2016 IL App (4th) 150481-U

NO. 4-15-0481

FILED
April 27, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

HENRY VAN BROUGHTON,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
THE PRISONER REVIEW BOARD,	)	No. 13MR1149
Defendant-Appellee.	)	
	)	Honorable
	)	Chris Perrin,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's decision to grant the Prisoner Review Board's motion to dismiss plaintiff's complaint for declaratory judgment.

¶ 2 In November 2013, plaintiff, Henry Van Broughton, filed a *pro se* complaint for declaratory judgment against defendant, the Prisoner Review Board (Board). In March 2014, the Board filed a motion to dismiss. In May 2015, the trial court granted the Board's motion and dismissed plaintiff's complaint.

¶ 3 On appeal, plaintiff argues the trial court erred in granting the Board's motion to dismiss his complaint for declaratory judgment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In November 2013, plaintiff, a prisoner confined at Dixon Correctional Center, filed a *pro se* complaint for declaratory judgment. Therein, he alleged he had been convicted of

first degree murder in 1974 and sentenced to an indeterminate term of 75 to 150 years in prison. In 1982, plaintiff appeared before the Board for his first parole hearing. The Board denied parole, and plaintiff was then scheduled for another parole hearing in one year. He was denied parole again and scheduled for annual parole hearings thereafter. In 2002, he was denied parole, but his next hearing was scheduled for three years later. See 730 ILCS 5/3-3-5(f) (West 1998). In 2010 and 2013, plaintiff was again denied parole and, after each denial, he was scheduled for another hearing in three years.

¶ 6 Plaintiff's complaint for declaratory judgment consisted of three counts. In count I, plaintiff argued section 3-3-5(c)(2) of the Unified Code of Corrections (Code) (730 ILCS 5/3-3-5(c)(2) (West 2012)) was unconstitutional because it violated the separation-of-powers clause of article II, section 1 of the Illinois Constitution (Ill. Const. 1970, art. II, § 1). Plaintiff claimed section 3-3-5(c)(2) authorizes the Board, an agency of the executive branch, to consider the seriousness of an inmate's offense when making parole decisions, but "[i]t is the legislative branch of Illinois' government that has been properly vested with the constitutional authority to define crime, determine seriousness therefor [*sic*], and ascribe penalties thereto."

¶ 7 In count II, plaintiff asked the trial court to declare section 3-3-5(c)(2) of the Code violated article I, section 11 of the Illinois Constitution (Ill. Const. 1970, art. I, § 11), which provides "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Plaintiff claimed this provision set a limit on the length of time an inmate could be held in prison due to the seriousness of his offense, and his continued incarceration after becoming eligible for parole could not be based upon the seriousness of his crime. Instead, plaintiff claimed if imprisonment were to continue after that time, "justification for it would have to be substantiated by other

reasons, facts or circumstances to his being or not being rehabilitated."

¶ 8 In count III, plaintiff sought a declaration that applying section 3-3-5(f) of the Code (730 ILCS 5/3-3-5(f) (West 2012)), as amended, violated the *ex post facto* clause of the United States Constitution (U.S. Const., art. I, § 10). He claimed that, at the time of his offense, section 3-3-5(f) required annual parole hearings, but that section subsequently was amended to allow the Board to set parole hearings more than one year apart. Plaintiff argued applying the amended version of section 3-3-5(f) to him creates a sufficient risk that his term of imprisonment will increase and would amount to an unconstitutional *ex post facto* violation.

¶ 9 In March 2014, the Board filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-615 (West 2014)). In May 2015, the trial court granted the motion. In doing so, the court found parole is an executive function and "no separation of powers violation arises from the denial of parole based on the seriousness of an inmate's offense." Also, the court found plaintiff's *ex post facto* claim had been rejected by the Illinois Supreme Court, citing *Hill v. Walker*, 241 Ill. 2d 479, 948 N.E.2d 601 (2011). The court dismissed plaintiff's complaint with prejudice. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 A. Standard of Review

¶ 12 In the case *sub judice*, the trial court granted the Board's motion to dismiss under section 2-615 of the Procedure Code. A motion to dismiss under section 2-615 challenges only the legal sufficiency of the complaint. *Schloss v. Jumper*, 2014 IL App (4th) 121086, ¶ 20, 11 N.E.3d 57. In ruling on a section 2-615 motion to dismiss, "the question is 'whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted.' " *Green v. Rogers*,

234 Ill. 2d 478, 491, 917 N.E.2d 450, 458-59 (2009) (quoting *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81, 806 N.E.2d 632, 634 (2004)). The trial court should not grant a motion to dismiss "unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161, 920 N.E.2d 220, 223 (2009). We review a dismissal pursuant to section 2-615 *de novo*. *Beacham v. Walker*, 231 Ill. 2d 51, 57, 896 N.E.2d 327, 331 (2008).

¶ 13 B. Separation of Powers

¶ 14 Plaintiff argues the trial court erred in ruling section 3-3-5(c)(2) of the Code does not violate the separation-of-powers clause of the Illinois Constitution (Ill. Const. 1970, art. II, § 1). We disagree.

¶ 15 The Illinois Constitution provides the legislative, executive, and judicial branches of government are separate and "[n]o branch shall exercise powers properly belonging to another." Ill. Const. 1970, art II, § 1. The purpose of the separation-of-powers "doctrine is to insure that each of the three branches of government retains its own sphere of authority, free from undue encroachment by the other branches." *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 334, 860 N.E.2d 246, 255 (2006).

¶ 16 The legislature has the power to define criminal conduct and determine the nature and extent of criminal sentences. *People v. Lee*, 167 Ill. 2d 140, 144-45, 656 N.E.2d 1065, 1067 (1995). However, "it is within the inherent power of the judiciary to impose sentences in criminal cases within the limits established by legislative act." *People v. Williams*, 66 Ill. 2d 179, 186-87, 361 N.E.2d 1110, 1114 (1977). "The function of the executive department, on the other hand, is to administer the sentence imposed by the court." *People ex rel. Day v. Lewis*, 376 Ill. 509, 514, 34 N.E.2d 712, 714 (1941). The power to grant parole within the statutory limits

established by the legislature is an executive function properly administered by the Board. See *Hill*, 241 Ill. 2d at 486, 948 N.E.2d at 605.

¶ 17 Section 3-3-5(c)(2) of the Code states the Board shall not grant parole if it determines the inmate's "release at that time would deprecate the seriousness of his offense or promote disrespect for the law." 730 ILCS 5/3-3-5(c)(2) (West 2012). Plaintiff argues that by authorizing the Board to consider the seriousness of an inmate's offense when deciding whether to grant parole, section 3-3-5(c)(2) improperly delegates the legislature's power to determine the penalty for a crime to the executive branch. However, the Board's decision to deny parole based on the seriousness of an offender's crime does not increase the penalty for that crime. By requiring the Board to consider the seriousness of an inmate's offense when making parole decisions, section 3-3-5(c)(2) of the Code does not intrude on the legislature's power to determine the appropriate penalty for the offense. Thus, plaintiff failed to demonstrate section 3-3-5(c)(2) violated the separation-of-powers clause.

¶ 18 C. Rehabilitative Potential

¶ 19 Plaintiff argues the trial court erred in failing to declare section 3-3-5(c)(2) violates article I, section 11 of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). We disagree.

¶ 20 Article I, section 11 of the Illinois Constitution states "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. This provision "places two limits on the legislature's ability to prescribe criminal sentences: (1) it prohibits criminal penalties that are 'cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community'; and (2) it prevents offenses with the same elements from having

different sentences." *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 55 (quoting *People v. Sharpe*, 216 Ill. 2d 481, 487, 521, 839 N.E.2d 492, 498, 517 (2005)).

¶ 21 In his complaint for declaratory judgment, plaintiff argued article I, section 11 limited the amount of time he could be incarcerated due to the seriousness of the offense and that once he was eligible for parole, he could only be held in prison for "other reasons, facts or circumstances related to his being or not being rehabilitated." However, courts have held "[t]he Board may properly consider principles of retributive justice and general deterrence in rendering its decisions." *Rivera v. O'Leary*, 191 Ill. App. 3d 367, 368, 547 N.E.2d at 1035 (1989); *Outlaw v. O'Leary*, 161 Ill. App. 3d 218, 221, 514 N.E.2d 208, 210 (1987). Plaintiff failed to demonstrate section 3-3-5(c)(2) was unconstitutional based on article 1, section 11 of the Illinois Constitution.

