

ORIGINAL

FILED

09/29/2020

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: OP 20-0452

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 20-0452

KELLY ALLEN FRANK,

Petitioner,

v.

JAMES SALMONSEN, Acting Warden,  
MONTANA STATE PRISON,

Respondent.

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Clerk of Supreme Court  
State of Montana

Representing himself, Kelly Allen Frank has filed a Petition for a Writ of Habeas Corpus, arguing that the Board of Pardons and Parole (Board) erred by failing to grant him parole and violated his due process rights. Frank contends that his incarceration is illegal and requests his immediate release from prison.

Available electronic records indicate that Frank has discharged his sentences for three convictions and that he has one remaining sentence. In 2008, the Powell County District Court imposed a ten-year sentence to the Department of Corrections for felony escape. Frank appealed as a self-represented appellant. *State v. Frank*, No. DA 08-0611, 2009 MT 176N, 2009 Mont. LEXIS 211. We affirmed and explained that his conviction and sentence for escape were not illegal. *Frank*, ¶¶ 7, 9, 12.

Frank’s instant petition concerns a parole revocation. We secured a copy of the Board’s disposition from its website. In April 2019, the Board revoked his parole and did not award any dead time, also known as time while on parole. The Board directed Frank to reappear next year and to obtain a victim impact class and any other available programming.

In his petition, Frank asserts that the Board’s revocation of his parole is an example of “clear over reach . . . .” He states that he was arrested on March 3, 2019, for misdemeanor verbal assault and that he was later returned to the Montana State Prison

(MSP) for revocation of his parole. He adds that the Board revoked his parole “and flopped Mr. Frank for one year.” He explains that his misdemeanor case from the Helena Municipal Court was to be dismissed with prejudice and includes a copy of the Deferred Prosecution Agreement. He argues that because his case has been dismissed, there is no basis upon which the Board could revoke his parole.

Frank relies on §§ 46-18-203 and 46-23-1028, MCA, to argue that the Board violated controlling statutes. We point out that § 46-18-203, MCA, applies to a district court’s revocation of a suspended or deferred sentence, not to the revocation of parole. The Board’s decision to revoke Frank’s parole was made three months before the Deferred Prosecution Agreement. When responding to Frank’s later inquiry, the Board advised him that, under the terms of that Agreement, if Frank did not comply with the conditions of the Agreement “it may result in reinstatement of prosecution.” The Board advised him further that its decisions are based a preponderance of evidence. Under the Department of Corrections’ rules, “[t]he offender must comply with all municipal, county, state, and federal laws and ordinances and shall conduct himself/herself as a good citizen.” Admin. R. Mont. 20.7.1101(8) (2008). Frank admits that he was arrested and charged with a crime. Frank was charged with a violation of law in Municipal Court more than a month prior to his parole revocation.

Frank also refers to § 46-23-1028, MCA, which does not apply here. Because Frank was charged with a new offense, there was no on-site hearing, and there was no opportunity to utilize the sanctions grid as outlined in § 46-23-1028, MCA. Any hearing to determine probable cause was unnecessary because probable cause existed for his arrest. *See Owens v. Risley*, 217 Mont. 35, 36, 70 P.2d 1, 2 (1985); § 46-23-1024(1)(b), MCA. Frank was held in an institution, MSP, pursuant to § 46-23-1023(3), MCA, prior to his appearance before the Board. *See Admin. R. M. 20.25.801(8)(2016)*. The Board revoked Frank’s parole because of a new misdemeanor offense—Frank was arrested for contacting a former victim, as the Board explained in its August 13, 2019 letter. Section 46-23-1025(3)(c), MCA; Admin. R. M. 20.25.801(16)(e) (2016). The Board

reiterated the Deferred Prosecution Agreement's statement that: "The charges in this case are supported by probable cause[.]" Regardless of the deferred imposition of sentence for this new offense, the Board did not violate the law by considering Frank's conduct while he was on parole.

This Court has stated several times before that the Board has broad authority to consider all evidence and matters. *McDermott v. McDonald*, 2001 MT 89, ¶ 20, 305 Mont. 166, 24 P.3d 200; § 46-23-208(4), MCA. "Moreover, [it] may consider evidence of offenses which were charged in dismissed counts." *McDermott*, ¶ 20. Frank has not demonstrated violation of either statutory or due process rights. "It is well established that a parole release determination is not subject to all the due process protections required to convict or confine." *McDermott*, ¶ 11.

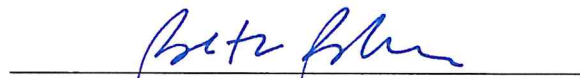

"Parole . . . is a discretionary grant of freedom from incarceration." *McDermott*, ¶ 24. Frank has not shown that the Board erred in revoking his parole. Frank has not demonstrated that he is illegally incarcerated, and he is not entitled to his release. Section 46-22-101(1), MCA.

IT IS THEREFORE ORDERED that Frank's Petition for a Writ of Habeas Corpus is DENIED.

The Clerk is directed to provide a copy of this Order to counsel of record and to Kelly Allen Frank personally.

DATED this 29<sup>th</sup> day of September, 2020.

  
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Chief Justice

  
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*John M. Saliba*  
*John Rice*  
Justices