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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 5/14/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LARRY JOSEPH PRINCE,) 1 CA-CV 12-0148
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
ARIZONA BOARD OF EXECUTIVE) (Not for Publication -
CLEMENCY,) (Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendant/Appellee,)
)
DUANE BELCHER, SR., Chairman;)
MARILYN WILKINDS; ELLEN STENSON,)
)
Real Parties in Interest/)
Appellees.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. LC2011-000547-001

The Honorable Eileen S. Willett, Judge

VACATED AND REMANDED WITH INSTRUCTIONS

Larry Joseph Prince
Appellant

Phoenix

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Attorneys for Defendant/Real Parties in Interest/Appellees

Phoenix

O R O Z C O, Judge

¶1 Larry Joseph Prince (Prince) appeals from the superior court's order denying his request for special action relief. For the following reasons, we vacate the superior court's denial of special action relief with directions to remand the matter to the Arizona Board of Executive Clemency (Board) for further findings.

FACTS AND PROCEDURAL HISTORY

¶2 In 1984, Prince was convicted of first degree murder and sentenced to death. *State v. Prince*, 160 Ariz. 268, 270, 772 P.2d 1121, 1123 (1989). The Arizona Supreme Court modified his death sentence to a life sentence without possibility of parole for twenty-five years. *Id.* at 276, 772 P.2d at 1129. After Prince served his twenty-five year term, the Board granted parole for Prince, and he was released from prison on August 23, 2010.

¶3 Prince was required to abide by certain conditions of parole. Specifically, he agreed that he would not use any controlled substances or narcotics except as prescribed for him by a licensed physician. He also agreed that he would submit to blood, urine, or breathalyzer testing upon request. Prince was given written instructions for submitting urine samples while on parole. Those instructions cautioned Prince to avoid drinking more than twenty to twenty-four ounces of fluids within two hours before he submitted his sample, as drinking excessive fluids could cause a

diluted specimen which is not suitable for testing. Prince was explicitly warned that submitting a diluted sample was also a violation of the conditions of his parole.

¶4 On March 23, 2011, Prince provided a diluted specimen, and on March 31, he provided a specimen which tested positive for methamphetamine. As a result, the Arizona Department of Corrections (DOC) issued a warrant for Prince's arrest. Prince self-surrendered, was returned to prison and waived his right to a preliminary hearing. The Board began Prince's parole revocation hearing on April 27, 2011. At the hearing, Prince questioned whether Treatment Assessment Screening Center, Inc. (TASC) had complied with their own collection and chain of custody protocols. As a result, the Board suspended the hearing and reconvened on June 9, 2011, at which time a representative from TASC appeared and testified before the Board. Prince cross-examined the TASC representative, and presented further evidence and argument. The Board held that Prince violated condition seven of his parole by submitting a diluted urine sample and a urine sample that tested positive for methamphetamine. In the disposition phase of the parole revocation hearing, the Board voted to revoke Prince's parole.

¶5 Prince filed a complaint for special action in the superior court, challenging the Board's actions. The superior

court denied his complaint. Prince appealed.¹ We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.A.1 (Supp. 2012).

DISCUSSION

¶16 On appeal, Prince argues that the superior court erroneously found that his parole was revoked in the manner required by Arizona statute and the minimum due process requirements set forth in *Morrissey v. Brewer*, 408 U.S. 471 (1972). As a separate and unrelated issue, Prince also argues that the superior court erred by refusing to suppress the contents of intercepted oral and wire communications which led to a subsequent criminal indictment.

¶17 "After the superior court has accepted jurisdiction and determined the merits of a special action petition, we review whether the court abused its discretion by its grant or denial of relief." *Hormel v. Maricopa Cnty.*, 224 Ariz. 454, 458, ¶ 16, 232 P.3d 768, 772 (App. 2010) (citations and internal quotation marks omitted). We review questions of law de novo. *Id.*

¶18 A prisoner has no constitutional or inherent right to parole. *Banks v. Ariz. State Bd. of Pardons & Paroles*, 129 Ariz.

¹ The minute entry Prince appealed from was unsigned. The superior court has since entered a signed minute entry, thereby rendering Prince's premature notice of appeal effective. See *Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981).

199, 200, 629 P.2d 1035, 1036 (App. 1981). Whether one is eligible for parole is a matter within the control of the Board, not the courts. *State v. Harris*, 133 Ariz. 30, 31, 648 P.2d 145, 146 (App. 1982).

¶19 Once an offender is released on parole, however, revocation deprives the parolee "not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on [the parolee's] observance of special parole restrictions. *Morrissey*, 408 U.S. at 480. In *Morrissey*, the United States Supreme Court held that a parolee's conditional liberty interest is protected by the Due Process Clause of the Fourteenth Amendment such that revocation requires "some orderly process, however informal." *Id.* at 482.

¶10 "The legislature intended to give the Board sole discretion to determine whether to grant or deny parole." *Stewart v. Ariz. Bd. of Pardons & Paroles*, 156 Ariz. 538, 540, 753, P.2d 1194, 1196 (App. 1988) (citations and internal quotation marks omitted). We "review acts of the Board to determine whether the Board exceeded its legal authority." *Id.* However, we will not substitute our view of the facts for that of the Board. *Cooper v. Ariz. Bd. of Pardons & Paroles*, 149 Ariz. 182, 184, 717 P.2d 861, 863 (1986).

