

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37789

RICKIE STORM,)	2011 Unpublished Opinion No. 446
)	
Petitioner-Appellant,)	Filed: April 21, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
JOHANNA SMITH, OLIVIA CRAVEN,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Richard D. Greenwood, District Judge.

Order dismissing petition for writ of habeas corpus, affirmed.

Rickie Storm, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark A. Kubinski, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Rickie Storm appeals the district court’s dismissal of his petition for writ of habeas corpus. We affirm.

**I.
BACKGROUND**

Storm is currently serving sentences for two counts of grand theft by possession of stolen property and one count of possession of a controlled substance. Storm has been placed on parole, and had that parole revoked, twice. The most recent parole began in August of 2008 and is the basis for Storm’s current habeas corpus action. A hearing officer found Storm guilty of numerous violations¹ of his parole and, after a hearing, the Commission of Pardons and Parole (the Commission) revoked Storm’s parole.

¹ Storm was found guilty of: failing to obey all laws by writing insufficient fund checks, possessing illegal drugs, driving under the influence (DUI), and attempting to assault a police officer; conducting himself in a manner which is harmful to himself and others by DUI, attempting to assault hospital staff after his DUI arrest, and attempting to assault a police officer; failing to follow the instructions of his parole officer by not abiding by a behavior contract, failing to attend counseling, and failing to obtain a polygraph; failing to submit to a drug and alcohol test; changing his residence without permission by not immediately reporting to his residence at New Hope upon release from prison and by staying at his girlfriend’s house without

Storm alleged in his habeas petition that he was supervised on parole as a sex offender on the basis of a 1981 conviction for rape, the sentence for which Storm completed in its entirety in 1988. He argued that placing him in this supervision category violated numerous constitutional rights, led to an improper parole revocation, and resulted in improper denial of a “work release” option during incarceration. Storm also alleged violations of various constitutional rights in the process by which his parole was revoked. Specifically, Storm argued that his parole officer lied about Storm’s violations, that the record before the Commission contained other inaccurate information, that the hearing officer was biased, that Storm was not allowed to present evidence in his defense, and that his parole was revoked on the basis of conduct that was not criminally charged or that was “dismissed” by the parole hearing officer. Storm requested that the court grant relief by: removing from the parole revocation hearing record all inaccurate information, removing from the parole revocation hearing record all information on charges not filed by the State or dismissed by a court or the hearing officer, ordering the Commission to reinstate his parole without supervision as a sex offender, sanctioning Storm’s parole officer for perjury, and ordering the Idaho Department of Correction to allow him to participate in work release.

The State filed a motion to dismiss Storm’s petition, which the district court granted. The court held that there was no constitutional violation in the process by which Storm’s parole was revoked, that being supervised as a sex offender was not the basis for the revocation of his parole, and that any other claims regarding the sex offender supervision were moot issues as Storm’s parole was validly revoked and therefore he would not be further supervised as a sex offender.

Storm appeals from the district court’s dismissal order. His argument focuses primarily upon the merits of his underlying habeas claims relating to his supervision as a sex offender. He argues that the district court erred by not holding an evidentiary hearing on his petition because he raised genuine issues of material fact concerning all his claims. He also asserts that the court erred in holding that his claims arising out of sex offender supervision are moot because if he was improperly placed on sex offender supervision in violation of his constitutional rights any parole violations he committed afterward are rendered “null and void.” Additionally, he reiterates his arguments made in his petition concerning the merits of his habeas claims relating to the Commission’s parole revocation decision.

II. ANALYSIS

Habeas corpus proceedings are civil in nature, and generally the Idaho Rules of Civil Procedure apply. I.C. § 19-4208; *Hoots v. Craven*, 146 Idaho 271, 275, 192 P.3d 1095, 1099 (Ct. App. 2008); *Drennon v. Fisher*, 141 Idaho 942, 943, 120 P.3d 1146, 1147 (Ct. App. 2005). In this case, the court considered materials outside of the pleadings before dismissing Petitioner’s claims. When a court considers matters outside the pleadings on an I.R.C.P. 12(b)(6) motion to

permission; failing to make himself available and actively avoiding supervision by not reporting directly to his residence at New Hope immediately upon release from prison, not checking in with his parole officer immediately upon release from prison, not residing at his approved residence for four days, and not returning his parole officer’s phone calls during this time period; failing to remain alcohol free and entering an establishment where alcohol is the main source of income; and associating with persons who were involved with illegal activities. Storm admitted to most of these violations.

dismiss, such motion must be treated as a motion for summary judgment. *Hayes v. Conway*, 144 Idaho 503, 506-07, 163 P.3d 1215, 1218-19 (Ct. App. 2007); *Duvalt v. Sonnen*, 137 Idaho 548, 552, 50 P.3d 1043, 1047 (Ct. App. 2002). Summary judgment pursuant to Idaho Rule of Civil Procedure 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hayes*, 144 Idaho at 507, 163 P.3d at 1219; *Duvalt*, 137 Idaho at 552, 50 P.3d at 1047. On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Duvalt*, 137 Idaho at 552, 50 P.3d at 1047. Because the trier of fact in a habeas corpus action is the court rather than a jury, if the evidentiary facts are not disputed, the court may properly resolve conflicting inferences and grant summary judgment. *Cf. Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (summary dismissal in post-conviction action); *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009) (summary judgment in civil action).

Because we determine, as explained below, that any issues concerning Storm's supervision as a sex offender are rendered moot by a valid revocation of his parole, we first address whether there is any merit to Storm's various allegations of constitutional rights violations in actions taken during the revocation process.

A. No Due Process Violation in Proceedings by Which Storm's Parole was Revoked

Storm argues that his parole officer placed inaccurate information in the report that the Commission relied upon in revoking his parole. Storm also argues that the Commission relied upon parole violations that were "dismissed" by the hearing officer to revoke his parole. He further contends that he was not allowed to "confront and cross-examine adverse witnesses and documentary evidence" at the parole revocation proceeding before the Commission. Finally, Storm argues that his improper supervision as a sex offender contributed to the improper revocation of his parole.

The Commission has broad discretion in making its parole decisions. *Hoots*, 146 Idaho at 276, 192 P.3d at 1100; *Drennon v. Craven*, 141 Idaho 34, 35, 105 P.3d 694, 695 (Ct. App. 2004). When we review a decision of the Commission our inquiry is only whether there was a rational basis in the record for the Commission's conclusions--not whether its determination is supported by a preponderance of the evidence or even substantial evidence. *Hoots*, 146 Idaho at 276, 192 P.3d at 1100; *Drennon*, 141 Idaho at 35-36, 105 P.3d at 695-96. Because our inquiry is thus limited, a habeas petitioner is not entitled to an evidentiary hearing to relitigate the facts of the alleged parole violations. *Matthews v. Jones*, 147 Idaho 224, 228, 207 P.3d 200, 204 (Ct. App. 2009).

Idaho Code provides for two separate hearings in parole revocation proceedings. I.C. § 20-229B; *Matthews*, 147 Idaho at 228, 207 P.3d at 204. The first hearing, the "factual parole revocation hearing," is conducted before a member of the Commission or a hearing officer. *Id.* Its purpose is to determine whether the alleged parole violations have been proven by a preponderance of the evidence. *Id.* If the violations are proven, the second "dispositional" hearing is conducted by the Commission to determine whether the parole will be revoked. *Id.* at 228-29, 207 P.3d at 204-05. The requisite process due for these hearings was specified in *Matthews*:

The procedural safeguards that must be provided in parole revocation proceedings in order to comport with the constitutional right to due process were outlined by the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 485, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 496 (1972). The Supreme Court there held

that because a parolee has a liberty interest at stake, the right to due process applies in parole revocation proceedings. *Id.* at 481-82, 92 S. Ct. at 2600-01, 33 L. Ed. 2d at 494. In determining what process was due, the Supreme Court mandated two important stages in the process for an individual who has been arrested for an alleged parole violation. *Id.* at 485, 92 S. Ct. at 2602, 33 L. Ed. 2d at 496. The first stage is a minimal inquiry, “in the nature of a ‘preliminary hearing,’” that should be conducted at or reasonably near the place of the alleged violation and as promptly as reasonably convenient to determine whether there is probable cause to believe there has been a parole violation. *Id.* This determination must be made by a neutral official who is uninvolved in the parolee’s case, i.e., someone other than the parole officer who reported the alleged violations or recommended revocation. *Id.* at 485-86, 92 S. Ct. at 2602-03, 33 L. Ed. 2d at 496-97. The parolee has a right to notice of this hearing, to notice of the nature of the violations that are alleged, and to appear and present evidence to the hearing official. *Id.* at 486-87, 92 S. Ct. at 2602-03, 33 L. Ed. 2d at 497. Absent a finding by the hearing official that an informant would be subjected to risk of harm should his identity be disclosed, on the parolee’s request the source of adverse information upon which the violation report is based must be made available for confrontation and cross-examination in the parolee’s presence. *Id.* . . .

The second stage in the process established by *Morrissey* is what the Court called the “revocation hearing.” *Id.* at 487, 92 S. Ct. at 2603, 33 L. Ed. 2d at 497-98. The Supreme Court described the required procedural safeguards as follows:

There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority. This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation. The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. . . .

. . . Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole

revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

Id. at 487-89, 92 S. Ct. at 2603-04, 33 L. Ed. 2d at 498-99 (footnote omitted).

Id. at 229-30, 207 P.3d at 205-06.

In this case, Storm appears to argue that the district court erred in finding a rational basis in the record to support the Commission's revocation decision. He asserts that he is entitled to an evidentiary hearing in the district court on his claims. However, Storm simply argues that his parole officer was not credible and the violation report was inaccurate. As stated in *Matthews*, Storm is not entitled to an evidentiary hearing in the district court to re-litigate the facts of his parole violations. After considering Storm's testimony, police reports, and the parole violation report, the hearing officer made credibility and factual determinations, dismissing some of the parole violation allegations and finding Storm guilty of others. Therefore the only inquiry for the district court was whether there is a rational basis to support those findings. Like the district court, we conclude that the hearing officer's decision had a rational basis in the evidence and consequently, the Commission's adoption of the hearing officer's findings of fact was also rational.

Furthermore, Storm was not denied procedural due process in the conduct of the hearing. As mandated in *Matthews*, Storm was given notice of both the factual and dispositional hearings, received a copy of the allegations of violations, received a copy of the violation report, and elected to proceed with both hearings, specifically declining the opportunity for a continuance for case preparation. The record does not support Storm's contrary assertion on appeal that he was deprived of the opportunity to present evidence at the dispositional hearing as he was specifically asked whether he needed a continuance for this purpose, and the Commission minutes show that Storm did in fact argue in his own defense at the hearing.² That Storm, after being given the opportunity to present evidence other than his own testimony at the hearing or continue the hearing, chose not to do so is not an error of the hearing officer or the Commission.

Storm's claim that the Commission relied on allegations of violations that were "dismissed" by the hearing officer is unsupported by the record. In fact, the Commission adopted the hearing officer's findings and recommendations and so noted that certain violations were dismissed.

Finally, Storm's argument that being supervised as a sex offender led to the improper revocation of his parole fails because it is clear from the record of Storm's dispositional hearing that the reasons cited by the Commission for revoking Storm's parole were numerous violations that had nothing to do with Storm's supervision as a sex offender. These include: writing

² Storm's argument that he was not allowed to present evidence in his defense at the dispositional hearing appears to arise from a two-sentence paragraph at the end of the Commission's minutes from the hearing that states, "The subject wanted to argue about absconding. The Director said he was found guilty of it at the violation hearing." This reference does not show that Storm was prohibited from presenting evidence in his own defense, for the minutes show Storm was allowed to argue his defense previous to this entry, and that this attempt by Storm to argue a point was after the Commission had already considered Storm's arguments and made its decision.

insufficient fund checks, possessing illegal drugs, driving under the influence (DUI), attempting to assault a police officer, attempting to assault hospital staff after his DUI arrest, failing to submit to a drug and alcohol test, not immediately reporting to his residence at New Hope upon release from prison, staying at his girlfriend's house without permission, not checking in with his parole officer immediately upon release from prison, not residing at his approved residence for four days, not returning his parole officer's phone calls during this time period, entering an establishment where alcohol is the main source of income, and associating with persons who were involved with illegal activities. Storm admitted to most of these violations, though he attempted to justify them or explain mitigating circumstances surrounding the commission of some of them.

Storm has not shown that the district court erred in holding that there is a rational basis in the record for the Commission's decision to revoke his parole and that the parole revocation decision was not caused by parole terms related to Storm's classification as a sex offender.

B. Issues Concerning Storm's Supervision as a Sex Offender Are Moot

Storm argues that supervising him as a sex offender violated various constitutional rights and Idaho statutes, aside from the improper revocation of his parole. He directs our attention to the areas in his life, while he was on parole, that were affected by this classification. He asserts that these issues should have been addressed independently of any issue regarding the parole revocation proceedings because if he was improperly placed on sex offender supervision in violation of his constitutional rights any parole violations he engaged in afterward are rendered "null and void."

