IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 02, 2014

JOHN C. WELLS, III v. TENNESSEE BOARD OF PROBATION AND PAROLE

Appeal from the Chancery Court for Davidson County
No. 12976I Claudia C. Bonnyman, Chancellor

No. M2013-02613-COA-R3-CV- Filed October 6, 2014

This appeal arises from a decision by the Tennessee Board of Probation and Parole ("the Board") to deny inmate parole at his initial parole review hearing. Inmate was convicted of nine counts of aggravated sexual battery and was denied parole due to the seriousness of his crimes and the likelihood that he would commit similar crimes again if released. Inmate filed a petition for a writ of certiorari, arguing that the Board exceeded its jurisdiction, was illegally comprised, and acted arbitrarily and capriciously. The trial court dismissed the petition with prejudice, and this appeal followed. We affirm the decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, and W. NEAL MCBRAYER, JJ., joined.

John C. Wells, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Joseph F. Whalen, Acting Solicitor General; and Jennifer L. Brenner, Senior Counsel, for the appellee, Board of Probation and Parole and Charles Traughber.

OPINION

BACKGROUND

In 1997, John C. Wells, III, was convicted of nine counts of aggravated sexual battery

and given an aggregate sentence of ninety years in the custody of the Department of Correction. His initial parole hearing took place on April 2, 2012, at the Northeast Correctional Complex. The four participating Board members were Yusuf Hakeem, who presided over the hearing, Chairman Charles Traughber, Patsy Bruce, and Ronnie Cole, all of whom were appointed by the Governor. Mr. Hakeem and Mr. Traughber's appointments were both set to end on December 31, 2011.

During the course of the hearing, Mr. Wells's personal history was reviewed, as well as the nature of his crimes. Mr. Wells accepted responsibility for his crimes and assured the Board that he would not commit a crime again because he now takes his time, deliberates before he acts, and does not jump to conclusions. Mr. Wells stated that he does not believe he is a pedophile and that his crimes were committed because things just "got out of hand." The Board reviewed Mr. Wells's programming history and determined that Mr. Wells had neither applied for nor completed any programs during his incarceration. Mr. Wells explained this was because, at the time of his Transition Accountability Plan ("TAP") assessment in 2007, his counselor told him none of the recommended programs were offered at his compound. He stated that he was told not to apply to such programs because they would be assigned to him from Nashville once he became eligible.

Mr. Hakeem and Mr. Traughber both voted to deny parole. Their decision was primarily based on the seriousness of Mr. Wells's crimes and the likelihood that he would commit similar crimes upon release. Mr. Hakeem conveyed these reasons as follows:

> Mr. Wells, to say the least, I would have liked to have seen you take more programming. . . . I hear what you say about programming that you can take and you can't take, but I don't see the effort on your part, as far as programming, that would give us the [mind set] or the belief that you're not the same person today that you were when you came in.
>
> What we -- what we need to see is some effort on your part. See, you can tell us about how you deliberate now and all of these things, but we need more than that, in my mind. We need to be able to see that you've been through programming that gives you more thoughts, more ideas of how to deal with situations and so forth. And there are programs identified for persons who are incarcerated for the kind of thing that you're incarcerated for.
>
> I cannot see myself voting today to grant you parole, sir. I do think that you have some ways to go, in regards to not being a threat to society. It's going to be my vote, sir, to decline you for seriousness of the offense, and my vote is to put you off for six years, sir.

Mr. Traughber adopted Mr. Hakeem's decision and added the following:

> Your sentence was imposed for a reason. Since your sentence does not expire until 2075, your sentences were -- ran consecutive, because [the] crimes you did [were] (inaudible) on vulnerable boys. You took advantage of them. You had control, and it didn't get out of hand. You set it in motion. And what you did resulted in very inappropriate sexual activities with these underage boys. You do not see that you have a problem, and you describe what you believe the kind of person that would do such behavior would be. You need to give that some more thought, because you never thought this would happen, you said, but you let yourself do it. And if you are not prepared to deal with it in some kind of fashion, this can happen again.
>
> I would have to concur with Mr. Hakeem, to release you at this point would depreciate the seriousness of the crime or promote disrespect for the law. The other (inaudible) is, I consider you a high risk to possibly do this again to some kids if you are granted parole at this time. So my vote is to decline and see you in April of 2018.

Mr. Hakeem's and Mr. Traughber's decision was adopted by Ms. Bruce and Mr. Cole. Notice of the Board's decision was served on May 2, 2012. A Request for Appeal was filed on that same date. After receiving no response, Mr. Wells filed a petition for a writ of certiorari to the Chancery Court of Davidson County. In his petition, Mr. Wells argued that the Board exceeded its authority, followed unlawful procedure, and acted illegally, arbitrarily and capriciously. This was based on Mr. Wells's claims that:

> Mr. Hakeem and Mr. Traughber improperly considered possible pending charges from Austin, Texas in reaching their decision.[1]
>
> Mr. Hakeem and Mr. Traughber determined that Mr. Wells would likely commit another sex offense upon release, without the aid of a clinical psychologist as contemplated by section 40-28-116(a)(2) of the Tennessee Code.
>
> Mr. Hakeem acted arbitrarily and capriciously by denying parole because he did not see any evidence that Mr. Wells attempted to take any programs while incarcerated.

[1]Mr. Wells has not raised this issue on appeal.

> The Board was an illegally and arbitrarily impaneled board because only two of the seven members met the qualifications set forth by section 40-28-103(c) of the Tennessee Code.
>
> Neither Mr. Hakeem nor Mr. Traughber had the authority or jurisdiction to preside over Mr. Wells's hearing or register a vote since their terms expired on January 1, 2012.

The chancery court dismissed the petition with prejudice. In its order of dismissal the court discussed each of Mr. Wells's claims and laid out the reasons for its ruling:

> Mr. Wells was not denied parole because he had possible charges in another state, nor because he failed to enroll in prison programming. Rather, he was denied parole because the Board found there was a risk he would not conform to the terms of his release and to release him would [depreciate] the seriousness of the crimes for which he was convicted . . . .
>
> Mr. Wells further claims it was unlawful, illegal, arbitrary, or fraudulent for the Board to determine he presented a risk of re-offending without conducting a psychiatric evaluation, citing Tenn. Code Ann. § 40-28-116(a)(2). However, Mr. Wells's assertion that such an expert evaluation is "mandated by the legislature" is legally incorrect. The requirement of a psychological evaluation applies only after parole is recommended . . . .
>
> Mr. Wells's remaining two issues for review assert that the Board's ruling is void because it was rendered by a Board acting illegally and outside of its statutory authority. . . . First, Mr. Wells claims that Board Members Yusuf Hakeem, Patsy Bruce and Ronnie Cole fail to meet the required statutory criteria necessary to become a lawful member of the Board of Probation and Parole. Mr. Wells claims that Tenn. Code Ann. § 40-28-103(c) mandates that the "appointing authority **shall** give preference to candidates with training, education or experience in the criminal justice system, law, medicine, education, social work of the behavioral sciences." The Petitioner stresses the word "shall" and argues that it is to be interpreted as mandatory. . . . Mr. Wells's argument on this issue fails because the statute upon which he relies is aspirational in its stated goals, not rigidly formulistic and mandatory as Mr. Wells asserts. . . . The statute merely requires the appointing authority to take certain qualifications into consideration and give preference to candidates who possess these qualifications . . . .

> The last remaining issue concerns the appointment of the two Board members who conducted the Petitioner's parole hearing. Mr. Wells claims that Mr. Yusuf Hakeem had not been reappointed to the Board after his term expired on December 31, 2011, and therefore was not a Board member and had no authority . . . when Mr. Hakeem voted to deny parole to the Petitioner. The Petitioner also claims that Mr. Charles Traughber's position on the Board is invalid because either his 2006 appointment was invalid due to an incorrect expiration date on his Appointment Letter, or because his July 11, 2011 appointment was void because he was not a member of the Board when appointed Chairman. . . . Mr. Wells argues that the holdover provision in article VII, § 5 of the Tennessee Constitution applies only to elected officers, and not to appointed members of the Tennessee Board of Probation and Parole.
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> . . . .
>
> Article VII, § 5 of the Tennessee Constitution states that "[e]very officer shall hold his office until his successor is elected or appointed, and qualified." . . . It is established Tennessee law that those appointed to Tennessee boards and commissions, such as the members of the appellate court nominating commission, qualify as officers for purposes of Article II, section 10 and its holdover provision. *See State* [sic] *ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973). A member of the Tennessee Board of Probation and Parole meets the criteria of a "public officer" as defined in *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978), and therefore would fall under the holdover provision in article VII, § 5 of the Tennessee Constitution. . . . As such, the Board was acting with full authority when it denied Mr. Wells parole.

(Emphasis in original.) The Order of Dismissal was filed on November 14, 2013. Mr. Wells appealed.

STANDARD OF REVIEW

The scope of review of a common law writ of certiorari is very limited, allowing only a determination of whether the Board has exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily. *Turner v. Tenn. Bd. of Paroles*, 993 S.W.2d 78, 80 (Tenn. Ct. App. 1999) (citing *Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871 (Tenn. Ct. App. 1994)). The manner in which the decision was reached is subject to review, but the correctness of the decision is not. *Powell*, 879 S.W.2d at 873. Therefore, if the Board

reached its decision in a constitutional or lawful manner, judicial review is not available. *Id.* In addition, appellate review of a writ of certiorari is limited because issuance of the writ is at the discretion of the trial court and is not available as a matter of right. *Robinson v. Traughber*, 13 S.W.3d 361, 364 (Tenn. Ct. App. 1999). Denial of a writ will not be reversed unless the trial court has clearly abused its discretion. *Id.*

ANALYSIS

In this appeal, Mr. Wells argues that the Board exceeded its jurisdiction, followed unlawful procedure, and acted arbitrarily and capriciously. He bases these arguments on the following claims:

> I. Neither Mr. Hakeem nor Mr. Traughber had authority to act as Board members for Mr. Wells's hearing because their appointments had ended.
>
> II. The Board was illegally empaneled.
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> III. The Board members acted arbitrarily when reaching their decisions by basing them on their own personal views of political correctness.
>
> IV. Mr. Hakeem and Mr. Traughber acted arbitrarily by basing their decisions partly on Mr. Wells's failure to try to enter programs while incarcerated.
>
> V. Mr. Hakeem and Mr. Traughber acted arbitrarily by failing to consider the opinion of a psychiatrist or licensed clinical psychologist before determining that Mr. Wells was likely to commit new sex offenses upon release.

We will discuss each issue in turn.

I.

Mr. Wells's first claim is based on article VII, section 5 of the Tennessee Constitution, which provides that:

> Elections for Judicial and other civil officers shall be held on the first Thursday in August, one thousand eight hundred and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service. The term of each officer so elected shall be computed from the first day of September next succeeding his election. The term of office of the Governor and of other executive officers shall be computed from the fifteenth of January next after the election of the Governor.

> No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. Every officer shall hold his office until his successor is elected or appointed, and qualified. No special election shall be held to fill a vacancy in the office of Judge or District Attorney, but at the time herein fixed for the biennial election of civil officers, and such vacancy shall be filled at the next Biennial election recurring more than thirty days after the vacancy occurs.

Mr. Wells focuses on the importance of interpreting laws according to the plain meaning of the text. He emphasizes how many times the word "elected" is used in article VII, section 5. He argues that, due to the prevalence of the word "elected," the provision does not apply to appointed members of the Board, but only to elected officials. Therefore, Mr. Wells asserts, neither Mr. Hakeem nor Mr. Traughber had authority to sit on the Board for Mr. Wells's hearing because their appointments were set to end on December 31, 2011, and neither of them had been reappointed since then.

Our Supreme Court has held that the text of a constitutional provision is the main guide in interpreting the provision's purpose. *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010). Provisions must be interpreted in a way that gives "plain and ordinary meaning to their words," but also considers "the history, structure, and underlying values of the entire document." *Id.* (citations omitted). We must also make sure to give *each* word its *full* effect. *Garrison v. Bickford*, 377 S.W.3d 659, 663 (Tenn. 2012).

After considering the plain meaning of the text and giving each word its full effect, we disagree with Mr. Wells's interpretation of the provision because he ignores the words "or appointed." TENN. CONST. art. VII, § 5. These words indicate that the provision was not meant to apply only to elected officials, but to appointed officials as well. Furthermore, the provision explicitly references "[e]very officer." Under Tennessee law, members of the Board fit the ordinary meaning of a "public officer." *See Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978) (defining "public officer" as "an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given him by law, and who exercises the functions concerning the public assigned to him by law."). Since appointed Board members qualify as officers, and article VII, section 5 specifically applies to officers and appointed officials, it is clear that the legislature intended members of the Board to fall under the holdover provision. Therefore, we agree with the trial court that both Mr. Hakeem and Mr. Traughber had authority to act as Board members for Mr. Wells's hearing because they were both valid holdover members at the time.

II.

Mr. Wells's second claim is based on Tenn. Code Ann. § 40-28-103(c), which provides that "[i]n 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." Mr. Wells argues that the word "shall" makes the preferences set forth in this provision mandatory. He goes on to suggest that only Mr. Traughber was legally qualified to sit on the Board since only he has "even a modicum of training in education or experience in the criminal justice system, law, medicine, education, social work or the behavioral sciences."

Mr. Wells further argues that the apparent disregard for the legislature's requirements of appointed Board members indicates that the members here were appointed for reasons of political patronage. The only evidence he provides to support this argument, however, is the fact that Mr. Cole and Mr. Hakeem served in the Tennessee House of Representatives and City Council of Chattanooga, respectively, in addition to his speculation that Ms. Bruce's event management company must have been involved in political campaigns or fund raising at some point.

As with Mr. Wells's first claim, we are presented with another issue of interpreting the text of a provision. We must interpret Tenn. Code Ann. § 40-28-103 according to the ordinary meaning of the text and give each word its full effect. *See Garrison*, 377 S.W.3d at 663. Upon doing so, we conclude that Mr. Wells misinterprets the statute. He focuses on the word "shall," but ignores the two words that follow it: "give preference." Tenn. Code Ann. § 40-28-103(c). These two words indicate that the qualifications listed in the statute only need to be taken into consideration when reviewing possible candidates; it is not required that a candidate possess such qualities in order to be appointed to the Board.

Moreover, the record shows that Mr. Hakeem, Ms. Bruce, and Mr. Cole all have leadership and decision-making experience in either a political, administrative, or community based organization.[2] We believe that their type of policy-based decision-making experience is directly applicable to working on an administrative body like the Board. In addition, the statute contains no language to suggest that a background in politics should cast doubt on an

[2] Mr. Hakeem was a representative of District 9 on the City Council of Chattanooga and was elected Council Chair in 1996, 2000 and 2001. Ms. Bruce previously operated event management and marketing companies and organized a community advocacy group called the West Nashville Presidents Council. Mr. Cole was formerly Vice President of the Ford Construction Company, a paving and bridge building contractor, and also served in the Tennessee House of Representatives in the 98th through 102nd General Assemblies. He was also the President of the Tennessee Road Association and the Contractor's Division of the American Road and Transportation Builders Association, as well as a member of the Tennessee Board for Licensing Contractors.

individual's appointment to the Board. Based on the previous experience of the Board members and the statute's failure to list any mandatory qualifications, Mr. Wells has failed to show that any member was improperly appointed or legally unqualified to participate in Mr. Wells's hearing. We therefore agree with the trial court on this issue and find Mr. Wells's argument to be without merit.

III.

Mr. Wells's third claim is that, in light of the political history of some of the Board's members and their alleged lack of qualifications, their decisions were based on their own views of political correctness.

The seriousness of an inmate's crimes and the likelihood that he would commit similar crimes upon release are appropriate factors to consider when making a parole decision. *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 482 (Tenn. 1997) (citing Tenn. Code. Ann. § 40-35-503(b)(1), (2)). In addition, Rule 1100.01.01-.07 of the Rules of the Board provides criteria that the Board may use when determining whether to grant or deny parole. These criteria include, *inter alia*: "[t]he nature of the crime and its severity," "[t]he inmate's training, including vocational and educational achievements," and "[a]ny other factors required by law to be considered or the Board determines to be relevant." TENN. COMP. R. & REGS. 1100-01-01-.07(1).

There is no meaningful evidence to suggest that any of the Board members based their decisions on anything other than the facts of this case. The record indicates that both Mr. Hakeem and Mr. Traughber based their decision on the seriousness of Mr. Wells's crimes and the likelihood that he would reoffend in light of his lack of programming and failure to assure the Board that he had changed. Mr. Hakeem made this clear when he explained the reasons for his decision, with which Mr. Traughber agreed:

> See, you can tell us about how you deliberate now and all these things, but we need more than that, in my mind. We need to be able to see that you have been through programming that gives you more thoughts, more ideas of how to deal with situations and so forth. . . . I do think that you have some ways to go, in regards to being a threat to society. It's going to be my vote, sir, to decline you for seriousness of the offense, and my vote is to put you off for six years, sir.

Ms. Bruce and Mr. Cole adopted Mr. Hakeem's decision as well. There is no evidence to suggest that any Board member's decision was based on anything aside from the aforementioned factors. Consideration of these factors is condoned by Tennessee statutory

law, Tennessee case law, and the Board's own rules. Tenn. Code. Ann. § 40-35-503(b)(1), (2); *Arnold*, 956 S.W.2d at 482-83; TENN. COMP. R. & REGS. 1100-01-01-.07. Accordingly, we agree with the trial court's judgment that the Board members did not act arbitrarily in deciding against recommending parole for Mr. Wells.

IV.

Mr. Wells's fourth claim is that Mr. Hakeem and Mr. Traughber acted arbitrarily by voting to deny parole partly based on a perceived lack of effort from Mr. Wells to participate in programs, when Mr. Wells's failure to participate was beyond his control. Mr. Wells relies on *Kisner v. Commonwealth, Dep't of Corr., Cent. Office of Review Comm.*, 683 A.2d 353 (Pa. Commw. Ct. 1996) to make this argument.

