

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001566-MR

SCOTT NEWCOMB

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 05-CI-00148

KENTUCKY PAROLE BOARD

APPELLEE

AND

NO. 2006-CA-002312-MR

CLAUDE SCOTT NEWCOMB

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-01178

COMMONWEALTH OF KENTUCKY,
PAROLE BOARD

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND THOMPSON, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Claude Scott Newcomb appeals from two orders of the Franklin Circuit Court dismissing his two actions in which he requested relief from the issuance of a parole violation warrant. For the reasons stated below, we affirm.

On December 14, 1995, the Madison Circuit Court sentenced Newcomb to seven and a half years' imprisonment, and on June 28, 1996, the Lincoln Circuit Court sentenced him to two terms of four years' imprisonment. The Lincoln Circuit Court ordered that its judgment run concurrently with the judgment of the Madison Circuit Court. Following two years of incarceration, Newcomb was granted parole.

On January 24, 2000, while still on parole, Newcomb was arrested by agents of the U.S. Drug Enforcement Agency for federal drug offenses. On March 31, 2000, Newcomb appeared in federal court and entered a plea of conspiring to distribute cocaine. After being granted bail pending sentencing, Newcomb was arrested by deputies of the Lincoln County Sheriff's Department, at the direction of Probation and Parole Officer Paul Barrett, for violating his parole by receiving a federal conviction.

Several days later, Newcomb waived his right to a preliminary revocation hearing and admitted that he had violated his parole by being convicted of a federal crime. Subsequently, an Administrative Law Judge (ALJ), from the Department of Corrections, determined that Newcomb was guilty of conspiring to distribute cocaine and referred the case to the Parole Board (Board) for further consideration. Upon receipt, the Board returned Newcomb to community supervision until his federal case was resolved.

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Several months later, Newcomb was sentenced to 96 months' imprisonment on an amended drug charge and on an aiding and abetting charge. Thereafter, he was placed in the custody of the Federal Bureau of Prisons. A month after Newcomb's sentencing, the Board issued a parole violation warrant against him as a consequence of the ALJ's determination and the conclusion of Newcomb's federal case.

Following the Board's issuance of the warrant, Newcomb filed a motion to dismiss and a writ of mandamus in which he requested the invalidation of the parole violation warrant. After his motion and writ were denied, Newcomb appealed both denials, and these appeals were consolidated by this Court.

Newcomb first contends that the Board made an unauthorized transfer of him into the custody of federal authorities following his release from jail. Citing two federal cases, Newcomb contends that this transfer violated the Supremacy Clause of the United States Constitution because the Board had no authority to transfer him to federal authorities without first receiving a writ to transfer him for federal sentencing from a U.S. District Attorney. We disagree.

Although Newcomb disagrees, the Board did not transfer custody of him to federal authorities. The Board merely released him from jail and returned him to community supervision pending the resolution of his federal case. As stated in the Board's memo to Newcomb, dated April 12, 2000, he was returned to community supervision with all his state parole conditions remaining in effect. Therefore, without even addressing the invalidity of Newcomb's legal contention, his factual contention is incorrect and, thus, not an appropriate ground for relief.

Newcomb next contends that his return to community supervision, following his release from jail, constituted a reinstatement of his parole. Specifically, because the Board was aware of his federal guilty plea and yet returned him to community supervision, Newcomb contends that the Board intentionally or inadvertently reinstated his parole. Thus, he contends that only a violation committed after his return to community supervision could constitute a sufficient ground to revoke his parole. We disagree.

Despite Newcomb's artful contention, there was never a final parole revocation hearing to determine whether or not he violated his parole as provided in 501 Kentucky Administrative Regulations (KAR) 1:040(1)(6). As indicated in the record, following his federal guilty plea, the Board chose to return Newcomb to community supervision until his federal case was concluded rather than to immediately issue a parole violation warrant. Consequently, Newcomb's contention that his return to community supervision absolved him from any parole violation related to his federal guilty plea is without merit.

Newcomb next contends that the Board violated Kentucky Revised Statutes (KRS) 439.430 and 439.330 when it failed to immediately issue a parole violation warrant following his federal guilty plea. Contending that these statutes do not provide for a delay in the issuance of a warrant, Newcomb contends that the Board abused its authority and prejudiced his case by delaying the issuance of the warrant.

After reviewing the applicable statutes and regulations, Newcomb's contention is patently incorrect. Nothing in 501 KAR 1:040 which addresses parole

revocation proceedings or in the statutes cited by Newcomb requires the immediate issuance of a parole violation warrant following a parolee's federal conviction and imprisonment.

Moreover, although KRS 439.430 does require the Board to make a determination regarding a prisoner's re-release within thirty (30) days of his incarceration, this statute applies exclusively to inmates who are imprisoned for a parole violation. Here, Newcomb was not imprisoned in a state prison for a parole violation but in a federal prison for a federal drug conviction. Thus, Newcomb's situation does not come within the scope of the statute's protection.

Finally, Newcomb was not impermissibly prejudiced by the procedural decisions of the Board. While Newcomb hoped that his state parole would have been revoked prior to being taken into federal custody, the Board did not choose this course and Newcomb had no right to demand what would in effect be the opportunity to serve his state and federal sentences concurrently. *Anglian v. Sowders*, 566 S.W.2d 789, 790-791 (Ky.App. 1978).

For the foregoing reasons, the two orders of the Franklin Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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