The district court correctly held that Storm's sex offender supervision issues are moot. An issue is moot if a favorable judicial determination would not result in relief and would have no practical effect. *State ex rel. Winder v. Canyon Vista Family Ltd. P'ship*, 148 Idaho 718, 724, 228 P.3d 985, 991 (2010); *Freeman v. Idaho Dep't of Corr.*, 138 Idaho 872, 875, 71 P.3d 471, 474 (Ct. App. 2003). Storm's parole was validly revoked based on other violations that had nothing to do with his supervision as a sex offender. Because he is no longer on parole, the relief he seeks--parole without sex offender supervision--is not within the power of this Court to grant and therefore addressing the issue would have no practical effect.³

C. Claim that Storm is Currently Being Subjected to Adverse Conditions of Confinement Due to His Past Sex Offense

Storm argues that he is being subjected to adverse conditions of confinement--not being able to participate in "work release" or "therapeutic community"--because of his prior sex offense in violation his constitutional rights.

The State responds that Storm may not assert this issue on appeal because he did not raise it below. We disagree. Storm took issue with his current conditions of confinement regarding work release in his petition, both in a factual recitation in the body of his petition and in his prayer for relief. Nevertheless, we affirm the district court's dismissal because we conclude that Storm's allegations fail to state a claim.

In his habeas petition, Storm alleged that the Department of Corrections violated the "grandfather clause" by denying him work release opportunities and that "respondents and support staff" violated various constitutional provisions, including the Due Process and Equal

³ We note that Storm has received assurances from the director of the Idaho Department of Correction that he will not be supervised as a sex offender if he is ever granted parole in the future.

Protection Clauses, without distinguishing between respondents or claims. On appeal, the only plausible characterizations of this claim that he gives this Court are a violation of due process and the “ex post facto clause or law.”

In order to state a claim for a due process violation, the claimant must first assert a protected liberty or property interest. *State v. Rogers*, 144 Idaho 738, 740, 170 P.3d 881, 883 (2007); *Lightner v. Hardison*, 149 Idaho 712, 717, 239 P.3d 817, 822 (Ct. App. 2010). Liberty interests implicating a right to due process for state prisoners can arise from two sources, the Due Process Clause of the Fourteenth Amendment and state laws or regulations. *Meachum v. Fano*, 427 U.S. 215, 223-30 (1976); *Lopez v. State*, 128 Idaho 826, 828, 919 P.2d 355, 357 (Ct. App. 1996). However, the Due Process Clause does not create a liberty interest in prison conditions “[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution.” *Montanye v. Haymes*, 427 U.S. 236, 242 (1976). *Accord Lopez*, 128 Idaho at 828-29, 919 P.2d at 357-58. A state may create liberty interests protected by the Due Process Clause, but such interests are generally limited to freedom from conditions that impose “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995). *Accord Lopez*, 128 Idaho at 829, 919 P.2d at 358. In this case, nothing about being disqualified from work release or other housing or treatment options is outside the scope of Storm’s sentence. Conditions of imprisonment that exclude work release or particular treatment options do not constitute atypical or significant hardship. To the contrary, they are very common conditions of incarceration and therefore do not give rise to a liberty interest. As Storm has not shown a liberty interest in being qualified to participate in work release or other types of housing or treatment, he fails to state a due process claim.

The Ex Post Facto Clause of the United States Constitution, Article I, Section 10, Clause 1, prohibits a law which imposes a greater punishment on a defendant than that which was permissible when he was convicted of the underlying offense, makes a punishment for a crime greater than it was when it was committed, or deprives a defendant of a defense available at the time the act was committed. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990); *State v. Gragg*, 143 Idaho 74, 75 n.3, 137 P.3d 461, 462 n.3 (Ct. App. 2005). The Idaho Constitution, Article I, Section 16, similarly prohibits ex post facto laws. *Gragg*, 143 Idaho at 75, 137 P.3d at 462. In the absence of any argument to the contrary, we will assume the United States ex post facto provision and our state provision are coextensive. *Id.* at 75-76, 137 P.3d at 462-63. A non-punitive, or civil, law will not violate the prohibition on ex post facto laws. *Id.* at 76-79, 137 P.3d at 463-66. In *Gragg*, we determined that the statutory requirement of sex offender registration was not an ex post facto law as it did not seek to punish the offender but was for the valid purpose of protecting the public and disseminating public information. *Id.* In this case, assuming Storm’s characterization of the prison regulations are true, such housing regulations are not punitive and do not constitute further punishment for his sex offense. They are simply regulatory standards for inmate housing with the apparent purpose of securing safety and order, like the sex offender registration upheld in *Gragg*. Thus, Storm has failed to state a claim that the policy complained of is an improper ex post facto law.

III.

CONCLUSION

The district court’s dismissal of Storm’s habeas corpus petition is affirmed.
Judge GUTIERREZ and Judge MELANSON CONCUR.