Kentucky Court of Appeals

No. 2020-CA-1495

LANCE CONN, *et al.* — *Appellants*

v.

On Appeal from Franklin Circuit Court,
No. 13-CI-1118

KENTUCKY PAROLE BOARD — *Appellee*

AMICUS BRIEF OF THE COMMONWEALTH OF KENTUCKY

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Certificate of Service

I served a copy of this brief on December 3, 2021 by U.S. mail to Timothy G. Arnold, Andrea Reed, Department of Public Advocacy, 5 Mill Creek Park, Section 101, Frankfort, Kentucky 40601; Angela T. Dunham, Amy V. Barker, Justice & Public Safety Cabinet, 125 Holmes Street, Second Floor, Frankfort, Kentucky 40601; Hon. Phillip Shepherd, Circuit Judge, 222 St. Clair Street, Frankfort, Kentucky 40601. The record on appeal has been returned to the Clerk of the Franklin Circuit Court.

Matthew F. Kuhn

STATEMENT OF POINTS & AUTHORITIES

INTERESTS OF AMICUS AND PURPOSE OF BRIEF

Attorney General Daniel Cameron is the Commonwealth's "chief law officer" and its "chief prosecutor." KRS 15.020(1); KRS 15.700. His job is to "appear for the Commonwealth in all cases in the Supreme Court or Court of Appeals wherein the Commonwealth is interested." KRS 15.020(3). Where, as here, a duly enacted Kentucky statute is at stake, the Commonwealth has an obvious interest. Indeed, "[t]here is no question as to the right of the Attorney General to appear and be heard in a suit brought by someone else in which the constitutionality of a statute is involved." *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974).

This lawsuit challenges the Kentucky Parole Board's authority to order a prisoner serving a life sentence to serve out that sentence. The Commonwealth, through Attorney General Cameron, files this amicus brief to argue that Kentucky law allows the Parole Board to order a serve-out in these circumstances and that such a serve-out is constitutional.

BACKGROUND

In Kentucky, "parole is not a right but a privilege." *Stewart v. Commonwealth*, 153 S.W.3d 789, 793 (Ky. 2005). The Parole Board, with members appointed by the Governor and confirmed by the Senate, decides whether to extend this "privilege" to eligible prisoners. KRS 439.320(1); KRS 439.330(1). Relevant here, there are no prisoners whom the Parole Board *must* parole. Instead, the Parole

Board "*may* release on parole" a prisoner who is "eligible for parole." KRS 439.340(1) (emphasis added); *see also* KRS 439.340(2) ("A parole shall be ordered only for the best interest of society . . . ."). Kentucky's parole regime, in other words, "vests broad discretion in the [Parole] Board." *Belcher v. Ky. Parole Bd.*, 917 S.W.2d 584, 587 (Ky. App. 1996).

For this reason, Kentucky courts take a hands-off approach when considering the Parole Board's decisions. As our Supreme Court put it, the "[d]enial of parole is an administrative function and this Court cannot probe the mind of the [Parole] Board in order to determine the sufficiency of the reasons." *Stewart*, 153 S.W.3d at 791; *see also Bartley v. Wright*, No. 2012-SC-643, 2013 WL 1188060, at *2 (Ky. Mar. 21, 2013) ("This Court has no power to order the executive branch to parole [a prisoner]."). That is not to say the judiciary defers to the Parole Board on all matters. But it is to say that Kentucky courts ask only whether the Parole Board "compli[ed] with the terms of" the applicable statutes. *Stewart*, 153 S.W.3d at 791; KRS 439.330(3).

Kentucky courts' narrow role reflects the notion, grounded in the separation of powers, that granting or denying parole is an "executive function, not a judicial one." *Commonwealth v. Cornelius*, 606 S.W.2d 172, 174 (Ky. App. 1980) (invalidating statute that allowed a sentencing court to grant parole). So "when a person has been convicted of a crime and has begun to serve his sentence the function and authority of the trial court *is finished.* What then happens to the

prisoner is entirely in the bailiwick of the executive branch of government, and is no business of the courts . . . ." *Peck v. Conder*, 540 S.W.2d 10, 12 (Ky. 1976) (emphasis added); *see also Morris v. Commonwealth*, 268 S.W.2d 427, 428 (Ky. 1954) ("The sentencing of persons convicted of crime and the parole of prisoners from confinement are separate and distinct functions of government.").

That brings us to this case. This long-running lawsuit, which dates to 2013, seeks to remake Kentucky's parole system. Relevant here, the Appellants broadly challenge the Parole Board's authority to order a serve-out for those serving a life sentence. [Vol. IV, R. 601–03]. A serve-out is a decision by the Parole Board that it will not consider allowing parole for the rest of a prisoner's sentence. 501 Ky. Admin. Reg. 1:030, § 1(10) (defining a serve-out). Instead, the prisoner must serve out the sentence imposed on him. For example, say a prisoner received a life sentence with the possibility of parole after 25 years. *See* KRS 532.025(3). If, after 25 years, the Parole Board considers the possibility of parole and determines that the prisoner should not be paroled during the rest of his sentence, that decision is a serve-out.

Kentucky law empowers the Parole Board to order serve-outs. The relevant statute states:

> If the parole board does not grant parole to a prisoner, the maximum deferment for a prisoner convicted of a non-violent, non-

> sexual Class C or Class D felony shall be twenty-four (24) months. For all other prisoners who are eligible for parole:
>
> (a) No parole deferment greater than five (5) years shall be ordered unless approved by a majority vote of the full board; and
>
> (b) No deferment shall exceed ten (10) years, *except for life sentences.*

KRS 439.340(14) (emphasis added). So, as relevant here, the Parole Board can "defer" parole consideration for more than 10 years—without limitation—if the prisoner is serving a life sentence. *Id.*; *see also* 501 Ky. Admin. Reg. 1:030, § 3(2)(b) ("Except as provided in KRS 439.340(14) . . . [t]he Board, at the initial or a subsequent review, may order a serve-out on a sentence."). And that is precisely what happens with a serve-out of a life sentence.

The Parole Board has ordered some of Kentucky's worst criminals to serve out their life sentences. For example, Stephanie Spitser, who pleaded guilty to kidnapping and murdering her 10-year-old stepson, was ordered to serve out her life sentence in 2017. *Parole Board Says Clay County Killer Must Serve Out Life Sentence*, Fox56 (Oct. 3, 2017), https://perma.cc/C999-8HEZ. And in 2020, the Parole Board served out the life sentence of Jeffrey Coffey, who killed a teenage couple on their first date. Jeff Neal, *Convicted Murderer Coffey Will Serve Out Life Sentence*, Commonwealth Journal (June 16, 2020), https://perma.cc/HVU4-HGQB. Other prisoners who have received serve-outs of life sentences include George Wade, who participated in the Trinity High School murders in Louisville,

and Clawvern Jacobs, who kidnapped, sexually abused, and beat a woman to death with rocks. Bill Estep, *Dozens of Convicted Murderers to Get a New Chance at Parole in KY After Policy Change*, Lexington Herald Leader (May 18, 2021), https://perma.cc/PVD4-CHTP.

This lawsuit seeks to undo these serve-outs. The Appellants' complaint broadly asks the circuit court to "[r]equire the Parole Board to set parole eligibility dates for all inmates who have been given a serve[-]out on a life sentence." [Vol. IV, R. 614; *see also* Op. Br. at 2 (acknowledging the scope of relief they seek); Vol. III, R. 448]. As a result, if the Appellants receive their desired relief, all the offenders discussed above—and many more—will be considered for parole again. This will require the families and friends of the victims of some of Kentucky's most horrific crimes to again face the possibility that their loved one's killer will be released.[1]

The Franklin Circuit Court rejected the Appellants' claim that the Parole Board lacks the authority to serve out a life sentence. [R. 846–48]. The trial court reasoned that, in *Simmons v. Commonwealth*, 232 S.W.3d 531 (Ky. App. 2007), this

[1] Earlier this year, the Parole Board issued a "directive" that purported to grant a parole hearing to any prisoner who received a serve-out of a life sentence "at the initial parole eligibility hearing." This directive prompted legal action against the Parole Board. *Commonwealth of Ky., ex rel. Cameron v. Ky. Parole Bd.*, 21-CI-440 (Laurel Circuit Court). The Laurel Circuit Court promptly granted a temporary restraining order, after which the Parole Board Chair rescinded the directive. As a result, the directive is no longer in force and does not affect this appeal.

Court "confronted th[e] precise issue" presented here. [Vol. VI, R. 846]. The circuit court read *Simmons* to "clearly provide[] that the Board has the authority to order an inmate to serve out his life sentence." [Vol. VI, R. 847]. The circuit court also rejected the Appellants' argument that *Simmons* is no longer good law. *Simmons*, the circuit court held, "has not been distinguished in any meaningful way, and thus the Board still retains the power to serve out a parole-eligible life sentence." [Vol. VI, R. 848].

After receiving the circuit court's decision, which resolved only one of their claims, the Appellants moved to certify the decision for an immediate appeal. *See* CR 54.02(1). The circuit court granted this motion [Vol. VI, R. 859–61], and this appeal followed.

ARGUMENT

The Appellants argue, first, that the Parole Board lacks the statutory authority to order an offender to serve out a life sentence and, second, that such a serve-out is unconstitutional. [Op. Br. at 9]. The Court should reject both arguments.

Taking each in turn, Kentucky law unambiguously permits the Parole Board to order a prisoner to serve out a life sentence. The relevant statute permits the Parole Board to order a "deferment" of parole consideration that exceeds 10 years if the offender is serving a life sentence. KRS 439.340(14)(b). As written, this statute places no limit on how long the Parole Board can defer parole

consideration for an inmate under a life sentence. The statute therefore leaves the Parole Board with the discretion to establish the length of any such deferment, which of course includes the discretion to order a life sentence to be served out. As this Court has held, for inmates serving a life sentence, "the deferment of their parole eligibility after the initial parole hearing can be greater than ten years, and they can be ordered to serve[]out their sentences."[2] *Hermansen v. Bevin*, No. 2015-CA-1005, 2016 WL 6892580, at *3 (Ky. App. Nov. 23, 2016).

The Appellants acknowledge—correctly—that KRS 439.340(14) "authorizes a longer deferment period for life sentences." [Op. Br. at 15]. But they incorrectly discern some meaning from the fact that the statute does not use the term "serve-out." [*Id.*]. But a serve-out is simply a shorthand to describe what the statute allows: a parole "deferment" for the rest of a life sentence. *See* KRS 439.340(14)(b). In fact, the Appellants fail to point to any statutory provision that limits the Parole Board's discretion when deciding how long to defer parole consideration for an inmate serving a life sentence. Without such a limitation,

[2] The statute that permits serve-outs dates to 2011. 2011 Ky. Acts Ch. 2, § 32(14) (HB 463); *see also Turner v. Ky. Parole Bd.*, No. 2011-CA-1949, 2013 WL 1688372, at *1 n.5 (Ky. App. Apr. 19, 2013). Before that, Kentucky's budget contained an analogous provision. *See Turner*, 2013 WL 1688372, at *1; 2010 Ky. Acts Ch. 1 (Extra.), Part I(H)(5)(c)(5) (HB 1). And before that, "parole deferment was left to the Parole Board's discretion." *Turner*, 2013 WL 1688372, at *3; *see also Simmons*, 232 S.W.3d at 534 (discussing the Parole Board's regulatory framework).

the default rule of discretion by the Parole Board governs. And that discretion includes ordering a serve-out of a life sentence.

The Appellants' constitutional arguments fare no better. In fact, any suggestion that a serve-out is unconstitutional cannot overcome this Court's published decision in *Simmons*. The Appellants concede, as they must, that *Simmons* "approved of" the Parole Board ordering a prisoner to serve out a life sentence. [Op. Br. at 12]. *Simmons*, however, did much more than that. It rejected the precise constitutional arguments that the Appellants now level.

In *Simmons*, the Parole Board "denied parole and ordered [the prisoner] to serve out his life sentence." *Simmons*, 232 S.W.3d at 533. This Court, with then-Judge Nickell writing, held that a serve-out is not an "enhancement of punishment or [an] elongation of [a prisoner's] sentence." *See id.* at 534. Instead, a serve-out "merely [is] a ruling by the Parole Board which is within its sound discretion." *Id.* at 535. As a result, the Court found that "[t]here has been no violation of either the federal or state constitutions *in any respect* in this matter." *Id.* (emphasis added).

Not stopping there, the *Simmons* Court specifically rejected the separation-of-powers challenge that the Appellants press here. [Op. Br. at 9]. Like the Appellants, the inmate in *Simmons* argued that, by ordering a serve-out of a life sentence, the Parole Board "erroneously exercised power belonging" to the General

Assembly. *Simmons*, 232 S.W.3d at 535. The Court easily dispatched of this argument, reasoning that "[i]t is well-recognized in Kentucky that the power to grant parole is purely an executive function." *Id.* (collecting cases).

