

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

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PAUL FAZZINI,

Petitioner,

v.

MEMORANDUM and ORDER  
05-C-439-S

WARDEN, FCI-Oxford and  
U.S. PAROLE COMMISSION,

Respondents.

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Petitioner filed his petition for a writ of habeas corpus under 28 U.S.C. § 2241 claiming he is unlawfully detained at the Federal Correctional Institution, Oxford, Wisconsin. Respondent filed his response on October 2, 2006. Petitioner's traverse was filed on December 18, 2006.

FACTS

Petitioner Paul Fazzini is currently incarcerated at the Federal Correctional Institution, Oxford, Wisconsin. On April 22, 1989 the United States District Court for the Northern District of Illinois sentenced petitioner to fifty years imprisonment to be followed by a five year term of probation for armed bank robbery and using a firearm during the commission of a crime of violence. Petitioner's conviction and sentence were affirmed in United States v. Fazzini, 871 F.2d 635 (7<sup>th</sup> Cir. 1989).

Petitioner filed a motion under 28 U.S.C. § 2255 in the United States District Court for the Northern District of Illinois. It was denied because petitioner raised the same issues that he had raised on direct appeal and failed to show changed circumstances. See U.S. v. Fazzini, 1998 WL 26161 (N.D. Ill. 1998).

On April 27, 1990 the district court reduced petitioner's sentence to 25 years imprisonment with a five year term of probation to follow consecutively. On March 22, 2001 petitioner was released from prison because of good time credits he had earned pursuant to 18 U.S.C. § 4161. Petitioner was to remain on parole for the full term of his 25 year sentence less 180 days which was to occur on July 4, 2010.

While petitioner was under supervision in the Northern District of Illinois the U.S. Probation office mistakenly believed that petitioner was serving his term of probation. When petitioner failed to comply with the DNA Analysis Backlog Elimination Act of 2000 his probation officer sought to have his probation revoked. After failing to appear for a hearing on December 17, 2002 petitioner was arrested on a bench warrant issued by the United States District Court for the Northern District of Illinois.

On January 17, 2003 petitioner filed an appeal to which the government argued that the appeal had to be dismissed for lack of jurisdiction since petitioner's sentence of probation would not

begin until his sentence of imprisonment is completed to include his term on mandatory release.

While his appeal was pending, petitioner departed the Northern District of Illinois without the permission of his U.S. Probation Officer. On September 11, 2003 he was arrested on Interstate 70 near Dayton, Ohio after the Ohio State Highway Patrol observed him driving down the highway at about 95 miles an hour. The vehicle's rear licence plate was counterfeit and there were several more counterfeit license plates in the car along with a counterfeit Illinois driver's license. Inside the car were maps with specific routes and towns highlighted in the states of Ohio, Illinois, Indiana and Wisconsin and list of banks in the highlighted towns with notations about the address, number of employees and in some cases whether the manager was a woman. There was also a metal box on the floor of the vehicle which contained a blonde wig, a hammer, leather gloves, rope, packing tape and a small toy revolver handgun. Petitioner was transported to Preble County Jail in Eaton, Ohio.

On September 22, 2003 the United States Parole Commission issued a detainer warrant for petitioner charging him with violating the conditions of mandatory release parole by possessing counterfeit license plates and driver's license and speeding. He was also charged with leaving supervision without permission,

failing to submit to drug testing and failing to maintain regular employment. On October 1, 2003 the warrant was executed.

On October 28, 2003 petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio claiming that the Parole Commission had no jurisdiction over him because he was on probation.

On November 17, 2003 the Commission supplemented its warrant with the information that petitioner had sustained convictions for Altered Operator's License and Speeding. On December 4, 2003 the Commission supplemented its warrant charging petitioner with attempted robbery and possession of implements of a crime.

After a preliminary interview was conducted to establish probable cause the Parole Commission sent petitioner a letter dated December 22, 2003 informing him that it had found probable cause and intended to conduct a local revocation hearing on February 2, 2004 at the Preble County Jail in Eaton, Ohio. The letter informed petitioner of the charges that would be considered at the hearing including attempted robbery. It also provided him a list of the adverse witnesses and a packet of the documents on which the charges were based.

A continuance was granted at petitioner's request and the hearing was held on March 19, 2004. Petitioner testified at the hearing and provided his explanation for the items found in his car. The Ohio State Trooper who had stopped petitioner testified

concerning the items found in the car. Petitioner had the opportunity to cross examine the state trooper.

The hearing examiner found the officer's testimony more credible than petitioner's explanation. The hearing examiner found petitioner had violated the conditions of his release and had taken a substantial step towards robbing three or more banks. He established a reparole guideline range of 52 to 64 months but recommended that he be re-paroled at the base of the guideline range because the crimes had not been committed. The Commission provided petitioner with notice of its findings and the evidence upon which it was based.

On March 30, 2004 the United States Parole Commission revoked petitioner's mandatory release continuing him to a presumptive parole date of January 11, 2008 after the service of 52 months in prison. The Commission imposed a special condition of alcohol aftercare treatment. Petitioner was returned to the custody of the Bureau of Prisons on April 6, 2004. Petitioner appealed this decision. On August 13, 2004 the National Appeals Board affirmed the decision. The Board specifically found that the Commission did not err in finding that it was more likely than not that he had planned a robbery spree to include more than three banks.

On July 6, 2005 the United States Court of Appeals for the Seventh Circuit held that petitioner was on mandatory release

parole after his release from prison and not on probation. U.S. v. Fazzini, 414 F.3d 695 (7<sup>th</sup> Cir. 2005).

#### MEMORANDUM

Petitioner's first claim is that his original conviction and sentence were unconstitutional. This claim can only be pursued by direct appeal or by a motion under 28 U.S.C. §2255. See Garza v. Lappin, 253 F.3d 918, 921 (7<sup>th</sup> Cir. 2001). Petitioner's remedy lies under 28 U.S.C. § 2255 which states as follows:

An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief by motion to the court which has sentenced him or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Petitioner appealed his sentence. He then filed a motion under 28 U.S.C. § 2255 to vacate his sentence. The United States District Court for the Northern District of Illinois denied him relief. Petitioner has not shown that this remedy was inadequate or ineffective to test the legality of his detention. Accordingly, petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2241 on the ground that his original conviction and sentence were unconstitutional must be dismissed.

Petitioner argues that his parole should not have been revoked because he was on probation rather than on parole when he was

released from prison. Although the government incorrectly believed petitioner was on probation he was on parole from his twenty five year sentence of imprisonment when he was released on March 22, 2001. Further, this issue was decided by the United States Court of Appeals in U.S. V. Fazzini, 414 F. 3d, 696 (7<sup>th</sup> Cir. 2005). The Court held that petitioner was on parole from his prison sentence under 18 U.S.C. § 4161 and was not on probation. Petitioner is barred from relitigating this claim in this Court.

Petitioner also argues that he was not provided due process in his revocation proceedings. In Morrissey v. Brewer, 408 U.S. 471, 488-490 (1972), the Court held that the minimum due process requirements included written notice of the claimed violations of parole, disclosure to the parolee of the evidence against him, opportunity to be heard in person, to present witnesses and documentary evidence, the right to confront and cross examine witnesses, a neutral and detached hearing body and a written statement of the evidence on which the finding was based.

The record indicates that petitioner received these due process requirements. Further, there is some evidence to support the Commissions' finding that petitioner planned to rob three banks. See Kramer v. Jenkins, 803 F.2d, 896, 901(7th Cir. 1986). Petitioner's petition for a writ of habeas corpus on the ground that he was denied due process protections in his revocation hearing must be dismissed.

Petitioner claims that the Bureau of Prisons improperly withheld credit for 571 days of vested good time credits. The regulation, however, provides that the earned good time during the period of his imprisonment cannot be used to shorten any period of imprisonment which the inmate may be required to serve for violation of mandatory release parole. 28 CFR 523.2©). Petitioner's petition for a writ of habeas corpus on this ground must be dismissed.

Petitioner claims that the Bureau of Prison did not properly calculate his release date and that he is owed 475 days of good time credits. Petitioner is incorrect. He does not earn any additional credit for the violator term. See 28 CFR 2.52(b). His sentence was properly calculated, and his petition for a writ of habeas corpus on this ground will be dismissed.

Petitioner challenges the Commission's imposition of a special condition for his future parole supervision-alcohol aftercare treatment. The Commission is authorized by law to impose any reasonable condition of release consistent with the nature and circumstances of the offense and the history and characteristics of the parolee. See 18 U.S.C. §4209(a). There need be only some evidence to support the Commission's finding. Id., at 901.

At the time of his original sentencing petitioner had a history of alcoholism. When his parole was revoked petitioner was charged with failure to report for drug testing. Based on these



facts, the Commission's decision to impose an alcohol aftercare condition on petitioner's future parole supervision was reasonable and supported by some evidence. Petitioner's petition for a writ of habeas corpus on this ground will be dismissed.

Petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2241 will be dismissed. Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his petition must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7<sup>th</sup> Cir. 1997).

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is DISMISSED with prejudice.

IT IS FURTHER ORDERED that judgment is entered DISMISSING petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2241 with prejudice.

Entered this 22<sup>nd</sup> day of December, 2006.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge