

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kishawn Braddy,	:	
	:	
Relator,	:	No. 23AP-197
	:	
v.	:	(REGULAR CALENDAR)
	:	
Lisa Hoying, In her official capacity as	:	
Chair of the Ohio Parole Board et al.,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on July 27, 2023

On brief: *Timothy Young*, Ohio Public Defender, and *Victoria A. Bader*, for relator.

On brief: *Dave Yost*, Attorney General, and *Jennifer A. Driscoll*, for respondents.

IN MANDAMUS

LUPER SCHUSTER, J.

{¶ 1} Relator, Kishawn Braddy, has filed this original action against respondents, Lisa Hoying, chair of the Ohio Parole Board (“parole board”), Scott Widmer, member of the parole board, Michael Anderson, chief hearing officer of the parole board, and Christopher Wilson, hearing officer of the parole board. Relator seeks a writ of mandamus ordering respondents to hold a new post-release control revocation hearing and find Braddy not guilty of the alleged Rule 4 violation and issue a new sanction on the remaining violations. For the following reasons, we grant Braddy’s requested writ of mandamus.

I. Facts and Procedural History

{¶ 2} Braddy is currently incarcerated at Southern Ohio Correctional Facility in Lucasville, Ohio. Respondents, who are all sued in their official capacities, are members or hearing officers of the parole board.

{¶ 3} In June 2022, Braddy was released from the Ohio Department of Rehabilitation and Correction (“ODRC”) and placed on post-release control supervision. Several weeks after Braddy’s release from incarceration, Parole Officer Isaiah Bell, who was assigned to supervise Braddy’s post-release control, learned that Braddy had been the victim of a shooting, leaving Braddy hospitalized with serious injuries.

{¶ 4} Subsequently, on December 28, 2022, the Ohio Adult Parole Authority (“OAPA”) notified Braddy that he had been charged with multiple alleged violations of the conditions of his post-release control related to the shooting incident and his lack of communication with his parole officer following the incident. Specifically, the OAPA alleged Braddy committed the following six post-release control violations:

[1.] RULE 1. I will obey federal, state and local laws and ordinances, including those related to illegal drug use and registration with authorities. I will have no contact with the victim of my current offense(s) or any person who has an active protection order against me.

TO WIT: On or about July 29, 2022, in the vicinity of Cuyahoga County you caused or attempted to cause serious physical harm to Brandon Moore.

[2.] RULE 1. I will obey federal, state and local laws and ordinances, including those related to illegal drug use and registration with authorities. I will have no contact with the victim of my current offense(s) or any person who has an active protection order against me.

TO WIT: On or about July 29, 2022, in the vicinity of Cuyahoga County you had in your possession or in your control, a handgun.

[3.] RULE 2. I will follow all orders given to me by my supervising officer or other authorized representatives of the Court or the Department of Rehabilitation and Correction, including, but not limited to obtaining permission from my

supervising officer before changing my residence and submitting to drug testing. Failure to report for drug testing or impeding the collection process will be treated as a positive test result.

TO WIT: On or about August 2, 2022 in the vicinity of Cuyahoga County you failed to report to your Parole Officer as instructed.

[4.] RULE 4. I will not purchase, possess, own, use or have under my control, any firearms, ammunition, dangerous ordnance, devices used to immobilize or deadly weapons, or any device that fires or launches a projectile of any kind. I will obtain written permission from the Adult Parole Authority prior to residing in a residence where these items are securely located.

TO WIT: On or about July 29, 2022, in the vicinity of Cuyahoga County you had in your possession or in your control, a handgun.

[5.] RULE 6. I will report any arrest, conviction, citation issued to me for violating any law, or any other contact with law enforcement to my supervising officer no later than the next business day following the day on which the contact occurred or, if I am taken into custody as a result of the law enforcement contact, no later than the next business day following my release from custody. I will not enter into any agreement or other arrangement with any law enforcement agency that might place me in the position of violating any law or condition of my supervision without first obtaining written permission to enter into the agreement or other arrangement from the Adult Parole Authority or a court of law.

TO WIT: On or about July 30, 2022, in the vicinity of Cuyahoga County you failed to report Law Enforcement contact.

[6.] RULE 8. I agree to fully participate in, and comply with, Special Conditions that will include programming/intervention to address high and moderate domains if indicated by a validated risk tool selected by DRC and any other special conditions imposed by the Parole Board, Court, or Interstate Compact.

TO WIT: On or about July 29, 2022, in the vicinity of Cuyahoga County you had contact with a known STG member.

(Joint Ex. B.) Officer Bell then filed a violation report on January 5, 2023 detailing the factual allegations to support each alleged violation.

{¶ 5} The OAPA conducted a post-release control revocation hearing on Braddy's alleged violations on January 31, 2023. The OAPA presented testimony from Officer Bell, Parole Officer Krystal Wheeler, and witness Eleah Mayo, and it admitted into evidence several documents, including Braddy's conditions of supervision, the Cleveland Police Report from the incident, the Cuyahoga Metropolitan Housing Authority ("CMHA") Report, and the voluntary statement of Mayo. Due to a failure of the recording equipment at the hearing, the parties submitted an agreed statement of facts summarizing the evidence presented at the hearing.

{¶ 6} The report of the Cleveland Division of Police from July 29, 2022 indicates officers responded to a report that a man had been shot. When officers arrived, they found Braddy, who was barely conscious, lying in the middle of the courtyard of an apartment complex with two gunshot wounds. The police report additionally notes that Brandon Moore arrived at a different hospital via private vehicle. Moore told officers he had been with friends in the apartment courtyard when cars pulled up and opened fire. Moore further said he was shot in the back as he ran away. Officers recovered shell casings from different ends of the courtyard as well as a bag of cocaine near a set of dice. The report also indicates officers observed a white Subaru vehicle that had damage from gunfire. Officers searched the vehicle and recovered a pistol drum magazine and drug packaging paraphernalia. The report did not include any information regarding ownership of the vehicle.

{¶ 7} An officer for the CMHA also responded to the incident and submitted a report. The officer arrived after first responders had already started administering aid to Braddy. The officer later learned that a male wearing a white t-shirt and black pants had fled the scene, and the officer confirmed that a man matching that description arrived at another hospital with a gunshot wound.

{¶ 8} Pursuant to the agreed statement of facts, Officer Bell testified he went to the hospital on August 2, 2022, after learning from another OAPA officer that Braddy had been hospitalized following a shooting that occurred on July 29, 2022. Due to the injuries he

sustained, Officer Bell learned that Braddy would be in the hospital for an extended period. Subsequently, on August 22, 2022, Officer Bell spoke with Braddy over the phone, and Braddy informed Officer Bell he was still in the hospital but did not notify Officer Bell that he had any contact with law enforcement. Eventually, Officer Bell learned Braddy was transferred to another hospital, though he did not learn of the transfer from Braddy.

{¶ 9} Officer Bell further testified that he spoke with Mayo, who witnessed the shooting and subsequent events, and Mayo told him that at the time of the event, she saw Braddy exit a vehicle with an unknown person. Mayo then saw Braddy talking to Moore before Moore shot Braddy and the unknown third person shot Moore. Officer Bell testified that Moore was designated as “STG,” or “security threat group,” and he said that one of the conditions of Braddy’s supervision was to have no contact with STG. (Agreed Statement of Facts at 6.)

{¶ 10} When Officer Bell served Braddy with violation paperwork, Officer Bell said Braddy maintained his innocence and stated he had been shot. When Braddy was subsequently released from the hospital, he did not notify Officer Bell. On September 23, 2022, the OAPA declared Braddy a post-release control violator at large. The Cleveland Police Department arrested Braddy on December 9, 2022. Braddy had not contacted Officer Bell at any point in the interim.

{¶ 11} Officer Wheeler testified she assisted in the investigation into Braddy’s shooting. Officials from the CMHA informed Officer Wheeler that security cameras were not in operation at the time of the shooting incident. When she spoke to Braddy, Officer Wheeler said Braddy told her he hosted a party for his grandmother and mother and that at the party, he “got shot and became unconscious.” (Agreed Statement of Facts at 7.) Braddy also told Officer Wheeler that Moore was at the party.

{¶ 12} Mayo witnessed the shooting. At the hearing, she testified she knew both Braddy and Moore. Mayo knew Braddy from growing up in the same neighborhood, and Moore is Mayo’s ex-boyfriend. Mayo testified Braddy and Moore did not get along well and were not friends. On the day of the shooting, Mayo said she saw Braddy and Moore talking outside. She then heard gunfire and when she looked outside, she saw Braddy clutching his stomach before collapsing to the ground. Mayo testified that Moore shot Braddy. She further testified that she did not see Braddy with a firearm. After Moore shot Braddy, Mayo

said she saw an unknown third person, dressed in all black, shoot Moore. At that point, Mayo said Moore continued shooting at the unknown person. After the shooting, Mayo said both Moore and the unknown shooter ran away but that Braddy remained on the ground until an ambulance arrived. Mayo said another person at the scene who was not Moore or the unknown shooter assisted Braddy after the shooting. In her voluntary statement to police, Mayo described Moore as being in a “shootout” with the unknown third person. (Joint Ex. G.) Mayo also testified that the white Subaru vehicle in the parking lot was a rental car that Moore had been driving.

{¶ 13} Braddy did not call any witnesses at the hearing. He did, however, introduce into evidence the medical records from the injuries he sustained in the shooting.

{¶ 14} During closing arguments, the OAPA argued that Braddy either shot Moore or was with an unknown individual who shot Moore. The OAPA asserted Braddy had control over a firearm by arriving in a vehicle with an unknown shooter. Additionally, the OAPA argued Braddy violated the conditions of his post-release control by failing to report contact with law enforcement and by associating with a known STG member. Counsel for Braddy argued there was no evidence that Braddy possessed a gun, noting the police reports did not indicate Braddy had a gun, the only witness testified she did not see Braddy with a gun, and the OAPA failed to establish a connection between Braddy and the unknown shooter.

{¶ 15} Following closing arguments, the hearing officer found Braddy not guilty of Counts 1, 2, and 3 but guilty of Counts 4, 5, and 6. The notice of findings of release violation hearing, mailed January 31, 2023, included a summary of evidence used in the findings. With respect to the Rule 4 violation, the notice of findings of release violation hearing stated only “[o]n or about July 29, 2022, in the vicinity of Cuyahoga County you had in your possession or in your control, a handgun.” (Joint Ex. J at 1.) The notice also contained a statement that “[t]he APA provided sufficient corroboration in the violation report to support these violations. Based on the corroboration, testimony, medical reports, and the record as a whole you are found Guilty of the above violations by the preponderance of the evidence standard.” (Joint Ex. J at 2.) As a result of the finding that Braddy violated the terms of his post-release control, and because the parole board views firearm violations as

among the most serious types of violations, the parole board imposed the maximum sanction of 270 days.

{¶ 16} Braddy requested administrative reconsideration of the hearing officer's decision. The parole board denied the request for reconsideration on February 21, 2023.

{¶ 17} Braddy then filed his complaint in the instant matter on March 28, 2023. In his complaint, Braddy alleged the OAPA presented insufficient evidence to support a finding that he violated the terms of his post-release control as it relates to the finding that he possessed a firearm. As a result, Braddy alleged the hearing officer's decision violated his due process rights by depriving him of his liberty interest in post-release control. Braddy requests the following relief:

- 1) That a writ of mandamus issue directing the [OAPA] to hold a new revocation hearing at which it must find Mr. Braddy not guilty of the alleged Rule 4 violation and issue a new sanction on the remaining violation;
- 2) If this court declines the first request, that an alternative writ issue or that this court order an evidentiary hearing; and,
- 3) Any other relief to which Mr. Braddy may be entitled.

