

STATE OF MICHIGAN  
COURT OF APPEALS

---

KENNETH R. HOPKINS,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

---

UNPUBLISHED

December 18, 2003

No. 242640

Macomb Circuit Court

LC No. 02-002051-AW

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order dismissing his petition for a writ of mandamus. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, who was paroled from prison in 1998, was later charged with violation of parole. He filed this petition, contending that defendant violated the time limitations for holding the preliminary and fact-finding hearings and other rules. We review the trial court's decision regarding an order of mandamus for an abuse of discretion. *Baraga Co v State Tax Comm*, 466 Mich 264, 268-269; 645 NW2d 13 (2002).

A parolee is entitled to a preliminary hearing on parole violation charges within ten days after an arrest for an alleged violation of parole. MCL 791.239a(1). Plaintiff showed that the preliminary hearing was not conducted within ten days of his incarceration but did not show that the hearing was not conducted within ten days of his arrest as that term is defined in 1999 AC, R 791.7740(1). Even if the preliminary hearing had not been held within ten days of plaintiff's arrest, it was held shortly thereafter. Because plaintiff received both a preliminary and a fact-finding hearing before his parole was revoked, he was not prejudiced by the delay and thus is not entitled to relief. *Callison v Dep't of Corrections*, 56 Mich App 260, 264-265; 223 NW2d 738 (1974).

We find no merit to plaintiff's contention that dismissal of new criminal charges mandated dismissal of the parole violation charges. Although a preliminary examination on criminal charges may be substituted for the preliminary hearing and a bind-over on the criminal charges establishes probable cause to believe a parole violation has occurred, a preliminary parole revocation hearing may be held even if the parolee is not bound over. 1999 AC, R 791.7740(2).

A fact-finding hearing on a parole violation is to be held within forty-five days after a paroled prisoner has been returned or is available for return to a state correctional facility. MCL 791.240a(1). Plaintiff showed that the fact-finding hearing was not held within forty-five calendar days after he first became available for return to prison. Even if the fact-finding hearing was not timely held, the delay would not warrant dismissal of the parole violation charges or release from prison. *Jones v Dep't of Corrections*, 468 Mich 646, 653, 658-659; 664 NW2d 717 (2003); *In re Lane*, 2 Mich App 140, 144; 138 NW2d 541 (1965), rev'd 377 Mich 695; 387 NW2d 912 (1966), overruled in part on other grounds by *Jones*, *supra* at 659. The proper remedy when the department of corrections fails to conduct a timely hearing is a complaint for an order of mandamus. *Jones*, *supra* at 658. The department did in fact conduct the fact-finding hearing and thus plaintiff has already received the relief for which a writ of mandamus could issue. Accordingly, we find that the trial court did not abuse its discretion in dismissing plaintiff's petition.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Helene N. White