

STATE OF MICHIGAN
IN THE SUPREME COURT

PATRICK J. KENNEY #256535,

Plaintiff-Appellant,

v

WARDEN RAYMOND BOOKER,

Defendant-Appellee,

Supreme Court No. 145116

Court of Appeals No. 304900

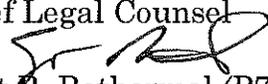
Wayne Circuit Court No.
11-003828-AH

**WARDEN RAYMOND BOOKER'S BRIEF IN RESPONSE TO THE
COURT'S ORDER FOR SUPPLEMENTAL BRIEFS**

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STATEMENT OF QUESTIONS PRESENTED

The following questions are presented in the Court's September 19, 2012 Order scheduling oral argument on the application and directing the parties to submit supplemental briefs:

1. What standards govern whether to grant habeas corpus relief?

Warden Booker answers: A writ of habeas corpus deals only with radical defects that render a judgment or a proceeding absolutely void. *In re Stone*, 295 Mich 207, 209; 294 NW 156 (1940). "A radical defect in jurisdiction contemplates an act or omission by state authorities that clearly contravene an express legal requirement in existence at the time of the act or omission." *Hinton v Parole Board*, 148 Mich App 235, 244-245; 383 NW2d 626 (1982).

2. Whether a claim of insufficient evidence in the context of a parole revocation hearing may provide a basis for habeas corpus relief.

Warden Booker answers: Yes. But the Parole Board maintains exclusive discretion to grant or deny parole and to discharge a parolee from parole.

3. Whether evidence that a parolee "should have known" of the presence of an item is sufficient to establish possession of that item where possession of the item constitutes a violation of parole.

Warden Booker answers: Yes.

4. What standard of review applies to factual decisions of the Michigan Parole Board?

Warden Booker answers: Whether the decision was supported by competent, material, and substantial evidence on the whole record.

**COUNTER-STATEMENT OF JUDGMENT /
ORDER APPEALED FROM AND RELIEF SOUGHT**

Plaintiff Patrick J. Kenney appeals an April 3, 2012 Court of Appeals ruling that reversed a June 2011 circuit court decision granting him habeas corpus relief. Kenney now seeks leave to appeal.

INTRODUCTION

A writ of habeas corpus deals only with *radical* defects that render a judgment or a proceeding absolutely void. Here, the pivotal question is whether the error Kenney asserts – that ALE Laws-Wright used the wrong standard of proof in determining that Plaintiff possessed the gun found in Kenney’s car – was such that, for the purposes of habeas review, the Parole Board lacked jurisdiction to continue Kenney on parole. The Parole Board had jurisdiction to continue Kenney on parole because he had yet to successfully complete parole and be discharged, and the ALE had jurisdiction to conduct the hearing because Kenney committed parole violations. As a result, there was no question as to jurisdiction; Kenney was merely challenging the *merits* of the revocation. That type of appeal should have been brought under the Administrative Procedures Act.

While a habeas corpus complaint may be used to review a parole revocation proceeding where a radical jurisdictional defect renders the judgment or proceeding absolutely void, a claim of insufficient evidence in the context of a parole revocation hearing is not the proper basis for habeas corpus relief. In this case, both ALE Laws-Wright and the Court of Appeals correctly determined there was enough evidence to establish Plaintiff’s constructive possession of the gun and, thus, a parole violation.

While the “known or should have known” standard used by ALE Laws-Wright at Kenney’s second parole revocation hearing was less than ideal, Laws-Wright’s written decision supported her determination that Kenney had “constructive possession” of the gun. And, because Kenney was a parolee and, thus,

had limited liberties, and because his release from parole is considered merely as a permit to leave the prison, this Court should adopt the lower evidentiary standard that ALE Laws-Wright used regarding parolees.

Finally, Article 6, §28 of Michigan's Constitution states that judicial review of an administrative decision is limited in scope to whether the decision is supported by competent, material, and substantial evidence on the whole record. That is the appropriate standard of review for the Parole Board's factual decisions.

STATEMENT OF FACTS

Plaintiff Patrick Kenney #256535 is a parolee under the supervision of the Michigan Department of Corrections (MDOC). MDOC previously incarcerated Kenney as a result of two controlled substance convictions. Defendant in this action is Warden Raymond Booker, former warden at the Ryan Correctional Facility, where MDOC previously incarcerated Kenney.

On December 10, 2007, Kenney's parole agent charged Kenney with violating five conditions of his parole: failing to report to his field agent; three charges related to having a firearm in his possession stemming from a traffic stop where police discovered a firearm in the battery compartment of the car he was driving; and taking items from his mother's residence without her permission and pawning them. (Def.'s Ex. 1, Certified Parole Record at 171.)

On March 25, 2008, MDOC afforded Kenney a hearing on these charges. Administrative Law Examiner (ALE) Kasenow found Kenney guilty by plea of failing to report to his field agent and guilty by hearing of the firearms charges.

The charge related to his mother's property was dismissed. (Def.'s Ex. 1, Certified Parole Record at 156-157.)

On April 23, 2008, as a result of the ALE's determination that Kenney violated the conditions on his parole, the Parole Board revoked Kenney's parole and continued his prison sentence for 60 months. (Def.'s Ex. 1, Certified Parole Record at 114-117).

Plaintiff filed a writ of habeas corpus in October 2010, requesting that the circuit court review the parole revocation. The circuit court granted Plaintiff's habeas request and ordered that MDOC provide him a new hearing to include exculpatory evidence regarding the firearm not heard at the first parole revocation hearing.

Kenney's second parole revocation hearing took place on November 18, 2010, and January 11, 2011. ALE Laws-Wright again found Kenney guilty by plea of failing to report to his field agent and guilty by hearing of the firearms charges. (Def.'s Ex. 1, Certified Parole Record at 19-21.) Specifically, ALE Laws-Wright found that Kenney had previously lent the subject vehicle to his friend and roommate, John Cook. Kenney admitted that he knew Cook was a drug dealer, and Kenney allowed Cook to use the car in exchange for drugs. ALE Laws-Wright further concluded that Kenney "knew or should have known" about the gun found in the car because, just 17 days before the instant arrest, Cook had possession of the car when police found a gun in the same battery compartment! Further, ALE Laws-Wright concluded that it was not a far leap to connect drugs with guns. (Def.'s Ex. 1, Certified Parole Record at 19-21.)

As a result of the guilty finding, the Parole Board continued Kenney's sentence for 24 months. (Def.'s Ex. 1, Certified Parole Record at 14-18.) So Kenney filed a second habeas action and requested that the circuit court vacate the guilty findings, enter an order finding him not guilty, and enter a judgment releasing and discharging him from parole. On March 22, 2011, the Parole Board granted Kenney a parole and released him on parole June 1, 2011. (Def.'s Ex. 1, Certified Parole Record at 5.)

Following a June 17, 2011 hearing, the circuit court held that ALE Laws-Wright used the wrong standard of proof for the firearms charges – that Plaintiff “knew or should’ve known” about the firearm – which amounted to a due-process violation. The circuit court held that the due-process violation resulted in a radical defect in jurisdiction and granted Kenney his requested habeas relief. (Def.'s Ex. 2, Circuit Court Transcript at 21-26.) The court then unilaterally discharged Plaintiff from parole. (Def.'s Ex. 2, Circuit Court Transcript at 27-28.)

PROCEEDINGS BELOW

On July 20, 2011, the Court of Appeals granted the Warden's application for leave and stayed the circuit court's decision. On April 3, 2012, in an unpublished opinion, the Court of Appeals reversed the circuit court's decision, holding that the evidence on which ALE Laws-Wright relied was not so lacking as to create a due-process violation and, thus, justify habeas relief. In short, the court held that ALE Law-Wright's usage of the “knew or should have known” standard was less than ideal, but that her reasoning supported a reasonable inference that Kenney knew

about and had constructive possession of the gun. Kenney then filed for leave to appeal in this Court.

