IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4358
(Summary Calendar)

ZACHERY CARNELL BROWN-EL,

Petitioner-Appellant,

versus

KEITH HALL,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(92-CV-409)

(October 20, 1993)

Before JOLLY, WIENER and EMILIO. M. GARZA, Circuit Judges.

PER CURIAM:[*]

In this prisoner habeas action, Petitioner-Appellant Zachery Carnell Brown-El appeals the district court's denial of his petition for relief pursuant to 28 U.S.C. § 2241. Brown asserts that he was deprived of due process in his parole revocation

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

proceeding by virtue of a delay in his preliminary hearing and delayed notice of the charges and evidence. He also insists that the Parole Commission retaliated against him for his legal activities when it denied him credit for "street time" and paroled him to a halfway house as a condition of parole. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Brown-El, an inmate at the Federal Correctional Institution (FCI), Oakdale, Louisiana, was convicted of possession with intent to distribute heroin in 1974, and was sentenced to ten years' imprisonment and a ten-year special parole term. The Parole Commission revoked his parole for the eighth time on November 18, 1991, for absconding from a halfway house and leaving the district without permission. He was then ordered imprisoned until the expiration of his special parole term. Brown-El filed the instant petition for habeas relief, alleging procedural violations in his parole revocation proceedings. Specifically, he challenged the constitutionality of two parole regulations, 28 C.F.R. §§ 2.48(g) and 2.50(d), insisting that, on their faces, they conflicted with statutory parole provisions; and that, as applied to him, they are unconstitutional. He claimed that these regulations were unconstitutional because they allowed the Parole Commission to dispense with his preliminary hearing and his right to 30-day disclosure of the charges and evidence. He also claimed that the Parole Commission retaliated against him for successfully appealing

an adverse decision to the Seventh Circuit Court of Appeals after he was exonerated of the charge that gave rise to a previous revocation of his parole, such retaliation being his placement in a halfway house and the revocation of credit for his "street time."

The Commission offered to re-open Brown-El's case and give him a new revocation hearing as a means of curing any alleged deficiencies in his notice of the charges and evidence. The district court held that this made moot the issue of delayed notice. The court also held that 28 C.F.R. § 2.48, which allows the preliminary interview and parole revocation hearing to be held simultaneously, did not conflict with 18 U.S.C. § 4214. The court found that Brown-El's allegations of retaliation by placement in a halfway house were conclusionary and that the Commission had discretion to impose that condition. The court also found that the Commission's actions in forfeiting credit Brown-El received for time spent on special parole was required by law and was not the result of vindictiveness. The district court therefore denied habeas relief, and Brown-El timely appealed.

II

ANALYSIS

A. Standard of Review

We do not reverse Parole Commission decisions absent "flagrant, unwarranted, or unauthorized action" by the Commission, or violations of required due process protections. Stroud v. United States Parole Commission, 668 F.2d 843, 846 (5th Cir. 1982) (citation omitted).

B. Due Process

Brown-El argues that 28 C.F.R. § 2.48(g) is unconstitutional because it conflicts with the statutory provisions of 18 U.S.C. § 4214 and because, as applied to him, it deprived him of due process of law when it allowed the Commission to dispense with a preliminary hearing. He also argues that 28 C.F.R. § 2.50(d) is unconstitutional because it conflicts with 18 U.S.C. § 4208(b) and because, as applied to him, it deprives him of 30 days' notice of the charges and of the evidence to be used against him at his parole revocation hearing.

The Supreme Court established what process is due in the context of parole revocation in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The Court held that minimum due process requires a preliminary hearing, as promptly after a parolee's arrest as convenient, to determine if probable cause exists for revocation of parole. Id. at 485-87. The Court also held that due process requires written notice of the claimed violations and disclosure of the evidence against the parolee. Id. at 489.

The statutory parole provisions provide that the alleged parole violator shall have "a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole. . . ." 18 U.S.C. § 4214(a)(1)(A). The parolee may postpone the preliminary interview in order to obtain representation by an

attorney. 28 C.F.R. § 2.48(b). A postponed preliminary interview may be conducted as a local revocation hearing "provided that the parolee has been advised that the postponed preliminary interview will constitute his final revocation hearing." § 2.48(g). If the alleged parole violator "knowingly and intelligently waives his right" to a preliminary hearing, he shall receive a revocation hearing within 90 days of his arrest. 18 U.S.C. § 4214(c). As we conclude that the regulations do not conflict with the statutory provisions, the question is whether as applied to Brown-El they deprived him of due process under Morrissey.

Brown-El was arrested on a parole violator warrant on July 24, 1991, for (1) failing to return to the halfway house, and (2) telephone harassment. On August 6 a preliminary interview was attempted but Brown-El elected to postpone the hearing in order to obtain an attorney and to request witnesses. He signed a form which stated that the Commission could order his postponed preliminary interview conducted as a local revocation hearing. The postponement was not to exceed 30 days.

Brown-El requested a separate preliminary hearing and revocation hearing by letter dated August 29. On September 5 the Commission notified him that it had decided to schedule a combination preliminary and local revocation hearing. Brown-El again objected to this procedure by letter, this one dated September 18. The Commission notified Brown-El on October 18 that his preliminary hearing and revocation hearing would be held on October 28. The Commission also notified him of the charges and

evidence that would be considered at the hearing on October 21, as well as an additional charge of leaving the district without permission on October 24. The hearing was conducted on October 28, and the Commission found that Brown-El had violated his conditions of parole by leaving the halfway house and leaving the district without permission, but made no finding on the telephone harassment charge. The Commission revoked his special parole and ordered him continued to expiration, with no credit for time spent on special parole. Brown-El appealed to the National Appeals Board, which affirmed the decision of the Commission.

