

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-4792
Summary Calendar

JOHN RICHARD MERIT,

Plaintiff-Appellant,

VERSUS

BRUCE LYNN, Secretary,
Dept. of Corrections,
and KEETSIE TULLIER,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Louisiana

(CA 92 0681)

(March 29, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

John Merit filed a § 1983 complaint seeking a Declaratory Judgment declaring the Louisiana Parole Board's denial of his right to participate in a "parole work release" program null and void.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

He also seeks injunctive relief, ordering the Parole Board to place him immediately on parole work-release status for a two-year period and, thereafter, to consider him for full parole status. Merit is additionally seeking an award of compensatory and punitive damages.

The magistrate judge characterized Merit's complaint as a habeas corpus application and recommended dismissal of the complaint based on his failure to exhaust state court remedies. The district court, however, determined that Merit was not deprived of a cognizable liberty interest and dismissed the complaint with prejudice.

OPINION

According to Merit, he was convicted of armed robbery and has already served more than twenty years of his fifty-year sentence. Merit attaches a copy of a letter from the Board of Pardons, dated November 14, 1989, in which the Board recommended to the Governor that Merit be granted eligibility for parole after serving one-third of his sentence. Although there is no documentation in the record that the Governor acted on the recommendation, Merit apparently had a parole hearing on November 19, 1991.

Merit contends that the district court erred in finding that the provisions of La. Rev. Stat. Ann. 15:574.4 (West 1992) did not create a liberty interest in parole release. Merit argues that the parole board abused the limited discretion delegated to it under 15:574.4 by failing to consider the factors listed in the provision in making its determination.

Merit also contends that Act 790 of the 1990 Louisiana Legislature, which added a new subsection to the Parole Statute, increases his expectation of parole.

There is no constitutionally protected interest in parole release. Board of Pardons v. Allen, 482 U.S. 369, 373, 107 S. Ct 2415, 96 L. Ed. 2d 303 (1987). Nevertheless, a statute may give rise to an expectation of parole if it uses mandatory language that creates a presumption that parole release will be granted if certain designated findings are made. Id. at 377-78.

La. Rev. Stat. Ann. 15:574.4(E) (West 1992) provides in part:

A parole shall be ordered only for the best interest of society, not as an award of clemency, and upon determination by the board that there is a reasonable probability that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen so that he can be released without detriment to the community or to himself.

Very similar language is found in the Montana statute discussed in Allen. 482 U.S. at 376. However, the Montana statute also contains an additional paragraph containing other mandatory language regarding parole release.¹ Allen determined that the language of the statute created a presumption that parole release would be granted and thus created a liberty interest protected by the due process clause. Id. at 378-381.

¹ The additional paragraph provides that "[s]ubject to the following restrictions, the board shall release on parole . . . any person confined in the Montana state prison or the women's correction center . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]. Mont. Code Ann. § 46-23-202 1985.

This Circuit has not addressed whether the Louisiana Parole Statute (15:574.4(E)) gives rise to a due process liberty interest in parole release. The statute contains some but not all of the mandatory language contained in the Montana statute, which was relied upon by Allen in finding a liberty interest.

However, we are certain that the issues raised by Merit are sufficiently meritorious (no pun intended) that it was error for the trial court to decide such issues sua sponte, particularly where Merit is acting pro se and where the defendants named in his complaint have not been served and have not appeared.

We vacate, therefore, the trial court's dismissal of this matter and remand the case to the trial court with instructions to

- a. issue process on the defendants;
- b. permit Merit to amend as to any named defendants who are no longer serving in the official capacities as stated;
- c. consider the appointment of counsel for Merit; and
- d. conduct such further hearings or proceedings as may be necessary to develop a full record as to the process and procedures involved in the Louisiana Parole Board's consideration of Merit's requested parole.

We have not addressed the merits of this case and nothing herein should be deemed or construed as a ruling on the merits.