IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES DUDGEON,

Petitioner, ORDER

v.

07-C-0200-C

JANE DIER-ZIMMEL, Superintendent,
Thompson Correctional Center,

Respondent.

This petition for a writ of habeas corpus is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Petitioner has paid the $5 filing fee. Petitioner James Dudgeon, an inmate at the Thompson Correctional Center in Deerfield, Wisconsin, challenges a final decision of the Wisconsin Division of Hearings and Appeals revoking petitioner's parole in Dane County Circuit Court case 97 CF 0678 and his extended supervision in Dane County Circuit Court case 01 CF 1931. Because petitioner is in custody in an institution located in this district, the petition is properly filed in this court. 28 U.S.C. § 2241(d).

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the district court may dismiss a petition summarily if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Federal habeas corpus relief is available to a state prisoner who is "in custody in violation of the Constitution

or laws or treaties of the United States." 28 U.S.C. § 2254(a). Federal habeas relief is not available to correct errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

From the petition, its attachments and state court records available electronically, I understand petitioner to be alleging the following:

ALLEGATIONS OF THE PETITION

On March 2, 1998, petitioner was convicted of two counts of theft in Dane County Case 97 CF 678. The court withheld sentence and placed petitioner on probation for a period of five years. On March 19, 2001, petitioner's probation was revoked. The court sentenced petitioner to four years of prison on count one and one year of prison on count two, with the terms to run consecutively.

On July 15, 2002, petitioner was convicted of issuing worthless checks in Dane County Case 01 CF 1931. He was sentenced to one year of initial confinement and four years of extended supervision, with the sentence to run consecutively to his sentence in 97 CF 678.

On or before March 9, 2004, 2004, petitioner was released from prison, placed on parole in case 97 CF 678, placed on extended supervision in case 01C CF 1931 and subject to the Wisconsin Department of Corrections' rules of supervision. Among other things, those rules prohibited petitioner from operating a business or investing in business opportunities. Petitioner was supervised by John Fiorello, a probation and parole officer employed by the department.

On December 23, 2004, Fiorello placed petitioner in jail on a parole "hold" without informing petitioner of the reason for the hold or the evidence relied upon. Fiorello failed to

interview petitioner within three days of detaining him, as required by the department's rules governing parole and extended supervision revocation. When he did interview petitioner on January 6, 2005, Fiorello did not advise petitioner that he had a right to a lawyer and threatened petitioner that he would be in further violation of his parole rules if he did not cooperate and answer Fiorello's questions. Petitioner denied all of the allegations that Fiorello made during the interview, which pertained to whether petitioner had held himself out as operating a business and had sought seed money for the purpose of investing in a golf course in Colorado.

Fiorello did not convene a preliminary hearing before an impartial third party to determine if probable cause existed to find that petitioner had violated his rules of supervision. A final revocation hearing was held on March 21, 2005 before Shannon Wittenberger, an Administrative Law Judge for the Wisconsin Division of Hearings and Appeals. Petitioner appeared at the hearing with a lawyer, Mitchell Cooper. According to Wittenberger's decision, petitioner stipulated to the various conduct alleged by Fiorello, but he denied that his conduct was in violation of his rules of supervision.

At the hearing, Fiorello failed to cause witnesses to appear so petitioner could confront them. Specifically, Fiorello did not require Thomas Waller of Denver, Colorado, to attend the hearing, although Waller had provided a written statement adverse to petitioner. Fiorello failed to provide verified, accurate and reliable evidence at the hearing. He did not develop evidence to corroborate statements made by witnesses and did not verify that email and instant message text used at the hearing was reliable. Fiorello did not inform petitioner or the administrative law judge of his intent to use written witness statements at the hearing.

Throughout the revocation process, Fiorello failed to submit all the documents required by the department's rules governing revocation proceedings. Fiorello failed to conduct a proper "Plotkin analysis" by failing to adequately explain whether alternatives to revocation were considered or why they were rejected.

On March 29, 2005, Wittenberger issued a decision finding that petitioner had violated the rules of his supervision. She ordered that petitioner's parole in case 97 CF 678 be revoked and that he be re-incarcerated for one year. She ordered that petitioner's extended supervision in case 01 CF 1931 be revoked and recommended that he be re-incarcerated for one year, consecutive to his sentence in the other case.

Petitioner appealed the revocation decision to David Schwarz, Administrator of the Division of Hearings and Appeals. On April 22, 2005, Schwarz issued a decision sustaining Wittenberger's decision. Schwarz found that petitioner's appeal was untimely. In the alternative, he agreed with Wittenberger's conclusions.

On March 12, 2005, petitioner appeared in the Circuit Court for Dane County for an extended supervision revocation hearing in case 01 CF 1931. The court revoked petitioner's extended supervision and order him re-incarcerated for a period of 30 months, to run consecutive to the one-year term petitioner had been ordered to serve on 97 CF 678.

On May 19, 2005, petitioner filed a notice of his intent to appeal the court's judgment in 01 CF 1931. The state public defender's office appointed Cynthia Fiene to represent petitioner. On November 8, 2005, Fiene submitted a motion on petitioner's behalf asking the

court to reconsider a prior ruling in which it denied petitioner's request for a sentence adjustment. On February 2, 2006, the circuit court entered an order denying the motion.

On June 14, 2006, Fiene filed a notice of appeal on petitioner's behalf from the February 2, 2006 order denying the motion for sentence modification. On July 26, 2006, Fiene submitted a "no merit" report to the Wisconsin Court of Appeals, District 4. The court of appeals has not yet decided the appeal.

DISCUSSION

Petitioner contends that his parole was wrongfully revoked as a result of Fiorello's actions, which petitioner alleges violated a variety of Wisconsin laws, regulations, and policies, as well as his rights under the United States Constitution. As noted previously, Fiorello's alleged violations of state law or the department's administrative rules do not provide a basis for the granting of habeas relief. However, some of Fiorello's alleged actions arguably violated the minimal requirements of due process outlined by the Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972). For example, Fiorello's failure to procure Waller's attendance at the revocation hearing might have deprived petitioner of his right to confront and cross-examine adverse witnesses. *Morrissey*, 408 U.S. at 489 (parolee facing revocation entitled to confront and cross-examine adverse witnesses). And the department's failure to hold a final revocation hearing until more than six months after petitioner was detained arguably violates *Morrissey's* directive that final revocation hearings be held within a "reasonable" time after the parolee is taken into

custody. *Id*. at 488 (indicating that two-month delay would not be unreasonable).[1] Accordingly, the petition contains allegations sufficient to survive summary dismissal.[2]

Apart from finding generally that petitioner has made allegations in his petition that are sufficient to establish that he is in custody in violation of his constitutional rights, I decline at this juncture to review each claim individually, as is usually this court's practice. That is because it appears that petitioner has not exhausted his state court remedies with respect to any claim raised in the petition, which is a prerequisite to this court's reviewing the claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) (before federal court may grant habeas relief to state prisoner, prisoner must exhaust his remedies in state court); 28 U.S.C. § 2254(b)(1). Notably, an appeal is currently pending in 01 CF 1931. If that appeal encompasses the claims that petitioner is raising in the instant petition, then he has not exhausted his state court remedies and the petition must be dismissed without prejudice to petitioner's refiling it after he has

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[1]Fiorello's alleged failure to provide petitioner with a preliminary hearing might also have been in violation of *Morrissey*. *Id*., at 487 (holding that parolee detained because of suspected parole violations entitled to preliminary hearing soon after initial detention). However, as District Judge Crabb explained in her order screening plaintiff's companion § 1983 lawsuit, any unlawful deprivation of petitioner's right to a preliminary hearing cannot provide a basis for granting habeas relief because that deprivation did not cause petitioner's current custody. *Dudgeon v. Fiorello*, 06-C-563-C, Order, December 7, 2006, dkt. #10 at 8. *See Aleman v. Sternes*, 320 F.3d 687, 690 (7th Cir. 2003) ("Whether a given prisoner's custody violates the Constitution, laws, or treaties of the United States depends, first, on whether all substantive rules have been respected (the merit of the claim) and, second, on whether any error *caused* the custody") (emphasis in original). Petitioner's custody is the result of his having been found guilty at the final revocation hearing of parole violations, not the result of his having been deprived of a preliminary hearing.

[2] But just barely. The written decisions from the Division of Hearings and Appeals indicate that petitioner did not challenge the factual accuracy of most of Fiorello's allegations but merely disputed the conclusion that the allegations established that petitioner was in violation of his rules of supervision. Accordingly, it appears that petitioner waived his right to contest the adequacy or accuracy of the evidence adduced against him at the revocation hearing.

completed one full round of state court review, including the filing of a petition for discretionary review in the state supreme court. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998); *Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Boerckel*, 526 U.S. at 845.

If, however, petitioner's pending state court appeal does *not* encompass the claims he is raising in the instant petition, then the question becomes whether petitioner still has a means available by which he can present the claims in state court. If he does not, then he has probably forfeited his right to federal review of the claims. *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004) (when habeas petitioner has failed to fairly present to state courts the claim on which he seeks relief in federal court and the opportunity to raise that claim in state court has passed, petitioner has procedurally defaulted that claim).

Accordingly, I will order the state to respond to the petition. Whatever the nature of this response, it should address the court's concerns regarding exhaustion and default.

ORDER

1. The clerk shall serve copies of the petition and attachments and this order by mail to Supervisor Dier-Zimmel and to the Wisconsin Attorney General.

2. The state shall file a response to petitioner's claims not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations or without prejudice on grounds of failure to exhaust, then it should file a motion to dismiss and all supporting documents within

its 30-day deadline. If relevant, the state must address the issue of cause and prejudice in its supporting brief. Petitioner shall have 20 days following service of any such motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-day deadline the state must file and serve not only its substantive legal response to petitioner's claims, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claims. The state also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims was unreasonable in light of the facts presented. *See* 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

3. Once the state has filed its answer or other response, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or

consider any submission that has not been served upon the state. Petitioner should include on each of his submissions a notation indicating that he served a copy of that document upon the state.

4. The federal mailbox rule applies to all submissions in this case.

Entered this 26th day of April, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge