IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

FILED

October 27, 1998

Cecil W. Crowson
Appellate Court Clerk

ANTHONY JAMES NORTON, Petitioner/Appellant, VS. DONAL CAMPBELL, COMMISSIONER TENNESSEE DEPARTMENT OF CORRECTION, Respondent/Appellee.	)	Appeal No. 01-A-01-9709-CH-00557 Davidson Chancery No. 97-206(II)

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

THE HONORABLE CAROL L. MCCOY, CHANCELLOR

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
KOCH, J.
CAIN, J.

O P I N I O N

An inmate in the custody of the Department of Correction petitioned the Chancery Court of Davidson County for judicial review of the constitutionality of a statute that rendered him ineligible for early release from his sentence. The Chancery Court dismissed the petition. We affirm.

I.

On November 19, 1993, Anthony James Norton was convicted of two counts of rape of a child, and was sentenced to two concurrent twenty year terms. At the time of his conviction, Tenn. Code Ann. § 39-13-523 was in effect. That statute reads in its entirety:

> **§ 39-13-523. Multiple rapists -- child rapists -- Definitions -- Sentencing. -- Release and Parole --**
>
> (a) As used in this section, unless the context otherwise requires:
>
> (1) "Child rapist" means a person convicted one (1) or more times of rape of a child as defined by § 39-13-522; and
>
> (2) "Multiple rapist" means a person convicted two (2) or more times of violating the provisions of § 39-13-502 or § 39-13-503, or a person convicted at least one (1) time of violating § 39-13-502, and at least one (1) time of § 39-13-503.
>
> (b) Notwithstanding any other provision of law to the contrary, a multiple rapist or a child rapist, as defined in subsection (a), shall be required to serve the entire sentence imposed by the court undiminished by any sentence reduction credits such person may be eligible for or earn. A multiple rapist or a child rapist shall be permitted to earn any credits for which such person is eligible and such credits may be used for the purpose of increased privileges, reduced security classification, or for any purpose other than the reduction of the sentence imposed by the court.
>
> (c) The provisions of title 40, chapter 35, part 5, relative to release eligibility status and parole shall not apply to or authorize the release of a multiple rapist or child rapist, as defined in subsection (a), prior to service of the entire sentence imposed by the court.

> (d) Nothing in the provisions of title 41, chapter 1, part 5, shall give either the governor or the board of paroles the authority to release or cause the release of a multiple rapist or child rapist, as defined in subsection (a), prior to service of the entire sentence imposed by the court.
>
> (e) The provisions of this section requiring multiple rapists to serve the entire sentence imposed by the court shall only apply if at least one (1) of the required offenses occurs on or after July 1, 1992.
>
> [Acts 1992, Ch. 878, § 1]

On November 29, 1996, Mr. Norton applied to the Department of Correction for a Declaratory Order, pursuant to Tenn. Code Ann. § 4-5-223 of the Uniform Administrative Procedures Act (UAPA). The application claimed that Tenn. Code Ann. § 39-13-523 was unconstitutional, because (1) it infringed upon the governor's power under the Tennessee Constitution to commute sentences, (2) it violated Mr. Norton's right to equal protection, and (3) it imposed cruel and unusual punishment upon him.

The prisoner asked for a contested case hearing, a declaration that the statute was unconstitutional, and an order granting him retroactive sentence reduction credits to be applied against his sentence. The Department did not convene a contested case hearing, but sent Mr. Norton a letter denying his request for a declaratory order.

Mr. Norton then filed a Petition for a Declaratory Judgment in the Chancery Court of Davidson County. *See* Tenn. Code Ann. § 4-5-225. The Chancery Court found Mr. Norton's claim to be without merit and dismissed his petition. This appeal followed.

II. The Right to a Contested Case Hearing

Mr. Norton raises five issues on appeal, each of which we will examine in turn. The first issue is whether the trial court erred in refusing to remand the case to the Department of Correction with orders to convene a contested case hearing.

We must first state that contrary to Mr. Norton's contention, the Department was not required to grant him a contested case hearing in response to his application. Tenn. Code Ann. § 4-5-223(a) provides that upon receiving a Petition for a Declaratory Order, filed by a person affected by a statute, rule or order within the primary jurisdiction of a state agency, that agency has two alternative courses of action available to it. It may either convene a contested case hearing and issue a declaratory order embodying the results of that hearing, or it may refuse to issue a declaratory order. In either case, the petitioner is entitled to judicial review of the agency's action, if he files a Petition for a Declaratory Judgment within the allotted time, which is exactly what Mr. Norton did.

The petitioner complains that the lack of a prior hearing unfairly disadvantaged him because no record was created for judicial review. It appears to us, however that Mr. Norton is not presenting any disputed facts, and that his plea for relief rests on conclusions of law alone. The Chancery Court does not need a record of prior proceedings to decide questions of law. Just as there was no requirement or need for a prior factual inquiry, there is no present reason to remand the case to the Department.

III. The Governor's Pardoning Power

Mr. Norton's second argument is that Tenn. Code Ann. § 39-13-523 is unconstitutional because it violates the separation of powers embodied in the Tennessee Constitution, specifically Article III § 6, which gives the governor the power "to grant reprieves and pardons, after conviction, except in cases of impeachment."

It appears to us that Mr. Norton has not demonstrated that he has standing to raise any issues related to the governor's pardoning power; the record does not reveal that he has applied to the governor for leniency, and he has not alleged that the governor has been prevented from pardoning him by virtue of the workings of Tenn. Code Ann. § 39-13-523.

Putting aside the question of standing, we note that our courts have stated on more than one occasion, that neither the legislature nor the judiciary has the authority to regulate or control the governor's power to commute a sentence. *Ricks v. State*, 882 S.W.2d 387, 391, (Tenn. Crim. App. 1994); *Collins v. State*, 550 S.W.2d 643, 650 (Tenn. 1977). But as the State points out in its brief, there is nothing in Tenn. Code Ann. § 39-6-523 that limits or purports to limit the governor's constitutional power to commute sentences.

It is true that Section (d) of the above-mentioned statute prevents the governor from using the administrative procedures established by the Prison Overcrowding Act, Tenn. Code Ann. § 41-1-501, et seq., to release certain prisoners. However the powers statutorily conferred upon the governor by the Prison Overcrowding Act are entirely separate from, and are in addition to, his general constitutional power to commute sentences. Just as the legislature is not barred from granting the governor such additional powers, it is also not prevented from placing limits on the powers it grants. Mr. Norton still has the right to ask the governor for leniency, and we believe there is nothing to prevent the governor from granting such relief, if he so wishes.

IV. Equal Protection

The petitioner claims that it is a violation of his equal protection rights under the Tennessee and United States Constitutions to treat him any differently from child rapists whose crimes were committed prior to the effective date of Tenn. Code Ann. § 39-13-523. He complains that he is barred from parole or from the use of sentence reduction credits to shorten his sentence, while they are not.

Such an argument is without merit. To credit it would have the effect of preventing the legislature from ever increasing the penalties that may be imposed for any crimes, because such an increase would of necessity involve inequality of punishment between those convicted before the increase, and those convicted afterward.

Further, analyzing Mr. Norton's claim within the framework established by numerous opinions of our state and federal courts that deal with equal protection, it is clear that he is not entitled to have the challenged statute examined under the strict scrutiny standard; he is not a member of any "suspect class" by virtue of his post-1992 conviction of rape, *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), and he has at least temporarily forfeited his fundamental right to personal liberty by virtue of a valid conviction and sentence, imposed through due process of law. *See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1, 7 (1979); *Wright v. Trammel*, 810 F.2d 589, 591 (6th Cir. 1987); *State ex rel. Stewart v. McWherter*, 857 S.W.2d 875, 876 (Tenn. Crim. App. 1992).

At most, he would be entitled to the benefit of the "rational basis test." *See Plyler v. Doe*, 457 U.S. 202 (1982). Applying that test, it is not difficult to see that there is a rational basis for legislation preventing the early release from confinement

of individuals who have been convicted of child rape, and who are guilty of victimizing some of the most vulnerable members of our society.

