

APPENDIX A
In the Supreme Court of Missouri

September Session, 2020

State ex rel. Jerome Berry,

Petitioner,

No. SC98532 HABEAS CORPUS
St. Francois County Circuit Court No. 19SF-CC00002
Eastern District Court of Appeals No. ED108860

Teri Lawson,

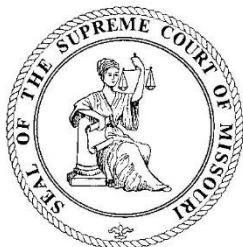
Respondent.

Now at this day, on consideration of the petition for a writ of habeas corpus herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, BETSY AUBUCHON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 2020, and on the 1st day of September, 2020, in the above-entitled cause.

WITNESS my hand and the Seal of the Supreme Court of Missouri, at my office in the City of Jefferson, this 1st day of September, 2020.



Betsy A. Aubuchon, Clerk

Deidre S. Knaebel, Deputy Clerk

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Supreme Court of Missouri

vs.

MANDATE

JUDGMENT

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SCANNED



In the Missouri Court of Appeals
Eastern District

ORDER

Petitioner has filed a Petition for Writ of Habeas Corpus along with Suggestions in Support and Exhibits.

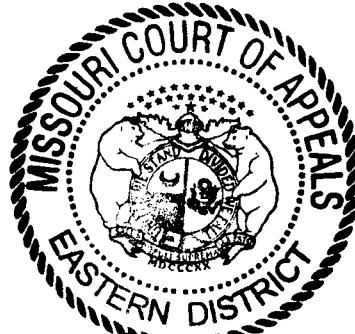
Being duly advised in the premises, the Court hereby DENIES Petitioner's Writ of Habeas Corpus.

SO ORDERED.

DATED: April 29, 2020


Colleen Dolan, Chief Judge
Writ Division I
Missouri Court of Appeals, Eastern District

cc: Teri Lawson
Kevin Schriener
Stephen Hawke



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FILED
12/12/2019
VICKI J. WEIBLE, CIRCUIT CLERK
ST. FRANCOIS COUNTY, MO

IN THE CIRCUIT COURT OF ST. FRANCOIS COUNTY STATE OF MISSOURI

JEROME E BERRY,)
)
Petitioner,)
)
v.) Case No. 19SF-CC00002
)
TERI LAWSON,)
)
Respondent.)

MEMORANDUM, ORDER, AND JUDGMENT

Introduction

The matter is before the Court on Jerome Berry's petition for a writ of habeas corpus, Respondent's response, and Petitioner's reply. On November 15, 2019, the Court held an evidentiary hearing where Petitioner presented his own testimony and the parties agreed to admit the exhibits attached to Petitioner's petition and Respondent's response. After consideration of the evidence and arguments submitted, the Court denies the petition for a writ of habeas corpus and enters judgment in Respondent's favor.

Background

Petitioner Jerome Berry is an inmate at the Farmington Correctional Center in Farmington, Missouri. In 1981, Berry committed two counts of forcible rape, attempted first-degree robbery and kidnapping. A St. Louis County jury convicted Berry, and the circuit court sentenced him to 30 years'

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imprisonment for both rape counts, fifteen years' imprisonment for kidnapping, and fifteen years' imprisonment for attempted first-degree robbery. The court ordered the sentences for rape and kidnapping to run concurrently and the fifteen-year sentence for robbery to run consecutively to the other sentences.

Because Berry committed forcible rape, a sexual assault offense as defined by § 589.015, RSMo., he cannot be eligible for parole or conditional release until he completes the Missouri Sex Offender Program (MOSOP). § 589.040, RSMo. 2011. Berry admits that he has failed to complete MOSOP. As a result, the Missouri Parole Board (the Board) was required to cancel his conditional release date. § 589.040, RSMo.

At the evidentiary hearing, Berry admitted that he had been convicted of rape, attempted robbery, and kidnapping, and that he has failed to complete MOSOP. Berry testified that he knows of other inmates who have not completed MOSOP, but have been paroled anyway, or who have been allowed to commit MOSOP while on parole release.¹

¹ Berry also testified that he failed to complete phase two of MOSOP in 2007 and that he has tried to be readmitted to the program since then, but without success. In his petition, Berry did not allege that Respondent is unfairly denying him access to MOSOP, so no such claim is before the Court. Even if it were, the Court would find that Berry has failed to present sufficient evidence to show he has been unfairly denied access to MOSOP because Berry did not present any evidence concerning why he has been unable to reenter the program.

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Respondent introduced at affidavit from the Board's lead parole analyst, Steven Mueller. Mr. Mueller's affidavit states that the inmates Berry mentioned, Solly Bauer and Jody Davis, were not required to complete MOSOP before parole release because they did not commit sexual assault offenses as defined by § 589.015. Mr. Mueller's affidavit also states that Chad M. White, a third inmate mentioned by Berry, was required to complete MOSOP before parole release because he did commit a sexual assault offense and that White did complete MOSOP as required. Berry does not contest this evidence.

In his petition, Berry alleges that the Board does not consistently apply § 589.040's bar on conditional release eligibility to other inmates. For the reasons set forth below, Berry's allegations fail to warrant habeas relief.

Discussion

In his petition, Berry claims that the Board applies § 589.040 in a discriminatory matter in that it has released two other inmates, Solly Bauer and Jody Davis, without requiring them to complete MOSOP. Berry also alleges that the Board "may" have released a third inmate, Chad M. White, without requiring him to complete MOSOP. Berry alleges the Board has violated his equal process rights because he is black and Bauer, Davis, and White are white. However, at the evidentiary hearing, Berry failed to present any evidence about the races of Bauer or Davis.

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Berry's allegations fail as a matter of law because Bauer and Davis did not commit sexual assault offenses as defined by § 589.015, RSMo., so they are eligible for conditional release under Missouri law. And based on Lead Analyst Mueller's affidavit, Department records show that White did complete MOSOP before he was paroled. Berry committed a sexual assault offense and failed to complete MOSOP, so he is not eligible for conditional release and the Board was required by statute to cancel his conditional release date. § 589.040, RSMo.

Section 589.040 requires the Department to develop a program for the treatment, education and rehabilitation of inmates serving sexual assault offenses. The Department developed the Missouri Sex Offender Program to fulfill that requirement. Section 589.040 also requires all inmates convicted of sexual assault offenses to complete MOSOP before becoming eligible for parole or conditional release. § 589.040.2, RSMo. (2011).

For the purposes of § 589.040.2, sexual assault is defined as:

- (a) The acts of rape in the first or second degree, forcible rape, rape, statutory rape in the first degree, statutory rape in the second degree, sexual assault, sodomy in the first or second degree, forcible sodomy, sodomy, statutory sodomy in the first degree, statutory sodomy in the second degree, child molestation in the first, second, third, or fourth degree, deviate sexual assault, sexual misconduct, sexual misconduct in the first, second, or third degree, sexual abuse, and sexual abuse in the first or second degree, or attempts to commit any of the aforesaid, as these acts are defined in chapter 566;

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- (b) The act of incest, as this act is defined in section 568.020;
- (c) The act of abuse of a child under section 568.060, which involves sexual contact;
- (d) The act of use of a child in a sexual performance; and
- (e) The act of enticement of a child, as defined in section 566.151, or any attempt to commit such act.

§ 589.015, RSMo. (2011). Because Berry committed two counts of forcible rape, he committed a sexual assault offense that requires him to complete MOSOP before he can be eligible for parole or conditional release. § 589.040.2 (2011); The Board has no discretion to allow Berry to be paroled or conditionally released unless he first completes MOSOP. *Reynolds v. Missouri Board of Probation and Parole*, 468 S.W.3d 413, 421 (Mo. App. W.D. 2015) (the current version of § 589.040.2 “eliminated the Board’s discretion in determining whether to extend conditional release dates” for inmates required to complete MOSOP who fail to do so).

The other inmates Berry points to, Solly Bauer and Jody Davis, did not commit sexual assault offenses and were therefore not statutorily required to complete MOSOP. Berry alleges that Bauer was convicted of first-degree endangering the welfare of a child and Davis was convicted of possession of child pornography. Neither of these offenses qualifies as a sexual assault under § 589.015, so neither inmate was statutorily required to complete MOSOP in order to be eligible for conditional release. § 589.040.2. These inmates were not

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similarly situated to Berry because the Board had discretion to release them, but the Board had no discretion to release Berry because he failed to complete MOSOP as § 589.040 requires.

Berry also alleges that another inmate, Chad M. White, was convicted of first-degree statutory sodomy and failing to register as a sex offender and “may not have completed MOSOP prior to his release.” But the evidence shows White was required to complete MOSOP under § 589.040.2 because he committed a sexual assault offense, and White *did* successfully complete MOSOP before he was granted release on parole.

Berry cannot show that the Board violated his due process rights because he has no liberty interest in conditional release and no right to be conditionally released before the expiration of his sentences. *Johnson v. Missouri Board of Probation and Parole*, 92 S.W.3d 107, 114 (Mo. App. W.D. 2002). Therefore, due process protections are not invoked when the Board extends or cancels his conditional release date. *Id.*

Berry cannot show that the Board violated his equal protection rights because he cannot identify a similarly situated group that was treated differently than him or otherwise show that the Board discriminated against him. The Equal Protection Clause directs that “all persons similarly circumstanced shall be treated alike.” *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

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But “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.” *Id.* Thus, the equal protection analysis focuses on classifications of persons or groups. *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. 2006).

“[E]qual protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.” *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)). For this reason, not all distinctions in treatment of individuals or groups are invalid. *Id.* A law may properly treat different groups differently, but it may not treat similarly situated persons differently unless such differentiation is adequately justified. *Id.* (citing *Creason v. City of Wash.*, 435 F.3d 820, 823 n. 3 (8th Cir. 2006)).

Berry has failed to show that the Board has applied § 589.040.2 in a discriminatory manner. Instead, Berry’s allegations show that the Board follows the statute as required. The Board must require all inmates who commit sexual assault offenses to complete MOSOP before they can be eligible for parole or conditional release. § 589.040.2, RSMo.; *Reynolds*, 468 S.W.3d at 421.

In his reply pleading, Berry argues that inmates Bauer and Davis are similarly situated to him because Department policy requires them to

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participate in MOSOP. That argument fails because although the inmates are required to participate in MOSOP, the Board has statutory discretion to allow them parole or conditional release even if they fail to complete MOSOP. For inmates who did not commit a sexual assault offense, the Board has *discretion* on whether or not to require MOSOP for the inmates' treatment, education, and rehabilitation. *Depauw v. Luebbers*, S.W.3d 805, 807 (Mo. App. E.D. 2009). The Board has no such discretion with Berry and other offenders who commit sexual assault offense.

The facts submitted in this case show the difference between the two categories of offenders. The Department of Corrections requires inmates such as Bauer and Davis to participate in MOSOP because their offenses were sexual in nature, even though they were not sexual assault offense as defined by statute. Because these inmates are not statutorily required to complete MOSOP before they are released, the Board can allow them to complete sexual treatment programs after they are released.

Berry and other offenders who commit sexual assault offense *cannot* be released on parole or conditional release unless they complete MOSOP. *Reynolds*, 468 S.W.3d at 421. The Board has no discretion to allow Berry to complete MOSOP while on parole release. *Id.* Berry is not similarly situated to offenders who did not commit sexual assault offenses as defined by statute,

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so the law may treat him differently than those offenders. *Doe v. Phillips*, 194 S.W.3d at 845.

Section 589.040.2 imposes stricter requirements on offenders who commit more serious sex offenses. The law furthers the State's valid interest in rehabilitating dangerous sex offenders before releasing them back into the general population. The law does not treat any classes of people different and only imposes requirements based upon crimes committed. There is no evidence that § 589.040.2 or the Board's application of it discriminates against a protected class. Berry has failed to establish that the Board has violated his due process or equal protection rights.

For these reasons, the Court finds that Petitioner Jerome Berry is lawfully confined in Respondent's custody. The Court denies the petition for a writ of habeas corpus and enters judgment in Respondent's favor.

12-11-19

Date

Patrick L. King, Judge

