

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 2171

MICHELLE NICKS¹

VERSUS

JAMES LEBLANC, SECRETARY DEPARTMENT OF CORRECTIONS &
RISK REVIEW PANEL OF STATE OF LOUISIANA

Judgment Rendered: May 7, 2010

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 565-101

Honorable Kay Bates, Judge

Michele Nicks
Angola, LA

In Proper Person
Plaintiff-Appellant

William L. Kline
Baton Rouge, LA

Counsel for
Defendant-Appellee
Louisiana Department
of Public Safety and
Corrections

BEFORE: CARTER, C.J., GUIDRY, AND PETTIGREW, JJ.

¹ According to the record, it appears that the proper spelling of Mr. Nicks' first name is "Michele."

GUIDRY, J.

Michele Nicks, an inmate in the custody of the Department of Public Safety and Corrections (DPSC) and housed at the Louisiana State Penitentiary in Angola, Louisiana, filed a petition with the Nineteenth Judicial District Court seeking issuance of a writ of mandamus and judicial review of an administrative remedy procedures (ARP) request² against the DPSC and the Louisiana Risk Review Panel, wherein he contested the refusal to provide him with a hearing before the Louisiana Risk Review Panel. A commissioner assigned by the district court to review the matter recommended that Nicks' petition for judicial review be dismissed for failure to state a cause of action. In his recommendation, the commissioner found, in part, that "there is no authority for this Court to review a recommendation rendered by a risk review panel or that mandamus relief is available to compel a response from a risk review panel." Accordingly, the commissioner recommended that the district court *sua sponte* raise the objection of no cause of action and dismiss Nicks' petition with prejudice. The district court accepted the recommendation and *sua sponte* peremptorily excepted to Nicks' petition on the basis of no cause of action to dismiss the action with prejudice. Nicks appealed.

In his petition, Nicks asserted that he was eligible to be allowed a hearing before the Louisiana Risk Review Panel, pursuant to La. R.S. 15:308, to seek application of the more lenient penalty provisions of the amended version of La. R.S. 15:529.1(habitual offender statute), under which he had previously been sentenced. Nicks alleged that he applied to the Louisiana Risk Review Panel five times "with no response at all."

Louisiana Revised Statutes 15:308 provides, in pertinent part:

² See Corrections Administrative Remedies Procedures Act, La. R.S. 15:1177-1184.

B. In the interest of fairness in sentencing, the legislature hereby further declares that the more lenient penalty provisions provided for in Act No. 403 of the 2001 Regular Session of the Legislature and Act No. 45 of the 2002 First Extraordinary Session of the Legislature shall apply to the class of persons who committed crimes, who were convicted, or who were sentenced according to the following provisions: ...R.S. 15:529.1(A)(1)(b)(ii) and (c)(ii), ...prior to June 15, 2001, **provided that such application ameliorates the person's circumstances.**

C. Such persons shall be entitled to apply to the Louisiana Risk Review Panel pursuant to R.S. 15:574.22. [Emphasis added.]

Thus, in order to be "entitled" to apply to the Louisiana Risk Review Panel,³ and thus mandamus relief, Nicks would have to establish that his application would ameliorate his circumstances. Based on the nature of Nicks' felony offenses, his application would not ameliorate his circumstances.

In 2001, the Louisiana Legislature amended subparagraphs (A)(1)(b)(ii) and (c)(ii) of La. R.S. 15:529.1, which had read, respectively:

(ii) If the third felony or either of the two prior felonies is a felony defined as a crime of violence under R.S. 14:2(13) or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years or any other crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

(ii) If the fourth or subsequent felony or any of the prior felonies is a felony defined as a crime of violence under R.S. 14:2(13) or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years or of any other crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence. [Emphasis added.]

The amended versions of those subparagraphs now read, respectively:

(ii) If the third felony and the two prior felonies are felonies defined as a crime of violence under R.S. 14:2(B), a sex offense as defined in R.S. 15:540 et seq. when the victim is under the age of eighteen at the time of commission of the offense, or as a violation of the Uniform Controlled Dangerous Substances Law punishable by

³ It should be noted that in Weaver v. LeBlanc, 09-0244, p. 5 (La. App. 1st Cir. 9/14/09), 22 So. 3d 1014, 1017, this court held that the only duty that the law clearly states that the Louisiana Risk Review Panel must perform is to review applications and "[t]here is no legal authority for us to compel any other action by [it]."

imprisonment for ten years or more, or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

(ii) If the fourth felony **and** two of the prior felonies are felonies defined as a crime of violence under R.S. 14:2(B), a sex offense as defined in R.S. 15:540 et seq. when the victim is under the age of eighteen at the time of commission of the offense, or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, **or of any other crime punishable by imprisonment for twelve years or more, or any combination of such crimes**, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence. [Emphasis added.]

At the time Nicks was adjudicated a habitual offender, he was sentenced based on a conviction of second degree battery, in violation of La. R.S. 14:34.1, and three predicate offenses comprised of terrorizing, burglary of a residence, and possession of cocaine, in violation of La. R.S. 14:40.1, La. R.S. 14: 62.2, and La. R.S. 40:967, respectively. In order for Nicks to be subject to a sentence of life imprisonment as a fourth felony offender under the prior version of La. R.S. 15:529.1(A)(1)(c)(ii), the State only had to establish that at least one of the felonies for which he was convicted was "a crime of violence under R.S. 14:2(13) or ... a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years or of any other crime punishable by imprisonment for more than twelve years;" a much lesser burden of proof.

Under the amended version of La. R.S. 15:529.1(A)(1)(c)(ii), the State bears a heavier burden of proof; but even under the more restrictive application, Nicks would still be subject to the same punishment. The amended statute requires that the fourth felony and two of the prior felonies be any of the following: "a crime of violence under R.S. 14:2(B), a sex offense as defined in R.S. 15:540 et seq. when the victim is under the age of eighteen at the time of commission of the offense, or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, or of any other crime punishable by

imprisonment for twelve years or more, or any combination of such crimes." Nicks' fourth felony of second degree battery is defined as a crime of violence under La. R.S. 14:2(B)(6), and two of the predicate offenses, terrorizing and burglary of a residence, are both crimes punishable by imprisonment for twelve years or more. See La. R.S. 14:40.1(B) and 62.2. Hence, due to the nature of Nicks' felony convictions, even under the amended version of La. R.S. 15:529.1(A)(1)(c)(ii), he would still be subject to a sentence of life imprisonment without benefit of parole, probation, or suspension of sentence.

Accordingly, Nicks' application to the Louisiana Risk Review Panel would not ameliorate his circumstances, and thus, he is not entitled to apply to the Louisiana Risk Review Panel. See La. R.S. 15:308(B) and (C). As such, the district court correctly determined that Nicks had no cause for requesting a writ of mandamus. Thus, we affirm the judgment of the district court. All costs of this appeal are assessed to the appellant, Michele Nicks.

AFFIRMED.