

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28698

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

GARDINER BOSEY SMITH III, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 07-1-0016 (Cr. No. 99-1186))

DEBRA ENRIQUETA
CLERK OF THE COURTS
STATE OF HAWAI'I

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FILED

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Nakamura and Leonard, JJ.)

Defendant-Appellant Gardiner Bosey Smith III (Smith or Petitioner), pro se, appeals the Order Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody filed on August 7, 2007 in the Circuit Court of the First Circuit, (circuit court).¹

A jury convicted Smith of Terroristic Threatening in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-716(1)(d) (1993), and three counts of Abuse of Family or Household Members, in violation of HRS § 709-906 (Supp. 2001). The circuit court sentenced Smith to ten years of imprisonment, with a mandatory minimum of three years and four months, for the terroristic threatening charge and one year of imprisonment for each count of Abuse of Family or Household Members, the terms to served concurrently with each other and any other sentence. The circuit court filed the Judgment on October 4, 2000.

Smith appealed his conviction. On October 25, 2001, in No. 23823, this court affirmed Smith's convictions.

On July 13, 2004, Smith was released on parole for a second time. On April 4, 2006, Smith was arrested for violating his parole for being "knowingly away from reported home during curfew hours" and "failure to notify parole officer of arrest."

¹ The Honorable Dexter D. Del Rosario presided.

On April 10, 2006, Smith signed a Notice of Right to Pre-Revocation Hearing (Pre-Revocation Notice), waiving his right to a preliminary hearing. Also on April 10, 2006, Smith signed a Notice of Hearing, Rights for Revocation Hearing and Request for Legal Counsel. On April 12, 2006, the Hawai'i Paroling Authority (HPA or H.P.A.) sent Smith a Notice of Hearing (Revocation Hearing Notice), informing him that his parole violation hearing would be held on May 17, 2006.

On May 17, 2006, Smith attended a parole revocation hearing and was represented by Arthur N. Indiola. On May 31, 2006, HPA revoked Smith's parole.

On April 25, 2007, Smith, pro se, filed a "Petition for Release from Custody Pursuant to Hawai'i Rules of Penal Procedure [HRPP] Rule 40" (Rule 40 Petition) against HPA, his parole officer Michael Knott (Knott), and a supervisor with HPA, Max Otani. Smith challenged the revocation of his parole:

First Cause of Action

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46. Respondent H.P.A. and Knott violated Petitioner's right to Due Process by failing to notify Petitioner he had a right to confront the witness against him at the revocation hearing, as required by H.R.S. § 706-670(7); H.A.R. [Hawai'i Administrative Rules] 23-700-44(a).
47. Respondent Knott further violated Petitioner's right to Due Process by falsely testifying at [Petitioner's] Parole hearing.
48. Respondent[] H.P.A. further violated Petitioner's right to Due Process by finding Petitioner "guilty to violations as charged, when in fact no evidence presented in the hearing contradicted Petitioner's claim, also one month and days [sic] had elapsed to the violation of [H.P.A.] Rule 1g, and as to Rule 1e, as such Respondent Knott testified at revocation hearing the [H.P.A.] does not accept collect phone calls, yet Petitioner was found guilty as charged.
49. By issuing the re-take warrant Respondent Knott also violated Petitioner's liberty interest in being on parole and posting bail in his pending criminal case.
50. Respondents H.P.A. and Knott violated Petitioner's right to Due Process by finding Petitioner violated conditions of his parole when no evidence of such was presented at the revocation hearing.

Second Cause of Action

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- 52. Respondents violated Petitioner's rights under Equal Protection Clause of the 14th Amendment to the United States Constitution.
- 53. Respondents violated Petitioner's right to Equal Protection when they acted in concert to revoke Petitioner's parole based on false testimony and no evidence at the revocation hearing, supported the charged violations of parole dissimilarly places Petitioner in unfair treatment contrary to treatment afforded to similarly situated parolees.

Third Cause of Action

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- 56. Respondents violated Petitioner's right under the Eighth Amendment to the United States Constitution by arbitrarily and capriciously subjecting Petitioner to a deprivation of his liberty interest by which Petitioner suffered atypical and significant hardship.
- 57. Respondents caused Petitioner to suffer atypical and significant hardship by acting in concert to subject Petitioner to a grievous loss of freedom, loss of college education, loss of good credit rating, loss of consortium and the benefits of family life, and loss of the opportunity to repair relationship with family members.

The circuit court denied Smith's Rule 40 Petition on August 7, 2007, and Smith timely appealed.

On appeal, Smith contends²:

Ground I

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- 57. Respondent ("H.P.A.") Knott violated Petitioner's right to Due Process by failing to notify Petitioner he had a right to confront witnesses against him on the [Notice] of Pre-Revocation Hearing written instrument page two (2), advised of Petitioner's rights, as required by H.R.S. § 706-670(7), H.A.R. 23-700-44(d).
- 58. Respondent Knott further violated Petitioner's right to Due Process by falsely testifying at [Petitioner's] Parole Revocation Hearing.
- 59. All Respondents violated Petitioner's right to Due Process by failing to ensure the Parole Revocation Hearing Process is fair and impartial.

² Smith's pro se Opening Brief fails to comply with Hawai'i Rules of Appellate Procedure Rule 28(b).

60. Respondents ("H.P.A.") and Knott violated Petitioner's right to Due Process by failing to submit to [D.P.A.] Darcy H. Kishida a affidavit or sworn, certified document, authorizing parole officer Sista Palakiko Beazley to sign by signature another parole officer name, Michael Knott on the notice of Pre-revocation Hearing written instruments for the circuit court record.
61. Respondents ("H.P.A.") and Knott violated Petitioner's right to Due Process by finding Petitioner violated conditions of his parole when no evidence of such was present[ed] at the revocation hearing.
62. All Respondents violated Petitioner's right to be free from the arbitrary and capricious punishment without Due Process.

Ground II

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65. Respondents violated Petitioner's right to equal protection clause rights when they acted in concert to revoke Petitioner's parole based on false testimony and a forged signature of another parole officer's name on a written instrument. Yet they showed a willful, reckless, and wanton disregard to Petitioner's equal protection clause rights and fundamental right to Due Process.

Ground III

. . . .

68. Respondents violated Petitioner's right under the Eighth Amendment to the United States Constitution by arbitrarily and capriciously subjecting Petitioner to deprivation of his liberty interest, by which Petitioner suffered atypical and significant hardship.
69. Respondents caused Petitioner to suffer atypical and significant hardship by acting in concert to subject Petitioner to a grievous loss of freedom, loss of college education, loss of good credit rating, loss of consortium and the benefits of family life, and loss of opportunity to repair family relationships.

(Some bracketed material in original and some added.) Smith also contends the circuit court erred in denying his Rule 40 Petition without a hearing.

Upon careful review of the record³ and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we conclude that Smith's appeal is without merit.

³ The record on appeal does not contain a transcript of the May 17, 2006 revocation hearing.

Smith failed to state a colorable claim for relief to entitle him to a hearing before the circuit court. In the First Cause of Action in his Rule 40 Petition, Smith claimed the Revocation Hearing Notice did not inform him that he could confront witnesses, in violation of HRS § 706-670(7) (1993 & Supp. 2006) and HAR § 23-700-44(a). On appeal, in his Ground I, Smith changes this claim to state that the Pre-Revocation Notice did not inform him that he could confront witnesses, in violation of HRS § 706-670(7) and HAR § 23-700-44(d).

A Pre-Revocation Notice and Revocation Notice are not the same and do not serve the same purpose. "The preliminary hearing shall be for the purpose of determining if there is probable cause to believe that the arrested parolee violated the terms and conditions of parole." HAR § 23-700-41(c). The Pre-Revocation Notice informed Smith of his right to a preliminary hearing to determine whether there was probable cause to believe that Smith violated his parole conditions. A revocation hearing determines whether there was an actual violation of a person's parole terms and whether parole will be revoked. HAR § 23-700-44. Smith's first point of error on appeal was not made below. Points not argued below are waived. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4).

Even if this point of error were not waived, the failure of HPA to notify Smith of his right to confront witnesses in its Revocation Notice was harmless error in this case.⁴ In his Rule 40 Petition, Smith stated that "Petitioner's counsel Arthur N. Indiola during cross-examination asked Respondent Knott did Mr. Smith inform you that he was in use of America-on-line, and Respondent Knott testified ("something like that")." Smith was afforded the opportunity to confront the witness against him.

⁴ A parole revocation hearing written notice to a parolee shall include that he has the right to confront witnesses at the revocation hearing. HAR §§ 23-700-44(a)(3) and 23-700-44(d). The Revocation Hearing Notice sent to Smith did not advise him that he had the right to confront witnesses at the revocation hearing.

Therefore, the error is harmless. Smith does not specify any other witnesses he was denied an opportunity to confront.

On appeal, Smith also argues in Ground I that his due process rights were violated because false testimony was given during the hearing, documents were not given to a deputy prosecuting attorney, no evidence was presented at the revocation hearing that was sufficient to find that Smith violated his parole conditions, and Smith's right to be free from arbitrary and capricious punishment was violated without due process. There is no transcript of the revocation hearing, and Smith failed to prove any error with respect to false testimony and sufficient evidence to revoke his parole. Regardless, Smith admits he did not answer the telephone at his home when his parole officer called after curfew. Clearly, the HPA did not believe Smith that he was home. Furthermore, it is not disputed that Smith did not call his parole officer immediately after his arrest, but his mother did call the parole officer.

A claim that documents were not given to a deputy prosecuting attorney was not made below, and this point of error is waived on appeal. HRAP Rule 28(b)(4). Smith was afforded a revocation hearing under HAR § 23-700-44, and Smith does not state any cognizable argument as to how that violated Smith's right to be free from arbitrary and capricious punishment without due process.

On appeal in Ground II, Smith makes a new claim regarding a forged signature. This claim was not made below; therefore, it is waived on appeal. HRAP Rule 28(b)(4).

On appeal in Ground III, Smith claims that his right to be free from cruel and unusual punishment was violated. Smith's sentence of ten years of imprisonment is not "so disproportionate to the conduct proscribed," State v. Kumukau, 71 Haw. 218, 227, 787 P.2d 682, 687 (1990), and is not "of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community." Id. Therefore, Smith's right to be free from cruel and unusual punishment was not violated.

The record in this case indicates that Smith's parole was revoked in a manner consistent with applicable federal and state constitutional provisions, statutes, and rules. Evidence was submitted that Smith violated conditions of his parole. He was provided counsel and given a full opportunity to confront the evidence against him and offer any defense. Assuming, arguendo, that HPA should have treated Smith's mother's phone call to Smith's parole officer as if Smith had personally called, Smith has failed to show the circuit court erred in not overturning his parole revocation based on his curfew violation.

Therefore,

The Order Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody filed on August 7, 2007 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, August 25, 2008.

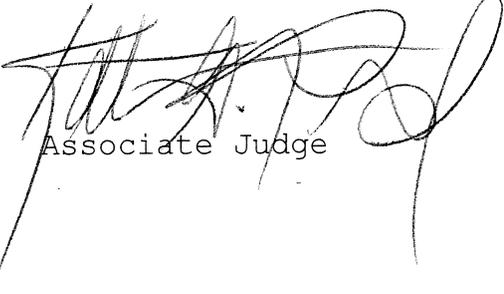
On the briefs:

Gardiner Bosey Smith III,
Petitioner-Appellant pro se.

Diane K. Taira
Darcy H. Kishida
Deputy Attorneys General
for Respondents-Appellees.


Presiding Judge


Associate Judge


Associate Judge