

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

DANNY HALL, #136165

Petitioner,

v.

CHRIS KAMIN and
MARK MELLENTIN,

Respondents.

OPINION and ORDER

08-cv-258-slc

Because Judge Shabaz is on a medical leave of absence from the court for an indeterminate period, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. It is this court's expectation that the parties in a case assigned to the magistrate judge will give deliberate thought to providing consent for the magistrate judge to preside over all aspects of their case, so as to insure that all cases filed in the Western District of Wisconsin receive the attention they deserve in a timely manner. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the purpose of issuing this order only, I am assuming jurisdiction over the case.

Petitioner Danny Hall is a state prisoner currently in custody at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. In his complaint, petitioner contends that he was unlawfully denied a preliminary hearing before his parole was revoked in February 2006. Petitioner brought this lawsuit under 42 U.S.C. § 1983; he seeks declaratory and monetary relief and requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

Petitioner has made his initial partial payment in accordance with 28 U.S.C. § 1915. However, because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A.

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). From a review of electronic records maintained on the Wisconsin Circuit Court Access Program (CCAP) and petitioner's complaint, I understand petitioner to allege the following facts.

FACTS

Petitioner is currently a prisoner at the Fox Lake Correctional Institution in Fox Lake,

Wisconsin. At times relevant to this complaint, respondent Chris Kamin was petitioner's probation and parole agent and respondent Mark Mellenthin was a probation and parole supervisor. Respondent Mellenthin is responsible for reviewing respondent Kamin's reports and for signing-off on any revocation.

On November 29, 2005, petitioner was charged with operating a motor vehicle after his license was revoked, "operating with PAC of .02 or more" and committing his seventh "operating while intoxicated" offense. Petitioner was placed on a parole hold in Dane County, Wisconsin on December 12, 2005. On December 15, petitioner received his notice of violation. A final revocation hearing was held on February 9, 2006, at which time petitioner's parole was revoked.

No preliminary hearing was ever held. Respondent Kamin was responsible for insuring that petitioner received a preliminary hearing. Respondent Mellenthin was aware that petitioner had not received a preliminary hearing.

DISCUSSION

Petitioner's sole contention is that he did not receive a preliminary hearing before his parole was revoked, in violation of his Fourteenth Amendment right to procedural due process. Petitioner does not appear to assert that the revocation itself was unjustified. In any event, 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 possible remedy available to petitioner if he proves respondent violated his due process rights by failing to afford him a preliminary hearing would be nominal damages of \$1.

An individual on parole has a protected 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 he was placed on a parole hold. 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).

The relevant exception in this case is that a preliminary hearing is not required when a parolee is being detained pursuant to another criminal charge, and not on the ground that he violated the terms of his parole. Saykally, 777 F.3d at 1287. In this case, petitioner had been charged with two felonies and a misdemeanor several weeks before he was informed that he had violated his parole. It may well be that petitioner's parole was revoked because the terms of his parole prohibited him from violating any laws, but this does not change the fact that petitioner was detained pursuant to an independent criminal charge and awaiting trial when his parole was revoked. Accordingly, petitioner was not entitled to a preliminary hearing before his parole was revoked and he will be denied leave to proceed on his claim that respondents Kamin and Mellenthin failed to provide him with such a hearing.

ORDER

IT IS ORDERED that

1. Petitioner Danny Hall is DENIED leave to proceed in forma pauperis on his claim that respondents Chris Kamin and Mark Mellenthin denied him due process in violation of the Fourteenth Amendment when they failed to provide him a preliminary hearing while he was being held before his parole was revoked. This case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is \$342.77; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 3rd day of June, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge