NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-3872 and 03-1710

ERNEST TRASLAVINA,
Appellant in No. 01-3872

v.

MICHAEL J. GAINES; U.S. PAROLE COMMISSION; SCOTT KUBIC; CAROL J. COFFEY; DOUGLAS GOLDRING and MICHAEL A. ZENK,
Appellees in No. 01-3872

ERNEST TRASLAVINA,
Appellant in No. 03-1710

v.

NANCY BAILEY, WARDEN,
Appellee in 03-1710

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civ. Nos. 99-cv-01970 & 00-cv-05737)
District Judges: A. Richard Caputo and Stephen M. Orlofsky

Argued November 3, 2003
Before: McKEE, SMITH and WEIS, Circuit Judges.

(Filed: January 21, 2004)

OPINION

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WEIS, Circuit Judge.

After due consideration of the issues raised by the plaintiff prisoner, we

conclude that the record supports his contention that he was misled by prison officials to waive parole consideration. Accordingly, in view of the time constraints present here, we directed the Parole Commission to grant a hearing *nunc pro tunc*, which was held on November 24, 2003. This opinion explains the reason for our order, and addresses other issues raised by plaintiff.

Plaintiff is a federal prison inmate who was convicted on two counts of drug related charges in the United States District Court for the District of Nevada in 1990. He was sentenced to 15 years imprisonment on count I and 15 years imprisonment on count II to run consecutively. Count I was a parolable offense, but count II was non-parolable by virtue of the Anti-Drug Abuse Act of 1986. Plaintiff began serving his sentences on August 17, 1990.

Despite the differing provisions as to parole, the Bureau of Prisons ("BOP") "aggregated" the sentences; that is, it treated them as a total sentence of 30 years. This arrangement has favorable aspects for an inmate in terms of allowable "good time credits."

Under 18 U.S.C. § 4205(a)[1] a prisoner becomes eligible for parole consideration after serving one-third of his sentence. Section 4206(d) provides that unless a prisoner has seriously violated institutional rules, he should be granted

[1] Applicable only to prisoners like the plaintiff who were sentenced before November 1, 1987.

mandatory parole at the expiration of two-thirds of his sentence.[2]

Plaintiff contends that, from the onset of his sentence, prison officials had unequivocally indicated to him that his release date, calculated as two-thirds of his aggregate sentence and contingent upon good time credits, would be in November 1999. Based on this information, plaintiff says he "waived" parole consideration in 1994, the one-third eligibility date for his first, parolable offense. In deciding to do so, he assumed that a successful hearing would parole him to the term on count II with a future release in 1999.

BOP officials had, in fact, documented the November 1999 projected mandatory release date; a progress report of November 21, 1997 listed "projected release 11-19-99 two-thirds," and a similar notation was made in a report of January 7, 1999. In a section of the latter report entitled "Release Planning," there appears the following: "Mr. Traslavina has a two-thirds release date of September 19, 1999. Upon release from incarceration, he anticipates residing with his mother in Forest Hills, New York. . . [H]e has been encouraged to participate in institutional release preparation program."

BOP officials even interviewed plaintiff's family members in preparation for his release in November 1999. Despite these favorable actions, plaintiff was notified

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[2] The Parole Commission has also adopted guidelines that provide that, in certain circumstances, including some apparently applicable to the plaintiff, parole would not be granted until at least 100-months incarceration had been served. See 28 C.F.R. 2.20.

on October 26, 1999 that he would not be imminently released into the community, but rather would be "paroled" to the consecutive 15-year non-parolable sentence. Thus, he would remain in custody.

A sentence monitoring entry of August 2, 1999, addressed to "any reviewing authority," described the process which led to this decision as follows: "Prisoner was eligible in 1994 (one-third of the first 15 years) to be paroled 'on paper' to the next 15-year non-parolable sentence. Had he been paroled, his statutory release date of 2009 would drop to 2004, but the two-third date on the aggregate would still stay in effect for November 19, 1999. Reason is that the 10-year cap stops any sentence from extending parole eligibility for more than 10 years."

