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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002210-MR

WILLIAM A. SHECKLES, JR.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 04-CI-00670

KENTUCKY PAROLE BOARD;
ROBERT W. MILBURN, JR.;
LUTITIA F. PAPAILLER; AND
VERMAN R. WINBURN

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.¹

HENRY, JUDGE: William A. Sheckles, Jr. (Sheckles), *pro se*, brings this appeal from an order of the Franklin Circuit Court, entered August 20, 2004, dismissing his petition for writ of mandamus. We affirm.

On August 24, 2000, Sheckles found his wife, Tara, in bed with another man. He beat her with his fists until she lost consciousness. Sheckles initially admitted attacking Tara, then

¹ Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

recanted. He later told Tara and her sister at separate times that by pleading temporary insanity he would not be convicted. From her bed in the intensive care unit, Tara identified Sheckles as the person who beat her into unconsciousness.

Sheckles subsequently pleaded guilty to an amended charge of second-degree assault.² He was sentenced pursuant to his plea to ten years, enhanced to seventeen years as a second-degree persistent felony offender (PFO II).^{3,4}

On February 4, 2004, Sheckles appeared before the Kentucky Parole Board (Board). The Board ordered Sheckles to serve-out his sentence. Pursuant to 501 Kentucky Administrative Regulations (KAR) 1:030 § 4(1), the Board must rely on at least one of sixteen factors in denying parole. The Board denied Sheckles' parole based on the following three factors:

- (a) Current offense - seriousness, violence involved;
- (b) Prior record - prior felony convictions, prior misdemeanor convictions, history of violence; and

² Kentucky Revised Statutes 508.020:

- (1) A person is guilty of assault in the second degree when:
- (a) He intentionally causes serious physical injury to another person; or
 - (b) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or
 - (c) He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument.
- (2) Assault in the second degree is a Class C felony.

³ Kentucky Revised Statutes 532.080.

⁴ This Court subsequently affirmed the circuit court's denial of Sheckles' motion to withdraw his plea. (Sheckles v. Commonwealth, 2002-CA-001977-MR).

(e) History of alcohol or drug involvement.

Also checked on the Board's decision form was "(c)rime involved firearm/deadly weapon or dangerous instrument." Use of a firearm, a factor under the above "current offense" category, was clearly not applicable to Sheckles. The Board hand wrote "African Head" over the phrase "deadly weapon or dangerous instrument." (Board Decision Number 159398N).

Pursuant to 501 KAR 1:030 § 4(4) and (5), an inmate in Sheckles' position who has been denied parole may request an appellate review by the Board. The request is required to be based on one or more of the following: (a) misconduct by a board member; (b) significant procedural error by a board member; or (c) significant new evidence that was not available at the time of the hearing, accompanied by adequate documentation. The request is initially screened by a board member or designee who either finds one or more of the three reasons substantiated and refers the matter to the board or fails to find one or more of the three reasons and denies the request for reconsideration.

In accord with the above process, Sheckles requested that the Board reconsider its decision, apparently alleging one of the three requisite reasons under which reconsideration is allowed - "significant new evidence that was not available at the time of the hearing." It appears that Sheckles took issue

with the Board's finding as a factor "crime involved firearm/deadly weapon or dangerous instrument," with 'African head' handwritten above "deadly weapon or dangerous instrument." As his supporting documentation, Sheckles attached a videotape which he alleged showed the sentencing court stating "that there was no weapon or dangerous instrument involved in this case."

In reviewing Sheckles' request, the screener found no basis for reconsideration by the Board due to the fact that 1) no significant new information existed and 2) the new information presented was not relevant to the Board's decision. Alternatively, listed as "additional comments or reason(s) for referral for reconsideration," the screener wrote: "Decision notes that 'African head,' not deadly weapon or dangerous instrument, (was) involved."

Two days after the denial, the Board notified Sheckles by letter that the documents he sent to the Board were made a part of his central office file which would be reviewed at his parole eligibility review. The Board, however, returned the videotape, noting that it did "not have the capability to listen to or to store videotapes."

On May 21, 2004, Sheckles filed, *pro se*, a petition for writ of mandamus with the Franklin Circuit Court, alleging an abuse of discretion by the Board in failing to review his videotape, and asking the court to direct the Board to hold a

new parole hearing in which they would consider his videotape evidence.

The Board moved for dismissal, and on August 20, 2004, the circuit court granted the Board's motion. This appeal followed.

Before addressing the merits of the appeal, it is necessary to first address a preliminary matter. Prior to the filing of briefs, the Board filed a "response and motion to affirm order of dismissal," which was treated as a motion to dismiss the appeal. A panel of this Court passed the motion to this panel assigned to consider the merits of the appeal.

Having reviewed the record, it is apparent that the motion is basically reiterated in the Board's brief before us. The motion contains arguments for affirming the circuit court's order, not arguments for dismissal of the appeal. We therefore deny the motion.

Before us on appeal, Sheckles reiterates his argument before the circuit court, arguing that the Board proceeded improperly in his request for reconsideration by not reviewing his videotape documentation, and further that the circuit court abused its discretion in dismissing his petition for writ of mandamus. We disagree.

The bottom line of Sheckles' argument before us is that he was treated unfairly in his appeal to the Board because,

although he attached in his request for reconsideration the videotape containing alleged "significant new evidence" as required by the regulation, the Board did not consider the videotape. Sheckles' argument fails, however, as his sole authority in support of his argument does not relate to the screening process, but instead relates to the Board's conduct *after* the screening process, when the screener grants the inmate's request for reconsideration. Sheckles cites us to 501 KAR 1:030 § 4, quoting specifically that portion that directs that: "The board shall vote after reviewing the initial taped interview and the record." A review of this portion of the regulation reveals, however, that it pertains to the Board's reconsideration which occurs *after* the request has made it past the screening process. Sheckles never got that far.

Furthermore, we fail to see how the circuit court erred by dismissing Sheckles' petition for writ of mandamus. When a party moves to dismiss a claim under Kentucky Rules of Civil Procedure (CR) 12.02(f),⁵ "[t]he [circuit] court should not grant the motion unless it appears the pleading party would not

⁵ Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (f) failure to state a claim upon which relief can be granted If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

be entitled to relief under any set of facts which could be proved in support of his claim." Pari-Mutuel Clerks' Union v. Kentucky Jockey Club, 551 S.W.2d 801, 803 (Ky. 1977). "In reaching its decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" Bagby v. Koch, 98 S.W.3d 521, 522 (Ky.App. 2002).

In providing for an appeal of the denial of parole, 501 KAR 1:030 § 4(4) states:

An inmate whose parole is . . . denied by . . . serve-out . . . may request an appellate review by the board. A request for the review shall be in writing *The request shall be screened by a board member or his designee to decide if a review shall be conducted. A review shall be conducted for the following reasons:*

- (a) If there is an allegation of misconduct by a board member that is substantiated by the record;
- (b) If there is a significant procedural error by a board member; or
- (c) *If there is significant new evidence that was not available at the time of the hearing. A request based on the availability of new evidence or information shall be accompanied by adequate documentation.*

Emphasis added.

Assuming that Sheckles' videotape of his sentencing provided the information he alleges, it did not rise to the

level of "significant new evidence that was not available at the time of the hearing," as it had neither been unavailable at the time of the hearing, nor did it constitute new evidence.

Additionally, the Board based its decision to deny on several factors unchallenged by Sheckles. Regardless of the Board's notation on its decision to the "African head," handwritten over the phrase "deadly weapon or dangerous instrument," the denial of Sheckles' parole was duly authorized under 501 KAR 1:030 § 4.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Burgin, Kentucky

BRIEF FOR APPELLEE:

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