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

JAMES ALFRED SMITH, JR.,

Petitioner, OPINION AND ORDER

v. 08-cv-641-slc

MICHAEL THURMER, Warden,
Waupun Correctional Institution,

Respondent.

On November 20, 2008, this court entered an order dismissing without prejudice a writ of habeas corpus filed by James Alfred Smith, Jr., an inmate at the Waupun Correctional Institution. In the petition, petitioner alleged that the Department of Corrections had violated his constitutional rights by finding him guilty of 121 major conduct violations and by extending his mandatory release date by five years. In addition, he alleged that the Wisconsin Court of Appeals misconstrued his habeas corpus proceeding as a John Doe action in the Circuit Court for Columbia County and that the state courts had used "methods of administration" to deny him access to the court in violation of Title II of the Americans With Disabilities Act.

Reviewing the petition preliminarily pursuant to Rule 4 of the Rules Governing Section 2254 Cases, I determined that it had to be dismissed because it lacked facts sufficient to state a cognizable constitutional claim. Specifically, I found that petitioner had

failed to comply with Rule 2(c) of the habeas rules by failing to allege specific facts concerning any one of his 121 conduct reports. His claim that the state courts had failed to properly construe his filings was problematic because that alleged failure appeared to have no bearing on the fact or duration of his sentence. Finally, petitioner had not alleged facts sufficient to state a claim under the ADA, and in any case, that claim was not the proper subject of a § 2254 petition.

On March 31, 2009, petitioner filed a new petition in this case. (In the meantime, petitioner had filed an appeal in the Seventh Circuit Court of Appeals. That court dismissed his case on March 24, 2009 for lack of appellate jurisdiction.) Because this court had previously entered judgment, the clerk of court construed the new petition as a motion to reopen the case.

Although it may have been more appropriate to docket petitioner's March 31 petition as a new case rather than a continuation of the old, it is unnecessary to dwell on this procedural question. Whether treated as a new, separate petition or an amendment to the initial petition, the March 31petition fails to cure the defects I identified in the November 2008 order. Accordingly, petitioner's motion to reopen the case will be granted and his March 31, 2009 petition will be construed as an amended petition, but the state will not be

ordered to respond to it. Instead, the petition will be dismissed because it is plain that petitioner is not entitled to relief.

Construing the petition broadly, I find that it fairly alleges the following facts.

ALLEGATIONS OF THE PETITION

Petitioner is an inmate at the Waupun Correctional Institution. Amended Pet., dkt. 15, ¶1. He has a mental illness. ¶13. While in custody, he has been found guilty of 121 major conduct violations, which has resulted in the extension of his mandatory release date by five years. Id., ¶2. Section DOC 303.81(9) of Wisconsin's administrative code requires that a hearing officer prepare a "second notice" of a hearing to be given to the alleged offender, his staff advocate, the disciplinary committee and any witnesses. Id., at ¶7. Petitioner was not provided with this second notice with respect to any of his 121 conduct violations. Id., at ¶8. In State ex rel. Anderson-El v. Cooke, 2000 WI 40, ¶¶21-25, 234 Wis. 2d 626, 610 N.W. 2d 821, the Wisconsin Supreme Court held that the Department of Corrections' failure to provide the inmate with this second notice violated a "fundamental procedural right" that rendered the disciplinary proceeding invalid. Id., at ¶9. After Cooke, the department has failed to overturn petitioner's 121 conduct violations. Id., at ¶10. Further, it has failed to publish Wis. Admin. Code DOC § 303.81(9) in any inmate handbook. Id.

The department charged petitioner with the 121 major conduct violations in retaliation for his filing more than 20 civil rights lawsuits. Id., at ¶13.

On April 18, 2008, petitioner filed a petition for a writ of habeas corpus in the Circuit Court for Columbia County. On June 6, 2008, the circuit court returned the documents and issued an order stating that no further action would be taken until petitioner satisfied the criteria for the proper filing of a civil action. On June 17, 2008, petitioner filed a notice of appeal to the Wisconsin Court of Appeals, District I. On August 5, 2008, the appellate court issued an order stating that the appeal was not properly before it. On August 11, 2008, the Wisconsin Supreme Court denied petitioner's petition for review. Id., at ¶10.

The state courts used "methods of administration" to deny him access to the courts and to protect state officials, in violation of petitioner's rights under the First and Fourteenth Amendments and the Americans With Disabilities Act. Id., at ¶11. The state court "gave the petitioner the appearance of judicial bias through the courts [sic] body language in addition to communications in court proceedings." Id., at ¶15. Prison officials used "methods of administration" to deny him programming and parole and to extend his mandatory release date. Id., at ¶13.

Petitioner seeks an order directing respondent to publish Wis. Admin. Code DOC § 303.81(9) in the inmate handbook, expunge the 121 conduct reports from petitioner's

disciplinary record, award damages and order petitioner's release from custody. Id., p. 13, ¶15.

OPINION

I begin with petitioner's claims that the Department of Corrections and state courts used "methods of administration" to deprive him of his right to access to the court under the First Amendment and the Americans With Disabilities Act. Not only are these claims stated in terms far too vague to state a claim for relief, but they are not properly brought in a habeas petition. Habeas relief is available only to secure a prisoner's release from confinement or to shorten the length of his confinement. Preiser v. Rodriguez, 411 U.S. 475, 486-87 (1973). On the other hand, when the only relief the prisoner can obtain is damages or a "different program or location or environment," the prisoner "is challenging the conditions rather than the fact of his confinement and his remedy is under civil rights law." Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991). Even if this court were to find that prison officials were discriminating against him on the basis of his alleged disability or that the state courts were refusing to entertain his habeas petition for nefarious reasons, damages, not release, would be the proper remedy for those wrongs. Accordingly, these claims must be brought in a civil action under § 1983.

I turn to the central claim in the amended petition, which is that the department violated petitioner's procedural due process rights in 121 disciplinary proceedings, the effect of which has been to deprive him of good time credits and lengthen the duration of his confinement. An administrative order revoking good-time credits is properly challenged in a habeas corpus action. Moran v. Sondalle, 218 F.3d 647, 65051 (7th Cir. 2000) (per curiam). As he did in the original petition, however, petitioner refers to his "121 major conduct violations" globally without identifying the date, charges or facts involved in any one of those disciplinary proceedings. Petitioner alleges only that in all 121 instances, he was deprived of the notice to which he was due under Wis. Admin. Code § 303.81(9) and that he was found guilty in retaliation for filing numerous civil rights lawsuits.

Wis. Admin Code § DOC 303.81(9), which required a hearing officer to provide the alleged offender with a "second notice" setting forth the time of the disciplinary hearing, was repealed in August 2000. State ex rel. Harris v. McCaughtry, 2006 WI App 56, n.2, 290 Wis. 2d 511, 712 N.W. 2d 87(Table) (unpublished opinion); Wis. Admin. Code § DOC 303.81. That is why petitioner is unable to find the rule in the inmate handbook: it no longer exists. In any case, even if the rule was still in effect at the time of some of the disciplinary proceedings that petitioner purports to be challenging, the failure of prison officials to adhere to their own regulations does not violate the federal constitution; what matters is the due process clause. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (habeas

corpus relief not available for errors of state law); Fuller v. Dillon, 236 F.3d 876, 880 (7th Cir. 2001). Further, even though the Wisconsin Supreme Court declared in Anderson-El, 2000 WI 40 at ¶¶20, 24, that the second notice requirement was a "fundamental procedural right" guaranteed by the Department of Corrections' regulations, the Due Process Clause protects only against the deprivation of substantive rights, not procedural ones. Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7th Cir. 1996); Shango v. Jurich, 681 F.2d 1091, 1101 (7th Cir. 1982). Thus, habeas relief is not available to petitioner for the failure of prison officials to follow their own regulations.

The due process clause requires that a prisoner receive at least twenty-four hours' notice of the charges against him so that he may "marshal the facts and prepare a defense." Wolff v. McDonnell, 418 U.S. 539, 564 (1974). Nowhere in the petition has petitioner alleged that he was not provided with at least 24 hours' notice of the charges against him at any particular disciplinary hearing. Further, he has not alleged any facts to suggest that he was denied any of Wolff's other procedural protections at any disciplinary hearing. About all he alleges is that he was found guilty in retaliation for his having filed civil rights complaints, but that conclusory allegation is devoid of any facts to support it. In the order dismissing petitioner's first petition, I advised petitioner that he could file a new petition if he had "facts to show that he was deprived at a particular disciplinary hearing of the due process protections to which he was entitled." Order, Nov. 20, 2008, dkt. #4, at 4. From

the amended petition, it is plain that petitioner has no such facts. Accordingly, his challenge to his 121 disciplinary proceedings will be dismissed with prejudice for his failure to state a valid constitutional claim. Rule 4 of the Rules Governing Section 2254 Cases (authorizing court to dismiss petition if it is plain that petitioner is not entitled to relief).

For the sake of completeness, I note that in the habeas corpus petition that petitioner filed in the Circuit Court for Columbia County in April 2008, he identified Conduct Report #1925701, accusing petitioner of lying about staff, as one of the reports he was challenging. Dkt. #14, exh. 1, ¶¶ 5-7. However, it appears that petitioner was not sanctioned for this violation with the loss of good time, but was placed in disciplinary separation. The choice to house an inmate in segregation rather than with the general population affects the severity, not the duration, of confinement; an inmate in segregation is not "in custody" for purposes of § 2254 and cannot use habeas corpus to challenge the sanction. Montgomery v. Anderson, 262 F.3d 641, 643-44 (7th Cir. 2001). Further, petitioner's challenge to that disciplinary proceeding alleged only errors of state law, not constitutional violations. Accordingly, even if I construe the federal petition as raising a challenge to the proceedings with respect to Conduct Report #1925701, it still must be dismissed.

ORDER

IT IS ORDERED that the petition is DISMISSED WITH PREJUDICE pursuant to Pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Entered this 15th day of June, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge