RENDERED: JULY 9, 1999; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001701-MR

TONY CLAY ROGERS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 97-CI-01679

LINDA FRANK, Chairperson - Kentucky State Parole Board — APPELLEE

OPINION
AFFIRMING

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BEFORE: GARDNER, KNOPF, AND McANULTY, JUDGES.

GARDNER, JUDGE. Tony Clay Rogers (Rogers) appeals pro se from an order of the Franklin Circuit Court denying his petition for a writ of mandamus. After review of the record and the arguments of the parties, we affirm.

Rogers currently is an inmate at the Green River Correctional Complex at Central City, Kentucky. He is serving a life sentence after being convicted by a jury in June 1982 of killing a young child. In March 1990, Rogers was reviewed for parole eligibility by the Kentucky Parole Board (the Board) for

the first time. On that occasion, the Board denied him parole and deferred reconsideration for a period of sixty months. In March 1995, the Board reviewed Rogers for parole, but again denied him parole and deferred reconsideration for a period of twenty-four months. On March 26, 1997, the Board interviewed Rogers for parole, but again denied him parole and deferred reconsideration for a period of fifty months.

On November 12, 1997, Rogers filed a petition for a writ of mandamus seeking an order from the Franklin Circuit Court compelling the Board to refrain from infringing upon his federal and state constitutional rights and requesting a new parole hearing. In May 1998, the Department of Corrections, on behalf of Linda Frank, filed a response to the petition. In its response, the appellee contended that the Board had complied with its procedural rules and the decision denying Rogers parole was not arbitrary. On May 29, 1998, the trial court summarily denied the petition and dismissed the action. This appeal followed.

Rogers argues that the Board violated his right to due process under the United States Constitution and the Kentucky Constitution by acting in an arbitrary manner. He contends that the Board exercised its authority arbitrarily by denying him parole while granting parole to allegedly "hundreds" of other prisoners convicted of murder. Rogers also complains that the Board did not follow the dictates of Kentucky Revised Statute (KRS) 439.340(2) by failing to fully consider whether he could fulfill the obligations of a law abiding citizen. Finally,

Rogers contends that the Board violated the Ex Post Facto Clause by applying a stricter approach to granting probation after 1986.

As a general rule, a writ of mandamus is an extraordinary remedy that is available only if the petitioner can establish that he has no other adequate remedy and irreparable injury will result if the writ is not granted. Owens Chevrolet v. Fowler, Ky., 951 S.W.2d 580, 582 (1997); Foster v. Overstreet, Ky., 905 S.W.2d 504, 505 (1995). A prisoner may seek a writ of mandamus to compel the Board to exercise its duty to perform a ministerial act, but not to exercise its purely discretionary duty in any particular manner. See Evans v. Thomas, Ky., 372 S.W.2d 798, 800 (1963), cert. denied, 376 U.S. 934, 84 S. Ct. 705, 11 L. Ed. 2d 653 (1964). See also White v. Board of Education of Somerset Independent School District, Ky. App., 697 S.W.2d 161, 163 (1985) (mandamus available to require administrative officer to perform purely ministerial act). "Mandamus is a drastic remedy, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought." In re Parker, 49 F.3d 204, 206 (6th Cir. 1995). In determining whether a writ of mandamus should issue, the following inquiries are relevant:

> 1) Is there a duty imposed upon the officer; 2) is the duty ministerial in its character; 3) has the petitioner a legal right, for the enjoyment, protection or redress of which the discharge of such duty is necessary; 4) has he no other sufficient remedy; and 5) in view of the fact that the issuance of the writ is not always a matter of right, are the circumstances of the case such as will call forth the action of the court[.]

Stratford v. Crossman, Ky. App., 655 S.W.2d 500, 502 (1983) (quoting Fiscal Court of Cumberland County v. Board of Education of Cumberland County, 191 Ky. 263, 230 S.W. 57, 60 (1921)). The standard of review upon appeal of a denial of a writ of mandamus is whether the circuit court abused its discretion. See Owens v. Williams, Ky. App., 955 S.W.2d 196, 197 (1997). In addition, the appellant bears the burden of demonstrating an abuse of discretion. Id.

In Belcher v. Kentucky Parole Board, Ky. App., 917 S.W.2d 584 (1986), the court discussed the discretionary nature of parole. First, the court held that neither the federal constitution, nor state law created a protected due process liberty interest in parole. The court noted that in Kentucky, parole is a matter of legislative grace, and "[n]othing in the statute [KRS 439.340] or the regulations mandates the granting of parole in the first instance, and nothing therein diminishes the discretionary nature of the Board's authority in such matters." Id. at 586 (citations omitted). However, the court indicated that a prisoner has some legitimate interest in a parole decision based on consideration of relevant criteria within the discretionary authority of the Board. Id. at 587.