¶11 According to *Morrissey*, the minimum due process requirements for a revocation hearing include:

(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.

¶12 We find that the Board fulfilled the first five due process requirements. However, it did not satisfy the sixth requirement because it did not make the statutory findings necessary to revoke Prince's parole.

¶13 Under Arizona law, to revoke an offender's parole and re-imprison him or her under A.R.S. § 31-417 (2002), the Board must find that a parolee is "delinquent." The statute does not define delinquent; however, reading the statutes pertaining to the revocation process together, we conclude that "delinquent" in § 31-417 refers to the two prong standard of § 31-415. When a statute is silent, "we look beyond the statutory language and consider the statute's effects and consequences, in addition to its spirit and purpose." *Calmat v. Ariz. v. State ex rel. Miller*, 176 Ariz. 190, 193, 859 P.2d 1323, 1326 (1993). Pursuant to § 31-415, a warrant may be issued to retake a parolee, if the Board "has reasonable

cause to believe that a paroled prisoner . . . has violated his parole . . . and has lapsed or is probably about to lapse into criminal ways or company" A.R.S. § 31-415 (emphasis added). In other words, the two prongs to show criminal recidivism under § 31-417 are reasonable cause to believe that the parolee has: 1) violated a condition of his parole, and 2) has lapsed or is probably about to lapse into criminal ways or company.

¶14 Condition seven of Prince's parole was that he would not use illegal drugs. He violated the terms of his parole by testing positive for methamphetamine on March 31, 2011.

¶15 Another component of condition seven was Prince's agreement to submit urine samples for the purpose of drug testing whenever requested by any supervising officer. Prince's parole officer provided him instructions for submitting urine samples for testing. Those instructions cautioned Prince not to drink more than twenty to twenty-four ounces of fluids within two hours before he submitted a sample because drinking excessive fluids could cause a diluted specimen which is not suitable for testing. Less than two months after signing these instructions,

Prince provided a diluted specimen.² This was also a violation of condition seven of his parole and was specified in the arrest warrant.

¶16 The written order revoking Prince's parole states that his parole is revoked because the Board found by a preponderance of the evidence "the info contained in warrant #11W1121." In other words, the Board revoked Prince's parole because he had violated the conditions of his parole by testing positive for methamphetamine and by submitting a diluted specimen. Thus, the Board's revocation order satisfied the first prong of A.R.S. § 31-415.

¶17 The revocation order did not, however, satisfy the second prong, as there was no finding that Prince was delinquent

² This was only one of six diluted specimens that Prince provided. He also tested positive for methamphetamine on two separate occasions. On January 27, 2011, Prince's parole officer warned him that because he had three significant violations, the next diluted or positive urine test would result in his return to custody. Thereafter, Prince provided a diluted sample on March 23, and on March 31, submitted a diluted sample that tested positive for methamphetamines. In his defense, Prince provided evidence that his doctor prescribed oxycodone for his back pain. Prince testified that because this medication causes dry mouth and difficulty urinating, he drank voluminous amounts of liquid to keep hydrated. He provided no evidence that his doctor had directed him to drink such voluminous amounts of liquid. Moreover, the testing instructions only limit liquid consumption in the two hours before the giving of a urine specimen, and the testing center is open ten hours per day. Thus, the Board could have found that it was conceivable that Prince could provide an undiluted specimen.

or that the Board had reasonable cause to believe that Prince had lapsed or was probably about to lapse into criminal ways or company. See *Rupp v. Walker*, 62 Ariz. 101, 104, 154 P.2d 371, 372 (1944) ("There was no declaration by the board of pardons and paroles of delinquency, and without such declaration no deduction from his good conduct time could be made.").

¶18 In sum, due process requires that the Board provide a written statement of the reason for revoking parole.³ See *Morrissey*, 408 U.S. at 489. Pursuant to A.R.S. § 13-417, the Board must find that Prince was delinquent, which meant that he had violated his parole and had lapsed or was probably about to lapse into criminal ways or company. The Board made no such written finding. For that reason, we vacate the superior court's order and direct that the matter be remanded to the Board. We note, however, that Prince is not entitled to release as he requests. See *Long v. Ariz. Bd. of Pardons & Parole*, 180 Ariz. 490, 494-95, 885 P.2d 178, 182-83 (App. 1994) (trial court does not have the authority to order a parolee's release to remedy due process violation in connection with parole revocation hearing).

³ The Board also failed to make any such specific finding on the record in the tape recorded hearings.

¶19 Prince also raises as error the superior court's refusal to decide his motion to suppress oral and wire tap information submitted by the Board in connection with its response to Prince's Rule 60(c) motion. Prince filed the motion after he filed his amended notice of appeal. Thus, the superior court did not have jurisdiction to decide Prince's motion to suppress.

¶20 We decline to take judicial notice of the recorded evidence and Prince's subsequent indictment, as this evidence was not before the superior court when it denied Prince's special action complaint.

CONCLUSION

¶21 We vacate the order of the superior court and remand to the Board with instructions to comply with A.R.S. § 31-417 and *Morrissey, supra*.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

PETER B. SWANN, Judge

/S/

LAWRENCE F. WINTHROP, Chief Judge