

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ALBERT DRAKE	)	
	)	
Petitioner	)	ID NO. 93009252DI
v.	)	
	)	
STATE OF DELAWARE	)	
	)	
Respondent	)	

Submitted: June 8, 2010
Decided: September 14, 2010

MEMORANDUM OPINION

Upon Motion of the State of Delaware to Dismiss the Appeal

*From a Decision by the Board of Parole – **GRANTED WITHOUT PREJUDICE***

Appearances:

Jerome M. Capone, Esquire, Wilmington, Delaware, Attorney for Albert Drake

Ophelia M. Waters, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State of Delaware

HERLIHY, Judge

The Defendant, Albert Drake, appeals a decision of the Delaware Board of Parole dated December 16, 2009 designating him to Tier designation level III of the Sex Offender Registry. The only issue before This Court is whether there is a right of appeal or seek a review of the Parole Board's tier designation decisions.

Factual Background

In September 1993, Drake was arrested on fifteen counts of Unlawful Sexual Intercourse in the First Degree,¹ eight counts of Unlawful Sexual Intercourse in the Second Degree,² three counts of Unlawful Sexual Contact in the Second Degree,³ two counts of Unlawful Sexual Penetration in the Third Degree,⁴ and one count of Incest.⁵ The above charges arose from Drake's admitted sexual abuse of his daughters.

Drake was indicted on September 27, 1993 on eleven of the twenty nine counts contained in the original criminal complaint; the remaining eighteen counts were not contained in the original indictment. The State, on August 3, 1994, dismissed the original indictment and re-indicted Drake modifying the lesser charge of Incest to the greater offense of Unlawful Sexual Intercourse in the First Degree. Additionally, four

¹ 11 *Del. C.* §775 (Repealed by 71 Del. Laws, c. 285, §§ 12 and 13, eff. Sept. 9, 1998.)

² 11 *Del. C.* §774 (Repealed by 71 Del. Laws, c. 285, §§ 12 and 13, eff. Sept. 9, 1998.)

³ 11 *Del. C.* §768

⁴ 11 *Del. C.* §770

⁵ 11 *Del. C.* §766

counts of Unlawful Sexual Intercourse in the First Degree were added to the indictment, along with two counts of Unlawful Sexual Contact in the Second Degree.

Trial was initially scheduled and re-scheduled to October 3, 1994. On the day of trial, Drake accepted the State's offer to one count of Unlawful Sexual Intercourse,⁶ and one count of Unlawful Sexual Contact in the Second Degree.⁷ Drake was sentenced to a total of twenty-seven years Level V, suspended after fifteen years Level V for the balance of the sentence to be served at Level III probation. Drake agreed to have no contact with the daughters, unless approved by the probation officer and/or with their consent, or any children under the age of 18 unless approved by the probation office, and agreed to undergo counseling during the probationary period. Drake was required to register as a sex offender.⁸ On November 21, 2006, Drake was conditionally released from Level V to Level III probation. Since his release, he registered with the State police as a sex offender.

Drake is 58 years old (was 56 on September 11, 2009) and is serving his probationary sentence for the offenses listed above. He is scheduled to be released from Level III probation on September 8, 2015. On February 1, 2009, State of Delaware mailed correspondence to Drake informing him that as a result of the

⁶ It was agreed by the parties, Under Rule 11(e)(1)(C), this charge has a sentence of 25 years at Level V, which was to be suspended after 15 years for probation.

⁷ Drake received two years at Level V, which was suspended for probation.

⁸ *See, Coleman v. State*, 729 A.2d 847 (Del. 1999).

amended sex offender registration requirements, he is required to appear in-person once each year to the State Bureau of Identification (S.B.I) to verify his address, employment and place of study, etc.⁹ Notice was sent to Drake informing him that that the Board shall not grant re-designation unless he establishes, by a preponderance of the evidence, that public safety does not require the original tier designation.¹⁰ A hearing before the Board was held on December 15, 2009. Drake appeared *pro se*. On December 16, 2009, the Board sent Drake a written decision determining that a Tier III is appropriate for the following reasons: Minimization of offense and too short of time in [the] community.¹¹ Through counsel, Drake appeals the decision and argues that the expansion of responsibilities for the Board of Parole should be reviewable by this Court.

Parties Contentions

⁹ Letter from State of Del. Department of public safety, to Albert Drake (Feb. 1. 2009).

¹⁰ Letter from State of Del. Board of Parole, to Albert Drake (Aug. 11 2009).

¹¹ Tier designation III is consistent with the relevant portion of 11 *Del. C.* §4121(d)(1)(a), which states: Any sex offender convicted or adjudicated delinquent of any of the following offenses shall be designated by the court to risk assessment Tier III:

- (a) Rape in the First Degree, Rape in the Second Degree, Rape in the Third Degree if the offense involved a child 12 or the offense involved force or threat of physical violence, Unlawful Sexual Contact in the First Degree, Unlawful Sexual Intercourse in the First or Second Degree, Unlawful Sexual Penetration in the First or Second Degree, Unlawful Sexual Contact in the First Degree, Continuous Sexual Abuse of a Child, Sexual Exploitation of a Child...

Drake submits that the right to appeal to this Court from the Board is conferred by 29 *Del.C.* §10101 (the Administrative Procedures Act). The argument is essentially that since the Board is not listed as an agency under 29 *Del.C.* §10161, the decision should be subject to review. Drake also concedes that because of the significant hardships associated with the tier designation, it is unreasonable not to provide him with judicial review of the Board's decision.

The State contends that the Board reviewed Drake's tier designation under 11 *Del. C.* §4121 and concluded that Tier III designation is appropriate. Furthermore, the State submits that Drake has not shown that the Board's decision was flagrant, unwarranted or unauthorized and as a result, the request should be dismissed with prejudice.

Discussion

A statutory overview is needed to place the current issue into context. Starting March 1, 1999, the authority to designate tier levels to sex offenders was given exclusively to the courts.¹² That authority included such designations on a retroactive basis, that is, offenses dating back to June 27, 1994.¹³ The authority to assign tier designations included making them at the time of original sentencing and when a person violated probation if the designation had not been done at the time of the original

¹² 71 *Del. Laws* c. 429; 11 *Del. C.* §4121(c).

¹³ 11 *Del. C.* §4121(a)(4).

sentence.¹⁴ For offenders convicted during a discrete period, June 4, 1996 to March 1, 1999, the Board was authorized, upon application of the Attorney General, to redesignate tier levels of such offenders.¹⁵ Effective July 16, 2008, that limited time provision was removed and any person regardless of conviction date was subject to Board designation.¹⁶ Three tiers are assigned to sex offenders; Tier I is the least restrictive, Tier II is intermediary and Tier III is the most restrictive in terms of requirements for the offender.¹⁷ Under Tier III, the full registration period for Drake is for life.¹⁸ The Attorney General is initially responsible for assigning new Risk Assessment Tier designations to the offenders.¹⁹ The offender has a right to a hearing regarding the Attorney General's tier designation decision.²⁰ This request must be made in writing within 10 days of the receipt of the tier designation from the Attorney General.²¹

¹⁴ 11 *Del. C.* §4121 (c).

¹⁵ 11 *Del. C.* §4122(c), now repealed, and §4122(b).

¹⁶ 76 *Del. Laws* c. 374; 11 *Del. C.* §4122(a).

¹⁷ *Id.*

¹⁸ 42 U.S.C. §16915

¹⁹ 11 *Del. C.* §4122(d)

²⁰ 11 *Del. C.* §4122(c)

²¹ *Id.*

If the offender requests a hearing, a hearing is held before the Board and the tier designation is reviewed.²² At the hearing, both the sex offender and the Attorney General have the right to be heard.²³ The Board of Parole then determines the appropriateness of the Attorney General's Risk Assessment Tier designation.²⁴ If a hearing is not requested by the offender, notice of the tier designation is sent by the Attorney General to the Superintendent of the Delaware State Police and to the chief law enforcement officer of the jurisdiction where the offender is residing at the time of the re-designation.²⁵

The Superior Court does not have statutory jurisdiction to review the decisions of the Board of Parole and federal habeas corpus is not a proper remedy.²⁶ This Court is only permitted to review the Board's decisions if there is "evidence of flagrant, unwarranted, or unauthorized action by the Board".²⁷ There is no evidence from the record that there was any such action on behalf of the Board in reviewing Drake's Tier III designation status. Instead, after a hearing was requested under 11 *Del. C.* §4122,

²² 11 *Del. C.* §4122(c)

²³ 11 *Del. C.* §4122(d)

²⁴ *Id.*

²⁵ 11 *Del. C.* §4122(e)

²⁶ *Moore v. State*, 171 A.2d 215 (Del. Supr. 1961).

²⁷ *Garvey v. Casson*, 423 F.Supp. 68, 70 (D.Del. 1976).

the Board reviewed the Attorney General's tier designation and concluded that Tier III was the proper placement for Drake. Its decision was based on minimization of offense and too short of a time in the community.²⁸ Therefore, this Court does not have statutory jurisdiction to review the decision under the *Garvey* standard. The Superior Court, however, has the authority to issue a common law writ of *certiorari* to review the tier designation decision by the Board.²⁹

It is constitutional for this Court to issue a writ of *certiorari*; no statute may take that authority away from the Superior Court.³⁰ “Under the constitutional and statutory law of Delaware, both the Supreme and Superior Courts have authority to issue writs of *certiorari*.”³¹ According to 10 *Del. C.* §562, the “Superior Court may frame and issue all remedial writs, including writs of habeas corpus and *certiorari*”

Before the Superior Court has the authority to issue a common law writ of *certiorari*, two threshold conditions must be satisfied.³² First, the judgment must be

²⁸ Letter from State of Del. Board of Parole to Albert Drake (Dec. 16 2009).

²⁹ *See, Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204 (Del. Supr. 2008).

³⁰ *Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204, 1210 - 1211 (Del. Supr. 2008).

³¹ *Shoemaker v. State*, 375 A.2d 431, 437 (Del. 1977).

³² *Maddrey*, 956 A.2d at 1213.

final and second, there can be no other available basis for review.³³ Both requirements are satisfied here. After conducting a hearing, the Board determined the Attorney General's placement of Drake on Tier III designation was proper. The Board subsequently sent Drake a letter on December 16, 2009, a day after the hearing, informing him of that Tier III classification. Therefore, the Board's review of the Attorney General's tier designation was a final decision. Next, a common law writ of *certiorari* is the only other basis of review. Absent evidence of flagrant, unauthorized or unwarranted action by the Board, which is not present in this case, this Court does not have jurisdiction to review the decision of the Board.³⁴ The threshold requirements for issuing a common law writ of *certiorari* are thus satisfied.

The Court must then determine if the claim is reviewable on *certiorari* without consideration to the merits of the case.³⁵ The Court's role is considerably more limited in scope than during statutory appellate review.³⁶ "Review on a writ of *certiorari* issued by the Superior Court differs fundamentally from appellate review because review on *certiorari* is on the record and the reviewing court may not weigh evidence

³³ *Id.*

³⁴ *Garvey*, 423 F.Supp. at 70.

³⁵ *Maddrey*, 956 A.2d at 1213.

³⁶ *Id.* at 1207.

or review the lower court's factual findings.”³⁷ The limited record the Superior Court is permitted to review is “nothing more than initial papers, limited to the complaint initiating the proceedings, the answer or response (if required), and the docket entries.”³⁸

On a common law writ of *certiorari*, the Superior Court cannot look behind the face of the record. Rather, it can only review the record for the purpose of confirming an irregularity in asserting jurisdiction, an improper exercise of its power or the declaration of an improper remedy behind the inferior tribunal.³⁹

The reviewing court “considers only those issues historically considered at common law; namely, whether the lower tribunal (1) committed errors of law, (2) exceeded its jurisdiction, or (3) proceeded irregularly.”⁴⁰ First, reversal for error of law is warranted when the record affirmatively demonstrates that the Board “proceeded illegally or manifestly contrary to law.”⁴¹ Second, reversal on jurisdictional grounds is necessary “only if the record fails to show that the matter was within the lower tribunal’s personal and subject matter jurisdiction.”⁴² Last, a lower tribunal’s decision

³⁷ *Id.* at 1213.

³⁸ *Id.* at 1216.

³⁹ *Id.* at 1214.

⁴⁰ *Maddrey*, 956 A.2d at 1213.

⁴¹ *Id.* at 1214 (quoting *Christina Town Center, LLC v. New Castle County*, 2004 WL 2921830, at *2).

⁴² *Id.*

will be reversed for irregularities of proceedings “if the lower tribunal failed to create an adequate record for review.”⁴³ Absent errors defined above, the Superior Court will not reverse the decision of the Board.

It is long established law that this court does not have jurisdiction to review an appeal of the Board’s parole decisions. That this court has determined that Board assignment of tier designations is “reviewable” by means of *certiorari* does not alter that precedent, and does not mean parole decisions are reviewable on *certiorari*.

The only issue the parties briefed is whether Drake had a right to appeal the Board’s tier designation. Neither party addressed the merits of the Board’s decision and certainly did not address it on the basis of what this Court is permitted to review on *certiorari*.⁴⁴

The Court’s decision to convert Drake’s appeal to a writ of *certiorari* means the Court shall issue a writ to the Board. Drake shall, within 10 days of its issuance, inform the Court and the Board if he seeks or does not seek a review of the Board’s decision by means of the writ.

The Board’s motion to dismiss his appeal is GRANTED without prejudice to Drake to seek review by means of a writ of *certiorari*.

⁴³ *Id.*

⁴⁴ Drake expressed concern that whether the Board has or does not have the discretion to conduct hearings on the tier designations. That issue is not before the Court, but 11 *Del. C.* §4122(d) authorizes such hearings.

IT IS SO ORDERED.

J.