In the case at bar, Rogers acknowledges the discretionary authority of the Board, but he maintains that it exceeded its authority by acting in an arbitrary and capricious manner. However, the Board provided Rogers an opportunity to be heard and a statement of the reasons for its denial of parole. The Board Decision form indicates that Rogers was denied parole

for the following reasons: (1) seriousness of the crime; (2) violence involved in the crime; (3) a life was taken; (4) misdemeanor record; (5) felony convictions; (6) history of drug and/or alcohol abuse; (7) good time loss; (8) poor institutional adjustment; and (9) crimes committed in institution. Rogers's complaint that the Board acted arbitrarily because other convicted murderers had been granted parole merely implicates the legitimate discretionary authority of the Board. Rogers has not demonstrated that he was denied parole based purely on illegal criteria. Moreover, Rogers's assertion that the Board improperly considered a prison disciplinary report that had been voided by the prison warden does not render the entire parole proceeding invalid given the numerous reasons supporting the decision.

Rogers's claim that the Board violated the Ex Post Facto Clause is without merit. Article I, Sections 9 and 10 of the United States Constitution, and Section 19 of the Kentucky Constitution prohibit ex post facto laws. The prohibition on ex post facto laws prevents the government from increasing punishment for an act that occurred prior to a change in the law. In a case involving the application of a new statute to parole eligibility, the Supreme Court in California Department of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), discussed the proper analysis for determining whether the retrospective application of a law offends the Ex Post Facto Clause. In Morales, the Court stated that the proper focus of the ex post facto inquiry is whether the relevant change "alters the definition of criminal conduct or increases the

penalty by which a crime is punishable," rather than whether it involves an "ambiguous sort of disadvantage" or affects "a prisoner's opportunity to take advantage of provisions for early release." Id. at 503 n.3, 115 S. Ct. at 1602 n.3. See also Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997). The ex post facto issue necessarily concerns a matter of "degree", but there is no violation if the change "create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes." Morales, 514 U.S. at 508-09, 115 S. Ct. at 1603. While the Supreme Court declined to articulate an exact dividing line for identifying ex post facto changes in the law, it clearly indicated that "speculative", "attenuated", and "conjectural" effects on punishment are insufficient under any threshold to constitute constitutional violations. Finally, the party challenging the law has the burden of establishing that the measure of punishment has increased in order to prove the existence of a constitutional violation. Id. at 510 n.6, 115 S. Ct. at 1603 n.6. As the court stated in Hamm v. Latessa, 72 F.3d 947, 959 (1st Cir. 1995), cert. denied, ___ U.S. ___, 117 S. Ct. 154, 136 L. Ed. 2d 99 (1996), "A party who asserts an ex post facto claim must show a real possibility of cognizable harm, not a theoretical possibility bound up in gossamer strands of speculation and surmise."

Rogers's ex post facto argument is deficient for several reasons. First, he has failed to identify any law that has been applied retrospectively by the Board. His complaint

merely concerns the Board's exercise of discretion, rather than application of new parole regulations. See generally Ruip v. United States, 555 F.2d 1331 (6th Cir. 1977) (parole guidelines do not come within prohibition against ex post facto laws because they are advisory guideposts for discretionary decision-making); Kelly v. Southerland, 967 F.2d 1531 (11th Cir. 1992) (same); Inglese v. United States Parole Commission, 768 F.2d 932 (7th Cir. 1985)(same). Rogers's reference to KRS 439.3401, the violent offender statute, as the impetus for a change in the frequency of parole denials is unavailing. This statute set minimum parole eligibility standards but it does not affect the ultimate decision on whether to grant or deny parole once a prisoner becomes eligible. Rogers has not suggested that KRS 439.3401 was applied to him directly.

Second, Rogers's complaint lacks any specificity with respect to how any change in the Board's practices actually increased the measure of punishment. Rogers asserts that when he was first incarcerated the Board's practice was to grant parole to everyone within a reasonable time after they became eligible. His allegation that he was denied parole because of an arbitrary modification in the standards for parole simply is too speculative and conjectural. The record reveals valid substantive reasons for the Board's decision denying him parole that Rogers had not refuted. As a result, Rogers has not demonstrated a cognizable ex post facto claim.

In conclusion, Rogers has failed to establish an entitlement to the extraordinary remedy of a writ of mandamus.

Rogers's complaints do not raise a legitimate challenge to the discretionary authority of the Board; and, therefore, he has not shown a clear right to relief. The trial court did not abuse its discretion in failing to grant the petition for a writ of mandamus.

For the foregoing reasons, we affirm the order of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Central City, Kentucky

BRIEF FOR APPELLEE:

Keith Hardison
Department of Corrections
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