COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA1813
Mesa County District Court No. 02CR1493
Honorable Thomas M. Deister, Judge

The People of the State of Colorado,

Plaintiff-Appellant,

v.

Edgar Linton Tucker,

Defendant-Appellee.

CASE REMANDED WITH DIRECTIONS

Division V
Opinion by: JUDGE RICHMAN
Dailey and Rovira*, JJ., concur

Announced: September 4, 2008

Pete Hautzinger, District Attorney, Jon Levin, Deputy District Attorney, Grand Junction, Colorado, for Plaintiff-Appellant

Douglas K. Wilson, Colorado State Public Defender, Andrea R. Manning, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2007.

The People appeal the trial court's order granting the motion of defendant, Edgar Linton Tucker, to correct his sentence pursuant to Crim. P. 35(a). We remand the case for correction of the mittimus.

Defendant was convicted by a jury of sexual assault on a physically helpless victim, sexual assault on a child by one in a position of trust, sexual assault on a victim incapable of appraising his or her conduct — each of which is a class 4 felony — and two counts of sexual assault where a ten-year age difference exists between the actor and the victim, each a misdemeanor. The trial court sentenced defendant to an indeterminate term of four years to life under the Colorado Sex Offender Lifetime Supervision Act of 1998 (Lifetime Supervision Act). On the mittimus, the court wrote, "Plus a mandatory period of parole as required by statute[,]" and "Months on parole 0060." Defendant's judgment and sentence were affirmed by a division of this court in *People v. Tucker*, (Colo. App. No. 03CA2443, Feb. 16, 2006) (not published pursuant to C.A.R. 35(f)).

Defendant subsequently filed a Crim. P. 35(a) motion to remove the court's reference to mandatory parole from the

mittimus. In his motion, defendant cited to the then-recent decision in *People v. Tolbert*, ___ P.3d ___ (Colo. App. No. 05CA1836, May 3, 2007) (*cert. granted* Apr. 14, 2008), in which a division of this court wrote: "Attempted sexual assault committed after July 1, 1996, but before July 1, 2002, is subject to discretionary, not mandatory, parole. *See* §§ 16-22-102(9), 17-2-201(5)(a.5), C.R.S. 2006." 2007 WL 1288451 at *1. The People opposed defendant's Crim P. 35 motion, arguing that the Lifetime Supervision Act calls for a mandatory period of parole pursuant to section 18-1.3-1006(1)(b), C.R.S. 2007, for class 4 sexual offense felonies, and that *Tolbert*, a case addressing an attempted sexual assault, a class 5 felony, is not applicable.

The court granted the motion and amended the mittimus to read "DISCRETIONARY PAROLE CRS 17-2-201 (5) (A.5)." The trial court noted on the mittimus that it approved the motion for the "reason stated by defendant's counsel" and cited to *Tolbert*. The People appealed.

The parties agree that defendant was convicted of offenses covered by the Lifetime Supervision Act. Moreover, the parties

correctly agree that the court's reference on the amended mittimus to section 17-2-201(5)(a.5), C.R.S. 2007, is misplaced. The applicable parole statute for defendant is section 17-2-201(5)(a.7), C.R.S. 2007. *See* § 17-2-201(5)(a.5) (applying that subsection to sex offenders "[e]xcept as otherwise provided in paragraph (a.7) of this subsection (5)"). Paragraph (a.7) applies to defendants sentenced under the Lifetime Supervision Act, as was defendant in this case.

Section 17-2-201(5)(a.7) provides that as to any person sentenced pursuant to the Lifetime Supervision Act for a sex offense committed on or after November 1, 1998, which is the case with defendant, the parole board "shall grant parole or refuse to grant parole, fix the conditions thereof, and set the duration of the term of parole granted pursuant to the provisions of part 10 of article 1.3 of title 18, C.R.S." The parties here agree that if defendant is released on parole, the applicable statutory provision is section 18-1.3-1006(1)(b).

That statute provides, in pertinent part:

> If a sex offender is released on parole pursuant to this section, the sex offender's sentence to incarceration shall continue and shall not be deemed discharged until such time as the parole board may discharge the sex offender

> from parole pursuant to subsection (3) of this section. The period of parole for any sex offender convicted of a class 4 felony shall be an indeterminate term of at least ten years and a maximum of the remainder of the sex offender's natural life.

The dispute in this appeal derives from the fact that section 18-1.3-1006(1)(b) contains language mandating a particular minimum indeterminate term of parole for certain levels of offenses falling under the Lifetime Supervision Act. *People v. Cooper*, 27 P.3d 348, 354 (Colo. 2001) ("[T]he Act . . . mandates minimum periods that Lifetime Supervision sex offenders must serve on parole."). Thus, the People request that we reinstate the original language of the mittimus, which refers to a mandatory period of parole. Defendant argues that this statute, combined with section 17-2-201(5)(a.7), provides for discretionary parole. We are not satisfied that either description alone is an accurate characterization of the applicable statutes.

Section 18-1.3-1006(1)(b) plainly requires mandatory minimum periods of parole once the board has released an offender under the Lifetime Supervision Act. The overall statutory scheme, however, makes it clear that the board's decision to release

offenders on parole contains elements of discretion, *see* § 17-2-201(5)(a.7) ("the board shall grant parole or refuse to grant parole, fix the conditions thereof, and set the duration of the term of parole granted"), provided that the discretion accords with the requirements of the Lifetime Supervision Act, sections 18-1.3-1001 to -1012. *See also Vensor v. People*, 151 P.3d 1274, 1276, 1277 (Colo. 2007) ("[T]he Act assigns discretion to the parole board to release [a defendant] to an indeterminate term of parole of at least ten years for a class four felony, or twenty years for a class two or three felony . . . . The Act expressly allocates to the parole board the discretion to supervise for 'the remainder of the sex offender's natural life,' necessarily implying a sentence sufficiently long to permit that supervision whenever the parole board deems it necessary . . . .").

No one word necessarily encompasses the requirements of the two statutes. Accordingly, rather than characterizing the language as "mandatory" parole or "discretionary" parole, the better practice would be to state on the mittimus that parole is determined under section 18-1.3-1006(1)(b), requiring the parole board to impose a

minimum parole period of ten years for the class four felonies, subject to the provisions of section 17-2-201(5)(a.7). Since the mittimus incorrectly cites to section 17-2-201(5)(a.5), the case is remanded for the court to correct the mittimus in accordance with this decision.

The case is remanded for correction of the mittimus.

JUDGE DAILEY and JUSTICE ROVIRA concur.