

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001624-MR

DOUGLAS WARD

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 99-CI-00157

KENTUCKY STATE PAROLE BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON AND TACKETT, JUDGES.

TACKETT, JUDGE: Douglas Ward (Ward) appeals pro se from an order of the Muhlenberg Circuit Court denying his petition for a writ of mandamus in which he sought a new hearing before the Kentucky Parole Board (Parole Board). Finding no error, we affirm.

Ward currently is an inmate at the Green River Correctional Complex serving a sentence of 100 years on convictions for wanton murder, two counts of robbery in the first degree and criminal conspiracy to commit robbery in the first degree. According to Ward, he has been imprisoned since 1981. On April 15, 1998, Ward appeared before a three member panel of

the Parole Board to review his eligibility for parole. Following the hearing, the Parole Board decided that Ward was a poor parole risk and deferred reconsideration of his eligibility for parole for a period of 144 months. The Parole Board gave the following reasons for its action: (1) seriousness of the crime; (2) violence involved in the crime; (3) a life was taken; (4) Ward's prior record; (5) Ward's misdemeanor record; (6) Ward's felony conviction(s); (7) Ward's admitted history of drug abuse; (8) crime involved firearm; (9) good time loss; and, (10) poor institutional adjustment. Ward's request for reconsideration by the Parole Board was rejected.

On April 13, 1999, Ward filed a petition for a writ of mandamus in circuit court seeking an order for a new hearing that "compels the Respondent [Parole Board] to act in a manner that is prescribed by clearly established law, and that will conform to the Respondents own Rules and Regulations that are duly promulgated." He contended the Parole Board improperly considered his initial conviction of murder that was reversed and remanded by the Kentucky Supreme Court, and that the Parole Board failed to apply the parole laws in effect at the time of his conviction. The Department of Corrections, on behalf of the Parole Board, filed a response challenging Ward's claims and requesting dismissal for failure to state a claim under Kentucky Rule of Civil Procedure (CR) 12.02 or summary judgment under CR 56. On June 21, 1999, the circuit court entered an order denying the petition and granting the Parole Board's request for summary judgment. Ward filed a motion to reconsider in which he asked

the court to withdraw its order dismissing and permit him to conduct discovery. The trial court summarily denied the motion to reconsider. This appeal followed.

Ward raises several challenges to the action of the Parole Board. First, he again contends the Parole Board improperly took into account the fact that the jury in his first murder trial convicted him and recommended a sentence of death even though the Kentucky Supreme Court later reversed the conviction and remanded the case for a new trial. Second, he argues that the Parole Board improperly failed to apply the same procedures and practices that were followed at the time of his conviction in 1981. Finally, he maintains that the trial court prematurely denied the petition without providing him with adequate notice and time to conduct discovery.

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 Parole 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 and 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 (1996), 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 [Kentucky Revised 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 [Parole] Board's's authority in such matters." Id. at 586. See also Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999). However, the court indicated that a prisoner has a legitimate interest in a parole decision based on consideration of relevant criteria. Belcher, supra at 587.

Ward's first argument involves his allegation that one of the Parole Board members was fixated on the fact that his initial murder conviction was reversed. He asserts that during the hearing, "the sole and only interest [of one of the Parole Board members] was seemingly utter disbelief in confirming that such [death] sentence had actually been reversed." Ward argues that the Parole Board exceeded its authority and deprived him of his right to appeal by taking into account his first murder trial. He contends that the Supreme Court's reversal rendered the jury's decision void and, therefore, it was no longer relevant to the parole decision.

In our review of the audiotape recording of the parole hearing, the only references found to the reversal of Ward's initial conviction occurred at the beginning of the hearing in (1) a chronological summary of the legal events leading to his imprisonment and (2) a question by one board member concerning the events following the Kentucky Supreme Court's remand of the case. These references were appropriate in understanding Ward's case. His attempt to imbue these references with significance in the deliberations by the board members in reaching their decision

is unsubstantiated by the record. The Parole Board gave ten explicit reasons for its decision, all of which are supported by the record and involve those issues discussed at length during the hearing. The reversal of Ward's conviction is, of course, a matter of public record and may be considered by the Parole Board. "Generally, a parole board has broad discretion in hearing evidence, including dismissed counts of an indictment, hearsay evidence, and allegations of criminal activity for which the prisoner has not even been charged." Aaron v. Commonwealth, Ky. App., 810 S.W.2d 60, 62 (1991). See also KRS 439.330(1)(a) (duties of parole board include study of prisoner case histories).

Ward's second argument that the Parole Board violated the Ex Post Facto Clause in Article I, Sections 9 and 10 of the U.S. Constitution and Section 19 of the Kentucky Constitution is equally without merit. Ward asserts that the 144-month deferment exceeded both statutory limits and what the "custom, practice, tradition, or law was when Appellant's sentence commenced." He claims that he was entitled to have the same policies, practices, and traditions that existed in 1981 applied to determine his parole eligibility in 1999. Ward states that hundreds of prisoners with equally egregious criminal records have been granted parole in the past and suggests that the recent trend toward restricting parole influenced the Parole Board's decision in his case.

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. See Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); Botkin v. Commonwealth, Ky., 890 S.W.2d 292 (1994). The main concern of the Ex Post Facto Clause is "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." Lynce v. Mathis, 519 U.S. 433, 441, 117 S.Ct. 891, 896, 137 L.Ed.2d 63 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 30, 101 S.Ct. 960, 965, 67 L.Ed.2d. 17 (1981)). See also Botkin, supra.

In a case involving the application of a new statute to parole eligibility, the United States Supreme Court in California Dept. 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. 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 a prisoner has suffered an alleged hardship, such as loss of an opportunity for parole. Id. at 506 n.3, 115 S.Ct. at 1602 n.3. See also Lynce v. Mathis, 519 U.S. 437, 441, 117 S.Ct. 891, 896, 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 "creates only the most speculative and attenuated possibility of producing the prohibited affect of increasing the measure of punishment for covered crimes. . . ." Morales, 514 U.S. at 509, 115 S.Ct. at 1603. 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, 519 U.S. 856, 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.”

Ward’s ex post facto argument is deficient for several reasons. First, he contends that the Parole Board improperly applied KRS 439.3401 in setting a deferment period of 144 months (twelve years). He notes that KRS 439.3401(5), which sets a maximum parole eligibility period of twelve years, indicates that it would not apply to persons who committed offenses prior to July 15, 1986. Ward states that prior to enactment of KRS 439.3401, the maximum deferral period was eight years.

The parole regulations in effect at the time of Ward’s hearing indicate that prisoners who committed crimes between December 3, 1980, and July 15, 1986, and received sentences of thirty-nine years and up, including life, would be initially eligible for parole initially after serving eight years. 501 Kentucky Administrative Regulation (KAR) 1:030(3)(a). However, in 501 KAR 1:030(3)(d) the Parole Board is given more discretion in assigning the deferment period. It states:

After the initial review for parole, a subsequent review, during confinement, shall be at the discretion of the board; however, the maximum deferment given at one (1) time shall not exceed the statutory minimum parole eligibility for a life sentence.

There is nothing in this regulation segregating the treatment of prisoners according to the date of their offense as exists with the initial parole review, which is established by statute. In addition, this regulation authorizes the Parole Board to apply the statutory minimum parole eligibility period for a life sentence as of the date of parole hearing as the maximum deferment period. Ward has not shown that there has been a change in the law that has resulted in a retroactive application of the law to his situation.

Ward's claim that he was entitled to treatment by the Parole Board consistent with past "policy, custom, practice or tradition" also fails. Ward's assertions that hundreds of other inmates convicted of murder have been granted parole and that the Parole Board was influenced by recent public concern over release of prisoners lend no valid support for granting relief. This complaint focuses on the Parole Board's exercise of discretion. The United States Supreme Court specifically stated in Morales that the ex post facto prohibition does not "require that the sentence be carried out under the identical legal regime that previously prevailed." 514 U.S. at 510 n.6, 115 S.Ct. at 1603 n.6.

Finally, given our conclusion that Ward's complaints are without merit, we believe the trial court did not abuse its discretion in denying the motion to reconsider in order to allow additional discovery. Under KRS 454.405, a trial court may dismiss a civil action at any time upon a finding that the action

is without merit. Ward has not shown that additional discovery was needed.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas Ward
Central City, Kentucky

BRIEF FOR APPELLEE:

Keith Hardison
Frankfort, Kentucky