STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: May 12, 2014)

LEROY MENARD	:	
	:	
v.	:	**C.A. No. NM-13-110**
	:	
R.I. DEPARTMENT OF CORRECTIONS,	:	
DIRECTOR A.T. WALL and	:	
R.I. PAROLE BOARD, CHAIRPERSON	:	
KENNETH WALKER	:	

DECISION

VAN COUYGHEN, J. This matter is before the Court on A.T. Wall, et al.'s (Respondents) motion to dismiss the application for post-conviction relief of Applicant Leroy Menard (Mr. Menard). For the reasons set forth herein, Respondents' motion to dismiss is granted. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-6.

I

Facts

Mr. Menard was convicted of first-degree robbery in 1994. Additional factual background of the robbery conviction may be found in State v. Menard, 669 A.2d 536 (R.I. 1996) (Menard I), in which the Rhode Island Supreme Court affirmed Mr. Menard's conviction. The factual background of that case is not pertinent to this matter.

Mr. Menard filed his first application for post-conviction relief in 1999, which was docketed in Newport County Superior Court as case number NM-1999-0049. Mr. Menard was represented by counsel for that application: first by court-appointed counsel and then by private counsel. See Menard v. State, No. NM-1999-0049, slip op. 1 (R.I. Super. June 7, 2002)

(Thompson, J.) (Menard II). Mr. Menard's first application for post-conviction relief was denied. Id. at 15.

This case represents Mr. Menard's second petition for post-conviction relief. The current controversy revolves around whether or not Mr. Menard is entitled to receive credit against his sentence for the time he spent at liberty while on parole. He also alleges that his due process rights were violated when the parole board failed to afford him a hearing when it eliminated the time he spent on parole from the time served on his sentence.

Pursuant to chapter 8 of title 13 of the Rhode Island General Laws, Mr. Menard has been released on parole five times, beginning in November of 2005 and ending in his most recent release in May of 2011.[1] Each time, his parole permit was revoked. Mr. Menard's application for post-conviction relief alleges that his sentence was unlawfully extended and recomputed by the inclusion of 1436 days served on parole.[2] According to Mr. Menard, by requiring him to serve the 1436 days, Respondents extended his sentence without authority to do so. Additionally, Mr. Menard argues that he should have received an administrative hearing prior to the determination that he would not receive credit toward his sentence for the 1436 days while on parole. Mr. Menard has requested that this Court order Respondents to cease extending his sentence, to restore the time spent on parole to the time served on his sentence, and to provide Mr. Menard with an administrative hearing.

[1] Mr. Menard attached all five parole contracts to his petition. See Pet., Ex. B.

[2] Specifically, Mr. Menard argues that Respondents "made an interpretive determination absent any legislative authority to do so . . . ." (Mr. Menard's Mem. of Law in Supp. of Pl.'s Post-Conviction Relief at 3, July 8, 2013.)

II

Procedural Posture

Upon receipt of Respondents' motion to dismiss, this Court duly notified Mr. Menard that it intended to dismiss his petition. In a letter dated July 3, 2013, this Court provided Mr. Menard with the legal basis for its opinion and invited a written response. On July 15, 2013, Mr. Menard provided his thirty-page response, which this Court reviewed. The motion to dismiss was argued on November 4, 2013, and all parties were given the opportunity to fully present their respective positions. After review of the arguments and papers filed, it is clear to this Court that no genuine issues of material fact exist, and that the motion to dismiss can be decided based upon Mr. Menard's petition and attached exhibits.

III

Standard of Review

Section 10-9.1-6, explicitly addresses the procedure for dismissal of a post-conviction relief application. Specifically, subsection (b) of that section provides that

> "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a genuine issue of material fact." Sec. 10-9.1-6(b).

Clearly, § 10-9.1-6(b) "permits a trial justice to dismiss an application whenever, based upon the record, the application, and the answer, he [or she] finds that no genuine issue of material fact

exists and the applicant is therefore not entitled to relief as a matter of law." Palmigiano v. State, 120 R.I. 402, 404, 387 A.2d 1382, 1384 (1978).

"[A] hearing justice is not obligated to conduct an evidentiary hearing in connection with an application for postconviction relief if there exists no genuine issue of material fact; however, the hearing justice must give the applicant an opportunity to reply to the hearing justice's proposed dismissal of the application." Perez v. State, 57 A.3d 677, 681 (R.I. 2013) (citing Toole v. State, 713 A.2d 1264 (R.I. 1998)). The opportunity to respond to a trial court's proposed dismissal of an application for post-conviction relief must be "meaningful," which means '"[t]he applicant must be accorded a reasonable amount of time to prepare a response to the court's proposed dismissal, 'regardless of the merits' of the application."' Campbell v. State, 56 A.3d 448, 457 (R.I. 2012) (quoting Mattatall v. State, 966 A.2d 125, 126 (R.I. 2009) (mem.) (citing Harris v. State, 973 A.2d 618, 619 (R.I. 2009) (mem.)).[3]

The rules of civil procedure are applicable to post-conviction relief applications. Palmigiano, 120 R.I. at 405 n.1, 387 A.2d at 1384 n.1. "The standard to be used in making this determination is that relied upon by the court in ruling on motions in civil cases brought pursuant to Super. R. Civ. P. 12(b)(6)." Id. at 404-05, 387 A.2d at 1384. '"The sole function of a motion to dismiss is to test the sufficiency of the complaint."' Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (quoting R.I. Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)).

In making its Rule 12(b)(6) determination, a court '"assumes the allegations contained in

[3] The Campbell Court also said that, although the appointment of counsel helps to make the opportunity to respond "meaningful," "'an indigent applicant for postconviction relief has the right to appointed counsel for his or her first application for postconviction relief.'" 56 A.3d at 458-59 (quoting Harris, 973 A.2d at 619); see also id. (holding that "to have a meaningful opportunity to reply prior to summary dismissal under § 10-9.1-6(b), an indigent, first-time applicant for post-conviction relief must be afforded counsel upon request"). Mr. Menard has filed a previous application for post-conviction relief.

the complaint to be true and views the facts in the light most favorable to the plaintiffs.'" Giuliano v. Pastina, 793 A.2d 1035, 1036 (R.I. 2002) (quoting Martin v. Howard, 784 A.2d 291, 297-98 (R.I. 2001)). The court may not look to matters outside the pleadings on a motion to dismiss, but, if the court does go outside the pleadings, it must automatically convert the motion into a motion for summary judgment with its distinct standard of review. See St. James Condo. Ass'n v. Lokey, 676 A.2d 1343, 1346 (R.I. 1996). However, a court considering a motion to dismiss under Rule 12(b)(6) may consider material attached to the complaint, which is "'deemed incorporated therein by reference.'" Multi-State Restoration, Inc. v. DWS Properties, LLC, 61 A.3d 414, 417 n.2 (R.I. 2013) (quoting Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721, 725–26 (R.I. 2003)).

Under Rhode Island's notice pleading standard, "[a]ll that is required is that the complaint give the opposing party fair and adequate notice of the type of claim being asserted." Haley v. Town of Lincoln, 611 A.2d 845, 848 (R.I. 1992). In particular, Super. R. Civ. P. 8(a) requires a pleading to include a "short and plain statement of the claim showing that the pleader is entitled to relief." Super. R. Civ. P. 8(a)(1). The pleading need not contain either "the precise legal theory" upon which a party's claim is based or "the ultimate facts that must be proven in order to succeed . . ." Haley, 611 A.2d at 848. Thus, "[t]he grant of a Rule 12(b)(6) motion to dismiss is appropriate 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009) (citations omitted) (internal quotation marks omitted).

IV

Analysis

A

Time Spent at Liberty upon Parole

"'Post-conviction relief is available to a defendant convicted of a crime who contends that his original conviction or sentence violated rights that the state or federal constitutions secured to him.'" Tassone v. State, 42 A.3d 1277, 1283 (R.I. 2012) (quoting Chapdelaine v. State, 32 A.3d 937, 941 (R.I. 2011)). The statute lists claims that a defendant may make via an application for post-conviction relief, which include:

> "[t]hat the . . . sentence was in violation of the constitution of the United States or the constitution or laws of this state," "[t]hat the sentence exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law" or "[t]hat his or her sentence has expired, his or her probation, parole, or conditional release unlawfully revoked, or he or she is otherwise unlawfully held in custody or other restraint." Sec. 10-9.1-1.

According to chapter 8 of title 13, the Parole Board may issue certain prisoners a "permit to be at liberty upon parole." G.L. 1956 § 13-8-9. Section 13-8-16 provides that such permits may be issued "upon any terms and conditions that the board may see fit in its discretion to prescribe, and the acceptance of the permit by the prisoner shall constitute an agreement on the part of the prisoner to abide by and conform to those terms and conditions."

Section 13-8-19 provides that when that permit is revoked, "in accordance with the provisions of § 13-8-18.1 [providing for a preliminary parole violation hearing] the parole board shall order the prisoner to be returned to the adult correctional institutions (ACI) . . . " Sec. 13-8-19(a). Importantly, subsection (b) explicitly provides that "[t]he time between the release of the prisoner under the permit and the prisoner's return to the (ACI) . . . under order of the board shall

not be considered as any part of the prisoner's original sentence." Sec. 13-8-19(b).

In Curtis v. State, 996 A.2d 601, 603-05 (R.I. 2010), a prisoner who was released on a parole permit sought to have his time spent as a parolee on community confinement counted as part of his sentence. With respect to the prisoner's request, the Rhode Island Supreme Court first explained that "[s]ection 13-8-19(b) generally precludes a prisoner from receiving credit toward his or her full sentence for time spent on parole." Id. at 605. The parolee in Curtis had also agreed to the terms of his permit, which included the fact that if he was returned to the place of his original confinement, the time between his release and reincarceration would not be considered as part of his sentence.[4] Id. at 605-06. The Court further stated that the statutory scheme is clear that the parole board has '"authority to prescribe 'any terms and conditions' that it 'may see fit in its discretion,"' and "'the acceptance of the permit by the prisoner shall constitute an agreement on [his] part . . . to abide by and conform to those terms and conditions.'" Id. at 605 (quoting § 13-8-16(a)). Therefore, both the express terms of the permit and the provisions of § 13-8-19(b) precluded counting the time spent on community confinement as part of the original sentence. Id.; see also Lee v. Gough, 86 R.I. 23, 32, 133 A.2d 779, 783-84 (1957) (finding "in accordance with chap. 617 [regarding parole] . . . and the terms of the permit, [a defendant] was required to be detained in the place of his confinement subject to the terms of

[4] Before his release from prison, Curtis signed a similar document to that which Mr. Menard signed, setting forth the terms and conditions of his parole. Id. at 603. It provided the following:

> "I agree that when this permit has been revoked as herein provided, or there is probable cause for such revocation, the Parole Board may issue an order authorizing my arrest an[d] my return to the place of confinement pending a hearing, and that I shall be detained therein according to the terms of my original sentence; and **in computing the period of my confinement, the time between my release upon said permit and my return to the place of my original confinement shall not be considered as any part of the term of my original sentence.**" Id. (Emphasis added.)

his original sentence without credit for the period of time between his release upon said permit and his return to the place of such confinement.”).

According to Mr. Menard’s application for post-conviction relief, his sentence was illegally recomputed and extended when he was required to serve 1436 days, which he had spent while on parole. Section 13-8-19(b) expressly provides the opposite, however. It provides that the time between release and return to the ACI shall not count toward Mr. Menard’s sentence. See § 13-8-19(b). According to the terms of that section, his original sentence was not recomputed but instead remained constant; the days on parole simply did not count towards the completion of sentence. See id.; Curtis, 996 A.2d at 605. Thus, the clear and unambiguous language provided in § 13-8-19(b) dictates that Mr. Menard is not entitled to receive credit against his sentence for the time spent on parole. See Curtis, 996 A.2d at 603.

In addition to the clear language of § 13-8-19(b), Mr. Menard also signed five parole permits which prohibit credit against his sentence for time spent on parole if his permit was revoked. Mr. Menard accepted those terms and conditions when he signed the permits and was permitted to be at liberty.[5] It is well settled that there exists no constitutional right to parole in Rhode Island. Curtis 996 A.2d at 607.[6] See also Greenholtz v. Inmates of Nebraska Penal and Corr. Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L.Ed.2d 668 (1979). “[P]arole is a privilege and not a right of the prisoner.” Curtis 996 A.2d at 607 (citing Bishop v. State, 667 A.2d 275, 278) (R.I. 1995). The parole board may attach terms and conditions, as it sees fit, when allowing a prisoner to be released on parole. See Morrissey v. Brewer, 408 U.S. 471, 496 (1972) (“The

[5] Mr. Menard attached the permits to his petition, and, thus, this Court may consider them in deciding Respondents’ motion to dismiss.

[6] Although Mr. Menard contests the application of the parole contracts, he was put on notice when he signed all five parole agreements, which explicitly stated that he would not receive credit for the time he was on parole. See Curtis, 996 A.2d at 606.

parole boards have broad discretion in formulating and imposing parole conditions.") See Curtis, 996 A.2d at 606; Bishop, 667 A.2d at 278. Thus, it is clear that Mr. Menard is bound by the terms and conditions of the five parole agreements. Curtis, 996 A.2d at 606 (citing Rondoni v. Langlois, 89 R.I. 373, 376, 153 A.2d 163, 164–65 (1959) (finding that a defendant was bound by the conditions of his parole agreement)). It is disingenuous for Mr. Menard to now argue that he should be excused from said terms and conditions to which he freely accepted when placed on parole.

For the reasons stated herein, this Court finds that it is clear, beyond a reasonable doubt, that Mr. Menard's claim that he should receive credit against his sentence for time spent on parole is without merit.

B

Notice and Hearing

Primarily, it should be noted that Mr. Menard does not contest the accuracy of the number of days he was on parole. Mr. Menard agrees that 1436 days is accurate and does not contest that the hearing that resulted in his revocation of parole violated his due process rights. Rather, Mr. Menard argues that he was not given notice and a hearing prior to the illegal "recomputing" of his sentence, thus violating his due process rights under § 13-8-18.1, the Rhode Island Constitution, and the United States Constitution.

Section 13-8-18 provides for revocation of a parole permit and states that

> "[t]he parole board may, by a majority vote of all of its members, revoke, in accordance with the provisions of § 13-8-18.1, any permit issued by it to any prisoner under the provisions of this chapter . . . whenever it shall appear to the board that the prisoner has violated any of the terms or conditions of his or her permit . . . , or has during the period of his or her parole violated any state laws."

The "revocation of parole is not part of the criminal-prosecution process," so a parolee "is

therefore not entitled to the full panoply of due-process rights." Gaze v. State, 521 A.2d 125, 127 (R.I. 1987). However, "it is acknowledged that revocation proceedings must accord the parolee a minimum degree of due-process protection." Id.; see also Lyons v. State, 43 A.3d 62, 67 (R.I. 2012) ("'[T]here is no 'constitutional or inherent right' to parole,'" so "'[d]ue process only entitles the parole applicant an opportunity to be heard and to be informed in what respects the applicant falls short of qualifying for parole[ ]'" (quoting Estrada v. Walker, 743 A.2d 1026, 1031 (R.I. 1999)); In re Lamarine, 527 A.2d 1133, 1135 (R.I. 1987); State v. DeRoche, 120 R.I. 523, 389 A.2d 1229 (1978). "Moreover, [Respondents are] not required to prove a violation beyond a reasonable doubt; rather, the violation need only be established by reasonably satisfactory evidence." State v. Bourdeau, 448 A.2d 1247, 1249 (R.I. 1982).

However, Mr. Menard is not arguing that he was denied due process in the revocation of his parole permit. Mr. Menard contends that he was denied due process in the purported "recalculation" of his sentence by failing to provide him with credit for time spent on parole. "The Due Process Clause applies when government action deprives a person of liberty or property . . . ." Mosby v. Devine, 851 A.2d 1031, 1037 (R.I. 2004) (citing Greenholtz, 442 U.S. at 7. "Protected liberty or property interests 'may arise from two sources—the Due Process Clause itself and the laws of the States.'" Id. (quoting DiCiantis v. Wall, 795 A.2d 1121, 1126 (R.I. 2002)). In determining whether a person has a protected liberty or property interest, "'[a court] must look not to the weight but to the nature of the interest at stake.'" Id. (quoting Greenholtz, 442 U.S. at 7) (internal quotation marks omitted). "'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Id. (quoting Lynch v. Gontarz, 120 R.I. 149, 157, 386 A.2d 184, 188 (1978)). According

to the Rhode Island Supreme Court, "[o]nly when [it] conclude[s] that a constitutionally protected interest has been infringed '[will] [it] inquire whether the procedures afforded were constitutionally sufficient.'" Id. at 1037-38 (fourth alteration in original) (quoting DiCiantis, 795 A.2d at 1126) (internal quotation marks omitted)).

It is well settled that:

> "A protected state-created liberty interest within the meaning of the due process clause of the Fourteenth Amendment arises only when a state places substantive limits on official discretion, which require that a particular 'outcome be reached upon a finding that the relevant criteria have been met.'" Bishop, 667 A.2d at 278 (quoting Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 462 (1989)).

In Bishop, our Supreme Court found that a prisoner did not have a protected liberty interest in the prison-inmate classification system because the statute governing the classification system gave the Department of Corrections "total and exclusive final discretion." 667 A.2d at 277. The Court noted that "Rhode Island ha[d] not enacted any statute or regulation that g[ave] rise to any statutory inmate liberty interest in its prison-inmate classification system." Id. at 278. Noting the "'broad administrative and discretionary authority"' that prison officials have over the institutions under their management and the fact that "'lawfully incarcerated persons retain only a narrow range of protected liberty interests,'" the Bishop Court held that no liberty interest existed. Id. (quoting Hewitt v. Helms, 459 U.S. 460, 467-68 (1983)) (internal quotation marks omitted). It also explained the discretion given to prison officials, stating that "'these [previous] decisions require that [a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight.'" Id. (quoting Hewitt, 459 U.S. at 467-68) (internal quotation

marks omitted)).

Mr. Menard's procedural due process claim must fail. First, for the reasons discussed above, he did not have a legal entitlement to the 1436 days that he claims he forfeited without due process of law. See § 13-8-19(b); Curtis, 996 A.2d at 605-06. Rhode Island law and the terms and conditions to which Mr. Menard agreed both provide that the time between his release and his return to the ACI would not be counted as part of his original sentence; therefore, there was no legal entitlement that required procedural due process protections. See § 13-8-19(b); Curtis, 996 A.2d at 605-06; Mosby, 851 A.2d at 1037. Even in Bishop, 667 A.2d at 277-78, where a state statute gave final discretion to determine a prisoner's classification to the director of the Department of Corrections, there was no liberty interest in the classification system. Here, the state statute does not allow for a different outcome: the statute explicitly provides that the time spent on parole is not included in the sentence. See § 13-8-19(b).

Furthermore, any "deprivation" merely flowed administratively from the revocation of his parole. The due process protections relative to the revocation of his parole were satisfied at the hearing that resulted in the revocation of his permit. Mr. Menard had no entitlement to a hearing for what he characterizes as a recalculation of his sentence but is, in fact, only the resumption of the original sentence as provided by law and the very terms and conditions of his permit. In Bishop, 667 A.2d at 279, the Court stated that an applicant for post-conviction relief could not "piggyback his parole liberty interest onto the prison classification system," arguing that a proper parole hearing and the provision of the parole board's reasons for denial were all that was required. Id. (citing State v. Tillinghast, 609 A.2d 217 (R.I. 1992)). Similarly, Mr. Menard was provided with the requisite process for the revocation of his parole. Thus, no additional process was due, requiring Mr. Menard to serve the days that he spent on parole, to

which he had no legal entitlement. See Mosby, 851 A.2d at 1037.

Additionally, Mr. Menard argues that he was not provided written notice of the "recalculation." Mr. Menard fails to acknowledge that the first paragraph of each permit contained the expiration date of his sentence. Each permit reflects a different expiration date consistent with the previous revocation of parole. It is disingenuous for Mr. Menard to allege that he never received notice of the extension of the expiration for his sentence when the expiration date is explicitly set forth on each permit. Each permit contains the days remaining on Mr. Menard's sentence, which includes the addition of the time spent at liberty upon his previous parole prior to revocation.

V

Conclusion

This Court is satisfied there are no genuine issues of material fact necessitating an evidentiary hearing. Mr. Menard was advised of the Court's intent to grant the within motion to dismiss and has provided a written response which was considered by this Court. Mr. Menard was also allowed to present his argument in open court. After considering his arguments, this Court finds that it is clear, beyond a reasonable doubt, that Mr. Menard is not entitled to relief under any set of facts that could be proven to support his claim. Therefore, Mr. Menard's petition for post-conviction relief is dismissed. Counsel for Respondents shall present the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Leroy Menard v. R.I. Department of Corrections, et al.**
CASE NO:	**NM-13-110**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**May 12, 2014**
JUSTICE/MAGISTRATE:	**Van Couyghen, J.**
ATTORNEYS:	
For Plaintiff:	**Leroy Menard, pro se**
For Defendant:	**John E. Corrigan, Esq.**