RENDERED: DECEMBER 17, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2003-CA-002682-MR

YORIG R. REYES — APPELLANT

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
CIVIL ACTION NO. 03-CI-00083

JOHN M. COY,
VERTNER TAYLOR,
LUTITIA F. PAPAILLER,
FRANCES G. CLINKSCALES,
LAURENCE CARTER-HATCHETT,
VERMAN RAY WINBURN,
FRANK DEROSSETT,
AND FAMES PROVENCE,
KENTUCKY PAROLE BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

MINTON, JUDGE: Yorig Reyes, a prisoner in the state's correctional system, was ordered by the Kentucky Parole Board to serve out his life sentence. Citing violations of numerous constitutionally protected rights, Reyes sued in Franklin

Circuit Court to mandamus the Board to release him on parole or determine that his parole be deferred or grant him another parole hearing. After reviewing the record in full and considering all pertinent arguments, we conclude that the Board has not violated Reyes's constitutionally protected rights and that the Franklin Circuit Court has properly granted summary judgment. Thus, we affirm.

**FACTUAL AND PROCEDURAL HISTORY**

Reyes was convicted in 1989 of murder, attempted murder, first-degree robbery, and two counts of first-degree sodomy, for which he received a life sentence. While in custody awaiting trial, Reyes escaped. And he was convicted in 1993 of second-degree escape, for which he received an additional five-year sentence, to be served consecutively with his life sentence.

Reyes's initial hearing before the Board occurred in 1993. The Board voted to have Reyes serve out his sentence. The decision was based upon several factors, including the seriousness of the crimes, the violence involved, the fact that a life was taken, Reyes's five felony convictions, his prior incarceration, and the use of a firearm in the commission of the offenses.

Reyes was granted another hearing before the Board on January 25, 1994. The Board again voted to have Reyes serve out his sentence, citing the same reasons articulated in its first decision.

On July 4, 2002, and again on July 29, 2002, Reyes wrote letters to the Parole Board Chairman, John M. Coy, requesting that the denial of his parole be reconsidered. The Board conducted a review of Reyes's case, on the record, on September 24, 2002. Again the Board voted to have Reyes serve out his sentence. The reasons listed were the seriousness of the crime, the violence involved, the fact that a life was taken, and the involvement of a firearm in the commission of the crime.

On October 1, 2002, Reyes filed another request for reconsideration, citing the Board's failure to consider his "personal outlook and change in character." Reyes's request was denied. On January 22, 2003, Reyes filed his Petition for Writ of Mandamus, Declaratory Judgment, and Injunctive Relief in the Franklin Circuit Court. The Board responded with a Motion for Summary Judgment, which the court granted in an order entered on December 4, 2003. This appeal follows.

Reyes makes four arguments: first, the Board violated the prohibition against the use of *ex post facto* laws; second, his due process rights were violated; third, the Board violated

his right to equal protection; and fourth, that he cannot receive a fair and impartial hearing before the Board because of ethnic bias and prejudice. We will discuss each argument individually.

**OUR STANDARD OF REVIEW**

Our review of a grant of summary judgment is limited to "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."[1] Summary judgment is to be cautiously applied, and the record is to "be viewed in a light most favorable to the party opposing the motion for summary judgment . . . ."[2] We believe the circuit court properly found there to be no genuine issues of material fact in this case.

**THE WRIT OF MANDAMUS**

The granting of a writ of mandamus "is a rare and extraordinary measure with a difficult standard to meet."[3] A party seeking a writ must prove that he "'has no other adequate remedy and that great and irreparable injury will result to

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[1] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

[2] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 479 (1991).

[3] Foster v. Overstreet, Ky., 905 S.W.2d 504, 505 (1995).

[him].'"[4] The purpose of a writ "is to compel an official to perform duties of that official where an element of discretion does not occur."[5] Mandamus should always be "cautiously employed. It is not a common means of redress and is certainly not a substitute for appeal."[6]

With these stringent standards in mind, we address Reyes's arguments.

**VIOLATION OF PROHIBITION AGAINST USE OF *EX POST FACTO* LAWS**

Reyes first argues that the Board violated the prohibition against the use of an *ex post facto* law when it failed to review his parole eligibility every eight years, and when it denied him parole and ordered him to serve out his sentence. We disagree.

501 KAR 1:011 was amended in 1988. The new version is found at 501 KAR 1:030. Because Reyes committed the crimes in 1985, he argues the pre-amendment version should be applied to his parole hearings. Specifically, Reyes argues that application of the pre-amendment version of the regulation precludes the Board from requiring him to serve out his

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[4] *Id.*, *quoting* Glasson v. Tucker, Ky., 477 S.W.2d 168, 169 (1972).

[5] County of Harlan v. Appalachian Regional Healthcare, Ky., 85 S.W.3d 607, 612 (2002).

[6] *Id.* at 613.

sentence. For purposes of clarity and comparison, we will discuss both versions of the regulation.

