

RICKY HEMBREE,)
)
 Petitioner/Appellant,)
)
 VS.)
)
 CHARLES TRAUGHBER,)
 CHAIRMAN OF THE TENNESSEE)
 BOARD OF PAROLES,)
)
 Respondent/Appellee.)

Appeal No.
01-A-01-9607-CH-00335

Davidson Chancery
No. 95-2784-I

FILED

December 11, 1996

**Cecil W. Crowson
Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.

SEPARATE CONCURRING
OPINION:
KOCH, J.

OPINION

A prisoner in the custody of the Department of Correction had his sentence reduced, and subsequently asked the Parole Board to grant him a new hearing. The Board considered his request, but declined to grant the hearing. The prisoner then filed a Petition for Certiorari in the Chancery Court. The court dismissed the Petition for failure to state a claim upon which relief can be granted. We affirm.

I.

On March 2, 1993 Ricky Hembree shot and severely injured his sister-in-law. He was indicted in the Cocke County Circuit Court for aggravated assault and first-degree murder, was convicted of aggravated assault, and was sentenced to six years imprisonment. He became eligible for parole after serving 30% of his sentence. Following a hearing on February 14, 1995, the parole board declined to release him, and recommended that he continue his anger management training and any other treatment that was available. Further consideration of parole was deferred until February of 1997.

Mr. Hembree also appealed his conviction to the Court of Criminal Appeals. The court upheld the conviction, but in an opinion filed May 18, 1995, it found that the trial court had erred in sentencing him. The trial court had applied four of the enhancement factors found in Tenn. Code Ann. § 40-35-114 to Mr. Hembree's crime, and accordingly gave him the maximum sentence permitted. The appeals court found two of the factors (the use of a firearm and the potential for bodily injury) to be inappropriate as enhancement factors, because they were essential elements

of the offense charged in the indictment. The court accordingly modified Mr. Hembree's sentence to five years in the custody of the Department of Correction.¹

The Public Defender wrote a letter to Charles Traughber, Chairman of the Board of Paroles, informing him of the action of the Court of Criminal Appeals, and requesting that Mr. Hembree be granted an earlier hearing to have his parole reconsidered. Mr. Traughber responded with a letter stating that the members of the Board who had voted on Mr. Hembree's case had reviewed the Public Defender's letter and Mr. Hembree's file, and decided not to modify the date for his next hearing.

Mr. Hembree then filed a Petition for Writ of Certiorari with the Chancery Court of Davidson County, arguing that the Parole Board's action was erroneous and unfair in light of the reduction in his sentence. The court dismissed the petition, finding that it failed to state a claim upon which relief could be granted. This appeal followed.

II.

We believe that the Chancery Court was correct to find that Mr. Hembree's Petition essentially asked it to review the intrinsic correctness of the Board's decision. Such a review is beyond the scope of the Writ of Certiorari. Under the Writ, the reviewing court may only inquire into the essential legality of the Board's decision. It can order that the entire record be sent up for review only upon a finding that the Board exceeded its jurisdiction, or acted fraudulently, arbitrarily or illegally in rendering its decision. See *Yokley v. State*, 632 S.W.2d 123 (Tenn. App. 1981); *Powell v. Parole Eligibility Review Board*, 879 S.W.2d 871 (Tenn. App. 1994).

¹Although the Court's opinion states that Mr. Hembree's sentence had been reduced to five years, the affidavit of Faye Claud, Manager of the Department of Correction's Sentence Information Services indicates that the sentence was reduced to four years and six months. The pleadings and all the briefs state this to be the actual sentence. There is no explanation in the record for the discrepancy.

In the present case, no facts were alleged to indicate that the Board acted in excess of its jurisdiction, or that its actions were fraudulent, arbitrary or illegal. A change in the length of sentence does affect a prisoner's release eligibility date (RED), because that date is calculated as a percentage of the full sentence, but Mr. Hembree had already reached his RED, and received the hearing he was entitled to, by the time his sentence was reduced.

The decision to grant or deny parole is a matter solely within the discretion of the Parole Board. See *Doyle v. Hampton*, 207 Tenn. 399, 340 S.W.2d 891 (1960). We believe that the choice of a hearing date after the required initial hearing is likewise within the Board's discretion. The appellant implies that if the Board had known that his sentence would be reduced, they would have advanced the date for his next hearing. Of course there is no way to judge the truth of that proposition. It appears to us, however, that the Board was given the opportunity to change the hearing date after it was informed of the sentence reduction, but exercised its discretion in declining to do so. We see nothing arbitrary in the Board's decision, nor do we think it to be manifestly unfair to require Mr. Hembree to serve 75% of his sentence before he is reconsidered for parole.

The decision of the trial court is affirmed. Remand this cause for further proceedings consistent with this opinion. Tax the costs on appeal to the appellant.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

SEPARATE CONCURRING OPINION:
WILLIAM C. KOCH, JR., JUDGE