

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 1, 2017

JIMMY NEWELL v. RICHARD MONTGOMERY, ET AL.

**Appeal from the Chancery Court for Davidson County
No. 15-334-III Ellen H. Lyle, Chancellor**

No. M2016-01787-COA-R3-CV

The petitioner sought a writ of certiorari seeking redress for the respondents' failure to schedule an initial parole hearing prior to his release eligibility date. The trial court dismissed the petition as moot, finding that a parole hearing was conducted following the filing of the petition and that any challenge relating to the parole hearing was untimely. The petitioner appeals. We affirm.

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

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and BRANDON O. GIBSON, J., joined.

Jimmy Newell, Hartsville, Tennessee, Pro Se.

Herbert H. Slatery, III, Attorney General and Reporter, and Andrée S. Blumstein, Solicitor General, Nashville, Tennessee, for the appellees, the Tennessee Board of Parole; the Tennessee Department of Correction; Richard Montgomery, Chairman of the Tennessee Board of Parole; and Derrick Schofield, Commissioner of the Tennessee Department of Correction.

MEMORANDUM OPINION¹

Jimmy Newell (“Petitioner”) is an inmate housed in the Trousdale Turner Correctional Facility, where he is serving a four-year sentence for two counts of theft of property. Petitioner first entered the custody of the Tennessee Department of Correction (“TDOC”) on July 17, 2014. An initial parole hearing was scheduled for September 22, 2014, due to his release eligibility date of January 20, 2015. *See* Tenn. Code Ann. § 40-35-503(d)(1) (“[The Tennessee Board of Parole (“the Board”)] shall conduct a hearing within a reasonable time prior to a defendant’s release eligibility date to determine a defendant’s fitness for parole”). The September 2014 hearing was reset for an unspecified date in January 2015 due to Petitioner’s institutional transfer to the Hardeman County Correctional Facility. Prior to the newly scheduled hearing in January 2015, Petitioner attended court in Hamilton County, Tennessee, necessitating an “Out to Court” status in the TOMIS computer system. This status persisted due to a clerical oversight even after Petitioner’s return to his facility on November 21, 2014. Petitioner was removed from the January parole hearing docket as a result of the incorrect status.

Petitioner made multiple requests to numerous individuals in an attempt to correct his status in time for the January 2015 hearing. His requests were unsuccessful, and he then exhausted his administrative remedies. Meanwhile, Petitioner was classified as a “close” custody inmate based upon a Class A disciplinary infraction for assault arising from an incident on February 9, 2015.

On March 18, 2015, Petitioner filed a petition for writ of certiorari, naming the Tennessee Board of Parole; the Tennessee Department of Correction; Richard Montgomery, Chairman of the Tennessee Board of Parole; and Derrick Schofield, Commissioner of the Tennessee Department of Correction as respondents (collectively “Respondents”). Petitioner requested his placement on the parole docket as soon as possible and “an order compelling [TDOC] and [the Board] to update policy and rules with corrective procedure to protect the due process rights of offenders to have hearings prior to their release eligibility dates; if necessary as an add-on to the parole docket.”

¹ Rule 10 of the Rules of the Court of Appeals of Tennessee provides as follows:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

During the pendency of the certiorari proceeding, Petitioner was granted an initial parole hearing on May 18, 2015. At the conclusion of the hearing, Hearings Officer Madden informed Petitioner that he could not recommend parole based upon Petitioner's classification as a "close" custody inmate. He continued, in pertinent part, as follows:

[I]t's policy. The Class A write-up would have been an automatic 12 months put off. But due to the fact that you're on close custody, my recommendation at this time is to decline you the balance of sentence due to the seriousness of the offense and adverse effect on discipline. You do not have enough time to come back up. We've practically flattened in two years. So I'm just going to go ahead and decline you the balance of sentence.

Officer Madden further advised Petitioner that he could file an appeal "under new information" if the infraction and "close" custody status were overturned.² Thereafter, Officer Madden recommended declining parole based upon the seriousness of the convicting offense and the adverse effect on institutional discipline in light of the Class A infraction while in custody. The Board accepted the recommendation and denied parole on May 26, 2015, finding 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 [and that the] release from custody at this time would have a substantially adverse effect on institutional discipline.

Petitioner appealed. The Board denied the appeal on July 17, 2015. The record before this court reflects that no further appeals were initiated by Petitioner.

On March 28, 2016, Petitioner filed a brief in support of his petition for writ of certiorari in which he acknowledged that he was ultimately granted a parole hearing but asserted that the hearing was not meaningful as required by law. Petitioner alleged that Officer Madden's cursory denial of parole based upon Petitioner's status as a "close" custody inmate was a finding not mandated by the Board's rules and regulations.

Citing the May 18 parole hearing, Respondents filed a motion to dismiss the certiorari petition as moot. Respondents alleged that any attempt to challenge the intrinsic correctness of the parole decision was outside the scope of review of a writ of certiorari. Respondents further asserted that any attempt to contest the denial of parole

² The Hardeman County Chancery Court overturned the finding of guilt for the disciplinary infraction and resulting status of close custody on June 30, 2016.

was not properly before the court. Respondents noted that Petitioner should have filed a second petition but that the time for filing such a petition had passed.

The trial court agreed with Respondents and dismissed the petition as moot because an initial parole hearing was conducted, the only remedy available and sought by Petitioner. The court found that Petitioner's attempt to challenge the parole hearing actually provided was outside the scope of the suit and untimely filed. The court further noted that the dismissal of the disciplinary infraction also did not constitute grounds for relief because the conviction was not necessary to uphold the denial of parole.

Petitioner filed a timely appeal. The means to obtain judicial review of an action by the Board is through the common law writ of certiorari. *Thandiwe v. Traugher*, 909 S.W.2d 802, 803 (Tenn. Ct. App. 1994). A writ of certiorari is not granted as a matter of right, and the decision to issue such a writ rests within the discretion of the trial court. *Ancro Fin. Co. v. Johnson*, No. W2000-02709-COA-R3-CV, 2001 WL 1298913, at *2 (Tenn. Ct. App. Oct. 23, 2001) (citing *Boyce v. Williams*, 389 S.W.2d 272, 277 (Tenn. 1965)); *see also Robinson v. Traugher*, 13 S.W.3d 361, 364 (Tenn. Ct. App. 1999). The scope of review under the common law writ of certiorari is "limited to a determination of whether the inferior tribunal or board which exercised its judicial functions has exceeded its jurisdiction or acted illegally, fraudulently or arbitrarily." *Yokley v. State*, 632 S.W.2d 123, 126 (Tenn. Ct. App. 1981); *see also Spunt v. Fowinkle*, 572 S.W.2d 259, 265 (Tenn. Ct. App. 1978).

Petitioner claims that the delay in the certiorari proceedings was prejudicial to the proceedings and in violation of Tennessee Code Annotated section 27-9-111(a).³ He further claims, inter alia, that the filing of a new petition was unnecessary when the instant petition was pending. Respondents argue that dismissal was appropriate because Petitioner received a parole hearing, the only remedy sought and available. Respondents further claim that any challenges related to the parole hearing are untimely and irrelevant because such challenges are an impermissible attack on the intrinsic correctness of the Board's decision. We agree that any challenge to the Board's denial of parole is untimely.

Tennessee Code Annotated section 27-9-102 provides as follows:

Such party shall, within sixty (60) days from the entry of the order or judgment, file a petition of certiorari in the chancery court of any county in which any one (1) or more of the petitioners, or any one (1) or more of the

³ "At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue."

material defendants reside, or have their principal office, stating briefly the issues involved in the cause, the substance of the order or judgment complained of, of the respects in which the petitioner claims the order or judgment is erroneous, and praying for an accordant review.

Here, Petitioner received a parole hearing, the only remedy sought and available to him. The Board denied Petitioner's appeal of the parole decision on July 17, 2015. Petitioner did not attempt to challenge the denial of the appeal until March 28, 2016, when he filed his brief in support of his original certiorari petition. Petitioner notes that the disciplinary infraction was not overturned until June 2016. First, the disciplinary infraction was not the only ground relied upon by the Board. Petitioner also never attempted to file an appeal with the Board once the finding of guilt for the disciplinary infraction was overturned. Moreover, any allegations concerning the denial of his appeal would still be untimely even if we were to consider the brief as an amendment of the original certiorari petition. Having so concluded, we further hold that the delay in proceedings was not prejudicial to Petitioner.

With the above considerations in mind, we affirm the dismissal of the petition. The case is remanded to the trial court for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, Jimmy Newell.

JOHN W. McCLARTY, JUDGE