STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

MARK EDWARD MITCHELL,
Plaintiff/Petitioner,

vs

File No. 93-11309-AA
HON. PHILIP E. RODGERS, JR.

MICHIGAN PAROLE BOARD,
Defendant/Respondent.

Plaintiff in Pro Per

Judith I. Blinn (P26678)
Attorney for Defendant

DECISION AND ORDER

Petitioner filed an Application for Leave to Appeal Decision of the Michigan Parole Board's Denial of Parole on July 15, 1993. Respondent filed a Motion to Dismiss or Affirm. This Court issued a Pre-Hearing Order on August 23, 1993. Petitioner filed a Request for Enlargement of Response Time requesting 30 additional days to respond to the motion to dismiss or affirm. This Court granted the 30 day extension to commence at the date of the Order filed on September 1, 1993. Petitioner untimely filed his Response to the motion to dismiss or affirm on October 12, 1993._ This Court has reviewed the Application for Leave to Appeal, the Motion to Dismiss or Affirm, briefs filed by the parties, and the court file.

There are two procedural impediments to this Court reading the substantive issue raised by Petitioner. First, venue is not proper in Grand Traverse County.

[A] petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county. MCL 24.303; MSA 3.506(203)

Petitioner is confined in the Hiawatha Temporary Facility located in Kincheloe, in Chippewa County, in the Upper Peninsula of Michigan. It is the opinion of this Court that, because Petitioner resides in Chippewa County, this matter is within the jurisdiction of the 50th Circuit Court of Chippewa County, Michigan.

Second, the application was not timely filed. The application was filed in mid-July, 1993, more than four months after the Parole Board denied Petitioner parole on March 2, 1993. Citing MCR 7.103(B)(1), Respondent argues, inter alia, that the application for leave to appeal is untimely. The pertinent subsections of MCR 7.103(B) state, as follows:

(1) Except when another time is prescribed by statute, an application for leave to appeal must be filed within 21 days after the entry of the judgment or order appealed from.

and

(6) An application under subrule (A)(2) or an application that is not timely under subrule (B)(1), must be accompanied by an affidavit explaining the delay. The circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application.

In this case, this Court finds no specific statutory guidance regarding a time limit on applications for leave to appeal made pursuant to MCL 791.234(5); MSA 28.2304(5). It is the opinion of this Court that the requirements of MCR 7.103 must be satisfied. Krohn v City of Saginaw, 175 Mich App 193, 196; 437 NW2d 260 (1988).1

Petitioner, in his responsive brief, objects to the requirement that an appeal be made within 21 days of the administrative decision. Petitioner made the following statements and query relative to the time limits for the application to

Footnote l: In Krohn, the Court of Appeals reviewed an appeal from the zoning board of appeals to circuit court. The Krohn Court addressed the determination of time frame with the following remarks, "that statute provides no time frame for the taking of an appeal to the circuit court. Since no time frame is established by statute, the court rules which are generally applicable to such matters are to be applied". (Citation omitted.) Krohn v City of Saginaw, supra at p 196.

appeal:

It should be noted that requiring a prisoner to file an appeal within twenty-one (21) days of the decision of the Parole Board is an impossibility, one prisoner from this facility saw the parole board on July 28, 1993, a decision was reached on July 30, 1993 and the prisoner was not notified [until] September 2, 1993. This is not an exception but rather the rule. So in the example if the prisoner had been denied parole, was he required to appeal before he was notified?

Obviously, there is an inference in the foregoing statement that Petitioner/prisoner may not have been promptly notified of the Parole Board's denial of parole. This Court acknowledges that Petitioner would not have sought leave to appeal until he was notified that his request for parole was denied. Yet, Petitioner did not file an affidavit to explain the delay as required by MCR 7.103(B)(6). Petitioner~s application for leave to appeal was untimely filed. Without more information, this Court is bound by the timelines set forth in the Court rules. The application is dismissed without prejudice and Petitioner may seek leave to appeal in the county of his residence.

Petitioner's substantive complaint is that the Parole Board abused its discretion when it denied Petitioner parole on March 2, 1993. While this Court will not rule on the substantive issues, it will offer the following discussion to guide the parties should leave to appeal be sought in Chippewa County. The Court of Appeals in King v Calumet & Hecla Corp, 43 Mich App 319; 204 NW2d 286 (1972), set forth the applicable_standard of review, as follows:

The proper standard of judicial review to be employed when reviewing an administrative board decision is whether the decision is supported by competent, material, and substantial evidence on the whole record. Williams v Lakeland Convalescent Center, Inc., 4 Mich App 477 (1966); Villella v Employment Security Commission, 16 Mich App 187 (1969); Diepenhorst v General Electric Co, 29 Mich App 651 91971); Const 1963, art 6, Section 28; MCLA 421. 38: MSA 17.540.

King, supra at p 326.

Both parties rely on Marrs v Board of Medicine, 422 Mich 688, 693-694; 365 NW2d 321 (1985) and Spalding v Spalding, 355 Mich 382, 384-385; 94 NW2d 810 (1959) for the standard of review of an

allegation of abuse of discretion. In Marrs, the Supreme Court reviewed a civil matter in which the respondent was an administrative agency. In the instant matter, Petitioner seeks leave to appeal an administrative decision in a criminal matter.

In evaluating the applicability of Marrs, this Court finds the following remarks helpful in structuring its response to Petitioner's application:

The Administrative Procedure Act, MCL 24.201 et seq; MSA 3.506(101) et seq, governs the proceedings. Section 106 provides, concerning review of an agency decision:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and. material error of law.
>
> (2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings. [MCL 24.306;MSA 3.506(206). Emphasis added.]

Marrs, supra at pp 693-694. 2

Footnote 2: This Court finds the Supreme Court's opinion in People v Talley, 410 Mich 378, 386-387; 301 NW2d 809 (1981), more instructive as it applies to the instant application for review than the Spalding v Spalding standard (which relates to civil matters). In Talley, the state's highest court commented at length on the current applicable standard of review for criminal matters. Justice Levin wrote a concurring opinion commenting on the Spalding decision and advocating a "more balanced view of judicial discretion":

Petitioner argues that Respondent was obligated to utilize guidelines in making a parole decision and that those guidelines suggested parole would likely be granted. Petitioner garnered a Parole guideline Score of +10 .3 Respondent's Summary for Parole Guideline Case Short Termer shows that a score equal to or greater than +4 yields a high probability of parole. The Michigan statute

Spalding’s hyperbolic statement leaves the impression that a judge will be reversed only if it can be found that he acted egregiously--the result evidencing "perversity of will", the "defiance [of judgment]", "passion or bias". To repeatedly invoke this overstatement leads lawyers and judges to believe that a discretionary decision is virtually immune from review and leads appellate courts to view any challenge to such a decision as essentially unfounded. Repetition of this statement is simplistic and misleading, and should not be indulged in by this Court or any other.

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A more restrained statement, speaking merely of the exercise of will, logic an reason, would have said all that needed to be said. Unfortunately, in the endeavor to send an unmistakably clear message, the Court raised the standard of review to an apparently insurmountable height.

A more balanced view of judicial discretion was presented in Langes v Green, where Justice Sutherland said:

The term "discretion" denotes the absence of a hard and fast rule. * * *When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

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Thus when a question of abuse of discretion 1S properly framed, it is incumbent upon a reviewing court to engage in an in-depth analysis of the record on appeal. (Emphasis added.)
Talley, supra, p 396-399.

Footnote 3: The parole guideline score sheets which are prepared in advance of the parole hearing take into account, among other factors, the instant offense, prior criminal record, institutional conduct, statistical risk, age and mental status.

which provides for guideline departure reads, as follows:

The parole board may depart from the parole guideline by denying parole to a prisoner who has a high probability of parole as determined under the parole guidelines or by granting parole to a prisoner who has a low probability of parole as determined under the parole guidelines. A departure under this subsection shall be for substantial and compelling reasons stated in writing. The parole board shall not use a prisoner's gender, race ethnicity, alienage, national origin, or religion to depart from the recommended parole guideline.

MCL 791.233e(6); MSA 28.2303e.(6).(Emphasis added.)

On the Notice of Action/Parole Board, the reasons for continuance are simply the following four tersely-worded phrases: criminal history, nature of crime, substance abuse history and insufficient progress. This Court does not believe that such an abbreviated rationale satisfies the statutory requirement that substantial and compelling reasons for denial be stated in writing.

Had this Court reached the substantive issue, it would have remanded this matter to the Michigan Department of Corrections Parole Board and required that the Board make written findings that comport with the statutory mandate to explain the "substantial and compelling reasons" why its members departed from the guidelines and denied parole to the Petitioner in March, 1993. Also, this Court-would have required that the Parole Board make "specific recommendations for corrective action the prisoner may take to facilitate release." MCL 791.235(12); MSA 28.2305(12).

However, for the reasons discussed -above, Petitioner' application for leave to appeal is denied without prejudice.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge
Dated: 1/12/94