VERMONT SUPREME COURT
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Case No. 21-AP-223

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

FEBRUARY TERM, 2022

Joshua Many* v. State of Vermont et al.	}	APPEALED FROM:
	}	Superior Court, Windsor Unit,
	}	Civil Division
	}	CASE NO. 21-CV-00828
		Trial Judge: Robert P. Gerety, Jr.

In the above-entitled cause, the Clerk will enter:

Petitioner appeals the trial court's denial of his petition for habeas corpus founded on alleged due process violations in the revocation of his furlough status and recission of parole. The trial court granted summary judgment to the State, concluding that petitioner had failed to exhaust his administrative remedies and, alternatively, that his claims were unmeritorious. We affirm.

The following facts are undisputed. At the time of the court's summary judgment decision in September 2021, petitioner was incarcerated at Southern State Correctional Facility with a minimum release date of September 24, 2019, and a maximum sentence of September 11, 2023.

In August 2020, petitioner was released from prison on conditional reentry furlough. Though he remained under sentence and subject to conditions of supervision, petitioner was able to live at home with his family, including his fiancée and her two children. He was also allowed to seek and maintain employment, correspond freely and privately with friends and loved ones, and seek medical and mental health care from providers of his choice.

In February 2021, petitioner took his fiancée's twelve-year-old son, K.R., to the Saint Albans Police Department hoping that an officer would talk to K.R. about K.R.'s behavior. Officers noticed marks or bruising on the child's neck and spoke privately with K.R., who stated that petitioner had grabbed him and scratched his neck. K.R. nevertheless told officers that he felt safe going home with petitioner.

In a follow-up interview on March 1, 2021, K.R. recanted his allegations and repeatedly told investigators that he did not think petitioner scratched his neck intentionally. Later that day petitioner met with the Parole Board, which granted him parole.

Petitioner's parole officer scheduled petitioner to meet and sign his parole agreement on March 10, 2021. Shortly before that meeting, however, the parole officer learned that the Franklin County State's Attorney would be pursuing charges against petitioner based on K.R.'s allegations. On March 9, the parole officer asked the Parole Board to rescind petitioner's parole in light of these charges. When petitioner reported to the parole office as scheduled on March 10, he was arrested and sent to prison, though he had not yet been cited or charged with a new crime.

Shortly after being reincarcerated, petitioner received a notice of suspension report alleging that he had violated the following furlough conditions:

> Condition 1: I will not be cited or charged; I will not commit any act punishable by law, including city and municipal code violations.
>
> Condition 3: I will not engage in threatening, violent, or assaultive behavior.

Around the same time, he was cited for misdemeanor domestic assault. The State arraigned petitioner on a simple-assault charge but never charged him with domestic assault.

Petitioner waived a furlough violation hearing, admitted guilt to violations of Conditions 1 and 3, and agreed to case-staffing. In light of two prior furlough violations for driving-related infractions, case staff interrupted his furlough for one year.

The Parole Board held a parole recission hearing for petitioner in April 2021, which petitioner attended. Prior to the hearing the Board received copies of the charging documents for petitioner's simple-assault case and report from his parole officer. Although petitioner's then-counsel was present remotely at the hearing, the Board did not permit counsel to represent him. Petitioner's counsel nevertheless raised due process concerns and offered to provide the Board with K.R.'s victim impact statement. Petitioner requested to call witnesses, including K.R. He also asserted that the parole recission request had been filed before he was cited for the new criminal charge, and that he had not been given the opportunity to sign his parole agreement as scheduled.

The Parole Board did not allow any evidence during the hearing and declined to speak with K.R. or any other witnesses. The Board explained that because petitioner had not signed the parole papers, it was not a violation-of-parole hearing and thus petitioner did not have the right to participate. The Board rescinded the grant of parole based solely on the charging documents and parole officer's report.

In April 2021 petitioner filed a petition for habeas corpus in the civil division, challenging the revocation of his furlough and rescission of his parole. Petitioner later amended his petition with the assistance of counsel. The parties filed cross motions for summary judgment.

The trial court granted the State's motion and denied the habeas petition. The court concluded that petitioner had the right to directly appeal his furlough revocation through Vermont Rule of Civil Procedure 74 and 28 V.S.A. § 724 because petitioner's furlough had been interrupted for one year. See 28 V.S.A. § 724(b) (providing right of appeal to civil division under Rule 74 when offender's furlough status is revoked or interrupted for ninety or more

days); id. § 724(c) (providing that civil division shall review record de novo and appellant must prove by preponderance of evidence that Department of Corrections abused its discretion). As such, the court concluded that habeas relief was not available to petitioner because he had failed to exhaust this statutory appellate process. Petitioner contended that he could not have appealed under § 724 because he was alleging a due process violation rather than an abuse of discretion, but the court rejected this argument, reasoning that due process issues could properly be considered in § 724 appeals. Alternatively, the court concluded that the Department of Corrections (DOC) did not violate petitioner's due process rights or otherwise commit error in revoking his furlough. The court also ruled that because parole never actually went into effect for petitioner, he had no due process rights in the rescission of parole.

In his principal appellate brief, petitioner argued that he had a liberty interest in his furlough status and parole status, and that due process violations occurred both in the revocation of furlough and rescission of parole. As to furlough revocation, he contended that the appeal process established by 28 V.S.A. § 724 was not an adequate alternative to habeas relief under his circumstances because the reviewing court could entertain arguments related only to abuse of discretion and not to alleged due process violations. After petitioner filed this brief but before he filed his reply brief, this Court decided Davey v. Baker, 2021 VT 94. We rejected this same argument in Davey, holding that the § 724 appeal process is a viable alternative to challenge furlough interruption and that "nothing in § 724(c) precludes a court from reviewing whether a denial of due process occurred." Id. ¶¶ 16-17. We affirmed the denial of Mr. Davey's habeas petition, premised on a due process argument, because of his failure to exhaust the § 724 appeal process. Id. ¶ 1. In his reply brief, petitioner acknowledged Davey and conceded that "his due process claims regarding revocation of his furlough were not properly brought under the writ of habeas corpus, and instead should have been raised via 28 V.S.A. § 724 and V.R.C.P. 74." He reiterated, however, that he had a liberty interest in his grant of parole and therefore was entitled to due process before the Parole Board.

Given petitioner's concession and the straightforward application of 28 V.S.A. § 724, we affirm the trial court's decision as to furlough revocation and need not address the issue further.[*] We do not reach petitioner's contentions that he had a liberty interest in his furlough status or that he was denied due process in the revocation of that status. We turn solely to petitioner's argument regarding rescission of parole.

We review summary judgment decisions de novo. In re Mayo Health Care, Inc., 2003 VT 69, ¶ 3, 175 Vt. 605 (mem.). Summary judgment is appropriate when the moving party has demonstrated "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "In determining whether a genuine issue of material fact exists, all reasonable doubts and inferences are allowed to the nonmoving party." Mayo Health Care, 2003 VT 69, ¶ 3.

[*] Davey acknowledged that a trial court has discretion to allow a petitioner who did not exhaust alternatives to seek habeas relief in limited circumstances "where there is no evidence that a petitioner intentionally disregarded viable alternatives to gain a tactical advantage." 2021 VT 94, ¶ 20. However, the trial court here did not exercise such discretion and petitioner has conceded that his habeas writ was an improper avenue to challenge his furlough revocation, so we need not analyze this question.

Here, the trial court correctly concluded that petitioner could not obtain habeas relief regarding parole. Under 12 V.S.A. § 3952, a "person imprisoned in a common jail, or the liberties thereof, or otherwise restrained of his or her liberty by an officer or other person, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint, and obtain relief therefrom if it is unlawful." Petitioner argues that the rescission of parole deprived him of a liberty interest because it resulted in his removal from the community and reincarceration behind bars. But this is factually inaccurate. Petitioner was not living out in the community as a result of parole being granted and he was not reincarcerated as a result of parole being rescinded. Petitioner was out on furlough at the time parole was initially granted, and he was arrested and reincarcerated for violating furlough conditions before he signed the parole agreement. One month later, when the Parole Board held a hearing and rescinded the grant of parole, petitioner was still incarcerated as a result of the furlough interruption. The fact that petitioner almost obtained parole status was thus irrelevant to any deprivation of liberty that he alleges occurred.

Moreover, the statutory provisions regarding parole agreements are unequivocal:

> The parole agreement shall not become effective until it is signed by the inmate. The Parole Board may withdraw the granting of parole at any time before the parole agreement is signed by the inmate. After the parole agreement is signed by the parolee, parole can only be revoked in accordance with subchapter 4 of this chapter.

28 V.S.A. § 502c(b). Subchapter 4 establishes specific procedures for revocation of parole, including issuance of a warrant, a written alleged violation produced by the parole officer, and a prompt hearing with the parolee and the parole officer present, at which the alleged violation must be proven by "substantial evidence." Id. §§ 551-552. Because it is undisputed that petitioner never signed the parole agreement, he was not yet on parole. Therefore, subchapter 4 did not apply to him and no further process was due. He did not experience a loss of liberty as a result of parole rescission, so his claim fails.

Affirmed.

BY THE COURT:

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice