STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: September 19, 2014]

STATE OF RHODE ISLAND	:	
	:	**C.A. No. P1-94-1478A**
v.	:	
HECTOR L. JAIMAN	:	

DECISION

MCBURNEY, M. Hector L. Jaiman (Defendant) brings this Motion to Compel Compliance with State Law. He argues that the Parole Board violated his due process rights during his parole revocation hearing. This Court derives its jurisdiction from G.L. 1956 § 8-2-15. For the reasons set forth below, this Court denies Defendant's motion.

I

Facts and Travel

On March 3, 2000, Defendant was convicted of first degree murder and sentenced to a term of life imprisonment. Subsequently, on February 11, 2013, Defendant was paroled to a halfway house, the Phoenix House program, in Rhode Island. On April 23, 2013, Defendant was arrested as a parole violator and given notice of his violation of parole the following day. Specifically, three allegations were made against him that resulted in his discharge from the treatment program: (1) tardiness from passes, deviation from trips, and returning with money; (2) letters written that implied the sale of narcotics to female residents at the halfway house; and (3) unauthorized cell phone possession and use.

Defendant requested a preliminary hearing regarding the parole violation. (Def.'s Ex. A, Preliminary Notice of Parole Violation, Apr. 24, 2013.) The preliminary hearing was scheduled

on May 6, 2013 to determine whether there was probable cause to believe that Defendant had violated the conditions of his release. (Def.'s Ex. B, Notice of Preliminary Hearing, Apr. 29, 2013.) Specifically, the purpose of the hearing was to determine whether Defendant violated condition number nineteen—successful completion of the Phoenix House Program.

At the hearing, three witnesses were presented: Parole Officer Greg Williams (Parole Officer); Colleen Thompson, Defendant's Primary Counselor (Counselor) at the Phoenix House; and Fred M. Pierce, Clinical Supervisor of the Phoenix House (Clinical Supervisor). (Def.'s Ex. R, Probable Cause Hearing Summary (Ex. R), at 1.) The testimony revealed that two female clients gave notes to the staff that allegedly were written by the Defendant, and that the staff gave the letters to the Counselor. Id. at 4. The Probable Cause Hearing Summary states: "For the record the notes say that a client wanted to meet up with a female client on the outside and gives a number for the female client to call. It also says that the female client told the writer that she likes dope and the writer has that for them and 'I'll hook you up for free.'" Id. At that point, the hearing officer interjected and asked that the female clients not be identified by name and the Defendant's attorney agreed. Id. The testimony also revealed that the Defendant never applied for a cell phone privilege, that he had a cellphone without permission, and that such a violation is a discharging offense. (Ex. R at 5, 7.) Finally, the testimony revealed that when returning from trips, the Defendant would check in late into the halfway house. Id. at 5.

There was also conflicting testimony regarding the reasons for the Defendant's discharge. The Counselor stated that the letters triggered the discharge and that the Defendant would not have been discharged if it had not been for the letters. Id. During closing argument, however, the Parole Officer stated that the Defendant was discharged for the "totality of his behavior at the

Phoenix house, not just the letters . . . ." Id. at 9. Following the hearing, the Defendant filed the instant Motion to Compel Compliance with State Law.

II

Standard of Review

"It is well established that 'a probation-revocation hearing is not part of the criminal-prosecution process and thus is not entitled to the full panoply of due-process rights.'" State v. Lawrence, 658 A.2d 890, 892 (R.I. 1995) (citing In re Lamarine, 527 A.2d 1133, 1135 (R.I. 1987)); see State v. Salvail, 117 R.I. 1, 6, 362 A.2d 135, 138 (1976) (stating that the "'full panoply of rights' applicable to a defendant at a criminal proceeding does not apply at a violation or revocation hearing . . . .") (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)). The reason for this general rule is that "'[p]arole arises after the end of the criminal prosecution, including imposition of sentence. . . . Revocation 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.'" Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (quoting Morrissey, 408 U.S. at 480).

Nevertheless, parolees must be afforded "a minimum degree of due-process protection" at parole revocation hearings. Gaze v. State, 521 A.2d 125, 127 (R.I. 1987). In Morrissey, the seminal case addressing due process rights in the context of a parole revocation hearing, the United States Supreme Court explained that due process is a flexible concept requiring that the alleged violator be given an "informal hearing structured to assure that the finding of a parole . . . violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's . . . behavior." Morrissey, 408 U.S. at 484. Thus, "[t]he defendant in a [parole] violation hearing is entitled to the minimum due process protections of

'notice of the hearing, notice of the claimed violation, the opportunity to be heard and present evidence [on] defendant's behalf, and the right to confront and cross-examine the witnesses against defendant.'" State v. Pompey, 934 A.2d 210, 214 (R.I. 2007) (quoting State v. Bernard, 925 A.2d 936, 938-39 (R.I. 2007)).

