

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 19, 2007

**REGINALD WILLIAMS v. TENNESSEE BOARD OF PROBATION AND
PAROLE**

**Appeal from the Chancery Court for Davidson County
No. 06-826-III Ellen Hobbs Lyle, Chancellor**

No. M2006-02336-COA-R3-CV - Filed October 26, 2007

Reginald Williams, an incarcerated state inmate, was denied parole by the Tennessee Board of Probation and Parole. After losing his administrative appeal, he filed a petition for writ of certiorari in chancery court. Mr. Williams argues that (1) the Board's use of amended rules and guidelines that were not in effect at the time of his sentencing in 1982 are a violation of the State and Federal Ex Post Facto Clauses and (2) the Board's stated reason of "seriousness of offense" for denial of parole is arbitrary and in excess of the Board's discretion. In dismissing the petition, the trial court determined there was no ex post facto violation and that the Board may consider "seriousness of offense" in deciding parole. After careful review, we find no error and affirm.

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

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Reginald Williams, Clifton, Tennessee, *pro se* Appellant.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Jennifer L. Brenner, Civil Rights and Claims Division, Nashville, Tennessee, for the Appellee, Tennessee Board of Probation and Parole.

OPINION

I. Background

In January 1982, the appellant, Reginald Williams pleaded guilty to robbery by use of a deadly weapon and murder during the perpetration of a robbery and was sentenced by the Shelby County Criminal Court to serve concurrent sentences of life and 15 years in the custody of the

Tennessee Department of Corrections¹. At Mr. Williams's first parole hearing on November 19, 2003, the Tennessee Board of Probation and Parole ("the Board") declined Mr. Williams's parole stating "seriousness of offense" as the reason for denial and scheduled Mr. Williams's next review for 2010. Mr. Williams appealed the Board's decision, which resulted in a parole hearing scheduled for August 17, 2005. The Board again declined Mr. Williams's parole and scheduled his next review in 2010. After Mr. Williams's appeal was denied by the Tennessee Department of Corrections, he filed a petition for writ of certiorari in the Davidson County Chancery Court. The Board responded with a Tenn. R. Civ. P. Rule 12.02(6) motion to dismiss, which was granted by the trial court. Mr. Williams appealed to this court.

II. Issues

The following issues are presented for our review by Mr. Williams:

- 1) Whether the trial court erred in dismissing the petition for writ of certiorari by finding that the Board's administrative policies do not violate the State and Federal Ex Post Facto Clauses.
- 2) Whether the trial court erred in the petition for writ of certiorari finding that "seriousness of offense" is a proper reason for denying parole.

III. Analysis

A. Standard of Review

The sole purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to test the sufficiency of the complaint, not the strength of the plaintiff's evidence. *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). It admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Winchester v. Little*, 996 S.W.2d 818, 821-22 (Tenn. Ct. App. 1998); *Smith v. First Union Nat'l Bank*, 958 S.W.2d 113, 115 (Tenn. Ct. App. 1997). Therefore, we must construe the complaint liberally in favor of Mr. Williams by taking all factual allegations in the complaint as true, *Stein v. Davidson Hotel*, 945 S.W.2d 714, 716 (Tenn. 1997), and by giving him the benefit of all the inferences that can be reasonably drawn from the pleaded facts. Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 5-6(g), at 254 (1999). Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief or when the complaint is totally lacking in clarity and specificity. *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992). On appeal, we review the trial court's legal conclusions regarding the adequacy of the complaint de novo with no presumption of correctness. *Bell*, 986 S.W.2d at 554; *Stein*, 945 S.W.2d at 716.

¹See *State v. Williams*, No. 25, 1991 WL 164364 (Tenn. Crim. App. W.S., filed Aug. 28, 1991).

B. Ex Post Facto

Mr. Williams argues that the rules and guidelines of the Board and the statute setting forth parole eligibility in effect at the time of his sentencing - not those in effect at the time of the parole hearing - should govern Mr. Williams's eligibility for parole, and that the application of current rules and statutes amounts to an ex post facto violation as to him.

Ex post facto laws are forbidden under both the United States and Tennessee Constitutions. U.S. Const. art. I, §§ 9, 10²; Tenn. Const. art. I, sec. 11.³ The United States Supreme Court and the Tennessee Supreme Court have defined one type of ex post facto law as that which "changes punishment or inflicts a greater punishment than the law annexed to the crime when committed." *Weaver v. Graham*, 450 U.S. 24, 29 n.12 (1981); *Miller v. State*, 584 S.W.2d 758, 761 (Tenn. 1979); see also *Baldwin v. Tennessee Board of Probation*, 125 S.W.3d 429, 432 (Tenn. Ct. App. 2003). However, this Court has previously made clear that most penal regulations are not annexed to a prisoner's sentence, and thus, that changes in those regulations do not normally implicate the ex post facto prohibition. *Baldwin*, 125 S.W.3d at 432.

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*, 125 S.W.3d at 433; *Sams v. Traughber*, No. 01A01-9603-CH-00133, 1996 WL 467684, at *1 (Tenn. Ct. App. M.S., filed Aug. 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.*⁴ 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

²Art. 1, § 9 of the U.S. Constitution provides in pertinent part, "No bill of attainder or ex post facto Law shall be passed." Art. 1, § 10 of the U.S. Constitution provides in pertinent part, "No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

³Tenn. Const. Art. I, § 11 states, "No ex post facto laws. - That laws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free Government; wherefore no *ex post facto* law shall be made."

⁴The parties do not dispute these statements as to the 1982 and current version of the regulation of the Tennessee Department of Correction. However, neither party submitted a copy of the regulations to the Court, and the Court has not been able to procure a copy of the policy regulations through Westlaw, Lexis, the Tennessee Supreme Court Library in Knoxville, the University of Tennessee College of Law Library, or the Tennessee Board of Probation and Paroles despite the fact that Rule 1100-1-1-.05(2)(a) of the Rules of the Tennessee Board of Paroles states, "The Board shall maintain and will disseminate written information concerning its organization, functions, policies, procedures, rules, regulations and parole criteria to any party requesting such information." Tenn. Comp. R. & Regs. 1100-1-1-.05 (1999). Therefore, we have relied on references to the regulations in *Baldwin* and *Sams*.

parole hearings that were mandated by the earlier version of the rule.

Further, Mr. Williams complains that Tenn. Code Ann. § 40-35-503(b)(2) (2006), which was originally enacted by the legislature on July 1, 1982, is an ex post facto law. When Mr. Williams was sentenced in January 1982, Tenn. Code Ann. § 40-3614 (1981) stated in pertinent part:

Grounds for parole - Terms - 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 opinion that there is reasonable probability that if such prisoner is released he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society.

On July 1, 1982, the amended portion Code became effective, and § 40-35-503(b)(2) now provides in pertinent part:

Release on parole is a privilege and not a right, and no inmate convicted shall be granted parole if the board finds that . . . (2) The 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.

Tenn. Code Ann. § 40-35-503 (2006). This Court has previously held that § 40-35-503(b)(2) “does not affect parole eligibility date or denial of parole, but instead enumerates one reason which the parole board may elect, in its discretion, to deny parole.” *Dyer v. Tennessee Bd. of Paroles*, No. M1999-00787-COA-R3-CV, 2001 WL 401596, *2 (Tenn. Ct. App. M.S., filed Apr. 23, 2001). In *Arnold v. Tennessee Board of Paroles*, 956 S.W.2d 478, 483 (Tenn. 1997), our Supreme Court held that the denial of parole on the basis of this factor does not raise any constitutional issues. Therefore, the Board’s stated reason for denial of “seriousness of offense” under § 40-35-503(b)(2) is not an ex post facto violation.

Thus, Mr. Williams’s argument that the Board’s use of 1992 amendment to the parole rules and Tenn. Code Ann. § 40-35-503(b)(2) (2006) are a violation of the State and Federal Ex Post Facto Clauses is without merit.

C. Denial of Parole Based on Seriousness of Offense

Mr. Williams also contends that the Board’s reason for denial of parole based on the seriousness of Mr. Williams’s offense was arbitrary and in excess of the Board’s discretion. The United States Supreme Court has ruled that a prisoner has no right under the United States Constitution to be released on parole prior to the expiration of a valid sentence. *Greenholtz v. Inmates of the Nebraska Penal and Correction Complex*, 442 U.S. 1, 7 (1979). In Tennessee, the grant of parole is a discretionary matter vested exclusively in the Board of Paroles. *Doyle v. Hampton*, 340 S.W.2d 891, 893 (1960). Decisions of the Board of Paroles, unlike those of most

other administrative agencies, are not subject to judicial review under the Administrative Procedures Act. *See* Tenn. Code Ann. § 4-5-106(c) (2005).

Tenn. Code Ann. § 40-35-503(b)(2) (2006), permits the Board to deny parole if “[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[.]” Tenn. Code Ann. § 40-35-503(b)(2). In *Arnold*, our Supreme Court stated that the Board must consider the seriousness of the offense in its determinations, in order to comply with Tenn. Code Ann. § 40-35-503(b). *Arnold*, 956 S.W.2d at 482. In addition, the Supreme Court in *Arnold* held that when the Board declines parole because of the seriousness of the offense, it is not imposing another punishment for the same crime, but simply perpetuating a validly imposed sentence. *Id.* Further, the courts have held repeatedly that the Board may consider the seriousness of a prisoner’s offense when making parole decisions. *See id.*; *Robinson v. Traughber*, 13 S.W.3d 361, 363; *Hopkins v. Tennessee Bd. of Pardons and Probation*, 60 S.W.3d 79, 83 (Tenn. Ct. App. 2001); *Boyd v. Tennessee Bd. of Pardons*, No. M1998-00914-COA-R3-CV, 2001 WL 360702, at *2 (Tenn. Ct. App. M.S., filed Apr. 12, 2001). Therefore, Mr. Williams’s argument as to the grounds for denying him parole is without merit.

Mr. Williams also contends that the Board grants others parole that are serving time for the same or similar offenses. This Court has previously stated that under Tennessee law, “parole decisions are made on an individual, case-by-case assessment, as required by statute, not by comparatively ranking offenders.” *Henderson v. Traughber*, No. M2002-02358- COA-R3-CV, 2003 WL 21642765, at *1 (Tenn. Ct. App. M.S., filed July 14, 2003) (citations omitted).

It appears to this Court, as it appeared to the trial court, that Mr. Williams has provided conclusory references attacking the intrinsic correctness of the Board’s decision, but not alleging any fundamental irregularity in the Board’s procedures nor any demonstrations that the Board acted illegally, fraudulently, or arbitrarily that would require issuance of a writ of certiorari. We therefore hold that the trial court did not err in granting the Board’s motion to dismiss under Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief may be granted.

IV. Conclusion

For the reasons stated herein, the judgment of the trial court is affirmed. Costs of appeal are assessed to the appellant, Reginald Williams.

SHARON G. LEE, JUDGE