

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001256-MR

TIM LITTLE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 14-CI-01336

KENTUCKY PAROLE BOARD

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, D. LAMBERT, AND NICKELL, JUDGES.

LAMBERT, D., JUDGE: Tim Little, proceeding *pro se*, appeals from a Franklin

Circuit Court order granting summary judgment to the Kentucky Parole Board.

Little alleges that his statutory and due process rights were violated when the

Board revoked his probation. Having reviewed the record and applicable law, we

affirm.

In October 2012, Little received a total sentence of fourteen years after pleading guilty to multiple charges, including one count of Receiving Stolen Property, two counts of Possession of Matter Portraying Sex Performance by a Minor, and one count of Possession of a Controlled Substance in the first degree. He was also required to register as a sex offender.

In March 2014, the Parole Board issued an order recommending parole for Little. The order notified Little that he had to comply with all standard conditions of parole, and also with any special conditions required by his parole officer. On April 30, 2014, Little signed a document describing the conditions of his supervision, which included cooperating “fully with any Probation and Parole Officer or any Peace Officer acting at the direction of a Probation and Parole Officer[.]” He was also required to follow the SOTP (Sex Offender Program) aftercare recommendations. These prohibited him from using Facebook or any other social networking websites accessible to minors. Little signed a statement acknowledging that he had read and understood these conditions and realized that any violation would be reported and could be grounds for revocation of his release.

On July 17, 2014, Little was taken into custody for allegedly violating the conditions of his parole. According to the Violation of Supervision Report prepared by his parole officer, Little was given permission to leave Kentucky to visit his brother, who was undergoing surgery at a hospital in Columbus, Ohio. The parole officer did not, however, give Little permission to spend the night there.

Little nonetheless telephoned from Columbus and left the officer a message containing information about the hotel where he was staying.

The report also stated that when the officer told Little on June 23, 2014, that he could not have a Facebook account and could not access the internet without monitoring software, Little admitted to the officer that he had three Facebook accounts. Little closed two of the accounts and the officer contacted Facebook to close the third. Little told the officer that he used one of the accounts under the pseudonym Paco Rey to talk to his victim in the past. Little also admitted that on June 23, 2014, his cousin created a new Facebook account for him under the pseudonym Ray Disney, and he admitted using that account.

Little signed a document waiving his preliminary parole revocation hearing, his right to counsel at that preliminary hearing, and admitting he was guilty of each and every violation contained in the notice. On July 22, 2014, a Parole Violation Warrant was issued to bring Little before the Parole Board for a final revocation hearing. At the hearing, which was held August 21, 2014, the Board determined Little had committed the violations and issued an order revoking his parole and ordering a 24-month deferment. Little filed a request for reconsideration which was denied.

Little then filed a petition for a writ of prohibition and/or mandamus, two supplements to the petition, a writ of *habeas corpus* and a motion for summary judgment. The Parole Board filed a response and cross-motion for summary

judgment. The trial court granted the Board's motion and dismissed Little's suit.

This appeal by Little followed.

Little argues that the trial court erred in failing to issue a writ of mandamus because his due process rights were violated by the Parole Board.

“[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.” *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, only minimum due process requirements are applicable to revocation proceedings. *Id.* at 489, 92 S.Ct. at 2604. These requirements include: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and the reasons for revoking parole. *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 1761-62, 36 L.Ed.2d 656 (1973) (citing *Morrissey*, 408 U.S. at 489, 92 S.Ct. at 2604).

The trial court held that mandamus was an unavailable remedy because the writ may only be used to compel an administrative agency to take a ministerial action, whereas the Parole Board was acting in a discretionary capacity

in revoking Little's parole. *See County of Harlan v. Appalachian Regional Healthcare, Inc.*, 85 S.W.3d 607, 613 (Ky. 2002). The trial court also held that a writ of prohibition was an inappropriate means to seek relief because its use is restricted to those situations in which a lower court, not an administrative agency, is acting or about to act prejudicially. *Mahoney v. McDonald-Burkman*, 320 S.W.3d 75, 77 (Ky. 2010).

But a writ of mandamus is held to be the appropriate remedy for a claimant seeking relief from due process violations affecting parole revocation proceedings. *Shepherd v. Wingo*, 471 S.W.2d 718, 719 (Ky. 1971).

The trial court did fully address the substance of Little's due process arguments, although under the more rigorous summary judgment standard. We will apply the abuse of discretion standard of review for the denial of a petition for a writ of mandamus. *Owens v. Williams*, 955 S.W.2d 196, 197 (Ky. App. 1997).

“The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound reasonable principles.” *Penner v. Penner*, 411 S.W.3d 775, 779–80 (Ky. App. 2013) (citation omitted).

Little alleges three due process violations: first, he was not afforded the opportunity to be heard or to present evidence to the Board that his Facebook accounts were closed; second, the Board did not permit him to confront and cross-examine the parole officer about the violations described in her report, and he was prevented from inquiring why the parole officer waited thirteen days to act on the violation relating to his visit to Columbus; and third, the Board's final report of the

results of the hearing was insufficient to meet the requirement of a written statement because it only recited the two charges, (1) failure to cooperate with Parole Officer and (2) violation of supplemental conditions of supervision for sex offender by having three Facebook accounts, without further explanation, as grounds for revocation.

Our review of Little's arguments is hampered by the fact that there is no recording or transcript of the final Parole Board hearing in the record. Little claims that he made several unsuccessful requests to have the recording added to the record, although he does not specify how these requests were made or to whom they were directed. Pro se pleadings are not required to meet the standard of those applied to legal counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Ky. 1983). Nonetheless, an "[a]ppellant may not raise allegations of error on appeal 'based entirely on a silent record.'" *Commonwealth v. Thompson*, 697 S.W.2d 143, 144 (Ky. 1985). Further, "[i]t has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Id.* at 145." *Hatfield v. Commonwealth*, 250 S.W.3d 590, 601 (Ky. 2008).

Little relies on an unpublished case of this Court, *Lawless v. Conover*, No. 2015-CA-000039-MR, 2016 WL 2981580 (Ky. App. May 20, 2016), *review granted* (Apr. 19, 2017), *not to be published*, to argue that "the onus is on the agency to maintain and create the record of its proceedings[,] and that "[a] prisoner cannot be said to have had meaningful access to the courts if, despite the

right to make a record at the prison, that record never makes it before any court.”

Lawless at *12-14.

Aside from its lack of precedential value, the facts of the *Lawless* case are significantly distinguishable from those before us. *Lawless*, a prison inmate, was alleged to have kicked a prison guard during a physical altercation initiated by another inmate. Following a prison disciplinary hearing, she lost a significant number of good time credits and received a penalty of 365 days of disciplinary segregation. *Lawless* steadfastly maintained that she did not kick the guard. The incident was purportedly videotaped by a surveillance camera, but the footage was not introduced into evidence at the prison disciplinary hearing. It may eventually have been viewed by the hearing officer, but was not included in the record before the circuit court. This Court reversed and remanded in order for the surveillance video to be made available to the circuit court for its consideration, or if the tape no longer exists, for *Lawless*'s good time credit to be restored and her assignment to disciplinary segregation to be reversed.

By contrast, in *Little*'s case, there was no decisive piece of conclusive evidence omitted from the record. The record does contain the form signed by *Little* in which he waived his right to a preliminary hearing and admitted to the violations reported by the parole officer. *Little* admits that he spent the night in Columbus without the permission of his parole officer and that he had three Facebook accounts, both clear violations of the conditions of his parole. He does not identify any witnesses he wished to call at his final hearing, nor does he

explain how the parole officer's alleged delay in issuing a warrant led to any prejudice or unfairness. The Parole Board's written results of the final hearing are minimal, but they served the purpose of informing Little why his parole was revoked. Under the circumstances, the trial court did not abuse its discretion in concluding that Little's due process rights were not violated.

The Franklin Circuit Court order granting summary judgment and dismissing Little's suit is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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