

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001800-MR

JOHN JAGOE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 05-CI-00508

COMMONWEALTH OF KENTUCKY,
JUSTICE AND PUBLIC SAFETY CABINET

APPELLEE

OPINION AFFIRMING

** **

BEFORE: DIXON, JUDGE; KNOPF AND PAISLEY, SENIOR JUDGES.¹

PAISLEY, SENIOR JUDGE: On March 15, 2005, John Jagoe's parole was revoked for failing to notify his parole officer in a timely manner that he had been arrested. Jagoe appealed the Parole Board's decision to the Franklin Circuit Court. His appeal was denied in an order of July 14, 2005, and this appeal followed.

¹ Senior Judges William L. Knopf and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Jagoe was convicted twenty years ago of murder and robbery in the first degree. He was granted parole on July 10, 2000. Under the conditions of his parole, Jagoe was required to notify his parole officer within seventy-two hours of any arrest. On December 30, 2004, which was the Thursday immediately preceding New Year's Eve, Jagoe was arrested on various charges and booked into the Louisville Metro Corrections Department at approximately 2:40 p.m. Jagoe claims that he was permitted to make the one free telephone call allotted to him under the jail policy at approximately 3:15 p.m. Jagoe tried to call Kyle McGowan, his parole officer, to report his arrest. According to Jagoe, his call to the Office of Probation and Parole was answered by an inmate clerk, who told Jagoe that McGowan no longer worked in the office. The inmate clerk ended the call before Jagoe could pursue the matter any further.

Jagoe tried to contact the Office of Probation and Parole again by using a collect call. His attempt was unsuccessful because the office does not accept collect calls. Jagoe then placed a collect call to his daughter and asked her to contact McGowan for him. When he spoke to her about fifteen minutes later, he learned that she too had been informed that McGowan no longer worked at the office.

It appears that jail counselors are normally on duty at the detention facility to assist incarcerated individuals in placing calls to Probation and Parole. Due to the upcoming New Year's holiday weekend, however, no jail counselor was on duty from Friday, December 31 to Monday, January 3, 2005. On Tuesday, January 4, 2005, Victoria Holt, a jail counselor, returned to work. Jagoe explained his situation to her; she contacted the Office of Probation and Parole where she was able to leave McGowan a

message on his answering machine. Although there is some dispute as to the day she actually made the call, it was unquestionably placed more than seventy-two hours after Jagoe's arrest.

A preliminary hearing was held before an Administrative Law Judge to determine whether probable cause existed to revoke Jagoe's parole. Testimony was heard from Kyle McGowan, the parole officer; Frank Mascagni, the attorney who represented Jagoe on the charges relating to the arrest; and from Jagoe himself. Mascagni and Jagoe both testified that Jagoe had remained in custody continuously from the afternoon of December 31, 2005. Mascagni confirmed that only one free telephone call was permitted to incarcerated individuals. He also testified that he represented Jagoe at his arraignment on December 31, 2004, and that Jagoe's family members were in frequent telephone contact with him on Saturday and Sunday.

McGowan testified that there was no protocol or mechanism in place at the Office of Probation and Parole to enable incarcerated parolees to contact the office. He explained that "they have to let us know in person, via their attorney, family member or some way that they have been arrested."

The ALJ stated that she had no choice under the circumstances but to make a finding of probable cause, but that she would list mitigating factors in her report. Her findings stated as follows:

Mr. McGowan testified that Mr. Jagoe did not contact him or the parole office to notify them of the arrest within the required 72 hours. Mr. McGowan also stated that no attorney for Mr. Jagoe or representative of Mr. Jagoe's provided notification within the required 72 hours. Mr. McGowan did

state that on 1/08/05 a Ms. Holt who is a case worker in the Jefferson Co. Detention Center did call him to notify him about Mr. Jagoe's arrest.

Mr. Mascagni testified that he began representing Mr. Jagoe on criminal charges on 12/31/04 and a complex series of additional warrants, summons and related proceedings began that transpired over a series of days.

Mr. Jagoe says he was in custody and did try to contact Mr. McGowan and/or the parole office. Mr. Jagoe testified that [he] had his daughter attempt contact with parole and did as[k] Ms. Holt to notify parole. He stated that Ms. Holt evidently did not understand the importance of calling Mr. McGowan and delayed calling if she did not call until 1/08/05. Mr. Jagoe has remained in custody since 12/31/05.

The Parole Board held a revocation hearing in which it found that Jagoe was guilty of violating the conditions of his parole. The Board accordingly ordered his parole deferred for forty-eight months. Jagoe's appeal of this decision was summarily denied. Jagoe then filed a petition for a writ of mandamus in the Franklin Circuit Court, which ultimately elected to treat the petition as an appeal of the Board's order. The circuit court found that there was substantial evidence upon which the Parole Board could base its decision to revoke Jagoe's parole.

Jagoe has never denied that he failed to contact his parole officer within seventy-two hours; instead, he contends that it was impossible for him to comply with this condition of his parole because he was incarcerated with limited access to a telephone during a holiday weekend. The fact that the Office of Probation and Parole does not accept collect calls further hampered his efforts to contact his parole officer.

We are troubled by the apparent absence of an established procedure to assist parolees who have been arrested and incarcerated, and consequently have limited

access to a telephone, to contact their parole officers. Our review of this case, however, is limited to a determination of whether, after a hearing, the revocation of parole constituted an abuse of discretion. *See Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986). Although we do not have the full record of the Board's proceedings, Jagoe's own testimony at the preliminary probable cause hearing indicated that he was able to contact his daughter via a collect telephone call, and that he was represented by counsel throughout the holiday weekend period. His attorney, Frank Mascagni, testified that he received numerous phone calls from Jagoe's family over the weekend, and that he represented Jagoe at his arraignment on the day following his arrest. Jagoe apparently never asked Mascagni to contact the parole officer on his behalf. Nor is there any indication as to why Jagoe's daughter (or other family members) could not continue in their attempts to contact McGowan.

While it is clear that Jagoe made some effort to give notice of his arrest, there is also evidence that there were other things he could have done to insure that his parole officer was notified. We cannot find that the Board abused its discretion in revoking his parole.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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