RENDERED: JULY 27, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-000278-MR

GARY D. WARICK — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 03-CI-00027

KENTUCKY PAROLE BOARD — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

COMBS, CHIEF JUDGE: Gary Warick appeals from a decision of the Boyle Circuit Court dismissing his petition for a writ of mandamus against the Kentucky Parole Board. After our review, we reverse and remand for further proceedings consistent with this opinion.

Warick was convicted in 1997 of first-degree burglary and was sentenced to ten-years' imprisonment. He was paroled in November 2001. On April 21, 2002, at 2:54 a.m., Warick was arrested in Pike County, Kentucky, on suspicion of alcohol

intoxication. At the time of his arrest, Warick was outside his supervision area. He was also out past his curfew, which required that he be at home between the hours of 10:00 p.m. and 6:00 a.m. He failed to report his arrest to his parole officer, who had previously given him a warning after he admitted to her that he had also traveled outside his area of supervision on April 15, 2002.

Warick's parole officer eventually learned about the events of April 21, 2002. Consequently, on May 6, 2002, Warick was arrested and was given a preliminary notice advising him that a preliminary parole revocation hearing would be held on May 13, 2002, to address a number of reported parole violations. The alleged violations committed by Warick were: (1) failing to report an arrest within 72 hours to a parole officer; (2) leaving his area of supervision without permission of a parole officer on April 21, 2002; (3) leaving his area of supervision without permission of a parole officer on April 15, 2002; (4) using alcohol on April 21, 2002; (5) failing to pay the Crime Victim's Fund as directed; and (6) violating his curfew on April 21, 2002. Warick signed and acknowledged the preliminary notice, and on May 13, 2002, a preliminary hearing on the alleged violations was held before an Administrative Law Judge (ALJ).

During this hearing, Warick informed the ALJ that he refused to be represented by his appointed counsel because he believed that she was conspiring with the parole board to revoke his parole. He also informed the ALJ that he was willing to proceed *pro se* but that he was not waiving his right to counsel. The ALJ found no merit in Warick's conspiracy claim, but she granted his request to dismiss his attorney.

However, she refused to continue the hearing so that Warick could again obtain new counsel, and she advised him that he would be held to the standards of an attorney in presenting his case *pro se*. After the hearing, the ALJ issued the following findings of fact:

> Gary Warick advised that he did not wish to use the services of the Hon. Christi Gray who was assigned his case from the Dept. of Public Advocacy. His contention was that, the fact that Ms. Gray had obtained copies of the discovery documents relevant to this case and had conferred with the parole officer regarding the facts indicated to him that she was working for the Parole Office. It was explained to Mr. Warick that the actions of Ms. Gray were perfectly appropriate in her efforts to defend his case. Mr. Warick made it clear that he wanted to proceed *pro se*. Ms. Gray offered to remain and set [sic] through the proceeding and assist Mr. Warick during the hearing if he so desired. He wished her to leave.
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> A Preliminary Motion was made by Mr. Warick challenging the jurisdiction of the forum to hear any of the violations that related to the incidents on 4/21/02. Charges from the 4/21/02 incidents are currently pending in Pike County. It was explained to Warick that he was not charged with new convictions and his Motion was Overruled. He wanted it noted that we were violating his Constitutional Rights by conducting the Preliminary Revocation Hearing[.]
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> Ella Anderson, Parole Officer, was sworn and introduced the attached documents into evidence. Ms. Anderson testified that on 4/21/02 Mr. Warick was arrested at 2:54 am in Pike County. He was charged with Alcohol Intoxication. The Alcohol Intoxication charge was based on Warick reportedly having difficulty walking on the street, smelling of alcoholic beverage, having slurred speech and red eyes. When Warick was arrested he was in Pike County which is outside his area of supervision. Additionally, the arrest occurred at 2:54 am and Warick has a curfew from 10:00 pm to 6:00 am. Ms. Anderson also indicated that Warick failed to report the arrest

within the required 72-hour period. On 4/15/02, Warick failed to report as scheduled. Ms. Anderson says his Mother called on 4/16/02 and stated that Warick was in Floyd County and forgot to report. Ms. Anderson testified that she directed that Warick report to her office. When Warick reported Ms. Anderson says that she inquired from Warick if he had been in Floyd Co. Ms. Anderson says she confirmed from Warick that he had been in Floyd Co. on 4/15/02 and discussed the fact that he was outside his area of supervision without the permission of his parole officer. Ms. Anderson reports that she advised him that it was a parole violation but that she would not take action on the violation at that time, but that it was serious and must not happen again. As to the supervision fees and payment to the Crime Victim's Fund, Ms. Anderson indicates that one payment had been made to each.

Gary Warick was sworn and testified that the supervision fees and payments to the Crime Victim's Fund were a misunderstanding. He says he did not realize the payments were important. Mr. Warick presented a copy of a $50.00 (fifty dollar) money order for payment of supervision fees and a $50.00 (fifty dollar) money order for payment to the Crime Victim's Fund. These fees were paid after his arrest and Warick indicates that the payment brings him current. Mr. Warick does admit that on 4/15/02 he did travel to Floyd County and says it was outside his supervision area. Mr. Warick contends that this Preliminary Hearing is not the appropriate forum for any matters concerning 4/21/02 and refused to address or answer any questions regarding anything relating to that date. He says he is a Christian and that he had served five year [sic], so when he was paroled he did lay around a while to get his mind right. He says he is now working five days a week. Mr. Warick stated he very much wants his liberty back. On cross-examination, he again refuses to answer any questions relating to the 4/21/02 incident on the bases [sic] that we are the wrong forum.

Based on these findings, the ALJ concluded that probable cause existed to believe that Warick had violated the terms of his parole. She ordered that the case be

referred to the chair of the parole board for issuance of a parole violation warrant against him. Warick was also advised of his right to request a special final hearing.

Warick was returned to custody on May 31, 2002. On June 6, 2002, the Kentucky Parole Board held a final parole revocation hearing and found him guilty of all alleged violations. Warick claims that he was given no oral or written notice of this final hearing. He objected to this lack of notice during the hearing and requested a continuance. This request was denied. Warick claims that he then refused to participate any further in the hearing. His parole was subsequently revoked and further parole board action was deferred for fifteen (15) months. His request for a rehearing was denied.

On January 17, 2003, Warick filed a petition for a writ of mandamus in the Boyle Circuit Court. He asked the court to vacate the parole board's decision to revoke his probation because it had committed a number of procedural and substantive due process violations. The court entered an order on August 22, 2003, denying the petition and holding that all due process requirements had been met. Warick's post-order motions were denied. This appeal followed.

On appeal, Warick alleges three errors in support of his contention that the trial court improperly denied his petition for a writ of mandamus: (1) that he was deprived of his right to counsel at the preliminary revocation hearing; (2) that he was not provided sufficient notice of the final revocation hearing; and (3) that the parole board based its decision to revoke his parole on inappropriate grounds.

We shall first address Warick's claim that he was deprived of his right to counsel at the preliminary revocation hearing. A parole revocation proceeding is not a part or a phase of a criminal prosecution; therefore, "the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the United States Supreme Court held that there is no rigid constitutional requirement that counsel be provided in all parole and probation revocation cases. Instead:

> the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.

Id., 411 U.S. at 790, 93 S.Ct. at 1763.

Kentucky statutory law, however, has removed the need for such "case-by-case" evaluations and has imposed greater requirements. Kentucky specifically provides indigent parolees the right to counsel at a parole or probation revocation hearing as set forth in Kentucky Revised Statutes (KRS) 31.110(2)(a):

> (2) A needy person who is entitled to be represented by an attorney under subsection (1) of this section is entitled:
>
> > (a) To be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney **and including revocation of probation or parole**[.]

(Emphasis added). The Kentucky Department of Corrections has also acknowledged and incorporated this statutory right in its Corrections Policies and Procedures (CPP) promulgated pursuant to 501 KAR 6:270 -- specifically CPP 27-19-01(II)(C)(5), which provides:

> It is the policy of the Department of Corrections to afford offenders alleged to have violated probation or parole with procedural due process which includes ... [t]he right to … have counsel of choice present, **or in the case of indigent persons who request assistance to adequately present the case, have counsel appointed**.

(Emphasis added).

The record reflects that Warick was provided counsel for purposes of the preliminary revocation hearing but that he refused to use her services because of a perceived conflict of interest. Our courts have repeatedly held that:

> a defendant who is represented by a public defender or appointed counsel does not have a constitutional right to be represented by any particular attorney, **and is not entitled to the dismissal of his counsel and the appointment of substitute counsel except for adequate reasons or a clear abuse by counsel**.

Henderson v. Commonwealth, 636 S.W.2d 648, 651 (Ky. 1982) (Emphasis added); *see also Deno v. Commonwealth*, 177 S.W.3d 753, 759 (Ky. 2005); *Fultz v. Commonwealth*, 398 S.W.2d 881, 882 (Ky. 1966); *Baker v. Commonwealth*, 574 S.W.2d 325, 326-27 (Ky.App. 1978). When a defendant requests substitution of counsel (as Warick effectively did here) he is required to show good cause, which includes:

> a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict.

Shegog v. Commonwealth, 142 S.W.3d 101, 105 (Ky. 2004), quoting *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972). The court must determine whether such "good cause" exists. "Whether good cause exists for substitute counsel to be appointed is within the sound discretion of the trial court." *Deno*, 177 S.W.3d at 759.

The ALJ (the counterpart of the court at this stage of the proceedings) concluded that Warick's claim of a conflict of interest lacked merit. We find no abuse of discretion in this conclusion. Warick believed that his attorney was working against him because she obtained a copy of the citation that was issued against him in Pike County and discussed it with his parole officer. We cannot agree that this conduct in any way constitutes evidence of a conspiracy against him. In a similar Montana case, a defendant facing revocation of a suspended sentence also rejected his appointed counsel. The Montana Supreme Court held:

> When court-appointed counsel is rendering effective assistance, the defendant has the choice of: (1) continuing with the counsel so appointed, or (2) having his counsel dismissed and proceeding on his own, pro se. **A defendant has no right to the appointment of counsel of his choice.** *State v. Pepperling* (1978), 177 Mont. 464, 473, 582 P.2d 341, 346. By rejecting court-appointed counsel for the revocation hearing, Lange effectively opted to proceed pro se without assistance of counsel.

State v. Lange, 733 P.2d 846, 849 (Mont. 1987) (Emphasis added.). We believe that this reasoning is sound and adopt it as our own. Accordingly, we conclude that the ALJ was

well within her discretion to dismiss Warick's counsel (per his request) and to require him to proceed *pro se* under the circumstances. We find no error.

Warick next argues that he was deprived of procedural due process because he failed to receive sufficient notice of his final parole revocation hearing. The U.S. Supreme Court has held -- and our courts have recognized -- that a parolee who is accused of having violated his parole agreement is entitled:

> to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.

Gagnon, 411 U.S. at 781-82, 93 S.Ct. at 1759. The final hearing, in particular, requires:

> **(a) written notice of the claimed violations of parole**; (b) disclosure to the parolee of evidence against him; (c) 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 factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey, 408 U.S. at 489, 92 S.Ct. at 2604 (Emphasis added); *see also Gagnon*, 411 U.S. at 786, 93 S.Ct. at 1761-62; *Lynch v. Commonwealth*, 610 S.W.2d 902, 906-07 (Ky.App. 1980).

At the outset of our discussion, we note that the cassette tape of the final revocation hearing is inaudible and completely unintelligible. Since the appellant bears the burden of providing us with a reviewable record, we are generally required to assume

in such cases that the evidence supports the decision of the trial court below. *See Ventors v. Watts*, 686 S.W.2d 833, 835 (Ky.App. 1985). However, we have received no assistance from the parole board as it failed to file a brief on appeal. In such cases, Kentucky Rule of Civil Procedure (CR) 76.12(8)(c) provides us with several options. We have the discretion to accept the appellant's statement of the facts and issues as correct and to reverse the judgment if appellant's brief reasonably appears to sustain such action. We also may hold the appellee's failure to file a brief to be a confession entitling us to reverse the judgment without considering the merits of the case.

We have nonetheless carefully reviewed the record and considered the merits of this case. We are persuaded on the merits that we must remand this matter to the parole board for another final revocation hearing that comports with due process requirements of notice. There is **nothing within the record** to refute Warick's assertions that he was not provided notice of the final hearing. The record reflects that Warick was given written notice of his preliminary hearing -- as well as written orders from the ALJ and the parole board concerning their respective decisions. However, we can find nothing to suggest that written notice was given to Warick before he faced the ultimate determination as to whether his parole would be revoked.

We note in particular that in its pleadings before the trial court, the parole board failed even to address Warick's claim that he was not given proper notice. The board either omitted or declined to present any evidence that proper notice was given. Under these unique circumstances, we cannot assume that procedural due process was

complied with here. It is indeed a luxury in which an appellate court cannot indulge as we bear the burden of assuring that due process is shown and not presumed. "The appropriate remedy for the denial of procedural due process protections in parole revocation hearings is to grant a new hearing." *Atkins v. Marshall*, 533 F.Supp. 1324, 1329 (S.D. Ohio 1982) Consequently, we believe that remand for a new revocation hearing before the parole board is both necessary and proper.

We note that a new hearing appears to be the only remedy for the error in this case -- one which is minimally burdensome for the board. Warick's remaining arguments address the substantive merits of his case. Therefore, as this case is to be remanded, we need not consider them here.

The judgment of the Boyle Circuit Court is reversed, and this matter is remanded for entry of an order directing the parole board to conduct a new hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gary D. Warick, *Pro se*
West Liberty, Kentucky

NO BRIEF FOR APPELLEE