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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001024-MR

ALDEAN HENDERSON, JR. — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-01120

KENTUCKY STATE PAROLE BOARD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

ACREE, JUDGE: Aldean Henderson, *pro se*, brings this appeal from an order of the Franklin Circuit Court dismissing his petition for writ of mandamus. We affirm.

Henderson was convicted in July 1980 of first-degree robbery, first-degree burglary, first-degree sexual abuse, and being a first-degree persistent

felony offender. After a bifurcated jury trial, the Appellant was sentenced, on the jury's recommendation, to concurrent terms of life and twenty (20) years.

Henderson was ordered by the Kentucky Parole Board to serve out his life sentence. Citing violations of numerous constitutionally protected rights, Henderson petitioned the Franklin Circuit Court for a writ of mandamus to compel the Board to release him on parole or grant him a new parole hearing. The circuit court granted the Board's motion to dismiss and denied the petition. This appeal followed.

In May 1990, Henderson came before the Board for parole consideration. Parole was denied and the Board deferred further consideration for sixty months. In May of 1995, Henderson again came before the Board. Parole was again denied and the Board ordered Henderson to serve out the remainder of his sentence. The decision was based upon several factors, including the seriousness of the crimes, the violence and firearm involved in the commission of the offense, Henderson's juvenile record, his misdemeanor record, fourteen prior felony convictions, four incarcerations, his history of violent behavior, and three prior parole violations.

In October 2000, Henderson requested that the Board reconsider its serve-out decision. The Board denied his request. Again in March 2005, Henderson sought reconsideration. The Board responded, stating it had reviewed his file and found no basis for reconsideration.

In late April 2005, Henderson sent letters to the Board and Lieutenant Governor Steve Pence requesting reconsideration of the serve-out decision. After the Board responded to both letters with repeated denials, Henderson sent one more request for reconsideration, which was denied. Henderson's subsequent petition to the Franklin Circuit Court was denied and his case dismissed. This appeal followed.

Henderson's brief consists of two arguments: first, that the Board violated the prohibition against the use of *ex post facto* laws; and second, that his due process rights were violated. We will discuss each argument individually.

When a party moves to dismiss a claim under Kentucky Rules of Civil Procedure (CR) 12.02(f), "[t]he [circuit] court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). "In reaching its decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" *Bagby v. Koch*, 98 S.W.3d 521, 522 (Ky.App. 2002).

The granting of a writ of mandamus "is a rare and extraordinary measure with a difficult standard to meet." *Foster v. Overstreet*, 905 S.W.2d 504, 505 (Ky. 1995). A party seeking a writ must prove that he "'has no other adequate remedy and that great and irreparable injury will result to [him].'" *Id.*, *quoting*

Glasson v. Tucker, 477 S.W.2d 168, 169 (Ky. 1972). The purpose of a writ "is to compel an official to perform duties of that official where an element of discretion does not occur." *County of Harlan v. Appalachian Regional Healthcare*, 85 S.W.3d 607, 612 (Ky. 2002). Mandamus should always be "cautiously employed. It is not a common means of redress and is certainly not a substitute for appeal." *Id.* at 613. With these stringent standards in mind, we address Henderson's arguments.

Henderson's first argument is that the application of the serve-out provision in 501 Kentucky Administrative Regulations (KAR) 1:030 violated the prohibition against *ex post facto* laws. We disagree.

In 1989, the regulations governing parole eligibility, 501 KAR 1:011, were revised. The new version is found at 501 KAR 1:030. Because Henderson committed his crimes in 1979, he argues the pre-amendment version should be applied to his parole hearings. Specifically, Henderson argues that application of the pre-amendment version of the regulation precludes the Board from requiring him to serve out his sentence.

501 KAR 1:030(3)(f) specifically states that the Board "reserves the right to order a serve-out of any sentence." Henderson alleges this is an *ex post facto* law because the Board could not have ordered a serve out under the regulation as it existed in the year he was convicted which did not specifically mention serve-outs.

"[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990), *citing Beazell v. Ohio,* 269 U.S. 167, 169-70, 46 S.Ct. 68, 68-69, 70 L.Ed. 216 (1925).

Henderson is serving a life sentence. He has no guarantee of parole. Parole is a privilege in Kentucky and its denial does not carry any constitutional implications. *Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999). For a prisoner in Kentucky to have an interest in parole that is protected under the Constitution, he must have a liberty interest in parole. The parole statute does not create a liberty interest in parole since it does not create an entitlement to parole. *Belcher v. Kentucky Parole Bd.*, 917 S.W.2d 584 (Ky.App. 1996). Henderson has no legitimate expectation of parole release, and the Board's ordering him to serve-out his sentence does not increase his punishment.

Furthermore, the prior regulation in existence when appellant committed his offense, effectively gave the Board the power to order a serve-out. The only difference was that the more recent regulation said so specifically. There was no *ex post facto* violation.

Second, Henderson argues that his due process rights were violated by the Board's actions. Specifically he takes issue with the Board's reliance on the

violent nature of his past criminal offenses and conduct when ordering him to serve-out his sentence, the Board's failure to issue findings of whether he had rehabilitated himself, and finally, its failure to hold a hearing with him present on his request for reconsideration.

Henderson does have a legitimate due process interest in a decision rendered in conformity with established procedures and policies, and based upon consideration of relevant criteria. *Belcher*, 917 S.W.2d at 587. However, Henderson has not proven that the Board's serve-out order was not proper.

This Court, in *Belcher*, determined all that was required in the parole review process when parole is denied is that the prisoner have the opportunity to be heard and that he be advised in general terms of the reason for the decision of the Board. *Belcher*, 917 S.W.2d 584. The judicial standard of review of decisions of the Parole Board is limited to an examination of compliance with the terms of Kentucky Revised Statutes (KRS) 439.250 to 439.560.

In this case, Henderson was advised of the reasons for the decision of the Board and had the opportunity to be heard before he was ordered to serve-out his sentence. 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. It is proper for the Board to consider an inmate's history including prior criminal acts, parole violations, and violent behavior when determining parole eligibility. Due process does "not require the Board to provide a detailed summary

or specify the particular evidence on which it rests the discretionary determination that the inmate is not ready for conditional release." *Belcher,* 917 S.W.2d at 588.

Contrary to his contentions, Henderson was not entitled to a new hearing upon his request for reconsideration. 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. 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.").

Henderson's due process rights have been satisfied.

For the foregoing reasons, the judgment of the Franklin Circuit is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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