

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000596-MR

BARRY BEARD

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 97-CI-01863

LINDA FRANK (CHAIRPERSON-  
KENTUCKY PAROLE BOARD)

APPELLEE

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Barry Beard (Beard) appeals pro se from an order of the Franklin Circuit Court denying his Petition for Writ of Mandamus. After reviewing the record, we affirm.

In February 1997, Beard was arrested and given notice that he was being charged with violating the terms of his parole for using illegal drugs as evidenced by a positive drug test. Beard waived a preliminary parole revocation hearing, so the matter was passed for a final revocation hearing before the Kentucky Parole Board. On March 25, 1997, Beard appeared before

a five-member panel of the Parole Board. At the hearing, Beard admitted having possessed marijuana and benzodiazepine. At the conclusion of the hearing, the Parole Board found that Beard had violated the conditions of parole, revoked his parole, and ordered him to serve out the remainder of his prison sentence (release date August 2000).

In December 1997, Beard filed a Petition for Writ of Mandamus seeking an order from the court requiring the Parole Board to conduct a new parole revocation hearing. Beard alleged that the Parole Board violated his right to due process by failing to provide a full written statement explaining the reasons for its decision. The Department of Corrections filed a response arguing that the Parole Board had not violated due process. On March 3, 1998, the trial court summarily denied the petition. This appeal followed.

Beard argues that the Parole Board failed to comply with the requirements of procedural due process. He contends that the Parole Board did not provide a sufficient "written statement by the factfinders as to the evidence relied on and reasons for revoking parole," as required by Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972). See also Rogers v. Hurley, Ky., 486 S.W.2d 696 (1972). Beard relies on a 1989 unpublished federal court decision of the Western District of Kentucky, Preston v. O'Dea, 89-0033-P(J), in support of his position that the Parole Board's use of a preprinted form was insufficient.

As a general rule, a writ of mandamus is an extraordinary remedy that is available only if the petitioner can establish that he has no other adequate remedy and irreparable injury will result if the writ is not granted. Owens Chevrolet v. Fowler, Ky., 951 S.W.2d 580, 582 (1997); Foster v. Overstreet, Ky., 905 S.W.2d 504, 505 (1995). A prisoner may seek a writ of mandamus to compel the Parole Board to exercise its duty to perform a ministerial act, but not to exercise its purely discretionary duty in any particular manner. See Evans v. Thomas, Ky., 372 S.W.2d 798, 800 (1963), cert. denied, 376 U.S. 934, 84 S. Ct. 705, 11 L. Ed. 2d 653 (1964). See also White v. Board of Education of Somerset Independent School District, Ky. App., 697 S.W.2d 161, 163 (1985) (mandamus available to require administrative officer to perform purely ministerial act). "Mandamus is a drastic remedy, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought." In re Parker, 49 F.3d 204, 206 (6th Cir. 1995). In determining whether a writ of mandamus should issue, the following inquiries are relevant:

- 1) Is there a duty imposed upon the officer;
- 2) is the duty ministerial in its character;
- 3) has the petitioner a legal right, for the enjoyment, protection or redress of which the discharge of such duty is necessary; 4) has he no other and sufficient remedy; and 5) in view of the fact that the issuance of the writ is not always a matter of right, are the circumstances of the case such as will call forth the action of the court?

Fiscal Court of Cumberland County v. Board of Education of Cumberland County, 191 Ky. 263, 230 S.W. 57, 60 (1921), quoted in Stratford v. Crossman, Ky. App., 655 S.W.2d 500, 502 (1983). The

standard of review upon appeal of a denial of a writ of mandamus is whether the circuit court abused its discretion. See Owens v. Williams, Ky. App., 955 S.W.2d 196, 197 (1997). In addition, the appellant bears the burden of demonstrating an abuse of discretion. Id.

In the case at bar, Beard has not demonstrated a clear and indisputable right to the writ of mandamus requiring the Parole Board to conduct a new parole revocation hearing. The form utilized by the Parole Board delineating the results of the revocation hearing provided sufficient information to support the Board's action. The form states that the Parole Board found that Beard had violated the conditions of parole for failure to refrain from the possession of marijuana and benzodiazepine. It also indicates that the Board's factual findings and ultimate decision were based on Beard's admission of guilt at the final parole revocation hearing. While the Parole Board could have provided a more extensive written explanation of its decision, we cannot say that its action in this case violated procedural due process as required by Morrissey. Consequently, the circuit court did not abuse its discretion in holding that Beard was not entitled to the relief he requested.

Finally, we note that Beard's reliance on an unpublished federal district court opinion is misplaced. This opinion has no precedential value in this Court and Beard's citation to it is contrary to the principles stated in Kentucky Rule of Civil Procedure 76.28(4)(c) and the Rules of the United States Court of Appeals for the Sixth Circuit Rule 24(c). In any

event, Preston does not support Beard's position because, unlike the situation in the current case, in Preston the Parole Board provided no indication of the evidence relied on for its decision, and did not state the basis for its decision revoking probation.

For the foregoing reasons, we affirm the order of the Franklin Circuit Court denying the petition for a writ of mandamus.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barry Beard, Pro Se  
Central City, KY

BRIEF FOR APPELLEE:

Keith Hardison  
Department of Corrections  
Frankfort, KY