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DISTRICT II

February 14, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1060 Anthony Plemens v. Eric Severson (L.C. #2017CV325)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Anthony Plemens appeals pro se an order denying his petition for a writ of habeas corpus. Plemens contends that he was arrested without a warrant and denied a probable cause hearing within forty-eight hours. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2015-16).[1] Plemens was detained, not arrested, pursuant to an order for violations of his probation and extended supervision.[2] Plemens' challenges, based solely on his contention that he was under arrest without a warrant, are without merit. We affirm.

BACKGROUND

In February 2017, Plemens was on probation for felony convictions. On February 13, the Wisconsin Department of Corrections (DOC) issued an order to detain Plemens because of his involvement in a drug-related incident, which would violate the rules of his probation. On that date, police detained Plemens and held him in the Waukesha County Jail.

About two weeks later, Plemens petitioned the circuit court for a writ of habeas corpus, naming the county sheriff as defendant. The sheriff filed a return to the petition and Plemens replied by letter. The court set a hearing for March 29, 2017.

Meanwhile, on March 3, 2017, the DOC conducted a preliminary hearing at which it found probable cause for revocation of Plemens' probation. The DOC notified Plemens of its decision to keep him in custody until it held a final revocation hearing. The final hearing would be administrative in nature, and he would be allowed to present evidence (including witnesses) and have legal counsel present. The DOC set the hearing for early April 2017, but upon agreement with Plemens, reset it for May.

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

[2] It appears that Plemens was on both probation and extended supervision. For ease of discussion, we will simply refer to probation.

At the March 29, 2017 hearing, the court advised the parties that it had reviewed "all of the materials" and then heard arguments from Plemens, appearing pro se, and from sheriff's counsel. Plemens argued that he was unlawfully arrested for new criminal charges that were pending and that his right to a probable cause hearing within forty-eight hours had been denied. Sheriff's counsel countered that Plemens had been on probation for a felony conviction, that his involvement in a drug-related incident violated conditions of his probation, and that this violation led to the detention order and his continued custody. Counsel noted that the district attorney had not issued any new criminal charges, which the court confirmed with Plemens.

The court dismissed the petition, concluding that Plemens' custody was based on the order to detain, not criminal charges. The court explained to Plemens that, after the DOC issued its final revocation decision in May, he had a right to challenge it through an administrative appeal process. Plemens moved for reconsideration. The court signed the order for dismissal, effectively denying the motion. Plemens appeals.[3]

[3] In his brief, the sheriff asserts that Plemens' brief incorporates documents that were not part of the record or were not the same version as those in the record. The sheriff requests that we strike those documents and the portions of Plemens' brief that refer to them. Although the sheriff is correct that a party should only cite to and rely on documents of record, we have reviewed those documents and conclude that, even if they were properly part of the record, they would not affect our analysis or decision.

DISCUSSION

The denial of a petition for a writ of habeas corpus presents a mixed question of fact and law. ***State v. Pozo***, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12. We will not disturb any factual determinations unless clearly erroneous. ***Id.*** Whether the habeas writ is available to the petitioner is an issue of law that we review de novo. ***Id.***

"As an extraordinary writ, habeas corpus is available to a petitioner only under limited circumstances." ***State ex rel. Haas v. McReynolds***, 2002 WI 43, ¶12, 252 Wis. 2d 133, 643 N.W.2d 771. A party who seeks habeas corpus relief must show (1) that he or she is restrained of liberty, (2) that the restraint was imposed by a body without jurisdiction or contrary to constitutional protections, and (3) that there is no other adequate remedy available in the law. ***Id.*** All three must be met. ***Id.***

Before reaching Plemens' primary argument, we address his general complaint about the manner in which the court conducted its hearing. Prior to making a decision on the petition, the court held a hearing, obliging the sheriff to produce Plemens and affording Plemens an opportunity to address the court and argue his case. Such a hearing is not required; under the habeas corpus statutes, a prisoner is first brought before the court *after* the writ has been granted. WIS. STAT. §§ 782.13, 782.14, & 782.15 (the writ commands the custodian to produce the prisoner and to explain the basis for the detention). Plemens nonetheless complains that the court did not conduct the hearing fully or fairly, asserting that the court confused his case with another and did not properly review the facts submitted before or during the hearing. Without identifying the specific error that resulted (other than denial of his petition), Plemens claims that this was an erroneous exercise of discretion. We disagree.