¶ 22 D. *Ex Post Facto* Clause

¶ 23 Plaintiff argues the trial court erred in ruling section 3-3-5 of the Code, applied retroactively to inmates sentenced to an indeterminate term of imprisonment prior to its enactment, does not violate the *ex post facto* clause of the United States Constitution. We disagree.

¶ 24 Both the federal and Illinois Constitutions prohibit enactment of *ex post facto* laws. U.S. Const., art. I. § 10; Ill. Const. 1970, art. I, § 16.

> "The *ex post facto* clauses of the United States Constitution prohibit retroactive application of a law inflicting greater punishment than the law in effect when a crime was committed. [Citation.] Those constitutional provisions, therefore, restrain legislative bodies from enacting arbitrary or vindictive legislation

> and assure that a statute gives fair warning of its effect. [Citation.] A law is *ex post facto* if it is retroactive and disadvantageous to a defendant. [Citation.] A law is disadvantageous to a defendant if it criminalizes an act innocent when performed, increases the punishment for an offense previously committed, or alters the rules of evidence making a conviction easier." *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 208-09, 909 N.E.2d 783, 800 (2009).

Our supreme court has noted it interprets this state's *ex post facto* provision in step with the United States Supreme Court's pronouncements. *Birkett*, 233 Ill. 2d at 209, 909 N.E.2d at 800.

¶ 25 Section 3-3-5 of the Code provides for the hearing and evaluation of inmates under consideration for parole. 730 ILCS 5/3-3-5 (West 2012). Subsection (f) governs the frequency with which parole hearings must be granted. 730 ILCS 5/3-3-5(f) (West 2012). At the time of plaintiff's offense, the relevant portion of the Code provided that "if [the Board] denies parole it shall provide for a rehearing not more than 12 months from the date of denial." Ill. Rev. Stat. 1973, ch. 38, ¶ 1003-3-5(f). Since that time, section 3-3-5 has been amended several times. Prior to January 1, 2012, the provision stated, in part, as follows:

> "[I]f [the Board] denies parole it shall provide for a rehearing not less frequently than once every year, except that the Board may, after denying parole, schedule a rehearing no later than 3 years from the date of the parole denial, if the Board finds that it is not reasonable to expect that parole would be granted at a hearing prior to the scheduled rehearing date." 730 ILCS 5/3-3-5(f) (West 2010).

In January 2012, the provision was amended to change the three-year maximum to five years. 730 ILCS 5/3-3-5(f) (West 2012).

¶ 26 In his complaint for declaratory judgment, plaintiff argued the Board's 2013 decision to schedule his next parole hearing in three years, in 2016, pursuant to section 3-3-5(f) violated the *ex post facto* prohibition because it created a sufficient risk that his term of imprisonment would be increased. Our supreme court has considered whether the reduced frequency of parole hearings constitutes an *ex post facto* violation. In *Hill*, 241 Ill. 2d at 491, 948 N.E.2d at 607-08, the defendant argued the amendments to section 3-3-5(f) could not constitutionally apply to him and he was entitled to annual parole hearings based on the statute in effect at the time of his offense. The court disagreed, finding "there is no question that section 3-3-5(f) on its face, or in its operation pursuant to its binding regulation (see 20 Ill. Adm. Code 1610.100(a)(2) (2016)), does not create significant risk of increasing [the defendant's] incarceration." *Hill*, 241 Ill. 2d at 494, 948 N.E.2d at 609. Citing its prior decision in *Fletcher v. Williams*, 179 Ill. 2d 225, 236, 688 N.E.2d 635, 641 (1997), the court again concluded section 3-3-5(f) did not violate the *ex post facto* clauses of the United States and Illinois Constitutions. *Hill*, 241 Ill. 2d at 494, 948 N.E.2d at 609.

¶ 27 Here, plaintiff failed to demonstrate section 3-3-5(f) of the Code, as amended, violates the prohibition against *ex post facto* laws when applied to him. Accordingly, we find the trial court did not err in granting the Board's motion to dismiss.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's judgment.

¶ 30 Affirmed.