

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

JAMES G. DUDGEON,

Petitioner,

v.

MATTHEW J. FRANK, Secretary,
Wisconsin Department of Corrections,
JOHN FIORELLO, Probation & Parole
Officer, Wisconsin Department of
Corrections, Division of Community
Correction–Probation and Parole.

Respondent.

ORDER

06-C-0563-C

Petitioner James G. Dudgeon is a state prisoner currently in custody at the McNaughton Correctional Center in Lake Tomahawk, Wisconsin. In his complaint, petitioner contends that his parole was wrongfully revoked as a result of illegal actions taken by respondent John Fiorello, petitioner’s parole agent, and respondent Matthew J. Frank. Petitioner brought this lawsuit under 42 U.S.C. § 1983; he seeks declaratory and monetary relief, in addition to immediate release from confinement. Petitioner asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a respondent who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Department of Corrections, 182 F.3d 532 (7th Cir. 1999).

From a review of petitioner's complaint, I understand him to allege the following.

FACTS

Petitioner is currently a prisoner at the McNaughton Correctional Center, Tomahawk, Wisconsin. At times relevant to his complaint, petitioner was housed at the Dane County jail in Madison, Wisconsin.

Respondent John Fiorello is a probation and parole officer employed by the Wisconsin Department of Corrections. Respondent Matthew J. Frank is Secretary of the Wisconsin Department of Corrections.

Petitioner has been incarcerated since December 23, 2004, when his parole was revoked. (Petitioner's complaint does not include any information about the reason for the revocation). Prior to the revocation, respondent Fiorello did not fully investigate the facts surrounding the revocation, was not objective in his investigation and did not keep accurate records of the investigation. After a parole hold was placed on petitioner, respondent Fiorello questioned him; petitioner answered the questions in full and did not make any admissions of guilt. Petitioner did not receive a preliminary hearing with an impartial third party.

When respondent Fiorello placed petitioner on a "probation/parole hold," he did not inform petitioner of the reason for this hold or the evidence relied upon. Respondent Fiorello failed to provide petitioner with documentation throughout the revocation process.

Petitioner did not receive a final revocation hearing within the time period required by Department of Corrections regulations. At petitioner's final parole revocation hearing, respondent Fiorello failed to cause witnesses to appear so that petitioner could confront them. Specifically, respondent Fiorello did not require Thomas Waller of Denver, Colorado to attend petitioner's revocation hearing, although Waller had provided a written statement

adverse to petitioner. Further, respondent Fiorello failed to require Waller and two other witnesses adverse to petitioner to swear to the veracity of their written statements, which were used at petitioner's revocation hearing. Respondent 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. Respondent Frank did not properly supervise respondent Fiorello, or insure that a final revocation hearing was held within the time period required by Department of Corrections regulations.

DISCUSSION

Petitioner contends that his parole was wrongfully revoked as a result of respondent 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. Specifically, petitioner contends that respondent Fiorello failed to conduct a preliminary hearing regarding the revocation of petitioner's parole and that Fiorello's actions before and after petitioner's parole was revoked and at petitioner's final revocation hearing undermine the validity of petitioner's parole revocation and current confinement.

A. Proper Parties

As an initial matter, I understand petitioner to allege that respondent Frank failed to adequately supervise respondent Fiorello and insure that all Department of Corrections regulations were followed. However, liability under § 1983 arises only through a defendant's personal involvement in a constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). In an action under § 1983 there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-695 (1978); Gentry, 65 F.3d at 561. Because respondent Fiorello's actions may not be attributed to respondent Frank using only the theory that respondent Frank should have reviewed or supervised respondent Fiorello actions more closely, petitioner's complaint against respondent Frank will be dismissed.

B. Claims Barred by Heck

As noted above, petitioner filed his complaint under 42 U.S.C. § 1983. However, a petition for a writ of habeas corpus under 28 U.S.C. § 2254 "is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)). The Court of Appeals for the Seventh Circuit

has held that “when a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice” rather than convert it into a petition for habeas corpus under § 2254. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. at 477). Petitioner’s claims regarding the legitimacy of his parole revocation involve issues cognizable in habeas corpus because a judgment in his favor would necessarily imply the invalidity of his current confinement. Heck, 512 U.S. at 487. To the extent that petitioner would be able to proceed on these claims against his parole officer, he cannot proceed under § 1983 until he shows that his confinement has already been invalidated or has been called into question by a federal court’s issuance of a writ of habeas corpus under 28 U.S.C. § 2254. Heck, 512 U.S. at 486-87. If petitioner wishes to pursue these claims, he will have to do so in a petition for a writ of habeas corpus after he has exhausted all the state court remedies available to him.

C. Lack of Preliminary Hearing

Petitioner’s allegation that he did not receive a preliminary hearing after his parole was revoked is differently situated. I understand petitioner to contend that respondent Fiorello’s failure to provide him a preliminary hearing violates his Fourteenth Amendment right to procedural due process. The court may consider this claim separately because it is

not intertwined with the question whether petitioner's current incarceration is legitimate. Any claim petitioner might have had that the failure to provide him a preliminary hearing rendered his custody illegal was mooted when petitioner received a final revocation hearing at which he was found guilty of parole violations. The only remedy available to petitioner if he proves respondent violated his due process rights by failing to afford him a preliminary hearing is nominal damages of \$1. After reviewing his allegations and the documents attached to his complaint, I conclude that it is possible that petitioner has stated a claim under the due process clause of the Fourteenth Amendment.

An individual on parole has a protectible liberty interest associated with his status as a parolee. Morrissey v. Brewer, 408 U.S. 471, 482 (1972). Consequently, parole may not be revoked without due process of law. In Morrissey, 408 U.S. at 485-88, the Supreme Court held that persons detained because of suspected parole violations are entitled to two separate hearings under the due process clause of the Fourteenth Amendment: a preliminary hearing soon after the individual's initial detention and a hearing before a final decision is made on revocation.

Petitioner has alleged that he was not given a preliminary hearing after his parole was revoked. In Morrissey, 408 U.S. at 485, the Court stated that the purpose of the preliminary hearing is "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of

parole conditions." The Court required that the hearing occur "as promptly as convenient after arrest" and that "someone not directly involved in the case" make the probable cause determination. Id.

The right to a preliminary hearing is not absolute, however. In the wake of Morrissey, courts have highlighted several situations in which a preliminary hearing is not required. See, e.g., United States v. Sciuto, 531 F.2d 842, 846 (7th Cir. 1976) (preliminary hearing required only where probationer held in custody pending final revocation hearing); United States v. Saykally, 777 F.2d 1286, 1287 n.2 (7th Cir. 1985) (preliminary hearing not required if notice of revocation is filed while probationer is detained pursuant to another criminal charge or sentence imposed for a subsequent offense); United States v. Holland, 850 F.2d 1048, 1050-51 (5th Cir. 1988) (preliminary hearing not required when probationer admits committing acts that violate the conditions of his probation). It is not clear from petitioner's complaint whether one or more of these exceptions to Morrissey's general rule requiring a preliminary hearing following parole revocation apply in this case. Petitioner does allege that he did not admit to committing any acts in violation of the terms of his parole. Therefore, petitioner will be granted leave to proceed on his claim that he was wrongfully denied a preliminary hearing following the revocation of his parole.

D. State Law Claims

Additionally, petitioner alleges that respondent Fiorello's actions after petitioner's parole had been revoked and at the final revocation hearing violated various Wisconsin Department of Corrections regulations and Division of Community Corrections Operations Manual policies. District courts have supplemental jurisdiction over claims arising under state law when they are so related to claims arising under federal law that they form part of same case or controversy. 28 U.S.C. § 1367(a); Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999). I understand the facts underlying petitioner's state law allegations to be closely related to his claims that his parole revocation was illegitimate and that the procedures followed at his final revocation hearing were unconstitutional. I understand these claims to be distinct from petitioner's claim that he was denied a preliminary hearing. Because petitioner will not be granted leave to proceed on the claims closely related to his state law claims, the court will not exercise supplemental jurisdiction over his state law claims. Accordingly, petitioner will be denied leave to proceed on his claims under Wisconsin law.

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondent John Fiorello failed to hold a preliminary hearing with

an impartial third party after petitioner's parole was revoked.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED with respect to his claim that his current incarceration is invalid because his parole was wrongfully revoked and because respondents did not follow proper procedures after his parole was revoked, without prejudice to petitioner's raising the claim in a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 after he exhausts available state court remedies.

3. The court declines to exercise supplemental jurisdiction over petitioner's state law claims regarding procedural and evidentiary errors made by respondent Fiorello.

4. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

5. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. The unpaid balance of petitioner's filing fee is \$330.40; petitioner is obligated to pay this amount in monthly installments, as described in 28 U.S.C. § 1915(b)(2).

7. Pursuant to an informal service agreement between the Attorney General and this

court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.

Entered this 7th day of December, 2006.

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