

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 17, 2014

ROGER JAMAL MYRICK v. STATE OF TENNESSEE, ET AL.

Appeal from the Chancery Court for Davidson County
No. 130470I Claudia C. Bonnyman, Chancellor

No. M2013-02352-COA-R3-CV - Filed October 8, 2014

This appeal arises from a decision by the Davidson County Chancery Court dismissing inmate's petition for declaratory judgment. Inmate was convicted of second degree murder and sought a declaratory order from the Tennessee Department of Correction ("TDOC") claiming he was eligible for parole and requesting a parole hearing date. The request was denied, so inmate filed a petition for declaratory judgment with the Davidson County Chancery Court, arguing that he was entitled to a parole hearing and mandatory parole pursuant to Tenn. Code Ann. §§ 40-28-115(b)(1) and -117(b). The State filed a motion to dismiss for failure to state a claim based on Tenn. Code Ann. § 40-35-501. The trial court granted the State's motion, and this appeal followed. We affirm the decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, and W. NEAL MCBRAYER, JJ., joined.

Roger Jamal Myrick, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Joe Whalen, Acting Solicitor General; and Lee Pope, Assistant Attorney General; for the appellee, State of Tennessee.

OPINION

BACKGROUND

Roger Jamal Myrick was convicted of second degree murder for an offense that occurred on January 19, 2007, and was ordered to serve his entire sixteen-year sentence. He is currently an inmate in the custody of the TDOC.

On February 17, 2013, Mr. Myrick asked the TDOC to find he was eligible for parole and requested a parole hearing date. The TDOC denied his request on March 11, 2013. Mr. Myrick then filed a petition for declaratory judgment with the trial court on April 1, 2013. He sought an order from the court directing the TDOC to grant him a parole hearing based on Tenn. Code Ann. §§ 40-28-115(b)(1) and -117(b). He claimed that, pursuant to section 115(b)(1), he was eligible for parole in 2012, and pursuant to section 117(b), he was entitled to “mandatory parole.”

The State filed a motion to dismiss for failure to state a claim based on Tenn. Code Ann. § 40-35-501. Mr. Myrick filed a response and motion for summary judgment on July 26, 2013. The trial court granted the State’s motion on September 27, 2013. In its decision, the court explained the evolution of Tennessee parole law and why Mr. Myrick was not eligible for parole:

Since the 1970’s when “mandatory” parole was established, there have been two major revisions to Tennessee’s sentencing and parole laws, the first in 1982 and the second in 1989. However “the Tennessee General Assembly purposefully did not repeal” portions of the old parole law “because it continued to govern the sentences and release of persons who committed crimes prior to July 1, 1982.” *Hickman v. [Tenn.] Bd. of Paroles*, 78 S.W.3d 285, 290 (Tenn. Ct. App. 2001). Accordingly, the statutes to which the Petitioner cites . . . are still valid statutes relevant to inmates convicted of committing crimes prior to July 1, 1982.

.....

In this case, the pleadings reveal that the Petitioner was convicted of murder in the second degree for an offence that occurred on January 19, 2007. Accordingly, the two statutes upon which the Petitioner relies, Tenn. Code Ann. §§ 40-28-115 and -117, do not apply. Rather, “[a]ll persons who commit crimes on or after November 1, 1989, shall be tried and sentenced under the provisions of this chapter,” *i.e.*, Chapter 35 of Title 40. Tenn. Code Ann. § 40-

35-117(a). Accordingly, Tenn. Code Ann. § 40-35-101 *et. seq.* applies to the Petitioner.

Tenn. Code Ann. § 40-35-501(i)(1) mandates that “[t]here shall be no release eligibility for a person committing an offense, on or after July 1, 1995, that is enumerated in subdivision (i)(2). The person shall serve one hundred percent (100%) of the sentence imposed by the court less sentence credits earned and retained.” Enumerated in subsection (i)(2) is the offense of “Murder in the second degree.” Tenn. Code Ann. § 40-35-501(i)(2)(B). Accordingly, the Petitioner, Mr. Myrick, must serve 100% of his sentence and is not entitled to a parole eligibility date.

Mr. Myrick appeals from the trial court’s ruling and asks this Court to: reverse the trial court’s decision and remand the case, order the trial court to assign “‘conflict’ free counsel” and conduct an evidentiary hearing, order the Board of Probation and Parole (“the Board”) to issue a parole hearing for Mr. Myrick, and grant any other relief this Court deems just.

STANDARD OF REVIEW

The trial court dismissed Mr. Myrick’s petition and granted the State’s motion because Mr. Myrick failed to state a claim upon which relief could be granted. A motion to dismiss for failure to state a claim for relief only challenges the legal sufficiency of the complaint and admits the truth of the factual allegations in the complaint. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). However, the motion asserts that these facts do not establish a basis for relief. *Id.* A trial court’s conclusions about the adequacy of a complaint are reviewed de novo, without a presumption of correctness. *Stewart v. Schofield*, 368 S.W.3d 457, 462-63 (Tenn. 2012).

Pleadings prepared by pro se litigants should be evaluated by less stringent standards than pleadings prepared by lawyers. *Id.* at 462. However, in order to preserve fairness between pro se litigants and their adversaries, pro se litigants are not excused from complying with the same substantive and procedural rules that represented parties must observe. *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003).

ANALYSIS

Mr. Myrick argues that he is entitled to a parole hearing and mandatory parole pursuant to Tenn. Code Ann. §§ 40-28-115(b)(1) and -117(b), respectively. Section 40-28-115(b)(1) addresses parole eligibility for certain inmates who have served one half of their

determinate sentence, while section 117(b) addresses mandatory parole and its restrictions. Tennessee Code Annotated section 40-28-115(b)(1) provides:

Every person sentenced to a determinate sentence and confined in a state prison, after having served a period of time equal to one half (1/2) of the sentence imposed by the court for the crime for which the person was convicted, but in no event less than one (1) year, shall likewise be subject to parole in the same manner provided for those sentenced to an indeterminate sentence.

Tennessee Code Annotated 40-28-117(b)(2) states:

(b) Every prisoner who has never been granted a parole of any type by the board on a particular sentence of imprisonment shall be granted a mandatory parole by the board subject to the following restrictions:

....

(2) Prisoners serving a determinate or indeterminate sentence with a maximum term of more than ten (10) years as fixed by the court, shall be paroled by the board six (6) months prior to the completion of the maximum term of sentence less credit for good and honor time and incentive time;

The State relies on Tenn. Code Ann. § 40-35-501, which addresses parole eligibility for anyone who committed certain crimes after July 1, 1995. The statute provides, in part:

(i)(1) There shall be no release eligibility for a person committing an offense, on or after July 1, 1995, that is enumerated in subdivision (i)(2). The person shall serve one hundred percent (100%) of the sentence imposed by the court less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236 or any other provision of law, shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%).

(2) The offenses to which subdivision (i)(1) applies are:

...

(B) Murder in the second degree;

Tenn. Code Ann. § 40-35-501(i)(1) and (2)(B).

Mandatory parole was originally established in 1974. *Hickman v. Tenn. Bd. of Paroles*, 78 S.W.3d 285, 290 (Tenn. Ct. App. 2001). The Tennessee Criminal Sentencing Reform Act of 1982 (“the Act”) applied to anyone who committed a crime on or after July 1, 1982. *Id.* The Act did not contain any mandatory parole provision, so people who committed crimes after July 1, 1982 were not entitled to mandatory parole. *Id.* However, the original mandatory parole statute was not repealed because it still applied to sentences and release of anyone who committed crimes before July 1, 1982. *Id.*

In 1989, Tennessee’s sentencing and parole laws were rewritten again. *Id.* The 1989 Act applies to “[a]ll persons who commit crimes on or after November 1, 1989.” Tenn. Code Ann. § 40-35-117(a). It also states that “[f]or all persons who committed crimes prior to July 1, 1982, prior law shall apply and remain in full force and effect in every respect, including, but not limited to, sentencing, parole and probation.” Tenn. Code Ann. § 40-35-117(c). Most importantly, the 1989 Act provides that there will be no release eligibility for anyone who commits second degree murder after July 1, 1995, and they will be forced to serve one hundred percent of the sentence imposed by the court less sentence credits earned and retained. Tenn. Code Ann. § 40-35-501(i)(1), (2)(b).

Mr. Myrick incorrectly relies on Tenn. Code Ann. §§ 40-28-115(b)(1) and -117(b) to argue he is entitled to parole. Because both of those provisions apply to crimes committed before July 1, 1982, those statutes do not provide the relief Mr. Myrick is seeking. The 1989 Act applies to Mr. Myrick because he was convicted of second degree murder for an offense that took place after November 1, 1989 and July 1, 1995. As a result, we agree with the trial court that Mr. Myrick is not eligible for parole and must serve his entire sentence.

Mr. Myrick also argues that, because inmates convicted of second degree murder have been paroled before, the Equal Protection Clause demands that he receive his own hearing. He bases this argument entirely on a document from the Board’s Research, Policy and Planning Division that includes information on how many inmates convicted of second degree murder were paroled between July 2007 and June 2013. However, this document is not part of the record.

Documents not in the record are not properly before this court. *UT Med. Grp., Inc. v. Vogt*, 235 S.W.3d 110, 122 (Tenn. 2007). Simply attaching a document to an appellate brief does not place it in the record on appeal. *Id.* Only matters set forth in the record may be considered. Tenn. R. App. P. 13(c) (“The Supreme Court, Court of Appeals, and Court of Criminal Appeals may consider those facts established by the evidence . . . and set forth in the record . . .”). Because this document is not in the record, this Court cannot consider the document, and Mr. Myrick’s Equal Protection argument fails.

Finally, Mr. Myrick requests that this Court order the trial court to assign him conflict free counsel and conduct an evidentiary hearing. His claims have failed, so he is not entitled to a hearing. As to the request for an attorney, Mr. Myrick's brief makes no argument that he is entitled to one, so that argument is waived. Tenn. R. App. P. 27(a)(7) (requiring that an appellant present reasons why appellate relief is required with citations to authorities).

CONCLUSION

The judgment of the trial court is affirmed. Costs of appeal are assessed against the Appellant, Roger Jamal Myrick, and execution may issue, if necessary.

ANDY D. BENNETT, JUDGE