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IN THE SUPREME COURT OF FLORIDA

LOUIE L. WAINWRIGHT et al.,	)	
PETITIONERS,	)	
vs.	)	CASE NO. 62,685
JAMES LAMONT TAYLOR,	)	
RESPONDENT.	)	

FILED

PETITIONERS' BRIEF ON MERITS

MAY 3 1983

SID J. WHITE
CLERK SUPREME COURT
By _____
Chief Deputy Clerk

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STATEMENT OF THE CASE AND FACTS

The Respondent, James Lamont Taylor, filed an original petition for habeas corpus in the Fifth District Court of Appeal asserting that he is entitled to immediate release from the custody of Petitioner, Louie L. Wainwright, Secretary of the Department of Corrections of Florida, and Jim Smith, Attorney General (R,1-6). He attributes his illegal detention to an erroneous computation by the Florida Parole and Probation Commission of his presumptive release date.

According to the sworn petition, Taylor was charged with two counts of sexual battery, both counts under section 794.011(5), Florida Statutes, and one count of kidnapping under section 787.01 (R,1-2). He pleaded nolo contendere to one count of sexual battery and was sentenced to prison for a term of fifteen (15) years on June 5, 1979 (R-2).

On April 22, 1980, the petitioner interviewed with a parole examiner, a Mr. Paul Rigsby, for the purpose of determining a presumptive parole release date, according to the sworn petition (R-2). Rigsby allegedly determined the matrix time range by locating the offense severity factor and the salient factor on the matrix. Petitioner's salient factor was "one," and Rigsby set the offense of conviction at a severity rating of "Greatest Most Serious-III (R-2). According to the guidelines in effect in April, 1980, given the above severity rating and salient factor, the matrix time range was 83 to 107 months (R-12). Mr. Rigsby arrived at

this matrix time range and added 13 months for an aggravating circumstance in respondent's instance, that of grand theft (R-12).

On May 21, 1980, the Parole and Probation Commission agreed with Mr. Rigsby's recommendation and set respondent's presumptive parole release date as May 3, 1988 (R-14). Later Mr. Rigsby requested respondent's presumptive parole release date be reduced by 24 months, on the basis the inmate had completed various programs and gets outstanding work reports and maintains a clear record. The Commission held that the date would remain at May 3, 1988 (R-18). The Commission denied respondent's request for review of his presumptive parole release date as untimely (R-20).

In his Habeas Corpus petition, Taylor asserted that Rigsby erroneously placed the offense of conviction in the "Greatest Most Serious II" category (R-3). Respondent was sentenced to serve fifteen (15) years for the offense of sexual battery, which in the information was sexual battery charged under section 794.011(5), sexual battery with force not likely to cause personal injury (R-10,22). The parole guidelines in effect in April, 1980, provided an offense severity rating for this offense as "Very High." The matrix time range for this rating, coupled with respondent's salient factor of "one," was 18 to 24 months. This range, plus the 13 months for the aggravating circumstance, would establish a total time of 38 months.

The Fifth District Court of Appeal entered an order on July 16, 1982, ordering Louie L. Wainwright and Jim Smith

the Petitioners herein, to show cause why the petition for Writ of Habeas Corpus should not be granted (R-25).

The Petitioners herein, Louis L. Wainwright as Secretary of the Department of Corrections and Jim Smith as Attorney General, in response to the petition for habeas corpus filed a "Motion to Dismiss or, Alternatively, to Substitute Proper Party" contending:

(1) That Wainwright as a non-voting member of the Florida Parole and Probation Commission, is not a proper party of this action, nor is Jim Smith, the Attorney General, who is not a member of the Florida Parole and Probation Commission.

(2) That the respondent had failed to exhaust his administrative remedies in that the respondents' presumptive parole release date was established by commission action on May 21, 1980, but no review of said agency action was sought. The respondent alleged in the petition for Writ of Habeas Corpus only that he sought review of the commission action of May 26, 1982, wherein the Commission rejected the hearing examiner's recommendation that the presumptive parole release date be reduced. However, the review request referred to by the respondent was apparently submitted some time prior to March 17, 1982, prior to the hearing examiner's recommendation and Commission determination that the presumptive parole release date should not be reduced but more than sixty (60) day after the agency action of May 21, 1980.

(3) That the respondent "had not shown by affidavit

or evidence the probable cause to believe that he is detained without lawful authority necessary for issuance of the writ sought herein"; and

(4) That the proper party-respondent in this cause would be the Florida Parole and Probation Commission rather than Smith and Wainwright(R,26-28).

The respondent filed a response to the petitioners' motion to dismiss or alternatively to substitute proper party (R,29-35).

In an opinion filed on August 6, 1982, the Fifth District Court of Appeal granted the Writ of Habeas Corpus and ordered the Respondent, Louie Wainwright, as Secretary of the Department of Corrections to forthwith release the respondent, then the petitioner, James Lamont Taylor, from custody subject to the standard provisions of parole in such cases (R,36-41).

The petitioners herein filed a Motion for Rehearing or for Clarification of Decision, which motion was denied by the district court on September 2, 1982 (R,42-47; 51). A notice to invoke the discretionary jurisdiction of this Honorable Court was timely filed and a brief on jurisdiction submitted by the petitioners herein (R-52;53-109). This Honorable Court entered an order accepting jurisdiction and dispensing with oral argument on April 11, 1983. Pursuant to the above the petitioners herein file their brief on the merits.

POINT ONE

PETITIONERS' MOTION TO DISMISS RESPONDENT'S PETITION FOR HABEAS CORPUS SHOULD HAVE BEEN GRANTED AS IT WAS NOT SHOWN THAT RESPONDENT HAD EXHAUSTED AVAILABLE ADMINISTRATIVE REMEDIES PRIOR TO FILING PETITION FOR WRIT OF HABEAS CORPUS.

ARGUMENT

The petitioners in their motion to dismiss or alternatively to substitute proper party raised the issue that the respondent had failed to exhaust his administrative remedies. The respondent alleged in the petition for writ of habeas corpus only that he sought review of the Commission action of May 25, 1982, wherein the Commission rejected the hearing examiner's recommendation that the presumptive parole release date be reduced. However, the review request referred to by the respondent was apparently submitted some time prior to March 17, 1982, prior to the hearing examiner's recommendation and Commission determination that the presumptive parole release date should not be reduced but more that sixty (60) days after the agency action of May 21, 1980.

The petitioners would submit that in addition to administrative review available to the respondent pursuant to Florida Statute Section 947.173 (1981), the respondent also had adequate remedy available by way of administrative appeal pursuant to Florida Statute Section 120.68 (1981) for review of final agency action. The establishment of a

presumptive parole release date constitutes final agency action, therefore, direct review of agency action was available to the respondent to litigate any issue as to any perceived error in establishing his presumptive parole release date. While direct review of agency action may not necessarily constitute an exclusive remedy, an extraordinary writ should not issue to relieve a petitioner of the obligation to pursue such review procedures unless the administrative remedies are totally inadequate to afford a basis for relief. Daniels v. Florida Parole and Probation Commission, 401 So.2d 1351 (Fla. 1st DCA 1981). Contra, Roberson v. Florida Parole and Probation Commission, 407 So.2d 1044 (Fla. 3d DCA 1981).

In Daniels, supra, the First District Court of Appeal recognized that the Commission's final action should be judicially reviewed under Section 120.68 of the Administrative Procedure Act.

Thereafter, in Holman v. Florida Parole and Probation Commission, 407 So.2d 638 (Fla. 1st DCA 1982) the First District Court of Appeal indicated that review of Commission action by mandamus would not lie when a section 120.68 appeal is available. More recently, the same court reiterated the above in the context of Section 947.173 review, Kirsch v. Greadington, Mitchell and Florida Parole and Probation Commission, Case No. AO-419 (Fla. 1st DCA January 4, 1983)[1983 FLW 259]. In Kirsch, supra, the petitioner alleged that he had exhausted his administrative remedies but did not allege that he had sought and received a Section 947.173 review of the Commission

action. The court dismissed the petition for writ of habeas corpus, without prejudice to the petitioner to file for rehearing and affirmatively show that he has invoked the jurisdiction of the court by filing his petition within thirty (30) days of the Commission action at his Section 947.173 review.

In the present case, even though agency review and an appeal therefrom was not properly sought by the respondent, the district court, nonetheless, construed the respondent's untimely review request as an exhaustion of administrative remedies.

The petitioners would submit that utilization of administrative review and a subsequent administrative appeal pursuant to §120.68, Fla.Stat.(1981) are required to exhaust administrative remedies prior to utilization of habeas corpus to review agency action. Daniels, supra,; Gobie v. Florida, Parole and Probation Commission, 416 So.2d 838 (Fla. 1st DCA 1981).

To hold otherwise effectively eliminates any requirement that administrative review and appeal be sought and utilized in a timely fashion but instead accepts the failure to utilize available and adequate administrative review procedures as the equivalent of exhaustion of remedies. Habeas corpus may not be utilized as a substitute for direct appellate review. Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980). Petitioners can see no reason therefore, why it is permissible to utilize habeas corpus as a substitute for

administrative review and appeal. The respondent's failure to timely pursue and utilize available administrative review and appeal procedures should result in a waiver of any right to contest the final agency action confirming the establishment of his presumptive parole release date.

POINT TWO

THE PETITIONERS' MOTION TO DISMISS RESPONDENT'S PETITION FOR WRIT OF HABEAS CORPUS SHOULD HAVE BEEN GRANTED AS PROBABLE CAUSE TO BELIEVE THAT THE RESPONDENT WAS DETAINED WITHOUT LAWFUL AUTHORITY WAS NOT SHOWN BY AFFIDAVIT, EVIDENCE OR PROPERLY VERIFIED PETITION.

ARGUMENT

In a motion to dismiss or alternatively to substitute proper party, the petitioners presented to the district court below a basis for dismissal of the respondent's petition for Writ of Habeas Corpus in that the Respondent James Lamont Taylor had not shown by affidavit or evidence probable cause to believe that he was detained without the lawful authority necessary for issuance of the writ (R-27). The record shows that the notary public certificate at the conclusion of respondent's petition for Writ of Habeas Corpus directly follows the Certificate of Service by the respondent (R-6). The notary public certificate reflects therefore only that some unidentified and unspecified matters were sworn to and subscribed before the notary. If anything, the jurat referred only to the fact that the Respondent,Taylor was swearing under oath that the parties listed in the Certificate of Service had been served with a copy of the petition. The only signature by Taylor appearing on the petition is on

the Certificate of Service. While a petition for a Writ of Habeas Corpus does not require a meticulous observation of the rules of pleading, it is nevertheless a general rule that the petition must be verified. Polk v. Crockett, 379 So.2d 369 (Fla. 1st DCA 1979). Florida Statute Section 79.01 requires that such a petition shall be granted only upon "affidavit" or evidence. In the present case the jurat in no way amounts to an affirmation of the factual allegations contained in the petition for habeas corpus such that the allegations should have been accepted as if accompanied by an affidavit.

POINT THREE

THE PETITIONERS' MOTION TO DISMISS OR ALTERNATIVELY TO SUBSTITUTE PROPER PARTY SHOULD HAVE BEEN GRANTED ON THE BASIS THAT THERE IS NO ENTITLEMENT TO PAROLE.

ARGUMENT

A line of Florida cases, in which district courts found illegal commission action, have resulted in a finding of a right to the inmate of immediate release from incarceration. Daizi v. Turner, ___ So.2d ___ (Fla. 4th DCA 1982) [1982 FLW 2523]; Lowe v. Florida Parole and Probation Commission, 416 So.2d 470 (Fla. 2d DCA 1982); Jenrette v. Wainwright, 410 So.2d 575 (Fla. 3d DCA 1982); Roberson, supra; Hardy v. Greadington, 405 So.2d 768 (Fla. 5th DCA 1981).

In Jenrette, supra, the Third District Court of Appeal granted habeas corpus, directing Wainwright to release the inmate from custody because his presumptive parole release date had been calculated in reliance on an uncounseled conviction. In Daizi, supra, the Fourth District also granted habeas corpus, subject to parole provisions. Based on its interpretation of Section 947.165(1) and Rule 23-19.03 that the Commission may not use factors relied on in arriving at the salient factor score to aggravate the applicable matrix time range, the court invalidated an aggravation for a concurrent conviction, which the Commission was authorized to impose under Rule 23-19.01(5).

In the present case, the Fifth District Court of Appeal granted habeas corpus "subject to the standard provisions of parole in such cases."

The petitioners would submit that even in the event Commission action is illegal, this does not mean the inmate is entitled to immediate release from incarceration. In treating a writ of habeas corpus as one for a writ of mandamus, this Honorable Court stated:

> The writ itself . . . . would not command the respondent's discretion, but rather would compel the respondent to exercise its discretion as to the granting or denial of parole without consideration of [unconstitutional] convictions.

Moore v. Florida Parole and Probation Commission, 289 So.2d. 719, 720 (Fla. 1974). Accordingly, habeas corpus is not an available remedy for improper action by the Commission. Habeas corpus relief requires showing a right or entitlement to immediate release from custody. A number of Florida cases have stood for the proposition that there is no right to parole. See Ivory v. Wainwright, 393 So.2d 542, 544 (Fla. 1981); Moore, supra, Gobie, supra, Arnett v. State, 397 So.2d 330, 332 (Fla. 1st DCA 1981); and Staton v. Wainwright, 665 F.2d 686, 688 (5th Cir. 1982).

The placement of an inmate on parole on the date his presumptive parole release date arrives, or legally should have arrived, is hardly automatic. The Commission is required under Section 947.174(b) to decide, atleast forty-six (46)

days prior to the arrival of the PPRD, whether it will authorize an EPRD, a discretionary decision. Gobie, supra.

Section 947.18 also requires the Commission to make a finding of:

> reasonable probability that, if [the inmate] is placed on parole, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society.

Ordering the release by habeas corpus of an inmate when his PPRD arrives or should have arrived would prevent the Commission from exercising its discretion in the parole grant process. Kirsch, supra.

The petitioners would submit that this Court in Moore, supra, recognized that the courts of this state could only compel the agency with parole powers to exercise its discretion as to the granting or denial of parole but could not judicially compel the granting of parole. The present decision would be in the nature of a judicial parole. Also, in the present case, there is a problem in ordering the parole of an inmate when the Florida Parole and Probation Commission is not a party to the proceeding as previously discussed. The Florida Parole and Probation Commission was never given an opportunity to decide upon the granting or denial of parole under the appropriate statutory criteria. What was done in the present case, is contrary to what this Court stated in Moore, in that the district court's decision was tantamount to ordering the grant of parole.

The Fifth District Court of Appeal has receded from the instant holding in Pannier v. Wainwright, 423 So.2d 533 (Fla. 5th DCA 1982) stating at 534:

> To the extent that Taylor may imply that the proper procedural attack upon the computation of a presumptive parole release date is by habeas corpus, we recede therefrom and reaffirm our holding in Hardy v. Greadington, 405 So.2d 768 (Fla. 5th DCA 1981), that the appropriate remedy for challenging presumptive parole release dates is by a writ of mandamus directed against the FPPC. See also Moore v. Fla.Parole & Probation Commission, 289 So.2d 719 (Fla. 1974). Habeas corpus would be the proper remedy only after an effective parole release date established pursuant to sections 947.174(6)(b) and 947.18, Florida Statutes (1981), has passed.

CONCLUSION

Based on the foregoing arguments and authorities the petitioners respectfully request that this Honorable Court quash the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by mail to: Mr. James Lamont Taylor, 2306 N.W. 16th Street, Fort Lauderdale, Florida 33301, on this 2nd day of May, 1983.

Of Counsel