

STATE OF MICHIGAN
COURT OF APPEALS

JAMES JONES,

Plaintiff,

v

DEPARTMENT OF CORRECTIONS,

Defendant.

UNPUBLISHED

November 30, 2001

No. 236835

Before: Sawyer, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

This original action comes before us on plaintiff's complaint for habeas corpus.¹

Plaintiff was originally convicted of delivery of a controlled substance and sentenced to a term of six to twenty years in prison. Plaintiff was released on parole on October 2, 1998. Plaintiff's record while on parole was less than exemplary, having been charged with a number of parole violations. These violations resulted in diversions to the Technical Rules Violation Center, as well as an extension of the term of his parole.

Then on March 11, 2001, plaintiff was arrested by the Ypsilanti Police Department following a traffic stop when the police saw a passenger in plaintiff's car throw out a bottle. After the passenger exited the vehicle and was talking to the police, plaintiff turned off the vehicle lights, sped away and eluded police. He was later arrested for obstruction of justice and lodged in the Washtenaw County Jail. On March 12, he was charged with three counts of parole violation, alleging failure to report to his parole agent on February 13, 2001, testing positive for cocaine on February 6, 2001, and for engaging in a violation of law when he attempted to elude police on March 11. Plaintiff pled true to the first two counts and not true to the third count.

A formal hearing was convened on May 16, 2001. The hearing officer dismissed the third count because the hearing was held more than forty-five days after plaintiff was available for return to the Department of Corrections. However, following the hearing of mitigation evidence, the hearing officer recommended that plaintiff's parole be revoked based on the first

¹ Although plaintiff apparently unsuccessfully pursued habeas corpus in the circuit court, this case is an original action in this Court, not an appeal from the circuit court's denial of habeas corpus.

two counts and that he continue to be incarcerated for eighteen months before further parole consideration. The Parole Board adopted the recommendation.

Plaintiff brought this habeas action alleging that his incarceration is unlawful because the hearing was not held within forty-five days as required by MCL 791.240a. Defendant responds that, while Count III was properly dismissed based upon the failure to meet the deadline for holding the hearing, that deadline does not apply to Counts I and II because defendant admitted his guilt as to those counts. We reluctantly agree with plaintiff that defendant lost jurisdiction to revoke plaintiff's parole due to its failure to hold the hearing within forty-five days.

MCL 791.240a(1) provides that a paroled prisoner is entitled to a hearing within forty-five days after his return, or after he is available for return, to the Department of Corrections under accusation of parole violation for any reason other than conviction of a crime. In *Stewart v Dept of Corrections, Parole Board*, 382 Mich 474; 170 NW2d 16 (1969), the Supreme Court held that violation of the statute deprived the parole board of the authority over the alleged parole violations, even where the parolee has admitted his guilt. In such case, the parolee was entitled to be discharged from prison and returned to the jurisdiction of the parole board. *Id.* at 479.

Furthermore, this Court previously held that violation of the statute, while a cause for issuance of a writ of mandamus, was not cause for issuance of a writ of habeas corpus. In *re Lane*, 2 Mich App 140, 144; 138 NW2d 541 (1965). The Supreme Court, however, reversed without comment and granted habeas corpus. In *re Lane*, 377 Mich 695 (1966).

In light of these Supreme Court cases, we have little option but to grant plaintiff's requested relief. However, we urge defendant to seek review in the Supreme Court and for the Supreme Court to reverse us. We agree with our prior opinion in *Lane* that mandamus is a more appropriate remedy than habeas corpus. We see little rational reason to require that plaintiff be returned to parole status. It would seem to us that if defendant violates the forty-five-day rule, it could properly be remedied by mandamus. It might perhaps even be appropriate to require that a parolee be released from detention on the forty-sixth day. However, we find nothing in the statute or in common sense to justify entitling plaintiff to a return to parole status, particularly in light of parole violations to which he has admitted.

A writ of habeas corpus shall issue. Pursuant to MCR 7.206(D)(3) and MCR 7.216(A)(7), we order that plaintiff be discharged from prison and returned to the jurisdiction of the parole board. We further deny plaintiff's motion to produce documents as moot.

We retain no further jurisdiction.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski