

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0201

DAVID A. WINN

VERSUS

LOUISIANA PAROLE BOARD

Judgment Rendered: September 14, 2011

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 577,029

The Honorable Kay Bates, Judge Presiding

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**David A. Winn
Angie, Louisiana**

**Plaintiff/Appellant
*Pro Se***

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Louisiana State Parole Board**

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

GAIDRY, J.

This appeal concerns the dismissal of a prisoner's petition for judicial review of a parole revocation decision. We affirm.

FACTS AND PROCEDURAL HISTORY

Prisoner David Winn was released to parole supervision on December 20, 2003. In May of 2007, he was charged with violating the conditions of his parole. A preliminary hearing was held on May 29, 2007. He pled guilty to numerous parole violations, and probable cause was found to exist that he violated other conditions. A final revocation hearing was held on September 12, 2007. He was found guilty after the hearing of violating various conditions of his parole, but the parole board voted to continue the matter, defer revocation, and impose a special condition on Winn's parole in lieu of immediate revocation, requiring Winn to successfully complete a long-term substance abuse program. Although Winn entered the treatment program, he was discharged and removed from the program prior to completion due to a violation of a disciplinary rule by possessing contraband (a weapon). Because he failed to satisfy the special condition of his parole imposed in lieu of immediate revocation, another final revocation hearing was held April 14, 2008, after which the parole board found him guilty of violating the special condition of his parole requiring him to successfully complete the treatment program. Considering all of the parole violations of which he was found guilty, the parole board voted to revoke his parole.

On August 28, 2008, Winn filed a federal *habeas corpus* petition in the United States District Court for the Western District of Louisiana, which was dismissed because he had not exhausted available state court remedies prior to filing his federal petition. Thereafter, on April 2, 2009, Winn filed a petition for judicial review of the revocation decision, alleging that he was

not given a preliminary hearing prior to the final revocation proceedings and that he was not given notice of the alleged violations prior to the final revocation hearing. Because his petition was filed more than 90 days after the revocation decision, the Commissioner recommended that it be dismissed on grounds of peremption. The district judge thereafter signed a judgment dismissing Winn's petition with prejudice. Winn appealed, alleging that the court erred in finding that his claim was barred by peremption and in failing to allow him to amend his petition to cure the grounds for dismissal.

DISCUSSION

Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint. La. R.S. 15:574.11(A). The granting, conditions, or revocation of parole rests in the discretion of the Board of Parole. *Id.* No prisoner or parolee shall have a right of appeal from the parole board's decision regarding the imposition or modification of authorized conditions of parole, the termination or restoration of parole supervision or discharge from parole before the end of the parole period, or the revocation or reconsideration of revocation of parole, except for the denial of a revocation hearing under La. R.S. 15:574.9. *Id.* Petitions for judicial review alleging a denial of a revocation hearing under the provisions of La. R.S. 15:574.9 are subject to a preemptive period of ninety days after the date of revocation by the Board of Parole, and petitions for judicial review filed after this preemptive period shall be dismissed with prejudice. La. R.S. 15:574.11(D).

Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the preemptive period. La. C.C. Art. 3458. Peremption may not be

renounced, interrupted, or suspended. La. C.C. Art. 3461. Winn's parole was revoked on April 14, 2008. Therefore, he had ninety days from that date to file a petition for judicial review alleging a denial of a revocation hearing. Having failed to file within the ninety-day period, his suit was perempted when filed on March 28, 2009 and was properly dismissed.

Winn also argues that the court should have allowed him to amend his petition to cure the grounds for dismissal rather than dismissing his suit with prejudice. Louisiana Code of Civil Procedure article 934 provides that where the grounds of the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment. However, if the grounds of the objection cannot be so removed, the claim shall be dismissed. La. C.C.P. art. 934. In this case, Winn argued before the Commissioner that his ignorance of the law, which led to his filing of the federal *habeas corpus* proceeding, resulted in his untimely filing. Winn was given an opportunity at this hearing to explain why his suit should not be considered untimely. Since peremption cannot be renounced, interrupted, or suspended, an amendment of the petition to allege ignorance of the law would not cure the grounds for the objection. Therefore, the court was correct in dismissing Winn's suit.

Finally, even if Winn's suit were not perempted, a review of the record reveals that Winn's petition for judicial review of his parole revocation was meritless. The record reflects that a preliminary hearing was held prior to Winn's revocation hearing, that he was given notice of the charges against him, and that the hearing was continued pending his completion of drug rehabilitation. After he failed to complete his drug rehabilitation program, another final revocation hearing was held, and the Board considered his violations and his failure to complete the special condition and voted to

revoke his parole. As he was not denied a revocation hearing, he has no appeal from this revocation decision.

CONCLUSION

This appeal has no merit. The judgment dismissing David A. Winn's petition for judicial review is affirmed. Costs of this appeal are to be borne by appellant.

AFFIRMED.