

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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SEP 25 2014

The Honorable Robin B. Stilwell, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2013-002348

James Robert Byrd, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Whether the PCR court erred in failing to find that the Parole Board unlawfully, arbitrarily, and capriciously revoked Petitioner's parole on the basis of allegations arising out of a criminal domestic violence charge against Petitioner which had not yet been adjudicated in court and for which Petitioner was later found not guilty?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the April 1981 term of General Sessions for kidnaping (1981-GS-23-1642) and first-degree criminal sexual conduct (CSC) (1982-GS-23-1643). (App.pp.102-03; pp.106-07). H.W. "Pat" Paschal, Jr., Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On July 28, 1981, the Honorable James B. Stephen sentenced Petitioner to concurrent terms of life imprisonment for kidnaping and thirty years for first-degree CSC.

A notice of appeal was filed at the South Carolina Court of Appeals. John L. Sweeney, Esquire and William I. Diggs, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Supreme Court affirmed Petitioner's convictions and sentences. State v. Byrd, Op. No. 82-MO-382 (S.C. Sup. Ct. filed Dec. 29, 1982).

Petitioner filed applications for post-conviction relief (PCR) in 1983, 1986, 1996, and 1998 and a petition for writ of habeas corpus in the United States District Court for the District of South Carolina in 2002. Petitioner was subsequently paroled on November 26, 2003.

An arrest warrant was issued for Petitioner on May 11, 2011 and it was served upon him the following day. (App.pp.27-28). On August 2, 2011, Petitioner attended an administrative hearing, at the conclusion of which the hearing officer recommended a parole revocation. (App.pp.29-30). On September 14, 2011, the Parole Board revoked Petitioner's parole after a hearing. (App.p.34).

Petitioner filed a PCR application on November 22, 2011 (2011-CP-23-7846). (App.pp.41-48). A hearing was held at the Greenville County Courthouse on August 28, 2013. (App.pp.66-90). Petitioner was present and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order filed October 24, 2013. (App.pp.92-101).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was entitled to relief.

Petitioner argues the PCR judge erred in failing to find the Parole Board unlawfully, arbitrarily, and capriciously revoked his parole. This allegation is without merit.

A.

At the PCR hearing, Petitioner argued his parole was improperly violated because it was based on a pending criminal domestic violence (CDV) charge and he was later found not guilty of this charge. (App.pp.82-83). Petitioner stated he had not been

drinking alcohol when he was arrested for CDV. (App.pp.84-85; p.87). Petitioner stated the parole revocation procedures should not have proceeded until after the CDV charge went to court. (App.pp.86-87). Petitioner admitted, however, that he had five prior parole violations. (App.p.87).

Parole agent Allen Norfus, Sr. testified he was not Petitioner's agent, but he conducted the administrative hearing. (App.p.70). Agent Norfus testified Petitioner's parole arrest warrant was issued upon probable cause after Petitioner was involved in an instance of CDV where alcohol was involved. (App.p.71). Agent Norfus testified Petitioner was not allowed to drink alcohol (because he was a Sex Offender) and agreed that "just drinking would have violated [Petitioner's] parole." (App.p.72; p.74). Agent Norfus testified he reviewed the incident report and spoke to the CDV victim before issuing the probable cause warrant. (App.pp.71-72). Agent Norfus testified the incident report and parole violation report were presented at the administrative hearing. (App.p.73).

Tony Anderson, Petitioner's former parole agent, testified he was not present at the administrative hearing but did present the case to the Parole Board. (App.p.75; pp.76-77). Anderson testified Petitioner had prior violations in addition to the new violations for drinking alcohol and not reporting the CDV arrest. (App.p.75). Anderson testified that not reporting an arrest to one's parole agent is a parole violation and that Petitioner did not report his arrest. (App.p.76).

Fredna Gary, an administrative hearing officer for the South Carolina Department of Probation Parole and Pardon Services testified she recalled Petitioner's case.

(App.p.77). Gary testified she issued a report from the hearing, which is unsigned because it is usually sent by email to the offender's supervising parole agent. (App.pp.78-79). Gary testified she found there was probable cause Petitioner violated his parole. (App.p.79). Gary testified the incident report from the CDV arrest indicated Petitioner and the victim were intoxicated, there were beer cans throughout the room, the victim's lip was bleeding, and there was blood on the wall. (App.p.79). Gary testified Petitioner had five prior parole violations (two of which involved new charges) and that she takes prior violations into account. (App.pp.79-81).

B.

In denying the PCR application, the judge found Petitioner "failed to meet his burden of proving his due process rights were violated and his parole unlawfully revoked." The PCR judge found "[Petitioner]'s use of alcohol and the failure to report the arrest were the basis for [Petitioner]'s parole arrest warrant." The PCR judge concluded "[Petitioner]'s case was properly before the Parole Board and this Court finds the Parole Board's revocation procedure in this case was lawful." (App.p.99).

C.

