

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

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No. 93-8772

(Summary Calendar)

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WALLACE LEE SIMS,

Plaintiff-Appellant,

versus

DAVID A. SMITH, Parole Office  
for the State of Texas a/k/a  
Smith, Jr., ET AL.,

Defendants-Appellees.

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WALLACE LEE SIMS,

Plaintiff-Appellant,

versus

WAYNE SCOTT, Director,  
TDC,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Western District of Texas  
(92-CV-149 & 93-CV-2)

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(July 6, 1994)

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

PER CURIAM:\*

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\* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Wallace Lee Sims appeals the district court's denial of his petition for habeas corpus relief. Finding no reversible error, we affirm.

A year after Sims was released on parole, he was arrested for sexual assault and grand jury proceedings were initiated against him. Contemporaneously, hearings were held to determine whether to revoke Sims's parole for committing a crime while on parole. After the completion of the revocation hearings, but during the pendency of the grand jury proceedings, the Texas parole board revoked Sims's parole. He is presently incarcerated pursuant to that decision. Sims was never prosecuted, however, for the conduct underlying the sexual assault charge. The state court dismissed the sexual assault charge based on the grand jury's failure to indict Sims.

After moving unsuccessfully to have his parole reinstated, Sims filed a petition in state court for habeas relief, alleging that the State should have delayed his parole revocation hearing until the criminal charge against him was resolved. He maintained that the failure to delay the hearing resulted in the erroneous finding that he committed sexual assault. Sims's state petition was denied. Sims then raised the same contentions in his federal petition for habeas relief. See 28 U.S.C. § 2241(c)(3) (1988). The district court, adopting the magistrate judge's report and recommendation, denied Sims's federal petition, but granted Sims a certificate of probable cause to appeal to this Court.

Sims contends that the district court erred in denying his petition for habeas corpus relief.<sup>1</sup> He argues that he was denied due process because (1) the parole revocation hearings were held while the criminal charge for the same conduct was still under investigation; and (2) he was denied the right to introduce evidence at his hearing. Both arguments are without merit.

Sims first argues that due process requires that a parole revocation hearing, based on the same conduct which underlies a criminal charge, must be delayed until the criminal charge is resolved. Implicit in Sims's argument is the notion that the Texas state parole board may not rely on conduct for which criminal charges have been dismissed when determining whether to revoke parole. Sims has not cited, and we have not found, any authority to support this proposition. Indeed, the difference in the degree of proof necessary to revoke probation, as opposed to gaining a criminal conviction, support the view that a parole revocation determination is not dependent on the outcome of criminal proceedings based on the same conduct. *See Scamardo v. State*, 517 S.W.2d 293, 298 (Tex. Crim. App. 1974) (holding that an "order revoking probation must be supported by a preponderance of the evidence"); *cf. Villarreal v. United States Parole Comm'n*, 985 F.2d

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<sup>1</sup> The district court denied Sims's petition for habeas relief based on its conclusion that Sims failed to allege a federal claim. Although this conclusion was erroneous))i.e., an alleged denial of due process regarding a state prisoner's parole revocation raises a federal claim, *see, e.g., Morrissey v. Brewer*, 92 S. Ct. 2593 (1972))the district court's error was harmless in light of our discussion of the merits of Sims's claim. *See Fed. R. Civ. P. 61.*

835, 839 (5th Cir. 1993) (stating that in federal parole revocation cases, "it is well established that the Parole Commission may consider evidence of parole violations even though such evidence was also considered by a criminal prosecuting authority that ultimately decided to dismiss criminal charges based on the same alleged conduct"). We therefore reject Sims's first argument on appeal.

We also reject Sims's argument that the failure to delay his parole revocation hearing until the completion of the criminal investigation denied him the opportunity to present rebuttal evidence at his hearing. In the context of a revocation hearing, due process requires at a minimum that "the parolee must have an opportunity to be heard and to show that, if he can, that he did not violate the conditions [of parole] . . . ." *Morrissey v. Brewer*, 92 S. Ct. 2593, 2603 (1972). The record shows that Sims appeared at his revocation hearing represented by counsel, cross-examined the State's witnesses, and presented evidence on his behalf. To the extent that Sims argues that he was unable to impeach the complaining witness with evidence from the grand jury proceedings, we note that Sims was nevertheless afforded the opportunity to cross-examine the complaining witness and contest her story. We therefore conclude that Sims's rights to due process were not violated.

Accordingly, we AFFIRM the judgment of the district court.