STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

ARLANDUS M. NOLEN,

Petitioner,

v

File No. 02-22335-AA
HON. PHILIP E. RODGERS, JR.

MICHIGAN PAROLE BOARD and
WARDEN RAY WOLFE,

Respondents.

Arlandus M. Nolen #273394
Petitioner in Pro Per

Jason Julian (P39547)
Attorney for Respondents

DECISION AND ORDER REGARDING
PETITIONER'S COMPLAINT FOR WRIT OF HABEAS CORPUS

Petitioner, Arlandus M. Nolen ("Nolen") is a prisoner confined at the Pugsley Correctional Facility under the jurisdiction of the Michigan Department of Corrections. He filed a Complaint for Writ of Habeas Corpus challenging the legality of his detention.[1] On September 4, 2002, the Court issued a Pre-Hearing Order giving any opposing party 35 days from the date of the Order to file a response and giving the Petitioner 42 days from the date of the Order to file a reply. These time limits have now expired.

The Court has reviewed the submissions, dispenses with oral argument pursuant to MCR 2.119(E)(3) and issues this written decision and order.

Nolen was originally confined when he was sentenced on October 16, 1998 to a term of 2 years to 15 years on his plea of nolo contendere in Washtenaw County for the offense of car

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[1] Petitioner alternatively seeks a writ of mandamus compelling the Parole Board to conduct another revocation hearing.

jacking. On February 28, 2002, Nolen was paroled. On June 5, 2002, Nolen was arrested in Washtenaw County on charges of receiving and concealing stolen property valued at over $20,000; possession of a firearm by a felon; and carrying a concealed weapon. On June 6, 2002, Nolen was served with notice of four parole violation charges: 1) being out after curfew; 2) being in possession of a stolen motor vehicle; 3) being a felon in possession of a firearm; and 4) being in possession of a firearm. Nolen waived his preliminary hearing on the parole violation charges.

On June 18, 2002, Nolen was represented by retained counsel Ronald McDuffie at the preliminary examination on the new criminal charges and the charges were dismissed without prejudice. On June 19, 2002, Nolen was transferred from the Washtenaw County jail to the Jackson SMN Facility in Jackson, Michigan. On June 20, 2002, he was arraigned on his parole violation charges and stood mute. The Michigan Department of Corrections Parole Violation Arraignment form indicates that Nolen advised the ALE Attorney that he had retained counsel (McDuffie) to represent him at the formal parole revocation hearing. Petitioner did not claim to be indigent.

On July 19, 2002, Nolen was transferred to the Reception and Guidance Center in Jackson. On July 20, 2002, a court-appointed attorney visited Nolen and informed him that his parole revocation hearing was scheduled for Wednesday, July 24, 2002 and that she had been appointed to represent him. Again Nolen advised her that he had retained counsel. On July 24, 2002, Nolen was transferred back to the Jackson SMN Facility for the revocation hearing. The same court-appointed attorney, not having heard from Mr. McDuffie, appeared on behalf of Petitioner.

The Court has reviewed the tape of the hearing and finds that, as a preliminary matter, appointed counsel questioned whether the hearing should go forward in the absence of retained counsel or whether Nolen should have additional time to secure the presence of his retained counsel. Nolen offered that McDuffie was his attorney and had been paid. He further stated that McDuffie thought the hearing was on July 31 and he had a scheduling conflict for July 24. The hearing officer reviewed the file and noted that McDuffie was sent a letter via facsimile on July 10 telling him to file his appearance by July 17. When no appearance was forthcoming, counsel was appointed. The hearing officer concluded that, because McDuffie had failed to file an appearance, the Board did not recognize him as Nolen's attorney.

The Respondent emphasizes the fact that neither Nolen nor appointed counsel made a formal motion or request to have the hearing postponed. The Respondent also refers the Court to Respondent's Exhibit 1, p3 which is the Parole Violation Formal Hearing Summary and Recommendation. The Summary and Recommendation states that Nolen indicated that he had retained counsel, but that all attempts by the Department of Corrections and court-appointed counsel to contact him had gone unanswered. Therefore, the Parole Board Member conducting the hearing concluded: "[g]iven the fact that no appearance was ever received from Attorney McDuffie, he was not deemed the attorney of record."

The witnesses who testified at the hearing were Nolen, the officer who arrested him on June 5, 2002 on the new felony charges, and a Parole Agent who "briefly supervised the offender following an administrative transfer." (Respondent's Exhibit 1, p 5).

Nolen was ultimately found guilty of all four violation charges and received a 24-month continuance.

Nolen claims that he is wrongfully confined for two reasons:

1) He was denied the right to counsel of his choice; and

2) He was not afforded the rights provided by MCL 791.240a

    a) He was not given timely notice of the Formal Parole Revocation Hearing;

    b) He was not allowed to cross-examine the witnesses against him; and

    c) The Parole Board did not issue its decision within 60 days.

MCL §791.240a gives the statutory authority under which parole violation hearings are held. It provides:

> (1) Within 45 days after a paroled prisoner has been returned or is available for return to a state correctional facility under accusation of a parole violation other than conviction for a felony or misdemeanor punishable by imprisonment under the laws of this state, the United States, or any other state or territory of the United States, the prisoner is entitled to a fact-finding hearing on the charges before 1 member of the parole board or an attorney hearings officer designated by the chairperson of the parole board. The fact-finding hearing shall be conducted only after the accused parolee has had a reasonable amount of time to prepare a defense.

> The fact-finding hearing may be held at a state correctional facility or at or near the location of the alleged violation.
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> (2) An accused parolee shall be given written notice of the charges against him or her and the time, place, and purpose of the fact-finding hearing. At the fact-finding hearing, the accused parolee may be represented by an appointed or retained attorney and is entitled to the following rights:
>
> (a) Full disclosure of the evidence against him or her.
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> (b) To testify and present relevant witnesses and documentary evidence.
>
> (c) To confront and cross-examine adverse witnesses unless the person conducting the fact-finding hearing finds on the record that a witness is subject to risk of harm if his or her identity is revealed.
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> (d) To present other relevant evidence in mitigation of the charges.
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> (3) A fact-finding hearing may be postponed for cause beyond the 45-day time limit on the written request of the parolee, the parolee's attorney, or, if a postponement of the preliminary hearing has been granted beyond the 10-day time limit, by the parole board.
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> (4) If the evidence presented is insufficient to support the allegation that a parole violation occurred, the parolee shall be reinstated to parole status.
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> (5) If the parole board member or hearings officer conducting the fact-finding hearing determines from a preponderance of the evidence that a parole violation has occurred, the member or hearings officer shall present the relevant facts to the parole board and make a recommendation as to the disposition of the charges.
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> (6) If a preponderance of the evidence supports the allegation that a parole violation occurred, the parole board may revoke parole, and the parolee shall be provided with a written statement of the findings of fact and the reasons for the determination within 60 days after the paroled prisoner has been returned or is available for return to a state correctional facility.

The Petitioner's right to be represented by counsel at the final parole revocation hearing is guaranteed by the statute and by Michigan appellate decisions, *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000); *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993); *Hawkins v Michigan Parole Board*, 45 Mich App 529, 206 NW2d 764 (1973), aff'd and opinion adopted in 390 Mich 569; 213 NW2d 193 (1973), rules adopted by the Director of the Department of Corrections pursuant to statutory authority, and a policy directive of the director dated March 1, 2001, No. 06-06-100. Moreover, sometimes the circumstances of the

alleged violations and a parolee's timely and colorable claim that he did not violate the conditions of his parole agreement, trigger a constitutional due process guarantee to counsel at the hearing. *Gagnon v Scarpelli*, 411 US 778, 790; 93 S Ct 1756; 36 L Ed 2d 656 (1973).

In *People v Gulley*, 66 Mich App 112; 238 NW2d 421 (1976), the Court held that the right to counsel entails affording a defendant a reasonable opportunity to obtain counsel of his own choosing, citing *People v Stinson*, 6 Mich App 648, 654; 150 NW2d 171 (1967), app den 379 Mich 785 (1967) and found "clear the impropriety of forcing appointed counsel on an individual who has the means to retain counsel and who is, in fact, attempting to do so." *Id* at 117.

In addition, the Petitioner has a due process right to present witnesses and evidence in his behalf at the hearing. *Morrissey v Brewer*, 408 US 471, 489; 92 S Ct 2593; 33 L Ed 2d 484 (1972), *Hawkins, supra*, 45 Mich App at 532; 206 NW2d 764. Again this right has been implemented by administrative rules and by the policy directive previously cited.

Finally, Petitioner was entitled to written notice of the claimed violations of parole. *Morrissey v Brewer, supra*. This due process right to notice is meaningless unless given sufficiently in advance of the hearing to afford a reasonable opportunity to prepare. *In re Gault*, 387 US 1, 33; 87 S Ct 1428; 18 L Ed 2d 527 (1967), *People v Gulley*, 66 Mich App 112; 238 NW2d 421 (1975); *People v Bell*, 67 Mich App 351; 241 NW2d 203 (1976).

In the instant case, the Petitioner advised the ALE at his arraignment that he had retained counsel. The ALE attempted to contact the attorney, but received no response, so counsel was appointed. Court-appointed counsel notified the Petitioner on July 20 that his revocation hearing was scheduled for July 24. Again the Petitioner advised her that he had retained counsel. Appointed counsel sent a letter via facsimile to Petitioner's retained counsel on July 21, but got no response. She contacted two potential witnesses. She appeared at the revocation hearing. The Petitioner's desire to be represented by retained counsel was discussed. The hearing officer decided to proceed with appointed counsel because retained counsel had not appeared on Petitioner's behalf.

Petitioner had four days notice of the date and time set for his revocation hearing. In that four days, his court-appointed counsel sent a facsimile to Petitioner's retained counsel and was apparently under the impression that she would not be representing Petitioner at the hearing. Because she never received a response from retained counsel, she appeared on behalf of the Petitioner at the hearing. None of the Petitioner's alleged witnesses appeared for the hearing.

Under these circumstances, the Petitioner was denied his right to be represented by counsel of his choice. More importantly, the Petitioner was denied reasonable notice of the hearing and a meaningful opportunity to prepare, cross-examine the witnesses against him and present relevant evidence in mitigation.

For the foregoing reasons, the Parole Board shall conduct another formal revocation hearing within 45 days of the date of this Order. The Petitioner shall either retain counsel who shall file an appearance within 21 days of the date of this Order or counsel shall be appointed to represent him. The Petitioner shall receive a minimum of 10 days notice of the date and time set for said hearing. The Petitioner shall be notified within 60 days of the date of this Order of the outcome of the hearing.

IT IS SO ORDERED.

This Order resolves the last pending claim and closes the case.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____