BERT EGGLESTON,	)	
	)	
Petitioner/Appellant,	)	Appeal No.
	)	01-A-01-9607-CH-00336
v.	)	
	)	Davidson Chancery
DONAL CAMPBELL, Commissioner,	)	No. 95-2258-I
Tennessee Department of Correction,	)	
	)	
Respondent/Appellee.	)	

FILED

January 24, 1997

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

BERT EGGLESTON, Pro Se
N.W.C.C.
Route 1, Box 660
Tiptonville, Tennessee 38079

CHARLES W. BURSON
Attorney General & Reporter

PATRICIA C. KUSSMANN
Assistant Attorney General
Civil Rights and Claims Division
404 James Robertson Parkway, Suite 2000
Nashville, Tennessee 37243
ATTORNEYS FOR RESPONDENT/APPELLEE

AFFIRMED AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

This is an appeal by petitioner/appellant, Bert Eggleston, from the judgment of the chancery court dismissing his petition for a declaratory judgment that respondent/appellee, the Commissioner of the Tennessee Department of Corrections ("the Commissioner"), violated petitioner's rights by removing his safety valve parole eligibility date. The facts out of which this matter arose are as follows.

In 1979, petitioner was convicted of murder and robbery and was sentenced to life imprisonment. At the time of petitioner's conviction, the law provided that he would not be eligible for parole release consideration for thirty calendar years. Tenn. Code Ann. § 40-3613 (codified at 40-28-116 (Supp. 1996)). Therefore, the Tennessee Department of Corrections ("the Department") calculated his probationary parole date for 16 June 2009.

In 1985, the General Assembly enacted legislation to alleviate the problems associated with prison overcrowding. ***See*** Tenn. Code Ann. §§41-1-501 to -510 (1990 & Supp. 1996). Pursuant to these sections, the governor may declare that a state of overcrowding emergency exists. ***Id.*** § 41-1-503 (1990). Thereafter, the governor must choose to pursue one or both of the plans described in the statutes. ***Id.*** § 41-1-504(a) (Supp. 1996). Under one of these plans, the governor may direct the Board of Paroles to reduce the parole eligibility dates of inmates. ***Id.***

On 11 December 1985, Governor Lamar Alexander declared that a state of overcrowding emergency existed and issued a directive. The directive provided, in part, that inmates, including those convicted of homicide, would be eligible for reduced parole eligibility dates, i.e., “safety valve” consideration. Pursuant to the directive, the Department calculated petitioner's safety valve release date for 15 January 1996.

While Governor Alexander's directive was in effect, two things occurred in regard to petitioner's parole dates. First, petitioner signed a waiver allowing him to earn prison sentence reduction credits which, in turn, reduced his parole eligibility date. Second, petitioner was convicted of second degree murder on 27 July 1987.

The court sentenced petitioner to twenty years to be served consecutively to his life sentence.

In December 1993, Governor Ned McWherter amended the directive issued by Governor Alexander to exclude persons convicted of homicide. As a result, the Department removed petitioner's safety valve parole date and reinstated his original probationary parole date less any sentence credits earned. Petitioner was not eligible for a parole hearing at any time during the imposition of Governor Alexander's directive.

On 21 July 1995, petitioner filed a petition for a declaratory judgment in the Davidson County Chancery Court. At the conclusion of his petition, petitioner requested that the court do the following:

> Issue an order stating that [petitioner's safety valve release date] in question was in fact revoked in clear violation of the Ex-Post Facto clause of the United States Constitution, and in violation of the Due Process clause of the [C]onstitution. And, that the defendant shall order all entitlements and protected claims related to [petitioner's safety valve release date] be reinstated forthwith.

In addition, petitioner argued that the Department calculated petitioner's probationary parole date in violation of the Tennessee Supreme Court's decisions in ***Howell v. State***, 569 S.W.2d 428 (Tenn. 1978), and ***Slagle v. Reynolds***, 845 S.W.2d 167 (Tenn. 1992). On 12 October 1995, the Commissioner filed a motion to dismiss and attached an affidavit and memorandum. On 3 January 1996, the chancery court entered a memorandum and order wherein the court held that petitioner had failed to state a claim upon which it could grant relief. Thereafter, petitioner filed a notice of appeal. As in his petition, he argues on appeal that the Commissioner's actions violated Tennessee case law and the United States Constitution.

Standard of Review

As is frequently done, the Commissioner's motion to dismiss included an affidavit. Thus, this court must determine the appropriate standard of review. To explain, Rule 12.02 of the Tennessee Rules of Civil Procedure states, in pertinent part, as follows:

> [T]he following defenses may at the option of the pleader be made by motion in writing: . . . (6) failure to state a claim upon which relief can be granted . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure 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.

