STATE OF MICHIGAN

COURT OF APPEALS

KEVIN LEROY SPIKES,

Plaintiff-Appellee,

v

MICHIGAN PAROLE BOARD,

Defendant-Appellant.

UNPUBLISHED
January 21, 1997

No. 189740
LC No. 94-412345

Before: Cavanagh, P.J., and Reilly and C.D. Corwin,* JJ.

PER CURIAM.

Defendant appeals by leave granted from the circuit court's reversal of defendant's decision to deny group sex offender therapy, and thereby parole, to plaintiff. We reverse.

Defendant's first issue on appeal is that the circuit court erred in reversing defendant's decision to deny therapy to plaintiff because the decision signaled a tacit acceptance of one of plaintiff's arguments. Plaintiff argued that defendant's requirement that plaintiff admit that he was guilty of the sexual assault for which he had been convicted before being admitted to group sex offender therapy violated plaintiff's privilege against self-incrimination, as guaranteed by US Const, Ams V and XIV. Plaintiff claimed that the requirement put him at risk of incriminating himself in a future criminal proceeding, and that the denial of therapy, and thereby parole, impermissibly punished plaintiff for refusing to admit his guilt.

Under our de novo review of this constitutional question, we agree with defendant that the circuit court erred in accepting plaintiff's argument. *Yaldo v North Pointe Ins Co*, 217 Mich App 617, 623 ; 552 NW2d 657 (1996). While a person may refuse to answer official questions at any proceeding where the answers might incriminate him in future criminal proceedings, a party to a civil action has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate. *Phillips v Deihm*, 213 Mich App 389, 399-400; 541 NW2d 566 (1995); *People v Ferency*, 133 Mich App 526, 533-534; 351 NW2d 225 (1984). The corrections and parole proceedings under which plaintiff was asked to admit guilt were not criminal in

* Circuit judge, sitting on the Court of Appeals by assignment.

nature because they did not promote any of the "traditional aims of punishment." See *Allen v Illinois*, 478 US 364, 370; 106 S Ct 2988; 92 L Ed 2d 296 (1986). Rather, the proceedings were designed to rehabilitate plaintiff. Therefore, plaintiff was required to show that the answers he would have given during the proceedings would in fact have tended to incriminate him in a future criminal proceeding. He failed to do so. *Phillips*, *supra* at 400; *Ferency*, *supra* at 534.

Plaintiff also cannot assert that he was impermissibly punished for his failure to admit guilt by defendant's refusal to grant him parole. Plaintiff did not lose an important right or entitlement, like the parties in *Lefkowitz v Turley*, 414 US 70, 85; 94 S Ct 316; 38 L Ed 2d 274 (1973), *Garrity v New Jersey*, 385 US 493, 497-498; 87 S Ct 616; 17 L Ed 2d 562 (1967), and *Spevack v Klein*, 385 US 511, 514; 87 S Ct 625; 17 L Ed 2d 574 (1967) . Rather, plaintiff forfeited a benefit that he would have gained had he chosen to admit his guilt – rehabilitation and, subsequently, parole. Cf. *In re Stricklin*, 148 Mich App 659, 665-666; 384 NW2d 833 (1986). Plaintiff was denied parole because of his failure to complete group sex offender therapy, and he was denied therapy because he refused to admit guilt. We conclude that the circuit court erred in tacitly holding that defendant unconstitutionally required plaintiff to admit guilt before allowing him to attend therapy because plaintiff presented no evidence that admitting his guilt would have incriminated him in a future criminal proceeding or that refusal of parole punished his silence.

Defendant's second issue on appeal is that the circuit court erred in overriding defendant's decision to deny group sex offender therapy, and thereby parole, to plaintiff because defendant's decision was authorized by law and was not an abuse of discretion. We again agree with defendant.

The power to grant or deny parole is vested in defendant. MCL 791.234(7); MSA 28.2304(7); *People v McKendrick*, 123 Mich App 631, 633; 333 NW2d 45 (1983). Plaintiff has no constitutionally protected interest in parole, only a hope or expectation of it. See *Hurst v Dep't of Corrections*, 119 Mich App 25, 28-29; 325 NW 615 (1982). The Legislature has provided that parole shall not be granted until defendant has reasonable assurance, after consideration of all the facts and circumstances, that the prisoner will not become a menace to society or the public safety. MCL 791.233(1)(a); MSA 28.2303(1)(a). Under MCL 791.233e; MSA 28.2303(6), the Department of Corrections is to develop parole guidelines to be consistent with MCL 791.233(1)(a); MSA 28.2303(1)(a) and which are to govern the exercise of defendant's discretion under MCL 791.234(7); MSA 28.2304(7). 1988 AACS, R 791.7715(d)(1), which governed the administration of parole at the time plaintiff was being considered for parole, allowed defendant to consider a prisoner's willingness to accept responsibility for his past behavior. Further, 1988 AACS, R 791.7715(2) allowed defendant to subject plaintiff to psychological evaluation before making a decision to release him because plaintiff had committed a sexual offense.

We hold that defendant's decision to deny parole to plaintiff was supported by competent, material, and substantial evidence and was authorized by law. See *Oakland Co Probate Court v Dep't of Social Services*, 208 Mich App 664, 666; 528 NW2d 215 (1995). The record clearly shows that defendant considered the nature of plaintiff's crime, plaintiff's refusal to accept responsibility for his past behavior, and other relevant facts and circumstances in making its determination to deny

parole because defendant continued to be a menace to society. See MCL 791.233(1)(a); MSA 28.2303 (1)(a); 1988 AACS, R 791.7715. The evidence presented by attachments to the parties' pleadings to the circuit court showed that plaintiff had been convicted of first-degree criminal sexual conduct, had refused to admit his guilt, and had been determined unfit for group sex offender therapy as a result of this refusal. Department of Corrections psychologists told plaintiff that he had no hope of rehabilitation unless he admitted his guilt. Defendant was therefore justified in concluding that plaintiff was a menace to society and should continue to be confined.

We also note that the circuit court exceeded the scope of its review in ordering defendant to provide therapy to plaintiff. The circuit court's standard of review of administrative decisions is the same as our standard, that is, to determine whether the administrative decision was supported by competent, material, and substantial evidence and whether it was contrary to law. *Oakland Co Probate Court*, *supra*. The circuit court made no such finding, but simply ordered therapy for plaintiff because it believed plaintiff was "arbitrarily" being denied therapy.

Reversed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles W. Corwin