(Compl. at ¶ 31.)

{¶ 18} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this court referred the matter to a magistrate of this court. On May 9, 2023, respondents filed a motion to dismiss pursuant to Civ.R. 12(B)(1) and (6). Braddy filed a memorandum in response to the motion to dismiss on May 15, 2023. The magistrate then issued an order on May 25, 2023, denying respondent's motion to dismiss. Respondents subsequently filed an answer on June 2, 2023.

II. Discussion

{¶ 19} Braddy argues the OAPA presented insufficient evidence to support a finding that he violated the terms of his post-release control with respect to the Rule 4 violation related to possession of a firearm. Thus, Braddy alleges the hearing officer's decision violated his due process rights by depriving him of his liberty interest in post-release control. Braddy does not challenge the guilty findings related to Rules 6 and 8.

{¶ 20} This court recently determined that a writ of mandamus is an appropriate remedy for an individual asserting a due process violation based on insufficient evidence to support the revocation of post-release control. *State ex rel. Barber v. Hoying*, 10th Dist. No. 23AP-71, 2023-Ohio-2204, ¶ 11 (noting “[t]he revocation of parole implicates a liberty interest and is, therefore, subject to certain procedural protections”). To be entitled to a writ of mandamus, a relator must demonstrate: (1) a clear legal right to the requested relief, (2) that respondent is under a clear legal duty to provide the relief, and (3) relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29 (1983), citing *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 42 (1978).

{¶ 21} Here, Braddy asserts there was insufficient evidence to find he was in possession of a firearm. To constitute sufficient evidence to sustain the revocation of post-release control, there must be “substantial evidence” to support the decision. (Internal quotations omitted.) *Barber* at ¶ 13, citing *State ex rel. Mango v. Ohio Dept. of Rehab. & Corr.*, 169 Ohio St.3d 32, 2022-Ohio-1559, ¶ 18. In post-release control revocation proceedings, the applicable burden of proof is the preponderance of the evidence. *Id.*, citing *Mango* at ¶ 19. Thus, there is “substantial evidence,” and therefore sufficient evidence, to support a finding of a post-release control violation when the evidence presented by the OAPA, if believed, demonstrates the violation by a preponderance of the evidence. *Id.*, citing *State v. Dillon*, 10th Dist. No. 21AP-666, 2023-Ohio-777, ¶ 45 (“[u]nlike more stringent evidentiary standards such as clear and convincing evidence or evidence beyond a reasonable doubt, the preponderance of the evidence requires only that the existence of a fact be more likely than not”).

{¶ 22} The hearing officer determined Braddy violated the terms of his post-release control through a Rule 4 violation by finding that Braddy had a firearm under his possession or control. As we explained in *Barber*, a person may knowingly possess an object through either actual possession or constructive possession. *Barber* at ¶ 16, citing *State v. Walker*, 10th Dist. No. 14AP-905, 2016-Ohio-3185, ¶ 63. Actual possession occurs when a person has an item within his immediate physical control. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶ 27 (10th Dist.), citing *State v. Saunders*, 10th Dist. No. 06AP-1234, 2007-Ohio-4450, ¶ 10. Constructive possession, on the other hand, occurs

“when a person knowingly exercises dominion and control over an object, even though the object may not be within the person’s immediate physical possession.” *Pilgrim* at ¶ 27, citing *State v. Hankerson*, 70 Ohio St.2d 87 (1982), syllabus. However, “the mere fact that property is located within premises under one’s control does not, of itself, constitute constructive possession.” *Hankerson* at 91. Instead, “[i]t must also be shown that the person was conscious of the presence of the object.” *Id.* As it relates specifically to firearms, “[c]onstructive possession of a firearm exists when a defendant knowingly has the power and intention at any given time to exercise dominion and control over a firearm, either directly or through others.” *State v. Dorsey*, 10th Dist. No. 04AP-737, 2005-Ohio-2334, ¶ 32.

{¶ 23} Here, the testimony and evidence at the post-release control hearing does not demonstrate that Braddy had actual possession of a firearm. The sole witness to the shooting did not see Braddy with a gun. Mayo, the only witness, testified that Moore was shot by an unknown individual who then fled the scene. When law enforcement spoke with Moore after the shooting, Moore did not identify Braddy as the shooter. The police reports from the incident do not indicate a gun was located on or near Braddy’s person when police arrived. To the extent respondents argue the evidence supports a finding that Braddy had actual possession of a firearm by suggesting that Braddy was the person who shot Moore, respondents do not point to anything in the record indicating this set of facts was more likely than not, the standard that must be shown to demonstrate possession by a preponderance of the evidence. *Dillon* at ¶ 45. Instead, the evidence suggests it is merely possible Braddy had actual possession of a firearm because he was at the scene of the shooting. However, mere possibility is not the standard for proof by a preponderance of the evidence. Thus, we agree with Braddy that the OAPA did not establish, by a preponderance of the evidence, that Braddy had actual possession of a firearm. *See Barber* at ¶ 23.

{¶ 24} Nonetheless, respondents assert there was ample evidence to support a finding that Braddy had constructive possession of a firearm. Respondents point to the portions of the record indicating that Braddy suffered a gunshot wound in the same incident as a known STG member at a scene where police recovered multiple shell casings and drug paraphernalia. From this evidence, respondents assert we can infer Braddy had

constructive possession of a firearm. Again, however, the evidence at the hearing indicates only that it is merely possible that Braddy constructively possessed a firearm. Even accepting as true that Braddy arrived at the scene with another individual who possessed a firearm, respondents do not point to anything in the record demonstrating, by a preponderance of the evidence, that Braddy was conscious of the presence of the firearm or that Braddy had any access to or ability to control the firearm. *Barber* at ¶ 27 (“[w]hile there was evidence presented that the firearm in the vehicle was accessible to relator, there was insufficient evidence to demonstrate that relator had any knowledge or awareness of the firearm other than mere proximity to it”). Further, to the extent respondents argue the presence of shell casings near the spot where first responders found Braddy suggests Braddy possessed a firearm, we note there was nothing in the record indicating the type of gun the shell casings came from or how long the casings had been in the area. Respondents ignore that there was not evidence at the hearing demonstrating Braddy possessed a firearm and instead ask us to assume the OAPA’s version of events must be true. We decline respondents’ suggestion to relieve the OAPA from its burden of proof in post-release control revocation proceedings.

{¶ 25} Accepting the evidence presented by the OAPA as true, there was insufficient evidence to establish by a preponderance of the evidence that Braddy possessed or controlled a firearm. Although there was evidence presented that Braddy was the victim of a shooting and that another individual, Moore, was also shot, there was insufficient evidence to demonstrate that Braddy had any knowledge or awareness of a firearm other than mere proximity to it. *See Barber* at ¶ 27, citing *State v. Gardner*, 8th Dist. No. 104677, 2017-Ohio-7241, ¶ 45 (finding that evidence established at most that the defendant “was in the vicinity of the gun, which is not sufficient to establish constructive possession”), and *State v. Ellis*, 8th Dist. No. 108302, 2020-Ohio-1115, ¶ 41 (insufficient evidence to support conviction for having a weapon while under disability because there was “no evidence to establish that other [than] being near the gun, [the defendant] ever had or was able to exercise any dominion and control over the firearm”). Given the OAPA’s failure to put forth evidence indicating Braddy had any access to or control over a firearm, we cannot find the OAPA presented the substantial evidence required to find Braddy violated the terms of his post-release control by possessing a firearm.

III. Conclusion

{¶ 26} Based on the foregoing reasons, we grant a writ of mandamus ordering respondents to vacate the order finding Braddy violated the terms of his post-release control and to hold a new revocation hearing at which it must find Braddy not guilty of the alleged Rule 4 violation and issue a new sanction on the remaining violations.

Writ of mandamus granted.

DORRIAN and LELAND, JJ., concur.
