

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002264-MR

TRACY STEWART

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 01-CI-00128

KENTUCKY PAROLE BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

BUCKINGHAM, JUDGE: Tracy Stewart appeals from an order of the Lyon Circuit Court denying his petition for declaratory judgment. The issue involves whether the Kentucky Parole Board validly denied parole to Stewart, a prison inmate. We affirm the circuit court's order in favor of the Parole Board.

Stewart was convicted of first-degree rape and first-degree burglary in 1985. He received a sentence of ten years and was paroled in 1990. While on parole, Stewart committed first-degree robbery. While the robbery charge was pending,

Stewart came before the court for parole violation and was given a "serve out" on the remainder of the original sentence. He was subsequently convicted on the robbery charge as well as on a charge of being a second-degree persistent felony offender. His enhanced sentence for that crime was fixed at life in prison.

In January 2001, Stewart was interviewed by the Parole Board, and it recommended that his parole be reinstated. The interview was held despite a memorandum from the chairman of the Parole Board to Stewart which stated that "you will not be eligible for parole consideration unless you have been denied entrance into, or been terminated from, the Sex Offender Treatment Program or until you have successfully completed this program." In February 2001, a memorandum was sent to all Parole Board members, stating that "Mr. Stewart was recommended for parole on January 26, 2001 at the Kentucky State Penitentiary. Due to the fact that he is an untreated sex offender, Mr. Coy requested that you review the file and indicate your vote below." All Parole Board members voted to send the case back before the Parole Board. A hand-written notation on the memorandum indicates that "Board erroneously believed I/M to be one who wasn't required to attend SOTP."

During the subsequent review of Stewart's case, the Parole Board voted to deny him parole and deferred him for further consideration for thirty months. It found that Stewart

was a poor parole risk because of the seriousness of the offenses, violence involved in the crimes, his juvenile record, crime involved firearm/weapon, and violation of the conditions of parole.

Stewart then filed a declaratory judgment action in the Lyon Circuit Court. He argued that the Parole Board's rescission of its original parole recommendation was unlawful. The circuit court ruled in favor of the Parole Board, and this appeal by Stewart followed.

Stewart raises several issues in support of his argument that the Parole Board's denial of parole was unlawful. He asserts that the Parole Board's decision violated statutes, was an arbitrary exercise of power, and was unconstitutional in that it applied statutes in an *ex post facto* manner. His arguments are without merit.

Effective July 15, 1986, Kentucky statutes required the Department of Corrections to operate a treatment program for sex offenders. The sex offender treatment program operated in the state penitentiaries takes many months for an inmate to complete. In order for a sex offender to be considered eligible for parole, the Parole Board requires the offender to complete the program. KRS¹ 439.340(11).

¹ Kentucky Revised Statutes.

When Stewart was convicted of first-degree rape in 1985, the sex offender treatment program legislation had not yet become effective. When Stewart was paroled in 1990, the legislation was in place. However, Stewart was not required to complete the program prior to being paroled, although he was considered to be a "sexual offender" pursuant to KRS 197.410(1)(a).

Stewart was arrested for first-degree robbery in 1992 and was returned to prison as a parole violator. While his robbery charge was pending, he was given a "serve out" on his original ten-year sentence for rape and burglary. In 1993, Stewart was convicted of robbery and PFO II, and he received a life sentence. As we have noted previously, Stewart was initially recommended for parole in 2001 but was subsequently denied parole after his case was reconsidered by the Parole Board.

Stewart first argues that the sex offender treatment program was not applicable in his case because his sex crime and conviction occurred prior to the date of the sex offender treatment program legislation. He points to the fact that he had initially been paroled in 1990 without having been required to complete the program. In connection with this argument, Stewart also asserts that the treatment program was applied to him in an *ex post facto* manner.

Stewart's arguments are without merit in light of Garland v. Commonwealth, Ky. App., 997 S.W.2d 487 (1999). Stewart argues that the facts in Garland are different from the facts in this case. He asserts that he had already completed his sentence for the sex offense when he was directed to complete the program while the offender in Garland was still serving his sentence for the sex offense when he was directed to complete the program. For reasons we explain hereinafter, we conclude that Stewart was still serving his sentence for the sex offense when he was directed to complete the program prior to being considered for parole.

Stewart next argues that the treatment program should not have been made applicable to him because he had already served his ten-year sentence for rape when he came before the Parole Board in 2001. He states that his life sentence for robbery and PFO II ran consecutively with his ten-year sentence for rape and burglary and that he had already completed the ten-year sentence when he came before the Parole Board in 2001. The Commonwealth agrees that the sentences ran consecutively with each other, but it maintains that the sentences became "an inseparable aggregate" pursuant to KRS 532.120(1)(b). See also KRS 533.060(2).

While Stewart's sentences may have been ordered to run consecutively, either by order of the trial court or by the

Department of Corrections records, by law the sentences may only run concurrently with each other. As the Kentucky Supreme Court stated in Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1994), "no sentence can be ordered to run consecutively with such a life sentence." Id. at 783. See also Mabe v. Commonwealth, Ky., 884 S.W.2d 668, 673 (1994).

As a result, we reject Stewart's argument that he had already served the ten-year sentence for rape when he came before the Parole Board in 2001. Pursuant to KRS 532.120(1)(a), when a person is under more than one indeterminate sentence which runs concurrently with another sentence, "the maximum terms merge in and are satisfied by discharge of the term which has the longest unexpired time to run." As the ten-year sentence and the life sentence had merged, Stewart was still under the sentence for rape. Therefore, he was subject to being considered a "sexual offender" for purposes of the sex offender treatment program. Stewart's reliance on Wallace v Wingo, Ky., 453 S.W.2d 557 (1970), is without merit.²

Stewart also argues that the Parole Board's decision to deny him parole was an unlawful exercise of arbitrary power in violation of Section 2 of the Kentucky Constitution. In support of this argument, he notes that he had already been paroled once before on the rape charge without having to

² That case involved the serving of consecutive sentences.

complete the treatment program. He also asserts arbitrary action in that the Parole Board waited many years after his rape conviction and the enactment of the legislation before notifying him that he would be required to complete the program before becoming eligible for parole. In addition, Stewart maintains that the Parole Board's consideration of his failure to complete the treatment program was not "pertinent information" which must be considered in accordance with KRS 439.340(2).

As we have noted, the Parole Board gave several reasons for denying Stewart parole. His failure to complete the sex offender treatment program was not one of the reasons given. Nevertheless, it appears that Stewart's failure to complete the program was a factor, if not the most important factor, in the Parole Board's denial of parole.

KRS 439.330(3) states that "[t]he orders of the board shall not be reviewable except as to compliance with the terms of KRS 439.250 to 439.560." Further, the Board had the authority to rescind its parole recommendation any time prior to Stewart's release. See 501 KAR³ 1:030, Section 4(2). Also, since Stewart's incarceration was for the merged sentence, his failure to complete the program constituted "pertinent information." In light of these facts, we do not conclude that

³ Kentucky Administrative Regulations.

the Parole Board's actions in denying Stewart parole were arbitrary or unconstitutional.

The judgment of the Lyon Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph Ray Myers
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Karen Quinn
Frankfort, Kentucky