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Coles (Brent) v. Bisbee, 134 Nev. Adv. Op. No. 62. (Aug. 2, 2018)

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CRIMINAL PROCEDURE, CIVIL APPEAL: RISK ASSESSMENT

Summary

The Court held that the use of the Static-99R assessment conforms with the assessment requirements under NRS 213.1214. It additionally determined that modifications to parole procedures do not constitute an ex post facto violation unless the changes create a significant risk of prolonging an inmate’s incarceration.

Background

Appellant Brent A. Coles is currently incarcerated for a sexual offense crime and was eligible for parole. The appellant’s recidivism risk was assessed with the Static-99R risk assessment. The assessment classified him as high risk to recidivate and the Parole Board denied his parole. The appellant filed a petition for declaratory judgment, arguing that: (1) the Static-99R assessment is not a “currently accepted standard of assessment” per NRS 213.1214(1);² (2) the assessment should not be considered because he would be paroled to serve a consecutive sentence, not be paroled into the community; (3) his due process rights were violated because he was not provided a copy of the risk assessment results; (4) changes to the parole statutes after his initial conviction constitute an ex post facto violation; and (5) he should receive a new assessment that includes “dynamic” as well as “static” factors. The State moved to dismiss under NRCP 12(b)(5) for failure to state a claim on which relief could be granted; the district court granted the State’s motion.³ He appealed to this Court, renewing his arguments that the Static-99R does not comply with the requirements of NRS 213.1214(1) and that the changed parole review procedures constitute an ex post facto violation.⁴

Discussion

The Court affirmed the district court’s holding because the appellant’s claims did not support the elements needed for a declaratory judgment. The Court rejected the appellant’s first argument that the Static-99R assessment does not comply with the requirements per NRS 213.1214(1).⁵ The statute requires that the Department of Corrections “asses each prisoner. . . using a currently accepted standard of assessment.”⁶ Since legislative history supports that the Static-99R is an accepted assessment, the Court denied to consider the appellant’s arguments against applying it.⁷

¹ By Tamara Cannella.

² NEV. REV. STAT. § 18.015(1) (2017).

³ NEV. R. CIV. P. 12(b)(5).

⁴ NEV. REV. STAT. § 18.015(1) (2017).

⁵ NEV. REV. STAT. § 18.015(1) (2017).

⁶ NEV. REV. STAT. § 18.015(1) (2017).

⁷ Hearing on S.B. 104 Before the Assembly Judiciary Comgfgfm., 77th Leg. (Nev., April 29, 2013); Hearing on S.B. 104 Before the Senate Judiciary Comm., 77th Leg. (Nev., April 10, 2013).

Retroactive changes in laws regarding parole procedure can violate the Ex Post Facto Clause when they create a significant risk of prolonging an inmate's incarceration.⁸ The appellant failed to show that the changes to the parole statute created a risk of prolonged incarceration. Thus, the Court rejected the appellant's second argument that the changed parole review procedures constitute an ex post facto violation.

The Court also rejected the appellant's last argument that using the Static-99R assessment violated his due process rights because he was not permitted to check the assessment's results for errors and contest them. Nevada's parole statute does not create a liberty interest to sustain a due process claim.⁹ Additionally, NRS 213.1075 provides that information gathered by the Parole Board is privileged.¹⁰ Further, the legislature has foreclosed the right for the appellant to challenge the assessment per NRS 213.1214(3).¹¹

Conclusion

Because the appellant's claims did not provide a basis to grant declaratory relief, the Court held that the district court properly granted the State's motion to dismiss the appellant's petition. The Court therefore affirmed the district court's order.

⁸ *Garner v. Jones*, 529 U.S. 244, 250–51 (2000).

⁹ *Anselmo v. Bisbee*, 133 Nev., Adv. Op. 45, 396 P.3d 848, 850–51.

¹⁰ NEV. REV. STAT. § 213.1075(3) (2017).

¹¹ NEV. REV. STAT. § 213.1214(3) (2017); *see also* NEV. REV. STAT. § 213.10705 (1991) (stating that release on parole “is an act of grace of the state”).