

STATE OF MICHIGAN
COURT OF APPEALS

DAULYS CHICO-POLO,

Plaintiff-Appellant,

V

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

FOR PUBLICATION
January 8, 2013

No. 307804
Ingham Circuit Court
LC No. 11-001026-AW

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

BOONSTRA, J. (*concurring*).

I concur in the result. I write separately to address two factors that counsel me toward that decision.

First, I suspect that the issue raised in this appeal is one that the Legislature never considered, and hence it is difficult to discern from the statutory scheme any legislative intent to answer the question before us. That is not a criticism of the Legislature, but merely an observation that legislatures cannot always anticipate factual situations that later may give rise to issues that were not contemplated at the time of the passage of the legislation in question.

As a consequence, we are here faced with two choices, neither of which is optimal, given that both arguably violate a rule of statutory construction. Under the first choice, as the majority notes, a failure to affirm the trial court would render nugatory the plainly stated requirement that the minimum sentence be “imposed by the court.” *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002) (“it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory”). Simply put, the trial court imposed no minimum sentence, but instead imposed an indeterminate life sentence with no minimum term. Any deviation that might result from that sentence, by way of an earlier release date, is purely a creation of the Legislature, and was not “imposed by the court.”¹

¹ To find otherwise would require an exercise of mental gymnastics that the majority is not, nor am I, prepared to employ, i.e., that although the trial court imposed no minimum sentence (but rather only an indeterminate life sentence), it was aware at the time of sentencing that the Legislature had adopted truth in sentencing laws, such that the trial court’s imposition of an indeterminate life sentence, with no mention of any minimum term, is the equivalent of the trial court “imposing” a minimum sentence of 20 years. By the same token, I am not prepared, as is

The second choice that is available to us, for which the majority opts in affirming the trial court, arguably fares no better in terms of its adherence to the rules of statutory construction. Specifically, MCL 791.234b contains a number of explicit exceptions, one of which is for the offense of first degree homicide in violation of MCL 750.316. The penalty for that offense is “imprisonment for life.” *Id.* Consequently, by concluding (as the majority does in affirming the trial court) that the plain language of MCL 791.234b implicitly excludes prisoners serving life sentences, we effectively render nugatory the existing explicit exception for first degree homicide (since there would be no need for it, as it would be subsumed within the implicit exception for prisoners serving life sentences). As noted, “it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory.” *Robertson*, 465 Mich at 748.

In endeavoring to interpret the language of MCL 791.234b, we are thus left with two imperfect choices. Ultimately, the best choice would be a third one, i.e., for the legislature to address this issue by way of statutory amendment, and to make plain its legislative intent as applied to the factual situation before us. But such a legislative solution is not currently available to us.

This leads me to the second factor that guides my decision. This matter comes before us on appeal from the denial of a writ of mandamus. “The issuance of a writ of mandamus is an extraordinary remedy.” *Citizens Protecting Michigan’s Constitution v SOS*, 280 Mich App 273, 284; 761 NW2d 210 (2008). “The plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus.” *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 493; 688 NW2d 538 (2004). We review a trial court’s denial of a writ of mandamus for an abuse of discretion. *In re MCI*, 460 Mich 396, 443; 596 NW2d 164 (1999). A trial court abuses its discretion when its ruling falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

To show that he is entitled to the extraordinary mandamus remedy, a plaintiff must demonstrate (1) that he has a clear legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. *Tuggle v Dep’t of State Police*, 269 Mich App 657, 668; 712 NW2d 750 (2005).

I conclude that plaintiff has not satisfied this burden. At a minimum, and for the reasons noted, I cannot find in the statute a *clear* legal duty on the part of defendant, or that plaintiff has a *clear* legal right to the performance of the alleged duty. If anything is clear, it is that the statute is *unclear* with regard to its application to defendant. Consequently, I am unable to find that the trial court abused its discretion in denying plaintiff the requested extraordinary relief of mandamus.²

the majority, to interpret the inclusion of the phrase “imposed by the court” in MCL 791.234b as a “conscious decision to exclude those prisoners serving life sentences but eligible for parole.”

² Plaintiff’s alternative request for declaratory relief fails for similar reasons. The grant or denial of declaratory relief is within the sound discretion of the trial court, and we grant the trial court

I therefore concur in the result reached by the majority.

/s/ Mark T. Boonstra

substantial deference in reviewing its decision. MCR 2.605; *PT Today, Inc v Comm'r of OFIR*, 270 Mich App 110, 129; 715 NW2d 398 (2006) (“Under the deferential standard of review outlined in MCR 2.605, a reviewing court must affirm the trial court’s decision even if a reasonable person might differ with the trial court in its decision to withhold relief.”). For the reasons noted, a reasonable person would find support in the canons of statutory interpretation for either plaintiff’s or defendant’s position, and the correctness of plaintiff’s preferred interpretation is therefore far from clear. Therefore, this Court should not, and properly does not here, upset the trial court’s sound exercise of discretion in denying plaintiff declaratory relief.