

1962

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Recommended Citation

Robert L. Tuma, Parole Revocation in Ohio, 11 Clev.-Marshall L. Rev. 186 (1962)

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Parole Revocation in Ohio

Robert L. Tuma*

THE *Varner* CASE POSED a problem faced by probation officers in many states.

While serving a one to fifteen year sentence for attempted burglary, petitioner was paroled from the Ohio State Reformatory.

Later, while petitioner was still on parole, he was arrested and taken into custody. He then instituted habeas corpus proceedings in which he alleged that a parole officer of the Pardon and Parole Commission filed, with the Sheriff of Summit County, a form captioned "Order to Hold."¹

Petitioner claimed that *he had not been given notice or knowledge of any alleged violation of the conditions of his parole*, and further, that any finding that there had been such a violation would be arbitrary and, in this case, an abuse of discretion. The Court of Appeals found that the petitioner was lawfully imprisoned by the sheriff and dismissed the petition. The Supreme Court of Ohio affirmed this decision.²

In this case, the Ohio Supreme Court was confronted with a problem which has raised apparent conflict with many authorities outside the State of Ohio.³ Can the Pardon and Parole Commission declare a paroled convict to be a parole violator before the expiration of the maximum period of his sentence without notice or hearing, according to the laws of Ohio and the Federal Constitution?⁴ Also, is such action by the Commission

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¹ Form, "Order to Hold," State of Ohio, Dept. Mental Hyg. & Correction, Bur. of Probation & Parole.

² *In re Varner*, 166 Ohio St. 340, 142 N. E. 2d 846 (1957).

³ See 29 A. L. R. 2d 1074-6. This annotation discusses the recurrent criminal problem of whether a convicted parolee who is legally at liberty under a suspension of sentence or probation granted by the trial court or under a parole or conditional pardon granted by the executive or by an administrative agency vested with such power is entitled to notice and hearing before revocation of such suspension of sentence or probation, parole, or conditional pardon; in other words, are notice and hearing a procedural requisite to revocation of such conditional liberty for breach of the terms on which it was granted.

⁴ *Supra*, note 2 at 342.

reviewable by habeas corpus proceedings, even though such convict is returned to an institution because of such action?⁵

The Court felt that such right of review would depend heavily upon the interpretation of the applicable statutes.⁶ The question of the constitutionality of the Commission's action was brought forth when the Court quoted Mr. Justice Cardozo in *Escoe v. Zerbst* (295 U. S. 490, 492, 55 S. Ct. 818, 79 L. Ed. 1566): "Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose."⁷

The Ohio Court likened this observation of Justice Cardozo to the parolee. The parolee is merely a convict at large by the sovereign grace. During the process by which he had been relieved of his freedom, the constitutional safeguards which form the protective bulwark around the individual citizens' liberties had been followed,⁸ and are not again available to him because he is still a "convict" and has not yet been re-endowed with that status classified as "citizen."

He has already been seized in a constitutional way, confronted by his accusers and the witnesses against him, tried by the jury of his peers secured to him by the Constitution, and,

⁵ *Riggs v. Correction Department, Parole Board Division*, 170 Ohio St. 347, 164 N. E. 2d 731 (1960). This very issue was to re-appear in the Supreme Court three years later. In Feb., 1960, the Supreme Court held that the action of the Pardon and Parole Commission in declaring petitioner to be a parole violator was not reviewable in habeas corpus proceedings even though petitioner had been returned to the penitentiary because of such action.

⁶ Two sections of the Ohio Revised Code pertinent to the petitioner in this case read:

Sec. 2965.01. As used in sections 2965.01 to * * * 2965.35, inclusive, of the Revised Code:

(E) 'Parole' means the release from confinement in any state penal or reformatory institution * * * by the pardon and parole commission upon such terms * * * and for such period of time as shall be prescribed by the pardon and parole commission in its published rules and official minutes. A parolee so released shall be supervised by the bureau of probation and parole. Legal custody of a parolee shall remain in the department of mental hygiene and correction until granted a final release by the pardon and parole commission.

(G) "Convict" means a person who has been convicted of a felony under the laws of this state, whether or not actually confined in a state penal or reformatory institution, unless he has been pardoned or has served his sentence.

⁷ *Escoe v. Zerbst*, 295 U. S. 490, 55 S. Ct. 818, 819, 79 L. Ed. 1566 (1935).

⁸ *Fuller v. State*, 122 Ala. 32, 26 S. 146 (1898); *Ex parte Levi*, 39 Cal. 2d 41, 244 P. 2d 403 (1952); *In re Patterson*, 94 Kan. 439, 146 P. 1009 (1915); *Guy v. Utecht*, 216 Minn. 255, 12 N. W. 2d 753 (1943).

by them, convicted of crime and sentenced to punishment therefor.⁹

In Ohio, prisoners placed on parole by the Ohio Pardon and Parole Commission are required to abide by the laws governing parole. These rules are provided by the Commission. While on parole, the subject remains in the legal custody of the Department of Mental Hygiene and Correction. The parolee is under the supervision of the Bureau of Probation and Parole. While on parole, he remains a prisoner of the State outside the confines of the institution from which he was paroled. This relationship is similar to that of a trusty of an institution.

The rules governing the parolee's freedom are more stringent than the rules governing the average person. A parolee can only change his residence or employment after consultation with, and approval of, his parole officer. He is not permitted to use, or possess, intoxicating liquors. He cannot leave the State or even the County without express permission. He may not marry without first securing the consent of his parole officer.¹⁰

Other jurisdictions have arrived at different decisions than the Ohio Court did in this case. Many times this is the result of statutes which exist in many states covering revocation procedure. While about half of the states expressly deny the right to a hearing in such cases,¹¹ many foreign courts base their conclusion on the fact that the conditionally freed individual is entitled to his freedom, and, as such, is possessed of a right which can only be forfeited by breaching the condition of its grant. Forfeiture without the opportunity for a hearing is then deemed to be a violation of constitutionally guaranteed due process.¹²

⁹ *Ughbanks v. Armstrong*, 208 U. S. 481, 285 S. Ct. 372, 52 L. Ed. 582 (1908).

¹⁰ "Parole Rules as Provided by the Ohio Pardon and Parole Commission and as Required by the Bureau of Probation and Parole," Ohio Dept. Mental Hyg. & Correction.

¹¹ States which do have statutes covering revocation procedure are: Ala., Colo., Fla., Ga., Ia., La., Md., Mo., Mont., Nebr., N. Mex., N. C., Okla., Ore., Tenn., S. Dak., W. Va., Wis., and Wyo. See: H. Weihofen, *Revoking Probation, Parole or Pardon Without a Hearing*, 32 J. Crim. Law 600-23 (1942).

¹² *Fleenor v. Hammond*, 116 F. 2d 982 (6th Cir. 1941). (Conditional pardon.) Compare with *Lester v. Foster*, 207 Ga. 596, 63 S. E. 2d 402 (1951) (Notice and hearing required to revoke suspended sentence); *Gross v. Huff*, 208 Ga. 392, 67 S. E. 2d 124 (1951) (Notice and hearing required to revoke probation sentence); with *Johnson v. Walls*, 185 Ga. 177, 194 S. E. 380 (1937) (Notice and hearing not required to revoke parole). Also, *State v. Theisen*, 167 Ohio St. 119, 146 N. E., 2d 865 (1957), (Neither judicial inquiry nor notice and hearing needed to terminate probation).

The Ohio Court dismissed the idea that the legislative intent supported an inference that there should be a hearing before a prisoner on parole be declared a parole violator.

The Court said that “. . . no intent should be recognized unless it has been clearly expressed.”¹³ This statement provided the impetus for some needed changes in the Ohio Statutes.¹⁴ Because of the misconstrued interpretation and strained construction relating to parole in general, Amended Substitute Housebill Number 671 was enacted by the General Assembly of the State of Ohio.¹⁵ The purpose of this act was generally to amend those sections which opened the doors to litigation and to clarify those sections of the Ohio Revised Code which left room for misinterpretation of various areas of the parole system.

Specifically, this act enlarged the membership of the Pardon and Parole Commission, it changed certain procedures of the Commission and it established a Bureau of Probation and Parole in the Division of Correction of the Department of Mental Hygiene and Correction.¹⁶

Regarding the problem of revocation of parole presented in the immediate case, Section 2965.21 was amended to read as follows:

Whenever any parole officer has reasonable cause to believe that any parolee under the supervision of the bureau of probation and parole has violated the terms and conditions of his pardon or parole, such parole officer may arrest such parolee, or may order any sheriff, deputy sheriff, constable, or police officer to make such arrest. A person so arrested . . . shall be confined in the jail or detention home of the county in which he is arrested until released . . . on parole or removed to the proper institution. . . . Upon making such arrest the parole officer shall, as soon as practicable thereafter, notify the superintendent of the bureau of probation and parole, in writing, that such parolee has been arrested and is in custody and submit in detail an appropriate report of the reason for such arrest. The superintendent shall thereupon make an appropriate recommendation to the pardon and parole commission and shall submit a copy

¹³ *Supra*, note 2.

¹⁴ “The Amended Substitute House Bill No. 671,” booklet. See footnote 15.

¹⁵ *Ibid*. Passed June 22, 1959. Approved July 2, 1959.

¹⁶ Section I of the Amended Substitute House Bill No. 671 amended these sections of the Ohio R. C.: 2301.32, 2951.05, 2965.01, 2965.02, 2965.03, 2965.05, 2965.07, 2965.17, 2965.20, 2965.21 and 5119.04. Section 2; repealed the following sections of the Ohio R. C.: Sections 2301.32, 2951.05, 2965.01, 2965.02, 2965.03, 2965.05, 2965.07, 2965.17, 2965.20, 2965.21 and 5119.04.

of the report of the parole officer to the pardon and parole commission which shall, in a reasonable time after receipt thereof, determine whether or not such parolee should be declared a violator of the terms and conditions of his pardon or parole.

In the event a parolee is declared to be a violator of the conditions of his pardon the commission shall forthwith transmit to the governor its recommendation . . . concerning . . . such violation and such violator shall be retained in custody until the governor issues an order concerning such violation.¹⁷

Statutes not expressly requiring or dispensing with notice and hearing have been interpreted in accord with the particular jurisdiction's determination of the applicability of the due process requirement.¹⁸

The Ohio Court held that the pertinent statutory provisions clearly indicated a legislative intent not to burden the parole process with such hearings.

The Court took a realistic and practical outlook in backing their reasoning when they said, "In many instances, potential witnesses justifiably are fearful of testifying publicly against a paroled convict, and therefore . . . it may be necessary for the Commission to rely upon secret investigations."¹⁹

Another very practical consideration to support the Courts' holding is that upon receipt of notice informing a parolee that his parole was about to be revoked, he might leave the jurisdiction.²⁰

This writer knows, from personal experience, the powerful disciplinary force which the threat of potential confinement can

¹⁷ *Ibid.*

¹⁸ *Johnson v. Walls*, 185 Ga. 177, 194 S. E. 380 (1937). A hearing was not required because that statute by its express terms states that, ". . . a parolee remains within the legal custody and control of the prison commission, a plain and clear abuse; if decision arrived at fraudulently, corruptly, or by mere personal caprice, was here, however, said to be subject to habeas corpus that such action might be reviewed."

In *U. S. ex rel. Nicholson v. Dillard*, 102 F. 2d 94 (4th Cir. 1939), the Supreme Court said ". . . the right of a parolee to the writ of habeas corpus is determined by statute. In legal effect, parolee is imprisoned and there is no question but that the prisoner is restrained of his liberty. Yet a parolee is in the 'legal custody and under the control of the Attorney General.' This statutory declaration that the restraint is legal removes from the parolee the 'privilege of the writ' and obviates judicial inquiry by habeas corpus."

¹⁹ *State ex rel. McQueen v. Horton*, 31 Ala. App. 71, 14 S. 2d 557 (1943).

²⁰ *Commonwealth ex rel. Meredith v. Hall*, 277 Ky. 612, 126 S. W. 2d 1056 (1939).

have on the parolee. If the parolee knew that the parole officer would be burdened with the formalities necessary for a judicial inquiry, the effectiveness of this method would be greatly diminished.²¹

The Court also considered the fact that the resulting burdens of administration from a judicial inquiry would undoubtedly discourage the Commission from granting many paroles that it would otherwise grant. In marginal cases, a parole board would mutually hesitate to grant paroles in view of the extra work and added responsibility on the board.²²

It is a principle of criminology that perfect adjustment of a person to society would involve complete conformity of the person's behavior with the prevailing customs and standards. Complete conformity rarely occurs, and indeed, is impossible unless there is a unified system of standards. Even in small, stable, homogeneous societies, such as primitive communities, some non-conformity appears. In complex, civilized societies, non-conformity abounds. People do not automatically obey either the mores or laws. They learn to obey through a long series of social experiences.²³

So then, the law must be more than Federal and State sanction of rules and regulations governing human conduct. Rather, it must also be an attempt to adjust human conduct for the security of the community and the individual involved.

It is for these reasons that this writer applauds the decision of the Ohio Supreme Court. Had it taken a contrary view, the primary purposes of parole, namely (1) the protection of society, and, (2) the rehabilitation of the offender, might have been set back by years.

²¹ Contrary to many of the theoretical principles of rehabilitation, this most practical threat of re-imprisonment is in many instances the only motivation for deterring the parolee from, in some way, violating his parole.

²² Owen v. Smith, 89 Neb. 596, 131 N. W. 914 (1911).

²³ Cavan, *Criminology*, 630 (1948).