III

Analysis

A

Issues Presented

This case presents several issues. A threshold issue is whether this Court has jurisdiction over matters decided by the Parole Board. Assuming that this Court has jurisdiction, Defendant argues that the Parole Board did not hold a hearing within ten days of the notification of violation of parole, in violation of G.L. 1956 § 13-8-18.1(d). He also maintains that the Parole Board denied him the ability to confront and cross-examine witnesses against him in violation of § 13-8-18.1(b)(3). Finally, Defendant claims that the preliminary hearing officer previously held a direct and supervisory position in the parole program when Defendant was on parole, in violation of § 13-8-18.1(a), which requires that the hearing officer not have had any supervisory involvement over the alleged violator.

B

Jurisdiction to Review Parole Board Decisions

The Rhode Island Supreme Court has implemented a "'hands-off' policy which has traditionally been invoked when dealing with Parole Board proceedings and [an] overall reluctance to interfere with what must necessarily be highly discretionary decisions." State v. Ouimette, 117 R.I. 361, 363, 367 A.2d 704, 706 (1976) (citing State v. Fazzano, 96 R.I. 472, 194

A.2d 680 (1963); Rondoni v. Langlois, 89 R.I. 373, 153 A.2d 163 (1959)); see also United States v. DiRusso, 548 F.2d 372, 374 (1st Cir. 1976) (Judges "have no jurisdiction to supervise, control, or second guess the decisions of the Parole Commission."); 59 Am. Jur. 2d Pardon and Parole § 112 (2d ed. 2012) ("Decisions made by a parole authority are not to be disturbed by the courts absent a determination that the decision is arbitrary and capricious or is an abuse of the discretion of the agency.").

Nevertheless, "it is acknowledged that revocation proceedings must accord the parolee a minimum degree of due-process protection." Gaze, 521 A.2d at 127 (citing Morrissey, 408 U.S. at 471). The Rhode Island Supreme Court "has consistently recognized basic due-process requirements, including the probationer's right to cross-examine his accusers at the revocation hearing." Id. (citing State v. Potter, 423 A.2d 67 (R.I. 1980); State v. Marrapese, 122 R.I. 494, 409 A.2d 544 (1979); State v. DeRoche, 120 R.I. 523, 389 A.2d 1229 (1978)); see generally Neil P. Cohen, The Law of Probation & Parole § 29:23 (2d ed. 1999) ("Appeal is generally permitted to challenge constitutional and statutory violations by the parole board."). Thus, this Court has jurisdiction to undertake a limited review to determine whether the Defendant was accorded a "minimum degree of due-process protection." See Gaze, 521 A.2d at 127.

C

Due Process Protections

1

Timely Preliminary Hearing

First, Defendant argues that notice of the parole violation was served to him on April 24, 2013 and the preliminary hearing was scheduled twelve days later on May 6, 2014, in violation of § 13-8-18.1. The Rhode Island General Laws provide that parolees are entitled to a

preliminary hearing regarding an alleged parole violation within ten days of service of the notice of violation. Sec. 13-8-18.1(d). The statute states:

> "The preliminary hearing shall take place no later than ten (10) days after service of notice set forth in subsection (b). A preliminary hearing may be postponed beyond the ten (10) day time limit for good cause at the request of either party, but may not be postponed at the request of the state for more than five (5) additional days. The parole revocation charges shall be dismissed with prejudice if a preliminary hearing is not conducted within the time period established by this paragraph, not including any delay directly attributed to a postponement requested by the alleged violator." Sec. 13-8-18.1(d).

The statute clearly and unambiguously states that the hearing must be held no later than ten days after service of notice. Nevertheless, "statutory requirements containing specific time limits are often not strictly enforced by the courts." Cohen, supra, at § 25:15; see United States v. Williams, 558 F.2d 224, 228 (5th Cir. 1977) (deferral of a preliminary hearing did not deprive defendant of his due process rights); United States v. Companion, 545 F.2d 308, 311-12 (2d Cir. 1976) (87-day delay not unreasonable because of "remoteness of the defendant in Arizona from the place of sentencing, Vermont . . . [because the defendant] did not assert his right to a speedy hearing until the delay was already a matter of historical fact . . . [and because defendant] has asserted no prejudice from the delay here); Hamill v. Ferguson, 937 F. Supp. 1517 (D. Wyo. 1996) (forty-three day delay between arrest in one jurisdiction and preliminary hearing in the other did not violate due process because such a delay was not unreasonable). When a defendant raises the issue of a time limit violation, courts "generally take the approach of balancing the reasonableness of the delay against the harm caused by the delay. They look at such factors at the length of and reason for delay, the alleged violator's efforts to secure a timely hearing, and the prejudice caused by the delay." Cohen, supra, at § 25:15.

In this case, the exhibits submitted by the Defendant indicate that the Defendant was notified of the violation of probation on April 24, 2013. (Ex. A.) The preliminary revocation hearing was scheduled on May 6, 2013, twelve days after the notice. (Ex. B.) Although a letter from Defendant to the hearing officer, dated May 3, 2013, indicates that Defendant was aware that the scheduled date was not within ten days and that he had not requested a postponement at that time, no evidence has been presented that the two-day delay caused harm to the Defendant. (Ex. C1.) Furthermore, an interoffice memorandum from the preliminary hearing officer to the Chairperson of the Rhode Parole Board states:

> "It is this Hearing Officer's understanding that at least part of the delay with regard to this hearing was 'directly attributed' to the alleged violator in that in one instance (on 5/6/13) he informed the previously assigned Hearing Officer . . . that he wanted a continuance as he needed more time in order to retain counsel; and in another instance (on 5/12/13) he wrote to Dr. Walker requesting that [the previously assigned Hearing Officer] be removed as the Hearing Officer based upon the fact that she had reported to SIU that [Defendant] had placed a third-party call to her from the prison resulting in his receiving a 'booking' and being placed in the Segregation Unit. Therefore, the allegations should not be dismissed with prejudice at this time . . . ." (Ex. E) (Emphasis in the original).

That memo also states that the previous hearing officer had to coordinate her schedule with Defendant's attorney to arrive at a mutually convenient date and time for the hearing "and that [Defendant's] attorney had in effect waived the 10 day period on his behalf." Id. Therefore, this Court finds that a two-day delay is not unreasonable nor is there evidence that the delay prejudiced the Defendant. See Cohen, supra, at § 25:15. Although the statute clearly mandates that the hearing be held within ten days of notice of violation of parole, this Court holds that the two-day delay did not violate Defendant's due process rights. See id.

2

Right to Confront and Cross-Examine Witnesses

Next, the Defendant argues that his parole violation resulted from "allegations of purportedly offering to provide drugs to unidentified and missing witnesses." He claims that had it not been for these allegations, there would not have been an arrest order. Thus, he maintains that "failing to afford, upon request, these critical witnesses" violated his right to confront and cross-examine witnesses. At the same time, he concedes that the Parole Board "did not find [him] guilty [of offering to provide drugs] but instead chose to violate [him] for failure to complete program requirements based on minor infractions . . . ."

Section 13-8-18.1(b) provides a defendant with certain rights at a parole revocation hearing, including the right to appear and speak on his or her own behalf, the right to call witnesses and present evidence, the right to confront and cross-examine witnesses, and the right to retain counsel. Specifically, § 13-8-18.1(b)(3) states that:

> "The alleged violator shall, within five (5) days of the detention, in Rhode Island be given written notice of the time, place and purpose of the preliminary hearing . . . The notice shall also inform the alleged violator of the following rights in connection with the preliminary hearing: . . . (3) [t]he right to confront and cross-examine the witnesses against him/her, unless the hearing officer finds on the record that a witness may be subjected to risk of harm if his or her identity is revealed . . . ." (Emphasis added).

Furthermore, the Rhode Island Supreme Court has stated that "hearsay may be admitted on issues central to determining whether a violation has been committed only if the hearing justice first finds that 'there is good cause for denying confrontation and/or cross-examination.'" Pompey, 934 A.2d at 215 (quoting Bernard, 925 A.2d at 939). Moreover, "[a] probation-revocation hearing is an informal proceeding, and strict application of the rules of evidence is not required." State v. Casiano, 667 A.2d 1233, 1239 (R.I. 1995) (citing State v. Bourdeau, 448

A.2d 1247, 1249 (R.I. 1982); State v. Bettencourt, 112 R.I. 706, 710, 315 A.2d 53, 55 (1974)); see also DeRoche, 120 R.I. at 529, 389 A.2d at 1232 (stating that "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." (Citing California v. Green, 399 U.S. 149, 155-56 (1970)).

As an initial matter, the Defendant did not raise the issue at the revocation hearing that he could not confront the two women who allegedly gave notes to the staff indicating that the Defendant allegedly attempted to sell them drugs. See generally Commonwealth of Mass., Dep't of Pub. Welfare v. Sec'y of Agric., 984 F.2d 514, 524 (1st Cir. 1993) (explaining that "courts will not entertain an issue that the parties failed to raise in the proper administrative venue unless the issue is jurisdictional in nature or some other compelling reason exists"); State v. Hazard, 785 A.2d 1111, 1115 (R.I. 2001) (stating that "[u]nder [Rhode Island's] well-settled raise-or-waive rule, failure to make an argument [at a proceeding below] waives the right to raise that argument on appeal) (citing State v. Donato, 592 A.2d 140, 141-42 (R.I. 1991)). Also, the Defendant has not presented any evidence that he requested to cross-examine these witnesses.

Moreover, when testimony regarding the letters began, the hearing officer asked that the witnesses not be identified by name. (Exhibit R at 4.) The Defendant's attorney even stated that he did not wish to know them by name. Id. Thus, it could be inferred that the hearing officer found that the witnesses might be subject to harm if their identities were revealed. See § 13-8-18.1(b)(3) (stating that a defendant has "the right to confront and cross-examine the witnesses against him/her, unless the hearing officer finds on the record that a witness may be subjected to risk of harm if his or her identity is revealed"); Envtl. Scientific Corp. v. Durfee, 621 A.2d 200,

203 (R.I. 1993) (stating that "[t]he weight to be given to any evidence rests with the sound discretion of the hearing officer").

3

Right to an Unbiased Hearing Officer

Finally, the Defendant argues that the hearing officer, Lynne Corry, had participated in a meeting with Defendant's Parole Officer and "had supervisory input during that meeting." Defendant also claims that this hearing officer admitted that she is not a parole hearing officer and has no training in conducting preliminary hearings regarding alleged parole violations. The Defendant cites to a letter written to him by this hearing officer dated October 25, 2013 (Ex. L) in support of this contention.

Section 13-8-18.1(a) requires that the preliminary parole revocation hearing be held before an unbiased hearing officer. Specifically, this provision states: "Such hearing officer shall not have had any prior supervisory involvement over the alleged violator." Sec. 13-8-18.1(a). Here, Defendant merely makes a general allegation that the hearing officer had supervisory input during the meeting. Such general allegations, without further evidence or explanations, are not persuasive.

Moreover, as a general rule, "the preliminary revocation hearing officer is frequently an administrative official, often employed by the parole board or the correctional authorities, and occasionally a member of the parole board." Cohen, supra, at § 25:17.

> "[R]ather than require the hearing officer to be a judge or even, as is required for a final revocation hearing, a 'neutral and detached' official, the Morrissey Court approved the use of administrative officials 'such as a parole officer other than the one who has made the report of parole violations or has recommended revocation.' The parole officer directly involved with the parolee is disqualified as lacking sufficient objectivity." Id.

Here, the hearing officer's role at the Rhode Island Department of Corrections was to supervise Providence Probation and Parole. (Ex. L, Letter from hearing officer to Defendant, Oct. 25, 2013.) No evidence has been presented that she made the report of parole violations or recommended revocation. In fact, at the preliminary revocation hearing, it was established that Parole Officer Greg Williams; Colleen Thompson, Defendant's Primary Counselor at the Phoenix House; and Fred M. Pierce, Clinical Supervisor of the Phoenix House, made those determinations. (Ex. R at 1.) The fact that the hearing officer admitted in the letter to the Defendant that she is not a parole hearing officer is not dispositive of the issue of whether she could have presided over the hearing. See Cohen, supra, at § 25:17. No persuasive evidence has been presented that the hearing officer held a supervisory role over the Defendant or recommended to revoke his parole. Therefore, the hearing officer did not violate Defendant's due process rights by presiding over the hearing. See id.

IV

Conclusion

In conclusion, this Court has jurisdiction to review the Parole Board's decision. The review is limited to determining whether Defendant was given minimum due process protections at the preliminary parole revocation hearing. Secondly, this Court finds that there is no violation of § 13-8-18.1(d), which requires that the preliminary hearing be held within ten days of the violation notice, because Defendant has not shown that he was harmed by the two-day delay. Third, Defendant's right to cross-examine witnesses was not violated because that issue was not raised at the hearing and because it could be inferred that the hearing officer found that the witnesses might be subject to harm if their identities were revealed. Finally, no persuasive evidence has been presented to this Court that the hearing officer had prior supervisory

involvement over the Defendant. For these reasons, this Court denies the Defendant's motion. Counsel shall present the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	State of Rhode Island v. Hector L. Jaiman
CASE NO:	P1-94-1478A
COURT:	Providence County Superior Court
DATE DECISION FILED:	September 19, 2014
JUSTICE/MAGISTRATE:	Magistrate John F. McBurney III

ATTORNEYS:

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