Tenn. R. Civ. P. 12.02 (West 1996). Although the Commissioner's motion failed to state a specific ground for dismissal, for the purposes of this case, we will assume one of the grounds for the motion was failure to state a claim because the trial court decided the case on this ground. A court may "prevent a conversion from taking place by declining to consider extraneous matters." ***Pacific E. Corp. v. Gulf Life Holding Co.***, 902 S.W.2d 946, 952 (Tenn. App. 1995). Thus, we must determine if the trial court considered "matters outside the pleading." A matter outside the pleading is "'any written or oral evidence in support of or in opposition to a pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings.'" ***Kosloff v. State Auto. Mut. Ins. Co.***, Ch. App. No. 89-152-II, 1989 WL 144006, at *2 (Tenn App. 1 Dec. 1989) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1366, at 681-82 (1969)).

In this case, we must conclude that the chancery court failed to exclude the affidavit and converted the motion to dismiss into one for summary judgment. The court's memorandum and order contained facts some of which are only found in the affidavit. Specifically, the court discusses the details of the governors' actions in 1983 and 1985. Although petitioner mentions these actions in his petition, he does not include all of the information found in the memorandum and order. Thus, based on the record before the court, we must conclude that the chancery court considered the affidavit and reviewed the case according to summary judgment principles.

A court shall grant summary judgment when there is "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." ***Byrd v. Hall***, 847 S.W.2d 208, 214 (Tenn. 1993). "In making this determination, the court is to view the evidence in a light favorable to the nonmoving party and allow

all reasonable inferences in his favor." ***Id.*** at 215. We apply this same standard when reviewing a decision of the chancery court. ***Clifton v. Bass***, 908 S.W.2d 205, 208 (Tenn. App. 1995). It is the opinion of this court that there are no factual disputes; therefore, we need only to address the legal issues.

Howell* and *Slagle

It is petitioner's contention that his situation is the same as that in ***Slagle***. We disagree. In ***Slagle***, the court discussed its earlier decision in ***Howell.*** The issue in ***Howell*** involved the calculation of parole eligibility dates when an inmate has multiple indeterminate sentences or multiple life sentences. The court decided the case on 31 July 1978. It held that the Department could no longer treat consecutive sentences as a continuous term of imprisonment for purposes of computing parole eligibility at thirty years. ***Howell***, 569 S.W.2d at 433-34. The court expressly narrowed the application of its holding by stating: "This opinion is prospective only and shall have no effect upon those cases wherein parole eligibility dates have already been established or to cases already final in the trial court." ***Id.*** at 435.

In ***Slagle***, the court did not add to its conclusion in ***Howell***, but simply held that the Department erred when it applied ***Howell*** because it had originally calculated Slagle's parole eligibility date in 1970. ***Slagle***, 845 S.W.2d at 170. ***Slagle*** has no applicability whatsoever to petitioner's situation. ***Slagle*** simply prohibited the Department from recalculating parole eligibility on consecutive sentences in conformity with ***Howell*** when the sentences were imposed prior to the 1978 holding.

Petitioner received one life sentence in 1979 and a consecutive twenty year sentence in 1987. Because his consecutive sentence was not imposed prior to 1978, the Department did not treat his multiple sentences as one continuous sentence for purposes of determining parole eligibility subject to later recalculation. Instead, the Department calculated petitioner's sentence precisely as it was directed to do in ***Howell***.

Constitutional Violations

We are also of the opinion that the trial court correctly found that the changes in the safety valve parole eligibility policy were not violations of the Ex Post Facto Clause of the United States Constitution. Parole of prisoners in Tennessee is a matter solely within the discretion of state officials. ***See*** Tenn. Code Ann. § 40-35-503 (Supp. 1996). "Release on parole is a privilege and not a right . . . ." ***Id.*** § 40-35-503(b). Just as a grant or denial of parole is within the discretion of the Board of Paroles, the emergency power to direct the Board of Paroles to consider inmates for early release when overcrowding exists in the Department is within the discretion of the governor. ***Id.*** § 41-1-504(a)&(b). There are "no limits on the number or types of such restrictions the governor may impose on early release eligibility as long as a sufficient number of inmates are eligible for consideration to reduce the in-house population."[1]

Petitioner insists that Governor McWherter's decision to exclude certain offenders from early release under the safety valve guidelines is an impermissible ex post facto law. The change, however, does not constitute an imposition of any additional punishment. The United States Constitution provides "[n]o state shall . . . pass any . . . ex post facto law." U.S. Const. art. I, § 10, cl. 1. An Ex post facto law is "any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" ***Weaver v. Graham,*** 450 U.S. 24, 28, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17, 22 (1991) (quoting ***Cummings v. Missouri***, 4 Wall. 277, 325-26, 18 L. Ed. 356 (1867)). A change in a parole eligibility date raises ex post facto concerns only if its effect is "to impose a greater or more severe punishment than was proscribed by law at the time of the offense." ***Kaylor v. Bradley,*** 912 S.W.2d 728, 732 (Tenn. App. 1995). The enactment of the "safety valve" law and subsequent changes in policy have not increased the quantum of punishment imposed at petitioner's original conviction. Governor McWherter's amendment did not impose any additional punishment. The safety valve statute was not in effect at the time of petitioner's conviction; therefore, it could not be said to have been "annexed to his crime" so as to implicate the Ex Post Facto Clause. Consequently, there is no violation of the Ex Post Facto Clause, and the trial court properly found that petitioner failed to state an ex post facto claim.

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[1] Tenn. Code Ann § 41-1-504(b) (Supp. 1996). There is one limitation on this power, but it is not relevant to the present case. ***Id.*** 41-1-504(c).

Petitioner's remaining claim is that the Commissioner violated his due process rights. Petitioner did not have an entitlement to a safety valve release date. Therefore, the Commissioner did not violate his due process rights when the Department removed this date in accordance with Governor McWherter's directive.

The Fourteenth Amendment to the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U. S. Const. amend. X1V, § 1. An interest which warrants due process protection can arise independently under the Constitution or can be created through state law. ***Kentucky Dept. Of Corrections v. Thompson***, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908, 104 L. Ed. 2d 506, 514 (1989). A prison inmate does not have a protected right under the Constitution to release on parole. ***Greenholtz v. Inmates of Neb. Penal and Correctional Complex***, 442 U.S. 1,7-8, 99 S. Ct. 2100, 2104, 60 L. Ed. 2d 668, 675-76 (1979). Therefore, any protected liberty interest petitioner has must derive from state law.

In ***Kaylor***, a convicted murderer claimed that his right to due process was violated when the Department excluded him from safety valve consideration. The court rejected the contention, reasoning:

> The Due Process Clauses of the state and federal constitutions protect only genuine claims involving preexisting entitlement. They do not protect unilateral expectations or abstract needs or desires. Thus, Mr. Kaylor's petition states a due process claim only if he acquired a vested right to an early release or a vested right to be considered for early release. State law provides him with neither.
>
> Inmates eligible for early release consideration do not have a statutory right to be paroled early. The parole board retains the right to decide which inmates should be paroled and may decline to release an inmate if it cannot conclude with reasonable probability that the inmate, if released, will live and remain at liberty without violating the law and that the inmate's release is consistent with society's welfare. Likewise, eligible inmates do not have a vested right to be considered for early release because the governor retains the power to alter the eligibility criteria at any time and because the opportunity to be considered for early release lapses once the overcrowding emergency abates.

Kaylor, 912 S.W.2d at 735(citations omitted).

As noted earlier, parole is a privilege in Tennessee rather than a right and is committed to the discretion of state officials. Tenn. Code Ann. § 40-35-503(b) (Supp. 1996). Although statutes require the governor to take certain actions to reduce prison overcrowding upon receiving certification that overcrowding exists from the Commissioner, he is granted unlimited discretion to exclude certain types of inmates from the safety valve release program. ***Id.*** § 41-1-504(b). Aside from the requirement that enough inmates be released to alleviate the overcrowding, there is nothing in the statute that establishes limitations on the governors' discretion to decide which inmates may be released in order to alleviate overcrowding. Thus, the safety valve release program does not create a liberty interest. The safety valve program "creates, at most, a temporary, conditional opportunity to be considered for early release . . . available only to inmates who have not been excluded by the governor." ***Kaylor v. Bradley***, 912 S.W.2d at 734. Petitioner is not entitled to the safety valve release date; therefore, the trial court correctly found that the Commissioner did not deprive petitioner of due process when he excluded petitioner from safety valve consideration.

Conclusion

The Commissioner is entitled to summary judgment. As previously stated there were no genuine issues of material fact and the law entitled the Commissioner to a judgment. The Commissioner did not err in calculating petitioner's parole eligibility date. Also, the change in the safety valve release program was not an ex post facto law and did not deprive petitioner of his constitutional rights.

Therefore, it results that the judgment of the chancellor is affirmed in all respects, and the cause is remanded to the trial court for any further necessary proceedings. Costs on appeal are taxed to the petitioner/appellant, Bert Eggleston.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

_____

HENRY F. TODD, PRESIDING JUDGE, M.S.

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BEN H. CANTRELL, JUDGE