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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002240-MR

TEDDY LEE COSBY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 96-CI-00004

KENTUCKY PAROLE BOARD;
and THEODORE R. CUSTER,
CHAIRPERSON FOR KENTUCKY
PAROLE BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

VANMETER, JUDGE: Administrative regulations in effect in 1984 did not expressly recognize that the Parole Board could order a defendant to serve out his sentence. The issue we must decide is whether the Board could permissibly make a decision to deny parole, or whether its options were limited to granting parole or deferring a decision to no more than eight years. We hold

that the Board had the option to deny parole. We therefore affirm the Franklin Circuit Court.

Following a trial in which Terry Lee Cosby received two death sentences for the 1984 robbery, kidnapping and murder of Kevin Miller, the Kentucky Supreme Court reversed.[1] On remand, Cosby entered an *Alford* guilty plea[2] and was sentenced in 1991 to two concurrent life sentences and a twenty-year sentence. In November 1992, Cosby met the Board for his initial parole consideration. At that time, the Board denied parole and ordered Cosby to serve out his sentence. In 1995, Cosby filed for reconsideration of the serve-out order. He was advised that the regulations had been changed and that a reconsideration request was required to be sent within 21 days of the serve-out order's issuance. In 1996, Cosby filed the instant action in the Franklin Circuit Court seeking a declaratory judgment that the Board was required, under the 1984 regulations, to give him periodic parole consideration not less than every 8 years, and that in 1995 the Board improperly failed to reconsider its 1992 serve-out decision. In September 2004, the circuit court granted the Board's motion for summary judgment. This appeal followed.

[1] *Cosby v. Commonwealth*, 776 S.W.2d 367 (Ky. 1989).

[2] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

In 1984, the administrative regulations governing parole eligibility provided that any person receiving a life sentence would be required to serve 8 years of the sentence before his or her case would be reviewed.[3] Additionally, "[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."[4]

In 1989, the regulations governing parole eligibility were revised, but the initial parole review date for offenses committed in 1984 and resulting in life terms remained at 8 years. The revised language governing any additional review stated as follows:

> After the initial review for parole, subsequent review, so long as confinement continues, shall be at the discretion of the board; except maximum deferment given at any one time shall not exceed the minimum parole eligibility for a life sentence as established by statute. The board reserves the right to order a serve-out on any sentence.[5]

One other notable 1989 change was that "[a]n inmate or someone on the inmate's behalf may request the board to reconsider a

[3] 501 KAR 1:011 §1 (1984).

[4] 501 KAR 1:011 §2 (1984).

[5] 501 KAR 1:030 §4(d) (1989).

decision to deny parole only after thirty (30) months have passed since the board's most recent action on the inmate."[6]

Cosby's first argument is that the application of the serve-out provision in 501 KAR 1:030 violated the prohibition against ex post facto laws. We disagree.

As previously noted, the 1984 version of the regulation provided that after the initial review, subsequent reviews were "at the discretion of the Board" although the maximum deferment was specifically limited to 8 years. The 1989 version, by contrast, states that additional reviews are at the discretion of the Board, that the maximum deferment "shall not exceed the minimum parole eligibility for a life sentence," and that the Board reserves "the right to order a serve-out on any sentence." The same regulation indicates by reference that the minimum parole eligibility for a life sentence is 8 years. So, the change in the wording of the regulation did not change the minimum date for parole eligibility. The only actual change in the two regulations is the 1989 addition of language that "[t]he board reserves the right to order a serve-out on any sentence."

The question then becomes whether, under the 1984 version, the Board had the ability to deny parole absolutely, or whether its discretion was limited to deciding either to grant

[6] 501 KAR 1:030 §5(4) (1989).

parole, or to defer a parole decision to a later date, not to exceed 8 years.

Clearly the Board is not required to grant parole. Kentucky courts have consistently held that the granting of parole is a discretionary act; that the right to parole is not constitutionally guaranteed; and that there is no inherent right to be released before the expiration of a valid sentence.[7] Thus, the Board has, and had under the 1984 regulation, the discretion to grant or to deny parole. The regulation's recognition of a deferment, therefore, was not the sole alternative to a grant of parole, but was in fact a third alternative to either granting or denying parole.[8] Since a prisoner in Kentucky has no legitimate expectation of parole release, the Board's order that Cosby serve out his sentence does not increase his punishment. Thus, no ex post facto violation exists.[9]

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[7] *Belcher v. Kentucky Parole Board*, 917 S.W.2d 584, 586 (Ky.App. 1996), citing *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); *see Hamilton v. Ford*, 362 F.Supp. 739, 742 (E.D. Ky. 1973) (court holding that convicted felons do not enjoy a constitutionally protected right to parole).

[8] See 59 Am. Jur. 2d, *Pardon and Parole* § 95 (2002) (noting that "[a] parole board may decline to render a determination at a parole hearing, but may instead choose to continue the hearing for a period of months or years, or defer the case for later consideration under similar parameters").

[9] The issues raised in this appeal recently have been addressed in two unpublished opinions of this court. *See Reyes v. Coy*, 2004 WL 2914912 (Ky.App. Dec. 17, 2004); *Preston v. Coy*, 2004 WL 1586844 (Ky.App. Jul. 16 2004). These decisions are not binding precedent. We mention them for informational purposes only.

Cosby's argument that the action of the Board invades the judicial power of the courts is similarly without merit. In *Commonwealth v. Cornelius*,[10] the court noted that "[i]t has been settled for many years that the decision as to whether a person serving a sentence of imprisonment should be paroled is an executive function, not a judicial one." Again, the Board had the power, under the 1984 version of the regulations, to make a parole decision at eight years. Cosby cannot complain that they made the decision to deny him parole, as opposed to deferring a decision.

Cosby's remaining arguments also lack merit. The decision of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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No brief filed for appellees

[10] 606 S.W.2d 172, 174 (Ky.App. 1980).