

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Demetrius Bailey, :
Appellant :
 :
v. : No. 1165 C.D. 2007
 : Submitted: June 6, 2008
David Wakefield :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: August 12, 2008

Demetrius Bailey (Bailey) appeals *pro se* the order of the Court of Common Pleas of Huntingdon County (trial court) dismissing his petition for a writ of habeas corpus in which he asserted he was placed in disciplinary custody without being afforded an appropriate due process hearing. The trial court dismissed Bailey's petition under authority of Rule 240 of the Pennsylvania Rules of Civil Procedure, which authorizes a trial court, in certain circumstances, to dismiss a complaint as frivolous and deny the plaintiff the right to proceed *in forma pauperis*. For the reasons that follow, we affirm.

Bailey is an inmate incarcerated at the State Correctional Institution at Huntingdon (SCI-Huntingdon). On April 9, 2007, Bailey was issued a misconduct report charging him with failure to stand for a 3:00 a.m. head count. That same day, Bailey filed a grievance alleging that he was being sexually harassed by an SCI-Huntingdon employee. Thereafter, on April 13, 2007, Bailey was issued

another misconduct report charging him with lying in his grievance and with threatening an SCI-Huntingdon employee and/or his family with bodily harm. A hearing on both misconduct reports was held on April 16, 2007.

With respect to the charge of failing to stand for the head count, Bailey testified that inmates are not required to stand for the 3:00 a.m. head count; he did respond to the counting officer; and that two other inmates would also testify that he responded to the counting officer. Bailey requested the appearance of those two inmates. This request was denied as unnecessary because neither inmate would be able to testify that Bailey showed movement, which, according to the hearing examiner, was required by the Inmate Handbook.¹ Relying on the misconduct report as more credible than Bailey's testimony, the hearing examiner found that Bailey was required not only to respond orally to a roll call but also to show movement and that Bailey did neither. Accordingly, the hearing examiner imposed a sanction of 60 days in disciplinary custody.

With respect to the charge of lying and threatening an SCI-Huntingdon employee, Bailey argued that the misconduct report did not support either lying or threatening. Bailey also denied that he did either act. Again relying on the misconduct report as more credible than Bailey's testimony, the hearing

¹ According to the Inmate Handbook, an inmate must do the following when a head count is being taken:

When the signal is given for a count, you must immediately stand by your cell door or bunk, with the light on, so you are clearly visible to the officer taking the count. You must remain silent during count. If it is necessary to take a recount, you must go through the same procedure. When count is completed, you will be notified by an announcement. Counts taken after evening lockup will be silent counts and, except for you being visible to staff, the above does not apply.

Inmate Handbook, 2005 Edition, Section X(C)(14). Copies of the Inmate Handbook are made available to every prisoner under the Department of Correction's jurisdiction.

examiner found that the evidence in the misconduct report supported the charge of threatening an employee. The hearing examiner agreed, however, that the report did not support the charge of lying. Based on his finding that Bailey made threats, the hearing examiner imposed a sanction of 60 days in disciplinary custody.

Bailey appealed to the prison's Program Review Committee. Bailey asserted that the charge of failing to stand for a head count should have been dismissed for the following reasons: the inmate number on the misconduct report was incorrect; the hearing examiner's denial of his request to call witnesses prevented him from presenting a defense; and Bailey was not required to stand at a 3:00 a.m. head count. Bailey also asserted that the charge of threatening an SCI-Huntingdon employee should be dismissed because there was insufficient evidence to support the charge. Upon review of the record, the Program Review Committee sustained the disciplinary custody imposed by the hearing examiner. Bailey then appealed to the Superintendent at SCI-Huntingdon, and he affirmed.²

On June 5, 2007, Bailey petitioned for a writ of habeas corpus challenging the legality of his confinement in disciplinary custody and requesting his release therefrom. Bailey asserted, *inter alia*, that his inability to call witnesses in his defense violated the due process clause found in the United States Constitution and in the Pennsylvania Constitution. Bailey further alleged that the

² The Department has established a procedure that gives prisoners a hearing, and appeal therefrom, when they are placed in disciplinary custody. Once a hearing examiner finds an inmate guilty of the charges alleged in a misconduct report, a prisoner may seek review with the program review committee. That decision can be appealed to the superintendent or facility manager of the prison. Finally, a prisoner may appeal the decision of the superintendent or facility manager to the Department's Office of Chief Counsel. *See* Inmate Handbook, 2005 Edition, Section X(D). It is unknown whether Bailey appealed the superintendent's decision to the Department's Office of Chief Counsel.

misconduct reports were fabricated and undertaken as retaliation for Bailey's filing a grievance against an SCI-Huntingdon employee. Additionally, Bailey sought leave to proceed *in forma pauperis*.

On June 8, 2007, the trial court *sua sponte* denied Bailey's request to proceed *in forma pauperis* and dismissed his petition for a writ of habeas corpus as frivolous pursuant to PA. R.C.P. No. 240(j).³ The trial court concluded that Bailey was not entitled to seek a writ of habeas corpus because he had an adequate and meaningful legal remedy in the form of the inmate grievance review system to redress the wrongs alleged. In any case, the trial court held that the complaint failed to state a claim because the denial of Bailey's request to call two witnesses was a proper exercise of the hearing examiner's discretion. The present appeal followed.

On appeal, Bailey raises one issue for this Court's review: whether the disciplinary hearings at SCI-Huntingdon that resulted in his confinement in disciplinary custody were conducted in violation of his procedural due process rights under the United States and Pennsylvania Constitutions.⁴ Bailey argues that

³ It provides as follows:

If, simultaneous with the commencement of an action or proceeding or the taking of an appeal, a party has filed a petition for leave to proceed *in forma pauperis*, the court prior to acting upon the petition may dismiss the action, proceeding or appeal if the allegation of poverty is untrue or if it is satisfied that the action, proceeding or appeal is frivolous.

PA. R.C.P. No. 240(j). A frivolous action has been defined as "[o]ne that 'lacks an arguable basis either in law or in fact.'" Note to PA. R.C.P. No. 240, citing *Neitzke v. Williams*, 490 U.S. 319 (1990). Under Rule 240(j), an action is frivolous, "if, on its face, it does not set forth a valid cause of action." *Bailey v. Wakefield*, 933 A.2d 1081, 1083-1084 (Pa. Cmwlth. 2007).

⁴ When reviewing the decision of a trial court, our scope of review is limited to a determination of whether constitutional rights have been violated or whether the trial court abused its discretion or committed an error of law. *Mann v. City of Philadelphia*, 563 A.2d 1284, 1286 (Pa. Cmwlth. 1989). **(Footnote continued on the next page . . .)**

the hearing examiner improperly denied his request to call witnesses and, in any case, reached a conclusion not supported by a preponderance of evidence. Finally, Bailey asserts that he did not receive fair notice in the form of a warning that his conduct violated prison rules. Stated otherwise, Bailey argues the merits of his complaint and not whether the trial court erred in holding that a habeas corpus proceeding is not available to a petitioner with another remedy by which to pursue his claims.

The availability of a writ of habeas corpus is governed by statute. Section 6503 of the Judicial Code states as follows:

- (a) GENERAL RULE. -- Except as provided in subsection (b), an application for habeas corpus to inquire into the cause of detention may be brought by or on behalf of any person restrained of his liberty within this Commonwealth under any pretense whatsoever.
- (b) EXCEPTION. -- Where a person is restrained by virtue of a sentence after conviction for a criminal offense, the writ of habeas corpus shall not be available if a remedy may be had by post-conviction hearing proceedings authorized by law.

42 Pa. C.S. §6503. Originally, the writ of habeas corpus functioned only to test the legality of a petitioner's commitment and detention. *Bryant v. Hendrick*, 444 Pa. 83, 87, 280 A.2d 110, 112 (1971). The manner of his treatment and discipline during confinement was traditionally not reviewable in habeas corpus proceedings. *Id.* However, the availability of a writ of habeas corpus was then extended to secure relief from confinement "under conditions which amount to cruel and unusual

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1989). As our inquiry involves solely questions of law, our standard of review is *de novo*. *Payne v. Department of Corrections*, 582 Pa. 375, 383, 871 A.2d 795, 800 (2005).

punishment.” *Id.* at 89, 280 A.2d 113. In extending the scope of habeas corpus, our Supreme Court noted the following caveat:

We do not mean to indicate by our present ruling that it is the function of the courts to superintend the treatment and discipline of prisoners in penal institutions.... [Only] where the conditions of confinement are ... cruel and callous ... the courts may order relief through habeas corpus....

Id. at 90, 280 A.2d 113. Stated otherwise, a writ of habeas corpus proceeding may be used to challenge the conditions of confinement, including discipline, as well as the legality of the confinement itself.

However, notwithstanding the enlarged scope of habeas corpus, it “is an extraordinary remedy that is available after other remedies have been exhausted or are ineffectual or non-existent.” *Department of Corrections v. Reese*, 774 A.2d 1255, 1260 (Pa. Super. 2001). Further, a habeas corpus proceeding is not a substitute for appellate review. *Id.* A habeas proceeding cannot be used as a collateral attack on a judgment or decision. STANDARD PENNSYLVANIA PRACTICE 2d §98:3 (2005). An exception to this general rule will be found only in the extraordinary case where there is a peculiar and pressing need for the writ because a fundamental error, such as lack of jurisdiction, renders the judgment under which the prisoner is confined wholly void. *Goto v. Lane*, 265 U.S. 393, 402 (1924); *McGlenn v. Smith*, 344 Pa. 41, 47, 24 A.2d 1, 5 (1942).⁵

Here, Bailey had available, and used, the inmate grievance review system to redress his disciplinary custody, which this Court has specifically held to

⁵ See *Smith v. Rundle*, 423 Pa. 93, 96, 223 A.2d 88, 89 (1966) (affirming trial court’s dismissal of petition for writ of habeas corpus without a hearing where the challenges to petitioner’s trial should have been raised in an appeal but also finding the substance of the prisoner’s constitutional claim non-meritorious).

provide “an adequate and legal remedy.” *Waters v. Department of Corrections*, 509 A.2d 430, 433 (Pa. Cmwlth. 1986) (dismissing an inmate’s petition for a writ of mandamus to challenge his disciplinary custody for the reason that the prison grievance system provided the remedy for seeking this relief). The trial court held the existence of this procedure foreclosed Bailey’s ability to petition for a writ of habeas corpus. Further, Bailey’s petition does not raise such a fundamental error, such as lack of jurisdiction, that might entitle him to invoke the exception to the general rule that habeas corpus is not available where the inmate has another remedy.

We agree with the trial court. To allow Bailey’s petition to go forward would turn the habeas proceeding, inappropriately, into a replacement for the prison grievance system; an appeal of the outcome of the grievance; or a collateral attack on that outcome. This would violate the principles articulated in *McGlinn*, 344 Pa. at 48, 24 A.2d at 4-5. Bailey challenges an evidentiary ruling by the hearing examiner, but that error, if any, could have been corrected in the procedure established for reviewing the imposition of disciplinary custody.

In any case, the constitutional rights of one subject to a prison disciplinary proceeding are limited and do not mirror those guaranteed to one accused of a crime. *Mays v. Fulcomer*, 552 A.2d 750, 752 (Pa. Cmwlth. 1989).⁶

⁶ An inmate’s entitlement to procedural due process is triggered by a deprivation of a protected liberty interest. *Brown v. Blaine*, 833 A.2d 1166, 1172 (Pa. Cmwlth. 2003). However, due process imposes few restrictions on a prison’s decision regarding where to house a prisoner. *Clark v. Beard*, 918 A.2d 155, 161 (Pa. Cmwlth. 2007). There is a protected liberty interest in avoiding restrictive confinement where the conditions impose atypical and significant hardship in relation to the ordinary incidents of prison life. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (citing *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). The United States Supreme Court held in *Wilkinson* that restrictive confinement deprives an inmate of a protected liberty interest under the following conditions: (1) the inmate has been sanctioned with confinement that deprives the **(Footnote continued on the next page . . .)**

The minimum due process required in a prison disciplinary proceeding was established in *Wolff v. McDonnell*, 418 U.S. 539 (1974) and consists of (1) written notice of the charges against the prisoner no less than twenty-four hours before the hearing; (2) a written statement of the evidence upon which the fact finder relied and the reasons for the discipline; (3) an opportunity to call witnesses and present documentary evidence in his defense, where it will not jeopardize institutional safety and correctional goals; and (4) in rare cases assistance by prison staff or a fellow inmate during the hearing itself. The right of a prisoner to call witnesses is not absolute, but discretionary.

