Circuit Court for Anne Arundel County
Case Nos. 02-K-97-001328 & 02-K-97-001344

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1198

September Term, 2016

GORDON PACK

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Beachley,
Shaw Geter,

JJ.

Opinion by Beachley, J.

Filed: August 11, 2017

In October 1980, appellant Gordon Pack Jr. pled guilty to two counts of first-degree rape in the Circuit Court for Anne Arundel County. The circuit court sentenced appellant to life imprisonment on each count, concurrent. Following various post-sentencing filings, in April 2016, appellant filed a motion to correct illegal sentence in the circuit court, arguing that recent United States Supreme Court precedent rendered his sentence unconstitutional. Following a hearing on July 28, 2016, the circuit court denied appellant's motion. Appellant presents the following issue for our review:

> Are life sentences for non-homicide crimes committed by a juvenile unconstitutional because Maryland law does not afford the offender a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, and instead vests the Governor with unlimited and standardless discretion to deny release on parole?

We hold that because appellant cannot allege that he has suffered a cognizable harm, he lacks standing to maintain this appeal. Accordingly, we affirm the circuit court's decision.

BACKGROUND

We choose not to discuss the lurid details of the underlying offenses that led to appellant's convictions. It suffices to say that appellant committed the abovementioned offenses as a fifteen-year-old. On October 7, 1980, following appellant's guilty pleas to two counts of first-degree rape, the circuit court sentenced appellant to two concurrent life sentences, and appellant has remained incarcerated since. Almost thirty years after appellant received his life sentences, the United States Supreme Court held it unconstitutional for a state to sentence a juvenile nonhomicide offender to life without the possibility of parole, depriving that juvenile of a "meaningful opportunity to obtain release

based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010). The Supreme Court made clear, however, that a state need not guarantee eventual freedom to such an offender. *Id*.

In response to *Graham* and its progeny, appellant filed a Motion to Correct Illegal Sentence and Request for Hearing on April 6, 2016. On July 28, 2016, the circuit court held a hearing on appellant's motion. At the hearing, appellant called Ruth Ogle, the program manager for the Maryland Parole Commission (the "Commission"), as his only witness. Ogle testified that since 1994, the Governor has paroled only one inmate sentenced to life. Instead, Ogle explained that when the Commission recommends parole to the Governor, the Governor will typically commute the life sentence to a fixed term of years. Ogle did not testify in any specific regard to appellant's case, and did not know whether appellant had yet had a parole hearing, or whether the Commission had recommended appellant for parole since 1980. At the conclusion of the hearing, the trial court stated:

> After reviewing the parties' pleadings, the testimony today as well as the case law that was provided by the parties, I am going to deny the Defendant's Motion to Correct the Illegal Sentence. I do not believe that the cases cited have reached this issue at this point. You have indicated it is an open question. And based upon my review, I do not think they apply to a situation as factually different as this or the mere fact that the Governor has an approval right in our system would invalidate all those sentences.

Appellant timely appealed.

DISCUSSION

Our analysis begins with a brief overview of the parole process for nonhomicide offenders sentenced to life. In Maryland, the Commission "has the exclusive power to . . . authorize the parole of an individual sentenced under the laws of the State to any correctional facility in the State" as well as to "hear cases for parole or administrative release in which . . . the inmate is serving a sentence of life imprisonment[.]" Md. Code (1999, 2008 Repl. Vol., 2016 Supp.), § 7-205(a)(1), (3)(iii) of the Correctional Services Article ("CS"). "[A]n inmate who has been sentenced to life imprisonment is not eligible for parole consideration until the inmate has served 15 years or the equivalent of 15 years considering the allowances for diminution of the inmate's term of confinement."[1] CS § 7-301(d)(1). Parole for such an inmate is governed by CS § 7-301(d)(4), which provides that, "if eligible for parole under this subsection, an inmate serving a term of life imprisonment may only be paroled with the approval of the Governor." For those serving life sentences, the Commission can only review and make recommendations to the Governor. CS § 7-206(3)(i).

In the wake of *Graham* and its progeny, the Commission amended its regulations in COMAR 12.08.01.18A(3) (amended October 24, 2016), in an apparent attempt to comply

[1] We note that different rules apply to those inmates sentenced to life imprisonment for committing homicide crimes. *See* Md. Code (1999, 2008 Repl. Vol., 2016 Supp.), § 7-301(d)(2), (3) of the Correctional Services Article ("CS").

with *Graham*'s mandates regarding juvenile offenders.[2] COMAR 12.08.01.18A(3) now reads as follows:

> In addition to the factors contained under §A(1)-(2) of this regulation, the Commission considers the following factors in determining whether a prisoner who committed a crime as a juvenile is suitable for release on parole:
>
> (a) Age at the time the crime was committed;
>
> (b) The individual's level of maturity and sense of responsibility at the time of [sic] the crime was committed;
>
> (c) Whether influence or pressure from other individuals contributed to the commission of the crime;
>
> (d) Whether the prisoner's character developed since the time of the crime in a manner that indicates the prisoner will comply with the conditions of release;
>
> (e) The home environment and family relationships at the time the crime was committed;
>
> (f) The individual's educational background and achievement at the time the crime was committed; and
>
> (g) Other factors or circumstances unique to prisoners who committed crimes at the time the individual was a juvenile that the Commissioner determines to be relevant.

Put simply, in Maryland, once a juvenile nonhomicide offender sentenced to life has served fifteen years (or the equivalent period with applicable diminution credits), that offender becomes eligible for parole. If the Commission, considering the new factors set

[2] The legislature has delegated to the Commission the authority to "adopt regulations governing its policies and activities under [the Correctional Services] title." CS § 7-207(a)(1).

forth in COMAR 12.08.01.18A(3) recommends parole for such an offender, the Governor has the exclusive power to decide whether to grant or deny parole.[3]

Appellant's Claims

Appellant argues that Maryland's parole system violates the Eighth Amendment in two ways. First, appellant focuses the majority of his brief on the argument that the Governor possesses unfettered discretion to deny parole to an inmate serving a life sentence without having to consider the juvenile's "demonstrated maturity and rehabilitation, or the distinctive attributes of youth"—standards the Supreme Court in *Graham* required the States to explore when considering parole for juvenile nonhomicide offenders. Appellant notes that neither CS § 7-301(d)(4), nor any other statutory provision currently requires the Governor to consider any particular standards in making a parole decision. This unfettered discretion to deny parole, appellant argues, renders CS § 7-301(d)(4) unconstitutional as applied to juvenile nonhomicide offenders such as himself, who were sentenced to life. Secondly, in one-and-a-half pages of his thirty-eight page brief, appellant alleges that the applicable COMAR regulations fail to comply with *Graham*. Specifically, appellant argues that COMAR 12.08.01.18A(3) is unconstitutional because it does not require the

[3] If the Commission chooses to recommend parole for an inmate sentenced to life who has served twenty-five years, and the Governor does not disapprove of the Commission's decision within 180 days of receiving that decision, the parole decision "becomes effective." CS § 7-301(d)(5). We note that appellant has served more than twenty-five years.

Commission to treat age as a mitigating factor, and that the Commission need not consider whether the offender has reformed.

Appellant's Claims are Premature

The Court of Appeals "has emphasized, time after time, that [its] strong and established policy is to decide constitutional issues only when necessary." *VNA Hospice of Md. v. Dep't of Health and Mental Hygiene*, 406 Md. 584, 604 (2008) (internal quotation marks omitted) (quoting *Burch v. United Cable*, 391 Md. 687, 695 (2006)). The Supreme Court has explained that, to have constitutional standing, a party "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . actual or imminent, not 'conjectural' or 'hypothetical[.]'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted).

Pursuant to Maryland's parole procedures, the Commission must first recommend appellant for parole before the Governor can consider whether to ultimately grant parole. Here, appellant does not claim that the Commission has recommended him for parole, and it is unclear whether this will ever occur. In the absence of a recommendation for parole by the Commission, there is no need to decide a constitutional issue regarding the Governor's alleged unfettered discretion in the parole process. Furthermore, to the extent appellant claims that the factors contained in COMAR 12.08.01.18A(3) may be applied in unconstitutional ways, he does not allege that the Commission has actually applied these

new factors in his case,[4] nor does he provide us with any basis—aside from his own speculation—to support the notion that they will be applied unconstitutionally. Appellant's claims, in the parlance of *Lujan*, are "conjectural" or "hypothetical."

Appellant also lacks standing to argue that Maryland's parole system is unconstitutional as applied to all juvenile nonhomicide offenders. The United States Supreme Court has stated that, "As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." *Cty. Court of Ulster Cty. v. Allen*, 442 U.S. 140, 155 (1979).

Pursuant to Maryland's parole procedures, the Commission must first recommend appellant for parole before the Governor can consider whether to ultimately grant parole. Appellant does not claim that the Commission has recommended him for parole, nor can he claim that his parole status now depends exclusively on the actions of the Governor. In short, neither the Commission nor the Governor has taken any action that violates *Graham*. Appellant's claims, in the parlance of *Lujan*, are "conjectural" or "hypothetical."

We find support for our conclusion in the relevant case law. In *People v. Franklin*, 370 P.3d 1053, 1054 (Cal. 2016), the Supreme Court of California addressed an appeal pursuant to *Graham* and its progeny regarding a juvenile homicide offender. There, in

[4] At oral argument, appellant's counsel stated that appellant received a parole hearing in light of *Graham*, and that appellant received a set-off. Appellant's counsel explained that a set-off occurs when the Commission neither grants nor denies parole. Appellant's counsel did not know the rationale for the set-off.

addition to addressing other issues, the *Franklin* court considered an argument by amicus curiae that the parole board's regulations concerning a juvenile offender's suitability for parole did not effectively provide those offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" as required by *Graham*. *Id*. at 1065. Declining to address the issue, the *Franklin* court held,

> As of this writing, the Board [of Parole Hearings] has yet to revise existing regulations or adopt new regulations applicable to youth offender parole hearings. In advance of regulatory action by the Board, and *in the absence of any concrete controversy in this case* concerning suitability criteria or their application by the Board or the Governor, it would be *premature* for this court to opine on whether and, if so, how existing suitability criteria, parole hearing procedures, or other practices must be revised to conform to the dictates of applicable statutory and constitutional law.

Id. at 1066 (emphasis added).

Like the California Supreme Court, many appellate courts, including the Supreme Court of the United States, have routinely declined to consider premature allegations of constitutionally recognized harm in a variety of contexts. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186 (1985) (declining to consider constitutional issue, stating that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue"); *Hodel v. Indiana*, 452 U.S. 314, 335-336 (1981) (dismissing a due process challenge as premature because "appellees [had] made no showing that they were ever assessed civil penalties under the [Surface Mining] Act, much less that the statutory prepayment requirement was ever applied to them or caused them

any injury"); *U.S. v. Foundas*, 610 F.2d 298, 301 (5th Cir. 1980) (declining to consider whether application of the Federal Parole Commission guidelines was invalid where defendant had not yet begun to serve her sentence, and it was possible that the guidelines could change before she became eligible for parole); *Pyles v. State*, 25 Md. App. 263, 269 (1975) (rejecting as premature appellant's due process claim regarding post-sentencing procedures when "it [would] be a long time before the appellant's sentence expire[d] and the principle [complained of] . . . [would come] into play").

We find this authority persuasive. Because the Commission has not recommended appellant for parole, the Governor need not take any action. Appellant, therefore, has not sustained any legally cognizable harm.

In urging us to consider his appeal despite the Commission not yet having recommended parole, appellant argues that the Supreme Court permitted Graham to challenge his life sentence after serving less than five years. *Graham* is distinguishable from the instant case.

In *Graham*, the State of Florida sentenced Graham, a juvenile nonhomicide offender, to life in prison. 560 U.S. at 57. Because Florida had abolished its parole system, Graham's life sentence effectively became life without the possibility of parole—his only opportunity for release was through executive clemency. *Id.* After receiving his sentence, Graham's only opportunity to be released from prison during his lifetime was through executive clemency. The same cannot be said for appellant. Maryland, unlike Florida, has not abolished its parole system.

CONCLUSION

For the reasons stated, appellant's allegations of unconstitutionality are speculative and hypothetical. The trial court, therefore, did not err in denying appellant's motion.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.