

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2005-CA-001014-MR

LARRY E. WATKINS-EL

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 05-CI-00040

KENTUCKY PAROLE BOARD

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

KNOPF, JUDGE: Larry E. Watkins-El appeals from an order of the Franklin Circuit Court denying his petition for a writ of mandamus against the Kentucky State Parole Board to order his release on parole. We find that the circuit court properly denied the petition as the Parole Board acted within its discretion to revoke his parole and there were no circumstances warranting extraordinary relief from the Parole Board's decision. Hence, we affirm.

In 1986, Watkins-El was convicted of assault in the first degree, possession of a handgun by a convicted felon, and being a first degree persistent felony offender. He received a life sentence. In 1988, Watkins-El committed the crime of escape in the second degree, and received a one-year sentence to run concurrently with his previous convictions. In 1996, the Board granted Watkins-El's parole. Subsequently, the Board revoked Watkins-El's parole, and then reinstated his parole in August 2002. At that time, Watkins-El agreed not to use or possess alcoholic beverages, volatile substances, or controlled substances unless prescribed to him by a licensed physician.

After a February 2003, arrest, Watkins-El admitted to violating these terms in December 2002. Watkins-El's parole officer agreed not to move to revoke parole based on these violations provided that Watkins-El would admit his guilt, spend sixty days in a halfway house, and not commit any other parole violations. Watkins-El satisfied the first two terms, but in July 2003, he tested positive for cocaine. Nevertheless, his parole officer again agreed not to move to revoke parole if Watkins-El admitted the violation and voluntarily entered a substance-abuse treatment program.

Pursuant to this agreement, Watkins-El was admitted to the treatment program. But shortly thereafter, he was arrested on new charges of fourth degree assault and criminal mischief.

Although the charges were ultimately dismissed, the Board moved to revoke Watkins-El's parole based upon his other violations. The presiding administrative law judge used Watkins-El's admissions of guilt to the two December 2002 counts of alcohol usage and the July 2003 count of cocaine usage to support the parole revocation. On September 16, 2003, the Board voted to revoke Watkins-El's parole based upon those findings. The Board also voted to grant Watkins-El a twenty-eight month deferment.

In response, Watkins-El filed a petition for writ of mandamus in the Franklin Circuit Court.<sup>1</sup> The court granted the writ, finding that the Board was estopped to rely on the December 2002 and July 2003 violations based upon Watkins-El's agreements with his parole officer. Following entry of that order in April 2004, Watkins-El was released and sought to be readmitted to a substance abuse treatment program. But in separate urine tests taken on July 15 and August 12, 2004, Watkins-El again tested positive for cocaine and alcohol use. Based on these violations, Watkins-El was arrested on September 10, 2004, and the Board subsequently revoked his parole.

Watkins-El then filed this second petition for writ of mandamus in Franklin Circuit Court. He alleged that his parole officer interfered with his attempt to be readmitted into the

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<sup>1</sup> Larry E. Watkins v. Kentucky Parole Board, No. 03-CI-01549 (Franklin Cir. Ct.).

treatment program, and that the Board violated his due process rights by revoking his parole. Watkins-El and the Board filed cross-motions for summary judgment, and the circuit court granted the Board's motion on May 5, 2005. Watkins-El now appeals to this Court.

Kentucky courts have repeatedly held that there is no constitutional right to parole, but rather parole is a matter of legislative grace or executive clemency. Fowler v. Black, Ky., 364 S.W.2d 164 (1963); Belcher v. Kentucky Parole Board, Ky.App., 917 S.W.2d 584 (1996); Lynch v. Wingo, Ky.App., 425 S.W.2d 573 (1968). Parole is simply a privilege and the denial of such has no constitutional implications. Morris v. Wingo, Ky., 428 S.W.2d 765 (1968); Tiryung v. Commonwealth, Ky.App., 717 S.W.2d 503 (1986).<sup>2</sup>

In Watkins-El's prior petition, the circuit court found that the Board was estopped to rely on Watkins-El's admitted violations based upon his substantial performance of the agreements with his parole officer. But in the current case, Watkins-El does not allege that any agreement precluded the Board's use of his July and August 2004 violations as a basis to revoke his parole. Rather, he asserts that his parole officer refused to approve Watkins-El's re-admission to the treatment program in retaliation for Watkins-El's having successfully challenged his prior parole revocation. Thus, he

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<sup>2</sup> Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999).

contends that the Board acted in bad faith and in violation of the circuit court's prior order.

However, the Board found that Watkins-El's parole officer refused to approve Watkins-El's readmission to the treatment program after he had tested positive for use of cocaine and alcohol. After these positive tests, the parole officer directed Watkins-El to appear for a substance abuse treatment assessment, but Watkins-El failed to appear or call to reschedule. These findings, which are supported by substantial evidence, refute Watkins-El's claims of bad faith on the part of the parole officer or the Board.

Furthermore, we find no merit to Watkins-El's claims that the parole revocation proceedings denied his due process rights.<sup>3</sup> Watkins-El asserts that his parole officer failed to advise him of the consequences of missing the assessment meeting. Such a failure to notify him does not reach the level of a due process violation. And even if it did, Watkins-El's other violations provided more than sufficient justification for

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<sup>3</sup> See Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), setting forth the minimum requirements of due process in parole revocation proceedings: (1) written notice of the claimed violations of probation; (2) disclosure to the probationer of the evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation; (5) a neutral and detached hearing body; and (6) a written statement by the fact-finder as to the evidence relied on and the reasons for revoking parole. Gagnon, 411 U.S. at 786, 93 S. Ct. at 1762.

revoking his parole. As the circuit court noted in this case, the Parole Board was well within its discretion to use these and prior violations to revoke Watkins-El's parole. Consequently, the circuit court properly dismissed his petition.

Accordingly, the order of the Franklin Circuit Court dismissing the petition for writ of mandamus is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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No brief for appellee  
Kentucky Parole Board.