Brown-El argues in his reply brief that the record does not show that he intelligently waived his right to a preliminary hearing. In his petition for habeas relief, he argued that he objected to a simultaneous preliminary and final revocation hearing, both before and at the October 28 hearing. He also alleged that he objected to late notice of the evidence to be used against him at the hearing, and late notice of the charge of leaving the district without permission. He admitted that the Commission offered to continue the hearing but that he declined to request a continuance. The record of the hearing supports these allegations.

A federal parolee whose parole is revoked is not entitled to habeas relief for delay in revocation proceedings unless he can show actual prejudice. Villarreal v. United States Parole Commission, 985 F.2d 835, 837 (5th Cir. 1993). Although Villarreal involved delay in the revocation hearing as opposed to the

preliminary hearing, there is no reason to believe that we would not apply a prejudice requirement in cases, such as this, involving preliminary hearings. See Vargas v. United States Parole Commission, 865 F.2d 191, 194 (9th Cir. 1988) (evidence of prejudice required for delay in conducting preliminary interview).

Even if we assume without granting that Brown-El did not knowingly and intelligently waive his preliminary hearing, he has not alleged any prejudice resulting from the Commission's actions in delaying his preliminary hearing and combining it with his final revocation hearing. He has not shown that any witnesses who would have been favorable to his defense of the charges became unavailable. See Villarreal, 985 F.2d at 838. Further, the purpose of the preliminary hearing is to establish probable cause for holding the alleged parole violator pending a final revocation hearing. If Brown-El had been exonerated of the parole violation charges at the revocation hearing, he could have established prejudice for holding him without probable cause during that time. But as Brown-El was found to have violated the conditions of his parole, he was not prejudiced.

As for the alleged late notice of the charges and evidence, 28 C.F.R. § 2.50(d) requires that "[a]ll evidence upon which the finding of violation may be based shall be disclosed to the alleged violator at or before the revocation hearing." Brown-El argues that this is in conflict with the statutory provision of 18 U.S.C. § 4208 which provides for 30 days' notice "prior to any parole determination proceeding." But 18 U.S.C. § 4214(a)(2)(A)-(D),

which specifies the procedures for parole revocation proceedings, does not contain such a time requirement. A specific statute applies over a more general statute. Busic v. United States, 446 U.S. 398, 406, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980). The regulation does not conflict with the statutory provisions.

Morrissey held that a parolee is entitled to written notice of the claimed violations and disclosure of the evidence against him, but did not set out any particular time period. 408 U.S. at 489. The record reveals that Brown-El received notice of the charges and evidence four to seven days before the hearing. He has not alleged any prejudice from the alleged late notice, and we perceive none. We hold that Brown-El was not deprived of due process.

C. Retaliation

Brown-El also insists that the Parole Commission retaliated against him for his successful appeal of a previous parole revocation by forfeiting 23 months' street time credit and forcing him to reside in a halfway house. He contends that the facts of this case give rise to a presumption of vindictiveness which the Commission had not rebutted.

Brown-El's parole was previously revoked and, after an appeal to the Seventh Circuit Court of Appeals, he was given a new revocation hearing. Following the conclusion of that second hearing, the Commission withdrew credit for the time Brown-El had spent on special parole and ordered him paroled to a halfway house after service of 35 months.

The forfeiture of credit for time spent on special parole is

not discretionary with the Commission. If parole is revoked because a parolee was released on a special parole term and violated any conditions of special parole, he "shall receive no credit for time spent on parole pursuant to 21 U.S.C. 841(c)." 28 C.F.R. § 2.57(c) (emphasis added). Forfeiture of the time Brown-El spent on special parole was mandatory. Munguia v. United States Parole Commission, 871 F.2d 517, 519-21 (5th Cir.), cert. denied, 493 U.S. 856 (1989). Apparently the Commission was merely correcting a previous mistake of not forfeiting this time. See McQuerry v. United States Parole Commission, 961 F.2d 842, 846 (9th Cir. 1992).

Although the Commission correctly argues that it was within its discretion to order Brown-El paroled to a halfway house, Brown-El also correctly argues that this does not really address his contention that the reason the Commission chose to exercise that discretion was to retaliate against him. Nevertheless, Brown-El's allegations of retaliation are purely conclusionary and are therefore properly dismissed. He does no more than set out the sequence of events and draw the unsupported conclusion that the Commission's actions on rehearing were in retaliation for his appeal. Like the plaintiff's allegations in Hilliard v. Board of Pardons and Paroles, 759 F.2d 1190, 1193 (5th Cir. 1985), Brown-El does not allege any particular facts that would support a finding of retaliation. His allegations are not "founded on anything more than his own assumption." Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1114 (5th Cir. 1987).

Although Brown-El lists another issue, the arguments he makes are covered in the two issues discussed above, except for his allegation that he was not allowed to confront a particular witness. As his parole was not revoked on the charge to which that witness's testimony was relevant, i.e., the telephone harassment charge, this issue is irrelevant.

Brown-El has not demonstrated a violation of due process or retaliation, so he is not entitled to habeas relief. The district court's dismissal of Brown-El's petition is

AFFIRMED.