

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001550-MR

MARK CONNOLLY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 99-CI-00336

KENTUCKY STATE PAROLE BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Mark Connolly, pro se, appeals from an order of the Franklin Circuit Court entered on June 2, 1999, that denied his petition for a writ of mandamus seeking an order requiring the Parole Board to reinstate his parole status. Having concluded that the trial court properly denied Connolly relief, we affirm.

In June 1995, Connolly was granted parole on an unspecified sentence involving 44 convictions for complicity to

criminal possession of a forged instrument in the second degree,¹ a conviction for theft by unlawful taking over \$100,² and a conviction for custodial interference.³ Based on some conversations between Connolly and his parole officer, on November 6, 1996, Connolly signed a three-page Treatment Contract that delineated the requirements for participation in a sexual offender treatment program. The contract specifically stated that "failure to comply with any of these requirements can result in your termination from treatment." Connolly's parole officer submitted a request to the Parole Board seeking imposition of this new, special condition of parole requiring sexual offender treatment. On November 24, 1997, the Parole Board sent a letter to the corresponding probation and parole office that was forwarded to Connolly's supervising parole officer granting a modification in Connolly's conditions of parole.⁴ The letter stated the condition to be added to the stipulations on the conditions of parole form as follows: "'Must attend and successfully complete Sex Offender Treatment Program and follow all aftercare recommendations.'"⁵

¹Kentucky Revised Statutes (KRS) 516.060 and KRS 502.020 (complicity).

²KRS 514.030.

³KRS 509.070.

⁴Between the time of the request for a new, special condition and the granting of that request by the Parole Board, supervision of Connolly had been transferred to a different parole officer.

⁵The record on appeal does not contain the actual parole conditions document.

After the addition of this new condition was communicated to Connolly, he enrolled in the Kentucky Sex Offender Treatment Program (SOTP) provided through an office in Lexington. However, in March 1998, personnel with the SOTP notified Connolly's parole officer that he was failing to comply with several requirements of the program. Connolly was advised by his parole officer and counselors at the SOTP that he needed to improve his conduct to continue in the program. On May 14, 1998, Connolly was notified by letter that he had been terminated from the SOTP effective May 18, 1998, on the following four grounds: (1) violating provisions in the treatment contract (specifically pertaining to partner support and not improving unsatisfactory ratings on the progress report); (2) failing to pass treatment tasks as directed; (3) unsatisfactory participation in treatment; and (4) unsatisfactory acceptance of responsibility for sexually abusive behaviors.

On June 2, 1998, Connolly's parole officer gave Connolly notice of a preliminary parole revocation hearing based on his termination from the SOTP. On June 8, 1998, Connolly contacted a private psychological professional, who was certified by the state to provide sex offender evaluation and treatment, about enrolling in a sex offender treatment and counseling program.

After Connolly voluntarily waived representation by an attorney, a preliminary hearing was conducted before an Administrative Law Judge (ALJ) on June 9, 1998. Witnesses at the preliminary hearing included Connolly, his parole officer, and

the SOTP officer that supervised Connolly's participation in the program. The SOTP officer testified to Connolly's unsatisfactory performance of the requirements of the program. Connolly testified that he had experienced several problems that caused him to miss counseling sessions including medical problems, child care responsibilities, and transportation difficulties. He also stated that he was attempting to establish a treatment program with a private counselor that his parole officer had recommended. The parole officer denied that he had referred Connolly to the private counselor as a substitute for the SOTP. The parole officer testified that he discussed the mandatory nature of the additional special condition for participation in the SOTP with Connolly and gave him a copy of the November 24, 1997, letter setting out the terms of the special condition. Connolly admitted having received a copy of the Parole Board's November 1997, letter and the May 1998, SOTP termination letter. The SOTP officer stated that prior to the hearing, Connolly had not mentioned his medical problems, child care responsibilities or transportation problems as reasons for his lack of participation in the programs.

At the conclusion of the hearing, the ALJ found probable cause that Connolly had violated the conditions of his parole and referred the matter to the Parole Board.⁶ Following a final revocation hearing, the Parole Board revoked Connolly's parole because of his termination from the SOTP based on the evidence presented at the preliminary revocation hearing.

⁶ See 501 KAR 1:040(1)(6)(2000).

On March 29, 1999, Connolly filed a petition for writ of mandamus seeking an order restoring his status as a parolee and "compelling the [Parole Board] to act in a manner prescribed by clearly established law, and in conformity of (sic) their own Rules and Regulations. . . ." He alleged that the Parole Board acted arbitrarily because he attempted to comply with the conditions of parole by obtaining sexual counseling, albeit outside the SOTP. Connolly asserted that he had not received fair notice that he had to successfully complete a particular sexual treatment program and that the Parole Board did not provide a written statement of the evidence relied on in revoking his parole.

On May 6, 1999, the Department of Corrections on behalf of the Parole Board filed a response to the petition. It argued that a writ of mandamus was an improper vehicle for relief because such a writ is available only in extraordinary circumstances where no other sufficient remedy exists. The Department also challenged the petition based on the merits.

On June 2, 1999, the circuit court entered an order denying the petition based on the merits. While indicating that a declaratory judgment action may have been a more appropriate procedural vehicle than the more limited writ of mandamus, the court decided to address the substantive aspects of Connolly's petition. It ruled that Connolly's claim that the condition which required him to complete the SOTP was improperly added was not properly before the court because it had not been raised at the parole revocation hearings. It also found that Connolly was

aware that he was required to complete that particular sexual offender treatment program and ruled that the Parole Board did not violate Connolly's procedural due process rights. This appeal followed.

On appeal, Connolly argues that the Parole Board acted arbitrarily in revoking his parole. He asserts that he made a sincere effort to comply with the spirit of the new, special condition of parole by attempting to participate in private sexual psychological counseling. Connolly contends that his parole officer led him to believe that he could satisfy the condition by attending the private treatment program. He argues that he is entitled to application of the rule of lenity so that his best efforts to comply with the new condition of parole should be considered sufficient compliance.

As it did in the court below, the Department of Corrections argues that Connolly's complaints can be summarily dismissed because he did not establish the prerequisites entitling him to the extraordinary remedy of a writ of mandamus. While this argument may have some validity,⁷ we agree with the circuit court's view that as a pro se litigant, Connolly's pleading should be construed liberally and that his claims should be decided on the merits. We also agree with the circuit court, however, that Connolly is not entitled to any relief.

⁷See 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) (prisoner may seek writ of mandamus to compel Parole Board to exercise its duty to perform a ministerial act, but not to exercise its discretionary duty in a particular way).

We begin our analysis of the merits by noting that the initial grant of parole is a privilege and not a right.⁸ The Parole Board has broad discretion in deciding whether to revoke parole, subject to certain minimal procedural due process rights.⁹ A parolee remains subject to the orders of the Parole Board during the period of his parole.¹⁰

Connolly contends that the Parole Board acted arbitrarily in revoking his parole for failing to complete the SOTP despite his good faith attempt to obtain private sexual psychological counseling. He argues that he was not aware that he was required to complete a particular sexual offender treatment program. He claims that based on conversations with his parole officer, he had been led to believe that treatment by the private counselor was sufficient.

The record indicates that Connolly had numerous conversations with his parole officer concerning enrollment and completion of the specific SOTP through the Department of Corrections' Division of Mental Health. His parole officer testified at the preliminary hearing that he unequivocally informed Connolly that he had to complete that specific treatment program. Connolly admitted receiving a copy of the November 1997 letter from the Parole Board that imposed the new condition that

⁸Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999); Lynch v. Wingo, Ky., 425 S.W.2d 573 (1968); Commonwealth v. Polsgrove, 231 Ky. 750, 22 S.W.2d 126 (1929); KRS 439.340.

⁹See e.g., Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Boulder v. Parke, Ky.App., 791 S.W.2d 376 (1990).

¹⁰KRS 439.346.

he "[m]ust attend and successfully complete Sexual Offender Treatment Program and follow all aftercare recommendations." He admitted signing and receiving a copy of the Kentucky Sexual Offender Treatment Program Contract, which explicitly stated that failure to comply with any of the requirements "can result in your termination from treatment."

Thus, we conclude from the record that Connolly was given fair notice that he was required to complete the SOTP as a condition of parole. While the parole officer admitted giving Connolly the business card of the private counselor from whom Connolly attempted to seek treatment, he adamantly stated that he did not tell Connolly that private counseling could serve as a substitute for completion of the state SOTP. While there appears to have been some miscommunication between Connolly and the parole officer, Connolly only sought private counseling after he had been terminated from the state SOTP. Given the evidence, we cannot say the Parole Board abused its discretion or acted arbitrarily in finding that Connolly violated a condition of his parole.

Connolly's reliance on the rule of lenity and Keith v. Commonwealth,¹¹ is misplaced. First, the rule of lenity is a principle of statutory construction by which ambiguous penal statutes will be construed in favor of the accused.¹² It has no

¹¹Ky.App., 689 S.W.2d 613 (1985).

¹²See Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1980); Commonwealth v. Lundergan, Ky., 847 S.W.2d 729 (1993); Woods v. Commonwealth, Ky., 793 S.W.2d 809 (1990).

application to the current circumstances. Second, in Keith, the Court held that there was no evidence that Keith had violated the terms of his probation. The facts indicated that Keith did everything he possibly could have done to comply with the requirements of his probation and that his probation had been revoked for reasons beyond his control.¹³ In the present case, Connolly's termination from the SOTP was not beyond his control and the record suggests that he did not conscientiously attempt to follow the requirements of the sex offender treatment program. His belated attempt to obtain private counseling without approval by the Parole Board is not similar to the situation faced by Keith. Therefore, the Keith case does not support Connolly's position.

Finally, Connolly contends that the Parole Board failed to provide a sufficient written statement as to the evidence it relied on and the reasons for the revocation.¹⁴ While the form produced by the Parole Board could have given a more complete explanation of its decision, we believe that it was sufficient in this case. The form indicates that the decision was based on the evidence presented at the preliminary parole revocation hearing. The entire preliminary hearing was audio taped and the ALJ produced a written document discussing the testimony, the findings of fact, and the conclusions of law. By referencing the preliminary revocation hearing in its statement of reasons, the Parole Board incorporated and adopted the evidence presented at

¹³Keith, supra at 615.

¹⁴See Morrissey, supra.

the earlier hearing. The purpose of a written statement of the evidence relied on and the reasons for a parole revocation is to provide a reviewing body or court and the parolee information explaining or supporting the Parole Board's action.¹⁵ As the Court stated in Black v. Romano,¹⁶ "[t]he written statement required by Gagnon [v. Scarpelli]¹⁷ and Morrissey helps to insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence."¹⁸ The audiotape and written report of the preliminary hearing provided sufficient information for review of the Parole Board's decision.

For the foregoing reasons, we affirm the order of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Connolly, Pro Se
Central City, KY

BRIEF FOR APPELLEE:

Keith Hardison
Frankfort, KY

¹⁵United States v. Gilbert, 990 F.2d 916 (6th Cir. 1993) (involving revocation of probation).

¹⁶471 U.S. 606, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985).

¹⁷411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

¹⁸ 471 U.S. at 613. See also Belcher v. Kentucky Parole Board, Ky.App., 917 S.W.2d 584, 587 (1996) (stating Board need not provide detailed summary or specify particular evidence supporting its decision denying initial grant of parole).