Filed 2/14/22 In re Flores CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re ANTHONY FLORES on Habeas Corpus.	C089974 (Super. Ct. No. 18HC00046)

"In 2016, voters approved Proposition 57, the 'Public Safety and Rehabilitation Act of 2016.' Proposition 57 amended the California Constitution to grant early parole consideration to persons convicted of a nonviolent felony offense. (Cal. Const., art. I, § 32, subd. (a)(1).)" (*In re Kavanaugh* (2021) 61 Cal.App.5th 320, 334 (*Kavanaugh*).) Proposition 57 also directed the Department of Corrections and Rehabilitation (CDCR) to adopt regulations in furtherance of its provisions. (Cal. Const., art. I, § 32, subd. (b); *Kavanaugh* at p. 334.) CDCR promulgated separate regulations for prisoners serving determinate and indeterminate sentences. (*Kavanaugh*, at pp. 334, 336 & fn. 3; see also Pen. Code, § 3040 et seq. and associated regulations [applicable to indeterminately

sentenced prisoners]; Cal. Code Regs., tit. 15, §§ 2449.1, 2449.3-2449.7, 3490-3493 [applicable to determinately sentenced prisoners].) The regulations for prisoners serving indeterminate sentences are not at issue in this case.

The CDCR regulations promulgated for prisoners serving determinate sentences (the determinate regulations) provide for parole consideration when the determinately sentenced prisoner has served the full term for the primary offense. The prisoner has the opportunity to submit a written statement to the Board of Parole Hearings (Board), but the prisoner does not have the right to an in-person hearing. A hearing officer reviews the records and submissions and approves or denies parole in a written decision with reasons stated. If parole is denied, the prisoner may request review of the decision and file a written description of why the decision was incorrect. A separate hearing officer considers the request for review.[1] (See *Kavanaugh, supra*, 61 Cal.App.5th at pp. 336-337.)

Anthony Flores, a prisoner serving a determinate term for nonviolent offenses, was denied parole under the determinate regulations. Because there is no right to an in-person parole hearing under the determinate regulations, Flores describes the process as a paper review. He petitioned the trial court for a writ of habeas corpus. The trial court granted the petition, concluding CDCR's parole determination did not comport with Proposition 57 and Flores's due process rights. The trial court ordered CDCR to grant Flores an in-person parole suitability hearing. Aware that the Board had issued its parole determination under emergency regulations subsequently superseded by new regulations not addressed by the trial court, the trial court nevertheless ordered CDCR to promulgate new regulations to ensure proper parole suitability determinations.

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[1] This is only a brief summary of the relevant regulations.

CDCR appealed to this court from the trial court's order, arguing the determinate regulations comport with due process and other applicable law and the Board's parole determination is supported by sufficient evidence.

After initial briefing was completed in this appeal, the Court of Appeal in *Kavanaugh* held that the CDCR parole regulations are consistent with Proposition 57 and do not violate prisoners' due process rights. (*Kavanaugh, supra*, 61 Cal.App.5th at pp. 344-361.) Because *Kavanaugh* supports CDCR's position in this appeal, we asked the parties to address *Kavanaugh* in supplemental briefing. In his supplemental briefing, Flores argues *Kavanaugh* is unpersuasive and distinguishable, and the hearing officer violated his due process rights in determining that Flores posed an unreasonable risk of violence.

Also after briefing in this case, Flores was released on parole and therefore is no longer incarcerated.[2] The parties agreed at oral argument that, as to Flores's release on parole, the petition for writ of habeas corpus is now moot, but that the trial court's order requiring CDCR to promulgate new regulations is not moot.

We conclude *Kavanaugh* is on point and persuasive, the hearing officer properly considered whether Flores posed an unreasonable risk of violence, and the trial court's order to CDCR to promulgate new regulations must be reversed because the regulations were not inconsistent with Proposition 57 and due process and because new regulations had already superseded those applied by CDCR to deny parole for Flores.

We will reverse the trial court's order granting Flores's petition for writ of habeas corpus and remand with directions to the trial court to enter an order dismissing the petition for habeas corpus as to Flores's request for an in-person parole suitability hearing and to deny the request for an order directing CDCR to promulgate new regulations.

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[2] We granted the Attorney General's request, filed November 19, 2021, for judicial notice of a CDCR document reflecting Flores's release on parole on July 29, 2021.

BACKGROUND

In 2008, Flores was convicted of second degree robbery, a violent offense, and sentenced to two years in prison. In 2010, while still on parole for that conviction, Flores fled when an officer tried to make a traffic stop. The ensuing chase covered more than 30 miles, with multiple dangerous traffic infractions. Finally, Flores rammed an occupied police vehicle and tried to run over an officer. For multiple evading and assault convictions, Flores was sentenced to a term of 16 years four months for nonviolent offenses. While incarcerated, Flores had violations for fighting, battery on an officer with an unknown liquid, and resisting an officer. He completed vocational computer training.

Flores sought consideration for parole under Proposition 57. He submitted a letter to the Board, which a hearing officer reviewed and considered. The hearing officer denied parole, finding Flores posed an unreasonable risk of violence to the community. Flores requested review of the hearing officer's decision, and a reviewing officer found that the hearing officer performed the proper functions and that the decision had a rational basis.

Flores filed a petition for writ of habeas corpus in the trial court. The trial court issued an order to show cause and appointed counsel for Flores. Without holding an evidentiary hearing, the trial court granted the petition. The trial court determined the hearing officer erred by finding dangerousness based "merely [on] a numerical count of aggravating factors weighed against a numerical count of mitigating factors . . . ." It also ruled Flores was entitled to an in-person parole suitability hearing under Proposition 57 and section 3041.5. In addition to granting relief specific to Flores, the trial court ordered CDCR to promulgate new regulations to require hearing officers to make decisions consistent with the trial court's interpretation of the necessary dangerousness determination and to provide the opportunity for in-person hearings for Proposition 57 parole decisions.

CDCR appeals the trial court's order.

DISCUSSION

I

Because Flores has been released on parole, his petition for writ of habeas corpus seeking an in-person parole suitability hearing is moot. An issue is moot when, without fault of the opposing party, an event occurs that renders it impossible for the court to grant a prevailing defendant any effectual relief. (See *People v. DeLeon* (2017) 3 Cal.5th 640, 645.) Therefore, the appropriate disposition as to this issue is reversal with directions to dismiss the petition as moot. (See *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 135; *In re Marriage of Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 250 [reversing and remanding with instructions to dismiss moot action].)

II

On the other hand, the trial court's order requiring CDCR to promulgate new regulations is not moot as nothing has happened to render it impossible for CDCR to promulgate new regulations. We therefore turn to whether that order was proper. In doing so, we rely on the recently published decision in *Kavanaugh, supra*, 61 Cal.App.5th 320.

A

In *Kavanaugh*, the Court of Appeal held that CDCR's regulations implementing Proposition 57 do not conflict with constitutional guarantees and do not violate a prisoner's due process rights. In that case several prisoners sought habeas corpus relief after they were denied parole under the CDCR regulations. The trial courts granted the petitions but the Court of Appeal reversed, concluding: "[T]he parole regulations do not conflict with the constitutional guarantee of parole consideration or violate due process. [Proposition 57] broadly ensures parole consideration for eligible felons, but it does not specify the procedures governing the parole consideration process. Rather, it vests CDCR with authority to adopt regulations in furtherance of its guarantee of parole

consideration. CDCR acted within its mandate by enacting the [determinate] regulations. Further, the [determinate] regulations do not impinge on the procedural due process rights of prisoners seeking parole. They require annual parole eligibility reviews, set forth sufficiently definite criteria governing parole release decisions, mandate a written statement of reasons for each parole release decision, and grant prisoners notice of the parole proceeding, an opportunity to submit a written statement to the Board of Parole Hearings (the Board), and the right to seek review of an adverse decision. These features adequately safeguard against arbitrary and capricious parole release decisions." (*Kavanaugh, supra*, 61 Cal.App.5th at p. 335.)

The Court of Appeal in *Kavanaugh* found "no tension between [Proposition 57's] broad promise of parole consideration and the parole regulations CDCR has adopted." (*Kavanaugh, supra*, 61 Cal.App.5th at p. 347.) In so finding, it distinguished the statutes and regulations applicable to parole consideration for indeterminately sentenced prisoners. (*Ibid.*) Although those statutes and regulations provide for the appointment of legal counsel for potential parolees, in-person parole hearings, and multimember parole panels, the Court of Appeal rejected the argument that parole statutes and regulations applicable to indeterminately sentenced prisoners were applicable to prisoners determinately sentenced and now eligible for parole consideration under Proposition 57. (*Ibid*.) Flores disagrees with *Kavanaugh* in this regard, referring to the statutes and regulations applicable to indeterminately sentenced prisoners as the "standard" parole consideration scheme and claiming that the Proposition 57 voters intended to apply this scheme to determinately sentenced prisoners. As did *Kavanaugh*, we reject this reasoning because nothing in Proposition 57 evinces a voter intent in support of Flores's view. Furthermore, the scheme applicable to indeterminately sentenced prisoners is not the only parole consideration scheme that was already in existence before passage of Proposition 57. As *Kavanaugh* noted, an entirely different scheme of parole consideration that in many respects resembles the scheme for determinately sentenced

prisoners applies to nonviolent, non-sex-registrant second-strikers. (*Kavanaugh, supra*, 61 Cal.App.5th at p. 348.)

We agree with *Kavanaugh* that CDCR's regulations promulgated under the direction of Proposition 57 are consistent with Proposition 57. And we conclude Proposition 57 does not require a scheme different from CDCR's regulations.

B

Flores argues *Kavanaugh* did not consider whether Proposition 57 gave determinately sentenced prisoners the right to in-person parole hearings under Penal Code section 3041.5.[3] But *Kavanaugh* included Penal Code section 3041.5 in its summary of parole statutes and regulations applicable only to indeterminately sentenced prisoners (*Kavanaugh, supra*, 61 Cal.App.5th at p. 347), a group of statutes that includes Penal Code section 3041, which expressly excludes inmates sentenced under Penal Code sections 1170 et seq. [determinate sentencing]. While it may be true *Kavanaugh* did not specifically address the right to in-person hearings under Penal Code section 3041.5, it noted that provisions of the scheme applicable only to indeterminately sentenced prisoners did not confer any procedural rights on determinately sentenced prisoners. (*Kavanaugh,* at pp. 347-350.)

C

Kavanaugh concluded that prisoners do not have a due process right to in-person parole hearings under Proposition 57. (*Kavanaugh, supra,* 61 Cal.App.5th at pp. 347.) Flores argues *Kavanaugh's* conclusion is distinguishable and incorrect.

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[3] Penal Code section 3041.5, subdivision (a)(2) provides that, at all parole hearings, "[t]he inmate shall be permitted to be present, to ask and answer questions, and to speak on his or her own behalf."

1

Flores suggests *Kavanaugh* is distinguishable because it considered whether all determinately sentenced prisoners are eligible for in-person hearings under Proposition 57, whereas the trial court here found a due process right to an in-person hearing only for those potential parolees who were denied parole on a written submission and sought reconsideration. The trial court in this case noted it would be expensive to afford an in-person hearing to all determinately sentenced prisoners under Proposition 57, and ruled that CDCR "need not promulgate regulations requiring a live hearing for all eligible prisoners. [CDCR] might instead provide an initial paper review by which the parole board could grant parole to those it deems suitable for such. Upon request of any deemed unsuitable for parole a live hearing would be provided."

We disagree that *Kavanaugh* is distinguishable on this basis. *Kavanaugh* held that a determinately sentenced prisoner has no right to an in-person parole hearing under Proposition 57. We see no reason why such a constitutional due process right would then emerge from an initial denial of parole. Although the trial court's proposed process would be less expensive than in-person parole hearings for all determinately sentenced prisoners, and such a consideration is a permissible balancing factor in determining what due process requires (*Kavanaugh, supra*, 61 Cal.App.5th at p. 358), there is no evidence in this record about how much money such a hybrid procedure would cost or save. In any event, a prisoner may obtain judicial review of a parole denial by petition for writ of habeas corpus, which entitles a prisoner to an in-person hearing if the petition states a prima facie case for relief. (*Id*. at p. 341.)

2

Flores further argues *Kavanaugh* is distinguishable because it did not consider whether the determinate regulations violate the due process protections of the United States Constitution.

Kavanaugh's due process analysis was based mainly on the due process protections of the California Constitution. Nevertheless, although *Kavanaugh* cited mainly to California cases, those cases considered the jurisprudence of the United States Supreme Court on due process and then determined that the state Constitution provides greater protections. *Kavanaugh* applied the balancing test stated in *People v. Ramirez* (1979) 25 Cal.3d 260 (*Ramirez*) for determining whether CDCR's regulations violate due process rights. In *Ramirez*, the California Supreme Court held that the state Constitution provides due process protection for more liberty interests than does the federal Constitution. (*Id.* at pp. 265-269.) In other words, "[o]ur state due process constitutional analysis differs from that conducted pursuant to the federal due process clause in that the claimant need not establish a property or liberty interest as a prerequisite to invoking due process protection. [Citations.]" (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1069.)

In his argument that *Kavanaugh* did not consider the protections provided by the United States Constitution, Flores does not explain how considering federal due process protections would lead to a different result. Indeed, it appears that, because the state Constitution provides greater protection, a separate analysis relying only on United States Supreme Court precedents would not yield a better result for Flores. This conclusion is supported by a footnote in *Kavanaugh* noting that "numerous lower federal courts have found the parole regulations do not violate prisoners' procedural due process rights under the federal Constitution. [Citations.] Further, we note that there is federal appellate authority standing for the proposition that in-person parole hearings are not guaranteed by the federal due process clause. (*Franklin v. Shields* (4th Cir. 1977) 569 F.2d 784, 800 [en banc] ['[W]e discern no constitutional requirement that each prisoner receive a personal [parole] hearing . . . .'].)" (*Kavanaugh, supra*, 61 Cal.App.5th at p. 359, fn. 19.)

In addition, Flores argues *Kavanaugh* did not give sufficient weight to the dignitary interests of Proposition 57.

The dignitary interest in notice and an opportunity to be heard is one of the balancing factors in determining what due process requires. (*Ramirez, supra,* 25 Cal.3d at p. 269.) "[I]dentification of the dictates of due process generally requires consideration of (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) *the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official*, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation.]" (*Ibid*., italics added.)

Kavanaugh considered and rejected the argument that the dignitary interest provided by Proposition 57 required an in-person parole hearing. The court held: "Finally, with respect to the *Ramirez* factor concerning dignitary interests, we note that the parole regulations permit prisoners to make their case for parole release in ways other than in-person parole hearings. As noted, they allow prisoners to file a written statement before an initial parole decision and, if necessary, in a second written statement explaining why the initial parole decision is incorrect. [Citations.] Prisoners receive these opportunities annually, assuming they remain incarcerated and eligible for parole consideration. [Citations.] These opportunities promote the dignitary values of the persons seeking parole release. [Citation.]" (*Kavanaugh, supra,* 61 Cal.App.5th at p. 359.)

Given the regulations allowing the prisoner to submit written statements before and after an initial parole decision and providing for annual reviews, *Kavanaugh*

concluded "the parole regulations afford prisoners reasonable notice and a reasonable opportunity to be heard. That is all due process requires. [Citation.]" (*Kavanaugh, supra,* 61 Cal.App.5th at p. 359.)

Flores argues a prisoner has an interest in seeking freedom and that it may be difficult for a prisoner "to fully understand the review and explain themselves through written submissions." While an in-person hearing could be beneficial in helping prisoners understand the process and explain themselves better, whether due process requires an in-person hearing is subject to the balancing of factors that include dignitary interests but also "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Ramirez, supra,* 25 Cal.3d at p. 269.) We agree with *Kavanaugh* that the balancing of the *Ramirez* factors supports a finding that the CDCR regulations provide constitutional due process. (*Kavanaugh, supra,* 61 Cal.App.4th at pp. 354-359.)

III

We additionally conclude the trial court erred by directing CDCR to promulgate new regulations because Flores's parole suitability was determined under emergency regulations that had already been superseded by the time of the hearing on the petition for writ of habeas corpus. The trial court ordered CDCR to promulgate new regulations requiring "a *Lawrence*-based determination for suitability for parole for Proposition 57 parole-suitability determinations." The trial court should not have ordered the promulgation of new regulations because new regulations had already superseded the emergency regulations reviewed by the trial court. The Board denied parole for Flores in 2017 under emergency regulations not meant to be permanent, and new regulations were promulgated and became effective in 2018. (See Cal. Code Regs., tit. 15, § 2449.1, Register 2017, No. 15 (Apr. 13, 2017) through Register 2022, No. 2, (Jan. 14, 2022).) The trial court recognized there were new CDCR regulations, but it still ordered CDCR to promulgate even newer regulations based on *Lawrence*, without considering whether

the current regulations were adequate. Because the determination that Flores is not suitable for parole was made under regulations that have been superseded and the trial court did not consider whether the new regulations are adequate, the trial court should not have ordered promulgation of newer regulations. The Board relied on the superseded regulations in providing Flores's parole suitability determination, and hence those superseded regulations are the only regulations relevant to this appeal. (See *Hance v. Super Store Industries* (2020) 44 Cal.App.5th 676, 686 [applying rule in force at the relevant time].)

DISPOSITION

The order granting the petition for writ of habeas corpus is reversed, and the matter is remanded to the trial court with directions to enter an order dismissing the petition for habeas corpus as to Flores's request for an in-person parole hearing and to deny the request for an order directing CDCR to promulgate new regulations.

/S/
MAURO, Acting P. J.

We concur:

/S/
DUARTE, J.

/S/
HOCH, J.