

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

KENNETH L .LANE, :
Petitioner, : C.A. No. K10A-06-010 WLW
v. :
BOARD OF PAROLE, :
Respondent. :

THEODORE M. NEWHOUSE, JR., :
Petitioner, : C.A. No. K10A-07-001 WLW
v. :
BOARD OF PAROLE, :
Respondent. :

Submitted: November 10, 2011

Decided: February 21, 2012

ORDER

Upon Petitioners' Rule to Show Cause.

Denied.

Andre M. Beauregard, Esquire of Brown Shiels & O'Brien, LLC, Dover, Delaware;
attorney for the Petitioners.

Elio Battista, Jr., Esquire, Paul R. Wallace, Esquire and James T. Wakley, Esquire,
Department of Justice, Wilmington, Delaware; attorneys for the Respondent.

WITHAM, R.J.

FACTS

_____ Kenneth Lane (hereinafter “Lane”) and Theodore M. Newhouse, Jr. (hereinafter “Newhouse”) (jointly “Petitioners”) bring writs of *certiorari* appealing their respective decisions by the Board of Parole (hereinafter “Board”). Petitioners appealed to the Board after having been designated tier II sex offenders by the Attorney General. The Board determined that the lesser tier I designation was appropriate for Petitioners. It is from these decisions of the Board that Petitioners have filed writs of *certiorari* to this Court. On September 14, 2011, the Court set a briefing schedule in both cases. On October 6, 2011, Petitioners advised the Court that they could not fully brief the matter as the Board failed to produce a transcript or recording of the proceedings. Petitioners therefore filed a rule to show cause as to why their designations should not be dismissed with prejudice for lack of a transcript below. The Court heard oral argument on the rule to show cause on November 10, 2011. This constitutes the Court’s decision on the rule to show cause.

Standard of Review

_____ Superior Court Civil Rule 64.1 states:

(a) Except where a rule to show cause is required by statute, any matter of the type heretofore brought before the Court by rule to show cause shall be initiated by motion after a complaint or petition has been filed and may be presented *ex parte* with respect to any person who has not appeared in the case.

. . . .

(b) A rule to show cause may be issued only where required by statute. An order for a rule to show cause shall set forth the return date and time thereof, and shall require the respondent to answer or otherwise

plead at or before the return date and time. The order shall also state whether or not a hearing upon the rule will be held at the return date and time and, if not, what action the Court contemplates will be taken.

DISCUSSION

Woolley's classic treatise sheds light on the traditional understanding of a rule to show cause:

A motion is an application to the court, by a party or his counsel, for a rule or order; and the order made by the court, on motion, when drawn into form, is called a rule. The order or rule is either granted or refused; and if granted, is either a rule *absolute* in the first instance, or to *show cause*, which is sometimes called a rule *nisi*, that is *unless cause* be shown to the contrary, which rule *nisi* is afterwards, on a subsequent motion, made absolute or discharged.¹

This traditional nomenclature has been rendered largely obsolete by Superior Court Civil Rule 64.1, which states:

(a) Except where a rule to show cause is required by statute, any matter of the type heretofore brought before the Court by rule to show cause shall be initiated by motion after a complaint or petition has been filed and may be presented *ex parte* with respect to any person who has not appeared in the case.

....

(b) A rule to show cause may be issued only where required by statute.

From a procedural standpoint, Petitioners provided no statute authorizing a rule

¹ Victor B. Woolley, *Practice in Civil Actions and Proceedings in the Law of Courts of the State of Delaware* § 216 (1906).

Lane & Newhouse v. Board of Parole

C.A. No. K10A-06-010 WLW

February 21, 2012

to show cause for lack of a transcript, nor is the Court aware of one. Therefore, the rule to show cause was not proper.

Even if the Court excuses this breach of procedure, the Court finds no requirement of a transcript in this context. Petitioners argue that there is a requirement that the Board keep a record upon which a transcript may be based on appeal. As there is no record in this case, other than the determination of the Board, Petitioners contend that their tier designations should be dismissed with prejudice. Petitioners provide no case law to support their argument.

The Board argues that there is no statutory requirement for a transcript of Board proceedings under 29 *Del. C.* § 10004(h), 29 *Del. C.* § 10161(b), 11 *Del. C.* ch. 42, 11 *Del. C.* § 4122, or the Board rules. The Board states that the lack of a transcript requirement makes sense as there is no statutory right of appeal from any Board decision. The Board further argues that as a result of having no statutory right of appeal, Petitioners may only be heard by writ of *certiorari*, and there is no review of determinations of fact on such a writ, rendering a transcript superfluous.

Petitioners counter that chapters 11 and 101 of Title 29 are inapplicable to the Board's regulations. This is correct as 11 *Del. C.* § 4122(d) states:

Following receipt of timely notice by the Board of Parole, it shall hold a hearing to determine the appropriateness of the Attorney General's new Risk Assessment Tier designation. The person and the Attorney General shall have the right to be heard at the hearing. The Board of Parole shall have the authority to promulgate reasonable regulations to implement this subsection and subsection (c) of this section. Such regulations shall be effective and enforceable upon their adoption, *and*

Lane & Newhouse v. Board of Parole

C.A. No. K10A-06-010 WLW

February 21, 2012

*shall not be subject to Chapters 11 and 101 of Title 29.*²

This fact, however, does not lend credence to Petitioners' claim that a transcript is required. Instead, 11 *Del. C.* § 4122(d) provides greater regulatory freedom to the Board.

Finally, in the recent decision, *Drake v. Board of Parole*, the Court examined the adequacy of the record from the Board's determination of a sex offender's tier designation on appeal from the Attorney General's determination.³ As the *Drake* Court noted, "A record is sufficient to allow review on a writ of *certiorari* where the lower tribunal documents its decision and the basis for its decision."⁴ Although the Court makes no determination yet regarding the sufficiency of the record in these two cases, the Court does determine that a transcript is not required for the Board's determination.

²(emphasis added).

³2011 WL 5299666, Herlihy, J. (Del. Super. Oct. 25, 2011).

⁴*Id.* at *4 (citing *Christiana Town Ctr., LLC v. New Castle County*, 865 A.2d 521, 2004 WL 2921830, at *2 (Del. Dec. 16, 2004) (TABLE)).

Lane & Newhouse v. Board of Parole

C.A. No. K10A-06-010 WLW

February 21, 2012

CONCLUSION

For the reasons stated above, Petitioners' rule to show cause is hereby *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

oc: Prothonotary

xc: Andre M. Beauregard, Esquire

Elio Battista, Jr., Esquire

Paul R. Wallace, Esquire

James T. Wakley, Esquire