IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL DESHAWN TELLIS,
Appellant,
vs.
THE STATE OF NEVADA BOARD OF PAROLE COMMISSIONERS,
Respondent.

No. 81576-COA

FILED

JUL 23 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Michael Deshawn Tellis appeals from a district court order denying a petition for a writ of mandamus. First Judicial District Court, Carson City; James E. Wilson, Judge.

Tellis, an inmate who is serving consecutive fixed-term sentences for attempted murder and bribery or intimidation of a witness, filed a petition for a writ of mandamus before the district court against respondent the State of Nevada Board of Parole Commissioners (Board), challenging the Board's order denying him parole with respect to his attempted murder sentence and its decision not to schedule a rehearing within three years of the denial. The resulting dispute between the parties concerned whether the Board's actions were inconsistent with relevant statutes and its own internal guidelines. The district court determined that they were not and denied Tellis's writ petition. This appeal followed.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS

34.160, *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). This court generally reviews the district court's denial of a petition for a writ of mandamus for an abuse of discretion, but when the petition raises questions of law, such as those involving statutory interpretation, we review the district court's resolution of those questions de novo. *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 399, 399 P.3d 352, 354 (2017). This court will not review challenges to the evidence supporting the Board's decisions, but will consider whether the Board has properly complied with the applicable statutes, regulations, and guidelines. *See Anselmo v. Bisbee*, 133 Nev. 317, 320, 323, 396 P.3d 848, 851, 853 (2017) (explaining that Nevada's appellate courts generally will not review the evidence supporting the Board's parole decisions, that inmates nevertheless have a statutory right to be considered for parole, and that the Board infringes this right when it misapplies its internal guidelines when assessing whether to grant parole).

On appeal, Tellis first challenges the assessment of his risk of recidivism that the Board prepared in connection with its evaluation of his eligibility for parole. In particular, Tellis contends that the Nevada Department of Corrections (NDOC) prepared a risk assessment for the Board's consideration, which constituted a final determination, and that the Board improperly revised that assessment by adding two points against Tellis based on his employment status prior to his attempted murder offense. Initially, although Tellis directs this court's attention to NRS 213.131(1)(c) in an effort to demonstrate that NDOC's risk assessment constituted a final determination that was binding on the Board or that it otherwise had exclusive authority to assess his risk of recidivism, his effort

is unavailing since that statute only requires NDOC to, as relevant here, compile and provide data to the Board that will assist the Board in determining whether to grant parole. Moreover, the Board's regulations, which were adopted pursuant to its rulemaking authority, specifically require it to assess a prisoner's risk of recidivism, which is what it did here. *See, e.g.*, NRS 213.110(1) (setting forth the Board's rulemaking authority with respect to parole eligibility); *see also* NAC 213.514 (requiring the Board to conduct an objective assessment of a prisoner's risk of recidivism and to assign the prisoner a risk level based on that assessment).

To the extent Tellis nevertheless argues that the Board misapplied its guidelines by assessing two points against him based on his pre-offense employment status, his argument likewise fails. In particular, the record reflects that the Board only assessed one point against Tellis based on his pre-offense employment status, which was appropriate pursuant to the relevant Board guideline, because his presentence investigation (PSI) report indicates that he was not employed full-time for the twelve months preceding the offense even though he worked as a floor sweeper during that period.[1] *See Nevada Parole Recidivism Risk & Crime Severity Guidelines*, http://parole.nv.gov/uploadedfiles/parolenvgov/content/information/paroleriskassessmentvalues.pdf (last visited July 19, 2021) (requiring the Board to assess one point against an offender who was

[1]To the extent that Tellis disputes whether his PSI accurately reports his pre-conviction employment status, he has failed to demonstrate a basis for relief, as we cannot consider challenges to the evidence supporting the Board's decision. *See Anselmo*, 133 Nev. at 320, 396 P.3d at 851.

employed less than full-time or full-time for less than one year immediately prior to the offense at issue). Thus, given the foregoing, Tellis has not demonstrated that the Board's assessment of his risk of recidivism was inconsistent with the relevant statutes or its internal guidelines, and relief is therefore unwarranted in this regard. *See Anselmo*, 133 Nev. at 320, 396 P.3d at 851.

Tellis next argues that the Board misapplied its internal guidelines by concluding that he had an increasingly serious criminal record that counted as an aggravating factor against him. *See* NAC 213.518(2)(k) (explaining that the Board may consider whether any aggravating factors weigh against granting parole, including "[w]hether the prisoner has committed increasingly serious crimes"). For support, Tellis cites *Anselmo*, where the supreme court determined that this factor could not be applied against an inmate who is serving a life sentence for murder based on the version of the relevant Board guideline that was in effect at the time. 133 Nev. at 322-23, 396 P.3d at 852-53.

But although the version of the Board guideline quoted in *Anselmo* specifically indicated that this factor does not apply when an inmate is serving a life sentence for murder, *id.* at 321-22, 396 P.3d at 852, the Board modified the guideline by removing that exception in 2016 before Tellis's August 2019 hearing. *See Nevada Parole Guidelines Aggravating and Mitigating Factors Definitions*, http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/Aggravating_and_Mitigating_Factors_Definitions-1-2018.pdf (last visited July 19, 2021). Indeed, the guideline now simply states that NAC 213.518(2)(k) applies if the inmate's criminal conduct has escalated to include violence toward victims. *Id.* And because

Tellis's criminal conduct has escalated in this way as shown by his PSI, the Board's application of NAC 213.518(2)(k) against Tellis was consistent with its internal guideline, and Tellis therefore failed to demonstrate that the district court abused its discretion by denying his writ petition to the extent that it challenged the Board's decision to deny him parole.[2] *See Anselmo*, 133 Nev. at 322-23, 396 P.3d at 852-53; *see also City of Sparks*, 133 Nev. at 399, 399 P.3d at 354.

