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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001988-MR

EMORY JOHNNY CAVENDER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 08-CI-01233

CAROLINE MUDD, CHAIRPERSON,
KENTUCKY STATE PAROLE BOARD;
LADONNA THOMPSON, COMMISSIONER,
KENTUCKY DEPARTMENT OF CORRECTIONS;
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Emory Johnny Cavender, proceeding *pro se*, appeals
from a judgment of the Franklin Circuit Court denying his petition for a writ of

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

mandamus. The petition was filed after the Kentucky Parole Board denied his request for parole and ordered him to serve out the remainder of his life sentence. After our review, we affirm.

Cavender is a 48-year-old inmate who is serving a life sentence for murder. He became eligible for parole on February 1, 2008, and was subsequently interviewed by the Kentucky Parole Board. On February 11, 2008, the Parole Board notified Cavender that his request for parole was denied and that he was to serve out the remainder of his sentence because of: (1) the seriousness of the crime leading to his conviction; (2) the fact that a life was taken during the commission of the crime; and (3) the fact that a deadly weapon was used. On February 29, 2008, the Parole Board denied Cavender's request for reconsideration of its decision.²

On July 29, 2008, Cavender filed a "Petition for a Writ of Prohibition/Mandamus" in the Franklin Circuit Court in which he asked the court to award him another hearing before the Parole Board. Cavender specifically contended that by denying his request for parole and by ordering him to serve out the remainder of his sentence, the Parole Board improperly superseded the jury's decision to sentence him to life in prison with a "possibility of parole." He also contended that the Parole Board based its decision on incorrect information and that the decision constituted an *ex post facto* violation.

² We note that the administrative record of the Parole Board was not made part of the record on appeal. However, the parties agree on the procedural facts provided above.

On October 13, 2008, the circuit court dismissed Cavender's petition on the grounds that it failed to state a claim for which relief could be granted. Cavender subsequently filed a motion asking the circuit court to alter, amend, or vacate its order of dismissal pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. He also filed an alternative motion asking the court to enter findings of fact and conclusions of law to support its decision. The circuit court denied Cavender's CR 59.05 motion in an order entered on October 22, 2008, on the grounds that "[d]ecisions of the Kentucky Parole Board are not reviewable." The court also denied Cavender's motion for findings of fact and conclusions of law on the grounds that the motion was improperly brought because the "matter was dismissed before trial." This appeal followed.

On appeal, Cavender again argues that the Parole Board improperly superseded the jury's decision to sentence him to life in prison with a "possibility of parole" by denying his request for parole and by ordering him to serve out the remainder of his sentence. He also once again argues that the Parole Board's decision to deny his parole request was based on inaccurate information and that the decision constituted an *ex post facto* violation.

We note at the outset that the circuit court's determination that "[d]ecisions of the Kentucky Parole Board are not reviewable" is not a completely correct statement of the law. KRS 439.330(3) expressly provides that orders of the Parole Board are reviewable to ensure compliance with the terms of KRS 439.250 to 439.560. Accordingly, in *Willard v. Ferguson*, 358 S.W.2d 516 (Ky. 1962), the

former Court of Appeals held that this statute provided a limited right of review as to “questions of compliance with the parole act.” *Id.* at 517. The Supreme Court of Kentucky reiterated this holding in *Stewart v. Commonwealth*, 153 S.W.3d 789 (Ky. 2005), noting: “The judicial standard of review of decisions of the Parole Board is limited to an examination of compliance with the terms of KRS 439.250 to 439.560.” *Id.* at 791. With this said, we believe that the circuit court’s decision to dismiss Cavender’s petition was ultimately the correct one because the petition raised no meritorious claims for relief on its face.

Kentucky courts have long held that the Commonwealth’s statutes and regulations with respect to parole “have not elevated parole to a liberty interest in which inmates have a legitimate claim of entitlement. In Kentucky, parole is a matter of legislative grace.” *Belcher v. Kentucky Parole Bd.*, 917 S.W.2d 584, 587 (Ky. App. 1996). “Parole is simply a privilege and the denial of such has no constitutional implications.” *Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999); *see also Morris v. Wingo*, 428 S.W.2d 765, 765 (Ky. 1968) (citation omitted). In terms of due process, all that is 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.” *Stewart v. Commonwealth*, 153 S.W.3d 789, 791 (Ky. 2005).

In this case, Cavender was advised of the reasons for the decision of the Parole Board and had the opportunity to be heard. Therefore, his due process rights have been satisfied. *Id.* However, as noted above, Cavender contends that

the Board acted contrary to law and usurped the province of the jury – which sentenced him to prison with the “possibility of parole” – by ordering him to serve out the remainder of his sentence. This argument lacks merit. 501 Kentucky Administrative Regulations (KAR) 1:030 § 3(1)(f) provides that “[a]fter the initial review for parole, a subsequent review, during confinement, shall be at the discretion of the board The board shall reserve the right to order a serve-out³ on a sentence.” 501 KAR 1:030 § 4(4) further provides that an inmate’s request for parole may be denied “by deferment or serve-out.” Thus, Kentucky law clearly reflects that under the circumstances at hand an inmate is entitled to only one initial review for parole. Whether to allow for another review in the future or to order a serve-out is a decision fully within the sound discretion of the Parole Board – even in instances involving life sentences. *Simmons v. Commonwealth*, 232 S.W.3d 531, 535 (Ky. App. 2007). Thus, the Parole Board did not act contrary to law by ordering Cavender to serve out the remainder of his sentence once it denied his request for parole.

Cavender attempts to rebut this conclusion by raising a general contention that the Parole Board exercised power belonging to the judicial and legislative branches of government, thereby violating the “separation of powers” doctrine. However, “[i]t is well-recognized in Kentucky that the power to grant parole is purely an executive function.” *Id.*; see also *Commonwealth v. Cornelius*,

³ 501 KAR 1:030 defines a “serve-out” as “a decision of the board that an inmate shall serve until the completion of his sentence.” 501 KAR 1:030 § 1(13).

606 S.W.2d 172, 174 (Ky. App. 1980) (“It 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[.]”). Accordingly, the Parole Board was within the bounds of its discretionary powers in denying parole to Cavender and in ordering him to serve out the remainder of his life sentence. *Simmons*, 232 S.W.3d at 535. We therefore cannot say that the Parole Board exceeded its authority and invaded the functions reserved for the judiciary or the General Assembly. *Id.*

Cavender also contends that the Parole Board’s decision was tainted because the Board was provided with, and relied upon, inaccurate information. In support of this argument, Cavender cites only to an alleged exchange during his parole hearing in which a Board member asked him if he had lost 870 days of good-time credit even though persons sentenced to life in prison do not receive any such credit. Because Cavender has failed to include a recording of this hearing in the record, we must assume that it supports the decision below. *See Roberts v. Fayette County Bd. of Educ.*, 173 S.W.3d 918, 923 (Ky. App. 2005). Moreover, Cavender acknowledged in his petition that this apparent misconception by the Board member was clarified by another person in the room during the hearing. Therefore, Cavender’s argument that the Board’s decision was based on inaccurate information lacks merit and must also be rejected.

Cavender also argues that the Parole Board’s decision requiring him to serve out the remainder of his life sentence violated the constitutional

prohibition against *ex post facto* laws, *i.e.*, it retroactively increased his punishment after his conviction. This argument also lacks merit because we have previously held that the imposition of a serve-out on a life sentence is not punishment prohibited under *ex post facto* principles because it does not actually enhance or lengthen an inmate's sentence. *Simmons*, 232 S.W.3d at 534-35. Thus, this argument must also be rejected.

Cavender's remaining arguments are too vague to address and/or were not properly preserved below. Thus, they do not merit further attention. The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Emory Johnny Cavender, *pro se*
LaGrange, Kentucky

JOINT BRIEF FOR APPELLEES:

Wesley W. Duke
Justice and Public Safety Cabinet
Office of Legal Services
Frankfort, Kentucky