STATE OF MICHIGAN

COURT OF APPEALS

PATRICK J. KENNEY, Plaintiff-Appellee,	UNPUBLISHED April 3, 2012
v	No. 304900 Wayne Circuit Court
WARDEN RAYMOND BOOKER, Defendant-Appellant.	LC No. 11-003828-AH

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

Defendant appeals by leave the judgment granting plaintiff's complaint for habeas corpus and the accompanying order granting plaintiff's motion for summary disposition. We reverse and remand for entry of a judgment denying plaintiff's complaint for habeas corpus and an order denying plaintiff's motion for summary disposition.

Defendant argues that the circuit court erred in granting habeas corpus relief to plaintiff because there was no radical defect in jurisdiction rendering the parole board's revocation of plaintiff's parole absolutely void. We agree. "This Court reviews de novo questions of constitutional law." *People v Vaughn*, 291 Mich App 183, 195; 804 NW2d 764 (2010), lv gtd 490 Mich 887 (2011). "A determination regarding whether a party has received due process is a question of law reviewed de novo." *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007). Also, "[p]arole eligibility is governed by statute, and interpretations and applications of statutes are questions of law reviewed de novo." *Morales v Parole Bd*, 260 Mich App 29, 33; 676 NW2d 221 (2003).

"A prisoner's right to file a complaint for habeas corpus relief is guaranteed by Const 1963, art 1, § 12." *Moses v Dep't of Corrections*, 274 Mich App 481, 484; 736 NW2d 269 (2007). "The function of a writ of habeas corpus is to test the legality of the detention of any person restrained of his liberty." *Triplett v Deputy Warden*, 142 Mich App 774, 780; 371 NW2d 862 (1985). "The writ of habeas corpus deals with radical defects that render a judgment or proceeding absolutely void." *Moses*, 274 Mich App at 485. A radical defect in jurisdiction requires "an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission." *Id*. at 486 (quotations and citation omitted). Thus, although a prisoner "may not use a habeas proceeding as a substitute for an appeal or to review the merits of his criminal conviction, [the prisoner] may assert a radical

defect in the jurisdiction of the court in which his conviction was obtained." *Id*., citing MCL 600.4310(3) and *People v Price*, 23 Mich App 663, 669-670; 179 NW2d 177 (1970). For the purpose of habeas review, "a prisoner on parole remains 'in custody' despite the fact that the parolee is no longer confined within prison walls." *Triplett*, 142 Mich App at 781.

"After a prisoner is released on parole, the prisoner's parole order is subject to revocation at the discretion of the parole board for cause as provided in this section." MCL 791.240a(1). The parole board may revoke parole "[i]f a preponderance of the evidence supports the allegation that a parole violation occurred." MCL 791.240a(10).

An action for habeas corpus is an original action, not an administrative appeal. MCR 3.301(A); MCR 3.302. The circuit court thus correctly engaged in a review of the administrative record to determine whether a radical defect occurred. Here, the circuit court found a radical defect arising from a due process violation in plaintiff's parole revocation proceeding. In particular, the circuit court concluded that the hearing officer erred in finding that plaintiff possessed a handgun. The hearing officer stated that plaintiff "should have known" there was a gun in the battery compartment of the car plaintiff was driving. The circuit court determined that the "should have known" standard was incorrect and that application of the standard violated plaintiff's due process rights. The court also concluded that "[t]he evidence at the hearing failed to establish [p]laintiff's actual or constructive possession of the handgun."

In reviewing whether sufficient evidence of plaintiff's constructive possession of the handgun was presented to support the revocation of parole, we must consider whether any alleged insufficiency gave rise to a due process violation that constituted a radical defect in jurisdiction rendering the parole board proceeding absolutely void. *Moses*, 274 Mich App at 485. We noted that "the full panoply of rights due a defendant in a criminal proceeding does not apply to parole revocation, but . . . some orderly process, however informal, [is] required." *Triplett*, 142 Mich App at 782, citing *Morissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

Michigan case law is not entirely clear regarding whether or when a claim of insufficient evidence may establish a radical defect in jurisdiction for the purpose of habeas relief. Cf. *In re Faint*, 341 Mich 408, 411; 67 NW2d 187 (1954) (in a proceeding to have an accused person adjudged to be a criminal sexual psychopathic person, a "claim that the proofs at the hearing were insufficient is not a proper one for consideration in habeas corpus proceedings"); *In re Riggins*, 307 Mich 234, 239; 11 NW2d 871 (1943) (in a habeas proceeding, our "Supreme Court does not pass upon the weight of the evidence but examines the evidence to note whether the finding of the court was supported by any credible evidence") (internal quotations and citation omitted); *In re Van Dyke*, 276 Mich 32, 34; 267 NW 778 (1936) ("The present proceeding is not the proper one in which to determine whether the verdict was against the great weight of the evidence. *Habeas corpus* is not available to one convicted of a crime and committed by a court that has acquired jurisdiction and has not abused its power.") (emphasis in original).

However, some clarity regarding the federal constitutional requirements in this area has been provided by the United States Supreme Court, which has indicated that a parole revocation that is not supported by any evidence violates due process. In *Douglas v Buder*, 412 US 430, 431; 93 S Ct 2199; 37 L Ed 2d 52 (1973), the petitioner's probation was revoked on the ground

that he failed to promptly report an arrest. However, the record disclosed no evidence that the petitioner was subjected to actual restraint or taken into custody. *Id*. at 432. Thus, the United States Supreme Court "conclude[d] that the finding that petitioner had violated the conditions of his probation by failing to report 'all arrests . . . without delay' was so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment." *Id*.

In *Superintendent, Massachusetts Correctional Institution, Walpole v Hill*, 472 US 445, 455; 105 S Ct 2768; 86 L Ed 2d 356 (1985), the Court stated that "a modicum of evidence" was required "to revoke good time credits." The Court relied on, among other cases, *Douglas*, 412 US at 432, to conclude that "[i]n a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence." *Id*. The Court held in *Hill* "that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if there was some evidence from which the conclusion of the administrative tribunal could be deduced." *Id*. (internal quotations and citation omitted). Determining "whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id*. at 455-456. The Court held that the evidence in *Hill* was sufficient to meet the requirements of the Due Process Clause:

> The disciplinary board received evidence in the form of testimony from the prison guard and copies of his written report. That evidence indicated that the guard heard some commotion and, upon investigating, discovered an inmate who evidently had just been assaulted. The guard saw three other inmates fleeing together down an enclosed walkway. No other inmates were in the area. The [state appellate court] found that this evidence was constitutionally insufficient because it did not support an inference that more than one person had struck the victim or that either of the respondents was the assailant or otherwise participated in the assault. This conclusion, however, misperceives the nature of the evidence required by the Due Process Clause.
>
> The Federal Constitution does not require evidence that logically precludes any conclusion but the one reached by the disciplinary board. Instead, due process in this context requires only that there be some evidence to support the findings made in the disciplinary hearing. *Although the evidence in this case might be characterized as meager, and there was no direct evidence identifying any one of three inmates as the assailant, the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary*. . . . Because the determination of the disciplinary board was not so lacking in evidentiary support as to violate due process, the judgment of the [state appellate court] is reversed . . . . [*Id*. at 456-457 (emphasis added; citations omitted).]

In *Swarthout v Cooke*, ___ US ___; 131 S Ct 859, 862; 178 L Ed 2d 732 (2011), the Court noted that it had held the procedures required by the Due Process Clause are minimal in

the context of parole. The prisoner must be allowed an opportunity to be heard and provided with a statement of the reasons why parole was denied. *Id*. The Court held that it was of no federal concern whether a California rule of judicial review requiring "some evidence" to support the denial of parole was correctly applied. *Id*. at 863. The Court noted that "a mere error of state law is not a denial of due process." *Id*. (internal quotation and citation omitted).

We conclude that the "some evidence" standard set forth in *Douglas* and *Hill* applies here because this case involves a revocation of parole and not merely, as in *Swarthout*, a denial of parole. We will thus assess whether the parole board's finding was so lacking in evidentiary support as to violate due process. That is, the question is whether some evidence was presented to support the finding that plaintiff constructively possessed the handgun.

Recently, this Court explained the concept of constructive possession of a firearm:

> Possession of a firearm can be actual or constructive, joint or exclusive. A person has constructive possession if there is proximity to the article, together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Possession can be proven by circumstantial or direct evidence and is a factual question for the trier of fact. [*People v Johnson*, 293 Mich App 79, ___; ___ NW2d ___ (Docket No. 295664, issued June 14, 2011) (slip op at 2) (internal quotations and citations omitted.]

The *Johnson* Court found sufficient evidence of constructive possession in that case:

> The evidence indicated that police seized the rifles from the corner of the front room of the house, in the vicinity of where Johnson was seated behind the table that contained marijuana. Johnson admitted that he had been selling marijuana from the house for a month. He contends that there was no evidence that the weapons were in plain sight and no proof that they were his. However, the sizes of the rifles and the testimony describing their location in the corner of the front room, coupled with the fact that Johnson had admittedly been selling drugs from the house for a month, was sufficient to enable the jury to rationally find that he was aware of the rifles and that they were reasonably accessible to him. Thus, there was sufficient evidence that Johnson constructively possessed the rifles to support his felony-firearm conviction. [*Id*., slip op at 3.]

Here, the evidence that plaintiff constructively possessed the handgun was not so lacking as to deprive plaintiff of due process. Police found a handgun in the battery compartment of a car that plaintiff was driving; the car belonged to plaintiff's mother. Plaintiff admittedly knew that his front seat passenger, John Cook, was a drug dealer who had several drug houses. The two men were living together, and plaintiff allowed Cook to use the car in exchange for drugs. While no direct evidence was presented that plaintiff knew about the gun, circumstantial evidence supported a reasonable inference that plaintiff knew the gun was there. Plaintiff allowed Cook to use the car for the evident purpose of pursuing drug deals. Although plaintiff denied any knowledge that drug dealers tend to carry firearms, a reasonable inference could be drawn that plaintiff was aware of the gun, given his close association with Cook and the fact

Cook had the car just 17 days earlier when police found a gun in the same battery compartment. Plaintiff's denial of any knowledge that police had found a gun in the car on the earlier occasion could lack credibility in light of his drug-related dealings with Cook and his willingness to allow Cook to continue to use the car.

In short, the evidence established that (1) plaintiff and Cook lived together, (2) Cook traded drugs to plaintiff in exchange for the use of the car in which the gun was found, (3) plaintiff knew Cook was a drug dealer and could reasonably infer that drug dealers sometimes carry weapons, and (4) Cook was a passenger while plaintiff was driving when the police stopped them for speeding. Therefore, a reasonable factfinder could conclude that plaintiff constructively possessed the gun or, at the very least, possessed it jointly with Cook. Cf. *Hill*, 472 US at 457 (finding that the record was not so devoid of evidence as to violate the Due Process Clause where there was no direct evidence identifying any of three fleeing inmates as the assailant). Accordingly, plaintiff has failed to establish that his right to due process was violated on the basis of a lack of evidence.

Moreover, it does not appear that the hearing officer's findings hinged solely on application of the "should have known" standard. Although the hearing officer's analysis was certainly less than ideal, given that it relied in part on a "should have known" standard, we conclude that the hearing officer's reasoning also suggested that plaintiff knew about the weapon on the basis of the evidence and inferences discussed above. Thus, given these aspects of the hearing officer's analysis, which support a reasonable inference that plaintiff knew about and constructively possessed the gun, and the existence of "some evidence from which the conclusion of the administrative tribunal could be deduced," *Hill*, 472 US at 455, we are not convinced that the hearing officer's erroneous references to a "should have known" standard constituted a radical defect in the parole board's jurisdiction warranting a grant of habeas corpus.

In light of our conclusion that plaintiff failed to establish a due process violation that constituted a radical defect in jurisdiction, we need not consider defendant's remaining arguments on appeal.[1]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ David H. Sawyer

[1] We note, however, that plaintiff pleaded guilty to violating a condition of his parole by failing to report. This violation alone could have been sufficient to revoke plaintiff's parole. MCL 791.240a.

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TALBOT, J (*dissenting*).

I respectfully dissent. First, I believe that review of the record from the January 11, 2011, parole revocation hearing demonstrates that the hearing officer failed to acknowledge that the determination of whether to revoke Patrick J. Kenney's parole is based on a preponderance of the evidence standard.[1] The hearing officer instead erroneously asserted that the applicable standard was whether Kenney knew or should have known that the firearm was in the vehicle.

Second, even applying the preponderance of the evidence standard, I believe that the findings of fact of the hearing officer do not support that Kenney actually or constructively possessed the firearm that was retrieved from the battery compartment of the vehicle.[2] The hearing officer indicated that the vehicle was registered to Kenney's mother. Kenney was living with and receiving an allowance from John Cook, a known drug dealer, with whom Kenney shared the vehicle. Cook was in possession of the vehicle before Kenney began driving and Kenney testified he was not aware of the firearm's presence in the vehicle. Cook admitted that the gun was not placed in the vehicle by Kenney, and the hearing officer found Cook's testimony to be credible. Cook also had been arrested while driving the vehicle 17 days before Kenney was stopped. Kenney was not present. At that time a firearm was recovered from the same location

[1] MCL 791.240a(10).

[2] *People v Johnson*, 293 Mich App 79, __; __ NW2d __ (Docket No. 295664, issued June 14, 2011) (slip op at 2).

in the vehicle. I would find that there were insufficient proofs regarding Kenney's alleged possession of the firearm to sustain counts two through four.[3]

Finally, Kenney did plead guilty to count one, which was a failure on one occasion to make a scheduled report to his field agent. "If a preponderance of the evidence supports the allegation that a parole violation occurred, the parole board may revoke parole."[4] As such, I would find that the case must be remanded to the parole board on count one only for a determination regarding whether parole revocation is warranted.

/s/ Michael J. Talbot

[3] *Id.*

[4] MCL 791.240a(10).