

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1934

SHANE FOSTER

VERSUS

LOUISIANA PAROLE BOARD and
STATE OF LOUISIANA

Judgment Rendered: May 3, 2012.

* * * * *

On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 577,342

The Honorable Janice Clark, Judge Presiding

* * * * *

James D. "Buddy" Caldwell
Attorney General
and
Patricia H. Wilton
Assistant Attorney General
Baton Rouge, La.

Attorneys for Defendant/Appellant,
Louisiana State Parole Board

J. René Williams
Houma, La.

Attorney for Plaintiff/Appellee,
Shane Foster

* * * * *

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

BSF
QHP
TMH

CARTER, C. J.

This is an appeal of a judgment of the district court reversing a decision of the Louisiana State Parole Board that revoked inmate Shane Foster's release on parole.

FACTS AND PROCEDURAL HISTORY

Foster was released from custody to parole supervision in 2001. Shortly before his parole period was set to expire, Foster was alleged to have violated the conditions of his parole, namely, that he refrain from engaging in any type of criminal conduct and that he not have possession or control of any firearms or dangerous weapons. Preliminary and final parole revocation hearings were held, wherein photographs showing Foster holding two pistols along with two other men holding shotguns, were offered. Foster acknowledged being the man in the photographs holding the pistols, but argued that he was holding CO₂ powered pistols, which were neither firearms nor dangerous weapons. Foster also acknowledged that the other guns shown in the pictures were shotguns. The Parole Board revoked Foster's parole.¹

Foster sought judicial review of the Parole Board's decision by the district court. The commissioner to whom the case was assigned recommended that the Parole Board's decision be upheld, because Foster had not demonstrated that his due process rights were violated or that the decision should be reversed pursuant to Louisiana Revised Statutes 15:574.11, and because the revocation was not a decision that exceeded the

¹ Foster's parole was originally revoked in March 2009. He had sought judicial review and, because the record had not been properly preserved, it was deemed that he had been denied the right to judicial review and the decision of the Parole Board was reversed. The matter was remanded to the Parole Board for a new revocation hearing. This appeal concerns the proceedings that occurred after that remand.

discretion of the Parole Board. The district court judge rejected the commissioner's recommendation and reversed the Parole Board's decision, stating, "the revocation decision rendered in this matter is reversed as an arbitrary and capricious decision rendered in violation of [Foster's] due process rights." The Parole Board now appeals the judgment of the district court.

DISCUSSION

Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint. La. Rev. Stat. Ann. § 15:574.11A. The granting, conditions, or revocation of parole rests in the discretion of the Parole Board. *Id.* A prisoner or parolee's right to appeal a decision of the Parole Board terminating parole supervision is limited to the denial of a revocation hearing under Louisiana Revised Statutes 15:574.9. *Id.* However, the district court has appellate jurisdiction over pleadings alleging a violation of Section 574.9, with review being confined to the revocation record. La. Rev. Stat. Ann. § 15:574.11C. The district court is authorized to affirm the Parole Board's revocation decision or reverse and remand for further revocation proceedings. *Id.* An aggrieved party may appeal a final judgment of the district court. *Id.*

Section 574.9 provides, in pertinent part:

A. When a parolee has been returned to the physical custody of the Department of Public Safety and Corrections, office of corrections services, the board shall hold a hearing to determine whether his parole should be revoked, unless said hearing is expressly waived in writing by the parolee. A waiver shall constitute an admission of the findings of the prerevocation proceeding and result in immediate revocation. If the revocation hearing is not waived, the parolee shall be permitted to consult with and be advised and represented by his own legal counsel or legal counsel appointed under the provisions of R.S. 15:179. At the hearing the parolee may admit, deny, or explain

the violation charged, and he may present proof, including affidavits and other evidence, in support of his contentions. Upon request of the parolee, the parole board may postpone the rendering of its decision for a specified reasonable time pending receipt of further information necessary to a final determination.

In his petition for review filed with the district court, Foster alleged that he was denied due process, because he had not been charged with the crime of possessing a firearm, an acquittal of which would have prevented the revocation. However, parole revocation is not part of a criminal prosecution and the full panoply of rights due a defendant in a criminal prosecution does not apply. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Due process does not require that parole revocation be conditioned on a trial by jury or judge. *Cf. Morrissey*, 408 U.S. at 489 (setting forth the minimum requirements of due process for parole revocation). In fact, the Supreme Court long ago recognized that “[s]ometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State.” *Morrissey*, 408 U.S. at 479.

Foster further alleged that he was denied due process of law “in the conduct of the hearing” before the Parole Board because “the hearing conducted was done so on an incorrect basis.” Foster’s petition set forth that the Parole Board considered the violation as a “technical violation” of parole, but because his original conviction was for a crime of violence, possession of a firearm cannot by law be a technical violation of parole. Louisiana Revised Statutes 15:574.9G provides that the commission of certain offenses in certain circumstances entitles the offender to a ninety-day “technical revocation sentence.” Although the violation report filed in

Foster's parole record indicates that he was a technical violator, he did not receive a technical revocation sentence. Moreover, the "1st Technical Violator Eligibility Checklist," also filed in Foster's parole record, indicates that Foster is not eligible for a technical revocation sentence.

Finally, our review of the hearing afforded Foster does not support a finding that the notation that he was a technical violator affected the hearing. Foster was present at the hearing with counsel. He denied the charges that he had violated the two conditions of parole and offered his explanation that the photograph actually shows him holding two CO₂ pistols, which are neither firearms nor dangerous weapons. Foster's counsel participated in the hearing by asking questions of the parole officer and offering argument as to the merits of the parole violation. The record does not support a finding that Foster was denied due process in the conduct of the hearing.

The remainder of Foster's allegations raised in his petition for review relate to the merits of the Parole Board's revocation decision. Specifically, Foster maintains that the CO₂ powered pistols he was holding in the photographs were neither firearms nor dangerous weapons. This is, however, outside the limited scope of appellate review of revocation proceedings.² La. Rev. Stat. Ann. § 15:574.11.

² We note that the evidence in this case consists of the photographs of Foster holding what appear to be pistols alongside two other men holding what are undisputedly shotguns. Foster argued that he was holding CO₂ powered pistols, however they were not produced for the parole board's inspection. Instead, Foster offered evidence showing the commercial availability of CO₂ powered pistols that are replicas of firearms. Thus, Foster acknowledged that the photographs appeared to show that he was holding firearms, which were pointed at the other men's heads in one picture. The only evidence that they were not firearms was Foster's statement that they were CO₂ powered pistols.

CONCLUSION

After reviewing this matter, we find that Foster was afforded due process and the decision of the Parole Board must be affirmed. The district court's judgment reversing the decision of the Parole Board is reversed. Costs of this appeal are assessed to Shane Foster.

REVERSED.