

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

TONY MORGAN,

Plaintiff,

v

DEPARTMENT OF CORRECTIONS,

Defendant.

---

UNPUBLISHED

June 24, 2004

No. 246732

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

This original action comes before us on plaintiff’s complaint for habeas corpus and for superintending control.<sup>1</sup>

Plaintiff’s incarceration stems from a 1988 conviction for possession with intent to deliver cocaine and a 1991 conviction for second-degree criminal sexual conduct. On July 27, 2000, plaintiff was released on parole for a term of thirty-six months. As a condition of his parole, plaintiff was required to complete a “mental health or specialized sex offender treatment program” set up by the parole board. However, by September 26, 2001, plaintiff had been terminated from the outpatient sex offender treatment program because “[plaintiff] was not progressing in treatment due to emotional stuck points and significant level[s] of denial.”

On October 5, 2001, plaintiff was served with a parole violation charge that alleged he had violated parole by being released from the sex offender treatment program. Under MCL 791.240a(1), plaintiff was entitled to a fact-finding hearing “within 45 days after a paroled prisoner has been returned or is available for return to a state correctional facility . . . .” However, the parole revocation fact-finding hearing was not conducted until forty-eight days after plaintiff was available to return to a correctional facility.

---

<sup>1</sup> Plaintiff apparently unsuccessfully pursued a writ of habeas corpus in the circuit court. However, this case is an original action in this Court, not an appeal from the circuit court’s denial of habeas corpus.

Following the fact-finding hearing, the hearing officer recommended that plaintiff's parole be revoked due to plaintiff's failure to complete his treatment program. The hearing officer's report indicates that plaintiff's therapist testified that plaintiff's termination from the program was the result of plaintiff's emotional "stuck points" and his continued denial and blaming of others. The hearing officer recommended that parole be revoked and that plaintiff be continued (incarcerated) for twelve months before further parole consideration. The parole board revoked parole with a twelve-month continuance. Plaintiff was reconsidered for parole in May 2002, and the parole board denied parole together with a twelve-month continuance.

Plaintiff asks this Court to nullify the parole board's decision to revoke plaintiff's parole because of alleged defects in the parole revocation process. A writ of habeas corpus tests the legality of detaining an individual and restraining him of his liberty. *Hinton v Parole Bd*, 148 Mich App 235, 244; 383 NW2d 626 (1986). A writ will only be issued if a radical defect renders a proceeding void. *Id.* at 244-245. A radical defect in jurisdiction is an act or omission that clearly contravenes an express legal requirement in existence at the time of the act or omission. *Id.* at 245, quoting *People v Price*, 23 Mich App 663, 671; 179 NW2d 177 (1970).

Plaintiff first argues that defendant's violation of the forty-five- and sixty-day time requirements of MCL 791.240a constituted a radical defect in his parole violation proceeding, entitling him to be reinstated to parole status. In support of this position, plaintiff relies exclusively on this Court's decision in *Jones v Dep't of Corrections*, unpublished per curiam opinion of the Court of Appeals, issued November 30, 2001 (Docket No. 236835). In *Jones* this Court "reluctantly" held that the plaintiff was required to be released because the fact-finding hearing was not held within the forty-five-day time limit. *Id.* at slip op p 2. In making its decision, this Court followed our Supreme Court's decision in *Stewart v Dep't of Corrections*, 382 Mich 474; 170 NW2d 16 (1969). In *Stewart*, the Court ruled that the proper remedy for a violation of the time requirements of MCL 791.240a was to discharge the reincarcerated parolee:

The failure of the parole board to conduct the hearing provided for by the statute within 30 days constituted, in effect, a waiver of any claim based upon these violations since the alleged violations were not "a felony or misdemeanor under the laws of this state." We further conclude that, under these circumstances, the plaintiff is entitled to be discharged from prison but he will remain under the jurisdiction of the parole board as per their order of December 9, 1966. [*Stewart, supra* at 479.]

However, in *Jones v Dep't of Corrections*, 468 Mich 646, 659; 664 NW2d 717 (2003), the Court expressly overruled its decision in *Stewart, supra*, holding that "[t]he appropriate remedy for a violation of the forty-five-day requirement is a writ of mandamus." The *Jones* Court reasoned that "[t]he *Stewart* Court erred, in our judgment, by engrafting onto the terms of former MCL 791.240 a remedy that had no basis in the plain language of the statute." Therefore, the Court concluded, because the Legislature did not specifically set forth any consequences for a violation of the forty-five-day requirement in MCL 791.240a(1), mandamus was the appropriate remedy.

Accordingly, plaintiff is not entitled to reinstatement to parole status as a remedy for defendant's violation of the forty-five-day time requirement. Plaintiff is only entitled to seek a writ of mandamus. Moreover, the same rationale applies to MCL 791.240a(6), which requires

the parole board to issue its final decision within sixty days after the paroled prisoner has been returned or is available for return to a state correctional facility. Thus, plaintiff's argument that defendant's violation of MCL 791.240a(6) entitles him to be reinstated to parole status is also without merit.

Plaintiff next argues that a radical defect occurred in his parole violation hearing when privileged communications were improperly elicited through the testimony of the therapist who worked with plaintiff while he was in the sex offender program. He asserts that the therapist "clearly disclosed privileged information." We disagree.

Under the Mental Health Code, a "privileged communication" is a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis or treatment of a patient, or to another person while the other person is participating in the examination, diagnosis, or treatment or a communication made privileged under other applicable law. MCL 330.1700(h). Generally, a privileged communication may not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege. MCL 330.1750(1); *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 469; 608 NW2d 823 (2000).

Plaintiff fails to specify which instances of his therapist's testimony given at the hearing constituted privileged communications. "The psychiatrist privilege applies only to the *patient's communications*." *Id.* (emphasis in original). The examiner's report contains a detailed account of plaintiff's therapist testimony at the fact-finding hearing and, at most, reveals that the therapist stated that plaintiff had reached emotional "stuck points" in his treatment in the sex-offender program. There is no indication in the record that the therapist related plaintiff's privileged communications during the testimony.

Moreover, as a general proposition, the parole board must consider the prisoner's mental and social attitude when determining whether to grant parole. MCL 791.233(1)(a); *Oakland Prosecutor's Office v Dep't of Corrections*, 222 Mich App 654, 657; 564 NW2d 922 (1997). And by seeking parole, a prisoner places his mental health in issue, and gives implicit consent for information pertaining to his mental health to be furnished to the parole board to enable it to fulfill its statutory responsibilities. *Id.* at 658. In this case, plaintiff placed evidence related to his treatment in the sex offender treatment program in issue because the successful completion of the program was an express condition to his release on parole. And the information that plaintiff claims was privileged information had already been disclosed to the parole board when plaintiff's therapist provided the parole board with a detailed report on why plaintiff was discharged from the program. "Once otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if an otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege disappears." *Id.* Thus, we find that plaintiff's claim that there was improper privileged communications elicited at the fact-finding hearing is without merit.

Next, plaintiff argues that he was denied effective assistance of counsel when his attorney failed to argue to the parole hearing officer that the parole board was required to reinstate plaintiff's parole because of the violation of the forty-five- and sixty-day time limits. The constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal

proceedings. Parole revocation is not part of a criminal prosecution. *Morrissey v Brewer*, 408 US 471, 480, 92 S Ct 2593, 2599-2609, 33 L Ed 2d 484 (1972).

Finally, plaintiff argues that this Court should exercise superintending control because the parole board had a clear legal duty to reinstate his parole following the expiration of the term imposed when his parole was revoked. This Court lacks jurisdiction to issue the writ of superintending control requested by plaintiff. MCR 7.203 is the specific provision regarding the Court of Appeals authority to issue such orders. MCR 7.203(C)(1) provides that the court of Appeals may entertain an action “over a lower court or a tribunal immediately below it arising out of an action or proceeding which, when concluded, would result in an order appealable to the Court of Appeals.” The parole board clearly is not a tribunal immediately below this court. Rather, the decision of the parole board is appealable to the circuit court. MCR 7.104(D).<sup>2</sup>

The complaint for habeas corpus and for superintending control is denied.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Bill Schuette

---

<sup>2</sup> Nonetheless, we note that plaintiff erroneously asserts that he was sentenced to a twelve-month term for the parole violation. Rather, in revoking parole, the parole board set a twelve-month continuance for reconsideration of parole. A continuance is merely the period before an inmate will next be considered for parole. *In re Parole of Roberts*, 232 Mich App 253, 256; 591 NW2d 259 (1998).