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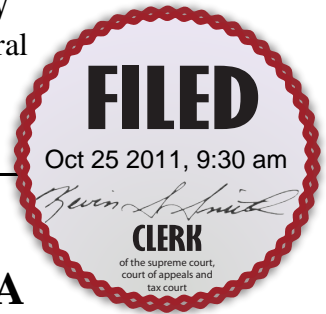
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**IN THE
COURT OF APPEALS OF INDIANA**

LONNIE GARNER, JR.,)

Appellant-Petitioner,)

vs.)

No. 48A04-1103-MI-174)

EDWIN BUSS, INDIANA PAROLE BOARD)
and D. CARNEYGEE, SUPERINTENDENT,)

Appellees-Respondents.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-1103-MI-99

October 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Lonnie Garner, Jr., pro se, appeals the trial court's order granting a motion to dismiss his petition for a writ of habeas corpus. Garner presents several issues for review, which we consolidate and restate as whether the trial court erred when it dismissed Garner's amended habeas corpus petition. We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Garner was convicted of unlawful possession of a firearm, as a Class B felony, and sentenced to fifteen years in the Department of Correction. On September 11, 2009, he was "mandatorily paroled[.]" Appellant's App. at 28. As conditions of his parole, Garner agreed to the following:

2. EMPLOYMENT AND RESIDENCE – I will make every effort to remain gainfully employed and I understand that I must obtain written permission from my supervising officer prior to changing my employment or residence.

* * *

8. FIREARMS AND DANGEROUS WEAPONS – I understand that carrying, dealing in, or possession of firearms, explosive devices or deadly weapons are [sic] a violation of my parole release agreement.

* * *

10. COMMUNICATION AND SPECIAL INSTRUCTION – I agree to report to my supervising officer as instructed and to respond to any and all communications from any authorized employee of the Department of Correction. I will abide by any special conditions imposed by the Indiana Parole Board which have been reduced to writing and included as a condition of my parole.

Appellant's App. at 31.

On September 28, 2009, a parole violation warrant was issued alleging that Garner had violated the conditions of his parole.¹ The warrant was served on Garner on September 30, at which time he was arrested. On the same date, Garner waived a preliminary hearing and “pled guilty to violating parole rules 2, 8, and 10.” Id. at 28. A parole revocation hearing was held on November 13, at which time Garner’s parole was revoked.

On March 1, 2011, Garner filed his pro se verified petition for writ of habeas corpus. And on March 18 he filed a pro se amended petition for writ of habeas corpus. His petitions name as respondents Edwin Buss, the Commissioner of the Department of Correction;² the Indiana Parole Board; and Donna Carneygee, as Superintendent of Westville Correctional Facility³ (collectively “Respondents”). On the same date, Respondents filed a motion to dismiss the petition under Trial Rule 12(B)(6) and a supporting memorandum.⁴ On March 22, the trial court entered an order granting the motion to dismiss (“Order”). The Order provides, in part:

The court now GRANTS the motion to dismiss.

The only proper party is the Superintendent. Ind. Code § 35-25.5-2-4. The former Commissioner and the Indiana Parole Board are dismissed.

¹ Garner has not included a copy of the parole violation warrant in the record on appeal.

² Respondents’ memorandum in support of their motion to dismiss and the trial court’s order refer to Buss as a “former” Commissioner, but Respondents do not state when Buss ceased to work in that capacity. Appellant’s App. at 90.

³ Carneygee is listed simply as “Superintendent.” Because the record on appeal indicates that Garner is incarcerated at the Westville Correctional Facility, we presume Carneygee manages that facility.

⁴ The motion to dismiss was filed on the same date Garner filed his amended petition for writ of habeas corpus. We will treat the motion and the subsequent order on the motion as applying to Garner’s amended petition as well.

Pleading guilty waived the right to challenge the validity of a conviction. United States v. Broce, 488 U.S. 563 (1989); Mapp v. State, 770 N.E.2d 332, 334-35 (Ind. 2002); Games v. State, 743 N.E.2d 1132, 1134-35 (Ind. 2001); Cornelious v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), trans. denied; Odom v. State, 647 N.E.2d 377, 380 (Ind. Ct. App. 1995)[, trans. denied]; Barnett v. State, 637 N.E.2d 826, 830 (Ind. Ct. App. 1994). All challenges to the revocation of parole are waived by [Garner's] plea of guilty.

[Garner's] parole was not revoked based on his mere arrest. [His] parole was not revoked for criminal activity while on parole at all.

The purpose of the preliminary hearing is to determine if there is probable cause, or reasonable grounds, to believe that the parolee committed an act that would be a violation of a condition to remaining on parole. Morrissey v. Brewer, 408 U.S. 471, 485 (1972). No second preliminary hearing is needed merely because new allegations of the violation of parole are brought as that would not undermine the original decision that reasonable grounds exist to believe that parole has been violated.

This court does not have jurisdiction to review the denial of parole where, as here, there is no allegation that the petitioner did not have a chance to voice his position and there is no allegation that he did not receive notice of the Parole Board's decision. . . .

Appellant's App. at 102-03 (some citations omitted). Garner now appeals.

DISCUSSION AND DECISION

Garner contends that the trial court erred when it dismissed his amended petition for writ of habeas corpus under Trial Rule 12(B)(6). The standard of reviewing a dismissal under Rule 12(B)(6) is well-settled:

The standard of review on appeal of a trial court's grant of a motion to dismiss for the failure to state a claim is de novo and requires no deference to the trial court's decision. Lei Shi v. Cecilia Yi, 921 N.E.2d 31, 36 (Ind. Ct. App. 2010). The grant or denial of a motion to dismiss turns only on the legal sufficiency of the claim and does not require determinations of fact. Id. " 'A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint

establish any set of circumstances under which a plaintiff would be entitled to relief.’ ” Id. (quoting Trail v. Boys & Girls Clubs of Northwest Ind., 845 N.E.2d 130, 134 (Ind. 2006)). Thus, while we do not test the sufficiency of the facts alleged with regards to their adequacy to provide recovery, we do test their sufficiency with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred.¹ Id.

Bellows v. Bd. of Comm’rs of Elkhart County, 926 N.E.2d 96, 110 (Ind. Ct. App. 2010).

In his petition Garner requested habeas corpus relief. “The purpose of a writ of habeas corpus is to determine the lawfulness of custody or detention of the defendant and may not be used to determine collateral matters not affecting the custody process.” Hardley v. State, 893 N.E.2d 740, 742 (Ind. Ct. App. 2008) (citation omitted). A defendant is entitled to a writ of habeas corpus if he or she is unlawfully incarcerated and is entitled to immediate release. Id. (citation omitted). Proper claims under a petition for a writ of habeas corpus include allegations that the petitioner’s sentence has expired, that he has been denied good time or credit time, or that he is seeking a correction of the beginning or end of his sentence. See Partlow v. Superintendent, 756 N.E.2d 978, 980 (Ind. 2001) (alteration in original). If a petitioner erroneously captions his action as a petition for a writ of habeas corpus rather than post-conviction relief, courts will frequently and properly treat the petition as one for post-conviction relief, based on the content of the petition, rather than the caption. Hardley, 893 N.E.2d at 743.

Garner captioned his petition as one for habeas corpus relief, and the petition alleges (1) that he has completed his fixed term; (2) that he has satisfied the minimum requirements of a petition for habeas corpus relief; and (3) that, for various reasons, his parole was unlawfully revoked. The first of Garner’s contentions, that he has served his fixed term, alleges that his incarceration is illegal. Therefore, that claim was properly

raised in a habeas corpus petition. See Partlow, 756 N.E.2d at 980. As such, and with the exception discussed immediately below, Garner stated a legally actionable claim for habeas corpus relief, and the trial court erred when it dismissed that claim for habeas relief.

We next consider the exception mentioned above. Garner named as respondents the Indiana Parole Board; Edwin Buss, a former Commissioner of the Indiana Department of Correction; and Donna Carneygee, the Superintendent of the Westville Correctional Facility. Respondents' motion to dismiss alleges in part that Buss and the Parole Board were not properly named as respondents in Garner's petition for a writ of habeas corpus because neither has or had custody of him. The trial court agreed, finding that the "only proper party is the Superintendent." Appellant's App. at 102.

Insofar as the trial court treated Garner's petition as one requesting habeas relief, and not post-conviction relief, the trial court was correct. A writ of habeas corpus "shall be directed to the office or party restraining the applicant" Ind. Code § 34-25.5-2-4. Garner has not shown that he is in the custody of Buss or the Parole Board, nor could he be. Thus, with regard to the request for habeas relief on the ground that Garner has served his fixed term, the trial court did not err to the extent it dismissed that claim against Buss and the Parole Board.

In the remaining claims Garner contends that his parole was unlawfully revoked.⁵ But Garner does not argue that he is entitled to immediate release due to the allegedly

⁵ Garner also contends that his petition meets the requirements for a request for habeas relief. In that regard he asserts that he "is challenging, not the validity of his conviction or sentence, but rather the validity of a parole revocation resulting from an invalid Preliminary Waiver, inter alia [sic]." Appellant's

unlawful revocation of his parole. Further, the remedy for an unlawful revocation of parole is filing a petition for post-conviction relief. See Ind. Post-Conviction Rule 1.1(a); Hardley, 893 N.E.2d at 743. Thus, his claims regarding the validity of the parole revocation proceedings were not properly before the trial court as bases for requesting a writ of habeas corpus.

The trial court did not indicate in the dismissal order whether it treated Garner's petition as one seeking strictly habeas relief or, instead, whether it considered the petition, even in part, as seeking post-conviction relief.⁶ The trial court did not err to the extent it dismissed, under habeas corpus law, Garner's claims regarding the validity of the parole revocation proceedings.

But our conclusion does not mean that Garner is without a remedy to challenge validity of the parole revocation proceedings. Given the hybrid nature of Garner's pro se amended petition, the trial court could have addressed Garner's claims regarding the parole revocation proceedings under the post-conviction rules. Therefore, we reverse the trial court's dismissal of Garner's claims challenging the validity of the parole revocation proceedings and remand with instructions for the trial court to consider those claims as requests for post-conviction relief. See Hardley, 893 N.E.2d at 743.

Brief at 7. Thus, we consider that argument as part of Garner's challenge to the parole revocation proceedings.

⁶ The conclusion that only Superintendent Carneygee is a proper party demonstrates that the court likely considered the petition only as requesting a writ of habeas corpus. But the trial court also concluded that it was without jurisdiction to review the denial of parole because there was no allegation that Garner "did not have a chance to voice his position" or that he "did not receive notice of the Parole Board's decision." Appellant's App. at 103. That finding rings of the supreme court's holding in Partlow: "a trial court does not have 'jurisdiction to entertain a petition for a writ of habeas corpus inasmuch as [a] petitioner [is] serving time under a proper commitment, his sentence [has] not expired, and he [has] not been denied good time or credit time" 756 N.E.2d at 980 (citation omitted, alterations in original).

Conclusion

In sum, Garner's amended petition stated claims for both habeas corpus relief and post-conviction relief. With regard to the former, we affirm the trial court's dismissal of Buss and the Parole Board, but we reverse the dismissal of that claim as to the Superintendent. By alleging that he has served his fixed term, Garner has stated a legally actionable claim for habeas relief, and we remand with instructions for the court to consider that claim on the merits. Given the posture of this Rule 12(B)(6) appeal, we will not consider the merits of Garner's claim that he has completed his sentence in the first instance on appeal.

As to Garner's claims challenging the parole revocation proceedings, we reverse the trial court's dismissal of those claims and hold that Garner has stated legally actionable claims for post-conviction relief. And we remand those claims with instructions for the trial court to exercise its jurisdiction to consider the claims under the Post-Conviction Rules on the merits rather than to dismiss the claims under Trial Rule 12(B)(6).⁷

Affirmed in part, reversed in part, and remanded with instructions.

RILEY, J., and MAY, J., concur.

⁷ In remanding these claims for post-conviction relief, we express no opinion as to the timeliness or the merits of the claims to be considered by the trial court.