

STATE OF MICHIGAN
COURT OF APPEALS

ASHONDO KARICE HILL,

Plaintiff-Appellant,

v

PAROLE BOARD and ST. LOUIS
CORRECTIONAL FACILITY WARDEN

Defendants-Appellees.

UNPUBLISHED
November 20, 2012

No. 310007
Gratiot Circuit Court
LC No. 12-011697-AH

Before: BORRELLO, P.J., AND FITZGERALD AND OWENS, JJ.

PER CURIAM.

Plaintiff appeals the circuit court order denying his complaint for a writ of habeas corpus. We affirm.

Plaintiff was originally granted a 24-month period of parole on May 22, 2007, following an extended incarceration for two counts of bank robbery. On November 26, 2008, plaintiff was alleged to have been involved with a carjacking. As a result of his involvement, plaintiff's parole agent charged plaintiff with three parole violations. Plaintiff's parole violations were dismissed at a June 26, 2009, parole revocation hearing because the only witness to the carjacking was unwilling to testify. However, plaintiff's parole period was extended to expire on May 22, 2010.

On November 15, 2009, plaintiff was involved in a home invasion and armed robbery. Plaintiff was released on bail on December 23, 2009. He was taken back into custody on June 16, 2009, when his bail was revoked. Plaintiff has remained in custody since that time. As a result of his involvement in the 2009 home invasion and armed robbery, plaintiff's parole agent charged plaintiff with six new parole violations. No parole revocation hearing was held because plaintiff pleaded guilty to one felony charge of armed robbery. On May 13, 2011, however, plaintiff withdrew his guilty plea, but he remained in custody pending trial on the armed robbery and home invasion charges.

On August 11, 2011, a parole violation warrant was issued for plaintiff. Additionally, his parole was extended to expire on May 22, 2012. On January 23, 2012, plaintiff's armed robbery and home invasion charges were dismissed without prejudice. After that date, plaintiff was in custody solely as a result of his alleged parole violations. Plaintiff filed a petition for a writ of

habeas corpus on February 1, 2012, arguing he should be released because the charges were dropped. While plaintiff's petition was pending, a parole revocation hearing was held on March 15, 2012. At the hearing, plaintiff was found guilty of four of the six parole violations he was charged with and a continuance was ordered. Plaintiff's petition for habeas corpus was dismissed on April 13, 2012.

Questions of "[p]arole eligibility [are] governed by statute and the interpretation and application of statutes is reviewed de novo." *Jackson v Dep't of Corrections*, 247 Mich App 380, 381; 636 NW2d 305 (2001). Additionally, "[a] prisoner's right to file a complaint for habeas relief is guaranteed" under the Michigan Constitution, *Moses v Dep't of Corrections*, 274 Mich App 481, 484; 736 NW2d 269 (2007), and questions of constitutional law are also reviewed de novo. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Plaintiff first asserts that defendants' delay in holding the parole revocation hearing until the resolution of his criminal prosecution constituted a waiver of his parole violations. However, our Supreme Court has already held that when the parole board fails to hold the fact-finding hearing within the 45-day statutory timeframe provided for in MCL 791.240a(3), the board's "statutory authority to revoke parole" is not relinquished. *Jones v Dep't of Corrections*, 468 Mich 646, 656; 664 NW2d 717 (2003). Instead, the appropriate remedy for a violation of MCL 791.240a "is a complaint for an order of mandamus rather than for a writ of habeas corpus." *Id.* at 658. Furthermore, because plaintiff has already received a parole violation hearing, a complaint for mandamus would be moot. Therefore, there is no relief this Court can grant to plaintiff for the MCL 791.240a violation.¹

Plaintiff next asserts that his defense to the parole violations was prejudiced by defendants' delay and, therefore, his due process rights were violated. However, plaintiff was given notice and a fair hearing, which are the due process rights a parolee has. *In re Parole of Haeger*, 294 Mich App 549, 575; 813 NW2d 313 (2011).

Moreover, under MCL 791.240a(3), which requires that a parole revocation hearing occur "[w]ithin 45 days after a paroled prisoner has been returned or is available for return to a state correctional facility," plaintiff only suffered a seven day delay. In a federal case construing Michigan law, a hearing that was held 46 days after the parolee was available for return was reasonable. *Brown v Jansen*, 619 F Supp 2d 372, 386 (WD Mich, 2009) (holding that a one day delay "does not amount to a constitutional deprivation cognizable on habeas review"). We

¹ We also note that the delay was not 28 months, as plaintiff claims, but seven days. A parolee is available for return on "the date that the criminal charges were dismissed," at which time the incarceration is authorized "solely by the parole detainer." *Hinton v Parole Bd*, 148 Mich App 235, 243; 383 NW2d 626 (1986). Because plaintiff's criminal charges were not dismissed until January 23, 2012, until that date, plaintiff was not available for return within the meaning of MCL 740.240a(3). With his parole revocation hearing occurring on March 15, 2012, the time between plaintiff's availability for return and the hearing was 52 days, a mere seven more than the 45-day timeframe called for by the statute.

similarly conclude that a seven-day delay does not amount to a constitutional deprivation cognizable on habeas review.

Even assuming defendants' delay was unreasonable, plaintiff's evidence of prejudice is insufficient. Plaintiff's evidence consists of his disagreement with witness credibility determinations made by the hearing examiner, his unhappiness with appointed counsel, and his inability to call an unidentified alibi witness. First, the hearing examiner was free to weigh the credibility of the witnesses, and "[t]his Court will not interfere with the trier of fact's role of determining . . . the credibility of witnesses." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). Additionally, plaintiff's unhappiness with his attorney's strategy is not grounds for arguing prejudice because an "attorney must enjoy great discretion in the trying of a case-especially with regard to trial strategy and tactics." *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Finally, plaintiff fails to give any reason for the unavailability of his unidentified alibi witness.

Plaintiff's prejudice claim is compromised for yet another reason. Parole violations only require the parolee to be found guilty by the preponderance of the evidence. MCL 791.240a(9). Here, there was enough evidence for the hearing examiner to find plaintiff guilty by the preponderance of the evidence. The fact that plaintiff's criminal charges were dismissed is not dispositive because even an "acquittal of criminal charges does not bar revocation of probation based on the same facts." *People v McEntyre*, 127 Mich App 731, 732; 339 NW2d 538 (1983). Plaintiff is unable to demonstrate a "radical defect[] which render[s] a judgment or proceeding void." *Hinton*, 148 Mich App at 244-245. Therefore, plaintiff is not entitled to habeas relief.

Affirmed.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens