



## Case Summary and Issue

William Lloyd appeals the trial court's denial of his petition for writ of habeas corpus, contending that the trial court erred in finding that he was not entitled to the relief requested. Concluding that the trial court did not abuse its discretion in finding that Lloyd was not entitled to immediate release from custody, we affirm.

## Facts and Procedural History

On November 2, 2004, Lloyd was sentenced to six years for battery, a Class C felony. He began serving his sentence on February 6, 2005, after completing a sentence previously imposed for operating a vehicle while intoxicated.

Lloyd was released on parole on August 29, 2007, and went to live with his mother. In late September of 2007, Lloyd was arrested for crimes allegedly committed against his mother and the police responding to the incident. On September 26, 2007, Lloyd's parole agent filed a report alleging that Lloyd had violated Rule 7<sup>1</sup> of his parole release agreement by committing new criminal offenses. It was also alleged that he had violated Rule 8<sup>2</sup> because when police searched the residence during the incident, they found a rifle and a handgun. The report alleged that when the parole agent approved Lloyd's placement in his mother's home, his mother had indicated there were no weapons in the home "because she was afraid of them." App. of Appellee at 16. A warrant was issued and Lloyd was returned to custody. On September 27, 2007, Lloyd signed a form entitled "Waiver of Preliminary Hearing" in which he indicated that he

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<sup>1</sup> Rule 7 prohibits "[e]ngaging in criminal conduct, felony offense, prohibited by federal or state law or local ordinance." Appendix of Appellee at 15.

<sup>2</sup> Rule 8 prohibits "[c]arrying, dealing, possessing firearms, explosive devices, or deadly weapons." *Id.* at 16.

“plead[s] guilty to the following alleged parole violations, and waive[s his] right to a Preliminary Hearing on Rule #8 – Possession of Firearms,” and “waive[s his] right to a Preliminary Hearing of the following alleged parole violation, Rule #7 – Criminal Confinement, causing Bodily Injury; Rule #7 – Battery w/ Bodily Injury; Rule #7 – Battery w/ Bodily Injury; Rule #7 – Intimidation; Rule #7 – Intimidation.” Id. at 17.<sup>3</sup>

As a result of the September incident, Lloyd was charged in Miami Circuit Court with criminal confinement, a Class C felony; two counts of battery, both Class D felonies; and two counts of intimidation, both Class D felonies. On February 21, 2008, the charges were dismissed because Lloyd’s mother, the victim/witness to the incident, was not competent to testify and the State was unable to proceed without her testimony. At the subsequent parole revocation hearing, Lloyd stated he had evidence he wished the parole board to consider. Upon determining that the evidence was a statement from Lloyd’s mother, the parole board indicated that it had received the evidence. The parole board noted that the criminal charges against Lloyd had been dismissed and that it would not consider the alleged Rule 7 violation. Lloyd withdrew his earlier guilty plea to the Rule 8 violation, alleging that his evidence showed the firearms were not his and he was not in possession of them because he did not even know they were in the house. The parole board found him guilty of violating parole Rule 8 and assessed the balance of his sentence.

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<sup>3</sup> The underlined portions are handwritten on the form.

Lloyd filed a petition for writ of habeas corpus against Mark Sevier, Superintendent of the Miami Correctional Facility, alleging that he is entitled to immediate release from the custody of the Indiana Department of Correction (“DOC”).

### Discussion and Decision<sup>4</sup>

#### I. Standard of Review

Indiana Code section 34-25.5-1-1 provides that “[e]very person whose liberty is restrained, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered from the restraint if the restraint is illegal.” The purpose of the writ of habeas corpus is to bring the person in custody before the court for inquiry into the cause of the restraint. Partlow v. Superintendent, Miami Correctional Facility, 756 N.E.2d 978, 980 (Ind. Ct. App. 2001), superceded by statute on other grounds. A petitioner is entitled to habeas corpus only if he is entitled to immediate release from unlawful custody. Id. The writ of habeas corpus cannot be used to determine collateral matters not affecting the custody process. Hardley v. State, 893 N.E.2d 740, 742 (Ind. Ct. App. 2008). A decision regarding habeas corpus relief is reviewed for an abuse of discretion. Benford v. Marvel, 842 N.E.2d 826, 828 (Ind. Ct. App. 2006). Without reweighing the evidence, we consider only the evidence most favorable to the judgment and reasonable inferences drawn therefrom. Id.

Although Lloyd makes several claims, the main crux of his argument is that the evidence presented at the revocation hearing did not support revocation of his parole

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<sup>4</sup> On February 3, 2009, Lloyd filed with this court a “Clarification Notice,” apparently wanting to make sure this court had received certain documents from the trial court’s record. We have received and considered the motions and evidence Lloyd lists therein.

under Indiana Code section 11-13-3-10(c).<sup>5</sup> The Legislature has not established a burden of proof for parole revocation hearings. However, this court has determined that although there are “distinguishing factors between probation and parole . . . [there is] no indication that revocation of parole should be more difficult or procedurally different than the revocation of probation.” Hornaday v. State, 639 N.E.2d 303, 309 n.10 (Ind. Ct. App. 1994) (quoting Richardson v. Markley, 339 F.2d 967, 969-70 (7th Cir. 1965), cert. denied, 382 U.S. 851 (1965)), trans. denied. The burden of proof in a probation revocation hearing is preponderance of the evidence. Ind. Code § 35-38-2-3(e). Once the parole board has fulfilled the procedural requirements of Indiana Code section 11-13-3-10, “it has almost absolute discretion in making its decision and such discretion will not be interfered with by the courts.” Hawkins v. Jenkins, 268 Ind. 137, 143, 374 N.E.2d 496, 500 (1978).

## II. Petition for Writ of Habeas Corpus

We can dispose of several of Lloyd’s arguments summarily. Lloyd contends that he was being held in violation of the Eighteenth Amendment. The Eighteenth Amendment has no applicability to this case not least because it was repealed in 1933 by

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<sup>5</sup> For this reason, it appears that Lloyd could also have filed for relief under the post-conviction relief rules. See Ind. Post-Conviction Rule 1(1) (“Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims . . . (5) that his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint . . . may institute at any time a proceeding under this Rule to secure relief.”). However, the post-conviction rules do not replace “the traditional remedy of habeas corpus as a method of challenging a defendant’s unlawful incarceration.” State v. Jeffers, 168 Ind. App. 284, 287, 342 N.E.2d 681, 683 (1976). In situations where entitlement to immediate release is not alleged, a petition alleging that parole has been improperly revoked is properly treated as a petition for post-conviction relief. Hannis v. Deuth, 816 N.E.2d 872, 875 n.2 (Ind. Ct. App. 2004). Because Lloyd does not challenge his underlying conviction or sentence and alleges he is entitled to immediate release, his petition was properly treated as one for habeas corpus.

the Twenty-First Amendment.<sup>6</sup> Lloyd also contends that the trial court's judgment fails to address his motion for default judgment. Although a motion for default judgment appears in his appendix, see appellant's appendix at 27, it is not file-stamped and the Chronological Case Summary does not reflect that it was ever filed with the trial court, see id. at 2. Error cannot be predicated on the failure to rule on a motion that was never filed.<sup>7</sup>

Lloyd argues that the parole board violated his Fourteenth Amendment due process rights by failing to admit evidence, failing to allow him to call witnesses, suppressing evidence in his favor, and failing to allow his defense. Parolees are entitled to certain minimum due process rights when their parole is to be revoked. Morrissey v. Brewer, 408 U.S. 471, 489 (1972). The minimum requirements are spelled out in the requirements of Indiana Code section 11-13-3-9 and -10. Relevant to this case are that the defendant at a parole revocation hearing is entitled to 1) appear and speak in his own behalf; 2) call witnesses and present evidence; and 3) confront and cross-examine witnesses. Ind. Code §§ 11-13-3-9(a); 10(a)(2). The parolee may also offer mitigating evidence suggesting the alleged violation does not warrant revocation. Woods v. State, 892 N.E.2d 637, 640 (Ind. 2008); Ind. Code § 11-13-3-10(a)(2).

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<sup>6</sup> Lloyd seems to argue that the Eighteenth Amendment deals with possession of contraband and somehow applies to the allegation he possessed weapons in violation of his parole release agreement. The Eighteenth Amendment – when it applied – applied to intoxicating liquors. We discern no basis for Lloyd's invocation of the Eighteenth or the Twenty-First Amendment as they relate to this case.

<sup>7</sup> As to the merits of Lloyd's motion for default, it appears he is alleging that the respondent failed to provide him with a videotape of his parole hearing. The record contains a letter from the respondent in response to Lloyd's subpoena noting that because the DOC does not conduct the parole hearings, any records from the hearing must be obtained from the parole board. Appellant's App. at 32. The respondent's response to Lloyd's petition for writ of habeas corpus notes that offenders are not permitted to possess videotapes and states that Lloyd may contact respondent's counsel to make arrangements to view the videotape. App. of Appellee at 4. There is no indication that Lloyd requested the videotape from the parole board or that he contacted respondent's counsel to view the videotape or that either failed to cooperate. Thus, to the extent Lloyd's motion for default was predicated on a discovery violation, it would have been denied.

As for Lloyd's claim that the parole board suppressed evidence in his favor, he fails to identify any alleged exculpatory evidence that was suppressed. His allegation seems to be that the evidence he provided was "suppressed" by not being considered. However, the videotape of the parole revocation hearing clearly shows that the parole board was in possession of the evidence Lloyd had submitted and that it was considered in the revocation determination. Lloyd also fails to identify any witnesses he wished to call on his behalf at the revocation hearing who were not allowed.

As for the alleged failure of the parole board to allow Lloyd's defense, Lloyd's defense is that he did not actually or constructively possess the weapons found in his residence. He offered letters from his mother professing that the weapons were hers and that Lloyd did not know they were in the house. He cited caselaw concerning Indiana Code section 35-41-2-1(b), which provides that "[i]f possession of property constitutes any part of the prohibited conduct, it is a defense that the person who possessed the property was not aware of his possession for a time sufficient for him to have terminated his possession." Lloyd did provide to the parole board a letter from his mother stating that the guns were hers and that Lloyd did not know they were in the house. However, there was also evidence that Lloyd's mother told Lloyd's parole agent before Lloyd's release that there were no weapons in the house because she was afraid of them. Lloyd's mother's credibility was an issue for the parole board to resolve. There was also evidence before the parole board – in the form of a letter Lloyd himself wrote to the chairman of the parole board – that Lloyd told his mother prior to his release on parole to "make sure to remove those guns," and that he "had no idea the gun had been brought

back into the house.” App. of Appellee at 25. It is clear from this evidence that Lloyd knew that guns had once been in the house, and again, the credibility of Lloyd’s denial that he knew they were presently in the house was a matter for the parole board. Constructive possession may be inferred when circumstantial evidence points to the defendant’s knowledge of the presence of a weapon, even if his control is not exclusive. Wallace v. State, 722 N.E.2d 910, 913 (Ind. Ct. App. 2000). Because Lloyd is not charged with a criminal offense regarding possession of the weapons but is alleged to have violated a rule of his release on parole, and because the burden of proof to support revocation of parole is lower than the burden of proof for obtaining a criminal conviction, there was sufficient evidence before the parole board from which it could find by a preponderance of the evidence that Lloyd was in violation of Rule 8.

Finally, Lloyd claims a violation of the Eighth Amendment of the United States Constitution and Article I, section 16 of the Indiana Constitution, both of which prohibit cruel and unusual punishment. He alleges cruel and unusual punishment in holding him without sufficient evidence to support his parole revocation. Because we have concluded there was sufficient evidence to revoke his parole, this claim fails to show his entitlement to immediate release.<sup>8</sup>

### Conclusion

Lloyd failed to show his entitlement to immediate release and the trial court therefore did not abuse its discretion in denying his petition for writ of habeas corpus.

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<sup>8</sup> To the extent Lloyd attempts to make any other arguments supporting his petition for writ of habeas corpus, we have been unable to discern them, and they are waived for failure to develop a cogent argument. See Davis v. State, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (“A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.”), trans. denied; see also Ind. Appellate Rule 46(A)(8) (requiring that contentions in appellant’s brief be supported by cogent reasoning).

Affirmed.

CRONE, J., and BROWN, J., concur.