

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

---

JAMES DOMKA,

Plaintiff,

v.

MEMORANDUM and ORDER  
07-C-063-S

PORTAGE COUNTY, WISCONSIN,

Defendant.

---

Plaintiff James Domka commenced this civil action against defendant Portage County, Wisconsin under 42 U.S.C. § 1983. He alleges in his amended complaint that he was denied due process protections when Portage County summarily terminated him from the Home Detention Program and withdrew his Huber privileges.

On June 15, 2007 defendant filed a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

#### FACTS

In deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff James Domka is an adult resident of Wisconsin. Defendant Portage County is a municipality organized under the laws of the State of Wisconsin.

On December 10, 2004 plaintiff was arrested for driving under the influence of alcohol when he drove his car into a ditch and had

an alcohol content of .179. On April 22, 2005 plaintiff pled no contest to DUI-third offense. The Portage County Circuit Court sentenced plaintiff to 105 days in jail. The judgment of conviction states in relevant part: "James Domka is sentenced to 105 days in jail, 3 days credit for time served. Can be served with Huber privileges. First 30 days in jail, balance on electronic monitor. Huber granted for work and counseling."

The Home Detention Program is created by §302.435, Wis. Stats. which provides in relevant part:

Subject to the limitation under sub(3), a county sheriff or a superintendent of a house of corrections may place in the Home Detention Program any person confined in jail who has been arrested for, charged with, convicted of or sentenced for a crime. The sheriff or superintendent may transfer any prisoner in the Home Detention Program to a jail.

The statute further provides:

If a prisoner described under sub (2) and the Department agree, the sheriff or superintendent may place the prisoner in the Home Detention Program and provide that the prisoner be detained at the prisoner's place of residence or other place designated by the Sheriff or superintendent and be monitored by an active electronic monitoring system. The sheriff or superintendent shall establish reasonable terms of detention and ensure that the prisoner is provided a written statement of those terms, including a description of the detention monitoring procedures and requirements and of any applicable liability issues.

Pursuant to this statute the Portage County Sheriff's Department has established terms of detention relating to the Home Detention Program (HDP) and the use of a Sobrietor as part of the HDP. The Sheriff's Department has a four page document containing 24 items which the prisoner and HDP officer sign and which the prisoner also initials. There is also a two page document which includes Sobrietor information and rules.

On June 7, 2005 plaintiff reported to the Portage County Jail to begin his sentence. On June 27, 2005 plaintiff began his participation in the Portage County HDP. That morning plaintiff met with Correctional Officer Penny Borski to complete the paperwork. Officer Borski explained the rules to plaintiff and he initialed each item on the 24 page document. Borski also told plaintiff he could feed his animals in the yard from 12-1 p.m.

Paragraph 8 of the document provides as follows:

I understand the consumption of alcoholic beverages or unlawful drugs or narcotics is prohibited and will result in immediate removal from the Home Detention Program, loss of Huber Privileges and returned to the Portage County Jail.

Paragraph 12 provides as follows:

I understand a violation of any of these conditions of agreement will cause my removal from the Program without notice or avenue of appeal...

Paragraph 16 provides as follows:

We will not tolerate any excuses, such as, but not limited to failing the voice test, missing a call, failing to get off the phone when the machine is trying to call you, etc. All the above are grounds for removal of the Program. In addition, it is your responsibility to inform your household of the conditions that need to be followed.

Officer Borksi also reviewed the Sobriator client information with plaintiff. A Sobriator is a machine that is connected through the prisoner's phone line to the Sheriff's Department to test the person's alcohol level. The information sheet provided as follows:

An alcohol reading on the Sobriator will result in immediate removal from HDP and you will lose your HDP & Huber Privileges. Be aware that ingesting any food or drink with alcohol can result in a positive breath alcohol test. Example: mouthwash and toothpaste, chewing tobacco, cough medicine, vanilla extract & some sauces and candies.

Officer Borski told plaintiff to rinse his mouth with water before each test. Plaintiff signed the Portage County Home Detention Criteria and the SI Sobriator Client information forms and received copies of the forms. Plaintiff understood that if he violated any of the rules included in these documents he would be removed from the program without notice.

Plaintiff's counselor at the Attic Program, Lynn Houlihan, explained to plaintiff that if he violated any conditions of the home detention program, his Huber privileges would be revoked.

Between June 27, 2005 and July 10, 2005 the Sobriotor recorded failed tests. These failures were due to user error. None of these failures indicated plaintiff had any positive alcohol reading.

Plaintiff was tested on the Sobriotor on July 10, 2005 at 9:55 a.m. and registered an alcohol level of .021. The Sobriotor automatically retested plaintiff at 10:00 a.m. and the result again registered .021. Officer Borski was not at work on July 10, 2005 but returned to work the next day at 7:00 a.m. She observed that plaintiff had tested positive for alcohol the previous day. Officer Borski telephoned plaintiff at his home at approximately 7:30 a.m. and requested that he report to jail with the Sobriotor within the next hour because of the two consecutive positive tests for alcohol. There is no evidence in the record that the Sobriotor equipment was inaccurate on July 10, 2005.

Pursuant to the Portage County Home Detention Program and the agreements signed by plaintiff, his participation in the Home Detention Program was revoked and his participation in the Huber Program was suspended for violating the terms of the Portage County HDP.

It was the policy of Portage County when it terminated an individual's participation in HDP to request the Court to revoke his or her's Huber privileges for sixty days. In plaintiff's case

they did not request the 60 day revocation from the Court because plaintiff only had 40 days of his Huber privileges remaining. Instead Portage County suspended his privileges for the remainder of his sentence.

Plaintiff was released from the Portage County Jail when he completed his sentence on August 21, 2005.

It is disputed whether Officer Borski or any officer told plaintiff that there was an additional Breathalyzer and/or blood or urine test that he would receive within two hours of a positive alcohol reading on the Sobriotor.

#### MEMORANDUM

Plaintiff claims the defendant deprived him of his liberty without due process when he was terminated from the HDP program and lost his Huber privileges. Plaintiff agrees that the Wisconsin Statute creating the Home Detention Program does not provide a basis for a protected liberty interest. Rather he contends that he has a liberty interest in the home detention program because of the due process clause of the United States Constitution and as a consequence of his plea negotiation in state court.

Plaintiff argues he was granted a protected liberty interest in home detention and Huber release pursuant to his plea agreement. This argument fails because the plea agreement was between the

prosecutor and plaintiff according to Santobello v. New York, 404 U.S. 257 (1971). Plaintiff received the agreed upon sentence in court. The plea agreement does not govern the post-conviction agreement between Portage County and plaintiff.

Plaintiff also contends that the due process clause itself grants him a liberty interest in continued home detention because it is similar to parole. The United States Supreme Court has held that an inmate on parole has a liberty interest in retaining that status. Morrissey v. Brewer, 408 U.S. 471 (1972); Young v. Harper, 520 U.S. 143 (1977).

In Paige v. Hudson, 341 F.3d 642, 643 (7<sup>th</sup> Cir. 2003), the United States Court of Appeals for the Seventh Circuit found that removal of a probationer from a home detention program into a jail is a sufficiently large incremental reduction in freedom to be classified as a deprivation of liberty under the due process clause. Plaintiff was not a probationer but was a convicted prisoner serving a portion of his sentence on the home detention program. It may be, however, according to Paige that plaintiff had a protected liberty interest in remaining in the home detention program arising from the Fourteenth Amendment due process clause.

Defendant argues that where plaintiff had a protected liberty interest derived from the Fourteenth Amendment Clause he waived his due process rights by signing the Home Detention Agreement. By



signing the agreement together with the Sobriotor agreement, plaintiff agreed that both his Home Detention and Huber release privileges would be terminated where he had a positive test for alcohol on the sobriotor. He also specifically agreed as follows: "I understand a violation of any of these conditions of agreement will cause my removal from the Program without notice or avenue of appeal..." By signing this agreement he waived his due process protections including notice and a hearing.

Plaintiff argues that his waiver was not knowing and voluntary. It is undisputed, however, that plaintiff understood that if he violated any of the rules included in these documents he would be removed from the Home Detention and Huber program without notice or avenue of appeal. Plaintiff made a deal with Portage county and received a benefit. Plaintiff was allowed to live at home instead of in the jail. In exchange for this benefit he agreed to abide by certain rules and agreed to waive his due process protections if he violated the rules. Specifically, he agreed that if he had a positive test for alcohol on the Sobriotor for any reason he would be returned to jail.

Plaintiff argues that because he thought, based on a comment by Officer Borksi, that he would have a follow-up Breathalyzer or blood test after a positive alcohol test on the Sobriotor his waiver was not knowing and voluntary. Any statements that were made by Officer Borski did not change the terms of the written

agreement that plaintiff signed. The terms are clear and unambiguous and plaintiff admits he understood them. This agreement was explained to him and he understood it before he signed it. His waiver of his due process protections was knowing and voluntary. See United States v. Hill, 252 F.3d 919, 924 (7<sup>th</sup> Cir. 2001).

Plaintiff waived any due process protections that may have been required when he lost his Home Detention and Huber privileges. Accordingly, his due process rights were not violated and defendant's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein with prejudice.

Entered this 26th day of July, 2007.

BY THE COURT:

/s/

---

JOHN C. SHABAZ  
District Judge