

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0039

STEVE M. MARCANTEL

VERSUS

LOUISIANA PAROLE BOARD

Judgment rendered: APR - 8 2014

On appeal from the
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana
Docket No. 610,812
Honorable Kay Bates, Judge

Steve M. Marcantel
Jonesboro, LA

Plaintiff-Appellant
In Proper Person

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BEFORE: PARRO, GUIDRY, McCLENDON,
THERIOT, AND DRAKE, JJ.

Parro, J. dissents and assigns reasons by [signature]
Judge McCleendon, J. dissents for reasons assigned by Judge PARRO.

[Handwritten signatures and initials]
MRT 4/8/14

GUIDRY, J.

Steve M. Marcantel appeals a judgment of the Nineteenth Judicial District Court (19th JDC), upholding the decision of the Louisiana Parole Board (the Parole Board)¹ to revoke his parole. For the following reasons, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In August 1998, Marcantel was convicted of seven counts of illegal possession of a firearm by a convicted felon and one count of theft. On April 7, 2000, he was sentenced to fifteen years on each of the firearm counts, to run concurrently, and was sentenced to ten years on the theft, to run consecutively, for a total of twenty-five years at hard labor. After serving twelve years and three months, on April 15, 2010, he was released by diminution of sentence for good behavior "as if released on parole."² See La. R.S. 15:571.5(A). On June 26, 2011, Marcantel was arrested and charged with domestic abuse battery, and his parole officer instituted revocation proceedings. See La. R.S. 15:571.5(B)(2).

A preliminary revocation hearing was held in July 2011; probable cause for a revocation hearing was found based on six parole violations. A revocation hearing before the Parole Board was held on October 11, 2011. Because the domestic abuse battery charge was still pending, the hearing was continued until disposition of that matter. The domestic abuse battery charge was dismissed on November 17, 2011, and another revocation hearing was held January 17, 2012. Following that hearing, the Parole Board found Marcantel guilty of five parole violations and voted to revoke his parole, requiring him to serve the entire twelve

¹ Effective August 1, 2012, the Board of Pardons, functioning as the committee on parole, became the successor to, and assumed control of, the affairs of the Board of Parole. 2012 La. Acts, No. 714, § 4. As a result, the current versions of the relevant statutes refer to the committee on parole, rather than the Board of Parole. See 2012 La. Acts, No. 714, § 7. Because these changes were not effective until August 1, 2012, we will continue to refer to the Parole Board in this opinion and will refer to the statutes as they were worded prior to amendment. The substantive provisions of the relevant statutes were not changed by the amendments in Act 714.

² The information about Marcantel's conviction, sentence, and release on parole was provided in his brief to this court. See also State v. Marcantel, 00-1629 (La. 4/3/02), 815 So. 2d 50.

years and nine months remaining on his sentence. See La. R.S. 15:571.5(C). Marcantel filed an administrative remedy procedure with the Parole Board, which denied his request for an administrative remedy. Marcantel then filed an appeal of the Parole Board's decision to the 19th JDC, where a hearing was held before a commissioner.³ Marcantel appeared and presented his arguments to the commissioner, who ultimately recommended to the district court that the Parole Board's decision be affirmed. After a review of the record, this recommendation was accepted by the district court. Marcantel's appeal was dismissed, with prejudice, at his cost, in a judgment signed October 23, 2012. This appeal followed. See La. R.S. 15:574.11(C).

APPLICABLE LAW

Louisiana's system of parole is set out in La. R.S. 15:574.2, et seq. Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint. La. R.S. 15:574.11(A). A Board of Parole is established within the Department of Public Safety and Corrections (DPSC) and is vested with the authority to determine "the time and conditions of release on parole" for offenders sentenced to imprisonment and confinement in any correctional or penal institution in this state. La. R.S. 15:574.2(A) and (D)(1). The granting, conditions, or revocation of parole rests in the discretion of the Parole Board. La. R.S. 15:574.11(A).

While on parole, the parolee remains in the legal custody of DPSC, and is subject to the supervision and orders of the Parole Board. La. R.S. 15:574.7(A). The chief probation and parole officer is responsible for the investigation and supervision of all parolees. La. R.S. 15:574.7(A). If the chief probation and parole

³ The office of commissioner of the 19th JDC was created by La. R.S. 13:711 to hear and recommend disposition of criminal and civil proceedings arising out of the incarceration of state prisoners. The commissioner's written findings and recommendations are submitted to a district court judge, who may accept, reject, or modify them. La. R.S. 13:713(C)(5); Harvey v. Stalder, 07-1595, p. 3 n.3 (La. App. 1st Cir. 5/2/08), 991 So. 2d 54, 56 n.3.

officer, upon recommendation by a parole officer, has reasonable cause to believe that a parolee has violated the conditions of parole, he shall notify the Parole Board and cause the appropriate parole officer to submit the parolee's record to the Parole Board. La. R.S. 15:574.7(C)(1). After reviewing that record, the Parole Board may order that the parolee be arrested and given a pre-revocation hearing to determine whether there is probable cause to detain the parolee. La. R.S. 15:574.7(C)(1)(c). Upon receiving a summary of the pre-revocation proceeding, the Parole Board may order the parolee's return to the physical custody of DPSC to await a hearing to determine whether his parole should be revoked. La. R.S. 15:574.7(C)(2)(a).

When a parolee has been returned to the physical custody of the DPSC, the Parole Board shall hold a hearing to determine whether his parole should be revoked. La. R.S. 15:574.9(A). The parolee shall be permitted to consult with and be advised and represented by his own legal counsel or by legal counsel appointed under the provisions of La. R.S. 15:179. La. R.S. 15:574.9(A). At the hearing, the parolee may admit, deny, or explain the violations charged and may present proof, including affidavits and other evidence, in support of his contentions. La. R.S. 15:574.9(A). The Parole Board may postpone the rendering of its decision for a specified reasonable time pending receipt of further information necessary to a final determination. La. R.S. 15:574.9(A). The Parole Board may order revocation of parole upon a determination that the parolee has failed, without a satisfactory excuse, to comply with a condition of his parole. La. R.S. 15:574.9(B)(1).

When the parole of a parolee has been revoked by the Parole Board for violation of the conditions of parole, the parolee shall be returned to the physical custody of DPSC and serve the remainder of his sentence as of the date of his release on parole. La. R.S. 15:574.9(E). An exception is provided in La. R.S.

15:574.9(G) for first-time technical violations, as follows:

(1)(a) Except as provided in Subparagraph (b) of this Paragraph, any offender who has been released on parole and whose parole supervision is being revoked under the provisions of this Subsection for his first technical violation of the conditions of parole as determined by the [Parole Board], shall be required to serve not more than ninety days without diminution of sentence or credit for time served prior to the revocation for a technical violation. The term of the revocation for the technical violation shall begin on the date the [Parole Board] orders the revocation. Upon completion of the imposed technical revocation sentence, the offender shall return to active parole supervision for the remainder of the original term of supervision. The provisions of this Subsection shall apply only to an offender's first revocation for a technical violation.

* * *

(2) A "technical violation", as used in this Subsection, means any violation except it shall not include any of the following:

(a) Being arrested, charged, or convicted of any of the following:

* * *

(iii) Any intentional misdemeanor directly affecting the person.

In Madison v. Ward, 00-2842 (La. App. 1st Cir. 7/3/02), 825 So. 2d 1245 (en banc), this court concluded that La. R.S. 15:574.11, with its provision for appeal of Parole Board actions in a limited, specified circumstance, was a statutory grant of appellate jurisdiction to the 19th JDC to review decisions of the Parole Board where a denial of a revocation hearing under La. R.S. 15:574.9 is alleged or the procedural due process protections specifically afforded for such a hearing were violated. Leach v. Louisiana Parole Board, 07-0848, p. 7 (La. App. 1st Cir. 6/6/08), 991 So. 2d 1120, 1124, writs denied, 08-2385 (La. 8/12/09), 17 So. 3d 378, and 08-2001 (La. 12/18/09), 23 So. 3d 947. Therefore, although La. R.S. 15:574.11(A)⁴ generally precludes an appeal from a decision of the Parole Board,

⁴ Louisiana Revised Statute 15:574.11(A) states, in pertinent part:

No prisoner or parolee shall have a right of appeal from a decision of the [Parole Board] regarding release or deferment of release on parole, the imposition or modification of authorized conditions of parole, the termination or restoration of parole supervision or discharge from parole before the end of the parole period, or the revocation or reconsideration of revocation of parole, except for the denial of a revocation hearing under R.S. 15:574.9.

under Subsection C of that statute, a district court has appellate jurisdiction over pleadings alleging a violation of La. R.S. 15:574.9, which sets out the procedures to be followed by the Parole Board in conducting a revocation hearing.⁵

The district court's review is conducted by the court without a jury, is confined to the revocation record, and is limited to the issues presented in the petition for review. The court may affirm the revocation decision of the Parole Board or reverse and remand the case for further revocation proceedings. An aggrieved party may appeal a final judgment of the district court to the appropriate court of appeal. See La. R.S. 15:574.11(C); Bertrand v. Louisiana Parole Board, 06-0871, p. 3 (La. App. 1st Cir. 3/28/07), 960 So. 2d 979, 980-81.

ANALYSIS

Marcantel challenges the judgment in five assignments of error, which are summarized as follows:

- (1) The revocation hearing in October 2011 created an expectation that the parole hold would be lifted if the domestic abuse battery charge against him were dismissed. When that charge was dismissed, he believed the January 2012 revocation hearing would merely be a continuation of the first hearing. Therefore, he did not call any witnesses or prepare for the second hearing, resulting in a violation of his due process right to a fair hearing.
- (2) He was not provided with any of the evidence relied on to support revocation and was denied the right to confront and cross-examine his parole officer, the preliminary hearing officer, or the police officers involved, because they were present at the preliminary hearing, but not at the January 2012 revocation hearing.
- (3) In the October 2011 hearing, the Parole Board panel made a verbal agreement with him that if the domestic abuse battery charge were dismissed, the Parole Board would lift the hold and release him. This verbal contract was breached by the Parole Board panel involved in the January 2012 hearing.
- (4) Because he had a satisfactory explanation for certain of the

⁵ Following Madison, the legislature specifically recognized the appellate jurisdiction of the district court over pleadings alleging a violation of La. R.S. 15:574.9 in 2005. See La. R.S. 15:574.11(C); 2005 La. Acts, No. 460 § 1, effective August 15, 2005. The district court's review shall be limited to the issues presented in the petition for judicial review. Leach, 07-0848 at p. 7 n.4, 991 So. 2d at 1124 n.4.

charged violations, and because the domestic abuse battery charge was dismissed, he should have been considered a first-time technical violator and sentenced to only 90 days of incarceration before being released again on parole.

(5) His parole officer made numerous misrepresentations and false statements in her written reports that were considered by the Board. He asks this court to consider a sworn appendix attached to his appeal brief, in which he counters and corrects each of these errors.

After examining all the evidence in the record before us, and considering the arguments raised by Marcantel, we find no violation of due process in the procedures used by the Parole Board in this case.

On June 29, 2011, Marcantel signed, indicating his receipt of, a notice that included a detailed bill of particulars concerning the conditions of parole that were allegedly violated, along with the factual circumstances underlying each violation charged. He, along with his attorney, were present at the preliminary hearing on July 5, 2011, where he had the opportunity to admit, deny, or explain the circumstances of each alleged violation and to question any of the witnesses providing testimony concerning the charges. Following the hearing, the hearing officer found probable cause with regard to six of the allegations and no probable cause with regard to three of the allegations. As a result of these findings of probable cause to revoke his parole, a revocation hearing before the Parole Board was scheduled for October 11, 2011.

At that hearing, Marcantel admitted that he had committed five of the violations and provided explanations concerning his conduct. The violations to which he pled guilty were: traveling outside of the district without permission; continuing to use alcohol throughout the period of supervision; sporadic employment and not providing proof of his attempts to secure and maintain stable employment; misrepresenting the extent of his alcohol use to a substance abuse clinic, resulting in its finding that he was not eligible for treatment; and failing to

pay supervision fees as ordered or to perform community service work in lieu of paying those fees. Although Marcantel claims that his explanations were accepted by the panel, the parole revocation decision form completed by the panel chairperson contains only marginal notes showing "G w/stmt," for the violations to which he had pled guilty and had attempted an explanation. There were no findings concerning those violations, which indicated that the panel had not made any decision to accept his explanatory statements and excuse the violations.

He pled not guilty to the domestic abuse battery charge, for which he had been arrested and confined. His defense to this charge was that, in order to get him out of the house, his wife had lied to the officers who responded to her complaint and, after admitting this falsehood to the police, she had been arrested and served time for false swearing in connection with this incident. Consequently, the Parole Board voted to continue the hearing, pending resolution of the domestic abuse battery charge.

At the second revocation hearing on January 17, 2012, Marcantel appeared and reiterated his guilty plea to the five violations that he had admitted at the first hearing. Consequently, the Parole Board found him guilty of those violations. Marcantel complains that, because he believed the first hearing had resolved everything except the pending domestic abuse battery charge, he did not call any witnesses or prepare for the second revocation hearing. However, Marcantel pled guilty to five violations of his parole conditions at both hearings. Therefore, nothing said on his behalf by any witness could have modified the conclusion that he had violated those conditions. See Holland v. Louisiana Board of Parole, 08-2392, p. 2 (La. App. 1st Cir. 8/12/09), 21 So. 3d 979, 980, writ denied, 09-2104 (La. 9/17/10), 45 So. 3d 1039. His mistaken belief concerning the second hearing did not result in a violation of his right to due process and a fair hearing.

Marcantel also alleges that he was not provided with any of the evidence used against him at the second revocation hearing and was denied the right to cross-examine witnesses against him. However, he received a complete bill of particulars before the pre-revocation hearing and heard all the testimony there that might later be used at the revocation hearings. The audio recording of the second revocation hearing shows there were no witnesses against him presented at that hearing. He was merely questioned about the charged parole violations and pled guilty to the same five violations he had admitted at the first hearing. Since he pled guilty to all five of the violations upon which his parole revocation was based, this complaint is irrelevant.

Marcantel also complains about many allegedly false statements and misrepresentations made by his parole officer in her contemporaneous notes concerning her supervision of him. This is irrelevant, because he pled guilty to five violations of his parole conditions. It was within the discretion of the Parole Board to conclude that these violations justified revocation of his parole. See LA. R.S. 15:574.9(B)(1).

With reference to any purported "verbal agreement" entered into at the first revocation hearing, the parole revocation decision form completed by the panel chairperson contains only marginal notes showing "G w/stmt," for the violations to which he had pled guilty and for which he had provided an explanation. In the space provided for "findings" to the left of each charged violation, nothing was written. This form shows that the panel at the first hearing had not made any decision to accept his explanatory statements and excuse the violations, such that a dismissal of the domestic abuse battery charge would result in a decision not to revoke his parole.

Regarding the domestic abuse battery charge, the Parole Board indicated it

had received evidence that verified Marcantel's statement concerning his wife's false swearing and showed that all pending charges against him had been dismissed by the court. Therefore, the Parole Board found he was not guilty of that violation. However, because Marcantel had been **arrested** for an intentional misdemeanor directly affecting a person, the Parole Board determined that he did not qualify for classification as a first-time technical violator and was not eligible for the 90-day revocation period provided by La. R.S. 15:574.9(G)(1)(a). The Parole Board legally erred in this determination.

As mentioned previously, when the parole of a parolee has been revoked by the Parole Board for violations of the conditions of parole, the parolee is returned to the physical custody of DPSC to serve the remainder of his sentence as of the date of his release on parole, unless the violations committed can be classified as "first-time technical violations." See La. R.S. 15:574.9(E) and (G). The plain language of La. R.S. 15:574.9(G), provides, in pertinent part, that "any offender ... whose parole supervision *is being revoked* ... for his first technical violation of the *conditions* of parole as determined by the [Parole Board], shall be required to serve not more than ninety days without diminution of sentence or credit for time served prior to the revocation for a technical violation." (Emphasis added.) As stated in La. R.S. 15:574.9(G)(2), a technical violation is any violation *except* a violation that includes any of the following conduct :

- (a) Being arrested, charged, or convicted of any of the following:
 - (i) A felony.
 -
 - (iii) Any intentional misdemeanor directly affecting the person.
 - (iv) At the discretion of the committee on parole, any attempt to commit any intentional misdemeanor directly affecting the person.
 - (v) At the discretion of the committee on parole, any attempt to

commit any other misdemeanor.

(b) Being in possession of a firearm or other prohibited weapon.

(c) Failing to appear at any court hearing.

(d) Absconding from the jurisdiction of the committee on parole.

In this case, it is undisputed that the only grounds for which Marcantel's parole was revoked all constitute technical violations. The only non-technical violation presented, being Marcantel's arrest for domestic abuse battery (an intentional misdemeanor directly affecting the person), was *not* the basis on which Marcantel's parole was revoked. Thus, under the plain language of the statute, Marcantel should be considered a first-time technical violator.

The Parole Board, however, found the simple fact of Marcantel's *arrest* on the domestic abuse battery charge was sufficient to disqualify him of first-time technical violator status. It is undisputed that the Parole Board could not revoke Marcantel's parole based on a mere arrest,⁶ and yet, it holds that such an arrest, without more, is sufficient to bar Marcantel from seeking the benefit of La. R.S. 15:574.9(G). Such a finding leads to the absurd consequence of punishing the parolee for behavior for which he is not even remotely guilty. Moreover, the Parole Board in this case expressly found Marcantel not guilty of the only non-technical violation charged -- involvement in a crime or criminal act (based on the

⁶ It has been consistently held that in absence of a conviction, there must be proof that the parolee committed the acts underlying the charge in order to revoke parole. As observed by the Louisiana Supreme Court in reversing a revocation based on a conviction from which the parolee had lodged an appeal: "We hold narrowly that the revocation of parole cannot be based solely on a conviction that is not final. We do not imply that pending appeal the Parole Board is precluded from revoking parole based upon **evidence** of actual misconduct that violates the conditions of parole." State ex rel. Clark v. Hunt, 337 So. 2d 438, 440 (La. 1976) (emphasis added). A violation of the conditions of parole may be shown by establishing a criminal conviction **or** by actual proof of the commission of a crime, apart from conviction. In the first instance, the hearing judge looks to the court record of a criminal prosecution, but in the latter he looks to the actual conduct of the defendant that violates the conditions of his parole. See State v. O'Conner, 312 So. 2d 645, 646-647 (La. 1975).

domestic abuse battery charge).⁷

Thus, we find the Parole Board clearly erred in finding that Marcantel is not eligible for first-time technical violator status based on the mere fact of his arrest⁸ for a crime that would constitute an intentional misdemeanor directly affecting the person, but for which the charge for the crime was dismissed and for which the Parole Board expressly found him not guilty. In so finding, we reverse the judgment of the district court affirming the Parole Board's decision and remand this matter for further revocation proceedings. See La. R.S. 15:574.11(C). All costs of this appeal are assessed to the Committee on Parole.

REVERSED AND REMANDED.

⁷ It should be pointed out that the standard of proof for finding a violation for purposes of revocation of parole differs from that needed for a criminal conviction. A Parole Board can find that a parolee committed a crime by a mere preponderance of the evidence for purposes of revoking parole, whereas the parolee may not be convicted of that same crime because of a finding that proof of the parolee's guilty was not established beyond a reasonable doubt. See Moore v. Olson, 368 F.3d 757, 760 (7th Cir.), cert. denied, 543 U.S. 949, 125 S.Ct. 362, 160 L.Ed.2d 266 (2004).

⁸ We are aware of this court's opinion in Gonzales v. State, 12-1721, p. 6 (La. App. 1st Cir. 4/26/13), 117 So. 3d 514, 517, in which it was held that the parolee's arrest on two felony charges that were later dismissed could constitute an *additional* basis for denying the parolee first-time-technical-violator status. We find this matter distinguishable and the case inapplicable, because unlike the present case, there is no mention in the opinion of whether the Parole Board made any independent determination that the parolee committed the acts underlying the dismissed felony charges.

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RHP
6/2/24
PARRO, J., dissenting.

I disagree with the majority opinion in this case, because the clear wording of LSA-R.S. 15:574.9(G) disqualifies Marcantel from being classified as a first-time technical parole violator. That statute allows any offender whose parole supervision is being revoked for "his first technical violation of the conditions of parole" to serve not more than ninety days without diminution of sentence or credit for time served prior to the revocation for a technical violation, after which time he is to be returned to active parole supervision. See LSA-R.S. 15:574.9(G)(1).

Marcantel did not plead guilty to one technical violation of parole; he pled guilty to five technical violations of parole. The violations to which he pled guilty were: traveling outside of the district without permission; continuing to use alcohol throughout the period of supervision; sporadic employment and not providing proof of his attempts to secure and maintain stable employment; misrepresenting the extent of his alcohol use to a substance abuse clinic, resulting in its finding that he was not eligible for treatment; and failing to pay supervision fees as ordered or to perform community service work in lieu of paying those fees. Therefore, his parole was not revoked for "his first technical violation of the conditions of parole," but was revoked for his first **five** technical violations of the conditions of parole.

Moreover, under LSA-R.S. 15:574.9(G)(2)(a)(iii), the first technical violator provisions do not apply to offenders who have been "**arrested**, charged, or convicted of ... [a]ny intentional misdemeanor directly affecting the person." (emphasis added). Although Marcantel pled not guilty to the domestic abuse battery charge, and the Parole Board eventually obtained evidence that the charge had been dismissed, the fact remains that he was arrested on an "intentional misdemeanor directly affecting the person." Contrary to the majority opinion, the Parole Board did not err in determining that this fact made him ineligible for the ninety-day revocation period as a first-time technical violator. This court cannot simply ignore the clear wording of the statute. To achieve the result reached by the majority, the legislature, not this court, would have to amend the statute and either remove the arrest language entirely or qualify it in such a way that an arrest on a charge that is later dismissed would not remove an offender from being considered as a first-time technical violator of parole.

Finally, jurisprudence from this court supports the Parole Board's conclusion on this issue. As noted in footnote eight of the majority opinion, in Gonzales v. State, 12-1721 (La. App. 1st Cir. 4/26/13), 117 So.3d 514, 516, this court found that a parolee's arrest on two felony charges that were later dismissed could, as in this case, constitute an additional basis for denying the parolee first time technical violator status. I do not find the majority's attempt to distinguish this case from the matter before us to be persuasive.

Therefore, I respectfully dissent.