

10-15-1984

Parole Revocation Procedures in Kentucky

Harry J. Rothgerber Jr.

J. W. Deese

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>



Part of the [Criminal Procedure Commons](#)

Recommended Citation

Harry J. Rothgerber Jr. and J. W. Deese, *Parole Revocation Procedures in Kentucky*, 4 J. Nat'l Ass'n Admin. L. Judges. (1984)
available at <https://digitalcommons.pepperdine.edu/naalj/vol4/iss2/7>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

PAROLE REVOCATION PROCEDURES IN KENTUCKY

Harry J. Rothgerber, Jr.
and J. W. Deese*

I. METHODS OF COMMENCEMENT OF PAROLE REVOCATION PROCEEDINGS

- A. Proceedings may be commenced without arrest.
 - 1. The discretionary power conferred to the Parole Board in KRS 439.430 implicitly recognizes this method of commencement.
 - 2. KRS 439.360 also allows the Parole Board to subject the parolees to its orders without arrest.
- B. If the Parole Board believes that a condition of parole has been violated, KRS 439.430(4) authorizes the issuance by the board of a warrant for the parolee's arrest.
- C. The most common method of initiating proceedings is through a warrantless arrest by a parole officer or police upon a written statement by the parole officer that he has reason to believe that a condition has been violated. KRS 439.430(1)
 - 1. This written statement is sufficient to cause the detention of a parolee without a warrant. KRS 439.430(1)
 - 2. KRS 439.430(1) demands immediate notification of the parole officer's director, as well as the submission of a written report containing the alleged violations. The director, in turn, reports to the board which will determine whether to issue a warrant or command the parolee's release.

II. DUE PROCESS REQUIREMENTS OF PAROLE REVOCATION

- A. Parole revocation is a two-step process involving both a preliminary and final revocation hearing and the Supreme Court has determined that procedural safeguards are needed at both stages. Morrissey v. Brewer, 92 S.Ct. 2593 (1972); Preston v. Piggman, 496 F.2d 270 (6th Cir. 1974).
 - 1. Since a parolee will suffer a "grievous loss" of liberty by revocation, he is generally entitled to a prompt preliminary hearing to determine if probable cause exists to detain him for the alleged parole violation. Morrissey v. Brewer, supra at 2602.

* Harry J. Rothgerber is Chairman of the Kentucky Parole Board. Jim Deese, an Administrative Law Judge for the Board, was recently elected Vice President of this Association.

- a. If his present liberty is denied solely due to the alleged violation, a prompt preliminary hearing is necessary. Id.; Wells v. Webb, Ky., 511 S.W.2d 214 (1974).
 - b. If the parolee is serving time on other charges, the pendency of revocation proceedings or the prospect of future proceedings is not considered a restraint on his present liberty. Therefore, a prompt disposition of the warrant is unnecessary. Moody v. Daggett, 97 S.Ct. 274 (1976).
 - c. If the parolee has left the jurisdiction, a preliminary hearing may be held in his absence. Davis v. Black, Ky., 518 S.W.2d 338 (1975).
 - d. To satisfy due process, the preliminary hearing should normally be held at the locality in which the parolee is initially confined. See Morrissey v. Brewer, supra at 2602.
2. Due process must be afforded at the preliminary hearing to determine whether there is "probable cause" to hold the parolee for a parole violation.
- a. A notice of the hearing stating the alleged violations and the limited purpose of the hearing is necessary. Morrissey v. Brewer, supra at 2603. Id.
 - b. The parolee may appear, speak in his own behalf and introduce documents with relevant information. Id.
 - c. The parolee may have witnesses with relevant information and can request that the adverse witnesses on which the alleged violations are based be present for confrontation and cross-examination. Id.
 - i. If the Administrative Law Judge specifically finds that there is just reason to deny the right to confrontation, the parolee can be precluded from confrontation and cross-examination. Id.; See also Rogers v. Hurley, 486 S.W.2d 696, 697 (1972).
 - ii. Although KRS 439.390 gives the board subpoena power to secure the attendance of witnesses in parole proceedings, it has been held by the Court of Appeals in an unpublished opinion that a parolee cannot compel the board to use this power at the preliminary hearing. This opinion does not seem to comport with the directives of Morrissey v. Brewer, supra.
 - d. The parolee is entitled to an independent decision maker. Morrissey v. Brewer, supra at 2602.

- e. The parolee is entitled to a written report of the preliminary hearing. Morrissey v. Brewer, supra at 2603.
3. The Supreme Court has held that a final parole revocation hearing must be held within a reasonable time after the parolee is taken into custody. Morrissey v. Brewer, supra at 2604.
 - a. Even though the Supreme Court did not say how much time was reasonable, it did say that a two month delay was not unreasonable. Id.
 - b. Under KRS 439.440, a final revocation hearing must be held within thirty days after the parolee is returned to prison.
 - i. Since KRS 439.440 applies only when the prisoner is returned to prison for a violation of his parole, the Board has determined that a return due to a new conviction negates the need to comply with the thirty-day limit. Accordingly, the Parole Board determines the propriety of his reincarceration when he first sees the board on his new sentence.
 - ii. The Supreme Court recently held that a parolee, imprisoned for a crime committed while on parole, is not constitutionally entitled to an immediate parole revocation hearing even though a parole violation warrant is issued and filed as a detainer. Moody v. Daggett, supra.
 - iii. A statute calling for automatic revocation based on a new conviction is unconstitutional, however, if it cannot be construed to allow a meaningful opportunity to be heard in mitigation. Moss v. Patterson, 555 F.2d 137 (5th Cir. 1977).
 4. Since the Parole Board is determining whether the parolee's liberty should be forfeited at a parole revocation hearing, the parolee is entitled to more formal procedural safeguards than at the preliminary hearing.
 - a. The parolee is entitled to a written notice of the parole violations alleged. Morrissey v. Brewer, supra at 2604; Forbes v. Roebuck, 368 F.Supp. 817 (E.D. Ky. 1974) affirmed 506 F.2d 1400 (6th Cir. 1974).
 - b. Evidence that will be used in support of parole revocation must be disclosed. Morrissey v. Brewer, supra at 2604. A presumption in favor of disclosure limits the privilege under KRS 439.510 which shields disclosure of information obtained by a parole officer.
 - c. The parolee must be afforded an opportunity to appear before the board to state reasons why his parole should not be revoked. Id.

- d. Presentation of witnesses and documentary evidence must be allowed. Id.; Preston v. Piggman, supra. The board has subpoena power to assure this right. KRS 439.390.
 - e. Confrontation and cross-examination must be allowed unless the board can find good cause not to. Morrissey v. Brewer, supra at 2604; Rogers v. Hurley, supra at 697.
 - f. A "neutral and detached" hearing body must conduct the hearing. The parole board itself is considered to meet this requirement. Morrissey v. Brewer, supra at 2604.
 - g. If parole is revoked, a written statement with specific findings of evidence and the board's reasons must be given. Id.; Forbes v. Roebuck, supra at 820; Rogers v. Hurley, supra at 697.
5. Any decision by the Parole Board revoking parole is subject to a due process review by the Courts. See Davis v. Black, supra; Preston v. Piggman, supra.

III. EVIDENTIARY STANDARDS OF PAROLE REVOCATION

- A. As a general rule, evidence relied on to justify revocation of parole does not have to comply with the rules of evidence required in a criminal trial. Morrissey v. Brewer, supra at 2604.
 - 1. The board may consider "letters, affidavits and other material" not usually admissible at trial. Id.
 - 2. Hearsay or double hearsay alone may be insufficient to cause revocation due to its inherent denial of confrontation. State v. Mingua. 327 N.E.2d 791 (Ohio App. 1974).
 - 3. Evidence seized in violation of the Fourth Amendment can be used in parole hearings. United States v. Farmer, 512 F.2d 160 (6th Cir. 1975); United States v. Winsett, 518 F.2d 51 (9th Cir. 1975).
 - 4. Parole may not be revoked solely on the basis of a new charge of a criminal offense. Ewing v. Waldrop, 397 F.Supp. 509 (N.D.N.C. 1975).
 - 5. Parole may not be revoked on a new charge if the parolee is acquitted. Standlee v. Rhay, 403 F.Supp. 1247 (E.D. Wash. 1975).
 - 6. Evidence from an offense of which the parolee is acquitted may be used against him in revocation hearings. See United States v. Iannece, 405 F.Supp. 599 (E.D. Pa. 1975).
- B. Since parole revocation proceedings are not the equivalent of a criminal prosecution, a burden of proof of "beyond a reasonable doubt" is not necessary.

1. At the preliminary hearing, the limited determination of probable cause to hold the parolee pending a final revocation hearing justifies the introduction of only "some evidence" to support revocation. Kidd v. Robinson, F.Supp. (W.D. Wash. 1976).
2. The standard of proof used at the final revocation hearing differs according to the jurisdiction. All cases since Morrissey, supra, have declined to demand a "beyond a reasonable doubt" standard. See United States v. Strada, 503 F.2d 1087 (8th Cir. 1974) ("reasonably satisfied"); United States v. Sample, 378 F.Supp. 43 (E.D. Pa. 1974) ("preponderance of evidence").

IV. RIGHT TO COUNSEL IN REVOCATION PROCEEDINGS

- A. There is no absolute right to counsel at either the preliminary or final revocation hearings. Since such proceedings are not a part of the criminal prosecution, the Sixth Amendment guarantee of the right to counsel does not apply and due process of law only requires the application of this right on a selective basis in complex or close cases. Gagnon v. Scarpelli, 93 S.Ct 1756 (1973); Forbes v. Roebuck, supra at 819; Reeder v. Commonwealth, Ky., 507 S.W.2d 491 (1973).
 1. To guarantee that the rights afforded by Morrissey v. Brewer, supra, are effective, the state may be required to furnish counsel at its expense in certain cases.
 - a. Presumptively, counsel should be provided in cases where the parolee makes a request for counsel based on a timely and colorable claim that he has not committed the alleged violation or there are substantial reasons which are complex or difficult to develop that would justify or mitigate the violation making revocation inappropriate. Gagnon v. Scarpelli, supra at 1764.
 - b. The parolee's ability to speak effectively in his behalf should be considered, especially in doubtful cases. Id.
 - c. If counsel is refused, the reasons must be set out in the record. Id.
 2. While KRS 533.050 provides that a defendant is entitled to assistance of counsel at probation revocation proceedings, no parallel statute pertaining to parole exists.
 3. KRS 31.110(2)(a), a provision of the Public Defender Act of 1972, states that a needy person is entitled to have counsel at all stages when a person providing his own counsel would be entitled to be represented by an attorney, including revocation of probation or parole. The pertinent question here is whether a non-indigent defendant would be entitled to counsel.

* * * *