As explained by the United States Supreme Court,

[O]rdinarily the right to present evidence is basic to a fair hearing, but the inmate's right to present witnesses is necessarily circumscribed by the penological need to provide swift discipline in individual cases [... and] by the very real dangers in prison life which may result from violence or intimidation directed at either other inmates or staff.

Ponte v. Real, 471 U.S. at 491, 495 (1985). The Supreme Court has further explained:

Prison officials must have the *necessary discretion to keep the hearing within reasonable limits* and to refuse to call witnesses

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inmate of almost any environmental or sensory stimuli and of almost all human contact; (2) the placement in the confinement is of an indefinite duration; and (3) the confinement disqualifies an otherwise eligible inmate for parole. *Id.* at 223. Thus, an inmate's residence in restrictive confinement that is temporary, non-solitary, and does not interfere with eligibility for parole does not implicate a protected liberty interest.

Here, Bailey did not aver that his temporary residence in disciplinary custody deprived him of any outside contact or that it interfered with his eligibility for parole. Bailey's petition does not state that his disciplinary custody imposed atypical and significant hardships in relation to the ordinary incidents of prison life.

that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. *Although we do not prescribe it, it would be useful for the [disciplinary board] to state its reasons for refusing to call a witness*, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases.

Wolff, 418 U.S. 566 (emphasis added). Thus, prison officials have discretion to refuse to call witnesses at a disciplinary hearing for safety reasons, lack of relevance, or lack of necessity, and this discretion does not implicate due process.

In addition, the exercise of a prison official's discretion at a disciplinary hearing is not reviewable in a habeas corpus proceeding. *See Fortune v. Dragovich*, 792 A.2d 1257, 1259 (Pa. Super. 2002) (a habeas corpus petition filed to challenge the exercise of discretion by prison officials is precluded); *see also Johnston v. Lehman*, 609 A.2d 880, 884 (Pa. Cmwlth. 1992) (although such discretionary exercises are not immune from judicial scrutiny, they are appropriately addressed in a claim of deprivation of constitutional rights under the federal Civil Rights Act, 42 U.S.C. §1983).

Here, Bailey requested two inmate witnesses appear at the disciplinary hearing to testify that Bailey responded to the counting officer. The hearing examiner denied Bailey's request as unnecessary to establish Bailey's guilt or innocence.⁷ Accordingly, the hearing examiner's refusal to call the requested

⁷ The Department's policy provides, in relevant part, that:

The Hearing Examiner may approve the presence of a staff member or witness, only if the staff member or witness has knowledge of the incident, is present on facility grounds, and only if the testimony is needed to establish the guilt or innocence of the inmate.

Department of Corrections Inmate Discipline Policy, DC-ADM 801, §3(D)(1).

witnesses was an exercise of the hearing examiner's discretion, which is not reviewable in a petition for a writ of habeas corpus. *Fortune*, 792 A.2d at 1259.

Finally, we note that this Court cannot grant the relief requested in Bailey's petition for a writ of habeas corpus because he is no longer in disciplinary custody.⁸ Indeed, the remedy of habeas corpus is not available where the challenged confinement has ended. *See, e.g., Commonwealth v. Smith*, 486 A.2d 445 (Pa. Super. 1984) (although habeas petition challenging unconstitutional conditions was filed prior to prisoner's release, subsequent release rendered appeal moot). Bailey's disciplinary custody is over and beyond the ability of this Court to alter.

For these reasons, the trial court's dismissal of Bailey's petition for a writ of habeas corpus as lacking an arguable basis in either law or fact is affirmed.

MARY HANNAH LEAVITT, Judge

⁸ It is axiomatic that an actual case or controversy must exist at all stages of appellate review. *See Pap's A.M. v. City of Erie*, 571 Pa. 375, 389, 812 A.2d 591, 600 (2002) (since the existence of an actual controversy is essential to appellate jurisdiction, if, pending an appeal, an event occurs which renders it impossible for the appellate court to grant any relief, the appeal will be dismissed as moot).

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David Wakefield :

ORDER

AND NOW, this 12th day of August, 2008, the order of the Court of Common Pleas of Huntingdon County dated June 8, 2007, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge