

RENDERED: January 31, 2003; 2:00 p.m.

NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000239-MR

DONNIE RAY STEVENS

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS WALLER, JUDGE
ACTION NO. 01-CI-00581

JOHN COY, CHAIRMAN
KENTUCKY STATE PAROLE BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON, AND KNOFF, JUDGES.

GUIDUGLI, JUDGE. Donnie Ray Stevens appeals, pro se, from an order of the Bullitt Circuit Court dismissing his petition for writ of mandamus. We affirm.

On June 28, 2001, Stevens filed a petition for writ of mandamus in the Bullitt Circuit Court requesting that the court issue a writ compelling the Kentucky State Parole Board and John Coy, its Chairman, to conduct another parole revocation hearing.

Stevens contended that his parole had been revoked illegally or was based upon insufficient evidence. He further alleged that his counsel was ineffective in his representation throughout the revocation process and specifically at the hearing. Although neither the chairman nor the Board has filed an appellate brief in this matter, they did file a motion to dismiss Stevens's petition with the trial court (trial record p. 44). In that motion, the following facts are set forth relative to Stevens's parole revocation:

Procedural Background

In 1983, petitioner was convicted of first degree rape, first degree assault, and first degree sodomy, for which he received twenty years' imprisonment. In 1988, he was granted parole, but in October, 2000, he was charged with seven violations:

- 1) Failure to follow special instructions of parole officer
- 2) Failure to report an arrest within 24 hours
- 3) Violation of supplemental conditions for sex offenders by possessing sexually arousing material
- 4) Violation of supplemental conditions for sex offenders by possessing sexually arousing material
- 5) Violation of supplemental conditions for sex offenders by establishing a sexual relationship

with an adult without prior approval of parole officer and treatment clinician

- 6) Possession of alcohol
- 7) Falsification of release report regarding employment status

At the preliminary revocation hearing, petitioner was represented by James Metry. The Administrative Law Judge issued the following Findings of Fact:

PO Roach introduced a waiver of hearing to establish the violations listed in counts 1-3.

Testimony from PO Clausen established that on 9/30/00 he attempted a home visit at Stevens=[s] residence when he saw a car pull into and then immediately out of the area of Stevenes= (sic) home. Local police stopped the vehicle and Stevens was found to be driving. In the home Clausen found beer and wine coolers in the refrigerator, and empties in the garbage. Also found was videotape of Stevens and a woman having sex in a hot tub. Female clothing was found in the trailer and Stevens admitted having a relationship with Bonnie Johnson without prior approval as required by his sex offender restrictions. PO Clausen found about seven business cards in Stevens=[s] wallet which read ADonnie Stevens Cleaning Service@ as well as a briefcase containing business records. Stevens had reported no employment and was drawing disability.

The Administrative Law Judge found petitioner guilty of all seven of the violations and issued the following Conclusions of Law:

The attached documents were admitted into evidence. The documents and the testimony established probable cause to believe that the parole conditions have been violated. This case is referred to the Chair of the Kentucky Parole Board for the issuance of a parole violation warrant.

The Parole Board affirmed the decision of the administrative law judge, finding petitioner guilty of all seven violations of parole. The Board based its decision upon the preliminary hearing and upon the evidence presented at the final heading. (References to exhibits omitted).

The parole board's revocation dated January 5, 2001, resulted in Stevens being sent back to prison to serve an additional 36 months of the original sentence. Thereafter, on June 28, 2001, Stevens filed his petition for writ of mandamus.

A writ of mandamus is an extraordinary remedy that is available only if the petitioner can establish that he has no other remedy and irreparable injury will result if the writ is not granted. Foster v. Overstreet, Ky., 905 S.W.2d 504, 505 (1995). Fiscal Court of Cumberland County v. Board of Education of Cumberland County, 191 Ky. 263, 230 S.W.2d 57, 60 (1921), sets forth the following five factors to be considered in determining whether a writ of mandamus should issue:

Upon an application for such writ [mandamus] the questions which usually arise are: (1) Is there a duty imposed upon the officer; (2) Is the duty ministerial in its character; (3) has the petitioner a legal right, for the enjoyment, protection or redress of which the discharge of such duty is necessary; (4) has he no other and sufficient remedy; and (5) in view of the fact that the issuance of the writ is not always a matter of right, are the circumstances of the case such as will call forth the action of the court?

In Wise v. United States, 369 F Supp. 30, 32-33 (W.D.Ky. 1973), the court stated:

As has been stated in several cases where a plaintiff seeks mandamus, he must prove three elements: (1) a clear right of plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) that no other adequate remedy is available.

In this case, Stevens has failed to meet the standard for the issuance of such a writ, since no duty has been imposed here and no right of Stevens has been violated. Stevens received all the due process rights he was entitled to under the Kentucky Revised Statutes (KRS) and administrative regulations. The Administrative Law Judge (ALJ) and the parole board complied with all aspects of Title 501, Chapter 1 of the Administrative Regulations. Stevens was charged with seven alleged violations and admitted three of them. The ALJ then heard evidence from the probation officer which established probable cause that he

had violated the remaining four conditions. Based upon his admissions and the overwhelming evidence presented, the matter was referred to the parole board. The parole board, in compliance with the regulations and applicable law, conducted another hearing and determined that Stevens had violated seven separate conditions of his parole. Based upon the evidence, the board revoked Stevens's probation and required him to serve an additional 36 months. Stevens received all due process guarantees he was entitled to and he has failed to meet the standard for issuance of a writ of mandamus.

Stevens also claims that his rights were violated in that his counsel at the parole revocation hearing was ineffective. First, we must point out that he has no constitutional right to counsel at such a hearing. ~~We~~ hold that a hearing before the parole board to determine whether or not a parole should be revoked is not such a ~~critical~~ part of criminal proceeding as to require the appointment of counsel. @ Wingo v. Lyons, Ky.App., 432 S.W.2d 821, 822 (1968); see also Gagnon v. Scarpelli, 411 U.S. 778 (1973) (adopting a flexible case-by-case standard for when counsel is required, rather than a rigid rule requiring the appointment of counsel when requested). Without a constitutional right to the presence of an attorney, it fails to matter whether the attorney which he did have was allegedly effective or not.

Even so, appellant has failed to demonstrate that his retained counsel was ineffective. The standard for determining ineffective assistance of counsel announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), was adopted by the Kentucky Supreme Court in Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). Strickland requires that the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. Id. at 668. In addition, Strickland mandates that judicial scrutiny be highly deferential. A court making this evaluation must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. Id. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...and to evaluate the conduct from counsel's perspective at the time Id. at 689.

According to Strickland, to establish prejudice, there must be proof that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the trial would have been different. In other words, the determinative issue is not whether petitioner's counsel made errors but whether he was so thoroughly ineffective that defeat was snatched from the jaws of victory. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992). Here, in this case, even if Stevens's counsel

had committed errors at the hearing, those errors (if any) were not sufficiently prejudicial as to warrant a new hearing.

Stevens admitted three of the seven alleged violations. His parole could have been revoked based on any one violation. However, besides his admission to three violations, the proof as to the other four violations was significant. Stevens contends that the parole officer violated his rights during the search of his trailer which resulted in the incriminating evidence. However, as a parolee, his Fourth Amendment rights were limited in scope. One of the conditions imposed upon Stevens (and other parolees) was that he ~~was~~ subject to a search and seizure if [a] Probation and Parole Officer has reasonable suspicion to believe that [he] may have illegal contraband on [his] person or property.@

In this case, the parole officer had reasonable suspicion to conduct a search of Stevens's trailer based upon Stevens's actions. Once the reasonable search was conducted, the evidence of his parole violations was significant and overwhelming. Stevens's attorney presented mitigating evidence at the hearing but could not overcome the substantial evidence that Stevens had violated his parole conditions, and not just to one violation but as to each of the seven separate conditions. Stevens's claim of ineffective assistance of counsel must fail in

light of the facts and the standard to be applied under
Strickland.

Based upon a thorough review of this case, the order
of the Bullitt Circuit Court denying Stevens's petition for a
writ of mandamus is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT PRO SE:

No Brief Filed By Appellee

Donnie Ray Stevens
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