

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001032-MR

SHERILL HARSTON

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID JERNIGAN, JUDGE
ACTION NO. 99-CI-00074

KENTUCKY STATE PAROLE BOARD

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, GUIDUGLI, and SCHRODER, Judges.

COMBS, JUDGE: The appellant, Sherill Harston (Harston), appeals from an order of the Muhlenberg Circuit Court denying his petition for a writ of mandamus to compel the appellee, the Kentucky Parole Board (the Board), to conduct a fair and unbiased parole hearing. We affirm the order of the circuit court.

In April 1978, Harston was convicted of Murder, Manslaughter in First Degree, and Theft by Unlawful Taking Over \$100; he was sentenced to a total of 124 years' imprisonment. The crimes for which Harston was convicted were particularly heinous and brutal: he strangled his live-in girlfriend and then drowned her young son in a sink. He then attempted to dispose of

the victims' bodies by burning them and then throwing them into a river.

In January 1985, Harston became eligible for parole for the first time and appeared before the Board. He was denied parole, and further consideration on his matter was deferred for eight years. Harston appeared before the Board a second time in January 1993. The Board denied parole and gave him a six-year deferment. In January 1999, Harston made his third and most recent appearance before the Board. Once again, the Board denied Harston parole and deferred further consideration for six years. On each of the three occasions that Harston was eligible for parole, the Board listed the following reasons as its basis for its denial: (1) the seriousness of his crimes; (2) the violence involved in his crimes; (3) the fact that two lives were taken; and (4) his prior criminal record. On February 19, 1999, Harston filed a petition for a writ of mandamus to compel the Board to conduct a fair and unbiased parole hearing. The court entered an order on April 21, 1999, denying his petition. This appeal followed.

Harston argues on appeal that the Board erred in considering improper and irrelevant factors in denying him parole. He contends that he was entitled to the issuance of a writ to compel the Board to conduct another hearing. We will first address as a threshold matter whether a writ is the appropriate remedy for relief.

A writ is an extraordinary remedy and will not be used to direct courts or quasi-judicial bodies in the performance of

their discretionary duties. Evans v. Thomas, Ky., 372 S.W.2d 798, 800 (1963).

It is a well settled rule of law that a mandamus will not lie to control or review the exercise of the discretion of any court, board, or officer, when the act sought to be enforced is either judicial or quasi judicial. This remedy will be applied only where no discretion is vested and the act sought to be enforced is purely a ministerial duty.

Combs v. State Board of Education, 249 Ky. 320, 323, 60 S.W.2d 957, 958 (1933). In denying or granting parole, the Board is performing a quasi-judicial function and necessarily exercising its discretion. Belcher v. Kentucky Parole Board, Ky. App., 917 S.W.2d 584 (1996). Thus, a writ is not the proper remedy.

Although Harston cannot obtain relief procedurally through a writ, we have nevertheless examined the substantive issues raised in his appeal and find that they are without merit. KRS 439.340(1) provides that the Board "may release on parole persons confined in any adult penal or correctional institution of Kentucky or sentenced felons incarcerated in county jails eligible for parole." (Emphasis added). In this jurisdiction, "[p]robation and parole are not constitutional rights, but, rather, are legislative clemencies granted as a matter of grace." White v. Commonwealth, Ky. App., 611 S.W.2d 529, 531 (1980). A prisoner has no entitlement to parole, and whether or not to grant parole is within the discretion of the Board. Belcher, supra. However, a prisoner does have "a legitimate interest in a decision rendered in conformity with the established procedure and policies; one which is based upon consideration of relevant

criteria." Id. at 587. A careful examination of the record shows that Harston's due process rights were satisfied and that the Board did not abuse its discretion in denying him parole.

We affirm the decision of the Muhlenberg Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT *PRO SE*:

Sherill Dewayne Harston
Green River Correctional
Complex
Central City, KY

BRIEF FOR APPELLEE:

Keith Hardison
Justice Cabinet
Department of Corrections
Frankfort, KY