

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1480

O'NEIL BASTIAN, JR.

VERSUS

**LOUISIANA BOARD OF PAROLE,
DIXON CORRECTIONAL INSTITUTE**

Judgment Rendered: 'MAR 23 2012

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 577,969

Honorable Janice Clark, Judge Presiding

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Handwritten notes:
J.E.W.
J.P.
J.C.

McCLENDON, J.

O'Neil Bastian, Jr., an inmate in the custody of the Louisiana Department of Public Safety and Corrections, filed suit in district court seeking to challenge the decision of the Louisiana Parole Board (Parole Board) to revoke his parole. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Mr. Bastian was arrested and convicted of murder in Louisiana in 1968. He received a life sentence, but in 1983, the Parole Board commuted his sentence to forty-five years, making him immediately eligible for parole. As a result, Mr. Bastian was released from prison and placed on parole. His parole term was from December 16, 1983 until November 15, 2013. Through the Interstate Compact for Adult Offender Supervision (Interstate Compact)¹, Louisiana allowed Mr. Bastian to serve his parole sentence in California. On September 9, 1988, the Parole Board suspended the supervision of Mr. Bastian's parole.² Thereafter, Mr. Bastian received the following letter, dated January 30, 1990, from the California Department of Corrections:

To Whom It May Concern,

Please be advised that Mr. Bastian, O'Neil LA#67900 and I-03414 is no longer on parole in either the State of California or Louisiana. Mr. O'Neil discharged from parole supervision on 10/30/88 per Offender Based Information System of the California Department of Corrections, Parole and Community Services Division. Any questions, please contact me at the above.

Sincerely,

Jeffrey Gaither
Parole Agent 1

¹ See LSA-R.S. 15:574.31 to 15:574.44.

² Louisiana Revised Statutes 15:574.7A provides:

Each parolee shall remain in the legal custody of the Department of Public Safety and Corrections, corrections services, and shall be subject to the orders and supervision of the board. At the direction of the board, the chief probation and parole officer shall be responsible for the investigation and supervision of all parolees. The board may modify or suspend such supervision upon a determination that a parolee who had conducted himself in accordance with the conditions of his parole no longer needs the guidance and supervision originally imposed.

On April 15, 1991, Mr. Bastian was arrested in California and convicted of attempted murder. He was sentenced to 292 months. Mr. Bastian was released from prison in 2003 after serving twelve and one-half years of his sentence. Mr. Bastian was placed on parole from 2003 until December 31, 2006, when he was discharged from parole in California.

Subsequently, Louisiana became aware that Mr. Bastian had a California felony conviction. On August 15, 2008, a Louisiana parole warrant was issued, and on November 26, 2008, Mr. Bastian was arrested in California and returned to Louisiana. Upon his return to Louisiana, the Parole Board notified Mr. Bastian of his final revocation hearing set for January 8, 2009.³ At the hearing, Mr. Bastian entered a plea of guilty to the violation of his parole by having a new felony conviction in California. At the end of the hearing, the Parole Board voted to revoke Mr. Bastian's parole.

Thereafter, on May 4, 2009, Mr. Bastian filed a Petition for Emergency Writ of Habeas Corpus, questioning the authority of the Parole Board to have revoked his parole on January 8, 2009. Mr. Bastian alleged that he was not on parole at the time of the alleged violation and, therefore, the revocation was a violation of his constitutional right to remain at liberty. Mr. Bastian further alleged that even if the Parole Board had the authority to revoke his parole, it waived its right because it made no effort to contact him from 1990 until 2008. In response, the Parole Board filed a motion to dismiss, in which it asserted that the petition was not filed within the ninety-day preemptive period set forth in LSA-R.S. 15:574.11D. The Parole Board asserted that because Mr. Bastian's petition was not timely filed, LSA-R.S. 15:574.11D required that it "shall" be dismissed with prejudice.

³ The letter to Mr. Bastian, dated December 19, 2008, provided, as follows:

The Parole Board has reviewed the violation report advising that you have been convicted of a felony while on parole.

You have been returned to Louisiana as a parole violator based on the new felony conviction you received in the State of California. Your final revocation hearing has been scheduled for 01/08/2009. Since Louisiana R.S. 15:574.10 provides for automatic revocation when a Louisiana parolee is convicted of a felony while on parole, the final hearing is for identification purposes only.

At the initial hearing, the commissioner found that the matters at issue were complex and that fairness dictated that counsel be appointed for Mr. Bastian. The matter was reset for hearing. At the conclusion of the subsequent hearing, the commissioner took the matter under advisement. On September 17, 2010, the commissioner issued her report. The commissioner initially disagreed with Mr. Bastian's conclusion that he was not on parole in Louisiana, and thus, eligible for habeas corpus relief. Accordingly, the commissioner determined that the only method to challenge the Parole Board's decision to revoke his appeal was to appeal that decision. Because Mr. Bastian's claims were untimely, in that they had perempted pursuant to the ninety-day limit set forth in LSA-R.S. 15:574.11D, the commissioner recommended that Mr. Bastian's petition be dismissed with prejudice. In accordance with the commissioner's recommendation, the district court rendered judgment on January 3, 2011, adopting as its reasons the commissioner's report and dismissing Mr. Bastian's suit with prejudice since it "was not signed or filed within 90 days after revocation, causing the right/cause of action to cease to exist."

