

FILED: December 21, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JACOB BARRETT,
aka Liam O'Neil,
Plaintiff-Appellant,

v.

MAX WILLIAMS,
Director of Oregon Department of Corrections;
and RANDY WORKMAN,
Warden, Oklahoma State Penitentiary,
Defendants-Respondents.

Marion County Circuit Court
08C22940

A140542

Joseph V. Ochoa, Judge.

Argued and submitted on August 03, 2011.

Jay Edwards argued the cause and filed the brief for appellant.

Justice Joy Rillera, Assistant Attorney General, argued the cause for respondent Max Williams. On the brief were John R. Kroger, Attorney General, David B. Thompson, Interim Solicitor General, and Matthew J. Lysne, Assistant Attorney General.

No appearance for respondent Randy Workman.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Affirmed.

1 SCHUMAN, P. J.

2 Petitioner sought a writ of habeas corpus, alleging that prison officials,
3 outside of his presence, were opening and reading mail sent to him by his attorney.
4 According to petitioner, this action violated a variety of his state and federal
5 constitutional rights. The court granted defendant's motion to deny the petition, and
6 petitioner appeals. We affirm.

7 A motion to deny a habeas corpus petition under ORS 34.680 for failure to
8 state a claim occurs after the petition for the writ is submitted but before it is issued; it is
9 analogous to a motion to dismiss under ORCP 21 A(8). See [Dunn v. Hill](#), 211 Or App
10 590, 597, 156 P3d 72 (2007) (ORCP 21 A(8) is the appropriate analog when a habeas
11 petition is challenged for failure to state a claim). In reviewing the grant of such a
12 motion, we therefore assume the truth of all the allegations in the petition and give the
13 petitioner the benefit of all favorable inferences that may be drawn from them. [Moser v.](#)
14 [Mark](#), 223 Or App 52, 54, 195 P3d 424 (2008).

15 Defendant correctly stated the facts under those standards in his motion to
16 deny the petition.

17 "[Petitioner] is in the legal custody of the Oregon Department of
18 Corrections but placed in the physical custody of the Oklahoma State
19 Penitentiary [OkSP] under the Interstate Compact Agreement.

20 "An Oregon attorney, Charles Simmons, represents him in a
21 Klamath County post-conviction case as well as 'on a number of [other]
22 civil actions, including a civil tort being prepared against the Oklahoma
23 Department of Corrections.'

1 "Starting in August 2008, the OSP staff began to 'open, read and
2 confiscate' the legal mail from Simmons, outside of [petitioner's] presence
3 and without due process rights * * *."

4 The petition also alleges that OkSP staff members "continue to open and read all my legal
5 mail outside my presence and refuse to deliver the legal mail confiscated * * *." The tort
6 case "being prepared," according to the petition, alleges that OkSP staff are committing
7 assault and battery against petitioner and "aiding and promoting racist gangs to assault"
8 him. Further, the petition recites the administrative remedies available to him and states
9 that he has exhausted all of them, without relief.

10 To overcome the motion to deny, the petition must allege facts (as opposed
11 to mere conclusions) that are sufficient to state a claim on which relief may be granted.
12 [Fort v. Palmateer](#), 169 Or App 568, 570, 10 P3d 291 (2000). Relief is appropriate if the
13 facts support a claim "that the [petitioner] is deprived of a constitutional right that
14 requires immediate judicial attention and for which no other timely remedy is practicably
15 available * * *." ORS 34.362(2); *Penrod/Brown v. Cupp*, 283 Or 21, 28, 581 P2d 934
16 (1978). The petition should be construed liberally and not dismissed for merely technical
17 defects. *Bedell v. Schiedler*, 307 Or 562, 566, 770 P2d 909 (1989).

18 Petitioner asserts that opening mail from his attorney in his absence
19 violated a variety of state and federal constitutional rights. In his petition and on appeal,
20 however, he presents what generously could be called arguments with respect to only
21 three: the right to counsel, the right to access to courts, and the right to equal treatment.
22 None of the arguments is persuasive.

1 We reject without discussion the argument that OkSP officials interfered
2 with petitioner's right to counsel. There is no right to counsel in either habeas corpus or
3 post-conviction relief cases under either the Sixth Amendment or Article I, section 11, of
4 the Oregon Constitution. *Elkins v. Thompson*, 174 Or App 307, 314-15, 25 P3d 376, *rev*
5 *den*, 332 Or 558 (2001). And, of course, there is no such relief in tort cases.

6 Petitioner's "access to courts" claim is grounded in the Due Process Clause
7 of the Fourteenth Amendment. The right was definitively established in *Bounds v. Smith*,
8 430 US 817, 97 S Ct 1491, 52 L Ed 2d 72 (1977), a case that dealt with inmates'
9 complaints that the state was not providing them with access to essential legal research
10 materials. The Court held that the constitution required that an inmate have a "reasonably
11 adequate opportunity to present claimed violations of fundamental constitutional rights to
12 the courts." *Id.* at 825. To comply with that requirement, the state could "assist inmates
13 in the preparation and filing of meaningful legal papers by providing prisoners with
14 adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828.
15 The Court significantly clarified and narrowed the *Bounds* holding in *Lewis v. Casey*, 518
16 US 343, 116 S Ct 2147, 135 L Ed 2d 606 (1996). *Lewis* was another case involving the
17 asserted inadequacy of prison legal materials. *Id.* at 346. The court held that the
18 constitution guaranteed inmates' access to courts only with respect to issues involving a
19 direct or collateral attack on their crime of conviction, or "in order to challenge the
20 conditions of their confinement. Impairment of any *other* litigating capacity is simply
21 one of the incidental (and perfectly constitutional) consequences of conviction * * *." *Id.*

1 at 355 (emphasis in original). Further, the inmate had to show that "the alleged
2 shortcomings * * * hindered his efforts to pursue a legal claim." *Id.* at 351. That is so
3 because, even if petitioner asserted facts indicating that the legal mail involved his crime
4 of conviction or conditions of confinement, and that reading his legal mail had a
5 detrimental impact on his ability to pursue a legal claim, those facts alone do not qualify
6 him for habeas relief; he must also allege facts showing that the deprivation of his right of
7 access to the courts "requires immediate judicial attention" and that "no other timely
8 remedy is practicably available." ORS 34.362(2); *Penrod/Brown*, 283 Or at 28.
9 Although petitioner does recite that "invoking the jurisdiction of this court to grant a writ
10 of habeas corpus is the most appropriate method of gaining the relief from the
11 deprivations" of his constitutional rights, and also that "there is a need for immediate
12 judicial scrutiny and there are no other plain, adequate or speedy remedies available," he
13 alleges no *facts*--indeed, he makes no legal *arguments*--to support those allegations. "A
14 petition must state more than mere conclusions; it must allege with particularity facts,
15 which, if true, would entitle the plaintiff to habeas corpus relief." *Fort*, 169 Or App at
16 570 (citing *Bedell*, 307 Or at 566).

17 Further, it is doubtful that petitioner *could* allege the necessary facts. In
18 *Keenan v. Peterson*, 92 Or App 703, 704, 759 P2d 1140 (1988), *vac'd and rem'd*, 307 Or
19 323, 767 P2d 441 (1989), an inmate petitioned for habeas corpus relief on the ground that
20 prison officials were depriving him of constitutional rights by monitoring telephone
21 conversations between him and his attorney. This court held that "[t]he procedures

1 adopted by [prison officials] do not infringe on any of petitioner's [constitutional] rights."
2 *Id.* On review, the Supreme Court vacated and remanded, holding that "[a]n injunction
3 proceeding, an action for declaratory judgment or a mandamus proceeding all would be
4 sufficiently timely to adjudicate petitioner's claims. * * * The trial court should have
5 dismissed the writ without reaching the merits." *Keenan v. Peterson*, 307 Or at 323, 325,
6 767 P2d 441 (1989). We discern no reason why the same reasoning does not apply here.
7 We therefore reject petitioner's claim based on the asserted denial of access to courts.

8 Petitioner argues¹ that opening his legal mail outside of his presence denies
9 him the equal protection of the laws:

10 "It is clear that Mr. Barrett would have the ability to protect any
11 mailings from his attorney * * * from disclosure to others were it not for his
12 incarceration. Because the right to be represented by counsel is a
13 fundamental right, discrimination against Mr. Barrett on the basis of his
14 incarcerated status that burdens that right is unconstitutional unless it is the
15 least restrictive means necessary to further a compelling governmental
16 interest. * * * It is clear that this standard cannot be met in this case, and
17 that your invasion of Mr. Barrett's protected attorney-client privilege
18 deprived him of equal privileges and immunities as guaranteed by Article I,
19 section 20, of the Oregon Constitution and Equal Protection of the Laws
20 under the Fourteenth Amendment."

21 "Inmates" are not a true class in this instance for purposes of Article I, section 20, that is,
22 a group that consists of individuals who would be considered as belonging to a distinctive
23 group even if the statute that burdens them did not exist. *State v. Clark*, 291 Or 231, 240,
24 630 P2d 810, *cert den*, 454 US 1084 (1981). If the group does not fit that definition, then
25 Article I, section 20, simply does not apply. *Sealey v. Hicks*, 309 Or 387, 397, 788 P2d

¹ The argument is actually made by petitioner's trial counsel in a letter to OkSP officials that is appended to, and incorporated in, the petition.

1 435, *cert den*, 498 US 819 (1990), *overruled in part on other grounds by* [*Smothers v.*](#)
2 [*Gresham Transfer, Inc.*](#), 332 Or 83, 23 P3d 333 (2001). In the absence of the criminal
3 law, "inmates" would not exist; it is the criminal law itself that creates the class.
4 Therefore, Article I, section 20, does not apply.

5 Petitioner's Fourteenth Amendment argument also fails. It derives from the
6 assertion that "the right to be represented by counsel is a fundamental right," and
7 therefore deprivation of that right must be subjected to strict scrutiny. As we have noted
8 above, however, representation by counsel in tort or post-conviction cases is not a
9 constitutional right at all, much less a fundamental one.

10 In sum, none of petitioner's constitutional arguments is persuasive.²

11 Affirmed.

² We note that OAR 291-131-030(2) provides: "Legal and official mail sent from or received in a Department of Corrections facility in sealed envelopes or parcels shall be opened and examined for contraband in the presence of the inmate, but shall not be read or photocopied, except as authorized in subsection (3) of this rule." Thus, although the constitution does not afford petitioner a right to be present when his legal mail is opened, Department of Corrections rules appear to do so.