

JERRY SAMS,)
)
 Petitioner/Appellant,)
)
 VS.)
)
 CHARLES TRAUGHBER, et al.,)
)
 Respondents/Appellees.)

Appeal No.
01-A-01-9603-CH-00133

Davidson Chancery
No. 95-2485-I

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

FILED

August 14, 1996

Cecil W. Crowson
Appellate Court Clerk

APPEALED FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
KOCH, J.

OPINION

The Board of Paroles declined to grant parole to the appellant, Jerry Sams. He subsequently filed a Petition for a Writ of Certiorari in the Chancery Court of Davidson County, claiming that the Board's concurrent decision to defer any future parole hearing for two and a half years was a violation of the constitutional prohibition against ex post facto laws. The Chancery Court dismissed the Petition for lack of jurisdiction, and for failure to state a claim upon which relief can be granted. We affirm.

I.

On November 20, 1991, a Cumberland County jury found Jerry Sams to be guilty of second degree murder. Mr. Sams was sentenced to nineteen years imprisonment as a Standard Range I offender, meaning he would not be eligible for parole until he had served at least 30% of his sentence.

On May 17, 1995 the Board of Paroles conducted a hearing to consider releasing Mr. Sams on parole. The two Board members present at the hearing recommended that parole be declined. Another Board member subsequently concurred, and the decision was communicated to the prisoner on May 26, 1995. The form containing the signatures of the Board members indicated "Seriousness of Offense" as a reason for declining parole, and contained a notation indicating that the next parole hearing on his case would take place in November of 1997. The letter notifying Mr. Sams of the Board's action informed him of his right of appeal as follows:

You have a right to request an appellate review by the Board if there is new evidence or information that was not available at the time of your hearing or if there are allegations of misconduct by the Hearing Official that are substantiated by the record or if there were significant procedural errors by the

Hearing Official. This request must be made within 21 days after notification.

Within twenty-one days of the Board's decision, Mr. Sams filed a request for appellate review of its deferral of his next parole hearing. He claimed that Tennessee Department of Correction Policy 501.30, which was in effect at the time he was sentenced, entitled him to a new parole hearing within one year of the previous one.

In a letter dated June 14, 1995, the Board notified Mr. Sams that appellate review was denied. The letter acknowledged that the above-mentioned policy had previously read "If a case is continued or parole denied, a future hearing date shall be specified within one year of the current hearing," but asserted that the policy had been changed effective April 23, 1992 to omit the phrase, "within one year of the current hearing."

On August 10, 1995, Mr. Sams filed his Petition for Certiorari. He claimed that since his offense was committed before the policy was amended, he was entitled to receive his next hearing in accordance with its earlier provisions, and that the length of the Parole Board's deferral of that hearing amounted to a deprivation of his constitutional right not to be subjected to an ex post facto law.

The State responded with a Motion to Dismiss on the ground that the Petition was not filed within sixty days of the Board's decision, as is required by Tenn. Code Ann. § 27-9-102, and that the petitioner had failed to state a claim upon which relief can be granted. The chancellor found that the Petition was not timely filed, and that Mr. Sams' arguments were without merit. This appeal followed.

The appellant admits that his Petition was filed more than sixty days after the Board's decision to deny him parole, but argues that it was nonetheless timely because it was filed less than sixty days after the Board of Parole denied him an appellate review.

This court has not previously determined whether the filing of a request for Appellate Review with the Board of Paroles tolls the sixty day jurisdictional limit for filing a Petition for a Writ of Certiorari, though the question has been raised in earlier cases. See *Fite v. State of Tennessee*, Appeal No. 01-A-01-9508-CH-00362 (Filed Nashville, February 28, 1996). Since we find that the appellant's Petition fails to state a claim on which relief may be granted, we likewise decline to address the issue made with respect to the timeliness of the appeal.

III.

Putting aside the jurisdictional issue, we must consider the appellant's argument that denial of an annual parole hearing is a violation as to him of Article I, § 10 of the U.S. Constitution, which forbids the States from passing any ex post facto law, and of Article 1, § 11 of the Tennessee Constitution, which is of like import.

The Tennessee Supreme Court has stated that under both the Tennessee and United States Constitutions, the critical question in determining whether an ex post facto violation exists is "whether the law changes the punishment to the defendant's disadvantage, or inflicts a greater punishment than the law allowed when the offense occurred." *State v. Pearson*, 858 S.W.2d 879, 883 (Tenn. 1993).

The United States Supreme Court has recently rejected the proposition that a change in the frequency of parole hearings to the possible detriment of one sentenced prior to the change must of necessity be considered a violation of the ex

post facto clause. *California Dept. of Corrections v. Morales*, 514 U.S.____, 115 S. Ct. 1597, 131 L.Ed.2d 588 (1995).

Mr. Morales was convicted of a murder which he committed while on parole from a conviction for an earlier murder. After a hearing, the Parole Board found him unsuitable for parole for numerous reasons, including the cruelty of his offense and his record of violence and assaultive behavior. Acting under the authority of a recently enacted California statute, the Board deferred his next hearing for three years instead of ordering the previously mandated annual review.

The statute in question permitted the Board to defer subsequent parole consideration after hearing, for those found unsuitable for parole, if the Board also found that "it is not reasonable to expect that parole would be granted at a hearing during the following years." (Cal. Penal Code Ann. § 3041.5(b)(2)). The U.S. District Court denied the prisoner's petition for habeas corpus, but the Ninth Circuit Court of Appeals reversed. 16 F.3d 1001 (1994). The Supreme Court reversed the Ninth Circuit.

The High Court reasoned that for the sake of administrative efficiency, the legislature could alter the methods to be followed by the Parole Board in determining if and when to parole prisoners, and that the adjustments ordered by the California legislature did not transgress any constitutional prohibitions. The application of the new procedures to Mr. Morales did not run afoul of the ex post facto clause, because in the light of the reasons that he was found unsuitable for parole, it had to be considered speculative at best whether more frequent hearings would have any effect on his actual term of confinement, and thus the severity of his punishment.

The Court declined to enunciate a rule or a formula to determine when a legislative enactment that alters parole procedures violates the prohibition against ex post facto laws, but stated that the question was one of the degree of risk that the statute would increase the measure of punishment retroactively. This court has adopted a similar case-by-case approach in determining whether the application of administrative changes to the early release of previously convicted inmates lawfully in the custody of the Department of Correction implicates ex post facto claims. See *Kaylor v. Bradley*, 912 S.W.2d 728 (Tenn. App. 1995).

Turning to the case before us, we note that Mr. Sams was denied parole because of the seriousness of his offense, in accordance with Rule 1100-1-1-.06(3)(b) which allows the board to turn down a prisoner if “His release at that time would depreciate the seriousness of the offense or would promote disrespect for the law.” it does not seem unreasonable to us that the Board could determine in a single hearing that releasing Mr. Sams at the earliest possible date would depreciate the seriousness of his offense, and that deferring further consideration for only one year would have the same effect.

The appellant relies on a federal class action suit from Michigan, *Shabazz v. Gabry*, 900 F.Supp. 118 (E.D. Mich. 1995), to bolster his argument. However, even though the *Shabazz* Court found that legislative action extending the interval between parole hearings for certain classes of prisoners was an ex post facto violation as to two of the three classes considered in the opinion, *Shabazz* is not a controlling opinion for this court, nor is it on point.

Without getting too much into the intricacies of the *Shabazz* opinion (and they are many) we note that unlike the California statutes discussed in *Morales*, and the changes in the Tennessee Administrative rules that Mr. Sams objects to, the Michigan statutes that were under challenge did not permit individualized scheduling

of parole hearings, depending on the likelihood that parole would be found appropriate for certain prisoners, but extended the interval between hearings for all prisoners similarly situated. The disputed statutes also postponed the date for the initial parole hearing, requiring some inmates to wait ten years before being considered for parole, while the law in effect at the time they were sentenced permitted parole consideration after only four years.

In contrast, the amended Tennessee policy did not prevent the Board from continuing to give timely consideration to those whose records made them suitable candidates for parole within the year, but only enabled the Board to eliminate hearings that would have no practical purpose. Further, the amendment did not affect the rights of inmates to receive a timely initial hearing, nor does Mr. Sams deny that he was granted a hearing that was consistent with his Release Eligibility Date.

IV.

We accordingly affirm the judgment of the trial court. Remand this cause to the Chancery Court of Davidson County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellant.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

WILLIAM C. KOCH, JR., JUDGE

