IN THE UTAH COURT OF APPEALS

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| Gary L. Welborn,<br><br>Petitioner and Appellant,<br><br>v.<br><br>Board of Pardons and Parole,<br><br>Respondent and Appellee. | ) | MEMORANDUM DECISION<br>(Not For Official Publication)<br><br>Case No. 20090720-CA<br><br>F I L E D<br>(August 19, 2010)<br><br>2010 UT App 230 |

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Third District, Salt Lake Department, 080923667
The Honorable Robert K. Hilder
The Honorable Sheila K. McCleve

Attorneys: Gary L. Welborn, Gunnison, Appellant Pro Se
Mark L. Shurtleff and Brent A. Burnett, Salt Lake City, for Appellee

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Before Judges McHugh, Thorne, and Roth.

PER CURIAM:

Gary L. Welborn appeals the district court's order granting the Utah Board of Pardons and Parole's (the Board) motion for summary judgment and dismissing his petition for extraordinary relief. We affirm.

Welborn first asserts that the district court erred in failing to grant his motion to strike the Board's motion for summary judgment as untimely. On April 21, 2009, the district court issued a minute entry order dismissing one of Welborn's claims and requiring the Board to respond to the petition for extraordinary relief within thirty days of receipt of the petition. The district court's docket indicates that the petition was not mailed to the Board until May 11, 2009. The Board filed its motion for summary judgment on June 8, 2009. Accordingly, the Board filed its response within thirty days of receipt of the petition.

Welborn next asserts that the district court erred in granting the Board's motion for summary judgment. We review the district court's decision for correctness. See Neel v. Holden, 886 P.2d 1097, 1100 (Utah 1994). However, decisions of the Board

are granted great deference and, thus, as a general rule such decisions are not subject to judicial review. See Walker v. Department of Corr., 902 P.2d 148, 150 (Utah Ct. App. 1995); see also Utah Code Ann. § 77-27-5(3) (2008) ("Decisions of the board in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review."). However, judicial review is allowed to ensure that procedural due process was not denied. See Labrum v. Utah State Bd. of Pardons, 870 P.2d 902, 909 (Utah 1993).

In his petition for extraordinary relief Welborn asserted that (1) the Board relied upon incorrect information when it made its decision, (2) the hearing officer refused to allow Welborn to testify as to inaccuracies in his presentence investigation report (PSI), and (3) the Board set an unusually long rehearing date. In regard to the first issue, Welborn asserts he was denied procedural due process because during the course of his parole hearing, the hearing officer incorrectly believed that Welborn had been convicted of two first degree felonies, and thus, the decision to deny him parole was based upon incorrect information. However, the Board's decision denying Welborn parole was clear that it was not based upon an incorrect understanding of the crimes for which Welborn was convicted. In fact, in an affidavit attached to the motion for summary judgment, the Chairman of the Board specifically stated that even though the hearing officer may have been confused about the nature of Welborn's convictions, the hearing officer did not make the final parole decision, and that the Board's decision was made with a correct understanding of the crimes for which Welborn was convicted. The Chairman added that the "Board did not base any part of its decision on the assumption that Mr. Welborn had two life sentences and one indeterminate term of one to fifteen years."[1] Thus, because the Board did not base its decision on the incorrect belief that Welborn was convicted of two first degree felonies and one second degree felony, the district court properly dismissed this claim.

Welborn also asserts that he was denied procedural due process because he was not allowed to testify as to inaccuracies that he alleged are contained in his PSI, while his victim was

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1. Welborn failed to properly respond to the Chairman of the Board's affidavit in order to create an issue of material fact. See Utah R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial.").

permitted to testify at the parole hearing. However, any alleged inaccuracies in the PSI were required to be addressed originally in the convicting court and on direct appeal. See Utah Code Ann. § 77-8-1(6)(b) (2008) ("If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered waived."). Further, petitions for extraordinary relief are not the proper vehicle for raising issues relating to his underlying conviction or claims of innocence. See, e.g., Manning v. State, 2004 UT App 87, ¶ 18, 89 P.3d 196 (stating that "rule 65B is not applicable in a challenge focused on a criminal conviction, even if a restriction on liberty results from the conviction"), aff'd on other grounds, 2005 UT 61, 122 P.3d 628. Thus, the district court correctly dismissed Welborn's claims relating to the allegedly incorrect PSI. Further, to the extent Welborn alleges that the victim should not have been allowed to testify at his parole hearing, the opportunity of the victim to be heard at the parole hearing is guaranteed by statute. See Utah Code Ann. § 77-38-4(1)(c).

Finally, Welborn asserts that the Board's decision was invalid because his sentence will exceed the term of incarceration proposed by certain sentencing guidelines. However, there is no constitutional right to receive parole prior to the expiration of a valid sentence, and "absent state standards for the granting of parole, decisions of a parole board do not automatically invoke due process protections." Malek v. Haun, 26 F.3d 1013, 1015 (10th Cir. 1994). Further, Welborn has no protected interest in the Board following any particular sentencing guidelines in considering his eligibility for parole. See Monson v. Carver, 928 P.2d 1017, 1023 (Utah 1996) (determining that sentencing guidelines do not create a liberty interest of any kind and to hold otherwise would transform Utah's indeterminate sentencing structure into a determinate sentencing structure). Thus, the district court properly dismissed Welborn's claim that his due process rights were violated by the Board's failure to strictly apply certain sentencing guidelines.

Affirmed.

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Carolyn B. McHugh,
Associate Presiding Judge

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William A. Thorne Jr., Judge

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Stephen L. Roth, Judge