

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

GILBERT MALOY

v.

DONALD T. VAUGHN, et al.

CIVIL ACTION

NO. 97-7355

MEMORANDUM

Broderick, J.

July 28, 1998

Presently before the Court is a pro se petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2241 by Petitioner Gilbert Maloy, who is currently incarcerated at the State Correctional Institution at Graterford, Pennsylvania. Petitioner claims that in denying him parole, the Pennsylvania Board of Probation and Parole ("Board") deprived him of a constitutionally protected liberty interest in violation of his rights under the 14th Amendment. Petitioner also claims that in denying him parole, the Board relied on impermissible factors, also in violation of his rights under the Fourteenth Amendment. The United States Magistrate Judge to whom the petition was referred filed a Report and Recommendation, recommending that the petition be summarily dismissed for failure to state a claim upon which relief can be granted. Petitioner filed timely objections to the Magistrate Judge's findings. Having conducted a de novo review of each of Petitioner's objections, the Court will approve and

adopt the Magistrate Judge's Report and Recommendation and dismiss the petition for a writ of habeas corpus.

As set forth in the petition for a writ of habeas corpus, Petitioner was convicted of indecent assault, terroristic threats, and attempted theft by unlawful taking in the Court of Common Pleas of Philadelphia County. He was sentenced to a term of nine to eighteen years' imprisonment. The sentence began to run on June 25, 1987, and Petitioner was eligible for parole on June 25, 1996.

On December 26, 1996, six months after his minimum sentence was served and he became eligible for parole, the Board reviewed Petitioner's file and denied his application for parole based on a series of factors. Attached to his petition is the Board's decision which indicates that Petitioner's application was denied for the following reasons:

1. Substance abuse
2. Habitual offender
3. Assaultive instant offense
4. Very high assaultive behavior potential
5. Victim injury
6. Need for counseling and treatment
7. Failure to participate in and benefit from a treatment program for sex offenders

8. Unfavorable recommendation from the Department of Corrections and the sentencing Judge.

In addition, the Board stated that Petitioner was required to participate in a prescriptive program plan, maintain a clear conduct record, and earn an institutional recommendation in order to qualify for parole on subsequent review.

In his petition for writ of habeas corpus, Petitioner makes two claims. First, he alleges that he was deprived of a constitutionally protected liberty interest, created by Pennsylvania's 1974 Sentencing Code, when the Board failed to grant his application for parole at the expiration of his minimum sentence. Second, Petitioner claims that in denying him parole, the Board impermissibly considered the following factors in violation of his substantive due process rights: the conduct underlying his original offense, which had already been taken into consideration by the court in imposing his definite sentence, including assaultive instant offense, victim injury, very high assaultive behavior potential, and Petitioner's status as a habitual offender; Petitioner's substance abuse, his need for continued counseling and treatment, and the requirement that he participate in a prescriptive program plan; and finally, the requirement that he maintain a clear conduct record and earn an institutional recommendation in order to qualify for parole on

subsequent review.

Because Petitioner filed timely objections to the Magistrate Judge's findings on each of these claims, the Court will review each claim in accordance with to 28 U.S.C. § 636(b)(1)(C). In addition, in his Objections to the Magistrate Judge's Report and Recommendation, Petitioner claims that the Magistrate Judge failed to address his claim that the Board impermissibly applied "revamped (new) procedures on him to determine eligibility for parole." Petitioner claims that the Board's application of such "revamped (new) procedures" is a violation of the Ex Post Facto Clause. Although it appears to this Court that Petitioner in fact raised the ex post facto violation for the first time in his objections to the Magistrate Judge's report, the Court will also consider the merits of this claim.

Having conducted a thorough and independent review of the Magistrate Judge's findings, the Court agrees with the Magistrate Judge that the Board's denial of parole did not deprive Petitioner of a constitutionally protected liberty interest. It is well-settled that there is no constitutionally protected liberty interest created under the Pennsylvania Parole statute. "[I]n Pennsylvania, a prisoner has no constitutionally protected liberty interest in being released from confinement prior to the expiration of his or her maximum term [of imprisonment]." Weaver

v. Pennsylvania Board of Probation and Parole, 668 A.2d 766, 770 (1997); see also U.S. ex. rel. Schiano v. Luther, 954 F.2d 910, 916 (3rd Cir. 1992)(Parole Act does not create a liberty interest in parole); Rogers v. Parole Agent SCI-Frackville, 916 F.Supp.474, 476-77 (E.D.Pa. 1996)(same); Commonwealth v. Button, 332 Pa.Super. 239, 481 A.2d 342 (1984)(same).

The Court also agrees with the Magistrate Judge's finding that no constitutionally protected liberty interest is created by either 42 Pa. C.S.A. § 9721(e)(sentences of imprisonment shall be for a definite term) or § 9756(requiring minimum and maximum sentence) of Pennsylvania's 1974 Sentencing Code. Under Pennsylvania law, the significance of the minimum sentence is that it establishes a parole eligibility date. "A prisoner has a right only to apply for parole at the expiration of his or her minimum term and [to] have that application considered by the Board." Krantz v. Pennsylvania Board of Probation and Parole, 483 A.2d 1044, 1047 (Pa. Commw. 1984)(a parole eligibility date, usually set at the expiration of the prisoner's minimum sentence, does not vest any right to a grant of parole upon reaching that date); Gundy v. Pennsylvania Board of Probation and Parole, 478 A.2d 139, 141 (Pa. Commw. 1984)("The sentence imposed for a criminal offense is the maximum term. The minimum term merely sets the date prior to which a prisoner may not be paroled.").

Thus, the Board's denial of parole did not deprive

Petitioner of any constitutionally protected liberty interest.

Having conducted a thorough and independent review of the Magistrate Judge's findings, the Court also agrees with the Magistrate Judge that the factors considered by the Board in denying Petitioner parole were not impermissible and did not violate Petitioner's substantive due process rights. In reviewing this petition for a writ of habeas corpus, the role of the Court is to "insure that the Board followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious or based on impermissible considerations." Block v. Potter, 631 F.2d 233, 236 (3rd Cir. 1980)(citing Zannino v. Arnold, 531 F.2d 687, 690 (3rd Cir. 1976)).

The Pennsylvania Parole Act grants the Board broad discretion in making parole decisions, and authorizes the Board to release a convict on parole "whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby." 61 P.S. § 331.21. The Court agrees with the Magistrate Judge's findings that all of the factors considered by the Board in denying Petitioner parole bear a rational relation to rehabilitation or the interests of the public. The Court also agrees with the Magistrate Judge's finding that an examination of

the factors considered by the Board reveals that the Board did not distinguish Petitioner from typical applicants and that nothing in Petitioner's habeas petition would support a claim that the Board acted in an arbitrary or capricious manner or with vindictiveness, bias, or prejudice. Therefore the Board did not abuse its broad discretion under the Pennsylvania Parole Act and the Board did not violate Petitioner's substantive due process rights by relying on the factors enumerated above in denying petitioner parole.

Finally, Petitioner claims that the Board violated the Ex Post Facto Clause by applying "revamped (new) procedures on him to determine eligibility for parole." Section Ten of Article One of the United States Constitution provides that no State shall pass any ex post facto laws. Any law that makes punishment of a crime more burdensome than when it was committed is prohibited as ex post fact. Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). Although it must be a law that makes the punishment more burdensome for ex post facto purposes, the Third Circuit has instructed that "laws" in this context include not just statutes but also some "validly promulgated [administrative] regulations" as well. United States ex rel. Forman v. McCall, 709 F.2d 852, 859 (3rd Cir. 1983). In McCall, the Third Circuit held that whether the parole guidelines of the U.S. Parole

Commission constituted "laws" depended on whether they were "applied without sufficient flexibility." Id. at 862.

The instant case concerns the Pennsylvania Board of Probation and Parole, rather than the U.S. Parole Commission. Petitioner alleges that the Board applied "revamped (new) procedures" in denying him Parole, in violation of the Ex Post Facto Clause. In order to state such a claim, Petitioner would have to point either to new laws applied to him or to parole guidelines "applied without sufficient flexibility." Petitioner has done neither. Petitioner has cited no law that has changed, and the Court is aware of no change in the law. As for the Board's policies and procedures, the Board adheres to no formal guidelines in making its parole determinations. It has complete discretion to parole a prisoner "whenever, in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interest of the Commonwealth will be injured thereby." 61 Pa.C.S.A. § 331.21. Petitioner's allegation of the Board's alleged use of "revamped (new) procedures" in denying Petitioner parole is insufficient to state a claim under the ex post facto clause. Jubilee v. Horn, 959 F.Supp. 276, 282 (E.D.Pa. 1997); Wise v. Pennsylvania Board of Probation and Parole, et al., 1998 WL 188845, *4 (E.D.Pa.)

For the foregoing reasons, the Court will adopt the report

and recommendation of the Magistrate Judge, consistent with this opinion, and will deny Petitioner's petition for habeas corpus relief under 28 U.S.C. § 2241. There is no probable cause for appeal.

An appropriate Order follows.

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ORDER

AND NOW, this 28th day of July, 1998; after careful and independent consideration of the petition for a writ of habeas corpus and the responses thereto; and after a de novo review of the Report and Recommendation of Judge Peter B. Scuderi, United States Magistrate Judge and Petitioner's objections thereto;

IT IS ORDERED:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The petition for writ of habeas corpus is **DENIED**.
3. A certificate of appealability is not granted.

RAYMOND J. BRODERICK, J.