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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001005-MR

ERIC LLOYD HERMANSEN AND
LEO SPURLING — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 14-CI-01271

MATTHEW BEVIN, GOVERNOR — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: Eric Lloyd Hermansen and Leo Spurling appeal the Franklin Circuit Court's order granting the Governor's[1] motion to dismiss their

[1] The initial complaint in this case was filed against then-Governor Steven Beshear. However, pursuant to Kentucky Rule of Civil Procedure (CR) 76.24(c)(1), Governor Bevin is now substituted as the named party in this appeal.

complaint concerning parole eligibility issues. After a careful review of the record, we affirm because the circuit court did not err in granting the motion to dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant prisoners Hermansen and Spurling, as well as prisoners Thomas Crum and Billy Glodjo,[2] filed a complaint in Franklin Circuit Court against the Governor, claiming: (a) the Governor failed to exercise his authority to correct his executively-appointed parole board's violations of Kentucky law when the parole board promulgated the provision in 501 KAR[3] 1:030 (2016) that authorizes the board to exercise its power to order serve-outs of the plaintiffs' parolable sentences, forcing them to forfeit their rights to parole eligibility, even though the board was never granted the authority by the General Assembly to promulgate that provision; (b) the parole board's actions in promulgating that regulation and ordering serve-outs of the prisoners' sentences are null, void, and unenforceable pursuant to KRS[4] 13A.120(4), KRS 13A.130(2), KRS 439.340(1), KRS 439.3401 and Sections 2 and 26 of the Kentucky Constitution; (c) despite the parole board's aforementioned violations of law and the board's neglect of duty and malfeasance in office demonstrating the continual violation of KRS 522.020(1), the Governor has failed to exercise his authority to institute removal proceedings against the board pursuant to KRS 439.340(5); (d) the Governor

[2] Prisoners Thomas Crum and Billy Glodjo are not parties to the present appeal, although they were plaintiffs in the circuit court.

[3] Kentucky Administrative Regulation.

[4] Kentucky Revised Statute.

should have exercised his Executive Authority to correct these violations of Kentucky law, rather than protecting the financial interests of Kentucky by permitting the parole board to violate Kentucky law so that Kentucky could continue receiving federal funds pursuant to 42 U. S. C. § 13703; and (e) the Governor, by his acts and/or omissions, has failed to exercise his Executive Authority to address, correct, and remedy all past, present and potential future irreparable harm caused by the forced forfeiture of the appellants' right to parole eligibility that has been perpetrated upon them by the parole board.

The Governor moved to dismiss the complaint, and the circuit court granted the motion to dismiss. Appellants now appeal, contending that: (a) appellants have a statutory right to parole eligibility; (b) the parole board did not possess the authority to promulgate the serve-out provision in 501 KAR 1:030 that takes away appellants' statutory right to parole eligibility; (c) the decisions of the Governor's executively appointed parole board requiring appellants to serve-out parolable sentences are null, void, and unenforceable; (d) there is a remedy to redress the harm caused to the appellants by the parole board's illegal promulgation of the serve-out provision, which forced appellants to forfeit their statutory right to parole eligibility; (e) appellants can file suit and seek redress against the Governor for refusing to exercise his authority to declare the acts of the parole board illegal in a mandamus-like action; (f) appellants have standing to seek mandamus relief against the Governor to declare the acts of his parole board as

being illegal, null, void, and unenforceable; and (g) the circuit court abused its discretion in denying appellants relief.

II. STANDARD OF REVIEW

> The circuit court granted the Governor's motion to dismiss.
>
> We review a trial court's order dismissing a complaint *de novo*. It is well established that a court should not grant a motion to dismiss a complaint unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.

Wagoner v. Bradley, 294 S.W.3d 467, 468 (Ky. App. 2009) (internal quotation marks and citations omitted), *overruled on other grounds by Hammers v. Plunk*, 374 S.W.3d 324, 330 (Ky. App. 2011).

III. ANALYSIS

We first note that the appellants have not included in the record on appeal any evidence concerning their convictions, sentences, parole hearings, or parole decisions. In fact, we do not even know when the aforementioned proceedings occurred, let alone the decision-maker's findings and conclusions that resulted from them. Therefore, it is unclear how they have been affected by the parole board's actions about which they complain. "It is the Appellant's duty to ensure that the record on appeal is sufficient to enable the court to pass on the alleged errors." *Smith v. Smith*, 450 S.W.3d 729, 731 (Ky. App. 2014) (internal quotation marks and citation omitted). Furthermore, "[i]t has long been held that, when the complete record is not before the appellate court, that court must assume

that the omitted record supports the decision of the trial court." *Id*. at 732 (internal quotation marks and citation omitted). Therefore, we must assume that the omitted record supports the circuit court's findings.

A. STATUTORY RIGHT TO PAROLE ELIGIBILITY

Appellants first claim that they have a statutory right to parole eligibility pursuant to KRS 439.330, KRS 439.340, and KRS 439.3401. Kentucky's statutory scheme provides for parole eligibility for certain offenses. *See* KRS 439.3401. The Governor acknowledges in his appellate brief that the appellants' "life sentences are parole eligible." However, he contends that they do not have a "continuing right to multiple parole hearings," and because they "were given their initial parole hearings," this "fully satisfied the parole board's statutory obligations" to the appellants. In their initial complaint filed in the circuit court, the appellants implied that they had been provided at least one parole hearing each, because they stated that they were "served-out on their parolable determinate and life sentences by the Governor's executively appointed [parole b]oard." The term "serve-out" is defined at 501 KAR 1:030 as "a decision of the board that an inmate shall serve until the completion of his sentence." Therefore, by stating that they were "served-out," the appellants admit that they had each come before the parole board at least once, and the board decided that they should have to finish serving their sentences, rather than be paroled.

The appellants contend that the board should not have ordered them to "serve-out" their sentences because this violates statutes that provide a right to parole eligibility. However, KRS 439.340(14) provides:

> If the parole board does not grant parole to a prisoner, the maximum deferment for a prisoner convicted of a non-violent, non-sexual Class C or Class D felony shall be twenty-four (24) months. **For all other prisoners who are eligible for parole:**
>
> > (a) No parole deferment greater than five (5) years shall be ordered unless approved by a majority vote of the full board; and
> >
> > (b) **No deferment shall exceed ten (10) years, except for life sentences**.

(Emphasis added). Thus, the statute provides an exception to the length of deferment after the parole board initially denies parole for those prisoners who are serving life sentences. Because the appellants are serving life sentences, as they acknowledge in their appellate brief, the deferment of their parole eligibility after the initial parole hearing can be greater than ten years, and they can be ordered to serve-out their sentences. Therefore, they do not possess a continued right to parole eligibility.

B. AUTHORITY TO PROMULGATE 501 KAR 1:030

The appellants next allege that the parole board did not possess the authority to promulgate the serve-out provision in 501 KAR 1:030 that takes away appellants' statutory right to parole eligibility. The serve-out provision of 501 KAR 1:030 states: "Subsequent parole review. Except as provided in KRS

439.340(14): (a) After the initial review for parole, a subsequent review, during confinement, shall be at the discretion of the board; and (b) The board, at the initial or a subsequent review, may order a serve-out on a sentence."

Contrary to the appellants' contention, in *Simmons v. Commonwealth*, 232 S.W.3d 531, 535 (Ky. App. 2007), we noted that "[i]t is well-recognized in Kentucky that the power to grant parole is purely an executive function." (Citations omitted). We further held that the parole board acted "within the bounds of its discretionary powers in denying parole to Simmons[] and ordering him to serve[-]out the remainder of his sentence." *Id*. Moreover, we concluded in *Simmons* as follows: "We cannot say the [p]arole [b]oard exceeded its authority. Further, we cannot hold the [p]arole [b]oard invaded the functions reserved for the judicial or legislative branches of government." *Id*. Consequently, pursuant to the holding in *Simmons*, the parole board had the authority to promulgate the serve-out provision because the power to grant or deny parole is purely an executive function.

C. ENFORCEABILITY OF PAROLE BOARD'S SERVE-OUT DECISIONS

The appellants next assert that because the parole board did not have the authority to promulgate the serve-out provision, the decisions of the parole board requiring appellants to serve-out parolable sentences are null, void, and unenforceable. However, as discussed *supra*, the parole board had the authority to promulgate the serve-out provision. Therefore, the appellants are not entitled to relief based upon this claim.

D. REMEDY

Next, the appellants contend that there is a remedy to redress the harm caused to the appellants by the parole board's illegal promulgation of the serve-out provision, which forced appellants to forfeit their statutory right to parole eligibility. However, because we decided *supra* that the promulgation was not illegal, this claim is moot.

E. MANDAMUS ACTION

The appellants assert that they can file suit and seek redress against the Governor for refusing to exercise his authority to declare the acts of the parole board illegal in a mandamus-like action. However, as we concluded *supra*, the parole board acted appropriately, which renders this claim moot.

F. STANDING TO SEEK MANDAMUS RELIEF

The appellants also allege that they have standing to seek mandamus relief against the Governor to declare the acts of his parole board as being illegal, null, void, and unenforceable. Again, because the parole board acted appropriately, this claim is moot.

G. ABUSE OF DISCRETION

Finally, the appellants claim that the circuit court abused its discretion in denying them relief. However, as mentioned previously, we review a decision granting a motion to dismiss *de novo*, not for an abuse of discretion. *See Wagoner*, 294 S.W.3d at 468, *overruled on other grounds by Hammers v. Plunk*, 374 S.W.3d

324, 330 (Ky. App. 2011). Regardless, for the reasons discussed *supra*, the circuit court did not err in granting the Governor's motion to dismiss.

Accordingly, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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