501 KAR 1:011 §2 states, "[a]fter the initial review for parole, subsequent reviews, so long as confinement continues, shall be at the discretion of the board; except that the maximum deferment given at any one time shall be eight (8) years." In contrast, the "new" version, 501 KAR 1:030 §3(4)(f), states:

> After the initial review for parole, a subsequent review, during confinement, shall be at the discretion of the board; except the maximum deferment given at one (1) time shall not exceed the statutory minimum parole eligibility for a life sentence. The board shall reserve the right to order a serve-out on a sentence.

The differences between the two versions of the regulations are slight. While 501 KAR 1:011 §2 specifically states that the maximum deferment shall be eight years, 501 KAR 1:030 §3(4)(f) states that the maximum deferment "shall not exceed the statutory minimum parole eligibility for a life sentence"; coincidentally, 501 KAR 1:030 §3(4)(a) mandates that for felony offenses committed after December 3, 1980, but before July 15, 1998, the "statutory minimum parole eligibility for a life sentence" is eight years. Therefore, although the pre-amendment version of the regulations provided a more straightforward articulation of the maximum length of deferment,

the two versions both provide that a deferment may not exceed eight years. So the only actual change made to the post-amendment version is the addition of the phrase, "the board shall reserve the right to order a serve-out on a sentence."

Looking at the definition of the terms "deferment" and "serve-out," we do not believe this addition to be significant. A "deferment" is defined in 501 KAR 1:030 §1(3) as "a decision by the board that an inmate shall serve a specific number of months before further parole consideration." The regulation further defines a "serve-out" as "a decision of the board that an inmate shall serve until the completion of his sentence."[7]

Reyes argues that because 501 KAR 1:011 §2 did not particularly mention serve-outs, the Board could not deny him parole and order him to serve out his sentence. However, we do not believe that by failing explicitly to mention serve-outs, 501 KAR 1:011 §2 necessarily required the Board to review an inmate's parole every eight years. A deferment and a serve-out are two completely different concepts. A deferment requires a decision by the Board that an inmate will receive further parole consideration at a later date; as such, a deferment inherently means that a prisoner may be eligible for parole in the future. But a serve-out requires a decision by the Board that an inmate must serve out the remainder of his sentence. This means that

[7] 501 KAR 1:030 §1(13).

at no time in the future will the inmate be eligible for parole. By mentioning deferments in 501 KAR 1:011 §2, we do not believe the intent of the regulation was to prevent serve-outs. Rather, the purpose was to set a maximum amount of time within which the Board could later consider an inmate's parole eligibility, if the Board determined that such future eligibility was possible. In this case, the Board decided on three separate occasions that Reyes was not, and never would be, eligible for parole. Therefore, rather than issuing him a deferment, they chose to have him serve out his sentence. This decision was within the Board's discretion and did not violate either 501 KAR 1:011 or 501 KAR 1:030. Based upon the grounds cited by the Board, this was not an abuse of discretion. Therefore, we affirm the circuit court's grant of summary judgment on this issue.

**DUE PROCESS VIOLATION**

Second, Reyes argues that his due process rights were violated by the Board's actions. Specifically, Reyes claims the Board "failed to abide by the provisions of KRS 439.340(2) and 501 KAR 1:011 and denied [him] parole." He also argues his rights were violated because the Board failed to give him timely notice of the September 2002 parole review.

At the outset, we observe that the granting of parole is a completely discretionary act subject to the prudence of the

Board. The right to parole is not constitutionally guaranteed, nor is there an inherent right "'to be conditionally released before the expiration of a valid sentence.'"[8] Although they may choose to do so, states are under no duty to establish a parole system.[9] As this Court has articulated:

> [t]he mere existence of a statutory possibility of parole does not mean the full panoply of due process required to convict and confine must be employed by the Board in deciding to deny parole and continue confinement . . . . While the statute and regulations entitle [appellant] to review, even a finding that certain relevant criteria have been met does not require the Board to release him prior to the expiration of his sentence. Nothing in the statute 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.[10]

Because Reyes had no due process rights to parole, his allegations are without merit. Nonetheless, we will review his arguments for any valid claims of error.

KRS 439.340(2) states:

> A parole shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when

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[8] Belcher v. Kentucky Parole Board, Ky.App., 917 S.W.2d 584, 586 (1996), *quoting* Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104, 60 L.Ed.2d 668 (1979).

[9] Greenholtz, *supra* at 7, 8.

[10] Belcher, *supra* n.8, at 586.

> arrangements have been made for his proper employment or for his maintenance and care, and when the board believes he is able and willing to fulfill the obligations of a law abiding citizen.

Reyes asserts that the use of mandatory language in the statute—"shall"—requires the Board to release prisoners once they have satisfied the requisite parole conditions. Based on the mandatory nature of the language, Reyes claims the Board was required to release him since, in his opinion, he satisfied the conditions of release.

But it is clear that the Board found differently. The Board unequivocally decided in 1993, 1994, and 2002 that Reyes was not eligible for parole based on a variety of significant factors; and, therefore, he should serve out the remainder of his sentence. We do not believe the Board's decision was an abuse of discretion, as there was ample evidence to support their findings that Reyes's crimes had, among other things, been sufficiently serious and violent to preclude him from early release. The Board obviously felt that Reyes had not been satisfactorily rehabilitated; therefore, we find no error with their decision.

Reyes also claims that his due process rights were violated because he did not receive notice of the 2002 parole review. Again Reyes argues the pre-amendment version of the regulation should apply to his case.

501 KAR 1:011 §7 states, "[t]he parole hearing will consist of an interview by the board, or a quorum of the board, with the inmate involved." Similarly, 501 KAR 1:030 §3(3), the amended version of the regulation, reads, "[t]he parole hearing shall consist of an interview with the inmate by the board, or a panel."

Despite Reyes's assertions, we do not believe that either version of the regulation is applicable because the Board's 2002 review of Reyes's parole eligibility was not a "parole hearing" but, rather, a "review" of Reyes's request for reconsideration. Reyes's letters to the Board explicitly requested reconsideration of the denial of his parole. The term "reconsideration" is defined by the regulations as "a decision to review a previous board action."[11] As the Board correctly noted in its letter to Reyes explaining the outcome of their evaluation, a review of parole eligibility only requires a hearing on the record, with the inmate's presence only necessary if a Board member wishes to hear additional testimony.[12] In this case, there is no evidence that any members of the Board requested Reyes's presence. Therefore, the fact that Reyes did not receive notice of the Board's review of his eligibility was

[11] 501 KAR 1:030 §1(11).

[12] 501 KAR 1:030 §4(5) ("If the case is set for review, it shall be conducted from the record of the first hearing. The appearance of the inmate shall not be necessary. If a board member wishes to have additional testimony, an appearance hearing may be conducted.").

not erroneous. So we affirm the grant of summary judgment with regard to Reyes's claims that his due process rights were violated.

**DENIAL OF EQUAL PROTECTION**

Reyes's third argument is that he was denied equal protection of the law. He claims that similarly situated prisoners were paroled, while he, a Latino male convicted of murdering a white woman, was not. Therefore, Reyes argues his constitutional rights were violated.

When considering a claim that is based upon equal protection, "the Court must first determine the proper level of scrutiny to be applied. Courts have consistently held that the difference in treatment of incarcerated persons does not constitute a denial of equal protection of the laws, in the absence of a showing of suspect classification."[13] Unless a suspect classification is at issue, the government need only show a rational basis for its actions.[14] As the United States Supreme Court noted in City of Cleburne, Tex. v. Cleburne Living Center:[15]

> The Equal Protection Clause of the Fourteenth Amendment commands that no State

[13] Mahoney v. Carter, Ky., 938 S.W.2d 575, 577 (1997).

[14] *Id.*

[15] 473 U.S. 432, 105 S.Ct. 3249, 87 L.E.2d 313 (1985).

> shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.
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> The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy--a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.[16]

Reyes's equal protection argument is based upon three different claims: first, that other inmates convicted of murder were granted parole; second, that women convicted of murder are

[16] *Id.* at 439, 440 (citations omitted).

paroled more frequently than men convicted of murder; and third, that he, a Latino man convicted of killing a white woman, was treated differently than other inmates. We disagree on all points, mainly because Reyes has failed to identify the suspect class of which he is a member. As the Commonwealth establishes in its brief, neither "inmates-who-have-murdered" nor "male inmates" are considered suspect classes. Reyes's status as a Latino could have placed him in a suspect class. But he failed to establish how he or any other Latino inmate has been treated differently or unfairly by the Board.

Reyes argues that a week after his parole was denied, a white man convicted of murder was paroled. He claims this establishes that he was treated differently. Of course, Reyes's argument ignores the myriad variety of factors capable of consideration in individual cases. Reyes was not only convicted of murder but also of attempted murder, robbery, two counts of sodomy, and escape. Taking into account all of these factors, it is clear that the denial of Reyes's parole was not based upon his being a male, or being Latino, or the fact that he killed a white woman, but, rather, the violent, serious nature of his crimes. Again, as the Commonwealth stated, the Board is charged with the task of protecting the public; and an inmate will not be released if the Board determines that the inmate still poses a risk to society. The Board has decided that Reyes poses such

a risk, so his parole has been denied. We believe this decision was rationally related to the legitimate government interest of protecting the public. Therefore, we find no fault with the Board's decision and no violation of Reyes's right to equal protection.

**IMPOSSIBILITY OF A FAIR AND IMPARTIAL HEARING**

Finally, Reyes argues he cannot receive a fair and impartial hearing before the Board because of bias and prejudice. He claims that the Board is obviously biased because it granted parole to a white man after it denied his parole, and because Coy's last written response to Reyes's numerous requests for reconsideration stated "any further correspondence regarding this matter shall be filed without response."

Since we have already decided that Reyes was not denied any rights and, having been properly ordered to serve out his sentence, is not eligible for future parole hearings, we hold that this issue is moot. There is no credible evidence upon which to conclude that the Board's decision was motivated by bias or prejudice. Reyes received more consideration from the Board than he was actually due. Therefore, we affirm the grant of summary judgment with regard to this issue.

## CONCLUSION

For the reasons discussed in this opinion, the decision of the Franklin Circuit Court granting the Parole Board's Motion for Summary Judgment and overruling Reyes's Writ of Mandamus is affirmed.

ALL CONCUR.

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