At the outset of the hearing, the court acknowledged that it had a similar case pending and had the two cases "a little bit confused." But the confusion related to the scheduling, not the merits, of the two matters. The very acknowledgement by the court that it had been slightly confused points up that the confusion was temporary and cleared, and the record reveals no misunderstanding by the court about the material facts or issues. Stating that it had "read all of the materials" (which included Plemens' petition and reply), the court then correctly summarized the case and zeroed in on Plemens' allegations. Without limitation, the court allowed Plemens to argue his claim and respond to the defendant's arguments. The hearing transcript demonstrates that the court fully considered the parties' contentions, examined the submitted materials, and had a firm command of the facts and issues. We see no error in the manner in which the court conducted the hearing.

Plemens asserts that his detention was based upon pending or new criminal charges arising out of the drug-related incident. He contends that the order to detain did not constitute a warrant, that his detention was therefore a warrantless arrest, and that his right to a criminal probable cause hearing within forty-eight hours was violated. *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991); ***State v. Koch***, 175 Wis. 2d 684, 696, 499 N.W.2d 152 (1993) (general requirement for judicial determination of probable cause within forty-eight hours). Plemens is in error.

Plemens was in custody pursuant to an order to detain from the DOC. Despite arguing that new criminal charges caused his detention, Plemens does not assert, much less explain, why the DOC's order to detain was somehow invalid or inapplicable. The DOC is authorized to take a probationer into custody to consider rule violations and possible revocation. ***State v. McKinney***, 168 Wis. 2d 349, 354, 483 N.W.2d 595 (Ct. App. 1992). Such agency action is not a

criminal proceeding and does not require the forty-eight-hour probable cause hearing. ***Id.***; ***State v. Martinez***, 198 Wis. 2d 222, 233-34, 542 N.W.2d 215 (Ct. App. 1995).

Moreover, Plemens is simply mistaken about the criminal charges. Defense counsel noted that information about the drug-related incident had been referred to the district attorney's office, but the court confirmed with Plemens and counsel that there were no new criminal charges at the time of the March 29, 2017 hearing, much less at the time of the February 13 detention. Merely because the conduct violating probation could also constitute a new crime does not mandate the district attorney to immediately file criminal charges. ***McKinney***, 168 Wis. 2d at 355. Absent such charges, no criminal probable cause hearing is required. ***Martinez***, 198 Wis. 2d at 233-34 (because criminal proceedings had not yet been commenced, defendant was not under arrest but was taken into custody per a probation hold and therefore "the requirements of a probable cause hearing [were] not applicable"). Plemens' additional contention on appeal that he has been denied his right to a speedy trial is similarly without merit because there were no new criminal charges at that time.

Although Plemens does not challenge the probation hold other than his contention that he was in custody pursuant to an arrest, we note that at the hearing, the court pointed out that Plemens could contest his probation revocation at the DOC's final hearing in May. ***Haas***, 252 Wis. 2d 133, ¶14 (a prisoner may challenge an administrative decision revoking probation through a writ of certiorari); *see also* ***State ex rel. Reddin v. Galster***, 215 Wis. 2d 179, 183, 572 N.W.2d 505 (Ct. App. 1997). If the final revocation decision was adverse and his administrative appeals were exhausted, Plemens could file a petition for a writ of certiorari to challenge the agency's decision. *See* ***Haas***, 252 Wis. 2d 133, ¶14. Because the certiorari writ was available, the habeas writ was not. ***Id.***

Plemens argues that, because of his pro se status, we should liberally construe his pleadings, focus on the facts and not labels, and that if he named the wrong person as a defendant or incorrectly labeled his action, we should substitute the proper defendant and/or amend his pleadings accordingly. *See* ***Amek bin-Rilla v. Israel***, 113 Wis. 2d 514, 521-22, 335 N.W.2d 384 (1983) (discussing the liberal pleading standards with respect to pro se prisoner litigation). We have in fact liberally construed Plemens' pleadings as well as his arguments, but to no avail for him. The sheriff, having custody of Plemens, was the correct person to name as a defendant for a habeas petition, but, as discussed, habeas is the incorrect action to commence. Further, amending or relabeling the petition as one for a writ of certiorari would be of no help here, as Plemens' petition was filed before the DOC's final revocation decision, making a petition for a writ of certiorari premature.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals