IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
HOCKING COUNTY, OHIO

LAWRENCE DEAN ROBINSON,	:	
Plaintiff-Appellant,	:	CASE NO. 03CA17
-v-	:	
SAMUEL TAMBI, WARDEN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES

APPELLANT PRO SE: Lawrence Robinson, #142-747, Hocking Correctional Facility, Nelsonville, Ohio 45764

COUNSEL FOR APPELLEE: Jim Petro and Philip A. King, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215-6001

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 5-28-04

ABELE, J.

{¶1} This is an appeal from a Hocking County Common Pleas Court judgment that dismissed a pro se declaratory judgment action filed by Lawrence Dean Robinson, plaintiff below and appellant herein.

{¶2} Appellant raises the following assignments of error for review:

{¶3} FIRST ASSIGNMENT OF ERROR:

"THE COURT ERRED WHEN IT RULED APPELLANT HAS NO STATUTORY

OR CONSTITUTIONAL RIGHT TO HAVE HIS PAROLE CONSIDERED ACCORDING TO GUIDELINES WHICH WOULD ALLOW HIS RELEASE PRIOR TO THE MAXIMUM SENTENCE IMPOSED UPON HIM."

{¶4} SECOND ASSIGNMENT OF ERROR:

"THE COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED APPELLANT'S CLAIMS CONCERNING HIS 'RIGHT' TO ANNUAL PAROLE HEARINGS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED."

{¶5} THIRD ASSIGNMENT OF ERROR:

"THE COURT ERRED WHEN IT RULED APPELLANT HAD NO RIGHT TO HAVE HIS PAROLE CONSIDERED BY A PANEL CONSISTING OF ONE OR MORE MEMBERS OF THE PAROLE BOARD AND ONE OR MORE HEARING OFFICERS."

{¶6} In 1973, appellant was convicted of murder and received a life sentence. On May 27, 2003, appellant filed a petition for writ of habeas corpus. Appellant basically claimed that he had been deprived of a right to meaningful, annual parole hearings.

{¶7} On July 25, 2003, appellee filed a motion to dismiss. Appellee asserted that appellant's claim, that he is entitled to immediate release upon parole, is not cognizable in a habeas corpus action. The trial court subsequently sua sponte changed appellant's petition into an action for declaratory judgment.

{¶8} On August 25, 2003, appellant filed a motion for declaratory judgment. Appellant essentially argued that the parole board has not given him annual parole hearings, that the parole procedure somehow violates his constitutional rights, and that the parole board has not complied with Adm.Code 5120:1-1-11(C), which requires the parole hearing to be heard by at least one member of the parole board and at least one hearing officer.

{¶9} On September 29, 2003, the trial court denied

appellant's petition for writ of habeas corpus and motion for declaratory judgment. The court found that his claims regarding his right to annual parole hearings not well-taken and that his claims failed to state a claim upon which to grant relief.

{¶10} In his three assignments of error, appellant asserts that the trial court erroneously granted appellee's motion to dismiss for failure to state a claim. Appellant first argues that the trial court improperly concluded that he does not have a "statutory or constitutional right to have his parole considered according to guidelines which would allow his release prior to the maximum sentence imposed upon him." Second, appellant contends that the court incorrectly determined that appellant's claim that he has a right to annual parole hearings fails to state a claim upon which relief can be granted. Third, appellant asserts that the trial court wrongly concluded that appellant does not have a right to have his parole considered by a panel consisting of at least one member of the parole board and at least one hearing officer.

{¶11} An appellate court reviews a trial court's decision regarding a motion to dismiss de novo. See, e.g., Shockey v. Fouty (1995), 106 Ohio App.3d 420, 424, 666 N.E.2d 304; see, also, Walters v. Ghee (Apr. 1, 1998), Ross App. No. 96 CA 2254. A trial court should not grant a motion to dismiss if there is some state of the facts by which the nonmoving party might state a valid claim for relief. See, e.g., Taylor v. London, 88 Ohio St.3d 137, 139, 2000-Ohio-278, 723 N.E.2d 1089 (citing O'Brien v.

University Community Tenants Union, Inc. (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus). When reviewing a motion to dismiss, a trial court must accept the facts stated in the complaint as true and must construe all reasonable inferences in favor of the nonmoving party. Id. (citing Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190, 532 N.E.2d 753).

A

{¶12} In his first assignment of error, appellant appears to argue that the current parole scheme violates the Ex Post Facto Clause. We gather that appellant disagrees with applying parole guidelines enacted in accordance with S.B. 2 to his conviction that occurred prior to the enactment of S.B. 2. He seems to contend that to the extent S.B. 2 extended the length of time that may elapse between parole hearings, it violates the Ex Post Facto Clause. We disagree.

{¶13} In Garner v. Jones (2000), 529 U.S. 244, 120 S.Ct. 1362, 146 L.Ed.2d 236, the United States Supreme Court considered the same issue posed above and concluded that extending the length of time between parole hearings did not violate the Ex Post Facto Clause, when the extension does not create a significant risk of increasing the offender's punishment. See, also, California Dept. of Corrections v. Morales (1995), 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588.

{¶14} Additionally, the Ohio Supreme Court has specifically held that a prisoner has no right to rely on the parole guidelines in effect prior to his parole hearing date and, thus,

applying the amended parole guidelines does not violate the Ex Post Facto Clause. See State ex rel. Bealler v. Ohio Adult Parole Auth. (2001), 91 Ohio St.3d 36, 740 N.E.2d 1100; Douglas v. Money (1999), 85 Ohio St.3d 348, 349, 708 N.E.2d 697.

> "'Changes in the parole matrix or parole guidelines may constitutionally be applied to inmates even though the changes occur after the inmates entered the state prison system. * * * [P]arole is a discretionary decision, and a state may constitutionally add or delete factors which guide the Parole Board's exercise of its discretion without running afoul of the Constitution. Simply put, an inmate has no vested interest in any particular set of parole guidelines, regulations, or matrices which assist the Parole Board in exercising its discretion, and changes in those matters do not impair any rights enjoyed by state prisoners pursuant to the United States Constitution.'"

{¶15} Harris v. Wilkinson (Nov. 27, 2001), Franklin App. No. 01AP-598 (quoting Akbar El v. Wilkinson (Apr. 28, 1998), S.D. Ohio No. C2-95-472, affirmed (C.A.6, 1999) 181 F.3d 99).

{¶16} In the case at bar, the change in the parole guidelines designating when an offender is entitled to parole hearings does not amount to an Ex Post Facto law. Appellant's maximum sentence has not expired and he has no constitutional right to be released from prison.

{¶17} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

B

{¶18} In his second assignment of error, appellant asserts that he is entitled to annual parole hearings. Appellant cites Adm. Code 5120-1-10(B) as support and quotes that provision as follows:

> In any case in which release is denied at the inmate's hearing, a second hearing shall be held as determined by the parole board, unless waived by the parole board, pursuant to Rule 5120-1-1-11 of the Administrative Code. If a continuance of 12 months or less is ordered, the parole board shall consider granting a furlough as provided by rule 5120-1-1-23 of the Administrative Code for for [sic] the period of such continuance. The minutes of the hearing shall reflect that both parole and furlough were considered by the parole board. The reason's [sic] for such extended time shall be communicated in writing to the inmate and the managing officer. In no event shall the second hearing be scheduled later than five years beyond the minimum eligibility date for release consideration unless for good cause shown. If release is denied at such second hearing, the inmate shall be elibible [sic] for annual hearings thereafter.

{¶19} R.C. 5120:1-1-10(B), as currently written, provides as follows:

> (B) In any case in which parole is denied at a prisoner's regularly constituted parole hearing and the board does not continue the prisoner to the expiration of the maximum sentence, the parole board shall:
> Set a projected release date in accordance with paragraph (D) of this rule, or
> Set the time for a subsequent hearing, which shall not be more than ten years after the date of the hearing.

{¶20} Under the current version of the Administrative Code, a prisoner is entitled to a parole hearing every ten years. Nothing in the current version requires annual parole hearings.

{¶21} Moreover, while a prisoner has a reasonable expectation that he will "receive meaningful consideration for parole," Layne v. Ohio Adult Parole Auth. (2002), 97 Ohio St.3d 456, 463, 780 N.E.2d 548, the mere presence of a parole system does not give rise to a constitutionally protected liberty interest in release on parole. See Bd. of Pardons v. Allen (1987), 482 U.S. 369, 373, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987); Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7,

99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); State ex rel. Vaughn v. Ohio Adult Parole Auth. (1999), 85 Ohio St.3d 378, 379, 708 N.E.2d 720. Because a prisoner does not have a substantive liberty interest in parole, he cannot challenge the procedures used to deny him parole and demand an annual hearing. See Olim v. Wakinekona, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); see, also, Poe v. Traughber (C.A.6, 1998), 145 F.3d 1333; State ex rel. Ferguson v. Ohio Adult Parole Auth. (1989), 45 Ohio St.3d 355, 356, 544 N.E.2d 674. As the court explained in Olim:

> "'A liberty interest is of course a substantive interest of an individual; it cannot be the right to demand needless formality.' [Shango v. Jurich (C.A. 7, 1982), 681 F.2d 1091, 1100-1101]. Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. See generally Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 Calif.L.Rev. 146, 186 (1983). * * * * The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right."

{¶22} Olim, 461 U.S. at 250-51.

{¶23} In the case at bar, appellant has not alleged that he has been deprived of a meaningful parole consideration, but instead believes that he is entitled to annual meaningful parole hearings. As we previously stated, however, neither the parole statutes nor regulations require annual parole hearings. Additionally, because appellant has no constitutional right to parole, "he has no similar right to earlier consideration of parole." State ex rel. Henderson v. Ohio Dept. of Rehab. & Corr. (1998), 81 Ohio St.3d 267, 268, 690 N.E.2d 887.

{¶24} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

C

{¶25} In his third assignment of error, appellant contends that he is entitled to have his parole considered by a panel consisting of at least one member of the parole board and at least one hearing officer. Appellant refers to Admin. Code 5120-1-1-11(C), which states that parole decision can be made by "a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers."

{¶26} Adm. Code 5120:1-1-11(C) provides:

> (C) The hearing may be conducted by the Parole Board or a quorum thereof, for the purpose of making a decision for or against release or may be conducted for the purpose of making a recommendation for or against release to the Parole Board by a panel consisting of one or more members of the Parole Board and one or more Parole Board hearing officers as designated by the Chairman of the Parole Board.

{¶27} First, we note that the regulation provides that the hearing may be conducted by at least one member of the parole board and one hearing officer. The regulation is not written in mandatory language.

{¶28} Second, because appellant possesses no liberty interest in release on parole, he cannot state a due process claim with respect to the procedures used to deny him parole. See Sims v. Ohio Adult Parole Auth. (Nov. 29, 2001), Richland App. No. 01CA36. Furthermore, "the APA's alleged failure to follow its

guidelines does not entitle [a prisoner] to release from prison." State ex rel. Bray v. Brigano (2001), 93 Ohio St.3d 458, 459, 755 N.E.2d 891.

{¶29} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Kline, P.J.,Concurs in Judgment and Opinion.
Harsha, J.,Concurs in Judgment & Opinion as to Assignments of Error I & II; Concurs in Judgment Only as to Assignment of Error III.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

For the Court

BY:
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.