In *Kisner*, an inmate claimed that he was being denied parole because of his failure to participate in a sex-offender program, but this failure was the result of his request for admission being denied. *Kisner*, 683 A.2d at 354. The inmate then filed a grievance requesting admission into a sex-offender program in light of his situation. *Id.* The Commonwealth Court of Pennsylvania stated that "a prisoner is in a 'catch 22' situation, and a cause of action would arise, where the Board of Probation and Parole insists on participation in a sex offender treatment program as a pre-requisite to parole, and [the prison] denies the prisoner admittance into the program." *Id.* at 356. However, the court held that the inmate failed to state a claim because he was not affirmatively denied admission, but was actually second on the waiting list to be evaluated for admission once a spot became available. *Id.*

In Tennessee, consideration of an inmate's participation in programming is appropriate when making a parole decision. Tenn. Code. Ann. § 40-35-503(g). Tennessee law states that:

> In determining whether an inmate should be granted parole, the board shall consider as a factor the extent to which the inmate has attempted to improve the inmate's educational, vocational or employment skills through available department of correction programs while the inmate was incarcerated. The board shall have the right to deny parole to an inmate who has made no attempt to improve such skills while incarcerated.

Id.

Kisner is not binding on this Court. But even if it were, it does not support Mr. Wells's argument because, like the inmate in *Kisner*, Mr. Wells was never denied admission

into any program. Certain programs had not been assigned to Mr. Wells yet or were not available in 2007, but Mr. Wells was never actually denied admission. It is still possible for him to participate in programming at some point during his incarceration. Also, there is no evidence to suggest that the Board required participation in programming as a pre-requisite to being granted parole. The evidence, particularly the statements of Mr. Hakeem and Mr. Traughber, only indicate that the Board considered Mr. Wells's programming history as one factor in making their decision, which is valid under Tennessee law. Tenn. Code. Ann. § 40-35-503(g). The Board's decision was primarily based on the seriousness of Mr. Wells's crimes and his overall likelihood to reoffend upon release. As discussed *supra*, either one of these factors is enough to support the Board's decision. We therefore agree with the trial court in that neither Mr. Hakeem nor Mr. Traughber acted arbitrarily in making their decisions.

V.

Mr. Wells's final claim is based on Tenn. Code Ann. § 40-28-116(a)(2), which provides that:

> No person convicted of a sex crime shall be released on parole unless a psychiatrist or licensed psychologist designated as a health service provider has evaluated the inmate and determined to a reasonable medical or psychological certainty that the inmate does not pose the likelihood of committing sexual assaults upon release from confinement.

Mr. Wells argues that, based on the statute, Mr. Hakeem and Mr. Traughber were required to consider the opinion of a psychiatrist or licensed clinical psychologist to help determine whether or not Mr. Wells was likely to abide by the law upon release. By not doing so, he argues, they acted arbitrarily and capriciously and did not have enough material evidentiary support to sustain their decision.

Again we are presented with an issue of statutory interpretation. As explained *supra*, we must give each word its full effect to interpret section 40-28-116(a)(2) according to the text's ordinary meaning. *See Garrison*, 377 S.W.3d at 663. We conclude Mr. Wells's argument fails due to his incorrect reading of the statute. The statute says there must be a clinical evaluation prior to the *release* of an inmate convicted of a sex crime, not prior to the Board's determination of an inmate's likelihood to reoffend. Mr. Wells was not being released. Even if he was, there is no statutory requirement that he receive a clinical evaluation before the Board makes its decision. *Id.* The Board's Rule 1100-01-01-.10(3) clarifies this point by stating that "[psychological] evaluations are not required prior to a sex offender's parole hearing but only prior to a sex offender's release on parole." TENN. COMP.

R. & REGS. 1100-01-01-.10(3); *see also* Tenn. Code Ann. § 116(a)(2). In addition, as previously stated, the Board's consideration of the seriousness of Mr. Wells's crimes and his likelihood to reoffend are enough to sustain its decision. *See* Tenn. Code. Ann. § 40-35-503(b)(1), (2); *Arnold*, 956 S.W.2d at 482-83. We therefore agree with the trial court that neither Mr. Hakeem nor Mr. Traughber acted arbitrarily and capriciously by not considering the opinion of a psychiatrist or licensed clinical psychologist, and that the Board had enough evidence to sustain its decision.

CONCLUSION

The judgment of the chancery court is affirmed. Costs of appeal are assessed against the appellant, John C. Wells, III, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE