RENDERED: OCTOBER 18, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-000323-MR

DONALD E. HARDY — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2019-SC-000143-DG

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 15-CI-00758

KENTUCKY PAROLE BOARD — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

GOODWINE, JUDGE: This matter is on remand from the Supreme Court of Kentucky instructing us to reconsider our prior opinion in light of its recent decision in *Jones v. Bailey*, 576 S.W.3d 128 (Ky. 2019). After careful review, we reverse.

## BACKGROUND

Donald Hardy ("Hardy") is serving a thirteen-year sentence for several fraud related offenses. He is currently out of prison on parole, having been released November 29, 2016.[1] Hardy was previously paroled April 1, 2014, and his subsequent revocation gave rise to this action. One of the conditions of his parole was the completion of a substance abuse program. On June 9, 2014, Hardy was dismissed from the substance abuse program due to numerous unexcused absences. Upon his dismissal from the program, Hardy's parole officer charged him with a parole violation.

501 KAR[2] 1:040 sets out the procedure for revocation proceedings when a parole officer charges a parolee with a violation. Section 1 of the regulation provides that the parole officer must initially serve the parolee with notice of a preliminary revocation hearing setting out the alleged violation or violations. The regulation also states that preliminary revocation hearings "shall be conducted by an administrative law judge of the Parole Board who shall have control over the proceedings and the reception of evidence at these hearings." 501 KAR 1:040 Section 1.

[1] http://kool.corrections.ky.gov/KOOL/Details/75390.

[2] Kentucky Administrative Regulations.

It is undisputed that Hardy received notice that his parole officer was initiating revocation proceedings based upon his discharge as "non-compliant" from the substance abuse program. The notice clearly explained Hardy's constitutional right to counsel and stated that a public defender may be available for indigent defendants. Under 501 KAR 1:040 Section 1(6)(b), the administrative law judge shall refer the case to the Parole Board for a final revocation hearing if, on the basis of the evidence presented, there is probable cause to believe that a parolee committed any or all of the alleged violations.

Section 5 of the regulation sets out a procedure by which a parolee may waive the preliminary revocation hearing and proceed directly to the Parole Board. Hardy was informed of this option by service of a waiver form which explicitly enumerated the rights he would be sacrificing and the legal peril he faced by signing the waiver. Both the notice and the waiver clearly inform parolees of the right to have a lawyer represent them at revocation proceedings, including a publicly-appointed attorney if the parolee cannot afford to hire private counsel.

The notice states, "You may waive (give up your right to) the Preliminary Parole Revocation Hearing and have your case submitted directly to the Parole Board by admitting that you are guilty of each and every violation." The waiver goes on to inform the parolee of the panoply of rights he is sacrificing

by signing the waiver form and states that he will *very likely* be returned to prison if he waives the preliminary revocation hearing.

Finally, the waiver informs the parolee that he has the option of requesting a "special final revocation hearing" when meeting with the Parole Board for the final parole revocation hearing. This special final revocation hearing provides both the parole officer and the parolee the ability to subpoena witnesses to the proceedings. After Hardy signed both these documents, he was taken into custody by his parole officer.

Hardy declined to request a "special final revocation hearing" when meeting with the Board at his final revocation hearing. Hardy entered a plea of not guilty and offered mitigating evidence concerning alleged medical reasons for exceeding the number of excused absences the substance abuse program permits. Hardy admitted to a total of eleven absences, five of which were later excused by the Board. Hardy acknowledged making mistakes in handling the process by failing to go to his treatment center and "get everything in writing" and admitted he "did not do that the right way."

The Board revoked Hardy's parole after finding him guilty of the probation violation. The Board member conducting the hearing stated, "You [weren't] doing things in the manner in which you were asked to do it," to which Hardy responded, "Yes, ma'am." Thereafter, Hardy filed a complaint in the

Franklin Circuit Court seeking declarative and injunctive relief. After considering both Hardy's and the Board's cross-motions for summary judgment, the circuit court granted summary judgment in favor of the Board.

Hardy's appeal followed. On appeal, Hardy argued: (1) the Parole Board denied Hardy his right to counsel under KRS[3] 31.110(2)(a); (2) the Parole Board denied Hardy his due process right to an evidentiary hearing; (3) the Parole Board failed to make findings of fact; and (4) this Court should remand this case and direct the Parole Board to change its regulations to conform to minimum constitutional and statutory requirements. We held: (1) Hardy's argument regarding the Parole Board's failure to make findings of fact was moot when he returned to parole; (2) Hardy was apprised of his right to counsel; and (3) Hardy was apprised of his right to a special final hearing and did not request such a hearing. Having reconsidered our opinion in light of *Bailey* as directed by the Supreme Court of Kentucky, we reverse.

## STANDARD OF REVIEW

In reviewing a grant of summary judgment, an appellate court must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

[3] Kentucky Revised Statutes.

However, when summary judgment stems from an administrative action, appellate review is modified for a determination of whether the petition raises specific, genuine issues of material fact sufficient to overcome the presumption of the propriety of the agency's action. *Smith v. O'Dea*, 939 S.W.2d 353, 356 (Ky. App. 1997).

## ANALYSIS

In *Bailey*, a convicted sex offender was released from prison on post-incarceration supervision. *Bailey*, 576 S.W.3d at 133. The defendant was required to successfully complete "a sex offender treatment program (SOTP). [The defendant] enrolled in a SOTP but did not complete the program[.]" *Id.* "Due to his failure to complete sex offender treatment as directed," the defendant received notice of a preliminary revocation hearing. *Id.* At the preliminary hearing, the defendant "was represented by counsel and was allowed to present witnesses and evidence, including mitigating testimony. . . . The ALJ found probable cause to believe that Bailey had violated his supervision conditions[.]" *Id.* at 134. The defendant "was not provided notice of the time and place of the final revocation hearing, did not have counsel to represent him at that hearing, and was not able to present witnesses or further testimony on the alleged violations. . . . [T]he Parole Board revoked Bailey's post-incarceration supervision." *Id.*

"[D]uring the appellate process, Bailey's post-incarceration supervision term expired." *Id.* at 135. Our Supreme Court held the defendant's request to remand the case for a new revocation hearing was moot. *Id.* However, the Court determined that the "public interest" exception to the mootness doctrine applied and proceeded with its review of the defendant's due process arguments. *Id.*

The Court relied on two key probation revocation cases: *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). "Although *Morrissey* and *Gagnon* establish guidance as to the minimal process due when an individual parolee's or probationer's conditional freedom may be revoked, the parties . . . [did] not dispute that these cases are also applicable to the 'akin' post-incarceration supervision." *Bailey*, 576 S.W.3d at 137. Based on these cases, our Supreme Court held the Parole Board's procedures violated the defendant's due process rights. *Id.* at 156.

In reaching its decision, the Court applied the due process requirements espoused in *Morrissey*.

> [T]he *Morrissey* Court held that the final, fact-finding hearing must be held within a reasonable time after the offender is taken into custody, and then summarized the final hearing minimum requirements as including:

> (a) written notice of the claimed violations of parole [or probation];
>
> (b) disclosure to the parolee [or probationer] of evidence against him;
>
> (c) 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 factfinders as to the evidence relied on and reasons for revoking parole [or probation].

*Id.* at 138 (quoting *Morrissey*, 408 U.S. at 489, 92 S.Ct. at 2604).

The Parole Board argued the defendant "was afforded minimum due process by comparing *Morrissey*'s six listed procedural requirements for a *final* hearing to the procedures employed in preparation for and in conducting Bailey's *preliminary* hearing." *Id.* at 142. Our Supreme Court held:

> The Parole Board's current conditional-freedom final revocation hearing procedures for post-incarceration supervisees violate an offender's due process rights. The offender has a due process right to: an evidentiary final hearing at which he can present evidence and confront witnesses; request assistance of counsel, the need for

> which the Board must decide on a case-by-case basis; a disposition based upon the preponderance of the evidence; timely notice of the time and place of the hearing and evidence against him; and a timely written decision stating the basis for any revocation.

*Id.* at 156.

Before we address Hardy's arguments, we must determine whether his appeal is moot. "As our courts have long recognized, "[a] 'moot case' is one which seeks to get a judgment . . . upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy." *Morgan v. Getter*, 441 S.W.3d 94, 98-99 (Ky. 2014) (quoting *Benton v. Clay*, 192 Ky. 497, 233 S.W. 1041, 1042 (1921)). Hardy is currently out of prison on parole, yet he urges us to review his arguments because this matter is one that is "capable of repetition, yet evading review[.]" *Id.* at 100 (quoting *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983)). For the "capable of repetition" exception to the mootness doctrine to apply, "(1) the challenged action must be too short in duration to be fully litigated prior to its cessation or expiration, and (2) there must be a reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* (citing *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992)).

Hardy argues as long as he remains on parole, if another violation is alleged, he will be subjected to the same revocation procedures. In a similar case,

this Court held "the same circumstances could indeed arise again. . . . [The defendant's] conditional discharge or probation could be revoked and then his probation reinstated too quickly to provide for the time to pursue an appeal. Furthermore, such a situation is certainly capable of repetition." *Bowlin v. Commonwealth*, 357 S.W.3d 561, 565 (Ky. App. 2012). As such, we hold the "capable of repetition" exception to the mootness doctrine applies and proceed with our review of Hardy's arguments.

First, Hardy argues he had a right to be represented by counsel at his final hearing under KRS 31.110(2)(a). In *Bailey*, our Supreme Court held "KRS 31.110(2)(a) does not create a statutory right to counsel for offenders at post-incarceration supervision final revocation proceedings." 576 S.W.3d at 135. Although Hardy did not have an absolute right to counsel in this instance, our Supreme Court held "the offender must be informed of his right to request counsel and pursuant to *Gagnon* the need for counsel must be assessed on a case-by-case basis, with the Parole Board exercising its sound discretion in determining whether the offender has a due process right to counsel." *Id.* at 147. A probationer facing revocation has a constitutional right to counsel when he raises

> a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the

> reasons are complex or otherwise difficult to develop or present.

*Id.* at 148 (quoting *Gagnon*, 411 U.S. at 790, 93 S.Ct. at 1764).

Here, Hardy alleges the Parole Board never informed him of his right to request counsel for his final hearing. Although the facts surrounding Hardy's revocation are undisputed, he may have had a right to be represented by counsel as he could have presented a justification for his absences.

Second, Hardy argues he was denied his due process right to an evidentiary final hearing. In *Bailey*, the Parole Board conceded

> the final hearing is not an actual "hearing" but may be more appropriately termed a "final adjudication" since the Board only reviews the record to determine that the ALJ's probable cause finding is correct. The Board also asserts that based upon the probable cause finding, the Board may then revoke the supervision. Citing KRS 532.043(5), the Board expressly insists that it is not required to find the offender actually committed the alleged violations by a preponderance of the evidence – probable cause suffices.

*Id.* at 143 (footnote omitted). The Court opined, "*Morrissey*'s explanation of the requirements for a final hearing makes evident that it contemplates an actual 'hearing' rather than mere review of the administrative record which was developed through minimal inquiry to allow a probable cause determination." *Id.* at 144. Our Supreme Court held the defendant was denied his right to due process when he "was not afforded an evidentiary final revocation hearing where he could

present evidence and confront witnesses[.]" *Id.* at 144 (footnote omitted). As such, we hold Hardy was denied the right to due process when the Parole Board denied him an evidentiary final hearing.

Third, Hardy argues the Parole Board failed to make written findings of fact. "One element of due process identified in *Morrissey*, 408 U.S. at 488-89, 92 S.Ct. 2593, is the provision to the offender of 'a written statement by the factfinders as to the evidence relied on and reasons for revoking parole [or probation].'" *Id.* at 151. Our Supreme Court noted,

> 501 KAR 1:070 Section 3(5)(a) provides that the offender shall be given written notification of the Board's decision within twenty-one (21) days from the date of decision. KYPB 30-02 Section C(4)(a) provides that the written determination shall provide a brief statement identifying the reasons for the determination and evidence relied upon.

*Id*. The Court held the defendant's due process rights were violated when the Parole Board failed to follow these procedures. As such, we hold Hardy's right to due process was violated when the Parole Board failed to render written findings, including the evidence relied on and the reasons for revoking Hardy's parole.

Finally, Hardy argues we should remand this case and direct the Parole Board to change its regulations to conform to minimum constitutional and statutory requirements. Hardy does not argue any specific regulation is unconstitutional. Instead, he argues because 501 KAR 1:040 has not been

amended since 2001, we should direct the Parole Board to update the regulation. Hardy's argument is conclusory. "It is not our function as an appellate court to research and construct a party's legal arguments, and we decline to do so here." *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005). As such, we decline to address this argument.

## CONCLUSION

For the foregoing reasons, we reverse the judgment of the Franklin Circuit Court. As in *Bailey*, we decline to remand this case as Hardy is currently on parole.

ALL CONCUR.

| BRIEFS FOR APPELLANT: | BRIEF FOR APPELLEE: |
|---|---|
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