

RENDERED: SEPTEMBER 23, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001998-MR

KEVIN R. BLACK

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANN O'MALLEY SHAKE, JUDGE  
ACTION NO. 04-CI-003029

EVAN K. ROACH; JOHN M. COY;  
PATRICIA A. COMBS; NELL O. GLASS;  
ROBERT M. MILBURN; LUTITIA F.  
PAPAILLER; JAMES PROVENCE;  
AND VERMAN R. WINBURN

APPELLEES

OPINION  
AFFIRMING

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BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Kevin R. Black appeals the denial of his declaratory judgment in the Jefferson Circuit Court. Black sought a declaration of rights, KRS 418.040, with regard to the procedures and results of his parole revocation. Appellees, Evan K. Roach and the Kentucky Parole Board, responded with a

request for summary judgment in the court below, which was granted.

The trial court reviewed this case using the summary judgment standard for an appeal of the action of an administrative agency. Smith v. O'Dea, 939 S.W.2d 353 (Ky.App. 1997). However, we find it necessary to clarify this standard. The General Assembly has limited the extent to which decisions of the Parole Board are open to review. KRS 439.330(3) states that the orders of the Parole Board are not reviewable except to ensure compliance with the terms of KRS 439.250 to 439.560. Furthermore, KRS 13B.020(3)(d)2a. exempts Parole Board hearings from the right of administrative appeal provided for in Chapter 13B.

It is long-established in this Commonwealth that parole is not a right, but a privilege and "a matter of grace or gift to persons deemed eligible." Stewart v. Commonwealth, 153 S.W.3d 789, 793 (Ky. 2005), citing Lynch v. Wingo, 425 S.W.2d 573 (Ky. 1968). Therefore, to the extent that appellant is merely challenging reasons for the revocation of his parole, but not compliance with the aforementioned statutes or constitutional issues, review is unavailable. As a result, there is no justiciable controversy for a declaratory judgment action, KRS 418.040, regarding those issues questioning the

Parole Board's decision. Instead, they should have been dismissed without consideration.

Appellant also challenged compliance with the statutes, which we will address. First, he alleges the Board failed to comply with KRS 439.440, which mandates that "[a]ny prisoner returned to prison for violation of his release shall be heard by the board within thirty (30) days on the propriety of his rerelease." Applicable regulations state that a final parole revocation hearing shall be held within thirty days of a parolee's return to a state institution. 501 KAR 1:040, Section 6.

Appellant's revocation hearing was held after the statutory time limit. He was arrested by his parole officer and charged with violating his parole on October 28, 2003. Appellant waived his right to a preliminary parole revocation hearing. He states that he was housed in a county facility until December 23, 2003, when he was transported to a state prison. The Parole Board convened a revocation hearing concerning appellant on February 17, 2004. Thus, 56 days elapsed from the time he was returned to prison until the Parole Board's hearing. Counsel for appellees below conceded the noncompliance with the statute,<sup>1</sup> but argued that since appellant

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<sup>1</sup> On appeal, counsel for appellees inaccurately asserts that appellant received a hearing on December 23, 2003, and so there was no technical violation. But appellant's Resident Record Card and the Parole Board's

admitted he violated the conditions of his parole he had not shown any prejudice. The trial court found, without elaboration, "that the Board's failure to hold the revocation hearing within thirty days was, if anything, harmless error."

The statute provides for no remedy as a result of non-compliance with the thirty day requirement. We further have found no case in Kentucky which devises a remedy for unreasonable delay by the Board. In Allen v. Wingo, 472 S.W.2d 688 (Ky. 1971), Kentucky's highest court stated that mandamus is the only proper remedy for abuse of authority by the parole board in connection with re-arrest and revocation of parole. See also Sutherland v. McCall, 709 F.2d 730 (D.C. Cir. 1983)(without a showing of prejudice, the proper remedy for delay is not habeas relief but a writ of mandamus compelling compliance with statutory time period). Appellant's apparent remedy was to seek a hearing by writ of mandamus from the Board once his hearing was delayed.

Due process requires that a final revocation hearing be held "within a reasonable time after the parolee is taken into custody." Morrissey v. Brewer, 408 U.S. 471, 488, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972). Parole revocation proceedings dictate only minimal due process procedures. Id. at 485-489, 33 L. Ed. 2d at 496-499. These include a preliminary

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document entitled "Results of Final Parole Revocation Hearing" record the hearing date as February of 2004.

revocation hearing and a final hearing, the opportunity to present witnesses and evidence and to confront and cross-examine adverse witnesses, and a right to a written statement of the decision-maker's reasons for the decision and evidence relied on. Id.

Appellant cites case law that addresses whether a parolee has a right to release by writ of habeas corpus for failure to timely hold a revocation hearing due to an unreasonable delay and prejudice. Roberson v. Mohr, 73 Ohio App.3d 262, 596 N.E.2d 1112 (1991); Hanahan v. Luther, 693 F.2d 629 (7th Cir. 1982). Appellant alleges that he was harmed because the period of delay "was attended by great anxiety" due to an illness of his father's and the worry that he would be returned to a high security prison. He contends that he has shown a due process violation, and that he should be released and restored to parole supervision.

The general rule is that where the parolee finally has been afforded the revocation hearing and the facts of the violation were fairly adjudicated, delay alone does not constitute a violation of due process entitling a parolee to immediate release; the delay must also be unreasonable and prejudicial for a parolee to establish a legal right to habeas relief. Goodman v. Keohane, 663 F.2d 1044, 1046 (11th Cir. 1981); Meador v. Knowles, 990 F.2d 503, 506 (9th Cir. 1993);

Villarreal v. United States Parole Commission, 985 F.2d 835, 837 (5th Cir. 1993); McNeal v. United States, 553 F.2d 66, 68 (10th Cir. 1977). Appellant did not petition for a writ of habeas corpus, and we do not believe that he has shown sufficient prejudice for such relief even if he had. Appellees stress that appellant as a parolee was already faced with the possibility of returning to prison. The anxiety a parolee faces is not comparable to that of an unconvicted defendant in a speedy trial context. Roberson, 596 N.E.2d at 268. The anxiety of such a prisoner, therefore, is not especially significant. Id. Appellant did not show that he was prejudiced by inability to defend his revocation or to present mitigation evidence due to the delay. Thus, we agree no harm was shown.

Appellant secondly argues that his hearing was brief and the Board failed to consider mitigating evidence. The trial court found that there is no due process requirement regarding the length of the revocation hearing. The hearing provided before a final revocation decision is made, must provide the parolee an opportunity to be heard and to show that he did not violate the conditions, or that circumstances in mitigation suggest that the violation does not warrant revocation. Morrissey, 408 U.S. at 488; see also Preston v. Piggman, 496 F.2d 270 (6th Cir. 1974). Appellant argues that the Board did not consider the evidence he provided in mitigation of his

parole violations. He argues that the Parole Board members seemed unaware of the facts he provided in mitigation.

We find nothing in the record to suggest that the Parole Board was not aware of or failed to consider the mitigation evidence appellant supplied. We note that appellant did not seek rehearing on his mitigation evidence. Due process provides a parole violator the opportunity to present facts in mitigation, but it does not ensure that the decision maker will be influenced by that evidence. We find no violation of due process requirements.

Finally, appellant argues that KRS 439.510 is unconstitutional under the Kentucky Constitution § 2 (protection against "absolute and arbitrary power"), § 3 (equal rights and equal protection), and § 26 ("all laws contrary" to the Kentucky Constitution shall be void). KRS 439.510 provides, in pertinent part:

All information obtained in the discharge of official duty by any probation or parole officer shall be privileged and shall not be received as evidence in any court. Such information shall not be disclosed directly or indirectly to any person other than the court, board, cabinet, or others entitled under KRS 439.250 to 439.560 to receive such information, unless otherwise ordered by such court, board or cabinet.

The Kentucky Supreme Court has suggested that the purpose of KRS 439.510 is "to protect the sources of confidential information,

matters of opinion, and comments of a personal and nonfactual nature . . .” Commonwealth v. Bush, 740 S.W.2d 943, 944 (Ky. 1987).

Appellant requested a copy of the report prepared by his parole officer in this case, which was denied. Now he argues that the statute violates the Kentucky Constitution and due process. We fail to see how the statute has violated any of the constitutional provisions appellant cites.

Additionally, failure to disclose the evidence in a report prepared by a parole officer pursuant to KRS 439.510 does not violate due process if the information is not used against the prisoner. The minimum due process requirements for parole revocation require that evidence used against the parolee is required to be disclosed. Morrissey, 408 U.S. at 489, 33 L. Ed. 2d at 499. That was done in this case by the Notice of Preliminary Hearing given to appellant. No more was required to be provided to appellant.

For the foregoing reasons, the dismissal of the declaratory judgment action is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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