From this judgment, Mr. Bastian appeals and assigns the following as error:

1. The district court committed an error of law in deciding that Mr. Bastian violated the terms of his parole.
2. The district court committed an error of law in deciding that Mr. Bastian was not discharged from parole on October 31, 1988, by the California Department of Corrections in both California and Louisiana.
3. The district court committed an error of law in deciding that Mr. Bastian was not entitled to a due process hearing before the Louisiana Parole Board.
4. The State of Louisiana "sat on its rights" and thereby waived its right to incarcerate Mr. Bastian.

DISCUSSION

In his initial assignment of error, Mr. Bastian asserts that he did not violate the terms of his Louisiana parole. At the time Mr. Bastian was placed on parole in 1983, the first sentence of LSA-R.S. 15:574.10 provided: "When a person is convicted in this state of a felony committed while on parole, his parole shall be deemed revoked as of the date of the commission of the felony." Although he recognizes that the statute was amended in 1987, Mr. Bastian asserts that because he was placed on parole in 1983, the law in effect at that time governs his parole. Therefore, according to Mr. Bastian, his subsequent conviction in California was not a felony "in this state" that could be used to revoke his parole in Louisiana.

In 1987, the legislature amended the first sentence of LSA-R.S. 15:547.10 to read:

When a person is convicted in this state of a felony committed while on parole or is convicted under the laws of any other state or of the United States or any foreign government or country of an offense committed while on parole and which if committed in this state would be a felony, his parole shall be deemed revoked as of the date of the commission of the felony or such offense under the laws of the other jurisdiction.

Section 2 of Acts 1987, No. 95, specifically provided that, "The provisions of this Act shall apply to all persons on parole before or after the effective date of this Act." Mr. Bastian apparently is asserting that the retroactive application of the 1987 amendment to LSA-R.S. 15:574.10 is a violation of the prohibition against *ex post facto* application of law.

Article I, § 10 of the United States Constitution and Article I, § 23 of the Louisiana Constitution prohibit applying criminal laws *ex post facto*. **Williams v. Creed**, 07-0614, p. 4 (La.App. 1 Cir. 12/21/07), 978 So.2d 419, 423, writ denied, 08-0433 (La. 10/2/09), 18 So.3d 111. In **State ex rel. Olivieri v. State**, 00-0172 (La. 2/21/01), 779 So.2d 735, cert. denied, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001), the Louisiana Supreme Court narrowed the focus of *ex post facto* analysis in Louisiana. While the court recognized that, in previous *ex post facto* analysis, Louisiana jurisprudence had broadly focused on

whether the change in a law operated to the disadvantage of an accused, the **Olivieri** court adopted the current federal approach to *ex post facto* analysis, which focuses on whether any change in the law altered the definition of criminal conduct or increased the penalty by which the crime was punishable. **Olivieri**, 00-0172 at pp.14-16, 779 So.2d at 743-44; **Williams**, 07-0614 at p. 5, 978 So.2d at 423.

After **Olivieri**, the only relevant issues regarding a legislative change are "whether the change alters the definition of criminal conduct or increases the penalty." **Olivieri**, 00-0172 at pp. 15-16, 779 So.2d at 744. In other words, in a post-sentence context, once a sentence has been imposed on a defendant, any change in the law that later occurs cannot be applied to that defendant to increase that sentence or penalty. Anything other than or less than this is not protected by the *ex post facto* clauses in the United States and Louisiana Constitutions. **Williams**, 07-0614 at p. 8, 978 So.2d at 425.

In this matter, because LSA-R.S. 15:574.10, as amended in 1987, neither altered the definition of criminal conduct nor increased the penalty, its application to Mr. Bastian is not an *ex post facto* application of the statute. Mr. Bastian's argument is without merit.

Mr. Bastian next asserts that he was discharged from parole on October 31, 1988, as evidenced by the January 30, 1990 letter from the California Department of Corrections. Therefore, according to Mr. Bastian, his request is one for habeas relief and not a challenge to his parole revocation, because he was no longer on parole. Mr. Bastian further contends that California had the authority to release him from parole in both Louisiana and California pursuant to Rule 4.112(a)(1) of the Interstate Compact, which provides:

The receiving state may close its supervision of an offender and cease supervision upon-

- (1) The date of discharge indicated for the offender at the time of application for supervision unless informed of an earlier or later date by the sending state.

Mr. Bastian contends that California stopped supervising Mr. Bastian because it was informed by Louisiana of an earlier date. However, Louisiana only suspended Mr. Bastian's parole supervision on September 9, 1988. It did not discharge him from his sentence. The commissioner's report specifically found that nothing in Louisiana law, including the interstate compact law, would have allowed California to alter or reduce Mr. Bastian's valid Louisiana sentence. We agree. Thus, contrary to Mr. Bastian's assertion, the Interstate Compact does not allow a receiving state to fully discharge a parolee from the sending state's parole sentence before the end date. California did not have the authority to release Mr. Bastian from his Louisiana parole.

Further, LSA-R.S. 15:574.6 clearly provides, in pertinent part:

The parole term, when the board orders a prisoner released on parole, **shall** be for the remainder of the prisoner's sentence, without any diminution of sentence for good behavior. (Emphasis added.)

Thus, when Mr. Bastian moved to California, he was still on parole with the State of Louisiana until November 15, 2013, and he was on parole when convicted of the new felony in California. Although we recognize that California apparently did not notify Louisiana of the felony conviction in accordance with Rule 4.109(a) of the Interstate Compact⁴, that failure does not mean that Mr. Bastian was no longer on parole. Mr. Bastian's second assignment of error is without merit.

In his fourth assignment of error, Mr. Bastian asserts that Louisiana waived its right to incarcerate him because it "sat on its hands" and let twenty-five years go by before checking on him. He contends that Louisiana's inaction and lack of due diligence resulted in the waiver of its ability to revoke his parole.

The due process clause of the Fourteenth Amendment prohibits inordinate delays in post-conviction proceedings such as revocation of parole, when the

⁴ Rule 4.109(a) provides:

A receiving state shall notify a sending state of significant violations of conditions of supervision by an offender within 30 calendar days of discovery of the violation.

delays cause prejudice to the defendant. **State v. Duncan**, 396 So.2d 297, 299 (La. 1981) (citing **Morrissey v. Brewer**, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). In determining whether the delay was unreasonable or prejudicial, a flexible approach is used in which all of the circumstances are evaluated. **Duncan**, 396 So.2d at 299.

In this matter, once Louisiana became aware of Mr. Bastian's subsequent felony conviction, a parole violation warrant was issued on August 18, 2008. The earliest date on which Mr. Bastian would have been available to the Parole Board was January 1, 2007, the day after his release from parole supervision for the California felony conviction, which was a difference of nineteen and one-half months. At the revocation hearing, Mr. Bastian admitted to his subsequent California felony conviction. We do not find that the delay was either unreasonable or prejudicial, and his right to due process was not violated.

In his remaining assignment of error, Mr. Bastian asserts that the revocation hearing did not provide him due process of law in that he was not allowed to have counsel present at the hearing.⁵

Louisiana Revised Statutes 15:574.11 is a statutory grant of appellate jurisdiction to the Nineteenth Judicial District Court to review decisions of the Parole Board where a denial of a revocation hearing under LSA-R.S. 15:574.9 is alleged or the procedural due process protections specifically afforded for such a hearing were violated. Thus, an appeal is allowed only where the parolee has alleged in his petition for judicial review that his right to a revocation hearing has been denied or that the procedural due process protections specifically afforded by LSA-R.S. 15:574.9 in connection with such a hearing were violated.⁶ **Leach**

⁵ Mr. Bastian also asserted that he was entitled to a full revocation hearing, rather than an automatic revocation hearing as provided in LSA-R.S. 15:547.10, based on his argument that the 1987 amendment to the statute was an *ex post facto* application of law.

⁶ Louisiana Revised Statutes 15:574.9A provides, in pertinent part:

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

v. Louisiana Parole Bd., 07-0848, p. 7 (La.App. 1 Cir. 6/6/08), 991 So.2d 1120, 1124, writs denied, 08-2385 (La. 8/12/09), 17 So.3d 378, and 08-2001 (La. 12/18/09), 23 So.3d 947. There is no other basis for an appeal. LSA-R.S. 15:574.11A.

In these limited, specified circumstances where an appeal is allowed, it must be taken within ninety days. LSA-R.S. 15:574.11D.⁷ The plain language of LSA-R.S. 15:574.11D provides that the time period provided therein is peremptive. Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period. LSA-C.C. art. 3458. Additionally, peremption may not be renounced, interrupted, or suspended. LSA-C.C. art. 3461.

In the instant case, Mr. Bastian did not file his petition until approximately four months after the Parole Board rendered its decision to revoke his parole, after the ninety days within which he was allowed by law to seek judicial review of his claims. Thus, Mr. Bastian's right to seek review was extinguished by his failure to bring his claim within the requisite ninety-day peremptive period set forth in LSA-R.S. 15:574.11D, and he is barred from challenging the Parole Board's decision.

CONCLUSION

Based on the above, the January 3, 2011 judgment of the district court dismissing Mr. Bastian's suit with prejudice as untimely, is affirmed. Costs of this appeal are assessed to O'Neil Bastian, Jr.

AFFIRMED.

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.

⁷ Louisiana Revised Statutes 15:574.11D provides, in relevant part:

Petitions for review that allege a denial of a revocation hearing under the provisions of R.S. 15:574.9 shall be subject to a peremptive period of ninety days after the date of revocation by the Board of Parole.