

RENDERED: OCTOBER 15, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002364-MR

JAMES LANG

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 03-CI-00206

KENTUCKY PAROLE BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; AND EMBERTON, SENIOR JUDGE.¹

JOHNSON, JUDGE: James Lang has appealed, pro se, from an order of the Franklin Circuit Court entered on October 14, 2003, granting the Kentucky Parole Board's motion for summary judgment and dismissing his petition for writ of mandamus. Having concluded that the trial court properly denied Lang relief, we affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On February 25, 2003, Lang filed a petition in the Franklin Circuit Court seeking the issuance of a writ of mandamus compelling the Kentucky State Board to conduct another parole revocation hearing. Lang contended as a basis for this motion that his parole had been revoked illegally. The Board filed a motion to dismiss and a motion for summary judgment with the circuit court. In that motion, the following facts are set forth relative to Lang's parole revocation:

Petitioner has a lengthy record, composed of thirty-one felony offenses. In 1983, he was convicted of four counts of criminal possession of a forged instrument (second degree), two counts of possession of a scheduled II controlled substance, and twelve counts of theft by deception (over one hundred dollars). In 1985, he was convicted of two counts of robbery in the second degree, three counts of robbery in the first degree, and six counts of persistent felony offender second degree. In 1995, he was convicted of receiving stolen property over three hundred dollars. Petitioner is also a repeat parole violator. Released on parole in December 1983, he went on to commit five new felonies in 1985. His parole was reinstated in December 1993, only to have him violate such in August 1994 with his parole revoked in September 1994. His parole was reinstated again in January 1997, with his violating such in January 1998, and his parole being revoked that same month. Once again, the Parole Board reinstated petitioner's parole in January 2002, but he violated such in September 2002, and it was revoked in November 2002. It is the most recent revocation of which petitioner currently complains.

On October 2, 2002, petitioner received a Notice of Preliminary Hearing, notifying that he was charged with five violations of his parole conditions: 1) use of controlled substances - morphine/opiates 2) failure to complete a substance abuse treatment program 3) failure to report to parole office 4) failure to report a change of address and 5) absconding parole supervision. On the same day, petitioner signed a Waiver of Preliminary Hearing, admitting his guilt to the violations. On November 26, 2002, petitioner appeared before the Parole Board for his final hearing. The three member panel voted to revoke his parole, basing its decision upon petitioner's waiver of his preliminary hearing, and his admission to guilt at the final parole hearing, and deferred petitioner for sixty months [citations to record omitted].

Following the Parole Board's deferment Lang petitioned the Board for reconsideration of its decision specifically asking that the Board reduce the deferment from 60 months to 48 months in order to allow him to remain classified in minimum security. On December 20, 2002, the Board found no basis for reconsideration and allowed the 60-month deferment to remain. Thereafter, Lang filed the petition for writ of mandamus in the Franklin Circuit Court, which was denied by an order entered on October 14, 2003. This appeal followed.

A writ of mandamus is an extraordinary remedy that is available only if the petitioner can establish that he has no other remedy and irreparable injury will result if the writ is

not granted.² The Court in Fiscal Court of Cumberland County v. Board of Education of Cumberland County,³ set forth the following five factors to be considered in determining whether a writ of mandamus should issue:

"Upon an application for such writ (mandamus) the questions which usually arise are: (1) Is there a duty imposed upon the officer; (2) [I]s the duty ministerial in its character; (3) [H]as the petitioner a legal right, for the enjoyment, protection or redress of which the discharge of such duty is necessary; (4) [H]as he no other and sufficient remedy; and (5) [I]n 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?"

In Wise v. United States,⁴ the Court stated:

As has been stated in several cases where a plaintiff seeks mandamus, he must prove three elements: (1) a clear right of plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) that no other adequate remedy is available.

Additionally, in establishing minimal due process procedures in connection with parole revocation proceedings, the United States Supreme Court in Morrissey v. Brewer,⁵ stated that a parolee must be provided with a preliminary parole revocation

² Foster v. Overstreet, Ky., 905 S.W.2d 504, 505 (1995).

³ 191 Ky. 263, 268, 230 S.W. 57, 60 (1921)(quoting 18 R.C.L., p. 114-15).

⁴ 369 F.Supp. 30, 32-33 (W.D.Ky. 1973).

⁵ 408 U.S. 471, 486-89, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

hearing in which the parolee has the opportunity to present witnesses and evidence and the right to confront and cross-examine adverse witnesses. The Court further stated that the purpose of the final revocation hearing is to determine contested relevant facts and to determine whether the facts warrant revocation.⁶ Minimum due process requirements include a written statement by the fact-finders as to the evidence relied upon and the reasons for revoking parole.⁷

In this case, Lang has failed to meet the standards for the issuance of a writ since no duty has been imposed and no right of Lang's has been violated. Additionally, Lang received all the due process rights to which he was entitled under law. Lang was charged with five violations. He waived his right to a preliminary hearing. In the signed waiver, Lang admitted all five violations. In addition, his signature attested a knowing and voluntary waiver of the hearing; waiver of calling witnesses, questioning witnesses and presentation of documents; and knowledge that the waiver would most likely result in his return as a parole violator and revocation of parole with the requirement of serving the remainder of his sentence. His signature appears directly below the following statement:

I hereby sign this waiver freely and voluntarily and with full knowledge of the

⁶ Id.

⁷ Id.

consequences of my action. I am not being forced to or promised anything to agree to this waiver. I am not under the influence of alcohol, narcotics, or drugs.

The form further contains the signature of Lang's probation and parole officer certifying that the waiver had been read to Lang.

The Parole Board, in compliance with the regulations and applicable law, conducted a final hearing. Lang again admitted to all five violations in the final hearing. Based upon Lang's waiver of the preliminary parole revocation hearing and his admission of guilt, Lang was found guilty of violating the five separate conditions of parole and he received a 60-month deferment. Lang received all due process guarantees to which he was entitled and he has failed to meet the standards for issuance of a writ of mandamus.

Furthermore, the circuit court correctly granted the Parole Board's motion for summary judgment. Summary judgment is appropriately granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁸ The usual summary judgment analysis is qualified in this case, however, as principles of

⁸ Kentucky Rules of Civil Procedure (CR) 56.03.

administrative law and appellate procedure bear upon the circuit court's decision.⁹ In cases involving prisoners,

[t]he problem is to reconcile the requirement under the general summary judgment standard to view as favorably to the non-moving party as is reasonably possible the facts and any inference drawn therefrom, with a reviewing court's duty to acknowledge an agency's discretionary authority, its expertise, and its superior access to evidence. In these circumstances we believe summary judgment . . . is proper if and only if the inmate's petition and any supporting materials, construed in light of the entire agency record (including, if submitted, administrators' affidavits describing the context of their acts or decisions), does not raise specific, genuine issues of material fact sufficient to overcome the presumption of agency propriety. . . .¹⁰

Applying this standard, we agree with the circuit court that Lang's allegations raise no genuine issue as to any material fact and do not entitle him to the relief he seeks.

First, we disagree with Lang's assertion that the final revocation hearing was pre-determined. In support of this assertion, Lang relies on the speed of the hearing and the fact that the Parole Board members brought with them a yellow Parole Board decision sheet, which Lang alleges is only used for revocations and deferrals. Under "Parole Board Action" on the form the following five alternatives are listed: deferment,

⁹ Smith v. O'Dea, Ky.App., 939 S.W.2d 353, 356 (1997).

¹⁰ Id.

continue on parole, violation of parole five times, serve out, and parole reinstated. In Lang's case, the Board found for deferment. No pre-determination can thus be attributed to the form. The speed of the hearing can also be attributed to the fact that Lang admitted guilt, both at the waiver of the preliminary hearing stage and at the final hearing.

Lang's argument of insufficient notice of the charges and insufficient access to the evidence fails for several reasons. First, his signature on the waiver of the notice of preliminary hearing form attests to knowledge of the charges against him. Additionally, the Parole Board's decision was based on his signature on this form and on his admitted guilt at the final revocation hearing and not on the evidence upon which he alleges he was denied access. And, pursuant to Morrissey, Lang's admission of parole violations is reasonable ground for revoking parole.¹¹

Finally, Lang argues that he was prejudiced because one of the same members of the Parole Board that decided his deferment also reviewed his reconsideration petition. Lang cites to no controlling authority entitling him to relief on this ground and the record is clear that the review procedures were followed. Lang's review for reconsideration was screened

¹¹ Morrissey, 408 U.S. at 490.

in accordance with applicable law and none of the reasons meriting reconsideration was met. There was no prejudice.

We will not consider Lang's assertion that his waiver of preliminary hearing was invalid as the issue was not raised before the circuit court and we will not consider it for the first time on appeal.¹²

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

James Lang, Pro Se
Lexington, Kentucky

BRIEF FOR APPELLEE:

Karen Quinn
Frankfort, Kentucky

¹² Abuzant v. Shelter Insurance Co., Ky.App., 977 S.W.2d 259, 262 (1998).