IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 4, 2016

RODNEY BIBBS v. TENNESSEE BOARD OF PAROLE

Appeal from the Chancery Court for Davidson County
No. 1577II Carol L. McCoy, Chancellor

No. M2015-01755-COA-R3-CV – Filed April 22, 2016

Appellant is an inmate in the Tennessee prison system; he is serving a life sentence, with the possibility of parole, for first degree murder. Appellee, the Tennessee Board of Parole, declined to recommend the Appellant for parole, citing as its reason the seriousness of his offense. Appellant filed a common law writ of certiorari in the Davidson County Chancery Court challenging the Board's decision to deny him parole. The chancery court dismissed the petition. We affirm.

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

KENNY ARMSTRONG, J., delivered the opinion of the Court, in which ANDY D. BENNETT and THOMAS R. FRIERSON, II, JJ., joined.

Rodney Bernard Bibbs, Tiptonville, Tennessee, Appellant, pro se.

Herbert H. Slatery, III, Attorney General and Reporter, Andrée Sophia Blumstein, Solicitor General, and Madeline B. Brough, Assistant Attorney General, for the Appellee, Tennessee Board of Parole.

OPINION

I. Background

Since 1989, Rodney Bernard Bibbs ("Appellant") has been an inmate in the custody of

the Tennessee Department of Correction; Mr. Bibbs is currently serving a life sentence, with the possibility of parole, for a Murder 1 conviction. Mr. Bibbs was found guilty of sexually assaulting and beating an eleven-year-old girl to death. Appellant attempted to rape the girl. When she escaped and locked herself in a bathroom, Mr. Bibbs kicked open the door and beat her with the butt of a .25 caliber pistol and the porcelain top of the toilet; he then threw her off a third-floor landing into the parking lot.

After serving twenty-six years of his life sentence, on September 4, 2014, Appellant appeared before the Tennessee Board of Parole (the "Board," or "Appellee") for his second parole-grant hearing. At the time of the hearing, Mr. Bibbs was fifty years old. Although the Board considered Appellant's recommendation letters, accomplishments while in prison, as well as his regret and remorse for his actions, the Board voted unanimously to decline parole. The Board's decision was based on its determination that "[t]he release from custody at this time would depreciate the seriousness of the crime of which the offender stands convicted or promote disrespect of the law: T.C.A. 40-35-503(b)(2)." As the hearing officer explained during the hearing:

> [Mr. Bibbs], to your credit, I think you have used your time of incarceration wisely. You have taken some programming that would hopefully make you a better citizen, a law-abiding citizen, when and if you should be paroled. However, it's difficult for me as a member of this parole board to look past the egregious, heinous nature of the crime that you've committed. What you did to that 11-year-old girl is difficult to look by. This is . . . only your second hearing before this board. You have only served 26 years on a life sentence. [Mr. Bibbs], I cannot vote to parole you this morning . . . . And, very simply, the reason for my vote, my declamation vote, is the seriousness of the offense of the crime that you committed and [for which you] have been convicted.

The Board set Mr. Bibbs' next parole review date for September of 2020.

On January 15, 2015, Appellant filed a petition for writ of certiorari in the Davidson County Chancery Court (the "trial court"), seeking review of the Board's decision to deny him parole. *See* Tenn. Code Ann. §§ 27-8-101 *et seq.* Citing his lack of disciplinary infractions and the fact that he had successfully completed anger management and social skills training while incarcerated, Mr. Bibbs argued that the Board had "acted illegally, fraudulently and arbitrarily in denying" him parole. In his petition, Mr. Bibbs also alleged that the Board had "violated the Ex Post Facto Clause of the U.S. and Tennessee Constitutions, by denying him parole for 6 years." Specifically, Appellant argued that, when he was incarcerated in 1989, "after an initial parole hearing, [he] would [have] been entitled to annual reviews. In 1992, annual hearings was [sic] done away with. [Mr. Bibbs] now has a significant increase in punishment and incarceration [due to the 6 year lapse between this

second parole hearing and his next hearing]." By order of August 13, 2015, the trial court dismissed Mr. Bibbs' petition upon its finding that the Board did not act illegally, fraudulently, or arbitrarily. Appellant filed a timely notice of appeal to this Court. Although Mr. Bibbs filed a uniform civil affidavit of indigency with his notice of appeal, our record does not contain a ruling on whether he is, in fact, proceeding as a pauper in this appeal. The absence of such order does not affect the finality of the trial court's order under Tennessee Rule of Appellate Procedure 3, but may affect how costs are assessed. We will address that issue in our conclusion below.

