

2005

Michael A. Bacon v. Jerry Jorgensen, Warden, Utah Board of Pardons and Parole, et. al : Brief of Respondent

Utah Court of Appeals

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Michael A. Bacon; Petitioner/Appellant.

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IN THE UTAH COURT OF APPEALS

MICHAEL A. BACON,	:	
Petitioner - Appellant,	:	
v.	:	Case No. 20050582-CA
JERRY JORGENSEN, Warden, UTAH	:	
BOAR OF PARDONS & PAROLE, et. al,	:	
Respondents - Appellees	:	

BRIEF OF RESPONDENTS - APPELLEES

Appeal from the Judgment of the Third Judicial District Court, Salt Lake County,
Judge Timothy R. Hanson

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**ORAL ARGUMENT AND PUBLISHED OPINION NOT
REQUESTED BY RESPONDENTS - APPELLEES**

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LIST OF ALL PARTIES

To the best of Respondents’/Appellees’ knowledge, all interested parties appear in the caption of this Brief.

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BRIEF OF RESPONDENTS - APPELLEES

STATEMENT OF JURISDICTION

This action comes within the original jurisdiction of this Court under Utah Code Ann. § 78-2a-3(2)(g) (West 2004).

STATEMENT OF THE ISSUES

1. Petitioner waived his right to challenge the procedures used by the Board of Pardons by voluntarily pleading guilty to the parole violations in question.

ISSUE PRESERVED BELOW. This issue was raised by the respondents in their motion for summary judgment. R. 95-96.

STANDARD OF REVIEW: “Historically, the decisions of the Board are accorded great deference. ‘The plenary authority of the Board of Pardons should not be disturbed in the absence of a clear abuse of its rightful discretion.’” Walker v. State, 902 P.2d 148, 150 (Utah App. 1995) (courts have inherent authority to review the board’s

decisions to assure that a petitioner's procedural due process rights have not been violated).

2. The timing and rescheduling of petitioner's parole revocation hearing did not violate his right to procedural due process.

ISSUE PRESERVED BELOW. This issue was raised in the respondents' motion for summary judgment. R. 96-98.

STANDARD OF REVIEW: Same as for Issue 1 above.

3. The district court correctly rejected the petitioner's motion to disqualify the trial judge as not being supported by the record or any facts.

ISSUE PRESERVED BELOW. This issue was raised by the petitioner in a post judgment motion (R. 203-6) to recuse Judge Timothy R. Hanson that was denied by Judge William W. Barrett. R. 226.

STANDARD OF REVIEW: The district court's ruling on a motion to recuse is reviewed for correctness. Pugh v. Dozzo-Hughes, 2005 UT App 203, ¶17, 112 P.3d 1247; State v. Alonzo, 973 P.2d 975, 979 (Utah 1998).

DETERMINATIVE STATUTES AND RULES

Utah Admin. Code R671-512-1. Execution of the Warrant.

When the agent executes the warrant, or as soon thereafter as possible, the agent shall provide the parolee copies of the warrant and the warrant request. At the same time, the agent shall also provide the parolee with the Notice Regarding Parole Allegations, the Challenge to Probable Cause Determination, and the Affidavit of Waiver and Plea of Guilt as published by the Board.

Utah Admin. Code R671-515-1. Timeliness of Parole Revocation Hearings.

A Parole Revocation Hearing will be conducted by a hearing officer within 30 days after detention unless the parolee expressly waives the hearing in writing. For good cause, the Board may continue the hearing beyond 30 days.

STATEMENT OF THE CASE

On June 17, 2004, the Board of Pardons and Parole of the State of Utah issued an arrest warrant for Michael Bacon on six allegations of parole violation. R. 107. That same day, the warrant was lodged with the Sevier County Jail where Bacon was incarcerated. Id. Bacon pled guilty to two misdemeanors (Arson and Terroristic Threat) on June 29, 2004, in the Sixth District Court for Sevier County. R. 109.

Bacon was served with the parole warrant and other documentation on July 7, 2004, and requested a hearing. R. 112. Petitioner was delivered into the custody of the Utah State Prison on July 14, 2004. R. 107. His parole violation hearing was originally scheduled for September 8, 2004 at 8:00 A.M. R. 114. The time of the hearing was changed on several occasions. R. 115-18. At the hearing, Bacon pled guilty to all six alleged violations of his parole. R. 123. Based on his guilty pleas, his parole was revoked and he was given a termination of sentence date of July 25, 2006. R. 120-21.

On August 31, 2004, Bacon filed this petition for an extraordinary writ. R. 1-9. In his petition, Bacon did not challenge his guilty pleas nor the substantive decision reached by the board. Instead he claimed that the board hearing had been untimely and that the

warrant was served on him in an untimely manner. R. 2, 10-17. Respondents filed a motion for summary judgment. R. 90-123.

At a hearing on April 19, 2005, the district court granted the respondents' motion. R. 176. The order dismissing this petition was filed on May 3, 2005. R. 180-87. The petitioner filed an objection to the proposed order, that also served as a post judgment motion, on May 16, 2005. R. 188-202. That same day, Bacon filed a motion for recusal of the trial judge (Judge Timothy R. Hanson) accompanied by an affidavit. R. 203-6. The only allegations contained in the affidavit were:

Petitioner declares under the penalty of perjury of Title 28 U.S.C. 1746 that its his sincere belief that Judge Hanson is not impartial and biased against the petitioner in regards to his case.

Some of these beliefs came about because of the Judges [sic] actions as outlined in the objection which helped form these beliefs.

R. 205.

Judge Hanson, questioning the legal and factual sufficiency of the motion, referred it to the presiding judge. R. 220. Judge Barrett denied the motion on June 1, 2005, based on the petitioner's failure to comply with the requirements of Rule 63(b), Utah R. Civ. P. R. 226. Petitioner's post judgment motion was denied by a signed minute entry order on June 8, 2005. R. 234-35. Bacon's notice of appeal was filed on June 30, 2005. R. 244-45. A further objection filed by the petitioner (R. 237-38) was denied by a signed minute entry filed on July 5, 2005. R. 248-49.

STATEMENT OF RELEVANT FACTS

The facts concerning the revocation of Bacon's parole are not relevant to this appeal. The only issues raised are procedural in nature.

SUMMARY OF ARGUMENT

Michael Bacon pled guilty to all six allegations of parole violation. His guilty plea was a waiver of all nonjurisdictional issues, including claims of pre-plea violations of due process.

The petitioner claims that the board's actions were untimely. But he does not show how an earlier hearing would have resulted in a different outcome. His parole would have been revoked, based on his guilty pleas, regardless of when the hearing was held.

The district court correctly denied the petitioner's motion to recuse. Bacon's motion was inadequate and it failed to present facts that would support a claim of bias.

ARGUMENT

I. PETITIONER'S GUILTY PLEAS CONSTITUTED A WAIVER OF ALL NONJURISDICTIONAL ISSUES, INCLUDING ALLEGED PRE-PLEA CONSTITUTIONAL VIOLATIONS

Petitioner's guilty pleas to the allegations of parole violation constituted a waiver of all nonjurisdictional issues, including alleged pre-plea constitutional violations. The general rule is well established: "[A] voluntary guilty plea is a waiver of the right to appeal all nonjurisdictional issues, including alleged pre-plea constitutional violations."

State v. Sery, 758 P.2d 935, 938 (Utah Ct. App. 1998); see also Bentley v. West Valley City, 2001 UT 23 ¶4, 21 P.3d 210, 211 (Utah 2001) (guilty plea waived all nonjurisdictional defects, “including any alleged pre-plea constitutional violations”); State v. Munson, 972 P.2d 418, 421 (Utah 1998) (“Thus, a knowing and voluntary guilty plea precludes reservation of issues for appeal, even those concerning alleged pre-plea constitutional violations.”); State v. Smith, 833 P.2d 371, 372 (Utah Ct. App. 1992) (“A voluntary plea of guilty or no contest constitutes a waiver of the right to appeal all nonjurisdictional issues”). “[B]y pleading guilty, the defendant is deemed to have admitted all of the essential elements of the crime charged and thereby waives all nonjurisdictional defects.” State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989).

Petitioner pled guilty to the parole violations. R. 123. No jurisdictional defects have been alleged by Bacon in his petition. When petitioner pled guilty, he waived his right to challenge any nonjurisdictional defects there might have been in the procedure used by the board. The district court correctly found that the issues raised in the petition had been waived. R. 183-84. The dismissal of the petition should be affirmed on this basis.

II. THE TIMING AND RESCHEDULING OF PETITIONER’S PAROLE REVOCATION HEARING DID NOT VIOLATE HIS RIGHT TO PROCEDURAL DUE PROCESS

Even if petitioner had not waived the claims made in his petition by pleading guilty to the parole violation allegations: not providing him with copies of the warrant and

warrant request earlier, not holding his parole violation hearing earlier, and rescheduling his parole revocation hearing for different times on the same day did not operate to deny petitioner procedural due process. The Utah Supreme Court has found that when a parolee's rights have been violated, the remedy is not to vacate the order, rather the remedy is to ensure the parolee's rights were met. Monson v. Carver, 928 P.2d 1017, 1028 (Utah 1996). To prevail on a due process claim, petitioner must "demonstrate how a particular procedural requirement [would] substantially further the Board's fact-finding process" Id. at 1030. "[I]f an inmate fails to demonstrate how a particular procedural requirement will substantially further the Board's fact-finding process, we have no basis for concluding that a failure to provide that procedure operated to deny the inmate due process." Id. (failure to permit counsel to participate in hearing not a due process violation because inmate made no showing how such participation would have substantially assisted the fact-finding process).

Petitioner fails to show how receiving a copy of the arrest warrant and warrant request, receiving a parole revocation hearing within thirty days, and receiving reasons for changing the time of day his hearing was held would substantially further the Board's fact-finding process. Rather than meet his burden, the petitioner argues for an absolute rule that would require the reversal of the board's decision for any perceived error without any consideration of the test set out in Monson.

Nor has petitioner shown that his revocation hearing was not held within a reasonable time. Instead, Bacon claims that any violation of the thirty-day time period (or the seven-day period for serving the warrant) carries a mandatory finding of prejudice. The Utah Supreme Court rejected this argument in Malek v. Sawaya, 730 P.2d 629, 630 (Utah 1986). In Malek, the inmate complained that “the Board failed to conduct a timely parole revocation hearing.” Id. The Supreme Court rejected this claim, and held that the inmate had not shown that failing to conduct a timely parole revocation hearing was a substantial and prejudicial denial of constitutional rights. “The very nature of the proceedings before the Board of Pardons prompts the conclusion that the time limitation for determining when a hearing date will be set is directory only and that noncompliance is not unreasonable per se.” Id. The court also “reiterated that a writ of habeas corpus is not an available remedy in the absence of a claim of fundamental unfairness at trial or a substantial and prejudicial denial of constitutional rights.” Id. (citing Morshita v. Morris, 730 P.2d 691, 693 (Utah 1980) (“[a]n entry of formal findings of fact and conclusions of law would add nothing in the instant case”)).

Petitioner’s parole would have been revoked regardless of whether the hearing was held within thirty days. He pled guilty to violating his parole. R. 123. The district court correctly determined that the outcome of Bacon’s parole violation proceeding would not have been changed by a change in the timing of the hearing.

III. BACON FAILED TO MEET HIS BURDEN OF SHOWING BIAS ON THE PART OF JUDGE HANSON

Upon receipt of the petitioner's motion to recuse, Judge Hanson referred the matter to the presiding judge for his review. R. 220. He only continued with this matter after the recusal motion had been denied by Judge Barrett. R. 226. Having complied fully with the requirements of Rule 63(b), Utah R. Civ. P., "the burden shifted to the petitioners to show actual bias or abuse of discretion." State v. Alonzo, 973 P.2d 975, 979 (Utah 1998).

We agree with the court of appeals that actual bias or abuse of discretion has not been demonstrated here. The parties differ widely in their account and general explanation of the trial judge's in-chambers comments. Absent a record of the actual language used by the judge and absent any other evidence of actual bias in the record, we agree with the court of appeals and conclude that the affidavits of one side are not enough to prove actual bias.

In State v. Gardner, we held that a trial judge's failure to recuse based on the appearance of bias may be grounds for reversal if actual prejudice is shown. Actual prejudice can be shown when there exists a reasonable likelihood that the result would have been more favorable for the defendants absent the trial judge's appearance of bias. Again, the comments alleged here created an appearance of bias; however, standing alone, we conclude that they were insufficient to support a finding that actual prejudice was suffered by petitioners. We therefore affirm the court of appeals in finding that had the judge recused himself, there was nevertheless no reasonable likelihood of a more favorable result for defendants.

Id. (citations and internal quotations omitted).

Bacon has failed to allege sufficient facts to show actual bias. As shown above, the district court's decision was correct and should be affirmed. Absent a showing that a more favorable result would have been reached if Judge Hanson had recused himself the

petitioner is unable to show actual prejudice. Judge Barrett correctly held that Bacon had failed to comply with Rule 63 and his decision to deny the motion to recuse should be affirmed on appeal.

CONCLUSION

For the above stated reasons, respondents ask this Court to affirm the dismissal of this action.

RESPONDENTS DO NOT DESIRE ORAL ARGUMENT OR A PUBLISHED OPINION

Respondents-appellees do not request oral argument and a published opinion in this matter. The questions raised in this appeal, having already been decided by this Court and the Utah Supreme Court in published opinions, are not such that oral argument or a published opinion are necessary, though respondents desire to participate in oral argument if such is held by the Court.

Respectfully submitted this 26th day of October, 2005.

A handwritten signature in black ink, appearing to read "Brent A. Burnett", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Respondents - Appellees, postage prepaid, to the following on this 26th day of October, 2005:

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