Masami v. Kesolei, 10 ROP 213 (Tr. Div. 2003)

WILLARD MASAMI,

Petitioner,

v.

MARCELLA KESOLEI, GORETTY MASAYOS, EMIL RAMARUI, and THEORDORE SUBRIS, members of the Palau Parole Board,

Respondents.

CIVIL ACTION NO. 03-020

Supreme Court, Trial Division
Republic of Palau

Decided: February 3, 2003
⊥214
R. BARRIE MICHELSEN, Associate Justice:

Willard Masami has filed a petition for writ of habeas corpus. He is currently in custody as the result of the execution of an arrest warrant issued by the Chairman of the Parole Board. Petitioner had been previously paroled from a conviction for attempted second degree murder. The arrest warrant was issued in conformity with 18 PNC § 1217(a)(2), which provides that "the Board, or any Board member" is authorized to "issue an arrest warrant" if a parolee is alleged to have violated parole. The warrant was based on the allegation that Petitioner violated both his curfew restrictions and the requirement that he refrain from alcohol consumption. The revocation hearing is set for February 17, 2003. In the meantime, he is being held without bail, as provided by 18 PNC § 1217(f).

Given the nature of a habeas petition, in which the petitioner is claiming that he is being held unlawfully, time is of the essence. Therefore, the Court will turn directly to the arguments that appear to have merit.

Petitioner directs the Court's attention to Article IV, Section 6 of the Palau Constitution, which provides, "A warrant for search and seizure may not issue except from a justice or judge on probable cause supported by an affidavit particularly describing the place, persons, or things to be searched, arrested, or seized." Petitioner therefore concludes that the statutory provision authorizing the Parole Board to issue arrest warrants is in conflict with the Palau Constitution.

The United States Constitution has no comparable provision restricting the issuance of arrest or search warrants to judges or justices. In the case of *Shadwick v. City of Tampa*, 92 S. Ct. 2119 (1972), the United States Supreme Court explained that because of the wide expanses of rural and sparsely populated areas of the United States on the one hand, and the dense population and high case loads in other parts of the country on the other, it was not expected that the

issuance of warrants would be limited to judges, although "this is not to imply that a judge or lawyer would not normally provide the most desirable review of warrant requests." *Id.* at 2124. Hence, the Fourth Amendment of the United States Constitution only requires that the existence of probable cause be assessed by neutral, detached, magistrates who need not be judicial officers. *Id.*

The geographical and demographic realities of the American experience that required an expanded class of persons to possess warrant-issuing authority were not comparable to Palau's situation at the time of the drafting of its Constitution. The Framers of the Palau Constitution were free to choose, and did choose, the more "desirable review of ⊥215 warrant requests"–the review provided by a judicial officer. Section 1217 of Title 18, which authorizes the Parole Board or any member thereof to issue arrest warrants for parolees, is in direct conflict with Palau's constitutional requirements. Issuance of arrest warrants is constitutionally limited to judges and justices. Palau Const. art. IV. § 6.

A separate deficiency of the challenged statute should also be noted. Section 1217 does not require a showing of probable cause. A mere allegation of a violation is sufficient to trigger an arrest warrant. This low threshold is constitutionally deficient, because warrants may only be issued "on probable cause supported by an affidavit." *Id.*

Another issue raised by Petitioner is his claim that he has not been provided due process. He directs the Court's attention to the first sentence of Article IV, Section 6 of the Palau Constitution, which provides; "The government shall take no action to deprive any person of life, liberty, or property without due process of law."

The Parole Board does not suggest that due process protections are not applicable to parole revocations, but rather argues that the statutory provisions are constitutionally adequate. The question presented, therefore, is a usual one: "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 92 S. Ct. 2593, 2600 (1972). *Morrissey* is the touchstone in the United States for testing whether parole revocation procedures comport with due process, and Petitioner urges adoption of its analysis here. The underlying facts of *Morrissey* are as follows: the petitioners, both parolees, were arrested at the direction of their parole officers, and their paroles were subsequently revoked by the Parole Board upon consideration of the written reports of those parole officers. Neither parolees were afforded a hearing before the revocation became final. *Id.* at 2596.

The Court provided an overview regarding how parole revocation generally proceeded at the state level in the United States during the early 1970s:

> The first stage [of the revocation process] occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is

> made concerning revocation. Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available.

Id. at 2602.

The Court stated that "[i]n our view, due process requires that after arrest, the determination that reasonable grounds exist ⊥216 for revocation of parole should be made by someone not directly involved in the case." *Id.* The Court concluded that a prompt preliminary hearing should be held before another administrator "such as a parole officer other than the one who has made the report of parole violations or has recommended revocation." *Id.* at 2603.

Petitioner contends that he is constitutionally entitled to some sort of immediate preliminary hearing as discussed in *Morrissey*. The Court does not concur. If, as part of a parole revocation, an arrest warrant was issued by a judicial officer based upon probable cause, Petitioner's due process concerns would be adequately addressed. A judicial arrest warrant meets the requirement that there be an independent "evaluation of whether reasonable cause exists to believe that conditions of parole have been violated." *Id.* Thus, a separate preliminary hearing would be unnecessary. Furthermore, the statute's subsequent procedural steps appear to meet all the usual requirements of due process: notice and opportunity to be heard within a reasonable time frame.

The Court therefore concludes that the Parole Board may decide to begin parole revocation proceedings by summons or arrest. If a summons is served that is in accord with the notice requirements set forth in 18 PNC § 1217, and the Board conducts a hearing within the thirty day period set forth in 18 PNC § 1218(a), then a parolee has been afforded due process. If, in its discretion, the Board believes that circumstances are such than an arrest of the parolee is necessary, then the Board may apply to the Court for a warrant. The application must be supported by statement under oath showing that there is probable cause to believe that the parolee has violated parole.

Because the issuance of the arrest warrant in this case was not authorized by the Palau Constitution, the detention of Petitioner cannot be justified on that basis, and to the extent that he is being held solely on the authority of that warrant, a writ shall issue ordering his release.

The granting of this writ does not affect the hearing date set by the Board, is not an indication of whether the Court would have issued a warrant if an application by the Board was duly made, nor should it be taken as an expression of opinion regarding whether or not the petitioner's parole should be revoked.