On January 11, 2000, the Parole Commission performed a record review and issued plaintiff a mandatory parole certificate for the first sentence *nunc pro tunc* to November 19, 1999. As a result of the BOP action, the plaintiff's release date was extended to 2009. However, on September 21, 2001, the United States District Court for the District of Nevada reduced the sentence on count II to ten years, thus accelerating the current release date to December 7, 2004.

While confined in Allenwood, Pennsylvania, plaintiff filed a pro se Bivens complaint in the Middle District of Pennsylvania against the Parole Commission, its chairman and other federal employees. He asked that the Parole Commission be required to perform a record review, reinstate his release date of November 19, 1999, and pay

compensatory and punitive damages for the time he had been incarcerated beyond November 19, 1999.

The District Court, relying on Heck v. Humphrey, 512 U.S. 477 (1994), entered summary judgment in favor of the defendants on the Bivens theory. Alternatively, treating the plaintiff's pleadings as a habeas corpus action, the Court found that plaintiff had failed to establish a basis for relief, other than a review on the record and a *nunc pro tunc* Parole Certificate which the Board had granted on January 11, 2000.

Having been transferred from Allenwood to Ft. Dix, New Jersey, plaintiff filed a second pro se complaint, this time challenging his continued incarceration under habeas corpus and naming the warden of Ft. Dix as the defendant. Specifically, plaintiff asked that his sentence be de-aggregated, and asserted further that because his waiver of a hearing in 1994 had not been intelligent, he was entitled to a parole hearing *nunc pro tunc* as of November 18, 1994. He also contended that he was not given good-time credits to which he was entitled and that prisoners in similar circumstances had been granted an earlier release.

The District Court denied the claim for a parole hearing *nunc pro tunc* because the issue had not been adequately presented through the administrative procedures of the BOP. The Court denied the constitutional claims of equal protection and Eighth Amendment violations on the same rationale.

Plaintiff filed a notice of appeal from both District Court decisions, which were later consolidated by order of this Court.[3] We assert appellate jurisdiction under 28 U.S.C. 1291 over Plaintiff's appeal from the dismissal of his Bivens action, and under 28 U.S.C. 2253 over Plaintiff's appeal from the dismissal of his habeas action.[4]

The release date computations in this case have been inconsistent and complicated. The confusion in the litigation aspect has also been somewhat unusual. Many of the problems have been generated by the plaintiff's pro se efforts and by the modification of the original sentence on count II. We have briefly summarized the extensive litigation conducted in both district courts, without detailing the various pleadings and motions. After carefully reviewing the various claims and contentions, we arrive at the following conclusions:

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[3] The notice of appeal from the Middle District of Pennsylvania was timely filed on October 5, 2001, well within the 60-day period after the District Court judgment. In the New Jersey action, though, various motions for reconsideration followed in the six months after the District Court dismissed the case on June 20, 2002. These motions were denied by the court on January 27, 2003, with the notice of appeal following on March 11, 2003. Even though Plaintiff's motions for reconsideration were not filed within 10-days of the original judgment, the district court disposed of them as if they were timely, and the government did not object to their untimeliness. Thus, the 60-day period for filing of a notice of appeal did not begin to run until January 27, 2003, making the Plaintiff's notice of appeal timely. See Inglese v. Warden, United States Penitentiary, 687 F.2d 362, 363 (11th Cir. 1982) (citing Thompson v. INS, 375 U.S. 384, 385 (1964) (per curium))

[4] We appointed counsel for plaintiff on his appeal and express our thanks for the able presentation of this case to the Court.

1. The BOP properly concluded that, after parole on the sentence for count I, the plaintiff was required to serve the non-parolable sentence on count II. To have done otherwise would have violated the sentencing court's explicit order that the non-parolable term be served consecutively to the parolable sentence.

2. The BOP in its administrative capacity has re-aggregated the two sentences as plaintiff requested. That action, however, has affected the calculations for release by only two days. The aggregation issue, therefore, is no longer before the court.

3. The plaintiff's equal protection claim is meritless. Although plaintiff did not present this issue in the first step, he did submit it in steps two and three of the administrative review, and it has not been ruled upon. Although the BOP has a policy of not reviewing issues that have not been raised in all three steps, we are persuaded that in these circumstances the pro se plaintiff adequately exhausted the administrative process. Nevertheless, on the record here, we are not persuaded that the plaintiff has provided us sufficient proof to establish his claim.

Our analysis "begins with the basic principle that a [litigant] who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination." McClesky v. Kemp, 481 U.S. 279, 292 (1987). Because Plaintiff has not pleaded that he is a member of a suspect class, see e.g. Pryor v. Brennan, 914 F.2d 921, 923 (7th Cir. 1990)(noting that prisoners are not a suspect class), or that a fundamental right has been infringed, see e.g. Mayner v. Callahan, 873 F.2d 1300, 1302

(9th Cir. 1990)(stating that "parole consideration is not a fundamental right deserving higher scrutiny"), the law imposes the rather modest requirement that the government not treat similarly situated individuals differently without a rational basis. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985).

Although plaintiff has introduced evidence of his differential treatment from that of another inmate, the record is devoid of any indication that such individual is "similarly situated" or received a preferential application of parole regulations. We conclude, therefore, that in the absence of evidence of purposeful discrimination against Plaintiff, his equal protection claim is meritless.

4. Plaintiff's waiver of parole consideration in 1994 was unintelligent, thereby requiring the Parole Board to consider his case in a hearing *nunc pro tunc* to that date.

As noted earlier, the plaintiff contends that over a period of years he was assured by prison employees of his mandatory release in 1999. As a result, he asserts that he did not ask for parole consideration in 1994, when he first became eligible at one-third of his sentence on count I. Had he requested a hearing and received favorable consideration at that point, the non-parolable sentence on count II would have started to run in 1994, rather than in 1999 when the mandatory parole at two-thirds of count I became effective.

The New Jersey District Court concluded that although the plaintiff had filed administrative appeals, he had not adequately presented his contention that his "waiver" of a Parole Board hearing in 1994 was ineffective. We take a different view.

In completing his BP-10 form appealing the institutional administrative denial of his claim for release, the plaintiff wrote: "[h]ad I been informed in 1990 that my two fifteen-year sentences would be de-aggregated, I would have seen the Parole Board in 1995. At no time did anyone tell me that upon reaching the two-third date, the sentence would be split ... I was constantly informed at every unit team that I would be released in November 1999...." The regional administrative board did not address this contention other than to state that the projected mandatory release date was December 5, 2004.

Plaintiff then appealed that decision to the Central Office of the BOP in Washington, D.C. using form BP-Dir-11. In addition to a claim for additional good-time credits, plaintiff asked for aggregation "or in the alternative release from my first sentence *nunc pro tunc* to 11-18-94 when I was first eligible for parole and no one took the time to explain to me that these sentences were to be de-aggregated upon reaching the release date of 11-19-99."

The Central Office denied the request for additional good-time credits and granted the request for re-aggregation. However, no mention was made of the request for *nunc pro tunc* computation as of November 19, 1994.

The New Jersey District Court pointed out that the waiver argument had not been presented at the institutional level and, therefore, the administrative process had not been completed. That ruling, however, overlooked the fact that plaintiff had raised the waiver issue in his appeal to the Regional Level in form BP-DIR-10 and, although somewhat vaguely, in the appeal to the Central Office.

The affidavit of Aaron Nixon, an inmate systems specialist in the BOP Washington, D.C. office, stated, "[i]ssues which are raised and addressed in the early administrative remedies (which are commonly referred to as a BP-9 at the institution level) and a BP-10 (at the regional level) are addressed by the Central Office . .." He continued, "[t]he waiver issue was not addressed at the institution level . . . [T]he references were viewed as a statement regarding, and support for his requested relief that the sentences be re-aggregated, not as a separate issue to be independently addressed." We believe that this narrow reading of the plaintiff's pro se appeal was unduly restrictive and overlooked the clearly expressed waiver claim in BP-10.

We note that the form BP-11 submitted to the Central Office required that copies of the completed BP-9 and BP-10 be attached. Consequently, it appears that the waiver claim was submitted to the final administrative decision-maker. On this record, we conclude that administrative remedies to the waiver issue were exhausted. Therefore, the merits of the claim should have been addressed by the District Court.

Ordinarily, we would remand to the District Court to conduct the necessary proceedings, make the appropriate factual findings and arrive at conclusions of law. However, there were special circumstances here which counseled immediate action on our part. If plaintiff was correct in his contention that he should have been paroled in 1994 or some earlier date before November 1999, it may have been that he should have been released before the scheduled date of December 4, 2004.

Remand to the District Court for its resolution of the issues could have resulted in delay and extended the plaintiff's incarceration beyond the proper date. Because that possibility existed, at the conclusion of oral argument we decided to address the issue immediately and directed the Parole Board to provide a hearing within thirty days *nunc pro tunc* to November 1994.

The record before us is sparse as to whether plaintiff was misled. Nevertheless, the documents prepared by the BOP corroborated his assertions to some extent. It is clear that the staff at Allenwood in 1999 expected that the plaintiff was to be released to the community in November of that year. The BOP began taking the required steps for that action in early 1999. The progress report prepared two years earlier (in 1997) also projected a release into the community in 1999.

The plaintiff's contention that he was told by staff members in 1992 that it would be futile to apply for parole at the one-third mark was not challenged by the defendants. The form waiving parole consideration at the June 1992 session of the Parole

Board was initialed by the plaintiff at the appropriate place. Significantly, at that location also appears the handwriting "witnessed by [an unintelligible signature] 3-16-92." Apparently, that unknown signatory was an employee of the BOP and permits an inference that plaintiff was being counseled by prison employees at that time. It is unlikely that plaintiff would otherwise waive parole consideration.

Of course, it would have been most helpful if we had been presented with an affidavit of the BOP employee who witnessed the waiver, setting forth the circumstances. The BOP would have been in a position to supply such evidence in the years that this litigation has been pending in the two district courts. That omission was also a factor in our determination that the just result here was an order directing the Parole Commission to have a hearing *nunc pro tunc*.

The Parole Board has now conducted that hearing and, based upon their review of plaintiff's record, denied him parole as of 1994. The plaintiff's request for relief on this claim has therefore been met.

5. We conclude also that the judgment in favor of the defendants in the Bivens action in the Middle District of Pennsylvania was properly entered. However, we reach that result by a different path than that used by the District Judge.

The plaintiff claimed damages for unlawful incarceration after November 19, 1999. As noted earlier, the BOP properly required service of the 15-year sentence on count II instead of release to the community. Adhering to this sequence, the plaintiff's

projected release date as of November 19, 1999 would be 2009. The Middle District entered judgment for the defendants on July 9, 2001, when the plaintiff was serving his count II consecutive sentence. At that point, the plaintiff had not been incarcerated illegally even if his waiver argument had prevailed. Therefore, as of the date judgment was entered for defendants, the plaintiff had suffered no damages and, therefore, had no Bivens claim.

It was not until September 21, 2001 when the District Court in Nevada reduced the sentence on count II to ten years, that the waiver claim assumed some potential viability. At that point, the release date was accelerated to 2004, and, as noted above, a successful parole hearing might have moved that date even earlier. However, the outcome of the *nunc pro tunc* hearing preserves the 2004 projected release date, and precludes any damages to support a Bivens action now. Any other relief to which plaintiff may have been entitled was included in the New Jersey action, which we have consolidated with the Middle District case.

Accordingly, we will affirm the judgment of the Middle District of Pennsylvania entered July 9, 2001, and affirm the judgment of the District of New Jersey entered July 21, 2002. Because the appropriate relief has been granted as to the waiver claim, plaintiff has no remaining cognizable claims.

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TO THE CLERK:

Please file the foregoing Opinion.

/s/ Joseph F. Weis
United States Circuit Judge