On September 19, 2012, this Court ordered oral argument on the application and directed the parties to submit supplemental briefs addressing four, discrete questions. This is the Warden's response to those questions.

ARGUMENT

I. A writ of habeas corpus deals only with radical defects that render a judgment or a proceeding absolutely void, defects that clearly contravene an express legal requirement in existence at the time of the act or omission.

A writ of habeas corpus deals only with radical defects that render a judgment or a proceeding absolutely void. *In re Stone*, 295 Mich at 209; *Walls v Director of Institutional Services*, 84 Mich App 355, 357; 269 NW2d 599 (1978). “A radical defect in jurisdiction contemplates an act or omission by state authorities that clearly contravene an express legal requirement in existence at the time of the act or omission.” *Hinton v Parole Board*, 148 Mich App 235, 244-245; 383 NW2d 626 (1982), quoting *People v Price*, 23 Mich App 663, 671; 179 NW2d 177 (1970).

Another portion of *People v Price* explains what is meant by a “radical defect in jurisdiction”:

Despite the general prohibition, *habeas corpus is open to a convicted person in one narrow instance, . . . and that is where the convicting court was without jurisdiction to try the defendant for the crime in question.* [Citations omitted.] This exception, it must be added is qualified by the requirement that the jurisdictional defect be radical. It must render the conviction absolutely void. *In re Palm* (1931), 255 Mich 632; *In re Gardner* (1932) 260 Mich 122; *In re Stone* (1940), 295 Mich 207. (Emphasis added.)

The pivotal question thus becomes whether the error asserted by defendant – the denial of an alleged right to counsel at a juvenile waiver hearing – was such that for the purposes of habeas review the recorders court can be said to have been without jurisdiction to enter a conviction. *Price*, 23 Mich App at 669-670.

The Court of Appeals recently addressed a parolee's habeas claim in *Wem v Michigan Dep't of Corrections*, unpublished opinion *per curiam* of the Court of Appeals, issued July 7, 2011 (Docket No. 297618), attached as Defendant's Exhibit 3. In *Wem*, the court held, correctly, that MDOC's violation of one of its own operating procedures did *not* create a radical defect in jurisdiction entitling the plaintiff to habeas relief.

Here, the pivotal questions are whether the error asserted by Kenney – that ALE Laws-Wright used the wrong standard of proof in determining that Kenney possessed the gun found in his car – was such that, for the purposes of habeas review, the Parole Board can be said to have been without jurisdiction to have continued Kenney on parole and whether ALE Laws-Wright was without jurisdiction to hold the revocation hearing.

The Parole Board had jurisdiction to continue Kenney on parole because he had yet to successfully complete parole and be discharged. A paroled prisoner is deemed to be serving the sentence imposed by the trial court and remains in custody of the Department of Corrections until parole is successfully completed. *Harper v Dep't of Corrections*, 215 Mich App 648, 650; 546 NW2d 718 (1996). ALE Laws-Wright had jurisdiction to hear the parole revocation case under MCL 791.240a because of the alleged violations. Whether she used an improper standard of proof at the revocation hearing did not vest the circuit court with power to

unilaterally discharge Kenney from parole. At best, as far as Kenney is concerned, it should have resulted in a second remand by the circuit court with instructions for an ALE to use the proper evidentiary standard.

The effect of Kenney appealing the *merits* of the revocation, and the circuit court in entertaining the review as it did, is a review more properly brought under the Administrative Procedures Act (APA), MCL 24.301 *et seq.* Parole revocation proceedings are contested cases under the APA and appeals of the decisions may be brought within 60 days after the date of mailing notice of the final decision or order of the agency under the APA. MCL 24.304(1). Per the above decision in *Price*, habeas challenges are limited to circumstances where there is a radical defect in *jurisdiction* of an underlying body or court to hear a case.

Here, Kenney is not challenging the jurisdiction of the ALE to hear his parole revocation case or the Parole Board to continue his parole, but, rather, he is challenging the *evidentiary standard* used at his hearing. As a result, habeas is not the proper avenue for relief as the evidentiary standard used at the hearing has nothing to do with jurisdiction. Rather, the proper method for such an appeal is under the APA.

Regardless, in reversing the circuit court's decision, the Court of Appeals held that the evidence that Kenney constructively possessed the firearm was not so lacking that it denied Kenney due process. The Court of Appeals properly concluded that the circumstantial evidence presented to the ALE supported a reasonable inference that Kenney knew the gun was there. Further, the Court of Appeals noted that it did not appear that ALE Laws-Wright's decision hinged solely

on the “knew or should’ve know” basis. The Court of Appeals held that her reasoning suggested she, too, based her decision on the circumstantial evidence discussed above.

II. A claim of insufficient evidence in the context of a parole revocation hearing may be the basis for habeas corpus relief, but the Parole Board maintains exclusive discretion to grant or deny parole and to discharge a parolee from parole.

“A prisoner’s right to file a complaint for habeas corpus relief is guaranteed by Const 1963, art 1, § 12.” *Moses v Dep’t of Corrections*, 274 Mich App 481, 484; 736 NW2d 269 (2007). “The function of a writ of habeas corpus is to test the legality of the detention of any person restrained of his liberty.” *Triplett v Deputy Warden*, 142 Mich App 774, 780; 371 NW2d 862 (1985). If a legal basis for detention is lacking, a judge must order the release of the detainee from confinement. MCL 600.4352.

The availability of review of parole revocation decisions under the APA does not foreclose alternative avenues of judicial review. *Triplett*, 142 Mich App at 779. Further, the Court of Appeals has held that “review of a parole revocation decision is permissible upon complaint for habeas corpus.” *Hinton*, 148 Mich App at 244. The court also held that the APA could not be the exclusive avenue for review of judicial review of a parole revocation because, as stated above, the right to file a complaint for habeas corpus is guaranteed by the state constitution. *Id.*

Thus, a court *does* have the power to review a parole revocation proceeding under the guise of a habeas petition. And the U.S. Supreme Court has indicated that a parole revocation that is not supported by any evidence violates due process. See *Douglas v Buder*, 412 US 430, 432 (1973).

Regardless, the circuit court exceeded its authority when it unilaterally discharged Plaintiff from parole. MCL 791.204 provides *exclusive* jurisdiction to the Michigan Department of Corrections regarding matters of parole: “subject to constitutional powers vested in the executive and judicial departments of the state, the department shall have exclusive jurisdiction over all of the following . . . Pardons, reprieves, commutations, and paroles.” MCL 791.204. Next, MCL 791.240a provides the remedy after a finding that a parole revocation hearing did not establish a parole violation. MCL 791.240a states that “[i]f the evidence presented [at the parole revocation hearing] is insufficient to support the allegation that a parole violation occurred, the parolee shall be reinstated to parole status.” MCL 791.240a. And, lastly, under Michigan’s Constitution, judicial review of an administrative decision of an ALE shall be limited in scope to whether the decision is supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, §28.

So while MCL 600.4352(1) provides prisoners with habeas relief, MCL 791.204 provides *exclusive* jurisdiction regarding matters of parole to the Michigan Department of Corrections, and, in turn, the Parole Board. So the Legislature clearly intended the MDOC and Parole Board to have exclusive jurisdiction over parole issues, including the discharge of a parolee. Accord, e.g., *Hopkins v Michigan Parole Board*, 237 Mich App 629, 646-649; 604 NW 2d 686 (1999), (because the Parole Board possesses exclusive jurisdiction over parole matters, and because the judiciary may exercise only limited review of Parole Board decisions, which review

does not encompass the authority to order prisoners' parole, the circuit court's order that the Parole Board release the prisoner violated the constitution).

If the Parole Board possesses exclusive discretion to grant or deny parole, it must also possess exclusive discretion of whether to discharge a parolee from parole. So a circuit court may review whether a Parole Board decision violated the Michigan Constitution, a statute, an administrative rule, or a written agency regulation. *Hopkins*, 237 Mich App 629, 639-640. And, pursuant to MCR 7.104(D)(7) and (8), a circuit court may reverse and remand a matter to the Parole Board. But a reviewing court does *not* possess authority to unilaterally discharge a parolee from parole.

