NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0157-08T1

STEVEN JOHNSON,

Appellant,

v.

NEW JERSEY STATE PAROLE BOARD,

Respondent.

Submitted October 1, 2009 – Decided December 7, 2009

Before Judges C.L. Miniman and Waugh.

On appeal from the New Jersey State Parole Board.

Steven Johnson, appellant pro se.

Anne Milgram, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Ellen M. Hale, Deputy Attorney General, on the brief).

PER CURIAM

Appellant Steven Johnson (Johnson) appeals from final agency action of respondent New Jersey State Parole Board (the Board) revoking his parole and requiring him to serve the maximum sentence imposed. We affirm.

Defendant pled guilty on April 28, 2003, and was convicted on July 25, 2003, of conspiracy contrary to N.J.S.A. 2C:5-2 and

2C:15-1. He was sentenced to five years imprisonment subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, with credit for eleven days time served, and three years of parole upon release.

Johnson was paroled on October 14, 2007, subject to multiple mandatory supervision conditions, one of which, condition seven, was that he not possess or own a firearm. Just thirty-eight days after his parole began, police officers with the City of Asbury Park Police Department observed Johnson exiting a vehicle the police were pursuing on a tip that the driver, Johnson's brother Shamar, was in possession of a firearm and dealing drugs. When the police approached Johnson to make inquiry of him, he reached into his jacket and pulled out his identification. In doing so, he exposed a loaded .45 automatic handgun in his waistband. The police placed defendant under arrest and charged him with unlawful possession of a handgun, possession of a handgun by certain persons not permitted to possess a firearm, and resisting arrest.

Subsequently, the Board revoked Johnson's parole for violation of the condition prohibiting him from possessing a weapon. A Board hearing officer conducted a hearing on January 8, 2008, at which one of the Asbury Park police officers testified. The hearing officer summarized the evidence and

found probable cause to believe Johnson violated condition seven. On February 19, 2008, a final revocation hearing was conducted and the hearing officer summarized the evidence, found that the police officer removed the loaded .45 caliber handgun from Johnson's waistband, and recommended revocation of his parole because he violated condition seven. The Adult Panel on March 20, 2008, adopted the recommendation of the hearing officer and revoked Johnson's parole.

Johnson appealed to the full Board, contending that his parole could not be revoked until the criminal charges were determined. The Board confirmed the revocation on March 19, 2008. The full Board found:

> that the arresting police officer provided a detailed testimony regarding how and where the firearm was discovered. Specifically, he testified that he removed the loaded .45 caliber handgun from your waistband. The full Board found that the Panel administratively reviewed this information and revocation was deemed necessary. The record does not support your contention that pursuant to statute the Board shall not revoke parole on the basis of new criminal charges that have not resulted in a conviction. The full Board found that pursuant to N.J.A.C. 10A:71-7.9(c) any parolee who has seriously or persistently violated the conditions of his parole may have his parole revoked and may be returned to custody[.] The full Board further notes that this Administrative decision does not need to be proven in a court of law.

This appeal followed. Johnson raises the following issues on appeal:

> POINT I - THE NEW JERSEY STATE PAROLE BOARD'S DECISION TO VIOLATE AND REVOKE THE APPELLANT'S PAROLE PRIOR TO AN ADJUDICATION OF CHARGE THAT WAS ULTIMATELY DISMISSED BY THE SUPERIOR COURT OF NEW JERSEY CRIMINAL DIVISION, VIOLATED THE APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE (14TH) FOURTEENTH AMENDMENT OF BOTH STATE AND FEDERAL CONSTITUTIONS.
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> POINT II - ORDERING THE APPELLANT TO SERVE THE MAXIMUM TERM REMAINING ON HIS PAROLE IS NOT A REASONABLE REGULATION THAT HAS BEEN ESTABLISHED, NOR AUTHORIZED BY N.J.S.A. 30:4-123.64(C) AND IS A VIOLATION OF THE APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE (14TH) FOURTEENTH AMENDMENT OF BOTH STATE AND FEDERAL CONSTITUTIONS.

More specifically, Johnson contends on appeal that his parole should not have been revoked because it was not proven beyond a reasonable doubt that he possessed the gun, the criminal charges filed against him were subsequently dismissed without prejudice at the request of the prosecutor on June 20, 2008, and N.J.S.A. 30:4-123.64c limits any period of reincarceration to six months, at which time parole release must again be considered.

The scope of our review of Board determinations is limited. Hare v. N.J. State Parole Bd., 368 N.J. Super. 175, 179 (App. Div. 2004). First, Board actions carry a presumption of validity and reasonableness, In re Vey, 272 N.J. Super. 199, 205

(App. Div. 1993), affirmed, 135 N.J. 306 (1994), and the inmate has the burden to show that the Board's action was unreasonable, Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). Second, we determine whether the Board's fact-findings are supported by sufficient credible evidence in the record as a whole. Trantino v. N.J. State Parole Bd., 166 N.J. 113, 172 (2001), modified, 167 N.J. 619 (2001); N.J. State Parole Bd. v. Cestari, 224 N.J. Super. 534, 547 (App. Div.), certif. denied, 111 N.J. 649 (1988). Third, on a parole revocation, we must determine whether the evidence supporting the revocation is clear and convincing. N.J.A.C. 10A:71-7.12(c)(1), -7.15(c). That is evidence

> upon which the trier of fact can rest "a firm belief or conviction as to the truth of the allegations sought to be established." In re Purrazzella, 134 N.J. 228, 240 (1993). It must be "so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." In re Seaman, 133 N.J. 67, 74 (1993).
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> [In re Registrant R.F., 317 N.J. Super. 379, 384 (App. Div. 1998).]

At to defendant's first point on appeal, he did not testify that he was not in possession of the firearm in question; he merely asserted his innocence. The officer who personally

removed the loaded weapon from defendant's waistband testified clearly and convincingly to the violation of condition seven. His testimony was essentially undisputed. We are entirely satisfied that the Board's determination to revoke defendant's parole was entirely reasonable.

Defendant, however, contends that where a violation of probation is based on a criminal offense, the violation must be proven beyond a reasonable doubt. Although he cited White v. N.J. State Parole Bd., 136 N.J. Super. 360 (App. Div. 1975), for this proposition, it does not so hold and we have found no appellate case requiring proof beyond a reasonable doubt. In the first instance, the violation here was not based on a criminal offense per se. Rather, it was based on mere possession of a firearm, which happens also to be a criminal offense for a felon. But, even if a violation of parole condition seven had to be proven beyond a reasonable doubt, the violation was proven beyond any doubt at all. No reasonable doubt respecting possession of the weapon was raised in either administrative hearing by defendant's bare denial of guilt.

In his second point on appeal, defendant contends the Board's order that he remain incarcerated for the balance of his term of parole——two years, ten months, and twenty-three days——contravened N.J.S.A. 30:4-123.64c, which requires the Board to

again consider Johnson for parole after six months. He acknowledges that despite his interpretation of the Board's decision, the Board did establish a future parole eligibility date (PED) of August 20, 2008. However, he asserts that he was not paroled at that time.

The Board has now explained that the PED to which defendant refers was erroneously calculated by the computer system utilized by the Department of Corrections. Instead, it is the records in the Board's computer system that governs any future release of defendant. Defendant's return to custody was governed by N.J.A.C. 10A:71-3.54(i), which provides:

> If a term of parole supervision imposed by a court pursuant to N.J.S.A. 2C:43-7.2 [the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2 Act] is revoked by the appropriate Board panel and the offender returned to custody for violation of a condition of supervision the Board panel shall determine:
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> 1. Whether the offender shall be required to serve the remainder of the term in custody and shall not be eligible for parole consideration on the remainder of the term;
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> 2. Whether the offender shall be required, except as provided in (i)3 below, to serve a term established pursuant to N.J.A.C. 10A:71-7.17B prior to being eligible for parole consideration; or
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> 3. Whether the offender, if originally sentenced pursuant to N.J.S.A. 2C:47-1 et seq. and eligibility for parole consideration required the recommendation of

> the Special Classification Review Board, shall be eligible for parole consideration pursuant to the provisions of N.J.A.C. 10A:71-7.19 or 7.19A, as appropriate.

Defendant was sentenced to a term of parole under the NERA, making this section of the administrative code applicable. Accordingly, the Board certainly had the discretion under N.J.A.C. 10A:71-3.54(i) to require defendant to remain in custody for the balance of his term of parole. Furthermore, we see no abuse of discretion in that decision.

In both of his point headings, defendant contends that he was denied due process in the administrative proceedings. He has not, however, explained anywhere in his brief how his due process rights were violated. The due process rights attaching to parole revocation were delineated in Morrissey v. Brewer, 408 U.S. 471, 487-89, 92 S. Ct. 2593, 2603-04, 33 L. Ed. 2d 484, 497-99 (1972). We have reviewed the administrative proceedings and do not note any violations of Morrissey.

Affirmed.