

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0944

GARRY NEIL PRATER
VERSUS
C.A. LOWE, JR. AND LEE HUBBARD

CONSOLIDATED WITH

NUMBER 2010 CA 0945

GARRY NEIL PRATER
VERSUS
SUPERVISOR SANDRA ORTEGO AND PAROLE OFFICER LEE HUBBARD

Judgment Rendered: December 22, 2010

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 575,517 c/w 577,340

Honorable Wilson Fields, Judge

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Garry Neil Prater
Pineville, LA

In Proper Person
Plaintiff – Appellant

James D. “Buddy” Caldwell, Attorney General
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Defendants – Appellees
C.A. Lowe, Jr., Sandra
Ortego, Lee Hubbard,
and Department of
Public Safety &
Corrections, Board of
Parole

* * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

Gary Neil Prater, an inmate, appeals a judgment of the district court affirming a decision of the Louisiana Department of Public Safety and Corrections, Board of Parole (Parole Board) to revoke his parole. We affirm.

BACKGROUND

While on parole supervision, on July 5, 2008, Prater was arrested by the DeRidder Police Department and charged with driving without a license, not wearing a seatbelt, possession of an alcoholic beverage in a vehicle, resisting and battery of a police officer, possession of marijuana, and possession of drug paraphernalia. Prater was booked into the Beauregard Parish jail on July 7, 2008.¹ Parole revocation proceedings were initiated. Prater deferred his right to a preliminary hearing before a hearing officer and agreed to postpone his final parole revocation hearing before the Parole Board until the charges had been disposed of. On July 18, 2008, the Parole Board ordered that Prater be returned to custody.

On November 5, 2008, Prater entered into a plea agreement with the State of Louisiana in which he entered guilty pleas to the charges of driving without a valid license, battery of a police officer, and possession of marijuana. For those crimes, the court sentenced Prater to 180 days in the Beauregard Parish jail and suspended 150 days of the sentence, with credit for time served.

On December 17, 2008, Prater wrote a letter to the Parole Board claiming to be a first technical violator entitled to a sentence of ninety days for violating the conditions of his parole. He asked the Parole Board to give him credit for time served because he had been in jail for almost six months.

In a Bill of Particulars, Prater was charged with violating Condition 8 of his parole by engaging in the following criminal activity: possession of marijuana in

¹ The record reflects that Prater was paroled on April 26, 2006, for the offenses of distribution of cocaine and marijuana.

the 3rd offense, battery on a police officer, resisting an officer, possession of drug paraphernalia, open alcohol container in vehicle, no driver's license, and no seat belt. Prater was also charged with violating Condition 15 of his parole, which required that he pay parole supervision fees or alternatively work 20 hours of community service, in that the last payment on this account was October 1, 2007, and Prater was in arrears on the account in the amount of \$954.00. On December 23, 2008, Prater waived his right to a preliminary hearing and pled guilty to all violations.

On January 21, 2009, a hearing was held before the Parole Board, at which time the violations set forth in the Bill of Particulars were read and Prater again pled guilty to violating the conditions of his parole as outlined in the Bill of Particulars. Prater also acknowledged that his signature appeared on the document in which he pled guilty to all charges and waived his right to a preliminary hearing. Prater was given an opportunity to speak on his behalf, at which time he denied the validity of the marijuana conviction, claiming that the drugs were not his, but acknowledged that he pled guilty to possession of marijuana in criminal court. At the conclusion of the hearing, the board members voted unanimously to revoke Prater's parole.

On February 19, 2009, Prater filed a petition seeking judicial review of the Parole Board's revocation decision, naming as defendant C.A. Lowe, Jr., the chairman of the Parole Board, and his parole officer, Lee Hubbard. In the petition, Prater asserted that he was entitled to receive a ninety-day technical violation sentence rather than a revocation of his parole because the criminal activity he pled guilty to constituted his first "technical violation" of his parole. He noted in the petition, however, that he had been reprimanded in 2007 for a drug paraphernalia charge.

On April 13, 2009, Prater filed a second petition for judicial review, naming

as defendants Hubbard and parole supervisor Sandra Ortego. Prater alleged that Ortego and Hubbard showed favoritism to other parolees charged with drug possession by allowing them to bond out of jail and that such favoritism violated his right to due process. He claimed to have evidence showing that Hubbard gave certain parolees ninety-day sentences for drug charges, which, Prater insisted, constituted malfeasance in office.

In opposition to the petitions for judicial review, defendants urged that the court did not have subject matter jurisdiction over the claims asserted by Prater because Prater did not allege due process violations in the revocation process. Defendants asked that the petitions be dismissed on that basis.

On June 23, 2009, the district court granted a motion to consolidate the two petitions for judicial review. After reviewing the parole revocation record, including the audio recording of Prater's final revocation hearing, a commissioner for the district court recommended that the petitions for judicial review be dismissed. In so doing, the commissioner stressed that at the revocation hearing, Prater pled guilty to violations of conditions of parole by engaging in criminal conduct and failing to pay supervision fees. Additionally, the commissioner found that because Prater pled guilty of a violation of Title 40 for possession of marijuana, he was not eligible for a ninety-day revocation sentence for technical violators provided for in La. R.S. 15:574.9(G). The commissioner ultimately found that Prater failed to show a violation of his due process rights in the revocation process, or that the Parole Board's decision to revoke his release on parole was an abuse of discretion, or that the Parole Board was required to impose a ninety-day revocation term under La. R.S. 15:574.9.

Adopting the commissioner's reasons as its own, the district court entered judgment affirming the Parole Board's revocation decision. Prater appealed, urging four assignments of error in which he claims that: (1) his parole officer

committed malfeasance in office by letting other parolees with drug offenses out on bond and giving them ninety-day sentences; (2) his due process rights were violated when his petitions for judicial review were consolidated on June 23, 2009, with favoritism and discrimination; (3) defendants violated a mandatory statutory provision which violated his constitutional rights as a parolee; and (4) he suffered cruel and unusual punishment due to the defendants' wrongful allegations and that his punishment is excessive for the crime committed.

An inmate has a limited right to appeal a decision of the Parole Board revoking his parole. A district court is vested with jurisdiction over a revocation decision of the Parole Board where the pleadings allege that the parolee's right to a revocation hearing has been denied or a violation of La. R.S. 15:574.9, which sets forth certain procedures in parole revocation cases, has been violated. La. R.S. 15:574.11(A) and (C); **Leach v. Louisiana Parole Board**, 2007-0848, p. 7 n.4 (La. App. 1st Cir. 6/6/08), 991 So.2d 1120, 1124 n.4, writs denied, 2008-2385 (La. 8/12/09), 17 So.3d 378 and 2008-2001 (La. 12/18/09), 23 So.3d 947.

In his third assignment of error, Prater claims that his mandatory statutory rights were violated in connection with the parole revocation determination. Apparently, this is a continuation of Prater's argument that he should have received a ninety-day sentence as provided for in Subsection (G) of La. R.S. 15:574.9 rather than a revocation of his parole for engaging in criminal activity. Pursuant to La. R.S. 15:574.9, certain offenders are entitled to a ninety-day "technical revocation sentence" where the parole supervision is revoked for a "first technical violation" of parole conditions.

Prater is not entitled to a ninety-day technical revocation sentence. Louisiana Revised Statutes 15:574.9(G)(2)(a)(iii) plainly states that a first "technical violation" for which the imposition of a ninety-day sentence is authorized in Paragraph G shall not include being arrested, charged, or convicted

of “[a]ny intentional misdemeanor directly affecting the person.” Prater pled guilty in criminal court and before the Parole Board to the crime of battery of a police officer. Battery of a police officer is listed as a “crime of violence” in the Louisiana Criminal Code. La. R.S. 14:2(B)(41). The crime can be either a felony or a misdemeanor, depending on the circumstances of the offense. La. R.S. 14:34.2. Battery by definition is the intentional use of force or violence upon the person of another. La. R.S. 14:33. Battery of a police officer is a non-technical violation falling under La. R.S. 15:574.9(G)(2)(a)(iii) because it is an intentional crime directly affecting the person. Therefore, as Prater is not eligible to receive a ninety-day technical violation sentence, the Parole Board could not have violated La. R.S. 15:574.9(G) by failing to impose a ninety-day sentence.²

In his second assignment of error, Prater apparently contends that the district court violated his due process rights by consolidating his petitions for judicial review on June 23, 2009. We find no merit in this claim. In both petitions, Prater attacked the merits of the Parole Board’s decision to revoke his parole. Therefore, we find no error in the consolidation of Prater’s petitions for judicial review of the Parole Board’s decision to revoke his parole.

Additionally, Prater argues that the defendants discriminated against him in violation of the 14th amendment because they allowed some parolees with drug offenses to have ninety-day sentences, but did not afford him the same treatment. He also contends that his parole officer committed malfeasance in office for giving parolees ninety-day sentences on drug offenses in violation of the probation and parole laws and that the Parole Board’s revocation of his parole constitutes cruel

² By virtue of La. Acts 2010, No. 510, § 1, La. R.S. 15:574.9(G)(2)(a)(ii), which had, at the time of Prater’s parole revocation, provided that a violation of Title 40 of the Louisiana Revised Statutes was not a “technical violation” as used in Subsection G, was repealed. Louisiana Revised Statutes 15:574.9(G)(2)(a)(iii) was not affected by the 2010 legislation. Since we have found that Prater was not entitled to ninety-day first technical violation sentence because he pled guilty to a crime falling under La. R.S. 15:574.9(G)(2)(a)(iii), it is unnecessary to address the impact of the repeal La. R.S. 15:574.9(G)(2)(ii) on the Parole Board’s revocation decision in this case.

and unusual punishment.

Prater has not alleged the revocation proceedings were faulty or that he was denied due process therein. Instead, Prater's remaining assignments attack the merits of the Parole Board's revocation of his parole. These allegations are outside the limited scope of review authorized by La. R.S. 15:574.11. Moreover, the Parole Board is vested with virtually total discretion when rendering a decision to revoke a release on parole. **Harris v. Louisiana Department of Public Safety and Corrections**, 2008-2295, p. 3 (La. App. 1st Cir. 8/6/09), 15 So.3d 385 (*unpublished*). The district court found no abuse of the Parole Board's discretion in revoking Prater's parole. We find no error in this determination.

CONCLUSION

For the foregoing reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to appellant, Garry Neil Prater.

AFFIRMED.