The assertion that the Parole Board's jurisdiction over parolees is exclusive in habeas matters is supported by this Court's decision in *Jones v Dep't of Corrections*, 468 Mich 646; 664 NW 2d 717 (2003). The Court in *Jones* held that the Parole Board's jurisdiction over parolees prevented a trial court from granting habeas relief when the Parole Board violated MCL 791.240a by not giving a revoked parolee a revocation hearing within the statutory time period. *Jones*, 468 Mich at 658. The Court recognized that the statute failed to prescribe a penalty for tardily providing a hearing, but it refused to graft a judicial remedy onto the statute. *Jones*, 468 Mich at 656.

The *Jones* Court held that the appropriate remedy was for a plaintiff to seek mandamus relief, and that this action may be maintained only to compel compliance with the statutory duty of holding a hearing, not to force discharge. *Jones*, 468 Mich at 658. The Court expressly held that the Parole Board retained discretion to revoke parole even after it violated the time limits in MCL 791.240a.

Jones, 468 Mich at 652-653. Thus, if the Parole Board maintains exclusive jurisdiction over parolees even when it violates a statute regarding a revocation, it certainly retains jurisdiction if a reviewing court finds an alleged due process violation from a revocation hearing, as in the case at bar.

In sum, even though a claim of insufficient evidence in the context of a parole revocation hearing may constitute a basis for habeas relief, the circuit court here was without jurisdiction to unilaterally grant Kenney a discharge from parole because the Parole Board has exclusive jurisdiction over all matters of parole. And, as detailed above, Kenney should have pursued the matter as an APA appeal because there was no radical defect in the jurisdiction of either the ALE to hear the case or the Parole Board to continue Kenney on parole.

III. Evidence that a parolee “should have known” of the presence of an item is sufficient to establish possession of that item where possession of the item constitutes a violation of parole.

The “knew or should have known” standard used by ALE Laws-Wright at Kenney’s second parole revocation hearing is not supported by current Michigan case law. But ALE Laws-Wright’s written decision amounted to an inarticulate use of the proper standard, “constructive possession.” Regardless, Kenney, as a parolee, *should* have been held to the lesser “knew or should’ve known” standard because parole is closely analogous to incarceration, where the burden of proof for evidentiary standards are lower.

The Court of Appeals recently held that possession of a firearm can be actual or constructive, joint or exclusive. A person has constructive possession if there is

proximity to the article, together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Possession can be proven by circumstantial or direct evidence and is a factual question for the trier of fact.

People v Johnson, 293 Mich App 79; 815 NW2d 815 (2011) (internal quotations and citations omitted).

Indeed, the Court of Appeals, in deciding this case, held that the circumstantial evidence supported a reasonable inference that Kenney knew the gun was in the car. The court also held that ALE Law-Wright's use of the "knew or should have known" standard was less than ideal, but that her reasoning also supported a reasonable inference that Kenney knew about and had constructive possession of the gun.

Regardless, the lesser "knew or should've known" standard *should* have been proper when used against Kenney, a parolee. The Supreme Court has held that "parolees are on the 'continuum' of state-imposed punishments," and that "parole is an established variation on imprisonment of convicted criminals The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence."

Samson v California, 547 US 843, 850 (2006). Further, parole revocation deprives the parolee not "of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v Brewer*, 408 US 471, 480 (1972). This Court has long recognized the limited nature of a parole release. In *In re Eddinger*, the Court held

that “[t]he purpose of a parole is to keep the prisoner in legal custody while permitting him to live beyond the prison enclosure so that he may have an opportunity to show that he can refrain from committing crime. It is a conditional release; the condition being that, if he makes good, he will receive an absolute discharge from the balance of his sentence.” *In re Eddinger*, 236 Mich 668; 211 NW 54, (1926). Finally, MCL 791.238(6) provides that a “parole shall be construed as a permit to the prisoner to leave the prison, and not as a release.”

While in prison, Michigan’s Prisoner Hearings Act (PHA) controls for matters related to, amongst other things, infractions of prison rules. The PHA requires that judicial review of an administrative decision of a hearing officer shall be confined to the record and shall be limited in scope to whether the action is authorized by law or rule and whether the decision is supported by competent, material, and substantial evidence on the whole record. MCL 791.255(4) provides:

The review shall be confined to the record and any supplemental proofs submitted pursuant to subsection (3). The scope of review shall be limited to whether the department’s action is authorized by law or rule and whether the decision or order is supported by competent, material and substantial evidence on the whole record.

In *Soto v Social Services Director*, 73 Mich App 263, 271; 253 NW2d 292 (1977), quoting *Ginsburg v Richardson*, 436 F2d 1146, 1148 (CA 3, 1971), *cert den*, 402 US 971 (1971); *reh den*, 403 US 912 (1971), the Court of Appeals defined “substantial evidence” as follows:

“Substantial evidence” means evidence which a reasoning mind would accept as sufficient to support a conclusion. “It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance of the evidence.” *See also Russo v Dep’t of Licensing & Regulation*, 119 Mich App 624, 631 (1982).

This Court reaffirmed this definition of substantial evidence in *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994), holding:

When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record. [Citation omitted]

"Competent evidence" is evidence "which is admissible as being able to assist the trier of fact in determining questions of fact, although it may not be believed."

"Material evidence" is evidence that is pertinent, or relevant, to the issue(s) in dispute; it is "that quality of evidence which tends to influence the trier of fact because of its logical connection with the issue." *In Re Payne*, 444 Mich at 692.

Finally, "substantial evidence" is, as noted above, more than a scintilla but less than a preponderance; it is the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. *In Re Payne*, 444 Mich at 692.

In sum, because parolees are merely on release status from incarceration and have conditional liberties while out in society, they should be held to the same evidentiary standards – substantial evidence – as are prisoners incarcerated inside prisons. The Warden posits that "knew or should've known" and "substantial evidence" are essentially the same standard and so the standard ALE Laws-Wright used is a proper one for parolees.

IV. Review of factual decisions of the Michigan Parole Board shall be limited in scope as to whether the decision was supported by competent, material, and substantial evidence on the whole record.

Article 6, §28 of Michigan's Constitution provides the standard of review for a reviewing court over an administrative action, such as the Parole Board's. Section 28 states that judicial review of an administrative decision shall be limited in scope to whether the decision is supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, §28.

As noted above, because Kenney challenged the merits of his parole revocation, this case *should* have been brought as an APA appeal, not a habeas action. As such, decisions of the Parole Board in the revocation proceeding would be set aside only if substantial rights of the parolee were violated because the decision was (1) in violation of the constitution or a statute; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedure resulting in material prejudice to a party; (4) Not supported by competent, material and substantial evidence on the whole record; (5) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion; or (6) Affected by other substantial and material error of law. MCL 24.306(1).

CONCLUSION AND RELIEF REQUESTED

First, a writ of habeas corpus deals only with *radical* defects that render a judgment or a proceeding absolutely void. Such a radical defect was not present here because the Parole Board retained exclusive jurisdiction to continue Kenney's parole.

Second, a claim of insufficient evidence in the context of a parole revocation hearing may be the basis for habeas corpus relief. But that issue is moot here as both ALE Laws-Wright and the Court of Appeals correctly concluded that the circumstantial evidence supported a reasonable inference that Kenney had constructive possession of the gun in the car.

Finally, although ALE Laws-Wright's written decision amounted to an inarticulate use of the proper legal basis, that being "constructive possession," the lower standard is proper for parolees due to their limited liberties.

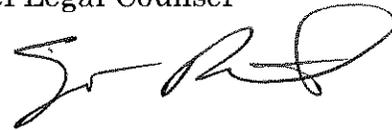
Accordingly, the Warden respectfully requests that this Court deny Kenney's application for leave to appeal.

Respectfully submitted,

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