A proceeding under the Uniform Post-Conviction Procedure Act may be instituted by "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . [t]hat his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint." S.C. Code Ann. § 17-27-20(A)(5) (Supp. 2004). An inmate's non-collateral claim that his parole was unlawfully revoked falls squarely within the ambit of the PCR statute. See Kerr v.

State, 345 S.C. 183, 186, 547 S.E.2d 494, 495-96 (2001); Al-Shabazz v. State, 338 S.C. 354, 368, 527 S.E.2d 742, 749 (2000). However, this does not give the PCR court the authority either to conduct a de novo review of the case or to otherwise sit in an appellate capacity to review the Parole Board's discretionary decision. To the contrary, the South Carolina Code specifically provides: "[t]he board shall be the sole judge as to whether or not a parole has been violated and no appeal therefrom shall be allowed." S.C. Code Ann. § 24-21-680 (1989 & Supp. 2004). The review of whether parole was unlawfully revoked should be limited to an examination of whether the revocation procedure itself was lawful. See S.C. Code Ann. § 17-27-20(A)(5).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proof. The United States Supreme Court has held that minimum requirements of due process in parole revocation proceeding include:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole").

Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604 (1972). While Petitioner now argues in his Petition for Writ of Certiorari that some of these minimum requirements were not met in his case, this issue was neither raised to the PCR judge nor ruled upon in the order of dismissal. Accordingly, any argument in this vein is not

preserved for appellate review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”).

Regardless, it has long been held that the grant of parole is not a right but a matter of grace bestowed by the government. See State v. De La Cruz, 302 S.C. 13, 16, 393 S.E.2d 184, 186 (1990); Bearden v. State, 223 S.C. 211, 215, 74 S.E.2d 912, 913 (1953). The United States Supreme Court has noted “[r]evocation [of parole] deprives an individual, 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, 408 U.S. at 480, 92 S. Ct. at 2600. Petitioner failed to demonstrate his constitutional rights were violated when his conditional liberty was revoked.

The incident and supplemental report indicates Petitioner was arrested for CDV on May 9, 2011. (App.pp.30-31). The report indicates Petitioner was visibly intoxicated and admitted to the officer that he had been drinking alcohol. (App.pp.30-31). Norfus and Anderson testified there was probable cause to issue an arrest warrant because Petitioner was drinking alcohol¹ and failed to report his arrest. (App.p.71; pp.75-76). The arrest warrant was issued May 11, 2011 and served on Petitioner May 12, 2011. (App.pp.27-28). The violation report prepared by Anderson was dated July 12, 2011 and listed Petitioner’s five prior parole violations, details of the present violation, and

¹ Norfus testified parolees on the Sex Offender Registry were not permitted to drink alcohol. (App.p.72; p.74). Petitioner was aware of this condition of parole because he had a prior parole violation that listed his alcohol consumption as one of the grounds. (App.p.5).

justification for recommendation of full revocation. (App.pp.8-9). Gary held the administrative hearing on August 2, 2011 and found revocation of parole was justified. (App.pp.29-30). Gary testified her decision has to do “primarily on what the current violations are. But it also is based upon his prior violations while under supervision.” (App.p.81). The Parole Board voted unanimously to revoke Petitioner’s parole on September 14, 2011. (App.p.34).

Petitioner has failed to cite any case law or precedent in support of his argument that his parole revocation should not have transpired until the adjudication of the CDV charge. The un-contradicted testimony from the PCR hearing was that failure to report an arrest to one’s parole agent was a parole violation. “Upon failure of any prisoner released on parole . . . to do or refrain from doing any of the things set forth and required to be done by and under the terms of his parole, the parole agent must issue a warrant or citation charging the violation of parole.” S.C. Code Ann. § 24-21-680 (emphasis added). Petitioner’s failure to report his CDV arrest and his admission to the arresting officer of having consumed alcohol triggered the issuance of the arrest warrant in this case. The parole agents, hearing officer, and parole board all followed the law in proceeding upon the path of a full revocation. Petitioner’s parole was “conditional liberty properly dependent on observance of special parole restrictions.” Morrissey, 408 U.S. at 480, 92 S. Ct. at 2600. Petitioner violated these restrictions and there was probable cause to issue an arrest warrant and begin parole revocation proceedings. Petitioner has failed to demonstrate the revocation procedure was unlawful, arbitrary, or capricious.

As Petitioner failed to meet his burden of proving he was entitled to relief, the

PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

September 25, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2013-002348

James Robert Byrd, Petitioner,

v.


State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 25th day of September, 2014.


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ATTORNEY FOR RESPONDENT



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ATTORNEY GENERAL

September 25, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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SEP 25 2014

S.C. Supreme Court

Re: James Robert Byrd v. State of South Carolina
Appellate Case No: 2013-002348
Lower Court Case No: 2011-CP-23-7846

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Carmen V. Ganjehsani, Esquire
Trisha Allen, Victim Services Counselor