IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000643-MR

DONALD BARTLEY APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-001373-OA
LETCHER CIRCUIT COURT NO. 85-CR-00070

HONORABLE SAMUEL T. WRIGHT,
JUDGE, LETCHER CIRCUIT COURT APPELLEE

AND

EDISON G. BANKS, II,
COMMONWEALTH ATTORNEY REAL PARY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Donald Bartley was indicted for murder in 1985 along with his co-defendants Benny Lee Hodge and Roger Dale Epperson. Bartley eventually pleaded guilty to the offense in exchange for the Commonwealth's not seeking the death penalty, meaning the highest sentence then available was life without the possibility of parole for 25 years. The Letcher Circuit Court imposed this highest possible sentence.

In 1996, Bartley filed an RCr 11.42 motion claiming that as part of his guilty plea, he had been promised a 200 year sentence with parole eligibility after 8 years. The Commonwealth claimed it had only taken the death penalty off the table in exchange for the guilty plea. The Court of Appeals, in an

unpublished decision, *Bartley v. Commonwealth*, No. 97-CA-0267-MR (August 28, 1998), found that there was no written plea deal. The court also stated that if there had been a plea deal as to sentence and the Commonwealth breached it, then Bartley could have raised it at sentencing, which he did not do. The Court also noted that Bartley's counsel stated that the plea deal, whatever it had been, was not breached by the Commonwealth.

In 2009, Bartley became eligible for parole. The Parole Board denied his parole and ordered that he serve out his sentence. Bartley then requested reconsideration, claiming that the prosecutor in his case had promised that he would be paroled as soon as he became eligible. The Parole Board denied the reconsideration request.

In 2011, Bartley filed *pro se* the petition for a writ of mandamus giving rise to this case. This petition was filed in the Court of Appeals and asked that the Letcher Circuit Court and prosecutor be required to abide by the plea agreement, which Bartley believes now entitles him to parole. The Court of Appeals dismissed the petition, noting that the proper avenue for challenging a parole decision was by a writ action in the appropriate circuit court, which in this case, the court suggested, was the Franklin Circuit Court.[1]

Bartley has now appealed, again *pro se*, to this Court. Because his writ petition was an original action in the Court of Appeals, his appeal to this Court is a matter of right.

[1] At that time, Bartley had filed a petition for a writ of mandamus against the Chair of the Parole Board and the Clay and Letcher Circuit Courts in Franklin Circuit Court. That petition was still pending when the Court of Appeals dismissed the petition giving rise to this case.

The exact nature of Bartley's complaint is difficult to discern from his brief to this Court. It appears to be based on an alleged plea deal in which the Commonwealth promised he would be paroled after 25 years. It is sufficient to state that the prosecutor does not control parole decisions. Moreover, the record in this case includes a document that disproves Bartley's claim about the nature of the plea deal. Included with documents filed by the Commonwealth is a copy of Bartley's 1987 Waiver of Further Proceedings with Petition to Enter Plea of Guilty. That document, which Bartley signed, notes that he had been informed by his lawyer that the maximum possible sentence was life without parole for 25 years. The document also states that the Commonwealth would recommend that sentence and would agree to allow Bartley to withdraw his guilty plea if the judge attempted to impose a death sentence.

To some extent, it appears that Bartley's claim is also driven by a misunderstanding of his sentence. The statute under which he was sentenced, KRS 532.025(3), describes his sentence as "life without benefit of probation or parole until the defendant has served a minimum of twenty-five (25) years of his sentence." He appears to be suggesting that he is now entitled to that "benefit" because he has served at least 25 years of his sentence.

This claim depends on a misreading of the statute and any plea bargain under the statute. Bartley was sentenced to life in prison. The qualification to that sentence—without the benefit of probation or parole for 25 years—simply means that he cannot receive the benefit before that time has passed. It does

not mean that he automatically becomes entitled to parole upon the passage of that time.

Parole is at most a privilege, not a right. *See Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999). "Parole is a matter of legislative grace or executive clemency." *Id.* This Court has no power to order the executive branch to parole Bartley.

As such, Bartley is not entitled to a writ of mandamus against the Letcher Circuit Court or the Commonwealth. For this reason, the order of the Court of Appeals dismissing the petition is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Cunningham, J., also concurs by separate opinion.

CUNNINGHAM, J., CONCURRING: I concur in the majority opinion. I write only to make one important point. I agree fully with the majority statement that "Parole is at most a privilege, not a right." I furthermore agree completely with the statement that "This Court has no power to order the executive branch to parole Bartley." But I do not intend, with my vote, to infer that the right to be *considered* for parole is not a statutory right.

In addition to those on death row, there are currently 177 men in our Kentucky prisons who are serving life without parole. Ninety-seven are serving life without parole by judicial sentence in accordance to law. Eighty are serving life without parole by serve-outs on life sentences imposed upon them by nine non-elective members of the Parole Board. The latter dispositions have been

made by our Parole Board in spite of the fact that neither our courts nor our General Assembly have deemed these men ineligible for parole.

We have long concluded that the judicial branch has no authority to direct the executive branch who to parole. We have yet to determine if the executive branch, through the Parole Board, has the authority to impose life sentences without parole upon persons that our legislature and courts have deemed eligible for parole.

That question was not before us in this case. The resolution of that issue awaits another day.

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