IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD L. GRENNIER,

OPINION and ORDER

Plaintiff,

05-C-81-C

v.

MATTHEW FRANK,

Defendant.

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This is a prisoner civil rights action under 42 U.S.C. § 1983 in which plaintiff Richard Grennier was granted leave to proceed in forma pauperis on his claim that he was classified as a sex offender in violation of the due process clause of the Fourteenth Amendment. On June 7, 2005, defendant filed a motion to dismiss on the grounds that plaintiff had failed to exhaust his administrative remedies and that he failed to state a due process claim in his complaint because he does not have a protected liberty interest at stake. In an order dated July 1, 2005, I converted defendant's motion to dismiss into a motion for summary judgment pursuant to Fed. R. Civ. P. 12(b) because the parties had submitted documents outside the pleadings that (1) might be relevant to the issues raised in defendant's motion and (2) did not appear to be matters of public record. I relieved the parties of their

obligation to submit proposed findings of fact and gave them until July 22, 2005 to submit any additional evidence relevant to the issues raised by defendant. Order, dkt. #13, at 2-3. Neither party submitted additional evidence after the July 1 order but defendant filed a reply brief in which he withdrew his argument that plaintiff failed to exhaust his administrative remedies. Dft.'s Reply Br., dkt. #14, at 1. However, defendant continues to press his argument that plaintiff does not have a protected liberty interest at stake. I have examined the documents submitted by the parties, most of which were relevant to the exhaustion issue. I will grant defendant's motion because I agree with him that plaintiff's classification as a sex offender and the requirement that he complete a sex offender treatment program do not implicate a liberty interest protected by the due process clause.

I allowed plaintiff to proceed on his due process claim because the allegations in his complaint suggested that he was classified as a sex offender and forced to complete a sex offender treatment program as a pre-condition to parole eligibility. The critical question with respect to plaintiff's due process claim was whether his allegations were sufficient to implicate a protected liberty interest. In his complaint, plaintiff alleged that he was classified as a sex offender while in prison despite never having been convicted of a sex offense and that, as a result of this classification, he had to complete a treatment program for sex offenders before becoming eligible for parole. I concluded that these allegations suggested interference with a protected interest in light of their similarity to the facts in Neal v.

Shimoda, 131 F.3d 818 (9th Cir. 1997) and Kirby v. Siegelman, 195 F.3d 1285 (11th Cir. 1999). In those two cases, prisoners who had not been convicted of sex offenses were classified as sex offenders while in prison and required to undergo sex offender treatment as a pre-condition to parole eligibility. In each case, the court concluded that the prisoner had a protected interest in avoiding the sex offender label and the attendant requirement that he complete sex offender treatment. After further consideration, I have concluded that the law in the Seventh Circuit would not recognize a protected liberty interest in plaintiff's circumstances.

A due process violation occurs when a state actor deprives an individual of a protected liberty or property interest without providing adequate process. The first question in any due process analysis is whether a protected liberty or property interest has been infringed. In the prison context, liberty interests can be created by state law or by the due process clause itself. Thielman v. Leean, 282 F.3d 478, 480 (7th Cir. 2002). A liberty interest arises under the due process clause when an inmate is subjected to a condition of confinement or restraint that essentially exceeds the inmate's sentence. Sandin v. Conner, 515 U.S. 472, 484 (1995); Washington v. Harper, 494 U.S. 210 (1990) (due process clause protects inmates from involuntary administration of psychotropic drugs); Vitek v. Jones, 445 U.S. 480 (1980) (liberty interest arises when inmate is transferred to mental hospital and subjected to mandatory treatment). State law or prison regulations give rise to liberty

interests when they impose "atypical and significant hardship[s] on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484. Regardless of the source of the protected interest, the focus is on the severity of the deprivation suffered by the inmate. Lekas v. Briley, 405 F.3d 602, 607 (7th Cir. 2005).

In this case, there are three deprivations that might give rise to a liberty interest. First, because plaintiff has been classified as a sex offender, it is necessary to examine whether he has a liberty interest in avoiding that label. Although the "sex offender" tag undoubtedly carries a stigma, it is clear that merely classifying an inmate as a sex offender is insufficient to give rise to a liberty interest. Townsend v. Vallas, 256 F.3d 661, 669 (7th Cir. 2001) (citing Paul v. Davis, 424 U.S. 693, 708-10 (1976)) (to give rise to liberty interest, harm inflicted to reputation must be coupled with change in legal status).

The second inquiry is whether plaintiff has a liberty interest in not being classified a sex offender and forced to participate in a sex offender treatment program. In Jones v. Puckett, 160 F. Supp. 2d 1016, 1023 (W.D. Wis. 2001), I concluded that these burdens were insufficient to give rise to a liberty interest:

> It is common for persons entering prison to have an evaluation of the reasons for their criminal behavior and their treatment needs, for the resulting evaluations to be recorded in their records and for the authorities who make programming and parole decisions to base their decisions in whole or in part on their sense of the effort a particular inmate has made to confront the problems that have been identified as contributing to his criminal conduct. Because it is common procedure, plaintiff cannot argue that his evaluation and

> identification as a person in need of sex offender treatment is the "atypical and significant hardship on the inmate" that creates a liberty interest. Sandin v. Conner, 515 U.S. 472, 484 (1995) ("[Liberty] interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.")

(Internal citations omitted).

The third possible source of a liberty interest is the plaintiff's inability to secure his release on parole, allegedly because he has not completed the sex offender treatment program. States may create liberty interests in being granted parole. Felce v. Fielder, 974 F.2d 1484, 1490 (7th Cir. 1992). Wisconsin has not done so. Its parole statute is written in non-mandatory terms that give the parole commission complete discretion to grant or deny parole. Wis. Stat. § 304.06(1)(b) ("the parole commission *may* parole an inmate . . . when he or she has served 25% of the sentence imposed") (emphasis added). Discretionary parole schemes do not create protected liberty interests. Heidelberg v. Illinois Prisoner Review Board, 163 F.3d 1025, 1026 (7th Cir. 1998) ("A state creates an expectation of release that rises to the level of a liberty interest within the meaning of the Due Process Clause if its parole system *requires* release whenever a parole board or similar authority dtermines that the necessary prerequisites exist.") (Emphasis added). By contrast, Wisconsin's mandatory release statute provides that "each inmate is *entitled* to mandatory release on parole by the department [when he has completed two-thirds of his sentence]."

Wis. Stat. 302.11(1) (emphasis added). The Court of Appeals for the Seventh Circuit has concluded that this language creates an expectation of release that implicates a liberty interest. Felce, 974 F.2d at 1491-92. However, this provision does not apply to plaintiff because he is serving a life sentence. Wis. Stat. § 302.11(1m) ("An inmate serving a life term is not entitled to mandatory release."). Therefore, the decision whether to grant him parole is governed by Wis. Stat. § 304.06(1)(b). Because that decision is discretionary, plaintiff does not have a liberty interest at stake.

This conclusion is not altered by the fact that one of the reasons the parole commission has declined to release plaintiff on parole is his failure to complete the sex offender treatment program. Among the documents submitted by plaintiff are what appear to be copies of decisions by the parole commission in July 1994, May 2003 and May 2005. Aff. of Richard Grennier, dkt. #11, Exh. #2, pp. 4-6. (Defendant does not contest the authenticity of these documents.) The documents indicate that the commission denied plaintiff parole on each occasion because he has not served sufficient time and because he presents an unreasonable risk to the community. In July 1994, the commission noted plaintiff's failure to complete sex offender treatment as one reason why plaintiff presented an unreasonable risk to the community:

> Release at this time would involve an unreasonable risk to the public. Successful completion of the recommended program, SOTP [sex offender treatment program], is essential to reduce the risk you present.

Id. at Exh. #2, p. 4. In May 2003, the commission offered a similar justification for denying plaintiff parole:

> You need to serve additional time for punishment. This, along with continued good conduct, successful completion of SOTP, and subsequent transition through reduced security for long-term monitoring in that regard will be necessary in order to reduce your risk to a more reasonable level.

Id. at Exh. #2, p. 5. Because the decision to grant or deny plaintiff parole rests within the discretion of the parole commission, the requirement that he complete sex offender treatment is not keeping him from obtaining something to which he otherwise would be entitled. Plaintiff's successful completion of the treatment program would not entitle him to immediate release on parole. The commission may determine that he continues to pose an unreasonable risk to the community. On the other hand, the parole commission could overlook his failure to complete the treatment program if other facts indicated that plaintiff no longer presented an unreasonable risk. Plaintiff's progress or lack of progress through the treatment program is simply a barometer by which the parole commission measures the risk plaintiff presents.

In screening plaintiff's complaint, I analogized the facts of the present case to those in Neal, 131 F.3d 818 and Kirby, 195 F.3d 1285. Those courts considered the stigmatizing impact of the "sex offender" label along with the requirement that the inmates complete a mandatory treatment program sufficient to give rise to a protected liberty interest. Neal,

131 F.3d at 830. After further consideration, I find the conclusions in these cases unpersuasive. In Neal, 131 F.3d at 824, the court acknowledged that a ruling in the inmates' favor would not "*guarantee* parole or necessarily shorten their sentences by a single day" (emphasis in original), but concluded nevertheless that the inmates had a liberty interest in becoming eligible for parole consideration under the Hawaiian parole scheme at issue. Although the Court of Appeals for the Ninth Circuit was willing to hold that an inmate had a liberty interest in discretionary parole, the Court of Appeals for the Seventh Circuit is not. Heidelberg, 163 F.3d at 1026 (discretionary parole schemes do not implicate liberty interests).

In Kirby, 195 F.3d at 1291, the Court of Appeals for the Eleventh Circuit held that the classification of an inmate as a sex offender implicated a liberty interest, citing the stigmatizing effect of the sex offender label as support for its conclusion. Id. at 1292. As I have already noted, stigmatization alone is insufficient to give rise to a liberty interest. Townsend, 256 F.3d at 699. Therefore, I disagree respectfully with the conclusion reached by the court in Kirby.

Because the classification of plaintiff as a sex offender and the requirement that he participate in a sex offender treatment program do not implicate a liberty interest, defendant is entitled to summary judgment with respect to plaintiff's due process claim.

ORDER

IT IS ORDERED that defendant Matthew Frank's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 25th day of August, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge