

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK J. KENNEY,

Plaintiff-Appellee,

v

WARDEN RAYMOND BOOKER,

Defendant-Appellant.

UNPUBLISHED

April 3, 2012

No. 304900

Wayne Circuit Court

LC No. 11-003828-AH

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

TALBOT, J (*dissenting*).

I respectfully dissent. First, I believe that review of the record from the January 11, 2011, parole revocation hearing demonstrates that the hearing officer failed to acknowledge that the determination of whether to revoke Patrick J. Kenney's parole is based on a preponderance of the evidence standard.¹ The hearing officer instead erroneously asserted that the applicable standard was whether Kenney knew or should have known that the firearm was in the vehicle.

Second, even applying the preponderance of the evidence standard, I believe that the findings of fact of the hearing officer do not support that Kenney actually or constructively possessed the firearm that was retrieved from the battery compartment of the vehicle.² The hearing officer indicated that the vehicle was registered to Kenney's mother. Kenney was living with and receiving an allowance from John Cook, a known drug dealer, with whom Kenney shared the vehicle. Cook was in possession of the vehicle before Kenney began driving and Kenney testified he was not aware of the firearm's presence in the vehicle. Cook admitted that the gun was not placed in the vehicle by Kenney, and the hearing officer found Cook's testimony to be credible. Cook also had been arrested while driving the vehicle 17 days before Kenney was stopped. Kenney was not present. At that time a firearm was recovered from the same location

¹ MCL 791.240a(10).

² *People v Johnson*, 293 Mich App 79, __; __ NW2d __ (Docket No. 295664, issued June 14, 2011) (slip op at 2).

in the vehicle. I would find that there were insufficient proofs regarding Kenney's alleged possession of the firearm to sustain counts two through four.³

Finally, Kenney did plead guilty to count one, which was a failure on one occasion to make a scheduled report to his field agent. "If a preponderance of the evidence supports the allegation that a parole violation occurred, the parole board may revoke parole."⁴ As such, I would find that the case must be remanded to the parole board on count one only for a determination regarding whether parole revocation is warranted.

/s/ Michael J. Talbot

³ *Id.*

⁴ MCL 791.240a(10).