

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph T. Cummings,	:	
Petitioner	:	
	:	
v.	:	No. 245 M.D. 2009
	:	Submitted: August 21, 2009
Pennsylvania Board of	:	
Probation and Parole,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE McCLOSKEY

FILED: October 7, 2009

Joseph T. Cummings, pro se, filed a petition for review in the nature of mandamus with this Court on April 28, 2009, seeking to challenge the decision of the Pennsylvania Board of Probation and Parole (Board) refusing to grant him re-parole. The Board filed preliminary objections in the nature of a demurrer, to which Cummings has filed a response, and which this Court shall now address. We sustain the Board's preliminary objections.

The Court of Common Pleas of Philadelphia County originally sentenced Cummings to a period of incarceration of eleven to twenty-five years following his conviction for murder (3<sup>rd</sup> degree), criminal conspiracy and possession of an instrument of crime. Following the expiration of his minimum sentence, the Board granted Cummings parole, and the Department of Corrections released him on parole on May

29, 2007. On May 30, 2008, Cummings was arrested and charged with assault, robbery and harassment. These charges were dismissed at a preliminary hearing on June 5, 2008. The Board conducted a parole revocation hearing on June 8, 2008, at which time Cummings admitted violations of two technical conditions of his parole: leaving the district without permission (Condition No. 1) and using drugs (Condition No. 5A). Based upon these violations, the Board revoked his parole and returned him to a state correctional facility. The Board rendered a decision on July 31, 2008, recommitting Cummings as a technical parole violator to serve six months backtime.

On December 12, 2008, the Board interviewed Cummings for consideration of re-parole. However, by decision dated February 9, 2009, the Board denied re-parole, indicating the following reasons for its parole denial:

Your need to participate in and complete additional institutional programs.

Your prior unsatisfactory parole supervision history.

Your failure to demonstrate motivation for success.

Your minimization of the nature and circumstances of the technical parole violation.

The Board also noted that it would review Cummings file and consider the following at his next re-parole interview:

Whether you have successfully participated in/successfully completed a treatment program for prescriptive program plan and anger management.

Whether you have maintained a favorable recommendation for parole from the Department of Corrections.

Whether you have maintained a clear conduct record.

Finally, the notice indicated that Cummings could file an application for re-parole no sooner than one year after the date of the decision denying re-parole.

Cummings sought to obtain relief from that decision by “appealing” that decision on February 19, 2009, asserting that (1) the Board’s notation that he “minimized” his misconduct is contradicted by his “green sheet” which indicates that he admitted to the alleged violations of Conditions 1 and 5A and by his expressions of contrition; (2) his alleged failure to demonstrate motivation for success “is an unsubstantial reason for not granting” parole and that through work experience, community service and program participation, he has demonstrated that he is motivated to succeed; (3) he had already participated in available systemic programs; (4) a Board member had a conflict of interest based upon the fact that he had been a District Attorney and was familiar with certain aspects of Cummings’ background; and (5) the Board’s indication of unsuccessful parole supervision was not supported by the facts.

On March 9, 2009, the Board issued a modification of its original considerations, indicating that Cummings, instead of having to complete an anger management program, would have to complete a batterer’s intervention program. In response to Cummings’ “appeal” of the Board’s February 9, 2009 decision, the Board issued a letter dated April 2, 2009, indicating that Cummings had no right to request administrative relief from a decision denying parole and thereby rejected his request.

On April 30, 2009, Cummings filed the present petition for review in the nature of mandamus in which he recites the history described above and claims that the Board issued its March 9, 2009, modification order “to clean up, and justify reasons for denial of reparole and excessive twenty-two month ... hit, which is a clear display of abuse of discretion, and arbitrary and capricious behavior.” (Petition for Review,

Paragraph 19). Cummings asserts that one of the unstated reasons the Board denied him re-parole is that he did not admit that he was guilty of the more recent criminal charges, which had been withdrawn, during the course of the parole interview. Cummings also specifically asserts that the Board member, whose impartiality he challenges, had a dispute with his wife's family regarding money the family paid to the Board member to retain his services as counsel for his wife's brother in a criminal matter. Cummings avers that the Board member made a specific reference to this relative during the re-parole interview, stating "oh, a two time murderer, huh?" Cummings asserts that the same Board member expressed disbelief in the reasons why the criminal charges against Cummings were dropped, asserting that statements the Board member made during the interview indicate that this member believed that there were other reasons than Cummings' innocence that explained why the charges against him were dropped.

Hence, Cummings contends that the interview and decision-making process violated his right to an unbiased decision-maker, and that, if the Board did consider the withdrawn criminal charges in making its decision, it was required to present the arresting officer at the interview in order for him to question the officer.

The Board filed preliminary objections to the petition for review demurring to Cummings claim, citing numerous decisions holding that prisoners have no right to parole and that the denial of parole is not a matter subject to judicial review. The Board also asserts that mandamus is not an appropriate remedy to seek to challenge the exercise of its discretion.<sup>1</sup>

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<sup>1</sup> In considering preliminary objections in the nature of a demurrer, this court must accept as true all well-pleaded facts and all reasonable inferences that may be deduced from those facts, Stone and Edwards Insurance Agency, Inc. v. Department of Insurance, 616 A.2d 1060 (Pa. Cmwlth. 1992), and we may sustain such objections only when, based on those facts and inferences, the law will not permit recovery. Jackson v. Garland, 622 A.2d 969 (Pa. Super. 1993).

The Board, relying upon Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766 (Pa. Cmwlth. 1997), contends that (1) this Court cannot reach beyond the facially valid reasons expressed in the Board's decision in evaluating Cummings' claim; and (2) Cummings cannot proceed in mandamus in order to assert that the Board relied on improper factors. Further, the Board demurs to Cummings' petition asserting that, before a party can properly raise due process, he must first demonstrate that the Board has interfered with a protected interest in life, liberty, or property.

Weaver, who had been convicted of rape and involuntary deviate sexual intercourse, filed a similar action in mandamus, claiming that the Board's denial of parole violated his constitutional rights. This Court, after reciting the nature of parole as one of grace granted as a favor to prisoners, noted that prisoners have "no constitutionally protected liberty interest in being released from confinement prior to the expiration of his or her maximum term." Id., 688 A.2d at 770. These notions have led courts to the conclusion that no right of appeal follows a Board decision denying a request for parole.

With regard to the form of his challenge, i.e., seeking mandamus, the Court observed that "mandamus is an appropriate avenue to compel a governmental body to perform a discretionary act where its duty to perform that act is mandated by the law, and the body has refused to perform the act based upon an erroneous interpretation of the law....The only relief that Weaver can obtain through mandamus is for the proper procedures to be followed and the proper law to be applied by the Board...." Id., 688 A.2d at 776.

More particularly, the Court provided the following guidance:

[M]andamus would only be issued if Weaver could show that the Board's refusal to grant parole, as evident

solely in its decision, was, as a matter of law, based upon an erroneous conclusion that it had the discretion to deny parole for the reason given. Mandamus is based upon a duty by an agency to follow a law and is available only when, under a correct interpretation of that law, the agency has an absolute ministerial duty --- no choice --- to act in a certain way. Mandamus cannot be used to say that an agency considered improper factors, that its findings of fact were wrong, or that the reasons set forth in its decision are a pretense. If that was the nature of mandamus, there would be no difference between it and an appeal from the agency's decision or other forms of actions to address those concerns.

Id., 688 A.2d at 777.

This Court has followed this analysis in the more recent case of Burkett v. Frank, 841 A.2d 646 (Pa. Cmwlth. 2004), in which an inmate filed a habeas corpus petition asserting that a trial court judge and district attorney, in retaliation against him for a previously successful habeas corpus petition, had written to the Board recommending that the Board not grant him parole. Similar to this case, Burkett asserted that the reasons espoused by the Board for denying parole were pretextual and that the Board had no legitimate reasons for denying parole. The Court rejected Burkett's claim, first citing to Section 19 of the Parole Act<sup>2</sup> which specifically directs the Board to consider recommendations made by the sentencing court and district attorney. The Court also stated as follows:

Moreover, even if Burkett could demonstrate that the recommendations of the sentencing judge and district attorney were based on improper motives, the Board's denial of parole would be proper based on the other reasons cited. "Mandamus cannot be used to say that an agency considered improper factors, that its findings

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<sup>2</sup> Act of August 6, 1941, P.L. 861, as amended, 61 P.S. §331.19.

were wrong, or that the reasons set forth in its decision are a pretense.”

Burkett, 841 A.2d at 650 (citing Weaver, 688 A.2d at 777).

The facial reasons the Board offered for its denial of parole to Cummings suggest that Weaver and Burkett apply such as to render Cummings’ mandamus action similarly subject to demurrer. However, the issue raised by Cummings claiming that one of the Board members did not act in an impartial manner presents a slightly different scenario from those two cases. Cummings asserts that the Board’s action was improper because of the alleged bias of the Board member. The Board argues that mandamus does not lie to address this and other constitutional claims (such as the right to confront witnesses against oneself), noting that, at least with respect to due process claims, Cummings cannot succeed in this mandamus action based upon the long-held tenant that, before a person can state a claim for such a violation, he must first establish the existence of a protected life, liberty, or property interest with which the state has interfered. Board of Regents v. Roth, 408 U.S. 564, 571 (1972). Further, the Board is correct in noting that, while the Courts have recognized due process rights associated with the revocation of parole, they have not accepted the same with regard to parole requests or consideration.

Our Supreme Court has, however, recognized situations in which courts can consider Board action denying parole in the context of a mandamus action where constitutional interests at issue. In Finnegan v. Pennsylvania Board of Probation and Parole, 576 Pa. 59, 838 A.2d 684 (2003), an inmate who was denied parole based upon changes to the Parole Act asserted that the application of the changes violated the constitutional prohibition against ex post facto laws. The effect of the changes to the Parole Act was to make it more difficult for certain inmates to obtain parole. The Court ultimately reasoned that the revision of the Parole Act did not violate the ex post facto clause when applied to a prisoner convicted before the revision. Based upon that

conclusion, the Court held that Finnegan was not entitled to use mandamus in order to compel the Board to apply the previous version of the Parole Act. See also Coady v. Vaughn, 564 Pa. 604, 770 A.2d 287 (2001) and Cimaszewski v. Pennsylvania Board of Probation and Parole, 582 Pa. 27, 868 A.2d 416 (2005). All of these cases stand for the discrete proposition that:

Where ... discretionary actions and criteria are not being contested but rather the actions of the board taken pursuant to changed statutory requirements are being challenged, an action for mandamus remains viable as a means for examining whether statutory requirements have been altered in a manner that violates the ex post facto clause ... Absent a change in the statutes governing parole, however, denial of parole would generally constitute a discretionary matter that is not subject to review.

Coady, 564 Pa. at 608-9, 770 A.2d at 290.

In a more recent decision from the Third Circuit Court of Appeals, the Court opined that our Supreme Court would likely dismiss a mandamus action based upon constitutional claims other than those arising under the ex post facto clause. See DeFoy v. McCullough, 393 F.3d 439 (3<sup>rd</sup> Cir. 2005). The claim involved an inmate's refusal to admit guilt, which was the dispositive reason for parole denial. Pointing to Weaver, the Court noted that mandamus is not available to review the Board's consideration of improper factors. The Court recited the above-quoted language suggesting that, unless a mandamus action involves a change in the parole statutes, parole decisions are not generally subject to review in mandamus. The Court further reasoned that extending mandamus to other constitutional claims would result in the availability of challenges tantamount to direct appeals.

We observe, however, that a concurring voice in that decision disagreed with the Court's conclusion that any opinion from our Supreme Court or this Court



definitively closed the question of availability of mandamus relief for other types of constitutional claims. The concurrence referred to this Court's decision in Voss v. Pennsylvania Board of Probation and Parole, 788 A.2d 1107 (Pa. Cmwlth. 2001). In that case, an inmate challenged a Board decision denying parole. The Board's sole basis for denying parole was a concept underlying Section 1 of the Parole Act which proposes the achievement of "the fair administration of justice," despite the direction of Section 22 of the Act for the Board to provide a brief statement of the reasons for the Board's action. Voss challenged the Board's use of an undefined standard in rendering its decision. This Court concluded that, based on a review of the petition for review and the preliminary objection, the Board had not apparently complied with its statutory mandates. The Court stated that "there is no way to determine what standards the Board relied upon to deny him parole. Hence, the Board's action was arbitrary and capricious and also constituted a denial of his substantive due process rights." Id., 788 A.2d at 1110 (footnote and citation to Coady omitted).

While recognizing the Board's broad discretionary powers, the Court noted that the Board had to comply with specifically articulated statutory standards. However, the Court stated additionally:

[T]he Court is not persuaded that the Board's denial of Voss' parole application based upon an "achieving the fair administration of justice" concept meets the requirements of due process. Voss has a clear right to receive a statement of the reasons for the denial of his parole application, particularly if the record demonstrates as he asserts that he met all previous requirements for parole imposed upon him by the Board.

Id., 788 A.2d at 1111 (footnote omitted).

Consequently, although our Supreme Court has suggested that mandamus is appropriate only where statutory changes have been applied in such a manner as to

violate the ex post facto clause, this Court has indicated that a substantive due process violation may provide a basis for mandamus relief. However, the factor that distinguishes this case from Voss is the fact that the Board's decision contains detailed reasons as to why the Board elected to deny re-parole.

Based upon our Supreme Court's limited conclusion regarding the use of mandamus to challenge a parole request denial, the above-noted case law indicating that inmates have no due process interest that would subject the Board's parole denial decision to a more closely scrutinized review and considering the distinguishing factors between this case and Voss, we conclude here that Cummings' due process arguments and his claims that the Board relied on pretext in reaching its decision do not support his request for relief in mandamus.

Accordingly, we sustain the Board's preliminary objections to Cummings' petition for review in the nature of mandamus and dismiss said petition.

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JOSEPH F. McCLOSKEY, Senior Judge

Judge Simpson concurs in result only.

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**ORDER**

AND NOW, this 7<sup>th</sup> day of October, 2009, the preliminary objections of the Pennsylvania Board of Probation and Parole are sustained. The petition for review in the nature of mandamus filed by Joseph T. Cummings is hereby dismissed.

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JOSEPH F. McCLOSKEY, Senior Judge