

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

William Arnold,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-120 (C.P.C. No. 10CVH09-12880)
Ohio Adult Parole Authority et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 27, 2011

Timothy Young, Ohio Public Defender, and *E. Kelly Mihocik*,
for appellant.

Michael DeWine, Attorney General, and *Jason Fuller*, for
appellees.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Plaintiff-appellant, William Arnold ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas dismissing his complaint against defendants-appellees, Ohio Adult Parole Authority, its chairman and board members ("OAPA" or "the board"), for failure to state a claim upon which relief can be granted. For the reasons that follow, we affirm.

{¶2} On July 9, 1990, appellant pled guilty to three counts of rape, two counts of corruption of a minor, and one count of complicity to pandering. He was sentenced to a

term of five to twenty-five years of incarceration on each of the rape convictions, with the sentences to be served concurrently. He was also sentenced to one year of incarceration on each of the corruption-of-a-minor convictions and on the complicity-to-pandering conviction, with the sentences for those convictions to be served concurrently with each other and consecutively to the sentences for the rape convictions.

{¶3} In September 2009, an OAPA panel recommended that appellant be granted parole. On December 10, 2009, OAPA conducted a full board hearing regarding the recommendation for parole. At the full board hearing, an attorney for appellant and a friend of appellant testified in support of granting appellant parole. Appellant's ex-wife, Debra Arnold ("Debra"), and former sister-in-law, Dorothy Lemming ("Lemming"), testified in opposition to granting appellant parole. A former social worker who knew appellant's family and was involved in the case, Debra Segrest-Adams ("Segrest-Adams"), also testified in opposition to parole. As a result of the hearing, the board reached a majority decision to deny parole to appellant.

{¶4} Appellant then filed a complaint in the Franklin County Court of Common Pleas seeking a declaration that the board's decision denying parole was void and an order requiring OAPA to conduct another full board hearing, among other relief. OAPA moved to dismiss the complaint for failure to state a claim upon which relief could be granted. On January 7, 2011, the trial court granted OAPA's motion and dismissed appellant's complaint, finding that appellant was given meaningful consideration for parole.

{¶5} Appellant appeals from the trial court's judgment, assigning the following errors for this court's review:

First Assignment of Error

Because Ohio statutes limit who may testify at a full parole board hearing, and the APA does not have discretion to disregard statutory procedures when conducting a full board hearing, the trial court erred when it dismissed Mr. Arnold's complaint.

Second Assignment of Error

The trial court ruled that the parole guidelines place no substantive limit on the APA's discretion when conducting a parole hearing. But R.C. 2967.03 and R.C. 5149.101 are statutory limits on the APA's authority, which the APA cannot disregard.

Third Assignment of Error

Mr. Arnold's complaint alleged that the APA's power to conduct a full parole board hearing was not properly invoked. The trial court failed to address that claim. The trial court erred when it dismissed Mr. Arnold's complaint without addressing each cause of action.

{¶6} We review de novo a trial court's dismissal of a case for failure to state a claim upon which relief could be granted. *Festi v. Ohio Adult Parole Auth.*, 10th Dist. No. 04AP-1372, 2005-Ohio-3622, ¶9. In considering a motion to dismiss for failure to state a claim, "[t]he court must presume all factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-moving party." *Id.* The court may only dismiss a case under Civ.R. 12(B)(6) when it " 'appear[s] beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.' " *Id.*, quoting *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus.

{¶7} In his complaint, appellant sought declaratory and injunctive relief. "The only reasons for dismissing a complaint for declaratory judgment before addressing the

merits of the case are: (1) no justiciable issue or actual controversy exists between the parties; or (2) the declaratory judgment will not terminate the uncertainty or controversy. For purposes of a declaratory judgment action, a 'justiciable issue' requires the existence of a legal interest or right, and a 'controversy' exists where there is a genuine dispute between parties with adverse legal interests." *Festi* at ¶11, citing *Wilburn v. Ohio Dept. of Rehab. & Corr.* (Nov. 27, 2001), 10th Dist. No. 01AP-198.

{¶8} The Supreme Court of Ohio has held that there is no constitutional or inherent right for an inmate to be released before the expiration of a valid sentence; therefore, an inmate who is denied parole is not deprived of a protected liberty interest. *Spencer v. Ohio State Adult Parole Auth.*, 10th Dist. No. 09AP-143, 2009-Ohio-4656, citing *State ex rel. Miller v. Leonard*, 88 Ohio St.3d 46, 47, 2000-Ohio-467; *State ex rel. Hattie v. Goldhardt*, 69 Ohio St.3d 123, 1994-Ohio-81. "Rather, 'the OAPA's decision to grant or deny parole is an executive function involving a high degree of official judgment or discretion [and] [t]he discretionary authority in relation to parole eligibility and release given the OAPA, pursuant to R.C. 2967.01 et seq., has been properly delegated by the legislature.' " *Weatherspoon v. Mack*, 10th Dist. No. 07AP-1083, 2008-Ohio-2288, ¶13, quoting *Wright v. Ghee*, 10th Dist. No. 01AP-1459, 2002-Ohio-5487, ¶42 (bracketed alterations sic). Although appellant's complaint includes a request for an injunction granting his immediate release on parole, the gravamen of his claim is a challenge to the procedures used by OAPA in the full board hearing, rather than a challenge to the denial of parole.

{¶9} Appellant's first two assignments of error address the content of the full board hearing and OAPA's discretion in conducting a full board hearing. Appellant's third

assignment of error raises the question of whether the full board hearing was properly convened, which is a threshold issue that must be resolved before considering the content of the hearing. Accordingly, we begin by reviewing appellant's third assignment of error.

{¶10} In his third assignment of error, appellant argues that the trial court erred by dismissing his claim without addressing his assertion that OAPA's power to conduct a full board hearing was not properly invoked. Although the trial court did not expressly address this claim, the court's decision reflects a conclusion that OAPA had authority to conduct the full board hearing in order to consider whether appellant was fit for parole.

{¶11} Appellant argues that OAPA improperly conducted a full board hearing, asserting that the hearing was convened following an objection submitted by his ex-wife to the panel recommendation that he be granted parole. Appellant claims that this was not a proper basis for a full board hearing and that OAPA may only conduct a full board hearing pursuant to a request from one of the individuals authorized to request a hearing under R.C. 5149.101(A).

{¶12} R.C. 5149.101(A) provides as follows:

(1) A board hearing officer, a board member, or the office of victims' services may petition the board for a full board hearing that relates to the proposed parole or re-parole of a prisoner. At a meeting of the board at which a majority of board members are present, the majority of those present shall determine whether a full board hearing shall be held.

(2) A victim of a violation of section 2903.01 or 2903.02 of the Revised Code, the victim's representative, or any person described in division (B)(5) of this section may request the board hold a full board hearing that relates to the proposed parole or re-parole of the person that committed the violation. If a victim, victim's representative, or other person requests a

full board hearing pursuant to this division, the board shall hold a full board hearing.

The cross-referenced portion of the statute, R.C. 5149.101(B)(5), encompasses the following individuals: the spouse of the victim of the original offense, the parent or parents of the victim of the original offense, the sibling of the victim of the original offense, and the child or children of the victim of the original offense.

{¶13} Appellant asserts that OAPA misconstrued the alleged objection from his ex-wife to be a request from a victim's representative or the parent of a victim under R.C. 5149.101(A)(2). He argues that his daughter was not the victim of the crimes for which he was convicted and that, accordingly, his ex-wife cannot request a hearing as a representative or parent of the victim. On the record before us, it appears that appellant is correct that his daughter was not the victim of the crimes for which he was convicted. In this context, the law defines the term "victim" as the person who is identified as the victim of a crime in a complaint, indictment or information that charges the commission of a crime and that forms the basis for criminal prosecution. R.C. 2930.01(H)(1). Appellant was charged with and pled guilty to crimes against other minor children, but not against his daughter.

{¶14} Notwithstanding the fact that appellant's ex-wife does not qualify as a representative or parent of the victim, nothing in the records attached to the complaint supports appellant's assertion that the hearing was convened pursuant to a request from his ex-wife. The digest of the full board hearing indicates that appellant's ex-wife read from a prepared statement and that another witness read from a letter submitted by appellant's daughter. Neither of those letters were attached to the complaint. Although we are bound to presume that all factual allegations are true and make all reasonable

inferences in favor of appellant because OAPA moved to dismiss under Civ.R. 12(B)(6), "unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss." *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 1994-Ohio-39. Where nothing in the record indicates procedural irregularity, a presumption of regularity attaches to administrative agency proceedings. *Freeman v. Ohio Dept. of Human Servs.* (Dec. 14, 1995), 10th Dist. No. 95AP-359, citing *State ex rel. Ohio Bldg. Restoration, Inc. v. Indus. Comm.* (1992), 64 Ohio St.3d 188, 189; *T. Marzetti Co. v. Doyle* (1987), 37 Ohio App.3d 25, 29. Despite the inaccurate description of appellant's ex-wife as the victim's mother, there is no evidence to support appellant's conclusion that OAPA convened the full board hearing pursuant to an objection from appellant's ex-wife.

{¶15} Appellant has failed to establish that OAPA improperly convened the full board hearing pursuant to an objection from his ex-wife. Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶16} Appellant's first two assignments of error are interrelated, and we will address them together. In his second assignment of error, appellant asserts that R.C. 2967.03 and 5149.101 are statutory limits on OAPA's authority and that the trial court erred by holding that these statutes are guidelines that placed no substantive limits on OAPA's discretion. In his first assignment of error, appellant claims that he was denied meaningful consideration for parole because OAPA disregarded these purported statutory limits on its authority.

{¶17} Generally, OAPA "has wide-ranging discretion in parole matters." *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719, ¶28, citing *State ex rel.*

Lipschutz v. Shoemaker (1990), 49 Ohio St.3d 88, 90. As this court has previously noted, "[u]nder R.C. 2967.03, a parole determination lies within the *absolute discretion* of the OAPA." *Green v. Ohio Adult Parole Auth.*, 10th Dist. No. 06AP-689, 2007-Ohio-4180, ¶11, citing *Woodson v. Ohio Adult Parole Auth.*, 10th Dist. No. 02AP-393, 2002-Ohio-6630 (emphasis added). However, OAPA's discretionary power is not completely unfettered. In *Layne*, the Supreme Court of Ohio held that OAPA's "discretion must yield when it runs afoul of statutorily based parole eligibility standards and judicially sanctioned plea agreements." *Layne* at ¶28. Likewise, OAPA's discretion must yield to other statutory limits imposed by the General Assembly.

{¶18} Appellant asserts that R.C. 2967.03 and 5149.101 are statutory limits on OAPA's discretion. We find that these statutes impose certain requirements on OAPA, thus arguably limiting its otherwise broad discretionary authority. For example, under R.C. 5149.101(B), if a full board hearing is petitioned for or requested under R.C. 5149.101(A), then OAPA must permit certain persons to appear at the hearing and give testimony or submit written statements. Therefore, OAPA does not have the discretion to refuse to allow those persons to testify at a full board hearing convened pursuant to R.C. 5149.101(A). By contrast, parole guidelines created by OAPA do not constitute substantive limits on its discretion and do not control its decisions. *Hattie* at 125; *Mayrides v. Ohio State Adult Parole Auth.* (Apr. 30, 1998), 10th Dist. No. 97APE08-1035.

{¶19} Appellant argues that the trial court erred by ruling that R.C. 2967.03 and 5149.101 were guidelines which placed no substantive limits on OAPA's discretion. Upon review of the trial court's decision, we find that, although the trial court quoted prior cases holding that OAPA's parole guidelines did not place substantive limits on its authority, the

trial court did not rule that R.C. 2967.03 and 5149.101 constituted non-binding guidelines within the meaning of those precedents. Accordingly, we find no error in this portion of the trial court's decision.

{¶20} The Supreme Court of Ohio has held that an offender who is eligible for parole must receive "meaningful consideration for parole" at his parole hearing. *Layne* at ¶27. Appellant argues that R.C. 2967.03 and 5149.101 impose limits on who may testify at a full board hearing and that he was denied meaningful consideration for parole because OAPA disregarded those limits.

{¶21} R.C. 5149.101(B) provides that, at a full board hearing petitioned for or requested under R.C. 5149.101(A), OAPA shall permit certain persons to appear and give testimony. The list of persons who shall be permitted to testify includes the victim of the offense for which the prisoner is serving the sentence, the victim's representative, or the parent of the victim of the original offense. R.C. 5149.101(B)(3); 5149.101(B)(5)(b). Appellant argues that this statute constitutes the exclusive list of individuals that may testify at a full board hearing. He claims that by permitting Debra, Lemming, and Segrest-Adams to testify as family members of the victim or victim representatives at the full board hearing, OAPA violated the statutory limitation imposed by R.C. 5149.101(B).

{¶22} As explained above, appellant appears to be correct that to the extent they testified regarding alleged acts toward appellant's daughter, Debra, Lemming, and Segrest-Adams were not properly characterized as family members or representatives of the victim as that term is defined by statute. However, we find that OAPA did not exceed its authority by considering these witnesses' testimony.

{¶23} R.C. 2967.03 provides, in relevant part, that OAPA "may investigate and examine, or cause the investigation and examination of, prisoners confined in state correctional institutions concerning their conduct in the institutions, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society." This statute has been construed as "allow[ing] the board to consider *any evidence* it feels is pertinent to the question of whether the prisoner is fit to be at liberty without harming others." *State ex rel. Thompson v. Clark* (1982), 7 Ohio App.3d 191, 192 (emphasis added). See also *Fugett v. Ghee*, 10th Dist. No. 02AP-618, 2003-Ohio-1510, ¶17 ("Both the Ohio Revised Code and the Ohio Administrative Code give the OAPA the authority to investigate and examine any matters affecting appellant's ability to be at liberty without being a threat to society."); *Mayrides*, *supra* ("R.C. 2967.03 authorizes the board to consider any matter relevant to an individual's fitness to be at liberty in society."). The language of R.C. 5149.101(B) functions as a limit on OAPA's discretion by providing that it must permit testimony at a full board hearing from certain persons, but it does not otherwise limit OAPA's authority under R.C. 2967.03 to consider any evidence it finds relevant to an individual's fitness to be released on parole. The statute does not state that the specified individuals are the only witnesses permitted at a full board hearing, it simply provides that those individuals may not be denied the opportunity to testify at the hearing—i.e., OAPA "shall permit" them to testify.

{¶24} Appellant also cites R.C. 5149.101(C) in support of his argument that OAPA's authority to hear testimony at a full board hearing is limited. That portion of the

statute provides that "[t]he persons who may attend a full board hearing are the persons described in [R.C. 5149.101(B)(1)-(6)]" and members of the media. R.C. 5149.101(C). Based on this limitation, appellant reasons that other individuals may not testify at the full board hearing because they must attend the hearing in order to testify at it. We disagree with appellant's construction of the statute. It is possible for a witness to be allowed into a hearing for the purpose of giving testimony without the witness being in attendance for the full hearing. Given that OAPA has been repeatedly recognized as having broad authority to consider a wide range of evidence, this statutory provision should not be construed as an indirect limitation on that authority. Moreover, by its own terms, R.C. 5149.101(C) is not intended to be an exclusive list of who may attend a full board hearing because it provides that OAPA may adopt rules permitting other interested persons to attend full board hearings. R.C. 5149.101(C).

{¶25} Based on OAPA's authority to consider evidence relevant to a potential grant of parole, it had discretion to consider testimony from Debra, Lemming, and Segrest-Adams. Appellant was not denied meaningful consideration for parole based on OAPA's consideration of this testimony. Accordingly, appellant's first and second assignments of error are without merit and are overruled.

{¶26} For the foregoing reasons, all three of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