II. Issues

We restate Appellant's issues as follows:

1. Whether the trial court erred in dismissing Appellant's petition and affirming the Board's decision to decline Appellant parole based upon the seriousness of his offenses.

2. Whether the trial court erred in finding that the denial of Appellant's parole did not violate the *ex post facto* clause because the denial of parole does not, in fact, extend Appellant's prison sentence.

III. Standard of Review

We first note that, while we are cognizant of the fact that Appellant is self-represented in this appeal, it is well-settled that "pro se litigants are held to the same procedural and substantive standards to which lawyers must adhere." ***Brown v. Christian Bros. Univ.***, No. W2012–01336–COA–R3–CV, 2013 WL 3982137, at *3 (Tenn. Ct. App. Aug. 5, 2013), *perm. app. denied* (Tenn. Jan. 15, 2014). As we have explained,

> parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.

Jackson v. Lanphere, No. M2010–01401–COA–R3–CV, 2011 WL 3566978, at *3 (Tenn. Ct. App. Aug. 12, 2011) (quoting ***Hessmer v. Hessmer***, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003)).

Release on parole is a privilege, not a right. Tenn. Code Ann. § 40-35-503(b) (2014). Accordingly, no prisoner has the absolute right to be released on parole prior to the expiration of his or her sentence. ***Graham v. State***, 304 S.W.2d 622, 623 (Tenn. 1957); ***Hopkins v. Tennessee Bd. of Paroles and Probation***, 60 S.W.3d 79, 82 (Tenn. Ct. App. 2001). The power to decide whether a prisoner should be granted parole rests solely with the Board, not the courts. ***Hopkins***, 60 S.W.3d at 82. Because the decisions of the Board are entirely discretionary, they are only subject to judicial review under the common law writ of certiorari. ***Powell v. Parole Eligibility Review Bd.***, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994). The issuance of a writ of common law certiorari is not, however, an adjudication of anything. ***Keen v. Tennessee Dep't of Correction***, No, M2001-00632-COA-R3-CV, 2008 WL 539059, at *2 (Tenn. Ct. App. Feb. 25, 2008) (citing ***Gore v. Tennessee Dep't of Correction***, 132 S.W.3d 369, 375 (Tenn. Ct. App. 2003)). Instead, it is "simply an order to the lower tribunal to file the complete record of its proceedings so the trial court can determine whether the petitioner is entitled to relief." ***Id.*** at *2 (citing ***Hawkins v. Tennessee Dep't of Correction***, 127 S.W.3d 749, 757 (Tenn. Ct. App. 2002); ***Hall v. McLesky***, 83 S.W.3d 752, 757 (Tenn. Ct. App. 2001)). The scope of review under the common law writ of certiorari is very narrow; "[t]he reviewing court is not empowered 'to inquire into the intrinsic correctness of the board's decision.'" ***Gordon v. Tennessee Dep't of Correction***, No. M2006-01273-COA-R3-CV, 2007 WL 2200277, at *2 (Tenn. Ct. App. July 30, 2007) (quoting ***Willis v. Tennessee Dep't of Correction***, 113 S.W.3d 706, 712 (Tenn. 2003)). The reviewing court does not weigh the evidence, but must uphold the lower tribunal's decision if the lower tribunal "acted within its jurisdiction, did not act illegally or arbitrarily or fraudulently, and if there is any material evidence to support the [tribunal's] findings." ***Jackson v. Tennessee Dep't of Correction***, No. W2005-02240-COA-R3-CV, 2006 WL 1547859, at *3 (Tenn. Ct. App. June 8, 2006) (citing ***Watts v. Civil Serv. Bd. of Columbia***, 606 S.W.2d 274, 276-77 (Tenn.1980); ***Davison v. Carr***, 659 S.W.2d 361, 363 (Tenn.1983)). The reviewing court should "review the record to determine if there was any material and substantial evidence to support the [tribunal's] action . . . . Such review is actually a question of law and not of fact . . . . . Therefore, . . . [the reviewing court does not] determine[] any disputed question of fact or weigh[] any evidence." ***Gallatin Housing Auth. V. City Council, City of*** Gallatin, 868 S.W.2d 278, 280 (Tenn. Ct. App. 1993) (citations omitted).

IV. Analysis

A. Seriousness of the Offense

The Board has the authority to parole inmates serving more than two years on felony sentences. Tenn. Code Ann. § 40-35-503(a). In his appeal, Mr. Bibbs argues that he was a suitable candidate for parole based on the following grounds: (1) he had an excellent prison record; (2) this was his first offense; (3) he was only twenty-three years old when he committed the offense; (4) he completed two vocational courses while in prison; (5) his very

"low risk" score on the offense risk assessment; (6) his family and community support; (7) the fact that he was is a high school graduate and Air Force veteran; and (8) his remorse and responsibility for his actions. Although, in determining whether an inmate should be granted parole, the Board considers the extent to which the inmate has improved his or her educational, vocational, or employment skills through the department of correction programs, Tenn. Code Ann. § 40-35-503(g), as noted above, parole is a privilege and not a right. Tenn. Code Ann. § 40-35-503(b)(2). Furthermore, Tennessee Code Annotated Section 40-28-117(a)(1) provides:

> Parole being a privilege and not a right, no prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board is of the opinion that there is reasonable probability that the prisoner, if released, will live and remain at liberty without violating the law, and that the prisoner's release is not incompatible with the welfare of society. If the board so determines, the prisoner may be paroled and if paroled shall be allowed to go upon parole outside of prison walls and enclosure upon the terms and conditions as the board shall prescribe, but to remain while thus on parole in the legal custody of the warden of the prison or the supervisor of the county jail or workhouse from which the prisoner is paroled, until the expiration of parole. The terms and conditions of parole set by the board may specifically include the requirement that a prisoner pay restitution to the victims of the crimes for which the prisoner had been sentenced to prison, to compensate them for their personal injuries or property losses or both proximately caused through the commission of those crimes.

In fact, Tennessee Code Annotated Section 40-35-503(b)(2), compels the Board to deny parole "if the Board finds that: . . . (2) granting parole would depreciate the seriousness of the offense of the crime of which the defendant stands convicted or promote disrespect for the law." Likewise, in ***Arnold v. Tennessee Dep't of Paroles***, 956 S.W.2d 478 (Tenn. 1997), the Tennessee Supreme Court specifically held that the Board may consider "seriousness of the offense" when determining whether to release an inmate on parole:

> In our view, consideration of the seriousness of the offense, the number of victims, and the risk to re-offend is appropriate to the parole decision. Consideration of these factors does not demonstrate that the Board acted illegally, fraudulently, arbitrarily, or in excess of its jurisdiction. Moreover, consideration of such factors does not implicate any constitutional right under the circumstances.

Arnold, 956 S.W.2d at 482-83; *see also* ***Turner v. Tennessee Bd. of Paroles***, 993 S.W.2d 78,

80 (Tenn. Ct. App. 1999); ***Robinson v. Traughber***, 13 S.W.3d 361, 363 (Tenn. Ct. App. 1999). It is clear from the transcript of Mr. Bibbs' parole hearing that the Board considered all of the grounds that Mr. Bibbs alleged in support of his parole, *see supra*. However, as set out above, the Board ultimately decided to deny Mr. Bibbs parole based on the seriousness of his offense. Certainly, the record supports the Board's ground for denial of parole. Mr. Bibbs' offense is, indeed, serious, heinous, and violent; it is all the more so because of the age of his victim. Although Appellant argues that the Board acted fraudulently and arbitrarily, he has not alleged facts sufficient to support this conclusion. He alleges no procedural irregularity. Rather, his argument rests solely on his exemplary prison record and accomplishments while incarcerated. As discussed above, "good behavior" facts are not dispositive on the Board's parole decision, and this Court may not substitute its judgment for the Board's. From the entire record, we conclude that the Board's decision was not illegal, arbitrary, or fraudulent; therefore, we cannot conclude that the trial court erred in dismissing Mr. Bibbs' petition.

B. Ex Post Facto

Appellant also argues that the Board's decision to set Mr. Bibbs' next parole hearing for September of 2020 was not only arbitrary, but was also a violation of the prohibition against *ex post facto* laws. The constitutional prohibition against *ex post facto* laws is found in both the United States Constitution, Article I, Section 10, and the Constitution of the State of Tennessee, Article I, Section 11. This prohibition is "aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts." ***California Dep't of Correction v. Morales***, 514 U.S. 499, 504 (1995). Specifically, an *ex post facto* law

> "changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed." ***Weaver v. Graham***, 450 U.S. 24, 32-33, 101 S.Ct. 960, 966 (1981). The critical question in an *ex post facto* claim is "whether the law changes the punishment to the defendant's disadvantage, or inflicts a greater punishment than the law allowed when the offense occurred." ***State v. Pearson***, 858 S.W.2d 879, 883 (Tenn. 1993).
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> Under both the state and federal constitutions and cases interpreting them, two factors must be present to establish a violation of the *ex post facto* prohibition: (1) the law must apply retrospectively to events occurring before its enactment; and (2) it must disadvantage the offender affected by it. ***State v. Ricci***, 914 S.W.2d 475, 480 (Tenn. 1996); ***Pearson***, 858 S.W.2d at 882 (quoting ***Miller v. Florida***, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451 (1987)) . . . . Actions which extend parole eligibility by altering the criteria for such eligibility can implicate the *ex post facto* clause because eligibility for parole consideration is part of the law annexed to the crime when committed. ***Kaylor***, 912 S.W.2d at 732 (citing ***Weaver***, 450 U.S. at 32-33, 101 S.Ct. at 966 (other citations

omitted). As the United States Supreme Court has stated:

> . . . retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits are "one determinant of petitioner's prison term . . . and . . . [the petitoner's] effective sentence is altered once this determinant is changed.

Lynce v. Mathis, 519 U.S. 433, 445, 117 S.Ct. 891, 898 (1997) (citations omitted).

Braden v. Tennessee Bd. of Probation, No. M2013-02036-COA-R3-CV, 2014 WL 5698741, *11-12 (Tenn. Ct. App. Nov. 4, 2014). Mr. Bibbs committed his offense in 1988 and was convicted in 1989. As set out above, he argues that he is entitled to a parole review hearing each year based on the law that existed at the time of his crime and conviction. This Court has addressed this very issue in ***Williams v. Tennessee Bd. of Probation and Parole***, No. M2006-02336-COA-R3-CV, 2007 WL 3132935 (Tenn. Ct. App. Oct. 26, 2007), wherein we stated:

> When Mr. Williams was sentenced in 1982, Tennessee Department of Correction Policy 501.30 provided that if a prisoner was denied parole, "a future hearing date shall be specified to be within one year of the current hearing." *See* ***Baldwin*** [***v. Tennessee Bd. of Paroles, et al.***, 125 S.W.3d 429 (Tenn. Ct. App. 2003), *perm. app. denied* (Tenn. Dec. 22, 2003)]; ***Sams v. Traughber***, No. 01A01-9603-CH-00133, 1996 WL 467684, at *1 (Tenn. Ct. App. M.S., file dAug. 14, 1996). In 1992, that rule was amended to remove the portion stating, "within one year of the current hearing," and now states that if parole was denied, "a future hearing date shall be specified." ***Id***. Accordingly, Mr. Williams argues that each time his parole request is denied, he is entitled to have a new hearing scheduled within one year. In ***Baldwin***, this Court held that the 1992 amendment that changed the scheduling of parole reviews is a procedural change "and is not facially unconstitutional." ***Baldwin***, 125 S.W.3d at 432. Since the amendment does not increase Mr. Williams's original sentence and thereby inflict greater punishment, the application of the 1992 amendment is not an ex post facto violation. Although it may increase the time between parole hearings, it does not increase his sentence. Therefore, Mr. Williams is not entitled to the annual parole hearings that were mandated by the earlier version of this rule.

Williams, 2007 WL 3132935, at *2.

As noted in ***Williams***, *supra*, in ***Baldwin v. Tennessee Bd. of Paroles***, 125 S.W.3d 429 (Tenn. Ct. App. 2003), this Court held that the amendment to the Board's procedural rules that eliminated the annual parole review was not facially unconstitutional. Based upon the ***Williams*** and ***Baldwin*** holdings, we cannot conclude that the Board's decision not to set Mr. Bibbs' next parole hearing within one year was a violation of the *ex post facto* clause.

Mr. Bibbs also argues that the six-year deferral of his next parole hearing was arbitrary. In ***Baldwin***, we also addressed the length of time to which an inmate's next parole review date could be deferred, and we held that a twenty year deferral constituted an arbitrary exercise of the Board's power. ***Baldwin***, 125 S.W.3d at 434-435. Specifically, we reasoned that the Board is comprised of seven members, who serve staggered six-year terms; therefore, a twenty-year gap between hearings would ostensibly ensure that completely different board members, i.e., members who had no part in the prior decision to deny parole, would be entrusted to conduct the next parole review. ***Id***. at 434. Accordingly, we held that to require an inmate to wait twenty years for his or her next parole hearing was "an arbitrary withdrawal of the power to parole from future Board members and that a twenty-year deferral would undermine the very provisions of the parole statutes that empower the Board to grant parole." ***Id***. In reversing the trial court's affirmation of the Board's decision in ***Baldwin***, this Court also opined that "the essential effect of the Board's action is to change Mr. Baldwin's sentence to life without parole, contrary to what the Legislature intended." ***Id***. In ***Baldwin***, we did not go so far as to set a bright-line rule as to the appropriate time between parole hearings; rather, we noted that "the determination of when a prisoner is ready to be released is not an easy one, and the provision for periodic hearings gives the Board the opportunity to re-evaluate its own decisions." ***Id***.

Since our decision in ***Baldwin***, this Court has, on several occasions, held that a deferral of parole for six years is not arbitrary. For example, in ***York v. Tennessee Bd. of Probation and Parole***, No. M2005-01488-COA-R3-CV, 2007 WL 1541360 (Tenn. Ct. App. May 25, 2007), we held that the Board's decision to defer the Mr. York's parole hearing for six years from the date of the denial of parole was not arbitrary under ***Baldwin***. Specifically, we held that the opportunity to review and decide whether Mr. York should be paroled was not withdrawn from future Board members. ***Id***. at *5. We also held that the Board had validly denied Mr. York parole based on its finding that "[t]he release from custody at the time would depreciate the seriousness of the crime of which the defendant stands convicted or promote disrespect for the law." ***Id***. at *6 (relying on Tenn. Code Ann. § 40-35-503(b)(2)); *see also* ***Tutton v. Tennessee Bd. of Probation and Paroles***, No. M2012-02513-COA-R3-CV, 2013 WL 6729811, at *4 (Tenn. Ct. App. Dec. 18, 2013) (holding that a six year deferral on the basis of the seriousness of the inmate's offense was not arbitrary); ***Hendricks v. Tennessee Bd. of Probation and Parole***, No. M2010-01651-COA-R3-CV, 2007 WL 1541360 (Tenn. Ct. App. May 25, 2007) (holding likewise). In light of these

holdings and the Board's finding concerning the seriousness of Mr. Bibbs' offense, we cannot conclude that the Board's decision to defer Mr. Bibbs' next parole hearing for six years was arbitrary.

V. Conclusion

For the foregoing reasons, we affirm the order of the trial court. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed against the Appellant, Rodney Bernard Bibbs. As noted above, from the record, it is unclear whether Mr. Bibbs is proceeding *in forma pauperis* in this appeal. If Mr. Bibbs is not proceeding as an indigent person, costs may be assessed against his bond or surety. Whether or not he is proceeding as a pauper, execution may issue for costs if necessary.

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KENNY ARMSTRONG, JUDGE