

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 31, 2015

**LESLIE DEAN RITCHIE v.
TENNESSEE BOARD OF PROBATION AND PAROLE ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 14-1214-III Ellen Hobbs Lyle, Chancellor**

No. M2015-00187-COA-R3-CV – Filed October 30, 2015

This appeal concerns the dismissal of an allegedly untimely petition for writ of certiorari due to the trial court's lack of subject matter jurisdiction. Because the petitioner has alleged that he filed an administrative appeal, the disposition of which would render his petition timely, we reverse the dismissal of his petition. We remand this matter to the trial court for a determination regarding the timeliness of the petition following the conclusion of the administrative appeal.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Reversed; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., C.J., and D. MICHAEL SWINEY, J., joined.

Leslie Dean Ritchie, Mountain City, Tennessee, Pro Se.

Herbert H. Slatery, III, Attorney General and Reporter; Andrée Blumstein, Solicitor General; and Madeline B. Brough, Assistant Attorney General, Office of Attorney General, Nashville, Tennessee, for the appellee, Tennessee Board of Probation and Parole.

OPINION

I. Factual and Procedural Background

The self-represented petitioner, Leslie Dean Ritchie, is an inmate at the Northeast Correctional Complex. On August 19, 2014, Mr. Ritchie filed a Petition for Writ of Certiorari in the Chancery Court for Davidson County, regarding actions taken by the

Tennessee Board of Probation and Parole (“the Board”).¹ According to Mr. Ritchie’s petition, the Board held a parole hearing regarding Mr. Ritchie on June 4, 2014, and denied him parole by order dated June 5, 2014. Mr. Ritchie received notification of this decision on June 19, 2014.

Mr. Ritchie’s petition alleged that the Board was “illegal and arbitrarily impaneled” because two of its members allegedly did not have “training, education or experience in the criminal justice system, law, medicine, education, social work or the behavioral sciences.” See Tenn. Code Ann. § 40-28-103(c) (Supp. 2015) (“In considering persons for appointment, the appointing authority shall give preference to candidates with training, education or experience in the criminal justice system, law, medicine, education, social work or the behavioral sciences.”) According to Mr. Ritchie, two of the Board members were incompetent to make informed decisions regarding parole due to their lack of qualifications. As such, Mr. Ritchie asserted that the decisions rendered by the Board were arbitrary and capricious.

The Board filed an initial motion to dismiss the petition based on Mr. Ritchie’s failure to make a partial payment of the litigation tax. That motion was denied based on the trial court’s finding that Mr. Ritchie had complied with the partial-payment requirement. The Board then filed a second motion to dismiss, pursuant to Tennessee Rule of Civil Procedure 12.02(1), asserting that the petition should be dismissed for lack of subject matter jurisdiction. The Board stated that its decision to deny parole was rendered on June 5, 2014, such that the applicable sixty-day time limit, pursuant to Tennessee Code Annotated § 27-9-102, for filing a petition for writ of certiorari had expired on August 4, 2014. Because Mr. Ritchie’s petition was not signed until August 13, 2014, the Board argued that the petition was untimely and that the trial court lacked subject matter jurisdiction.

Mr. Ritchie filed a response to the motion to dismiss, asserting that the sixty-day time limitation should be measured from the date he was notified of the Board’s decision, or June 19, 2014, rather than the date of the order’s entry. The trial court entered a Memorandum and Order Granting Motion to Dismiss on December 22, 2014. In its order, the court found that the petition was untimely because it was filed more than sixty days following entry of the Board’s order on June 5, 2014. The court relied upon *Hughes v. Tenn. Bd. of Paroles*, No. M2003-00266-COA-R3-CV, 2004 WL 193048 at *2 (Tenn. Ct. App. Jan. 30, 2004), *perm. app. denied* (Tenn. June 21, 2004), wherein this Court ruled that the sixty-day time limit found in Tennessee Code Annotated § 27-9-102 would begin to run on the date of the order’s entry, rather than the date upon which the

¹ Mr. Ritchie’s petition also named Richard Montgomery, Chairman of the Board, as a respondent, but Mr. Montgomery is not a party to this appeal.

petitioner was notified of the decision. The trial court therefore dismissed Mr. Ritchie's petition with prejudice. Mr. Ritchie timely appealed.

II. Issue Presented

Mr. Ritchie presents the following issue for our review, which we have restated slightly:

Whether the trial court erred in determining that the sixty-day time limitation found in Tennessee Code Annotated § 27-9-102 began to run from the date of entry of the Board's final order.

III. Standard of Review

Regarding the proper standard of review to be applied concerning the grant of a motion to dismiss pursuant to Tennessee Rule of Civil Procedure 12.02(1), our Supreme Court has explained:

A motion to dismiss for lack of subject matter jurisdiction falls within the purview of Tenn. R. Civ. P. 12.02(1). Challenges to a court's subject matter jurisdiction call into question the court's "lawful authority to adjudicate a controversy brought before it," *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000), and, therefore, should be viewed as a threshold inquiry. *Schmidt v. Catholic Diocese of Biloxi*, 2008-CA-00416-SCT (¶ 13), 18 So.3d 814, 821 (Miss. 2009). Whenever subject matter jurisdiction is challenged, the burden is on the plaintiff to demonstrate that the court has jurisdiction to adjudicate the claim. *See Staats v. McKinnon*, 206 S.W.3d 532, 543 (Tenn. Ct. App. 2006); 1 Lawrence A. Pivnick, *Tennessee Circuit Court Practice* § 3:2 (2011 ed.) ("Pivnick").

Litigants may take issue with a court's subject matter jurisdiction using either a facial challenge or a factual challenge. *See, e.g., Schutte v. Johnson*, 337 S.W.3d 767, 769-70 (Tenn. Ct. App. 2010); *Staats v. McKinnon*, 206 S.W.3d at 542. A facial challenge is a challenge to the complaint itself. *See Schutte v. Johnson*, 337 S.W.3d at 769. Thus, when a defendant asserts a facial challenge to a court's subject matter jurisdiction, the factual allegations in the plaintiff's complaint are presumed to be true. *See, e.g., Staats v. McKinnon*, 206 S.W.3d at 542-43.

Alternatively, "[a] factual challenge denies that the court actually has subject matter jurisdiction as a matter of fact even though the complaint

alleges facts tending to show jurisdiction.” *Staats v. McKinnon*, 206 S.W.3d at 543. Thus, the factual challenge “attacks the facts serving as the basis for jurisdiction.” *Schutte v. Johnson*, 337 S.W.3d at 770.

For the purposes of its motion to dismiss, the Diocese accepted the facts contained in Mr. Redwing’s amended complaint. The Diocese asserts that, even positing these facts as true, Tennessee’s courts are without subject matter jurisdiction to adjudicate Mr. Redwing’s claims. Accordingly, the Diocese’s challenge to the trial court’s subject matter jurisdiction is facial, not factual. Therefore, the trial court’s decision regarding the existence of subject matter jurisdiction is a question of law. It follows, therefore, that we will review the lower courts’ conclusions regarding subject matter jurisdiction without a presumption of correctness. *See Northland Ins. Co. v. State*, 33 S.W.3d at 729; *see also Schutte v. Johnson*, 337 S.W.3d at 769.

Redwing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436, 445-46 (Tenn. 2012). Similarly, in this matter, the Board accepted the facts as represented by Mr. Ritchie’s petition, asserting that the petition was untimely filed. As such, the Board has mounted a facial challenge to the petition, such that the trial court’s decision regarding subject matter jurisdiction presents a question of law, which we review with no presumption of correctness. *See id.*

Our Supreme Court has outlined the scope and purpose of a writ of certiorari as follows:

The common-law writ of certiorari serves as the proper procedural vehicle through which prisoners may seek review of decisions by prison disciplinary boards, parole eligibility review boards, and other similar administrative tribunals. By granting the writ, the reviewing court orders the lower tribunal to file its record so that the court can determine whether the petitioner is entitled to relief.

A common-law writ of certiorari limits the scope of review to a determination of whether the disciplinary board exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily. The petition does not empower the courts to inquire into the intrinsic correctness of the board’s decision. Previously, we have specifically approved the use of a common-law writ of certiorari to remedy (1) fundamentally illegal rulings; (2) proceedings inconsistent with essential legal requirements; (3) proceedings that

effectively deny a party his or her day in court; (4) decisions beyond the lower tribunal's authority; and (5) plain and palpable abuses of discretion.

Willis v. Tenn. Dep't of Corr., 113 S.W.3d 706, 712 (Tenn. 2003) (internal citations omitted).

Finally, this Court has explained with regard to *pro se* litigants:

Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many *pro se* litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to a *pro se* litigant and unfairness to the *pro se* litigant's adversary. Thus, the courts must not excuse *pro se* litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.

The courts give *pro se* litigants who are untrained in the law a certain amount of leeway in drafting their pleadings and briefs. Accordingly, we measure the papers prepared by *pro se* litigants using standards that are less stringent than those applied to papers prepared by lawyers.

Pro se litigants should not be permitted to shift the burden of the litigation to the courts or to their adversaries. They are, however, entitled to at least the same liberality of construction of their pleadings that Tenn. R. Civ. P. 7, 8.05, and 8.06 provide to other litigants. Even though the courts cannot create claims or defenses for *pro se* litigants where none exist, they should give effect to the substance, rather than the form or terminology, of a *pro se* litigant's papers.

Young v. Barrow, 130 S.W.3d 59, 62-63 (Tenn. Ct. App. 2003) (internal citations omitted).

IV. Subject Matter Jurisdiction

Mr. Ritchie has asked this Court to rule upon whether the trial court erred in its determination that it lacked subject matter jurisdiction due to the untimeliness of his petition for writ of certiorari. Mr. Ritchie asserts that the trial court erred in determining that the sixty-day time limitation found in Tennessee Code Annotated § 27-9-102 (2000) began to run from the date of entry of the Board's order on June 5, 2014, rather than from the date upon which he received notification of the Board's decision. Although the issue

of subject matter jurisdiction is clearly dispositive, we find the issue better framed as whether the June 5, 2014 order is actually the final order of the Board in this matter for the purpose of determining when the applicable limitation period began to run.

The record contains an Offender Hearing Decision Notification sent to Mr. Ritchie by the Board, notifying him of its decision to deny parole. Mr. Ritchie signed this document as received on June 19, 2014. The notification provides that Mr. Ritchie has a right to appeal the decision pursuant to Tennessee Code Annotated § 40-28-105 (Supp. 2015), which provides in pertinent part:

Inmates whose parole has been revoked or rescinded, or who have been denied parole, or whose grant of parole has been rescinded, may request an appellate review by the board. The board shall establish a reasonable time limit for filing of the request.² If the time limit is not met, the request for an appellate review will be denied. An appellate request will be screened by a board member or designee and a review will be conducted if there is new evidence or information that was not available at the time of the 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 a hearing official. The appellate review will be conducted from the record of the first hearing and the appearance of the inmate will not be necessary. If a board member decides that an appearance hearing is necessary, it will be scheduled before a board member or hearing officer who did not conduct the hearing that is the subject of the appeal. A summary of the appellate hearing will be prepared and the board will vote after a review of the summary and the record of the first hearing. The decision after an appellate review will require the concurrence of three (3) board members. The decision rendered after an appellate review will be final.

Tenn. Code Ann. § 40-28-105(d)(11) (emphasis added).

With regard to petitions for writ of certiorari, Tennessee Code Annotated § 27-9-101 (2000) provides:

Anyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state may have the order or judgment reviewed by the courts, where not otherwise specifically provided, in the manner provided by this chapter.

² The Notice provided to Mr. Ritchie states that his request for an appeal would have to be received by the Board within forty-five days from “the date this decision notice is signed.”

(Emphasis added.) Tennessee Code Annotated § 27-9-102 then states:

Such party shall, within sixty (60) days from the entry of the order or judgment, file a petition of certiorari in the chancery court of any county in which any one (1) or more of the petitioners, or any one (1) or more of the material defendants reside, or have their principal office, stating briefly the issues involved in the cause, the substance of the order or judgment complained of, the respects in which the petitioner claims the order or judgment is erroneous, and praying for an accordant review.

As this Court has often explained, “the sixty-day statute of limitations is mandatory and jurisdictional. Failure to file the petition within the statutory time limit results in the Board’s decision becoming final and, once the decision is final, the trial court is deprived of subject matter jurisdiction.” *Blanchard v. Tennessee Bd. of Prob. & Parole*, No. E2012-00663-COA-R3-CV, 2012 WL 5993734 at *3 (Tenn. Ct. App. Dec. 3, 2012) (internal citations omitted).

It is undisputed that the Board rendered its decision to deny parole to Mr. Ritchie by entry of a written order dated June 5, 2014. It is also undisputed that Mr. Ritchie was notified of this decision on June 19, 2014. In his brief filed on appeal, Mr. Ritchie asserts for the first time that he subsequently filed a timely internal appeal with the Board on or about July 24, 2014, which he also asserts was denied on September 15, 2014. Mr. Ritchie further states that because his petition was dismissed, the certified record of the underlying parole hearing was never filed with the trial court.

The Board contends that because Mr. Ritchie failed to mention his administrative appeal at the trial court level and did not present it as an issue for review in his appellate brief, he has waived any consideration of it here. We note, however, that this Court’s precedent has made clear that the sixty-day limitation period found in Tennessee Code Annotated § 27-9-102 begins to run only upon “final action upon the administrative appeal.” *See Hylar v. Traughber*, No. 01A01-9610-CH-00482, 1997 WL 49163 at *3 (Tenn. Ct. App. Feb. 7, 1997). As this Court has explained:

While the statutory requirement that the person seeking the writ have no other plain, speedy, or adequate remedy does not impose strict ‘finality’ or ‘exhaustion of remedies’ requirements on petitions for writs of common-law certiorari, it reflects a reviewing court’s prudential obligation to stay its hand and to decline to disrupt on-going proceedings when timely and adequate relief for the perceived wrong is available either in the on-going proceeding or elsewhere.

Bowling v. Tenn. Bd. of Paroles, M2001-00138-COA-R3-CV, 2002 WL 772695 at *3 (Tenn. Ct. App. Apr. 30, 2002). Furthermore, the timeliness of Mr. Ritchie's petition determines whether the trial court lacked subject matter jurisdiction, and this Court may consider issues of subject matter jurisdiction *sua sponte*. See Tenn. R. App. P. 13(b); *Ruff v. State*, 978 S.W.2d 95, 98 (Tenn. 1998); *In re Estate of Boykin*, 295 S.W.3d 632, 635 (Tenn. Ct. App. 2008).

This Court has, in numerous cases, begun the running of the sixty-day limitation period provided in Tennessee Code Annotated § 27-9-102 on the date the petitioner exhausted his or her administrative appeal. See *Hickman v. Tenn. Bd. of Paroles*, 78 S.W.3d 285, 289 (Tenn. Ct. App. 2001); *A'La v. Tenn. Dep't. of Corr.*, 914 S.W.2d 914, 916 (Tenn. Ct. App. 1995); *Blanchard*, 2012 WL 5993734 at *3; *Schaffer v. State, Bd. of Prob. & Parole*, No. M2010-01805-COA-R3-CV, 2011 WL 2120169 at *1 (Tenn. Ct. App. May 27, 2011); *Armistead v. Tenn. Dep't of Corr.*, No. M2008-02107-COA-R3-CV, 2009 WL 2567851 at *1 (Tenn. Ct. App. Aug. 18, 2009); *Clark v. Tenn. Bd. of Prob. & Paroles*, No. M2006-01747-COA-R3-CV, 2008 WL 269511 at *1 (Tenn. Ct. App. Jan. 30, 2008). In the case at bar, Mr. Ritchie asserts that he filed an administrative appeal that would affect the timeliness of the filing of his petition for writ of certiorari. We note that Mr. Ritchie is a *pro se* litigant and should be afforded some leeway in the drafting of his pleadings. See *Young*, 130 S.W.3d at 62-63. Moreover, the Board would be equally aware of any administrative appeal. We therefore find the trial court's dismissal of Mr. Ritchie's petition to be premature. Accordingly, we reverse the trial court's dismissal of Mr. Ritchie's petition for lack of subject matter jurisdiction. We remand the matter to the trial court for a determination regarding the timeliness of Mr. Ritchie's petition based on the entry date of the final order following the exhaustion of his administrative appeal.

V. Conclusion

For the foregoing reasons, we reverse the trial court's dismissal of Mr. Ritchie's petition for writ of certiorari. We remand the case to the trial court for a determination regarding the timeliness of Mr. Ritchie's petition following the conclusion of his administrative appeal. Costs on appeal are assessed to the appellant, Tennessee Board of Probation and Parole.

THOMAS R. FRIERSON, II, JUDGE