

RENDERED: January 24, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001198-MR

DARRELL WAYNE ROSE

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 02-CI-00349

FORREST SEXTON

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: COMBS AND PAISLEY, JUDGES; and JOHN D. MILLER, Special Judge.¹

PAISLEY, JUDGE: This is a pro se appeal from an order entered by the Pulaski Circuit Court dismissing appellant's pro se "petition to proceed with a civil action for a violation of civil rights and false arrest, false imprisonment and equal protection under the law." We affirm.

Appellant was on parole in July 2001 when he was arrested as a result of an altercation with one Cathy Garrett.

¹Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

The charge of fourth-degree assault was dismissed after Garrett refused to cooperate in prosecuting the case. However, after a hearing appellant's parole was revoked for failing to follow his parole officer's special instructions to "commit no aggressive or violent behavior toward" Garrett, and for failing to cooperate with his parole officer.

Appellant then filed the action below, in essence claiming that a witness in the parole revocation hearing, Abraham Dailey, violated his rights by posing as a police officer, and by assaulting and placing him under arrest. Appellant alleged that his right to equal protection was violated because Dailey's involvement in the assault incident violated Dailey's own parole prohibition against consorting with other felons, but yet Dailey's parole was not revoked. Appellant further asserted that his rights were violated when his former parole officer, appellee Forrest Sexton, took steps to revoke his parole based on the assault incident involving Garrett. The trial court disagreed and this appeal followed.

We do not have access to a tape or transcript of the preliminary and final parole revocation hearings. However, after the preliminary hearing, the administrative law judge made the following findings and conclusions:

Supervisor Forrest Sexton was sworn and introduced the parole documents into evidence. Supervisor Sexton testified that Rose had failed to cooperate with his parole officers in carrying out the supervision plans. Rose was directed by parole officers

not to have contact with or commit any acts of violence towards Cathy Garrett. On 7/24/01 Rose was arrested by the Pulaski Co. Sheriff's Dept. on the charge of Assault 4th degree (domestic) against Cathy Garrett. Previously Rose, had been continued sine die by order dated 7/02/01 for failing to cooperate with Parole Officers when on 4/27/01 he fled on foot from Parole Officers Tim Perdew and Forrest Setxon [sic] when he was ordered to stop. He had also signed new conditions of supervision on 3/29/01 that directed him to commit no aggressive or violent behavior toward Cathy Garrett. Additionally, as part of the Motion for Continuance Sine Die that was approved 7/2/01 was the special condition that Rose agree to stay away from and have no contact with and commit no acts of violence toward Cathy Garrett. The assault 4th charge had been dismissed earlier in the day 8/2/01 at the request of Cathy Garrett.

Steve Cundriff, Deputy Sheriff Pulaski Co., testified that he responded to the call on 7/24/01 at the Family Dollar. Deputy Cundriff says that when he arrived he initially spoke to a witness who informed him what had occurred and that Rose was inside a store. He then spoke with Rose, placed him in the car and proceeded down to the Family Dollar to speak with Garrett and other witnesses. Deputy Cundriff says that Garrett had been slapped and was upset. She appeared afraid to the [sic] leave the store though he saw no physical marks on her. Based up [sic] his conversation with Garrett and statements of other witnesses Deputy Cundriff arrested Rose for Assault 4th.

Abraham Dailey, witness to the incident on 7/24/01, testified that he pulling [sic] through the shopping center on his way to the Shell when he observed Rose and Garrett in the parking lot. He said something about what he had seen troubled him so he continued to watch through glass windows while he was inside the Shell calling for gas authorization. Dailey says that he saw Rose "whaling on the lady." That he saw him hit

her at least two to three times. Dailey said he started calling to the man and that he told him to stop. It is his belief that Rose quit hitting the woman because he saw him coming. Rose then started heading away until Dailey detained him to wait for the police. The woman went into the Family Dollar. Dailey did not know Rose or Garrett.

Colline Meek, witness to the incident, said that on 7/24/01 she was in the car with her son and a friend backing out of a parking spot. She observed Rose slap Garrett on her left cheek and watched Garrett pull away from Rose and run into the store. Meek said she heard a man yelling at them and that she then pulled back into the parking spot and went into the store to see if the lady was alright. The woman appeared really scared and shaken. Meek did not know Rose or Garrett.

Rita Miller, co-worker of Rose, testified that on 7/24/01 Garrett came to their sewing shop inquiring about pillows Miller was sewing. As it turned out Miller was sewing pillows for Rose that Garrett informed Miller belonged to her. According to Miller the conversation was nasty and rude and conclude [sic] with Garrett storming out of the business. Testimony indicated that the location was close to the shopping center where the incident between Rose and Garrett occurred.

Kathy Garrett testified that on 7/24/01 she did go to the sewing business and speak with Rita Miller in efforts to regain sofa pillows that belonged with her living room suite. She says that she left the business mad, embarrassed and crying. Later, Garrett stated that she saw Rose pulling into the shopping center and that she also pulled in, parked, got out of her car and waited for Rose to come and speak with her. Garrett says she just wanted her property and says that he told her to stay away from his job. Garrett indicated that she got angry and slapped Rose who responded by grabbing her by the clothing on [sic] left shoulder and

pushing her back. Garrett denies Rose ever struck her. She also denies telling the police officer that Rose struck her.

Darrell Rose did not testify.

FINDINGS IN MITIGATION:

None.

CONCLUSIONS OF LAW:

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

1) Failure to cooperate with Parole Officers in carrying out the supervision plans. Continued Sine Die (7/2/01).

1) [sic] Failure to cooperate with Parole Officers on 4/27/01.

2) Failure to follow special instructions of Parole Officer. The parolee was advised of his right to request a special final hearing.

Contrary to appellant's allegations on appeal, the record contains nothing to support his contentions that Dailey posed as a police officer, that Dailey arrested or assaulted him, or that Sexton and Dailey engaged in any conspiracy to deprive him of his constitutional rights. Instead, it is clear from the record that several other witnesses testified regarding appellant's assault of Garrett, and that the assault was not the sole basis for appellant's parole revocation. Moreover, there is no basis for concluding that as an inmate or parolee, appellant was a member of a protected class whose equal protection rights were violated. Given these conclusions, we cannot agree with

appellant's contention that the trial court erred by dismissing his petition below.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darrell Wayne Rose
Burgin, Kentucky

BRIEF FOR APPELLEE:

Stephen P. Durham
Frankfort, Kentucky