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Anselmo v. Bisbee, 133 Nev. Adv. Op. 45 (Jun. 29, 2017)

Marco Luna
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CRIMINAL LAW: DUE PROCESS

Summary

The Nevada Parole Board can deny parole for any reason authorized by regulation or statute. However, inmates do have a statutory right to have a parole hearing under NRS 213.140(1). Therefore, in limited cases where the Nevada Parole Board clearly misapplied its own internal guidelines in assessing whether to grant parole to an inmate, a new parole hearing is warranted.

Background

Appellant, Michael P. Anselmo, was convicted of murder and sentenced to life in prison without the possibility of parole in 1972. He was subsequently convicted for escape on two occasions in 1976 and 1977. Each escape conviction added a consecutive ten years to Anselmo's life sentence. For the next twenty years, however, Anselmo became a model prisoner. So, in 2006, the Pardons Board commuted his sentence to life with the possibility of parole. After this, Anselmo appeared before the Parole Board on three separate occasions between 2006 and 2012. He was denied parole primarily due to the seriousness of his underlying offense.

On November 17, 2014, the parole hearing at issue, the Parole Board gave his Parole Risk Assessment. The Assessment found that Anselmo had a low risk for committing a subsequent offense, but that his original offense (murder) had the highest severity level. These designations directed the board to consider aggravating and mitigating factors to determine whether parole was appropriate.

During the hearing, three members recommended granting parole. However, the remaining four members voted to deny parole because the nature of Anselmo's criminal record was "increasingly more serious" and because of the potential impact on the community. Anselmo filed for reconsideration, which was denied.

Anselmo argued that he is entitled to a new parole hearing because the parole board based their decision on an immutable characteristic, the nature of his original crime. Furthermore, Anselmo argued that the board did not follow their own internal guidelines in his assessment.

Discussion

The Board may deny parole for any reason authorized by statute

Anselmo first argued that the Court should emulate the California Supreme Court's *In re Lawrence* decision.² In *Lawrence*, the California Supreme Court found that the egregiousness of an inmate's original offense can only be a factor if the Parole Board also finds that the inmate poses a current threat to public safety. In other words, when there is no evidence that an inmate poses a threat to public safety, the Board cannot then deny his parole based on the immutable characteristic of his original crime.³ By doing so, the Parole Board denies the inmate's due process and statutory rights.

¹ By Marco Luna

² *In re Lawrence*, 190 P.3d 535 (Cal. 2008).

³ *Id.* at 564.

The Nevada Supreme Court rejected this argument because California statutes regarding Parolees are considerably different than those in Nevada. For example, in California, the Parole Board “must grant parole unless it determines that public safety requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction.”⁴ Based on that specific language, the California Supreme Court found that “California inmates have a due process right in the grant of parole, such that a decision to deny parole is subject to judicial review.”⁵

Conversely, Nevada statutes do not give any due process rights in the grant of parole to Nevada inmates. Therefore, unlike California courts, the Court here will not review the evidence supporting the Parole Board’s decision. This finding was based on NRS 213.1099(2)(c) and 213.10885(2)(a), which state that the Parole Board “shall” consider the seriousness of the underlying offense in determining whether to grant or deny parole.⁶ Therefore, because Nevada law clearly allows a parole denial based on the severity of the crime committed, the Court here could not grant the Writ Mandamus based on statutory grounds.

The Board must follow its internal guidelines

Anselmo also argued that the Board did not follow its own internal guidelines when it noted that the nature of his criminal record was “increasingly more serious.” The Court agreed. Anselmo’s parole denial was based on the aggravating factor: “[n]ature of criminal record is increasingly more serious.”⁷ The Court followed the internal guidelines for the Division of Parole and Probation, which state, “if the person is now serving a sentence of life, or Murder/Sexual Assault, don’t use this as the person has already committed the most serious of crimes.”⁸ Based on this clear language, the Court found that this aggravating factor should not have been applied to Anselmo.

Conclusion

The Court found that even though the Nevada the statutory scheme allows the Parole Board to deny parole for any reason, inmates still had a statutory right to be considered for parole under NRS 213.140(1). So, considering NRS 213.140(1) with the case at bar, where the Board misapplied its own guidelines, the Court found that extraordinary relief is necessary in this instance. Therefore, the Court granted Anselmo’s Writ of Mandamus and instructed the Board to vacate its November 17, 2014 denial of parole and conduct a new parole hearing where NAC 213.518(2)(k) is not applied.

⁴ *Id.* at 547.

⁵ *See In re Rosenkrantz*, 59 P.3d 174, 205 (Cal. 2002).

⁶ NEV. REV. STAT. §§ 213.1099(2)(c), 213.10885(2)(a) (2015).

⁷ NEV. ADMIN. CODE § 213.518(2)(k) (amended 2017).

⁸ *Nevada Parole Guidelines Aggravating and Mitigating Factors Definitions*, http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/Aggravating_and_Mitigating_Factors_Definitions.pdf.