V. Cruel and Unusual Punishment

Mr. Norton claims that the application of Tenn. Code Ann. § 39-13-523 to his sentence amounts to cruel and unusual punishment, because the amount of time he will be have to serve in prison is disproportionate to the severity of his crime.

The trial court examined his twenty year sentence in light of his crime, and concluded that the sentence was not grossly disproportionate, and thus did not amount to cruel and unusual punishment. *See State v. Harris*, 844 S.W.2d 601 (Tenn. 1992, dissent by Daughtrey, J.). Mr. Norton points out, however, that it is not the length of his sentence that he is objecting to, it is the requirement that he serve the sentence day for day, without the possibility of parole or the benefit of sentence reduction credits.

We note that the chancery court does not have jurisdiction to review the length of Mr. Norton's sentence; such a review would have to be conducted in our courts of criminal jurisdiction. The only question under review is the application of Tenn. Code Ann. § 39-13-523 to that sentence.

This is not a matter of first impression. The Court of Criminal Appeals has dealt with the same question in a case similar to the present one. In the unpublished case of *State v. Holder*, No. 01-C-01-9501-CC-00015 (filed Nashville, March 22, 1996), the defendant was accused of rape of a child. The evidence showed that Mr. Holder had engaged in sexual intercourse and other sexual activities with his twelve year old daughter. He argued that the activity was consensual, but

because of the age of the victim, his actions constituted rape under the law. The jury found him guilty, and he received a sentence of twenty-three years.

On appeal, Mr. Holder argued, as Mr. Norton does, that the application of Tenn. Code Ann. § 39-13-523 to his sentence was unconstitutional because the punishment it imposed was grossly disproportionate to the crime. The court did not agree, and found that because of the vulnerability of the victim, and the superior power and strength of the defendant, it was not unconstitutionally disproportionate to compel the defendant to serve every day of his twenty-three year sentence. We believe the same logic applies in the present case.

VI. Rule 12.02(6)

Mr. Norton's final issue involves the manner in which the trial court dismissed his claim. The State filed a Motion to Dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12.02(6) Tenn. R. Civ. P. The trial court granted the motion. The petitioner argues that he stated four substantial claims (the four issues previously treated in this opinion) and that the trial court erred by not recognizing that fact.

However, dismissal under Rule 12.02(6) has nothing to do with how many claims the non-moving party has stated in his complaint, or how good a job he did in explaining his contentions. Even a poorly drafted complaint (and Mr. Norton's was not) can result in the denial of a Rule 12.02(6) motion, if it states a claim that is cognizable under the law. *See Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. App. 1992).

The purpose of a Rule 12.02(6) motion is to test the sufficiency of the complaint. Such a motion admits the truth of all material factual allegations in the

complaint, but asserts that such facts do not constitute sufficient grounds for legal relief. *Holloway v. Putnam County*, 534 S.W.2d 292 (Tenn. 1976). While the court must liberally construe the complaint in the plaintiff's favor, it need not consider the legal conclusions in that complaint to be true. *Dobbs v. Guenther*, 846 S.W.2d 270 (Tenn. App. 1992).

As we mentioned in Section II of this opinion, there are actually no disputed facts in this case, only a question of whether those facts entitle the appellant to the relief he seeks. Such a situation renders pre-trial examination of the complaint under a Rule 12.02(6) motion especially appropriate, for a trial of the facts would add nothing of value to the court's deliberations. In granting the motion, the court determined that the plaintiff was not entitled to relief under the law.

Since the trial court's order is based entirely on conclusions of law, the scope of our review is de novo, with no presumptions of correctness accompanying the lower court's order. *Carbide Corp. v. Huddleston*, 854 S.W.2d 87 (Tenn. 1993). Having conducted such a review, we find no error in the chancery court's reasoning, or in its conclusions.

VII.

The order of the trial court is affirmed. 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.

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BEN H. CANTRELL, PRESIDING JUDGE, M.S.

CONCUR:

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WILLIAM C. KOCH, JR., JUDGE

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WILLIAM B. CAIN, JUDGE