

[Cite as *Pope v. Sheldon*, 2018-Ohio-4396.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DONALD K. POPE

Petitioner

-vs-

ED SHELDON

Respondent

JUDGES:

Hon. William B. Hoffman, P.J

Hon. Patricia A. Delaney, J.

Hon. Earle E. Wise, Jr.,J.

Case No. 18CA52

O P I N I O N

CHARACTER OF PROCEEDINGS:

Writ of Habeas Corpus

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

October 22, 2018

APPEARANCES:

For Petitioner

ALLEN VENDER
Assistant State Public Defender
250 East Broad Street – Suite 1400
Columbus, OH 43215

For Respondent

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Hoffman, P.J.

{¶1} Donald Pope has filed a Petition for Writ of Habeas Corpus requesting immediate release from prison based upon alleged due process violations during his parole revocation hearing. Respondent has filed a motion for summary judgment.

FACTS

{¶2} According to the petition, Pope was convicted of rape, kidnapping and aggravated robbery in the Lucas County Court of Common Pleas on April 20, 1995. He received an aggregate prison sentence of 15 years to life. He was granted parole on July 20, 2009. Petitioner was then accused of violating his parole on May 4, 2014. The parole violation was based upon the allegation Petitioner assaulted his pregnant girlfriend.

{¶3} On August 13, 2014, the parole board held a hearing. According to the Motion for Summary Judgment, Petitioner's girlfriend refused to testify and claimed she did not recall the events of May 4, 2014. Two witnesses, Toledo Police Officer Barwiler and Adult Parole Authority Officer Moran, testified at the parole board hearing. Although they did not witness the incident with Petitioner's girlfriend, they testified about their conversations or interviews with her.

{¶4} Based upon the testimony of the officers, the parole board found Petitioner guilty of violating the terms of his parole.

{¶5} Petitioner's only contention is he is entitled to release because the parole board cannot find a parole violation based solely on hearsay testimony.

HABEAS CORPUS

{¶6} The United States Supreme Court held in *Morrissey v. Brewer*, certain due process rights must be provided in parole revocation proceedings. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

{¶7} Petitioner argues his due process rights were violated at his parole hearing. However, “As long as an unreasonable delay has not occurred, the remedy for noncompliance with the *Morrissey* parole-revocation due process requirements is a new hearing, not outright release from prison.” *State ex rel. Johnson v. Ohio Adult Parole Auth.*, 90 Ohio St.3d 208, 2000-Ohio-61, 736 N.E.2d 469 (internal citations omitted).

{¶8} Pope has filed a petition for writ of habeas corpus requesting immediate release from prison. The Supreme Court has explained unless there is an unreasonable delay in holding the hearing, the remedy is not release from prison which is what issuance of a writ of habeas corpus would do. Rather, the remedy for a violation of due process is simply a new hearing. Pope has not requested a new hearing. He has asked for immediate release from prison.

{¶9} Further, Petitioner’s sole claim his due process rights were violated is premised upon the fact his violation was based solely upon hearsay testimony. In *Johnson*, supra, a case similar to the case at bar, the petitioner argued the hearsay testimony of the officers was inadmissible at the parole revocation hearing. *Id.* at 210. Like the instant case, the petitioner in *Johnson* was found to have violated his parole based upon an alleged assault of his girlfriend. *Id.* at 208.

{¶10} Also like *Johnson*, officers testified as to statements made by the girlfriend of the petitioner who was the alleged victim of the assault. The Supreme Court held,

“[The girlfriend’s] statements to the officers were admissible hearsay under Evid.R. 803(2), and even if they were not, hearsay is admissible in revocation proceedings. *State ex rel. Coulverson v. Ohio Adult Parole Auth.* (1991), 62 Ohio St.3d 12, 16, 577 N.E.2d 352, 355. *State ex rel. Johnson v. Ohio Adult Parole Auth.*, 90 Ohio St.3d 208, 2000-Ohio-61, 736 N.E.2d 469 (2000). We have not been provided a transcript of the parole hearing, so we cannot say for certain the statements to the officers were or were not excited utterances. Nonetheless, even if the statements were not excited utterances, hearsay is admissible as evidence at the parole hearing.

{¶11} Based upon the foregoing, we find Petitioner has failed to state a claim upon which relief may be granted.

{¶12} The petition for writ of habeas corpus is dismissed.

By: Hoffman, P.J.

Delaney J. and

Wise, Earle J. concur