

RENDERED: MARCH 31, 2017; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001878-MR

DAVID WAYNE BAILEY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 15-CI-00477

SHANNON JONES, CHAIRMAN,
KENTUCKY PAROLE BOARD,
JUSTICE AND PUBLIC SAFETY
CABINET

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, DIXON AND D. LAMBERT, JUDGES.

DIXON, JUDGE: David Wayne Bailey (Bailey) brings this *pro se* appeal of an order of the Franklin Circuit Court dismissing his appeal from a post-incarceration supervision revocation hearing. He argues that he was entitled to counsel at his

final hearing. Because we determine that Bailey was indeed entitled to counsel under KRS¹ 31.110(2)(a), we reverse and remand.

Facts

Bailey was convicted of sexual abuse in the first degree and sentenced to five years' imprisonment. He was released from custody but remained subject to post-incarceration supervision,² in connection with the Sex Offender Treatment Program (SOTP). He enrolled in SOTP but became "sarcastic[] and combative[]" during a group session. Two employees of SOTP determined that Bailey was not sufficiently taking responsibility for his actions, and they dismissed him from the program. Bailey, by contrast, argues that he was terminated because one employee of SOTP disagreed with his views on abortion, which he had provided during the group session.

The Parole Board then revoked Bailey's post-incarceration supervision due to his failure to complete SOTP. Though Bailey admits that he had counsel during his preliminary revocation hearing, he stated that he was not provided with counsel during his final revocation hearing.³ His administrative

¹ Kentucky Revised Statutes.

² Bailey repeatedly states that he was granted parole, and Jones states that Bailey was on "Sex Offender Conditional Discharge." However, our review of the record reveals that Bailey was actually on post-incarceration supervision. *See generally Jones v. Commonwealth*, 319 S.W.3d 295, 297-98 (Ky. 2010) (discussing the difference between post-incarceration supervision and conditional discharge).

³ The court was not provided with a record of either the preliminary or final revocation hearing. However, Jones appears to concede in her brief that Bailey was denied counsel at his final revocation hearing.

request for reconsideration was denied. He then filed this action in the Franklin Circuit Court. The circuit court dismissed Bailey's action, finding that Bailey's due process rights had not been violated. This appeal follows.

Analysis

Bailey made five arguments before the circuit court: 1) he was denied counsel at his final revocation hearing; 2) he was not permitted to provide mitigating factors at his revocation hearing; 3) the parole board abused its discretion when it denied his release; 4) testimony concerning his state of mind presented at the hearing was not authenticated;⁴ and 5) he was denied his right to call witnesses at his final revocation hearing. To the extent that Bailey has made any other arguments to this Court that were not raised below, we decline to address them. "It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011) (internal citation omitted). "[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). Furthermore, it appears that Bailey failed to make any argument to the circuit court regarding a First Amendment retaliation claim, and we decline to address those arguments now.⁵ "Proceeding *pro se* does not provide one with 'a license not to comply with

⁴ Bailey has not raised this argument on appeal, and we therefore assume that he has abandoned it. See *Shelby Motor Co. v. Quire*, 246 S.W.3d 443, 443-44 (Ky. 2007).

⁵ Jones and Bailey both state to this Court that Bailey made a retaliation claim below. Bailey made arguments to the circuit court in two separate documents. In the first document, entitled

relevant rules of procedural and substantive law.’” *Smith v. Bear, Inc.*, 419 S.W.3d 49, 55 (Ky. App. 2013) (quoting *Faretta v. California*, 422 U.S. 806, 835 n. 46, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975)).

Bailey concedes that he was provided counsel during his preliminary post-incarceration supervision revocation hearing. He argues, however, that he should also have been provided counsel during his final revocation hearing.

Preliminarily, we deem it necessary to engage in some discussion of regulations concerning preliminary and final revocation hearings for post-incarceration supervision for sex offenders.

The United States Supreme Court has held in [*Gagnon v. Scarpelli*, 411 U.S. 778, 781-82, 93 S.Ct. 1756, 1759, 36 L.Ed.2d 656 \(1973\)](#), that a parolee accused of having violated his parole agreement is entitled

to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.

“BRIEF IN SUPPORT OF PETITION TO ISSUE WRIT OF MANDAMUS . . .”, Bailey cites the First Amendment but does not make any arguments concerning his termination from SOTP as a result of his religious beliefs. In the second document, entitled “DECLARATION IN SUPPORT OF PETITION TO ISSUE WRIT OF MANDAMUS”, Bailey provides numerous facts surrounding his termination from SOTP. However, Bailey at no point stated to the trial court that he was bringing a retaliation claim, nor did he make any arguments pursuant to that claim. Indeed, his statements concerning his termination from SOTP are directly relevant to his argument that he should have been provided counsel at his final revocation hearing. Because Bailey may not raise a claim for the first time to this Court, we decline to address that issue here.

Moreover, according to the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972), the final hearing must 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, . . . and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

In addition, *Gagnon* makes clear that the parolee has the right to be represented by counsel if the case involves significant issues of either guilt or mitigation. *Id.*, 411 U.S. at 790, 93 S. Ct. at 1764.

Pursuant to the guidelines in *Gagnon*, Kentucky Administrative Regulations (KAR) regarding post-incarceration supervision revocation hearings for sexual offenders require a two-step process. The preliminary post-incarceration supervision revocation hearings for sexual offenders are conducted before an administrative law judge (ALJ). 501 KAR 1:070 § 1(5). At the preliminary hearing, “the offender shall present all evidence the offender desires to make part of the administrative record.” 501 KAR 1:070 § 1(4)(c). Witnesses at that hearing also may give testimony, but must do so under oath and should be available for cross-examination, unless there is good cause to prevent it. 501 KAR 1:070 §

1(5)(b). “The probation and parole officer shall present evidence first and the offender shall be given the opportunity to present evidence in defense or mitigation.” 501 KAR 1:070 § 1(5)(e). After the preliminary hearing, the ALJ must make a determination as to whether probable cause exists to believe the offender committed a violation of his post-incarceration supervision. 501 KAR 1:070 § 1(6).

If the ALJ determines that probable cause exists, the Parole Board issues a warrant to bring the offender before the board for a final hearing. 501 KAR 1:070 § 2(1)(a). At the final revocation hearing, “[t]he Parole Board shall determine what action should be taken concerning the revocation of sex offender postincarceration supervision and return of the offender as a sex offender postincarceration supervision violator.” 501 KAR 1:070 § 3(1). The board may consider new evidence submitted by the defendant if it is given in writing and in advance of the final revocation hearing, or at a special hearing if the defendant so requests. 501 KAR 1:070 § 3(3).

Under 501 KAR 1:070 § 1(11), offenders are currently required to be provided with counsel during their preliminary revocation hearings:

Any party appearing before an [ALJ] of the Kentucky Parole Board may be represented by counsel if he so desires. The party may have, upon motion thereof, a continuance for the purpose of obtaining the presence of counsel; except that chronic appearance for hearing without counsel by an offender who is capable of

retaining counsel may be deemed an implicit waiver of counsel.

(Emphasis added.) However, it appears that 501 KAR 1:070 § 3 does not require the appointment of counsel for final revocation hearings in cases involving post-incarceration supervision.

The Kentucky Department of Corrections has also addressed the matter of counsel in the Corrections Policies and Procedures (CPP), promulgated pursuant to 501 KAR 6:270:

It is the policy of the Department of Corrections to afford offenders alleged to have violated probation or parole with procedural due process which includes . . . [t]he right to . . . have counsel of choice present, or in the case of indigent persons who request assistance to adequately present the case, have counsel appointed.

CPP 27-19-01(II)(C)(5). Again, however, CPP 27-19-01(II)(C)(5) apparently only applies to preliminary revocation hearings, because CPP 27-19-01(III)(C)(4) states that “[a]ny offender appearing before an [ALJ] may be represented by counsel if he so desires” Each of the above-mentioned provisions seemingly exclude final revocation hearings, in which the offender is present before the Parole Board and not an ALJ.

Having determined that our current administrative regulations do not require counsel in post-incarceration supervision final revocation hearings, we note that the absence of a regulatory mandate is not necessarily determinative. KRS 31.110(2)(a) provides that

A needy person who is entitled to be represented by an attorney under subsection (1)⁶ of this section is entitled . . . [t]o be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his or her own counsel would be entitled to be represented by an attorney and including revocation of probation or parole

The clear statutory language in KRS 31.110(2)(a), which is not facially limited to preliminary revocation hearings, encompasses “revocations” of parole.

It is well established in Kentucky law that “a criminal defendant has a right to assistance of counsel not only at the actual trial, but at every ‘critical stage’ of the criminal proceedings.” *Commonwealth v. Tigue*, 459 S.W.3d 372, 383 (Ky. 2015). Our legislature has explicitly required needy persons to receive counsel in parole revocations, because such proceedings constitute a “stage[] of the matter beginning with the earliest time when a person providing his or her own counsel

⁶ KRS 31.110(1) provides, in full, as follows:

A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, or who is accused of having committed a public or status offense or who has been committed to the Department of Juvenile Justice or Cabinet for Health and Family Services for having committed a public or status offense as those are defined by KRS 610.010(1), 610.010(2)(a), (b), (c), or 630.020(2) is entitled:

(a) To be represented by an attorney to the same extent as a person having his or her own counsel is so entitled; and

(b) Except as provided in subsection (2)(c) of this section, to be provided with the necessary services and facilities of representation, including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.

would be entitled to be represented by an attorney” KRS 31.110(2)(a). It makes no sense to us that counsel should be available for preliminary revocation hearings yet denied in final revocation hearings.

Final revocation hearings are not merely perfunctory matters. 501 KAR 1:070 § 3 provides:

Final Revocation Hearings. At the final sex offender postincarceration supervision revocation hearing:

(1) The Parole Board shall determine what action should be taken concerning the revocation of sex offender postincarceration supervision and return of the offender as a sex offender postincarceration supervision violator.

(2) The charges specified in the warrant shall be explained to the offender and the offender shall be given the opportunity to admit or deny them.

(3) The evidence shall be limited to the administrative record made before the administrative law judge, except that if the offender wishes to present new or different evidence or information than the offender presented at the preliminary hearing:

(a) The board may consider any new evidence or information submitted by the offender in writing and in advance of the final revocation hearing.

(b) The offender may request a special hearing for the presentation of new or different evidence or information.

1. The request for a special hearing shall be made by the offender no later than at the beginning of the final hearing.

2. The grant or denial of a special hearing shall be totally within the board’s discretion.

3. The board may grant a request for a special hearing if the board finds that the new or different evidence or information is relevant to the proceeding, and that it could not have been presented at the preliminary hearing.

- (4) If a request for a special hearing is granted by the board:
- (a) A short continuance may be granted so that the special hearing can be scheduled.
 - (b) The special hearing shall take place at the central office of the board, unless the board designates another site.
 - (c) At the special hearing, the following order of proceedings shall be followed:
 - 1. The offender, parole officer, and all witnesses shall be sworn in by the Parole Board.
 - 2. The board shall present a short statement of the charges against the offender.
 - 3. The parole officer shall present proof to substantiate the charges, subject to cross-examination by the offender.
 - 4. The offender may present proof to rebut the parole officer's charges, subject to rebuttal evidence and testimony by the parole officer.
 - 5. The parole officer may put on any rebuttal proof subject to cross-examination.
 - 6. The board may question both the offender and the parole officer and any witnesses.
 - (d) After the conclusion of the special hearing, the board shall make a determination as to whether to revoke the offender's sex offender postincarceration supervision, and notify the offender in writing, as provided by subsection (5) of this section.

Thus, under these provisions, Bailey had the ability to present additional evidence to the Board and had the possibility of an additional "special" hearing wherein witnesses may testify. Counsel could be as crucial for this stage of the proceedings as in a preliminary hearing. Under these regulations the Board could make an entirely different decision than that of the ALJ based upon this additional evidence. Clearly, the final hearing is a critical stage of the revocation process. Therefore, we hold today that the statutory right to counsel under KRS

31.110(2)(a) also extends to post-incarceration supervision revocation proceedings.⁷

Because Bailey was not provided with counsel during his final post-incarceration supervision revocation hearing, we reverse the circuit court's dismissal of Bailey's petition and remand for further proceedings consistent with this opinion. As Bailey concedes that he indeed had counsel during his preliminary revocation hearing, we need not remand for a new preliminary hearing.

Because we reverse Bailey's final hearing, we need not determine whether the Parole Board abused its discretion when it revoked his post-incarceration supervision. Furthermore, we find Bailey's remaining arguments concerning his preliminary hearing to be without merit. Although Bailey has argued that he was not permitted to present "mitigating factors" or call witnesses, he also admits that he did present witnesses to discuss his mental health during his preliminary hearing. This process is consistent with the procedure delineated in 501 KAR 1:070 and the requirements of procedural due process set forth by the United States Supreme Court. *See Morrissey*, 408 U.S. at 487, 92 S. Ct. at 2603 (describing the requirements for both preliminary and final revocation hearings). Because Bailey was clearly provided an opportunity to present mitigating evidence during his preliminary hearing, no due process violation occurred.

⁷ We would note this decision is consistent with two earlier unpublished decisions of this Court. *See Warick v. Kentucky Parole Bd.*, 2007 WL 2142277 (2007); *Dodd v. Coy*, 2005 WL 119863 (2005).

Conclusion

In sum, we hold that KRS 31.110(2)(a) creates a statutory right to counsel in post-incarceration supervision revocations. We hold that it applies to both preliminary and final revocation proceedings. We also hold that no due process violation occurred when Bailey was not permitted to put on evidence during his final revocation hearing because he was allowed an opportunity to do so during his preliminary hearing.

The Franklin Circuit Court's order dismissing is reversed, and the matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Bailey, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Angela T. Dunham
Frankfort, Kentucky