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DISTRICT IV

October 15, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP522 Harlan Richards v. Kathleen Nagle (L.C. # 2012CV2482)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Harlan Richards appeals a circuit court order that dismissed his action to have WIS. ADMIN. CODE § PAC 1.06(16) (2010) declared void and to enjoin any consideration of that code provision in Richards' future parole determinations. The circuit court dismissed the complaint for failure to state a claim upon which relief could be granted. After reviewing the briefs and

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

Richards' complaint raised six declaratory judgment claims: (1) the addition of new parole criteria in WIS. ADMIN. CODE § PAC 1.06(16) (2010) violates the ex post facto clause; (2) all of WIS. ADMIN. CODE ch. PAC 1 (2010) became void when 2009 Wis. Act 28 was repealed; (3) the "interests of justice" criterion set forth in WIS. ADMIN. CODE § PAC 1.06(16)(h) (2010) is unconstitutionally vague; (4) the repeal of language contained in WIS. ADMIN. CODE § PAC 1.06(7) (1993) deprived Richards of a presumption of release on parole; (5) the application of a new presumption that "life means life" violated Richards' due process right to fair notice; and (6) the enactment of WIS. STAT. § 301.001 abolished punishment as a basis for the denial of parole. Richards renews each of these contentions on appeal and adds an additional argument that, if the allegations in his complaint are not sufficient to state a claim under the declaratory relief statute, we should construe his complaint as stating a civil rights claim under 42 U.S.C. § 1983.

Respondent Kathleen Nagle, Chairperson of the Wisconsin Parole Commission, raises a threshold issue as to whether Richards has standing to pursue any of his claims. We will assume without deciding that Richards does have standing under WIS. STAT. § 227.40 to challenge the validity of an administrative rule that affects him, and we will proceed to address the merits of Richards' claims. Because we are reviewing a dismissal for failure to state a claim, we will assume all facts set forth in the complaint to be true.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Ex Post Facto Clause And Shifting Presumptions

The chapter of the Wisconsin Administrative Code dealing with parole procedures was repealed in its entirety and replaced with a new chapter effective December 1, 2010. The old chapter provided that a recommendation or grant of parole "shall be made only after the inmate" had satisfied each of five criteria—namely, become parole eligible; served sufficient time so as not to unduly depreciate the seriousness of the offense; demonstrated satisfactory adjustment to the institution and program participation; developed an adequate parole plan; and reached a point at which release would not pose an unreasonable risk to the public. WIS. ADMIN. CODE § PAC 1.06(7) (1993). The new chapter provides that a recommendation or grant of release "may be made after consideration of" all of the previous five criteria, plus whether the inmate had refused or neglected to perform assigned duties within the institution, had demonstrated sufficient effort in required programs in one of three specified ways, or was subject to confinement in another state or deportation, and whether release would be in the interest of justice. WIS. ADMIN. CODE § PAC 1.06(16) (2010). Richards first argues that the change in the parole criteria violates the ex post facto clause.

The ex post facto clause bars the enactment of laws or administrative rules that, by retroactive application, would increase the punishment for a crime after its commission. *See* U.S. CONST. Art. I, §10, cl. 1; ***Garner v. Jones***, 529 U.S. 244, 249 (2000). Retroactive changes in the laws or rules governing the parole of prisoners, in some instances, may violate the ex post facto clause. ***Garner***, 529 U.S. at 250. The test is whether retroactive application of a new

parole law or rule creates "a significant risk of prolonging [the inmate's] incarceration."[2] ***Id.*** at 251. If such a significant risk is not evident from the language of the enactment itself, an inmate may present "evidence drawn from the [new law or] rule's practical implementation by the agency charged with exercising discretion" showing that longer sentences are in fact being served under the new law or rule than were being served under the old one. ***Id.*** at 255.

We are not persuaded that the language of the new parole rule at issue here creates any significant risk of prolonging the incarceration of Richards or any other inmate. To begin with, the old rule created a series of necessary, but not sufficient, conditions that needed to be met as a precondition of parole. The new rule directs the commission to consider eight factors, but does not make any of them an absolute prerequisite for parole—meaning that the commission could now choose to grant parole even if one of the criteria listed in the old rule had not been met. Thus, the new rule actually broadens the conditions under which parole could be granted. Furthermore, the additional clauses relating to an inmate's performance of duties in the institution and efforts in required programs are really just a more detailed delineation of considerations that were already inherent in the old, unified criteria of whether the inmate had demonstrated satisfactory adjustment to the institution and program participation. Similarly, the interest of justice standard is a catchall provision that could have been considered inherent in the prior criteria about not depreciating the seriousness of the offense and evaluating the risk to the

[2] The respondent suggests that an inmate may not claim the protection of the ex post facto clause unless he or she has a protected liberty interest at stake. However, she cites no authority for that proposition, and has not addressed the line of cases cited by the appellant that appear to apply the ex post facto clause to changes in parole laws without any mention of liberty interests.

public. As to the new criterion regarding another inmate's potential confinement in another state or deportation, that factor would seemingly weigh in favor of earlier, not later, release on parole.

We note that Richards' fourth and fifth claims—relating to whether there was a presumption in favor of parole when the five criteria under the old rule had been satisfied, whereas there is now a presumption that "life means life"—could be liberally construed as a request to be able to produce evidence showing that the implementation of the new rule has led to an actual increase in sentences. Even under such a construction, however, and even if Richards' complaint were amended to include additional factual assertions he makes in his brief, we are still not convinced that Richards' allegations would be sufficient to state an ex post facto claim upon which relief could be granted.

To support his contention that there has been a shift from a presumption of parole to a "life means life" presumption, Richards cites statistical evidence showing a significant increase over the past two decades in the amount of time that inmates sentenced to life in prison are actually serving before being granted parole. The problem, however, is that Richards links that shift to the enactment of Truth-In-Sentencing (TIS) laws in the late 1990s, not to the enactment of the recently revised rule on parole considerations. As the United States Supreme Court has explained, "discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised." ***Garner***, 529 U.S. at 253. Thus, as insights into the risk of recidivism or other societal concerns may change over time, so too may parole decisions regardless of changes in parole criteria. *See* ***id.*** In sum, an evolution over time, in light of TIS, in the manner in which the parole commission has been exercising its discretion over parole decisions on indeterminate life sentences does not violate the ex post facto clause.

Authority To Promulgate Rule

In 2009, in conjunction with legislation creating or revising a number of programs for prisoners that could affect parole eligibility dates, the Wisconsin legislature amended WIS. STAT. § 15.145(1) to rename what had been known as the parole commission to the earned release review commission. 2009 Wis. Act 28, §§ 34, 2699m-2773 (enacted June 29, 2009). In 2011, in conjunction with repealing many of the provisions in 2009 Wis. Act 28, the legislature changed the commission's name back to the parole commission. 2011 Wis. Act 38, § 3 (eff. Aug. 2, 2011).

Richards' second claim is that, because WIS. ADMIN. CODE ch. PAC 1 (2010) was enacted while various provisions of 2009 Wis. Act 28 were in effect, the new code provision became void when 2009 Wis. Act 28 was repealed. Specifically, Richards argues that, since the "earned release commission" no longer exists, any rules that commission may have promulgated also no longer exist. This contention is flawed in multiple respects.

First, we note that the primary authority to promulgate rules on parole stemmed from WIS. STAT. § 227.11(2), which refers generically to "each agency" and which was not altered in any way by the passage or repeal of 2009 Wis. Act 28. Second, Richards cites no authority for the proposition that simply renaming an administrative agency in any way alters that agency's statutory rule-making authority or affects the validity of rules adopted at any point in time. And third, even if the earned release commission could properly be viewed as no longer existing or not having any authority going forward, it does not follow that any rules promulgated or other actions taken by that commission while it was properly in existence are void.

Vagueness Doctrine

Richards' third claim is that the "interests of justice" criterion set forth in WIS. ADMIN. CODE § PAC 1.06(16)(h) (2010) is unconstitutionally vague. The vagueness doctrine arises from the procedural due process requirements of fair notice and proper standards for adjudication. ***Larson v. Burmaster***, 2006 WI App 142, ¶29, 295 Wis. 2d 333, 720 N.W.2d 134. That doctrine has two components: first, whether a law regulating conduct "'sufficiently warns persons wishing to obey the law that [their] conduct comes near the proscribed area,'" and, second, whether those charged with enforcing such a law may do so "'without creating or applying their own standards.'" ***Id.*** (quoted source and internal quotation marks omitted).

Richards' complaint fails to state a claim with regard to vagueness for two reasons. First, the administrative rule setting out parole criteria is not a law regulating conduct. And second, no procedural due process protections attach to discretionary parole determinations because a prisoner has no liberty interest in obtaining parole unless there is a mandatory release date. *See* ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶¶7-11, 246 Wis. 2d 814, 632 N.W.2d 878.

We further note that, to the extent that Richards' fourth and fifth claims regarding whether he had fair notice of any shift in the presumptions being applied by the parole commission could be construed as raising due process issues rather than ex post facto issues, those claims also fail due to Richards' lack of liberty interest in obtaining discretionary parole.

WIS. STAT. § 301.001

Richards' sixth claim is that the enactment of WIS. STAT. § 301.001 abolished punishment as a basis for parole. This contention lacks any factual basis. Section 301.001 is a general provision that sets forth the public policy goals for WIS. STAT. chs. 302 to 304. The fact that such a broad statement of purpose does not explicitly mention punishment does not mean that the statutes prohibit punishment. To the contrary, it is well established that punishment is a primary consideration in imposing prison sentences. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. That consideration is properly reflected in the parole criteria regarding whether enough time has been served so as to avoid unduly depreciating the seriousness of the offense.

42 U.S.C. § 1983

Finally, because Richards has not stated any valid constitutional basis to challenge WIS. ADMIN. CODE § PAC 1.06(16), it would make no difference whether his claims were placed in the framework of a civil rights action under 42 U.S.C. § 1983 rather than a declaratory judgment action.

IT IS ORDERED that the order dismissing Harlan Richards' declaratory judgment action is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals