IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JAMES DUNN,	)	
Appellant,	)	
	)	
v.	)	**WD84515**
	)	
MISSOURI DEPARTMENT OF CORRECTIONS,	)	**FILED: March 22, 2022**
Respondent.	)	

Appeal from the Circuit Court of Cole County
The Honorable Daniel R. Green, Judge

Before Division Two: Alok Ahuja, P.J., and Edward R. Ardini, Jr., and Janet Sutton, JJ.

James Dunn is currently incarcerated based on sentences he received in 1997 for second-degree murder and armed criminal action. Dunn filed a petition for declaratory judgment against the Department of Corrections in the Circuit Court of Cole County. Dunn claimed that the Board of Probation and Parole had incorrectly recalculated his parole eligibility date. Dunn contended that the Board's recalculation was based on new Board regulations which were not in effect at the time he was sentenced, which changed the minimum prison term on Dunn's armed criminal action conviction. Dunn claimed that the Board's new parole eligibility calculation conflicted with the governing statutes, and violated multiple constitutional provisions. The circuit court granted the Department of Corrections' motion for judgment on the pleadings, and Dunn appeals. We affirm.

Factual Background

In June 1997, Dunn was convicted in the Circuit Court of St. Louis County of second-degree murder, in violation of § 565.021,[1] and armed criminal action, in violation of § 571.015. The charges arose from Dunn's fatal shooting of Larry Pearson in Maplewood on March 31, 1996. Dunn was convicted following a jury trial. The circuit court sentenced him to life imprisonment for both the murder and armed criminal action convictions, with the sentences ordered to run consecutively.

Beginning in 1979, § 571.015.1 has provided that, in connection with a first conviction of armed criminal action, "[n]o person convicted under this subsection shall be eligible for parole . . . for a period of three calendar years."

On August 1, 2019, Dunn received a notice from the Board of Probation and Parole that he was scheduled for a parole hearing on October 10, 2019. Dunn alleged that the Board scheduled the October 2019 parole hearing based on its view that §§ 558.019.3 and .4(1) required him to serve 85% of his sentence for second-degree murder (with his life sentence calculated at thirty years), and that he was required to serve an additional three years on his armed criminal action conviction by operation of § 571.015.1.

On October 15, 2019, Dunn received another notice from the Board, informing him that his parole hearing had been rescheduled to June 2036. Dunn requested an explanation for the seventeen-year delay of his initial parole hearing.

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[1] Unless otherwise indicated, statutory citations refer to the 1994 edition of the Revised Statutes of Missouri.

The Board explained that Dunn's parole eligibility on his armed criminal action conviction was governed by the "15 year rule" in the Board's "Procedures Governing the Granting of Parole and Conditional Release" (the "Blue Book").[2] Section 19(E) of the Blue Book specifies that "[o]ffenders serving life . . . sentences . . . may not be eligible for parole until a minimum of 15 years has been served, except where statute requires more time to be served." The Board also informed Dunn that, although it previously scheduled offenders for an initial parole hearing two years prior to the conclusion of their minimum prison terms, the Board had adopted a new rule effective September 1, 2019, under which it was now scheduling offenders for an initial parole hearing four months prior to their earliest parole eligibility date.

Dunn filed a petition for declaratory judgment against the Department of Corrections in the Circuit Court of Cole County on September 1, 2020. Dunn argued that the Board's recalculation of his minimum parole eligibility date was in conflict with various Missouri statutes and regulations. Dunn also alleged that the Board's determination that he was required to serve a minimum of fifteen years on his life sentence for armed criminal action conflicted not only with the governing statutes, but also with one of the Board's own pre-2008 regulations. Dunn contended that the Board's retroactive application of its newer regulations constituted an unconstitutional *ex post facto* law. He also alleged that the redetermination of his parole eligibility date violated separation of powers

[2] The current version of the Blue Book, revised on January 1, 2017, is available at https://doc.mo.gov/sites/doc/files/2018-01/Blue-Book.pdf.

principles, as well as Dunn's constitutional rights to due process of law and to the equal protection of the laws.