The Appellants cannot get around *Simmons*. As a published decision of this Court, it is binding here. SCR 1.030(7)(d); *Taylor v. King*, 345 S.W.3d 237, 242 (Ky. App. 2010); *Metcalf v. Commonwealth*, No. 2008-CA-2381, 2009 WL 3151140, at *2–3 (Ky. App. Oct. 2, 2009). It is therefore established law that ordering an inmate to serve out a life sentence does not violate "either the federal or state constitutions in any respect" and, more specifically, is in keeping with Kentucky's separation of powers. *Simmons*, 232 S.W.3d at 535.

The Appellants imply that later case law undermines *Simmons*. [Op. Br. at 9–11]. But *Simmons* remains just as persuasive (and binding) today as the day it was issued. This Court has repeatedly applied *Simmons*. *Hermansen*, 2016 WL 6892580, at *3; *Gerton v. Justice & Public Safety Cabinet*, No. 2009-CA-1712, 2010 WL 2218774, at *2 (Ky. App. June 4, 2010); *Cavender v. Mudd*, No. 2008-CA-1988, 2009 WL 2835173, at *2–3 (Ky. App. Sept. 4, 2009). And *Simmons* is not an outlier in any respect. It built on the Court's earlier conclusion that "the decision as to whether a person serving a sentence of imprisonment should be paroled is an executive function, not a judicial one." *Cornelius*, 606 S.W.2d at 174. And it tracks the Supreme Court's holding that "[p]arole is a privilege and its denial has no constitutional implication." *Stewart*, 153 S.W.3d at 793.

The Appellants' favored case law does not help their cause. They rely on *McClanahan v. Commonwealth* for the proposition that a court cannot impose a sentence above "the lawful range of punishment established by the General Assembly." 308 S.W.3d 694, 698 (Ky. 2010). But that principle has no purchase here. The Parole Board's decision to order a life sentence to be served out does not affect the sentencing range established by the General Assembly. Instead, it respects the General Assembly's prerogative. *Simmons* resolved this very issue. "The imposition of a serve-out," *Simmons* held, "is not punishment. It is merely a ruling by the Parole Board which is within its sound discretion." *Simmons*, 232 S.W.3d at 535; *see also* KRS 439.340(2) ("A parole . . . shall not be considered a reduction of sentence or pardon."). In other words, a serve-out of a life sentence is not an "enhancement of punishment or elongation of a [prisoner's] sentence." *See Simmons*, 232 S.W.3d at 534; *see also Garland v. Commonwealth*, 997 S.W.2d 487, 489 (Ky. App. 1999) (rejecting argument that altering parole eligibility is an "improper enhancement" of a sentence because "the appellant still faces a maximum five-year sentence; no more and no less").

The Appellants also cite *Phon v. Commonwealth* for the notion that "a sentence imposed beyond the limitations of the legislature as statutorily imposed is unlawful and void." 545 S.W.3d 284, 304 (Ky. 2018). But that holding, which the Court described as "narrow," does not apply here. *See id.* Again, ordering a serve-out of a life sentence does not change the punishment authorized by the General

Assembly. *See Simmons*, 232 S.W.3d at 534–35. For those serving a lawfully imposed life sentence, the General Assembly has of course authorized that sentence. That the Parole Board has exercised its administrative function to deny parole does not impose a sentence beyond that allowed by the General Assembly—it is still a life sentence, which is exactly what the General Assembly authorized. "What then happens to the prisoner [after the trial court imposes a sentence] is entirely in the bailiwick of the executive branch of government . . . ." *Peck*, 540 S.W.2d at 12.

The Appellants attempt to invoke *Florida v. Graham* for its discussion of the unique nature of a sentence of life without the possibility of parole. 560 U.S. 48, 69–70 (2010). But none of the Appellants received that sentence. [Op. Br. at 1]. If they were under such a sentence, they would not be parties here, for there would be no role for the Parole Board. *Cf.* KRS 439.340(1) (allowing the Parole Board to act when an inmate is "eligible for parole").

In the same vein, the Appellants urge that a serve-out of a life sentence effectively constitutes a sentence of life imprisonment without the possibility of parole. [Op. Br. at 13–15]. But the Appellants received life sentences with only the *possibility* of parole. The Parole Board accorded them that possibility but ultimately exercised its discretion to deny parole. That denial does not transform the

Appellants' sentences into life without the possibility of parole. Their life sentences remain just that. *See Simmons*, 232 S.W.3d at 534–35; *Garland*, 997 S.W.2d at 489.

* * *

This appeal is simple. Kentucky law allows the Parole Board to order a serve-out of a life sentence, and *Simmons* rejected any argument that such a serve-out is unconstitutional.

CONCLUSION

The circuit court's judgment should be affirmed.

Respectfully submitted by,

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