

**IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE**

<p>FILED Nov. 29, 1995 Cecil Crowson, Jr. Appellate Court Clerk</p>

STEVEN TOTTY,)
)
Plaintiff/Appellant,)
)
VS.)
)
THE TENNESSEE DEPARTMENT)
OF CORRECTION and THE)
STATE OF TENNESSEE,)
)
Defendants/Appellees.)

Davidson Circuit
No. 94C-2192

Appeal No.
01-A-01-9504-CV-00139

APPEAL FROM THE CIRCUIT COURT FOR DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE WALTER C. KURTZ, JUDGE

For the Plaintiff/Appellant:

Steven Totty, Pro Se

For the Defendants/Appellees:

Charles W. Burson
Attorney General and Reporter

Merrilyn Feirman
Assistant Attorney General

AFFIRMED AND REMANDED

WILLIAM C. KOCH, JR., JUDGE

OPINION

This appeal involves a state prisoner's efforts to enforce a plea bargain agreement. The prisoner filed a petition for a common-law writ of certiorari in the Circuit Court for Davidson County after the Department of Correction refused to release him in accordance with his understanding of the agreement. The trial court granted the department's motion to dismiss for lack of subject matter jurisdiction, and the prisoner has appealed. We affirm the dismissal of the petition because it fails to state a claim upon which relief pursuant to a common-law writ of certiorari can be granted.¹

I.

Steven Totty entered into a plea bargain agreement with the District Attorney General for Gibson County in February 1991. In return for Mr. Totty's agreement to plead guilty to the charge of aggravated rape and to accept a fifteen-year sentence, the district attorney general allegedly agreed that Mr. Totty would be released from prison after serving four and one-half years or thirty percent of his sentence.² The criminal court approved the agreement and sentenced Mr. Totty to serve fifteen years for aggravated rape.

Mr. Totty was incarcerated at the Lake County Regional Correctional Facility in Tiptonville. After serving four and one-half years of his sentence, he requested the Department of Correction to release him in accordance with his understanding of the 1991 plea bargain agreement. The department refused, and Mr. Totty filed a petition for a common-law writ of certiorari in the Circuit Court

¹This court may affirm a decision based on principles different from those relied on by the trial court. *Continental Casualty Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986); *Dudley v. Unisys Corp.*, 852 S.W.2d 435, 439 (Tenn. Ct. App. 1992). Tenn. R. App. P. 13(b) and 36(a) permit us to base our decision on the controlling legal principles even though they have not been cited or relied upon by either party. *Nance v. Westside Hosp.*, 750 S.W.2d 740, 744 (Tenn. 1988); *City of Memphis v. IBEW, Local 1288*, 545 S.W.2d 98, 100 (Tenn. 1976).

²The department's characterization of the agreement is that Mr. Totty would be "eligible for parole after serving only thirty percent (30%) of his sentence" [emphasis added]. Neither the plea bargain agreement nor the order of conviction and sentence are in the appellate record. Accordingly, the department's characterization of the agreement is not supported by the record. Since we must take the allegations in Mr. Totty's petition as true for the purposes of this appeal, we must accept his version of the terms of the agreement.

for Davidson County, alleging that the department was acting illegally by refusing to honor the plea bargain agreement. The department filed a motion to dismiss on the ground that the trial court did not have jurisdiction over Mr. Totty's petition. Mr. Totty did not file a timely response to the department's motion, and the trial court dismissed Mr. Totty's petition for lack of subject matter jurisdiction.³

II.

The department's motion to dismiss contains two errors that have unnecessarily complicated and prolonged this litigation. The first error is the motion's mistaken reference to "Rule 12.02 of the Tennessee Rules of Criminal Procedure." There is, of course, no such rule, but it is obvious that the department's lawyer meant to rely on Tenn. R. Civ. P. 12.02(1).⁴ The sloppy drafting is not fatal to the trial court's decision since we construe motions in light of their substance, not their form. *Bemis Co. v. Hines*, 585 S.W.2d 574, 576 (Tenn. 1979); *Usrey v. Lewis*, 553 S.W.2d 612, 614 (Tenn. Ct. App. 1977).

The second error involves the department's insistence that the trial court did not have subject matter jurisdiction to consider Mr. Totty's petition for a common-law writ of certiorari. Subject matter jurisdiction involves a court's lawful authority to adjudicate a particular controversy, *Turpin v. Conner Bros. Excavating Co.*, 761 S.W.2d 296, 297 (Tenn. 1988), and hinges upon the nature of the cause of action and the relief sought. *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994). We recently pointed out in a similar case that the circuit and chancery courts clearly have subject matter jurisdiction over petitions for common-law writs of certiorari in light of Tenn. Code Ann. § 27-8-104(a) (1980) and Tenn. Code Ann. § 16-11-102(a) (1994). *Fox v. Tennessee Bd. of Paroles*, App. No. 01-A-01-9506-CH-00263, slip op. at 3, ___ T.A.M. ___ (Tenn. Ct. App. Nov. 17, 1995). Accordingly, the department's reliance on Tenn. R. Civ. P. 12.02(1) was misplaced.

³Rule 12.04(c), (f) of the Davidson County Local Rules of Court requires an opponent of a motion to file a written response to the motion and provides that the motion "shall be granted" if no response is filed.

⁴The department's motion states that the trial court "is without jurisdiction to hear [Mr. Totty's] claim."

The department's erroneous reliance on Tenn. R. Civ. P. 12.02(1) does not necessarily undermine the trial court's dismissal of Mr. Totty's petition. The record and the briefs indicate that the department's motion was based on its assertion that the department was not exercising a "tribunal function" and, therefore, that "a common law writ of certiorari is not the proper remedy by which to litigate the alleged illegality." This reasoning is more consistent with a Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim upon which relief can be granted than it is to a Tenn. R. Civ. P. 12.02(1) motion to dismiss for lack of subject matter jurisdiction.

This is the latest in a series of cases in which the department's lawyers have erroneously invoked Tenn. R. Civ. P. 12.02(1) instead of Tenn. R. Civ. P. 12.02(6). Just as we have done in the other cases,⁵ we will construe the department's motion in this case as a Tenn. R. Civ. P. 12.02(6) motion. A motion to dismiss for failure to state a claim upon which relief can be granted tests a complaint's sufficiency. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). A complaint should be dismissed only when it contains no set of facts that would entitle the plaintiff to relief. *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690, 691 (Tenn. 1984). Thus, the courts must take all well-pleaded allegations in the complaint as true and must construe the complaint liberally in favor of the plaintiff. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d at 938; *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).

III.

Plea bargain agreements play a significant role in today's criminal justice system. Since they affect fundamental rights, the courts treat them as contracts. *State v. Howington*, App. No. 01-S-01-9407-CC-00073, slip op. at 9, 20 T.A.M. 42-1 (Tenn. Oct. 9, 1995) (Opinion designated "For Publication"). Plea bargain agreements become binding on the parties once they are approved by the trial court. *State v. Todd*, 654 S.W.2d 379, 382 (Tenn. 1983); *Parham v. State*, 885 S.W.2d 375, 382 (Tenn. Crim. App. 1994). Thus, prosecutorial promises made in

⁵*Fox v. Tennessee Bd. of Paroles*, *supra*, slip op. at 3-4; *Rowland v. Bradley*, 899 S.W.2d 614, 615 (Tenn. Ct. App. 1994); *Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871, 872 (Tenn. Ct. App. 1994).

return for a plea bargain agreement must be fulfilled once the court approves the agreement. *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499 (1971).

If plea bargain agreements are enforceable contracts, prisoners who enter into them should be able to seek judicial redress if the State breaches the contract. This relief includes setting the agreement aside or seeking judicial enforcement of the agreement. These actions are governed by applicable statutory law and general contract principles.⁶

IV.

Mr. Totty may very well have a claim if the State induced him to plead guilty to aggravated rape by promising to release him after he served thirty percent of his sentence.⁷ Even if he has a claim, however, he must pursue his claim through the appropriate administrative channels, and he must seek relief from the officials who have the authority to release him before the expiration of his sentence. Mr. Totty's complaint is fatally deficient in this regard.

Tennessee's courts have the constitutional prerogative to issue common-law writs of certiorari. *See* Tenn. Const. art. VI, § 10. Unless otherwise provided by law, these writs may only be used to review the decisions of "an inferior tribunal, board, or officer exercising judicial functions." Tenn. Code Ann. § 27-8-101 (Supp. 1995). Since the statutory limitation should not be construed so narrowly

⁶District Attorneys General have broad authority over the charging process, *Cooper v. State*, 847 S.W.2d 521, 537-38 (Tenn. Crim. App. 1992); *State v. Lunati*, 665 S.W.2d 739,746 (Tenn. Crim. App. 1983), *cert. denied*, 466 U.S. 938, 104 S. Ct. 1913 (1984), and over the continuation of criminal prosecutions. *In re Death of Reed*, 770 S.W.2d 557, 560 (Tenn. Crim. App. 1989). Tenn R. Crim. P. 11(e)(1) authorizes them to negotiate plea bargain agreements, and these agreements become enforceable contracts once approved by the trial court. *State v. Howington*, *supra*, slip op. at 9.

Prior to the *State v. Howington* decision, another panel of this court had observed that a district attorney general's plea bargain agreement does not bind the parole board. *Smith v. Harter*, App. No. 01-A-01-9408-CV-00387, slip op. at 3, 20 T.A.M. 8-35 (Tenn. Ct. App. Jan. 27, 1995) (No. Tenn. R. App. P. 11 application filed). We need not decide here whether this statement in *Smith v. Harter* survives *State v. Howington* since this appeal can be disposed of on the ground that Mr. Totty sued the wrong state agency.

⁷Mr. Totty has no claim if the State only agreed that he would be eligible for parole after serving thirty percent of his sentence, unless for some reason inconsistent with the agreement and the applicable statutes, the department has refused to certify that he is eligible to be considered for parole.

that it circumscribes the availability of the writ, *Rhea County v. White*, 163 Tenn. 388, 396, 43 S.W.2d 375, 377 (1931), the Tennessee Supreme Court has held that a petition for a common-law writ of certiorari may be used to review an administrative decision when the administrative agency is acting in a judicial or quasi-judicial capacity. *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn. 1983); *Bell v. Bradley*, App. No. 01-A-01-9506-CH-00273, slip op. at 2, 20 T.A.M. 42-19 (Tenn. Ct. App. Sept. 27, 1995), perm. app. filed (Tenn. Oct. 11, 1995).

Whether an agency is acting in a judicial or quasi-judicial capacity depends on the nature of the decision and the process by which the decision was reached. The Tennessee Supreme Court has noted that the judicial power includes the power to interpret and apply the laws, *Richardson v. Young*, 122 Tenn. 471, 493, 125 S.W. 664, 668 (1910), and to adjudicate the legality of past acts. *In re Cumberland Power Co.*, 147 Tenn. 504, 509-10, 249 S.W. 818, 819 (1923). Other courts have held that an agency is acting in a judicial or quasi-judicial capacity if its decision is likely to affect the rights and duties of specific individuals and if the decision is to be reached through the application of the law to present or past facts developed in a proceeding in which notice and an opportunity to be heard are required. *Miller v. Collier*, 878 P.2d 141, 145 (Colo. Ct. App. 1994); *Hoefler v. Sioux City Community Sch. Dist.*, 375 N.W.2d 222, 224 (Iowa 1985).

Mr. Totty's complaint provides us with no basis for concluding that the department was exercising "judicial functions" when it declined to release him on parole or that the department even had the authority to release him. The term "parole" connotes releasing a prisoner into the community before the expiration of her or his sentence. *See* Tenn. Code Ann. § 40-28-102(5) (1990). Except for mandatory parole,⁸ parole is a privilege and not a right.⁹ Neither the department, the district attorneys, nor the courts have the authority to parole an inmate. Parole may be granted only by the Tennessee Board of Paroles. *See* Tenn. Code Ann. §§ 40-28-116(a)(1), 40-35-503(a) (Supp. 1995).

⁸Tenn. Code Ann. § 40-28-117(b) (1990).

⁹Tenn. Code Ann. § 40-28-117(a); Tenn. Code Ann. § 40-35-503(b).

The department was not acting in a judicial or quasi-judicial capacity when it declined to release Mr. Totty. It was simply acknowledging that it did not have the authority to parole him. The department's decision not to exceed its statutory authority was certainly not illegal, fraudulent, or arbitrary. Mr. Totty's remedy, if indeed he has any remedy, is to pursue his demand for release with the parole board. Accordingly, Mr. Totty's petition against the department fails to state a claim that can be granted pursuant to a common-law writ of certiorari.

V.

We affirm the denial of the petition for a common-law writ of certiorari and remand the case to the trial court for whatever other proceedings may be required. We also tax the costs of this appeal to Steven Totty for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE

CONCUR:

HENRY F. TODD, P.J., M.S.

SAMUEL L. LEWIS, JUDGE