

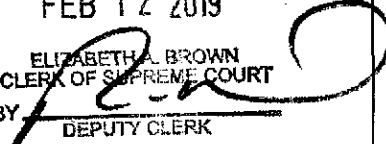
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL MCCORMICK,
Appellant,
vs.
BOARD OF PAROLE
COMMISSIONERS,
Respondent.

No. 74885-COA

FILED

FEB 12 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Michael McCormick appeals from an order of the district court denying a petition for a writ of mandamus.¹ First Judicial District Court, Carson City; James Todd Russell, Judge.

McCormick argues the district court erred by denying his November 9, 2017, petition. In his petition, McCormick asserted the Nevada Board of Parole Commissioners erred when it stated there were two victims under the age of 18. Specifically, McCormick contended the Board erred by finding he targeted two victims, his young daughters, when he was only convicted of the sexual assault of his younger daughter. McCormick sought an order directing the Board to reconsider his request for parole while only considering one victim.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

P.2d 534, 536 (1981). This court reviews an order resolving a petition for a writ of mandamus for an abuse of discretion. *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006). This court will not review challenges to the evidence supporting Board decisions, but will consider whether the Board has properly complied with the applicable statutes and regulations. See *Anselmo v. Bisbee*, 133 Nev. ___, ___, 396 P.3d 848, 851, 852-53 (2017).

The standards the Board must use when determining whether to release an inmate on parole are codified in the Nevada Administrative Code. See *id.* at ___, 396 P.3d at 851. NAC 213.518(2)(n) requires the Parole Board to consider “[w]hether, in committing the crime for which parole is being considered, the prisoner targeted a child under the age of 18 years or a person who is vulnerable because of his or her age or disability.”

The record demonstrated McCormick was convicted of sexually abusing his younger daughter, but the presentence investigation report contained information concerning McCormick’s alleged abuse of his older daughter. The record further demonstrated the Parole Risk Assessment and Guideline that was prepared for the Board’s consideration of McCormick’s parole request identified two aggravating factors: (1) the crime was targeted against a child, listing McCormick’s daughters aged 4 and 10; and (2) the “[i]mpact on the victim(s) and/or community.” The Board denied McCormick’s request for parole based on those two aggravating factors.

The district court concluded that, pursuant to NRS 213.005(5) and NRS 213.131(12), it was appropriate for the Board to consider McCormick’s older daughter as a victim because she met a statutory definition of a victim and the presentence investigation report contained information indicating McCormick may have also sexually abused her.


The Parole Risk Assessment and Guideline demonstrate that the Board considered the older daughter as if she was the target of the crime for which McCormick was being considered for parole. Yet, the documentation concerning the sexual assault conviction clearly demonstrated that only the younger daughter was the target of the crime at issue. NAC 213.518(2)(n) plainly states that the Board is only to consider whether the target of the crime at issue was younger than 18, and not whether there were any other potential young victims of additional crimes. Therefore, the Board should not have included McCormick's older daughter under the NAC 213.518(2)(n) aggravating factor and the district court erred by finding such an action was appropriate under these circumstances.


Because the record demonstrated the Board should not have included McCormick's older daughter in the aggravating factor from NAC 213.518(2)(n), it violated its own guidelines by considering an inapplicable aggravating factor when weighing McCormick's request for parole. Given the circumstances in this matter, the Board's consideration of an inapplicable aggravating factor violated McCormick's statutory right for a proper consideration of whether he should be receive parole. *See Anselmo*, 133 Nev. at ___, 396 P.3d at 853 (concluding the Board's consideration of an inapplicable aggravating factor infringed upon an offender's statutory right to receive consideration for parole). Therefore, we reverse the district court's decision to deny McCormick's petition, and remand for the district court to issue a writ of mandamus to instruct the Board to vacate its denial of McCormick's parole and conduct a new parole hearing in which it does

not consider McCormick's older daughter as the target of the crime for which parole is considered.² Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, A.C.J.
Douglas


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. James Todd Russell, District Judge
Michael McCormick
Attorney General/Carson City
Carson City Clerk

²The Board may consider information concerning McCormick's older daughter under a different aggravating factor, *see* NAC 213.518(2)(p) ("Any other factor which indicates an increased risk that the release of the prisoner on parole would be dangerous to society or the prisoner."), but may not list such information as an inapplicable aggravator in violation of its own guidelines.