IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK SCOTT MCKINNEY,
Petitioner,
vs.
DAVID SMITH, IN HIS OFFICIAL CAPACITY AS EXECUTIVE SECRETARY OF THE NEVADA BOARD OF PARDONS,
Respondent.

No. 53952

FILED

OCT 06 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING PETITION

This is an original petition for a writ of mandamus or habeas corpus or review.

In 1988, petitioner Mark Scott McKinney was convicted of armed robbery and possession of a stolen vehicle and sentenced to 180 years in prison. McKinney's codefendant, who was sentenced to serve a similar term of imprisonment, was granted a commutation and made immediately eligible for parole after serving 17 years. Five years after his codefendant's sentences were commuted, McKinney applied to the Board of Pardons (the Board) to have his sentences commuted and become immediately eligible for parole.

The Board heard McKinney's application for commutation of his sentence at a hearing on October 28, 2008. At this hearing, only seven of the nine members of the Board were present. The Board consists of nine members, comprised of the Governor, Attorney General, and the Justices of the Supreme Court pursuant to Nevada Constitution Article 5, § 14(1). In order to commute punishments, the Governor, the Attorney General, and the Justices of the Supreme Court, or a major part of them, must vote to grant clemency. The Governor must cast an affirmative vote

in order for the Board to grant clemency. After presentations were made, a motion was made to commute McKinney's remaining sentences to run concurrently. The motion was seconded and a vote taken. Four of the seven present Board members, including the Governor, voted in favor of the motion. However, because the total number of votes was not a majority of the Board as a whole, the Executive Secretary of the Nevada Board of Pardons, respondent David Smith, announced that the motion had failed.

In his petition, McKinney argues that he is entitled to relief because a majority of the Board present at his hearing voted in favor of commuting his sentences. McKinney argues that a writ of mandamus is the appropriate legal vessel in this case because the power to alleviate his sentence rests entirely with the executive branch. McKinney further argues that mandamus relief is warranted here because he has no right to appeal from the decision of the Board, since actions of the Board are discretionary. However, McKinney asks this court that if it does not believe that a writ of mandamus is appropriate here to treat his petition as either a writ of habeas corpus or a petition for a writ of review. We conclude that McKinney has not utilized the correct procedural avenue for us to grant him the relief sought.

"[We] may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously." Redeker v. Dist. Ct., 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); NRS 34.160. "The writ does not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law." Redeker, 122 Nev. at 167, 127 P.3d at 522; NRS 34.170.

Because McKinney did not utilize the correct procedural path, we decline to exercise our discretion to consider whether Nevada Constitution Article 5, § 14 mandates that Board action regarding a commutation of a sentence requires a majority vote of those members present or a majority vote of seated members,. Specifically, we conclude that McKinney has adequate remedies at law to seek redress of the board's decision.

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979). As such, McKinney has an adequate remedy at law by submitting an application to the Board. Furthermore, "commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464 (1981).

In light of the foregoing, we

ORDER this petition DISMISSED.

_____, C.J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Richard F. Cornell
Attorney General/Carson City

PICKERING, J., with whom HARDESTY, J., agrees, concurring and dissenting:

I believe Mr. McKinney has presented a proper petition for writ relief that the court should decide on its merits, not reject on procedural grounds. He maintains that a constitutionally sufficient majority of the Pardons Board voted to commute his sentence, making him immediately eligible for parole, yet that the Board's Executive Secretary refuses to recognize the vote or process his commutation paperwork. As a result, McKinney remains in prison, serving his original, uncommuted 180-year sentence. If he is correct on the law—that the Nevada Constitution requires only a quorum majority, not an absolute majority, for the Pardons Board to act—this would be a classic case for granting extraordinary writ relief. See NRS 34.160 (providing that a writ of mandamus may be issued by "the Supreme Court . . . to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station"); NRS 34.170 ("This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.").

A simple example illustrates the point. Assume exactly the same facts as Mr. McKinney's petition presents but that at the October 2008 Pardons Board meeting, five of the seven members present (including the Governor, whose "yes" vote is always required, Nev. Const. art. 5, § 14(1)) had voted in his favor, instead of four of seven (again, including the Governor). At that point, Mr. McKinney would have had not just a quorum majority (four of the seven Board members present) but also an absolute majority (five of the nine-member Pardons Board, which consists of "[t]he governor, [the seven] justices of the supreme court, and

[the] attorney general," id.). If the Secretary of the Pardons Board had refused to record and process Mr. McKinney's commutation in that circumstance, surely writ relief would lie. The Secretary of the Pardons Board would be refusing to perform a ministerial act that the law—in this case, the Nevada Constitution—requires him to perform. The discretionary act—the Board members' vote to grant or deny commutation—would have occurred; all the court would be ordering is for the Board's Executive Secretary to carry its decision into effect. Cf. Falcke v. Douglas County, 116 Nev. 583, 3 P.3d 661 (2000) (granting mandamus to compel a master plan amendment that passed on a simple majority vote; although the act of granting a master plan amendment is discretionary, the discretion lies in whether and how the members choose to vote, not in the legal question of whether, the vote having occurred, a measure required a simple or super-majority vote to pass). And though the majority suggests that a new application to the current Pardons Board for commutation is an adequate alternative remedy, that option, while it might moot this dispute, does not vindicate the denial of right to have the 2008 commutation, if valid, recognized and processed accordingly.

The Pardons Board members have voted, leaving them nothing more to do. No discretion or political question remains. The uncertainty lies with the Secretary's obligation under the law: Does Article 5, section 14 of the Nevada Constitution provide for a pardon or commutation of sentence on a majority vote of the Pardons Board members who attend a meeting? Or does the "major part of them," id., require an absolute majority of all members of the Pardons Board, whether present at the meeting or not, for the Board to act?

Article 6, section 4 of the Nevada Constitution grants this court original jurisdiction to issue a writ of mandamus in a proper case. State of Nevada v. McCullough, 3 Nev. 202, 214-15 (1867). This jurisdiction has been appropriately, if rarely, exercised in other analogous settings, where an injury is imminent and no right of direct appeal or other review exists. Cheung v. Dist. Ct., 121 Nev. 867, 124 P.3d 550 (2005); cf. Marbury v. Madison, 5 U.S. 137 (1803) (recognizing that mandamus could appropriately compel the Secretary of State to deliver a commission the President had signed, since the appointment decision had been made, making the commission's delivery a ministerial act, but holding that the United States Constitution did not grant original jurisdiction to the United States Supreme Court in this setting); Ex Parte Janes, 1 Nev. 319 (1865) (invalidating, in the context of an original proceeding for a writ of habeas corpus, a pardon granted by the governor alone, as opposed to a majority of the pardons board).

For these reasons, I would reach the question raised by Mr. McKinney's petition on the merits. This said, I am unconvinced by his argument respecting the proper construction of Article 5, section 14(1) of the Nevada Constitution. It provides that "[t]he governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one, may . . . commute punishments . . . and grant pardons . . . ." (Emphasis added.) This provision, as written, refers to an absolute majority of the Board's enumerated membership; nothing suggests empowering a quorum majority to act. This makes sense, given that commutations and pardons are matters of grace, not entitlement.

While I respectfully dissent from my colleagues' decision not to reach the merits of the petition, therefore, I concur in the end result.

Pickering, J.

I concur:

Hardesty, J.