

STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
No. 22-CV-00708

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WAYNE JOHNSON  
Petitioner,

v.

VERMONT PAROLE BOARD  
Respondent.

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RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Respondent the Vermont Parole Board revoked Petitioner Wayne Johnson's parole after a hearing at which it determined that he violated a parole condition by violently assaulting his wife in October 2021.<sup>1</sup> On review, Mr. Johnson claims that he was improperly excluded from part of the hearing during which his wife testified in violation of his due process rights. The parties have filed cross-motions for summary judgment addressing this issue.

There are few material facts except as to how the revocation proceeding unfolded. Though the parties draw competing inferences, the video recording of the proceeding is in the record and speaks for itself.

The hearing was conducted remotely as to all participants. Prior to it, Mr. Johnson's wife requested to testify outside of his presence. At the beginning of the hearing, it was clear that the Board had determined to exclude Mr. Johnson during his wife's testimony to "protect" her. Counsel for Mr. Johnson sought a compromise, such as excluding him from her testimony, but then playing the testimony back to him and letting him consult with her prior to cross-examination. The Board made it abundantly clear that it had no interest in lesser limitations on Mr. Johnson's presence than full exclusion, and no one revisited the matter thereafter.<sup>2</sup>

Mr. Johnson's wife appeared on video and testified at length. Mr. Johnson was in an electronic "breakout room" for the duration. Her testimony was wholly consistent with the

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<sup>1</sup> Two other violations had been asserted. Mr. Johnson admitted one, and the DOC elected not to pursue the other. The hearing focused on the one disputed violation arising out of the October 2021 assault, which is the only violation at issue here.

<sup>2</sup> The State argues that Mr. Johnson's counsel blew it by not reiterating the objection later when the time would have come to meet with Mr. Johnson, and thus there is no way to tell how the Board might have reacted had she only asked to meet with him after the conclusion of his wife's testimony. The State's point is not well taken. This was a very short and informal proceeding. The Board was crystal clear when the matter initially came up it was not considering lesser alternatives although it never explained why. Mr. Johnson did not somehow waive or fail to preserve the due process issue by not renewing the objection later.

thrust of her prior statements and police reports, though it may have been more expansive in some of its particulars. At the conclusion of her testimony, Mr. Johnson's counsel, obviously well prepared, vigorously cross-examined her in detail. All the while, Mr. Johnson was unable to see or hear the proceeding or to consult with counsel. When the cross-examination ended, Mr. Johnson was permitted back into the hearing for the remainder of the testimony (one other witness). Mr. Johnson did not testify. He was found guilty primarily on the basis of his wife's testimony.

On review, Mr. Johnson argues that he had a qualified right to be present at the hearing, to understand the evidence being presented against him, and to confer with counsel, and the Board violated all these rights by completely excluding him from the hearing for no reason.

Prior to revocation, a parolee is entitled to "an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). At the final hearing, the "parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Id.* at 488. The minimum requirements of due process are "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (*unless the hearing officer specifically finds good cause for not allowing confrontation*); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Id.* at 489 (emphasis added). And in Vermont, parolees are entitled to counsel. 13 V.S.A. § 5233(a)(1).

As to confrontation, one scholarly work elaborates as follows: "The parameters of the due process right of confrontation must be determined in light of the *Morrissey* Court's view that revocation procedures should be 'informal,' 'structured to assure that the finding of a . . . violation will be based on verified facts and . . . accurate knowledge.' Thus, the key consideration appears to be trustworthiness. Confrontation at probation and parole revocations is mandated because it contributes to the likelihood that the factfinder will be able to ascertain the truth. But when there is some indication that the evidence is accurate and there is good reason to forgo the right of confrontation, due process may be satisfied despite the lack of confrontation." Neil P. Cohen, *Law of Probation & Parole* § 21:33 (2d).

Mr. Johnson argues that there was no basis to limit his attendance at the hearing at all, and the Board offered no reason for doing so. The Board in fact said that it did so to "protect" Mr. Johnson's wife. In context, the Board's reason is salient, and the court declines to second-guess it. Mr. Johnson was accused of aggravated domestic assault and those charges were pending at the time of the hearing. His wife requested the opportunity to testify without his presence, and it is reasonably inferable that she desired to avoid the trauma and intimidation of testifying about a violent assault directly in the presence of her attacker, and the Board so found. In fact, throughout much of her testimony she appeared to be traumatized, intensely fearful, and shaken. While the better practice surely would have been for the Board to more clearly and expressly explain its reasons, the court declines

to conclude that there was no basis at all to limit Mr. Johnson's presence during his wife's testimony.

The real question in this case is whether the extent to which he was excluded violated his due process rights. Mr. Johnson argues that removing him entirely from the proceeding prevented him from knowing the evidence being presented against him and prevented him from conferring with counsel, whose cross-examination presumably would have been aided by his input. The State argues that the Board's procedure adequately preserved Mr. Johnson's rights and ensured the reliability of the evidence.

The principal confrontation concern—the main issue here—is with the accuracy of the evidence and the ability of the finder of fact to make credibility determinations and otherwise fairly evaluate it. In this regard, the court notes that two cases relied upon Mr. Johnson deal with substantially different situations. *State v. Eldert*, 2015 VT 87, 199 Vt. 520; *Rodriguez v. Pallito*, 2014 VT 18, 195 Vt. 612. Neither case addressed the removal of the parolee from the hearing during the live testimony of the witness who would establish the violation. Rather, in both cases, there was no such live witness at all. Instead, the DOC proceeded largely on hearsay statements alone in circumstances where reliability was substantially uncertain and the necessity for doing so was unclear. *Eldert*, 2015 VT 87, ¶ 20; *Rodriguez*, 2014 VT 18, ¶ 24. In *Eldert* and *Rodriguez*, there basically was no confrontation at all.

That is not at all the case here. Mr. Johnson's wife testified at length. Her testimony was consistent with her pre-hearing statements and the police reports. Counsel for Mr. Johnson was well prepared and cross-examined her in detail. This case simply does not present the gravity of the concerns that *Eldert* and *Rodriguez* did.

Nevertheless, the need to limit Mr. Johnson's participation in the hearing must be balanced against the reliability of the evidence. See *Eldert*, 2015 VT 87, ¶ 18. In this case, it is unclear whether excluding Mr. Johnson had any substantial impact on reliability. However, it is far less clear why the Board felt compelled to exclude him in the manner it did. The Board offered no reason, and none is inferable from the record, why it could not as conveniently have granted counsel's request to play back the testimony to Mr. Johnson, allow a brief consultation with counsel, and then proceed with cross-examination. Other apparently readily available alternatives would have been to allow him to see and hear the proceeding while preventing his wife from seeing and hearing him. The Board's failure to even consider such possibilities goes unexplained in the record. In the circumstances of this case, the court concludes that the procedure actually employed violated Mr. Johnson's due process rights.

To the extent that the State has cited several provisions of the Parole Board Manual which might be interpreted to give the Board carte blanche to do what it did in this case, the court notes that when applying any such provisions, the Board must take care to do so in a manner that respects the parolee's due process rights. The constitution trumps the manual.

As for a remedy, Mr. Johnson accepts that the court has discretion to remand for a new hearing, but he requests that the court instead reverse the determination of guilt and remand only for a new disposition based on the admitted violation, and that before a

different panel of the Board. The implication of the argument is that the Board's treatment of Mr. Johnson was so egregious that it has lost the opportunity to cure the procedural violation and cannot be trusted to hold a new hearing in compliance with this decision. The argument is greatly exaggerated and unsupported by the record.

Order

For the foregoing reasons, Mr. Johnson's motion for summary judgment is granted, and the State's is denied. The Parole Board's determination of the October 2021 violation is vacated, and this case is remanded for a new hearing as to that violation in compliance with this decision.

SO ORDERED this 21<sup>st</sup> day of December, 2022.



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Robert A. Mello  
Superior Judge