

RENDERED: OCTOBER 6, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000237-MR

KENNETH WILLIAMS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 05-CI-00683

COMMONWEALTH OF KENTUCKY,
PAROLE BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,¹ SPECIAL JUDGE.

WINE, JUDGE: Kenneth Williams appeals from an order of the Franklin Circuit Court denying his petition for a writ of mandamus against the Kentucky Parole Board (the Board). He argues that mandamus was appropriate to set aside the Board's revocation of his parole based upon due process violations and the Board's use of an allegedly flawed drug test to support its decision. We agree with the circuit court that Williams

¹ Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

received all the due process to which he was entitled and that the Board's decision was supported by substantial evidence. Hence, we affirm.

Williams was previously convicted on four counts of robbery in the first degree, three counts of trafficking in a controlled substance, and one count each of criminal mischief in the first degree and being a persistent felony offender in the second degree. Williams has been paroled on four separate occasions, most recently on May 26, 2004. On August 10, 2004, he was taken into custody and charged with numerous violations of the conditions of his parole, including possession and use of controlled substances, failure to follow instructions from his parole officer, failure to report to his parole officer, and providing false information to his parole officer.

Williams' parole officer agreed to continue the revocation proceedings in exchange for Williams entering and completing a residency program, attending and complying with his substance abuse treatment program, committing no further violations of parole, admitting to the charged violations, and waiving his right to a preliminary parole hearing. Williams was released to the residency program on August 16, 2004, but he was returned to custody for additional parole violations. Thereafter, the parole officer agreed to a second continuance after Williams again admitted the violations, and he agreed to

return to the residency program and commit no further violations. However, Williams was terminated from the program after testing positive for using marijuana and for failing to comply with other conditions of the program. Williams was returned to custody on December 12, 2004.

Following a preliminary hearing on February 3, 2005, the presiding administrative law judge revoked Williams' parole based upon his previously-admitted violations, as well as the positive drug test and his termination from the residency program. On March 1, 2005, the Board voted to revoke Williams' parole based upon those findings. The Board also voted to defer Williams' future parole eligibility for forty-eight months.

Thereafter, Williams filed a petition for a writ of mandamus in the Franklin Circuit Court. He argued that the Board failed to fulfill its part of the agreement, and that the November 16 urine test was flawed and was insufficient evidence on which to base the revocation. After considering Williams' argument, the Board's response, and the record before the Board, the circuit court denied the petition. Williams now appeals to this Court.

Kentucky courts have repeatedly held that there is no constitutional right to parole, but rather parole is a matter of legislative grace or executive clemency. *Belcher v. Kentucky Parole Board*, 917 S.W.2d 584 (Ky.App. 1996); *Lynch v. Wingo*, 425

S.W.2d 573 (Ky. 1968); *Fowler v. Black*, 364 S.W.2d 164 (Ky. 1963). Parole is simply a privilege and the denial of such has no constitutional implications. *Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999). Nevertheless, parole revocation hearings must meet certain minimum requirements to satisfy due process. These requirements include: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of the evidence against him; (c) the 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, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and the reasons for revoking parole. *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 1761-62, 36 L. Ed. 2d 656 (1973), citing *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972). As Williams correctly notes, an extraordinary writ is the proper remedy for parole board due process violations. *Shepherd v. Wingo*, 471 S.W.2d 718 (Ky. 1971).

Williams raises two related grounds challenging the revocation of his parole. First, he argues that the Board

reneged on its agreement not to revoke his parole. And second, he contends that the Board failed to establish a proper chain of custody for the November 16, 2004 drug test and therefore, that positive test could not be used as a basis for revoking his parole. But as the circuit court correctly noted, the record is clear that Williams was not promised leniency or that his parole would not be rescinded based on his previous violations. To the contrary, he admitted the previous violations in exchange for a continuance of the revocation proceedings while he pursued treatment.

Even discounting the positive drug test as flawed, the residency program terminated Williams for other violations. Williams' termination from that program constituted a violation of any agreement he may have had with his parole officer. Thereupon, the Board was authorized to consider all of his previously-admitted violations in making its decision to revoke his parole.

Although the Board was justified in revoking Williams' parole for other reasons, we also cannot find that the Board abused its discretion by relying on the test. Williams' appointed counsel states in an affidavit that no chain of custody was ever established for the drug test, but Williams does not indicate that this issue was ever raised before the Board. Furthermore, while Williams states that the chain of

custody evidence did not comply with the Corrections Department's policies and procedures, he fails to show that any defect in the evidence was a sufficient ground for challenging the evidence. See *Lucas v. Voirol*, 136 S.W.3d 477 (Ky.App. 2004).

Finally, we find no violations of Williams' due process rights. Williams was provided with notice of the claimed violations of his parole and was appointed counsel. He was advised of the evidence against him, given an opportunity to be heard and present evidence on his behalf, afforded the opportunity to confront and cross-examine adverse witnesses before a "neutral and detached" judge, and received a written order that his parole had been revoked which specifically stated the grounds. Under the circumstances, we agree with the circuit court that Williams has shown no basis for extraordinary relief from the Board's action.

Accordingly, the order of the Franklin Circuit Court denying Williams' petition for a writ of mandamus is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Kenneth Williams, *pro se*
Burgin, Kentucky