STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-1702

ANDREW WOOD,
Plaintiff,

v.

JEFFREY WALLIN, Director of Vermont Crime Information Center and MICHAEL SCHIRLING, Commissioner of Department of Public Safety,
Defendants.

RULING ON THE STATE'S MOTION TO DISMISS

In this case, Plaintiff Andrew Wood seeks Rule 75 review of a determination of the Vermont Department of Public Safety (DPS) to not remove him from the Vermont Sex Offender Registry operated by the Vermont Crime Information Center. The State has filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. It argues: (1) Mr. Wood failed to exhaust his administrative remedies; (2) Mr. Wood's petition is not "ripe" for review; and (3) mandamus is not available because Mr. Wood is not entitled to clear and certain relief, better avenues for redress are available, and because DPS lacks the authority to grant relief in these circumstances.

The underlying dispute is as follows. For qualifying convictions, and as relevant to this case, the Registry has a 10-year reporting requirement. 13 V.S.A. § 5407(e).[1] At issue here is when that 10-year period begins. In 1993, Mr. Wood was sentenced concurrently to 8–10 years for felony sexual assault and 20–life for "murder." The sexual assault conviction triggered his requirement to appear on the Registry. The murder conviction alone would not have done so. Mr. Wood served more than 10 years in prison and eventually was released on parole. More than 10 years later, he is still on the Registry. His position is that he maxed out his sexual assault sentence so once he was released from prison, his Registry requirement started, and it ended 10 years later. The State's position is either that (a) because the sentences were imposed concurrently, he remains in effect on parole for sexual assault, and the 10-year period has not yet begun, or (b) the 10-year period under § 5407(e) does not begin to run until discharge from probation or parole regardless whether it is

[1] Mr. Wood relies on the original 1996 version of § 5407, and the State does not object to that. Accordingly, for purposes of this decision and without taking any position on which version of the Registry statutes properly apply, the court will apply the 1996 version of § 5407 here.

connected to the qualifying conviction.[2]

Section 5407(e) provides as follows: "All reporting requirements under this section, except for sexually violent predators, shall cease 10 years after the sex offender is released from prison or discharged from probation or parole, whichever is later. The 10-year period shall not be affected or reduced in any way by the actual duration of the offender's sentence as imposed by the court, nor shall it be reduced by the sex offender's release on parole or ending of probation or other early release." As applied to the issue presented here, the statute is ambiguous insofar as it does not explicitly describe how it applies to multiple and concurrent sentences and does not expressly indicate whether the probation or parole must be related to the qualifying offense or applies to any probation or parole.[3]

Exhaustion of administrative remedies

The State claims that Mr. Wood failed to exhaust his administrative remedies. DPS's regulations make an administrative remedy available, as follows:

> 5.1 ADMINISTRATIVE REVIEW
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> An individual who believes that he or she is improperly on the sex offender registry or on the Vermont Sex Offender Registry Web Site, or who believes that incorrect information is included in the registry or on the Vermont Sex Offender Registry Web Site may request an Administrative Review by contacting the Director in writing. The Director, or his or her designee, in cooperation with DOC, shall investigate the alleged discrepancy within 3 business days of receipt of notification. The Director is limited to correcting clerical errors, reviewing orders from the Court, confirming the identity of registrants and researching matters of law.
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> 5.2 CORRECTIONS
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> A registry requirement found to be invalid or incorrect will be corrected as soon as practicable after discovery. The registrant will be notified by mail that his or her appeal has been successful. If the appeal results in removal from either the registry or the Vermont Sex Offender Registry Web Site, the individual shall be removed as soon as practicable. The VCIC will notify the appropriate law enforcement agencies, DOC and a registered victim that the individual has been removed from the registry or the Web Site.
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> 5.3 INVALID CHALLENGE NOTIFICATION
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> The Director shall notify in writing any person whose challenge has been determined to be invalid as a result of an investigation. Such notice shall

[2] The State clearly takes position (a). In places in the briefing it also appears to take position (b), which is not entirely consistent with (a).

[3] The State could have clarified this provision in its regulations, but it has not done so. See Vt. Admin. Code 17-2-2:3.11(a) (duplicating statutory language without elaboration).

advise the individual that no apparent error exists and will provide an explanation for the decision. The notice shall include information that the decision may be appealed to the Commissioner of Public Safety.

5.4 APPEAL FROM CHALLENGE

An appeal to the Commissioner shall be initiated by written notice; indicating in the appeal that the Director has found the challenge to be invalid. The Commissioner's decision, which shall issue within 30 days of receipt of the written appeal, will not be set aside absent court order.

Vt. Admin. Code 17-2-2:5.

Mr. Wood sent his request to Director Wallin as required by § 5.1. Section 5.1 says that matters presented will be investigated within 3 days. Nothing in the regulation provides any time limit for notice of any administrative response. DPS publicly takes the position that it will both investigate and "resolve" such petitions within that 3-day period. See https://sheriffalerts.com/cap_office_disclaimer.php?office=55275&fwd=aHR0cDovL3d3dy5jb21tdW5pdHlub3RpZmljYXRpb24uY29tL2NhcF9tYWluLnBocD9vZmZpY2U9NTUyNzU= (last visited Feb. 15, 2022). Relying on this, Mr. Wood considered the lack of response from Director Wallin within 3 days as triggering the appeal period and notified Commissioner Schirling of that lack of response under § 5.4. Commissioner Schirling responded that his "team" would look into it but did not respond in substance. After 30 days ran, Mr. Wood filed this action. Director Wallin in fact responded in substance approximately one month after first being contacted. Commissioner Schirling never did.

The State argues that, following Director Wallin's substantive decision, Mr. Wood should have appealed to Commissioner Schirling before seeking further review here. Mr. Wood's position is that Director Wallin failed to respond in a timely manner (within 3 business days), and he already had sought further review from Commissioner Schirling.

The court does not hesitate to enforce the rule requiring the exhaustion of administrative remedies where those remedies are available and petitioners have clear notice as to how to pursue them. In this case, DPS voluntarily gives itself a very short amount of time to investigate petitions and takes the position on its website that it will resolve those petitions within that time as well. Nothing in its regulations otherwise gives it any timeframe for notice of a decision from the director, and thus no petitioner can know when a decision can be expected and when an appeal becomes timely. It is reasonable in these circumstances for Mr. Wood to have relied on the representation on the website and to seek review before the commissioner when he did. The court cannot conclude that he failed to exhaust his administrative remedies in these circumstances.

Ripeness

By "ripeness," the State refers to its view of the underlying substantive issue. According to it, because Mr. Wood remains on parole, and 10 years have not elapsed since he was discharged from parole, his claim to be removed from the Registry is not "ripe." For reasons set forth below, the court declines to address the substance of the dispute at this

time.

Mandamus

The State argues that mandamus cannot be available in this case. For mandamus to be available "(1) the petitioner must have a clear and certain right to the action sought by the request for a writ; (2) the writ must be for the enforcement of ministerial duties, but not for review of the performance of official acts that involve the exercise of the official's judgment or discretion; and (3) there must be no other adequate remedy at law." *Pet. of Fairchild*, 159 Vt. 125, 130 (1992). There is no indication in this case that the underlying facts are in dispute. Mr. Wood was given the sentence he was given, and he was released on parole. The circumstances of his sentence and his service of his sentence are not in dispute. Under those circumstances, VCIC either must keep him on the Registry or it must remove him; it has no discretion otherwise. There is no relief Mr. Wood needs from anyone other than DPS, and DPS is fully capable of granting it if appropriate. DPS's own regulations say that review is "limited to correcting clerical errors, reviewing orders from the Court, confirming the identity of registrants *and researching matters of law*." Vt. Admin. Code 17-2-2:5.1 (emphasis added). Mr. Wood has presented DPS with a matter of law to resolve. If the determination of that matter of law is resolved in Mr. Wood's favor, relief in the nature of mandamus will be an appropriate remedy.

Thus, to the extent that the State has claimed that this court lacks subject matter jurisdiction, it does not. To the extent that the State has asserted that Mr. Wood has failed to state a claim, he has not.

While the court often resolves pure issues of law, as is presented here, on a motion to dismiss, the court declines to do so in this case. This case presents substantial questions as to the meaning and reach of "concurrence" under Vermont's sentencing statutes, see 13 V.S.A. § 7032, how concurring sentences affect the breadth of 13 V.S.A. § 5407(e), and otherwise how to properly interpret § 5407(e). Considering the gravity of the issues, as well as collateral issues completely unexplored by the parties, such as whether the State's interpretation is entitled to deference, whether any legislative history informs the matter, etc., the court prefers to await the presentation of more probing and complete briefing before ruling on the underlying dispute.

Order

For the foregoing reasons, the State's motion to dismiss is denied.

SO ORDERED this 15th day of February, 2022

Robert A. Mello
Superior Judge