Tellis next argues that he was entitled to a hearing within three years of the hearing that gave rise to this appeal and that the Board improperly failed to schedule him for any hearing when it denied him parole. NRS 213.142(1) provides that, "[u]pon denying the parole of a prisoner, the Board shall schedule a rehearing." The Board has discretion to determine when to hold the hearing, although the elapsed time between hearings generally must not exceed three years. NRS 213.142(1). The interval between hearings may be up to five years, however, when an

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[2]Insofar as Tellis argues in his reply brief that the applicable version of the Board's guideline is the pre-amendment version because it was the version that was in effect at the time of his attempted murder conviction and that application of the post-amendment version of the guideline constituted an ex post facto violation, his argument fails. Indeed, NRS 213.10885(6) authorizes the Board to amend its parole guidelines if they are determined to be ineffective, and specifically directs the Board not to apply an ineffective guideline in assessing an inmate's eligibility for parole. Moreover, the Board's internal guidelines are not laws for ex post facto purposes. *See Vermouth v. Corrothers*, 827 F.2d 599, 602, 604 (9th Cir. 1987) (recognizing that federal parole guidelines are not laws for ex post facto purposes and that a prisoner has no basis to expect parole guidelines to remain constant).

inmate has more than 10 years left to serve on the sentence for which the inmate seeks parole, not including any credits that may be allowed against the inmate's sentence. NRS 213.142(2).

Here, Tellis had more than ten years left to serve on his attempted murder sentence at the time of his August 2019 parole hearing, not including any credits that could be allowed against his sentence, and the permissible interval between the hearing and any rehearing was therefore five years, rather than three years. *See* NRS 213.142(2). The Board, however, did not schedule a rehearing within the permissible five-year interval, as it instead denied Tellis "further consideration of parole . . . to sentence discharge." Put another way, the Board essentially determined that it did not need to schedule a rehearing because Tellis's attempted murder sentence was projected to expire within less than five years after his August 2019 parole hearing based on the credits available to him at the time of the hearing.

But the fact that Tellis's sentence is projected to expire within the permissible five-year interval does not necessarily mean that the sentence will expire within that period[3] or that the Board could simply decline to schedule a rehearing as it did here. Indeed, while NRS 213.142

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[3]The possibility remains that Tellis will not complete his attempted murder sentence before the permissible five-year interval between parole hearings expires, as he may not earn the maximum number of credits available to him, *see* NRS 209.4465 (setting forth categories of credits available to inmates convicted after July 17, 1997), and the credits he has earned could be subject to forfeiture if certain circumstances occur. *See* NRS 209.451 (setting forth circumstances in which an inmate's credits may be forfeited).

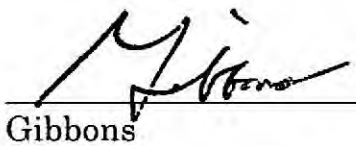
vests the Board with discretion to determine the date on which to hold a rehearing within the relevant three or five-year period, the statute specifically provides that "[u]pon denying the parole of a prisoner, the Board *shall* schedule a rehearing." (Emphasis added.) And the Nevada Supreme Court has long recognized that "'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) (internal quotation marks omitted).

Given NRS 213.142(1)'s language, this court directed the Board to file an answering brief to address whether it improperly failed to schedule a rehearing after denying Tellis parole. Although the Board asserts in its answering brief that no hearing was required since Tellis's sentence was projected to expire within the permissible five-year interval between parole hearings, it makes no attempt to address the impact or proper construction of the term "shall" for purposes of the NRS 213.142(1). Thus, it has waived any argument on this point. Given the Board's failure to address this language, *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived), we apply NRS 213.142(1)'s plain language and conclude that the Board was required to schedule a rehearing upon denying Tellis parole in August 2019, even if only tentatively pending the possible expiration of his attempted murder sentence. *See Pasillas*, 127 Nev. at 467, 255 P.3d at 1285; *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006) ("When a statute is clear on its face, we will not look beyond the statute's plain language."). To the extent the

district court reached a contrary conclusion when it denied Tellis's writ petition, it erred. *See City of Sparks*, 133 Nev. at 399, 399 P.3d at 354.

Thus, given the foregoing, we affirm the district court's order denying Tellis's writ petition insofar as the petition challenged the Board's decision to deny him parole. But to the extent the petition challenged the Board's failure to schedule a rehearing, we reverse the district court's order denying the petition, and remand for the court to issue an order directing the Board to schedule a rehearing within five years of Tellis's August 2019 parole hearing.

It is so ORDERED.[4]



_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. James E. Wilson, District Judge
Michael Deshawn Tellis
Attorney General/Carson City
Attorney General/Dep't of Public Safety/Carson City
Carson City Clerk

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[4]Having considered Tellis's remaining arguments, we conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.