

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

FILED

February 27, 2003

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30967

RELEASED

February 28, 2003

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. BRUCE PATTON,
Petitioner,

v.

JAMES RUBENSTEIN, COMMISSIONER,
WEST VIRGINIA DEPARTMENT OF CORRECTIONS
AND THE WEST VIRGINIA BOARD OF PROBATION AND PAROLE,
Respondents

PETITION FOR A WRIT OF HABEAS CORPUS

WRIT DENIED

Submitted: January 21, 2003

Filed: February 27, 2003

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The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE STARCHER and JUSTICE ALBRIGHT dissent and reserve the right to file dissenting opinions.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. “The decision to grant or deny parole is a discretionary evaluation to be made by the West Virginia [Parole Board]. However, such a decision shall be reviewed by this Court to determine if the [Parole Board] abused its discretion by acting in an arbitrary and capricious fashion.” Syl. Pt. 3, *Rowe v. Whyte*, 167 W.Va. 668, 280 S.E.2d 301 (1981).

2. “The West Virginia [Parole Board] must obey legislation and must act in a way which is not unreasonable, capricious, or arbitrary.” Syl. Pt. 3, *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

3. “The record in parole revocation cases must affirmatively show that the documents and evidence produced in the revocation proceeding have been submitted to all duly appointed and qualified members of the West Virginia Board of Probation and Parole for consideration prior to the final decision, that the number of members considering such documents and evidence constituted a quorum for conduct of business by the Parole Board, and that a majority of the duly appointed and qualified members considering the documents and evidence must concur in any order revoking parole, either by signing the order or filing with the secretary of the Parole Board a written concurrence in such revocation, which may be then so certified by the chairman of the Parole Board, the secretary of the Parole Board, or a

member of the Parole Board assigned to conduct the proceeding.” Syl. Pt. 2, *State ex rel.*

Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Per Curiam:

Mr. Bruce Patton filed this petition for a writ of habeas corpus seeking relief from a decision of the West Virginia Parole Board (hereinafter “Board”) revoking his parole. Mr. Patton contends that the Board acted in an arbitrary and capricious manner in revoking his parole. Specifically, Mr. Patton contends that the evidence of parole violations, including mitigating circumstances, was inadequate to support the parole revocation; that the Board failed to adequately consider less restrictive alternatives; and that the poor audio tape quality prevented all members of the Board from reviewing the evidence presented at the parole revocation hearing prior to rendering the decision to revoke parole. Based upon the briefs, record, and arguments of counsel, we deny the requested writ of habeas corpus.

I. Factual and Procedural History

Mr. Patton was sentenced to thirty years for aggravated robbery and breaking and entering. On December 21, 2001, after serving seven and one-half years of his sentence, Mr. Patton was paroled and subsequently became employed as a member of a towing crew. On June 24, 2002, after having been on parole for approximately six months, Parole Officer Pamela Baldwin filed a petition to revoke parole, charging Mr. Patton with the following five violations: (1) breaking the 9:00 p.m curfew on April 11, 2002; (2) visiting a bar on April 11, 2002; (3) driving on a suspended license on May 13, 2002; (4) possession of alcohol on June

6, 2002; and (5) driving on a suspended license on June 6, 2002. Subsequent to a July 30, 2002, hearing, the hearing examiner found probable cause on only charges one, three, and four.

On September 19, 2002, Board Chairman Douglas F. Stump conducted a final hearing in which Mr. Patton testified. The factual issues raised in the hearing testimony will be addressed in the Discussion section of this opinion. Subsequent to the revocation hearing, Chairman Stump, according to an affidavit signed by him, met with the other two signing members of the Board and “discussed the matter thoroughly” prior to rendering a decision to revoke parole on October 1, 2002. Chairman Stump also explained in the affidavit that the “Board does not routinely listen to or review audio tapes of revocation hearings in their entirety.”

In seeking a writ of habeas corpus in this Court, Mr. Patton alleges that a thorough review of the evidence submitted in this case reveals the arbitrary and capricious nature of the Board’s revocation decision. Moreover, Mr. Patton alleges that the Board filed to satisfy the requirements of *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996), regarding review by all members of the Board prior to a revocation determination. We address these issues separately in this opinion.

II. Standard of Review

This Court stated as follows in syllabus point three of *Rowe v. Whyte*, 167 W.Va. 668, 280 S.E.2d 301 (1981): “[t]he decision to grant or deny parole is a discretionary evaluation to be made by the West Virginia [Parole Board]. However, such a decision shall be reviewed by this Court to determine if the [Parole Board] abused its discretion by acting in an arbitrary and capricious fashion.” In syllabus point three of *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996), this Court explained that “The West Virginia [Parole Board] must obey legislation and must act in a way which is not unreasonable, capricious, or arbitrary.”

Regarding Mr. Patton’s contention that the Board failed to satisfy the requirements of *Eads*, this Court reviews such questions of law *de novo*. See *Phillips v. Fox*, 193 W.Va. 657, 661, 458 S.E.2d 327, 331 (1995) (“In reviewing challenges to . . . findings and conclusions . . . we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the . . . underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review”).

III. Discussion

A. Contentions Regarding Revocation Hearing Testimony

We first address Mr. Patton’s primary contention that the Board acted arbitrarily and capriciously in revoking his parole based upon what Mr. Patton characterizes as very

technical violations of parole. During the September 19, 2002, hearing conducted by Chairman Stump, the charges against Mr. Patton were developed and mitigating factors were explained. With regard to the allegation of a curfew violation, Mr. Patton explained that he broke the 9:00 p.m. curfew on April 11, 2002, as a direct result of employment obligations in his position as a member of a twenty-four hour towing crew. He further maintained that his parole officer had encouraged his participation in this employment and had knowledge of its particular hourly demands. He alleged that he had been called to the Good Times Bar in Dunbar to assist a stranded motorist. His employer, Mr. Lee Mullans, submitted a letter to the Board asserting that Mr. Patton had indeed been called on that employment mission.

With regard to the charge of driving on a suspended license¹ on May 13, 2002, Mr. Patton explained that a female customer had refused to drive her own vehicle from Advance Auto Parts to Mr. Patton's place of employment for the replacement of her brakes, due to her fear that the brakes would fail completely during that drive. Mr. Patton explained, during the revocation hearing, that he had telephoned his employer for advice concerning the customer's refusal to drive her own vehicle. Mr. Patton explained that his employer had advised him that the customer would have to pay a wrecker fee if the vehicle had to be towed

¹Mr. Patton's license had been suspended due to unpaid traffic tickets. Mr. Patton contends that he did not receive meaningful assistance in obtaining a driver's license from his parole officer. West Virginia Code § 62-12-15 (1993) provides that parole officers "shall use all practical and suitable methods of aid and encourage persons on parole and to bring about improvement in their conduct and condition." We find no merit in Mr. Patton's allegation that his parole officer failed to fulfill any of her duties as his parole officer.

from Advance Auto Parts to the location at which the brakes would be replaced. Thus, Mr. Patton agreed to drive the vehicle for the customer the one mile from Advance Auto Parts. At the parole revocation hearing, Mr. Patton explained: “And when I pulled in, Pam [the parole officer making a routine check] was behind us. She seen her get out of the truck and a little kid and I showed Pam the brake shoes in my hand that I got from over there. I mean I wasn’t supposed to be driving. You know, I can’t be right and be wrong. And I tried to do somebody a favor. . . .”

With regard to the charge of alcohol possession on June 6, 2002, Officer Bryan Jones, the police officer who observed Mr. Patton purchasing the beer at a local Go-Mart, testified at the parole revocation hearing. He did not observe Mr. Patton drinking the beer, but he did notice that there was a woman in Mr. Patton’s truck with him. With regard to the Go-Mart beer purchase, Mr. Patton testified that he had purchased a case of beer for his girlfriend. He also stated that he realized that he was a “recovering alcoholic” and that he had served as the chairman of Alcoholics Anonymous at the Huttonsville Correctional Center.

While Mr. Patton does not attempt to argue that the violations did not occur, he contends that the mitigating circumstances should have persuaded the Board to administer an alternative resolution of a less restrictive nature than total revocation of parole and replacement within the prison population. He further maintains that the Board failed to adequately evaluate less restrictive alternatives such as those provided by the West Virginia

Legislature in West Virginia Code § 62-12-19(b) (1998) (Supp. 2002),² advocating alternative means of resolution, included substance abuse treatment programs, day reporting centers, and counseling programs. *See* West Virginia Code §§ 62-11C-5(d)(5), 62-11C-5(d)(8), 62-11C-

²West Virginia Code § 62-12-19(b) provides:

When a parolee is under arrest for violation of the conditions of his or her parole, he or she shall be given a prompt and summary hearing, at which the parolee and his or her counsel shall be given an opportunity to attend. If at the hearing it shall appear to the satisfaction of the board that the parolee has violated any condition of his or her release on parole, or any rules or conditions of his or her supervision, the board may revoke his or her parole and may require him or her to serve in prison the remainder or any portion of his or her maximum sentence for which, at the time of his or her release, he or she was subject to imprisonment: Provided, That if the violation of the conditions of parole or rules for his or her supervision is not a felony as set out in section eighteen of this article, the board may, if in its judgment the best interests of justice do not require revocation, reinstate him or her on parole. The division of corrections will effect release from custody upon approval of a home plan. Notwithstanding any provision of this code to the contrary, when reasonable cause has been found to believe that a parolee has violated the conditions of his or her parole but said violation does not constitute felonious conduct, the commissioner may, in his or her discretion and with the written consent of the parolee, allow the parolee to remain on parole with additional conditions or restrictions. Such additional conditions or restrictions may include, but shall not be limited to, participation in any program described in subsection (d), section five, article eleven-c of this chapter. Compliance by the parolee with such conditions of parole shall preclude revocation of parole for the conduct which constituted the violation. Failure of the parolee to comply with such conditions or restrictions and all other conditions of release shall constitute an additional violation of parole and the parolee may be proceeded against under the provisions of this section for the original violation as well as any subsequent violations.

5(d)(9) (2001). Mr. Patton contends that his rehabilitative efforts, including attendance of Alcoholics Anonymous meetings, the establishment of gainful employment, and the ability to maintain a constant place of residence, were indications that he had become a functioning, successful member of the public during his six months on parole.

In discussing possible alternative resolutions, Chairman Stump mentioned a program at St. Mary's Correctional Center, the Second Chance Program, designed to assist in treatment for alcoholism. Chairman Stump also alluded to the Pruntytown Correctional Center and stated that his preference would be placing Mr. Patton on electronic monitoring. During the hearing, Mr. Patton admitted that his sister, with whom he had established a residence, would not favor electronic monitoring since it would require constant supervision by a parole officer. Subsequent to the hearing, and off the record, the parole officer allegedly contacted Mr. Patton's sister and questioned the sister regarding her willingness to assist her brother in an electronic monitoring arrangement. The parole officer apparently thereafter reported the contents of such conversation to the Board, and a determination was made that there was no "home plan" since electronic monitoring would not be a feasible alternative. Parole was thereafter revoked.

Upon review of the evidence presented regarding the three charges, we find no abuse of discretion by the Board in investigating the alleged violations and in determining that the evidence was sufficient to warrant a finding that the violations did indeed occur. We

further find no abuse of discretion in the Board's decision not to implement less restrictive alternatives. The record reflects that the Board considered alternatives to placing Mr. Patton in prison and inquired into the possibility of home monitoring. While Mr. Patton alleges that the off-the-record conversation with his sister was improper and/or prejudiced him in some manner, we find that argument lacking in merit based upon the fact that Mr. Patton admitted during the revocation hearing that his sister would not be amenable to a resolution which included home monitoring at her home. Thus, any error in permitting off-the-record discussion of the matter was harmless.

B. Review as Required by *State ex rel. Eads v. Duncil*

Mr. Patton also alleges that the entire Board did not provide adequate review of the evidence presented in the revocation hearing, as required by *Eads*. Syllabus point two of *Eads* instructs as follows:

The record in parole revocation cases must affirmatively show that the documents and evidence produced in the revocation proceeding have been submitted to all duly appointed and qualified members of the West Virginia Board of Probation and Parole for consideration prior to the final decision, that the number of members considering such documents and evidence constituted a quorum for conduct of business by the Parole Board, and that a majority of the duly appointed and qualified members considering the documents and evidence must concur in any order revoking parole, either by signing the order or filing with the secretary of the Parole Board a written concurrence in such revocation, which may be then so certified by the chairman of the Parole Board, the secretary of the Parole Board, or a member of the Parole Board assigned to conduct the proceeding.

196 W. Va. at 605, 474 S.E.2d at 535.

Mr. Patton alleges that the audio tape quality was so poor that even the transcriber could not decipher all contents of the revocation hearing. Mr. Patton also contends that the Board members cast their votes based upon an incomplete record of the proceedings due to the poor quality of the recording equipment. The State maintains that there was ample evidence of parole violations and that the poor audio tape quality did not affect the validity of the Board's conclusions.

Our review of this matter reveals that the affidavit submitted by Chairman Stump specifies that he presented the issues to the other members of the Board in conference, discussed the allegations and evidence with the other members of the Board, and that the Board rendered a conclusion as an entire Board, as required by *Eads*. The affidavit evidences the Board's action in reviewing the Summary and Recommendation prepared by Chairman Stump. In these circumstances, we decline to conclude that the revocation of Mr. Patton's parole should be vacated.

Based upon the foregoing, we deny Mr. Patton's requested writ of habeas corpus.

Writ denied.