

RENDERED: January 21, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000420-MR

ANTHONY DODD

APPELLANT

v. APPEAL FROM LEE CIRCUIT COURT
HONORABLE WILLIAM TRUDE, JR., JUDGE
ACTION NO. 03-CI-00206

JOHN COY;
RANDY ECKMAN

APPELLEES

OPINION
REVERSING AND REMANDING

** **

BEFORE: KNOFF AND TACKETT, JUDGES; AND EMBERTON, SENIOR JUDGE¹.

KNOFF, JUDGE: Anthony Dodd appeals from an order of the Lee Circuit Court, entered February 12, 2004, dismissing his petition for a writ of mandamus against the parole board.² Dodd

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Although other respondents were named in the circuit court, Dodd's notice of appeal names only John Coy, apparently in his capacity as chairman of the parole board. Under CR 73.03,

maintains that the board revoked his parole without according him required process and should be ordered to reconsider his revocation following adequate procedures. We agree and so must reverse and remand.

In 1999, the Grayson Circuit Court convicted Dodd of several counts of sodomy and sexual abuse and sentenced him to concurrent terms of imprisonment totaling ten years. In May 2003, the parole board granted Dodd parole. Among the conditions of Dodd's release were requirements that he successfully complete a sex offender treatment program (sotp) and that he "not establish a dating, intimate, sexual relationship with an adult without prior approval of the probation and parole officer and treatment clinician." In September 2003, Dodd was expelled from his sex offender treatment program because he had missed three meetings with his clinician and because he had established an intimate relationship with a woman and had not notified or sought approval from his parole officer or his clinician. Alleging that Dodd's failure to complete the sotp constituted a violation of his parole agreement, Dodd's parole officer had him arrested on October 1, 2003.

therefore, the board, through its representative Coy, is the only appellee before us.

Immediately after the arrest, apparently, the parole officer presented Dodd with a department of probation and parole form titled "Notice of Preliminary Hearing." The form advised Dodd that because of his alleged expulsion from the sotp his parole officer was seeking to have his parole revoked. It notified Dodd that a preliminary revocation hearing was scheduled for October 21, 2003. It listed some of Dodd's rights with respect to the hearing, such as his right to be represented by counsel. And it informed him that

[y]ou may waive (give up your right to) the Preliminary Parole Revocation Hearing and have your case submitted directly to the Parole Board by admitting that you are guilty of each and every violation.

On the back of the form were brief statements waiving the right to counsel at the preliminary hearing, the right to a five-day waiting period, and the right to the preliminary hearing itself. In conjunction with this last waiver, the form again advised Dodd that by waiving the hearing he was admitting the charges against him and that

as a result of signing this Waiver, I will very likely be returned as a parole violator, have my parole revoked, and could be required to serve the remainder of my sentence.

Upon the advice of his parole officer, Dodd executed all of these waivers. No preliminary hearing was held. Instead, Dodd was remanded to custody and met the parole board

for a final revocation hearing on October 20, 2003. He appeared at the hearing pro se. He admitted that he had not promptly reported his new romance and admitted further that his friend lived with her twenty-five year old, mentally handicapped daughter. He asserted, however, that he did not think that he had done anything wrong by forming an adult attachment. On the contrary, he expected the new relationship to stabilize his life.

The board disagreed. It revoked Dodd's parole and ordered him to serve out his sentence. Dodd thereupon filed the present action in the Lee Circuit Court. He complained that the parole board had revoked his parole without according him sufficient process and sought a writ ordering the board to give him a new and more meaningful hearing. As noted above, the trial court summarily dismissed Dodd's petition, from which dismissal Dodd has appealed.

As Dodd correctly notes, an extraordinary writ is the proper remedy for parole-board due process violations.³ The question on review is whether the trial court erred by failing to grant such a remedy.

³ Shepherd v. Wingo, 471 S.W.2d 718 (Ky., 1971); Mahan v. Buchanan, 310 Ky. 832, 221 S.W.2d 945 (1949).

The United States Supreme Court has held that a parolee accused of having violated his parole agreement is entitled

to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.⁴

Although notice of the charges, a neutral decision maker, and an opportunity to be heard are requirements at both stages, the final hearing must include

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, . . . and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.⁵

In addition, the parolee has rights to be represented by counsel. He has a constitutional right to counsel if the case

⁴ Gagnon v. Scarpelli, 411 U.S. 778, 781-82, 93 S. Ct. 1756, 1759, 36 L. Ed. 2d 656 (1973).

⁵ Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972).

involves significant issues of either guilt or mitigation.⁶ He also has an unqualified right to revocation counsel under KRS 31.110(2)(a).⁷

The parole board contends that Dodd waived these rights and essentially pled guilty by executing the waiver provisions on the Notice of Preliminary Hearing form. Dodd maintains that his purported waiver was induced by the parole officer and was neither knowing nor voluntary. Although the question does not seem to have been addressed in Kentucky, we have no doubt but that the parole board may employ the revocation analog of a guilty-plea proceeding. We agree with Dodd, however, that more needs to be done to ensure that such a “plea” is knowing and voluntary than was done in this case.

In particular, we are concerned that Dodd’s “plea” was uncounseled and that his waiver of the right to counsel was elicited without a hearing, without adequate warning “of the hazards arising from and the benefits relinquished by waiving counsel”⁸ and without a finding on the record that Dodd’s waiver

⁶ Gagnon v. Scarpelli, *supra*.

⁷ “A needy person who is entitled to be represented by an attorney under subsection (1) of this section is entitled: (a) To be counseled and defended at all stages of the matter . . . including revocation of probation and parole.” KRS 31.110(2)(a).

⁸ Hill v. Commonwealth, 125 S.W.3d 221, 226 (Ky., 2004).

of counsel was "knowing, intelligent, and voluntary."⁹ Several states with statutes comparable to KRS 31.110 affording a right to revocation counsel have held that safeguards such as these apply to the waiver of such counsel.¹⁰ We agree. Because Dodd was denied these safeguards, his waiver of counsel must be deemed involuntary and the revocation based on it invalid.

Accordingly, we reverse the February 12, 2004, order of the Lee Circuit Court and remand for entry of a writ ordering the parole board to vacate its revocation of Dodd's parole and to conduct an evidentiary revocation hearing at which Dodd's statutory right to counsel is given effect and which satisfies the other procedural standards established by the Supreme Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

David S. Mejia
Louisville, Kentucky

BRIEF FOR APPELLEE:

Karen Quinn
Frankfort, Kentucky

BRIEF FOR APPELLEE RANDY
ECKMAN:

G. Edward Henry, II
Henry Watz Gardner Sellars &
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⁹ *Id.*

¹⁰ State v. Evans, 569 S.E.2d 673 (N.C. App., 2002); People ex rel. Sinclair v. Warden, 579 N.Y.S.2d 981 (N.Y. Sup., 1991); Salley v. State, 410 S.E.2d 921 (S.C., 1991); State v. Bryan, 395 A.2d 475 (Md. App., 1978). See Annotation, "Right to Assistance of Counsel at Proceedings to Revoke Probation," 44 ALR 3d 306 (1972).