Both Dunn and the Department filed motions for judgment on the pleadings. The circuit court granted the Department's motion for judgment on the pleadings, and denied Dunn declaratory relief. Following the denial of his motion to set aside the judgment, Dunn filed the current appeal.

Standard of Review

This Court reviews a circuit court's ruling on a motion for judgment on the pleadings *de novo*. *Woods v. Mo. Dep't of Corr.*, 595 S.W.3d 504, 505 (Mo. 2020) (citing *Mo. Mun. League v. State*, 489 S.W.3d 765, 767 (Mo. 2016)). "'[A] motion for judgment on the pleadings should be sustained if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting *Madison Block Pharmacy, Inc. v. U.S. Fid. & Guar. Co.*, 620 S.W.2d 343, 345 (Mo. 1981)).

Discussion

On appeal, Dunn does not challenge the Board's determination that he must serve 85% of his life sentence for second-degree murder, with the life sentence treated as a thirty-year term of imprisonment. Dunn also does not challenge the Board's conclusion that, because his sentences were ordered to run consecutively, he must serve any minimum prison term on his armed criminal action conviction *in addition to* the minimum prison term for his second-degree murder conviction, before he will become parole-eligible. Instead, Dunn challenges only the Board's conclusion that, before Dunn is eligible for parole, he must serve fifteen years on his

life sentence for armed criminal action. Dunn contends that – at least under the law as it existed at the time of his underlying offense, conviction, and sentencing – he is only required to serve three years before being eligible for parole on his armed criminal action conviction.

Although Dunn contends that the Board's recalculation of his parole eligibility date violates multiple constitutional provisions, statutes, and regulations, all of his claims rely on his interpretation of three legal authorities: § 217.690.4; § 571.015.1; and the Board regulation which appeared at 14 C.S.R. 80-2.010(4)(A)(1) prior to 2008. None of these authorities ever provided, however, that Dunn would be eligible for parole on his armed criminal action conviction after serving only three years of his life sentence.

At the time of Dunn's offense and conviction, § 217.690.4 specified the manner in which parole eligibility was determined for offenders serving consecutive sentences. Section 217.690.4 provided:

> When considering parole for an offender with consecutive sentences, the minimum term for eligibility for parole shall be calculated by adding the minimum terms for parole eligibility for each of the consecutive sentences, except the minimum term for parole eligibility shall not exceed the minimum term for parole eligibility for an ordinary life sentence.

§ 217.690.4. This provision currently appears in § 217.690.5, RSMo Cum. Supp. 2021.

Dunn contends that the final phrase of § 217.690.4, which specified that "the minimum term for parole eligibility shall not exceed the minimum term for parole

eligibility for an ordinary life sentence," meant that the minimum prison term for his *entire sentencing sequence* could not exceed the minimum term applicable to a single life sentence. This Court squarely rejected that argument in *Langston v. Missouri Board of Probation & Parole*, 391 S.W.3d 473 (Mo. App. W.D. 2012), in which an inmate similarly argued that "no inmate with consecutive sentences can have a minimum prison term prior to parole eligibility that is longer than the minimum prison term he would have on a single life sentence." *Id.* at 476. We explained:

> The plain language of [current] section 217.690.5 requires that the minimum prison term on each consecutive sentence be added together to reach an aggregate minimum prison term prior to parole eligibility with the limitation that no individual minimum prison term added into the total can itself be greater than the minimum prison term for a life sentence.

Id.

Under *Langston*, § 217.690.4 permitted an offender's <u>*total*</u> minimum prison term to be longer than the minimum term of a single life sentence, so long as none of the minimum prison terms on the offender's individual sentences exceeded the minimum term for a life sentence. The statute did not prevent the Board from imposing a 15-year minimum term for Dunn's armed criminal action sentence, in addition to the minimum term he is required to serve on his consecutive life sentence for second-degree murder.

Dunn also argues that he was eligible for parole consideration on his armed criminal action sentence after serving three years under § 571.015.1, which provides that "[n]o person convicted [of armed criminal action] shall be eligible for parole . . .

for a period of three calendar years." Once again, however, Dunn's argument has been squarely rejected by controlling precedent. The Missouri Supreme Court has explained that

> Section 571.015.1 is written in the prohibitive sense and not as a grant of a right. Under this statute, [an individual convicted of armed criminal action] is precluded from receiving a parole hearing in the first three years of his sentence. It does not give him a vested right to a parole hearing immediately upon serving three years of his sentence. For the statute to say what appellant wants it to say, it should state, "[a] person . . . shall be eligible for parole . . . upon serving three calendar years of his sentence." Instead, the statute states, "[n]o person . . . shall be eligible for parole . . . for a period of three calendar years." These two versions have different meanings. Even construing the statute liberally in favor of the accused, we cannot extend the statute beyond its proper limits. We hold that § 571.015.1 does not grant appellant the right to a parole hearing or make him eligible for parole upon serving the first three years of his sentence.

McDermott v. Carnahan, 934 S.W.2d 285, 287-88 (Mo. 1996) (citation omitted); *see also McDermott v. Mo. Bd. of Prob. & Parole*, 61 S.W.3d 246, 247-48 (Mo. 2001); *Mozee v. Mo. Bd. of Prob. & Parole*, 401 S.W.3d 500, 503 (Mo. App. W.D. 2013) (following *McDermott*, and rejecting an offender's argument that "the three-year period specified in § 571.015.1 establishes not only the *minimum* period before an inmate convicted of armed criminal action can be eligible for parole, but also the *maximum* period").

Dunn argues that the *McDermott* cases and *Mozee* were overruled by the Supreme Court's more recent decision in *Mitchell v. Phillips*, 596 S.W.3d 120 (Mo. 2020). In *Mitchell*, the offender Mitchell was convicted of drug trafficking in the second degree under § 195.295.3, RSMo 2000, which specified that his sentence

"shall be served without probation or parole." Years after Mitchell's sentencing, the General Assembly repealed § 195.295.3, RSMo 2000. Mitchell argued that, in light of the repeal of the statute which denied him parole, he should now be considered parole-eligible. The Supreme Court disagreed. It held that "Mitchell's parole ineligibility was mandated as part of the punishment within the particular statute designating the permissible penalty for his offense," and was therefore "part of his sentence." *Mitchell*, 596 S.W.3d at 123. Because making Mitchell parole-eligible would alter the sentence imposed at the time of his conviction, the Supreme Court held that the repeal of § 195.295.3, RSMo 2000 did not have any retroactive effect on Mitchell's parole ineligibility. *Id.* at 125.

Mitchell did not overrule the Supreme Court's own earlier decisions in the *McDermott* cases, or this Court's decision in *Mozee*, *sub silentio*. *Mitchell* addressed the effect of post-conviction, post-sentencing *changes* to parole eligibility laws. But neither the *McDermott* cases, nor *Mozee*, applied post-conviction statutory amendments to persons previously sentenced. Instead, those cases interpreted a provision which has existed in § 571.015.1, unchanged, *since 1979*. The *McDermott* cases and *Mozee* did not give retroactive effect to any change in the law, and *Mitchell* has no effect on their holdings.

Finally, Dunn contends that he was eligible for parole on his armed criminal action conviction after three years, under the version of 14 C.S.R. 80-2.010(4)(A) which existed prior to regulatory revisions in 2008. Prior to 2008, 14 C.S.R. 80-2.010(4)(A) provided:

> When an inmate has been convicted of a felony where a dangerous or deadly weapon is used and is guilty under section 571.015, RSMo of the crime of armed criminal action, minimum parole eligibility is as follows:
>
> 1. First conviction of armed criminal action – an inmate must serve a minimum of three (3) calendar years . . .

Subsections 2. and 3. of 14 C.S.R. 80-2.010(4)(A) then described the minimum terms for offenders who had been convicted of armed criminal action more than once.[3]

Although the former version of 14 C.S.R. 80-2.010(4)(A) may be worded somewhat differently than § 571.015.1, it had the same effect: it simply specified the *minimum* amount of time an offender was required to serve before becoming eligible for parole on an armed criminal action conviction; it did not specify the *maximum* period before parole eligibility. Consistent with *McDermott*'s interpretation of § 571.015.1, the regulation merely set a floor on an offender's parole eligibility on an armed criminal action sentence; it did *not* decree that an offender "shall be eligible for parole . . . upon serving three calendar years of his sentence." *McDermott*, 934 S.W.2d at 288.

The fact that the Board's pre-2008 regulation did not grant parole eligibility in all cases after three years is confirmed by subsection 4. of the former version of 14 C.S.R. 80-2.010(4)(A), which provided:

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[3] The pre-2008 version of 14 C.S.R. 80-2.010(4)(A) had its genesis in a rule which was proposed on July 15, 1988, and formally adopted with an effective date of November 1, 1988. *See* 13 MO. REG. 1195 (Aug. 1, 1988) (notice of proposed rule); 13 MO. REG. 1729 (Oct. 17, 1988) (Order of Rulemaking). This version of 14 C.S.R. 80-2010 was rescinded, and a comprehensively rewritten rule substituted in its place, effective in March 2008. *See* 32 MO. REG. 2064 (Oct. 15, 2007) (notice of proposed rule); 33 MO. REG. 354 (Feb. 1, 2008) (Order of Rulemaking).

> In all of the cases listed in paragraphs (4)(A)1.-3., if the armed criminal action sentence, concurrent sentences, or both, are longer than the previously mentioned minimum[s], parole eligibility will be determined according to subparagraph (4)(F)2.A. This happens only when the minimum eligibility exceeds the mandatory requirement of the armed criminal action sentence. This also applies to consecutive sentences when appropriate.

This subsection is unfortunately garbled: there apparently <u>was no</u> "subparagraph (4)(F)2.A" in the regulation as it existed prior to 2008. Nevertheless, the pre-2008 version of 14 C.S.R. 80-2.010(4)(A)4 clearly recognized that there would be cases in which an offender's "minimum [parole] eligibility exceed[ed] the mandatory requirement[s]" stated in 14 C.S.R. 80-2.010(4)(A)1-3. In those cases, the regulation clearly states that "parole eligibility will be determined" under a different regulatory provision, using a calculation distinct from the minimums stated in subsections 1. to 3.

The *McDermott* cases involved an armed criminal action offense committed prior to June 1991, *see McDermott v. Carnahan*, 934 S.W.2d at 286, while the offender in *Mozee* committed his armed criminal action offense prior to November 1995. *Mozee*, 401 S.W.3d at 501. Thus, the offenders in *McDermott* and *Mozee* were subject to the same Board regulations as Dunn. In both cases, the Courts recognized that the Board's regulations required the offenders to serve more than three years on their armed criminal action convictions prior to parole eligibility. *See McDermott v. Carnahan*, 934 S.W.2d at 288; *Mozee*, 401 S.W.3d at 504-05. In both cases, the Courts held that the Board's regulations were entitled to be enforced, and were consistent with § 571.015.1. The application of the Board's

regulations in the *McDermott* cases and *Mozee* is flatly inconsistent with Dunn's claim that the Board's pre-2008 regulations *required* that he be considered for parole after three years.

Dunn has failed to identify any legal authority which *required* that he be considered parole-eligible on his armed criminal action sentence after three years, without regard to the length of his armed criminal action sentence. Instead, the relevant statutes and regulations merely specified that he was required to serve *at least* three years before being considered parole-eligible on that sentence, and that his parole eligibility on that sentence could not be longer than the minimum prison term for an "ordinary life sentence." Dunn has failed to identify any change in the law subsequent to his offense, conviction, and sentencing, which was retroactively applied to him. Because the Board's actions are consistent with the governing statutes, as those statutes have existed at all relevant times, and because the Board's actions did not give retroactive effect to any change in the substantive law, Dunn's *ex post facto*, due process, and separation of powers arguments necessarily fail.

Dunn also argues that the Department is judicially estopped from denying that he became parole eligible on his armed criminal action conviction after three years. Dunn contends that, in three cases, the Department has taken the position that an offender sentenced to a consecutive term of life imprisonment for armed criminal action became parole eligible in three years. Those three cases are *Jones v. Missouri Department of Corrections*, 588 S.W.3d 203 (Mo. App. W.D. 2019); *Allen v.*

Norman, 570 S.W.3d 601 (Mo. App. S.D. 2018); and *Lotts v. Payne*, No. 4:18-CV-1087 RWS, 2021 WL 3206698 (E.D. Mo. July 29, 2021), *appeal dismissed*, No. 21-2892, 2021 WL 7085175 (8th Cir. Oct. 26, 2021). Dunn argues that the Department has denied him the equal protection of the laws by calculating his parole eligibility on his armed criminal action conviction differently from the offenders in the *Jones*, *Allen*, and *Lotts* cases.

Notably, *Jones*, *Allen*, and *Lotts* involve similar situations. In each case, criminal defendants were convicted of first-degree murder, and armed criminal action, for crimes which they committed before the age of eighteen. In each case, the defendants were sentenced to life imprisonment without the possibility of parole on the murder charges, and to consecutive life sentences for their armed criminal action offenses. The sentences of life without parole on the murder charges were found to be unconstitutional, due to the offenders' age at the time of the crimes, under *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). In response to the *Miller* and *Montgomery* decisions, the Missouri General Assembly enacted § 558.047, RSMo 2016, the "*Miller* fix" statute, which provided that offenders like the defendants, convicted of murder for crimes committed before the age of eighteen, would be eligible "for a review of his or her sentence" by the Board of Probation and Parole "after serving twenty-five years of incarceration on the sentence of life without parole." § 558.047.1(1), RSMo 2016.

In *Jones*, *Allen*, and *Lotts*, the issue arose as to how the defendants' unconstitutional life-without-parole sentences for murder, and the legislature's

revision of the unconstitutional sentences to provide for parole eligibility, should interact with the defendants' consecutive sentences for armed criminal action. In each case, the court held that the defendants were subject to the general rule that their *ultimate* parole eligibility was determined by adding together the minimum prison terms on each of the constituent, consecutive sentences forming the defendants' total sentencing sequence – including any minimum term applicable to the defendants' armed criminal action convictions.

Dunn has not provided this Court with any of the Department's court filings in the *Jones*, *Allen*, or *Lotts* cases. From the courts' opinions, however, it appears that in each case the Department stated that the defendants would be eligible for parole consideration following the service of the 25-year minimum term on their murder sentences specified in the "*Miller* fix" statute (§ 558.047.1(1), RSMo 2016), and *an additional three years* to reflect the statutory minimum term for armed criminal action.

<u>*Even if*</u> the Department stated in *Jones*, *Allen*, and *Lotts* that the offenders would only be required to serve three years of their armed criminal action sentences before becoming parole-eligible, this would not invoke judicial estoppel principles, or establish an equal protection violation.

> [J]udicial estoppel "is a flexible, equitable doctrine intended to preserve the integrity of the courts." "All factors that are relevant should be considered by the Court, but once a party takes truly inconsistent positions, there are no inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." Factors to consider include: (1) a party's later position is clearly inconsistent with its earlier position; (2) whether the party was successful in persuading a court to accept the party's earlier position

> such that judicial acceptance of an inconsistent position in a later proceeding would create the perception that a court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. These factors "are guideposts, not elements, intended to assist courts in identifying when judicial estoppel should be applied to preserved the integrity of the judicial process and prevent litigants from playing 'fast and loose' with the courts."

Banks v. Kansas City Area Transp. Auth., 637 S.W.3d 431, 445 (Mo. App. W.D. 2021) (citing and quoting *Vacca v. Mo. Dep't of Labor and Indus. Relations*, 575 S.W.3d 223, 232-33, 235, 236 (Mo. 2019)).

In the *Jones*, *Allen*, and *Lotts* cases, the *length* of the defendants' minimum prison terms for their armed criminal action convictions was not at issue, or decided by the courts. Instead, the only relevant point was that the defendants *had* other sentences, with their own minimum prison terms, which were consecutive to their murder sentences. The courts in those cases merely addressed how the consecutive sentences would interact with the defendants' murder sentences, without deciding what the defendants' parole eligibility dates actually were. Thus, in none of these cases did the Department succeed in persuading a court that the defendants would only be required to serve three years on their armed criminal action sentences before being parole-eligible. Nor did the Department derive any particular advantage by stating that the defendants' minimum term on their armed criminal action sentences was three years, as opposed to some longer period. Judicial estoppel is inapplicable in these circumstances.

Nor has Dunn established an equal protection violation.

> The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government. It does not reject the government's ability to classify persons or "draw lines" in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals.

Tyler v. Mitchell, 853 S.W.2d 338, 341 (Mo. App. W.D. 1993) (citation omitted). "It is well settled that the government's imposition of punishment of one person more harshly than another does not, of itself, give rise to an equal protection violation." *State Bd. of Reg'n for Healing Arts v. Brown*, 121 S.W.3d 234, 236 (Mo. 2003). Because Dunn does not contend that he and the offenders in *Jones*, *Allen* and *Lotts* are being treated differently due to their membership in any protected class, to establish an equal protection violation he must establish that "there is no rational basis for the difference in treatment." *Jefferson City Apothecary, LLC v. Mo. Bd. of Pharmacy*, 499 S.W.3d 321, 331 (Mo. App. W.D. 2016) (citation omitted).

<u>*Even if*</u> the Department of Corrections only required the offenders in *Jones*, *Allen*, and *Lotts* to serve three years on their life sentences for armed criminal action before becoming parole-eligible, there plainly would be a "rational basis" for treating them differently from Dunn. In each of those cases, the defendants were less than eighteen years old at the time of the relevant offenses. In *Miller* and *Montgomery,* the Supreme Court of the United States emphasized that sentencing considerations are different with respect to juvenile *versus* adult offenders, and held that parole must be more freely available to youthful offenders as compared to older offenders. *See Miller*, 567 U.S. at 471-74; *Montgomery*, 577 U.S. at 206-08. Indeed, *Miller* categorically declared that "children are constitutionally different from

adults for purposes of sentencing." 567 U.S. at 471. What is said in *Miller* and *Montgomery* about the material difference between the criminal sentencing of youthful and adult offenders establishes a rational basis for treating youthful offenders differently for purposes of parole eligibility on their armed criminal action convictions – assuming the Department has actually done so. Dunn's equal protection argument has no merit.

Dunn has advised the Court that the Department of Corrections has revised its calculation of the parole eligibility dates for a large number of currently incarcerated offenders serving consecutive sentences for armed criminal action, after initially informing them that they would be required to serve only three years before becoming parole-eligible on those sentences. We decide another such case today. *See Bolden v. State*, No. WD84514; *see also Mozee*, 401 S.W.3d at 501-02. We are aware of other cases in which the Department has significantly revised the calculation of offenders' parole eligibility dates, years after an initial determination. *See*, *e.g.*, *Hill v. Cassady*, 571 S.W.3d 154, 157-58 (Mo. App. W.D. 2019); *Mann v. McSwain*, 526 S.W.3d 287, 288 (Mo. App. W.D. 2017). Dunn does not argue that he is entitled to relief based solely on the fact that the Department has changed his parole eligibility date. Nevertheless, crime victims, incarcerated individuals, their families and friends, and others may attach considerable significance to the parole eligibility dates the Department announces. While the Department's erroneous notification of an early parole eligibility date may not itself grant offenders enforceable rights, we are troubled by the apparent frequency with which the

Department is required to correct parole eligibility determinations which are governed by long-standing statutory and regulatory provisions. The Department, the inmate population, and the public would be better served if the Department exercised greater care in its initial determination of offenders' parole eligibility dates.

Conclusion

The Board of Probation and Parole is entitled to require Dunn to serve a minimum of fifteen years on his life sentence for armed criminal action before he is eligible for parole, in addition to any minimum term he is required to serve on his second-degree murder sentence. The circuit court's judgment, which granted judgment on the pleadings to the Department of Corrections, is affirmed.

Alok Ahuja, Judge

All concur.