

1986

LOUIS MALEK, Plaintiff and Appellant , v. KEN SHULSEN and GARY WEBSTER, Respondents and Appellees : Brief of Respondent

Utah Supreme Court

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1986 21052

IN THE SUPREME COURT OF THE STATE OF UTAH

LOUIS MALEK,	:	
Plaintiff/Appellant,	:	
-v-	:	District Court No. C-85-2595
	:	Supreme Court No. 21052
	:	Category No. 3
KEN SHULSEN and GARY WEBSTER,	:	
Respondents/Appellees.	:	

BRIEF OF RESPONDENTS

AN APPEAL FROM THE ORDER DENYING PETITIONER'S
APPLICATION FOR A WRIT OF HABEAS CORPUS IN THE
THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE HOMER F. WILKINSON, JUDGE PRESIDING

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Supreme Court Utah

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	:	Supreme Court No. 21052
KEN SHULSEN and GARY WEBSTER,	:	Category No. 3
Respondents/Appellees.	:	

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether petitioner's claims are barred by the applicable statute of limitations?
2. Whether petitioner is entitled to immediate release from the Utah State Prison absent a showing that he was prejudiced by the Board of Pardons' delay in conducting his initial parole hearing or his parole revocation hearing.

STATEMENT OF THE CASE

This is an appeal from the denial of a writ of habeas corpus filed in the Third District Court of Salt Lake County, the Honorable Homer F. Wilkinson presiding.

STATEMENT OF THE FACTS

On May 18, 1977, petitioner pled guilty to a charge of manslaughter arising out of the beating death of a six year old boy. (R. 29). He was sentenced to serve one to fifteen years in the Utah State Prison (R. 3). After serving approximately five years of his sentence, petitioner was paroled on May 11, 1982. (R. 29). Less than ten months later, petitioner was arrested by

the Provo City Police Department and charged with attempted murder and aggravated robbery. (R. 12, 30). Based upon the filing of criminal charges against petitioner, the Board of Pardons issued a warrant for his arrest on March 18, 1983 and charged him with violating the terms and conditions of his parole. (R. 30). On that same day, petitioner was served with the Board's warrant and waived his right to a prerevocation hearing. He was transported to the Utah State Prison to await trial on the criminal charges. (R. 12, 30). The Board of Pardons scheduled petitioner's hearing for April 13, 1983. The hearing was subsequently continued by the Board pending disposition of the criminal charges. (R. 32).

On July 8, 1983, petitioner was convicted of aggravated robbery and attempted murder and sentenced by Fourth District Judge Alan Sorenson to serve two concurrent sentences of five years to life at the Utah State Prison. (R. 30). The Board of Pardons received a copy of the Fourth District Court's order on May 16, 1984, and scheduled a parole hearing for May 23, 1984. (R. 12, 30). Petitioner objected to the scheduled hearing date on the grounds that he had not had adequate time to prepare for the hearing. Accordingly, at petitioner's request, the hearing was rescheduled for July 25, 1984. He appeared before the Board on that date, pled guilty to the parole violation charges and was granted a parole rehearing date of July, 1988. (R. 31).

Over nine months later, petitioner filed an application for a writ of habeas corpus, claiming that the hearing conducted on July 25, 1984, was not conducted in a timely manner, and therefore, he was entitled to immediate release from the Utah State Prison. (R. 2).

The district court denied the petition on the grounds that petitioner's claim was barred by the statute of limitations and that petitioner had not been prejudiced by the delay in conducting the parole hearing. (R. 40, 42).

SUMMARY OF ARGUMENT

Petitioner's claims are based upon two different theories. First, that the Board of Pardons failed to conduct a timely parole grant hearing as required by Utah Code Ann. § 7-27-7 and second, that the Board failed to conduct a timely parole revocation hearing as required by Morrissey v. Brewer, 408 U.S. 471 (1972).

Respondents contend that regardless of whether the Board failed to conduct the parole hearings in a timely manner, that petitioner's claims are barred by the three month statute of limitations which governs the filing of habeas corpus claims. (Utah Code Ann. § 78-12-31.1). This provision operates as a bar to petitioner's claims despite petitioner's attempt to characterize his injuries as ongoing in nature and despite the existence of a statutory provision which tolls the running of the limitation period while petitioner is imprisoned. Petitioner's attempts to defeat the limitation period are contrary to basic rules of statutory construction and basic legal principles which establish when a cause of action accrues.

The tolling statute was enacted in 1975 and contains general language applicable to all types of legal claims filed by individuals who are imprisoned. By contrast, the limitation period governing habeas corpus claims was enacted in 1979 and

applies specifically to habeas corpus claims. Therefore, the three month statute of limitations controls over the previously enacted and more general language of the tolling provision and consequently operates as a bar to petitioner's claims.

Alternatively, even if petitioner's claims were not barred by the statute of limitations, petitioner is required to show that he was prejudiced by the delay in conducting the parole hearings before he is entitled to relief in the form of an order directing his release from imprisonment. The requirement of establishing prejudice as a condition precedent to release is firmly established in both state and federal jurisdictions, as well as the State of Utah.

In the present case, petitioner appeared before the Board on charges of violating the conditions of his parole. Yet, petitioner failed to produce any evidence at either the fact-finding or dispositional phase of that hearing. Instead, petitioner plead guilty to the parole violation charges based upon the intervening criminal convictions. Therefore, petitioner can not contend that the delay in conducting the hearing deprived him of the testimony of critical witnesses or any other form of mitigating evidence, since petitioner did not attempt to present any evidence at the Board hearing.

Accordingly, petitioner has failed to establish that he was prejudiced by the delay in conducting his parole hearings and consequently, petitioner is not entitled to release.

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN FINDING THAT PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS WAS BARRED BY THE STATUTE OF LIMITATIONS.

It is a general principle of law that a statute of limitations commences running when the cause of action has accrued or the right to commence legal action comes into existence. Generally, a cause of action accrues when a wrong or injury has been sustained. See Ash v. State, 572 P.2d 1374 (Utah 1977) and Tolman v. K-Mart Enterprises, Inc., 560 P.2d 1127 (Utah 1977). Accordingly, once a individual has sustained a wrong, he is entitled to commence legal action within a statutorily prescribed period of time and failure to commence suit within the appropriate time will result in a denial of that claim.

Utah Code Ann. § 78-12-31.1 is the statute of limitations governing writs of habeas corpus. That section provides as follows:

Within three months: For relief pursuant to a writ of habeas corpus. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner.

In the present case, petitioner has based his writ of habeas corpus upon two separate claims. First, petitioner claims that he was denied a parole grant hearing or a date for that hearing within six months of his commitment to the Utah State Prison. Petitioner's contention is based upon Utah Code Ann. § 77-27-7 which provides:

(1) The Board of Pardons shall determine within six months after the date of an offender's commitment for a felony offense, a date upon which the offender shall be afforded a hearing to establish a date of release or a date for a rehearing, and shall promptly notify the offender of the date.

(Emphasis added).

On March 18, 1983, petitioner was transported to the Utah State Prison pursuant to a Board warrant. On July 8, 1983, he was committed to the Utah State Prison by Fourth District Court Judge Alan Sorenson to serve two concurrent sentences of five years to life. Although petitioner initially appeared before the Board on April 13, 1983, he was not given a release date at the time nor was his case heard by the Board. For purposes of the statute, petitioner first appeared before the Board on July 25, 1984.

Thus, the question is when did petitioner's cause of action accrue. Petitioner was transported to the Prison on March 18, 1983 on parole violation charges, but was not actually committed to the Prison "for a felony offense" until July 8, 1983. Thus, under Utah Code Ann. § 77-27-7 cited above, it is the commitment date of July 8, 1983 which is used to calculate the six month hearing date. Under that analysis, the petitioner should have been heard by the Board of Pardons no later than January 8, 1984. It was on this date that petitioner's cause of action accrued because it was at this point in time that petitioner had the right to commence legal action.

Utah Code Ann. § 78-12-31.1 cited above, limits the petitioner's right to file an application for a writ of habeas

corpus to three months from the time his cause of action accrued. This means that petitioner had from January 8, 1984 to April 8, 1984 to commence legal action challenging the validity of his confinement. However, as discussed above, it was more than one year later, on May 5, 1985, that petitioner finally filed his application. Thus, the trial court was correct in finding that petitioner's claim was untimely and barred by the statute of limitations.

Petitioner's second claim is that his parole revocation hearing was not conducted in a timely manner as required by Morrissey v. Brewer, 408 U.S. 471 (1972). In Morrissey, the Supreme Court held that a parolee detained on parole violation charges was entitled to a revocation hearing within a reasonable period of time. The Court also held that 60 days was not per se unreasonable. However, beyond this general guideline, the court did not specify an exact period of time within which a revocation hearing must be held. Petitioner contends that it is per se unreasonable to conduct a revocation hearing more than 90 days after a parolee is taken into custody. Assuming for purposes of argument, that petitioner's contention is correct and that the 90 day period is controlling, petitioner's revocation hearing should have been conducted no later than October 9, 1983; 90 days after his commitment to the Utah State Prison. Thus, petitioner's cause of action accrued on October 9, 1983 and he had 3 months from that date until January 9, 1984 to file his application for a writ. However, it was not until almost a year and a half later, May, 1985, that petitioner finally filed his claim for relief. Thus,

the trial court was correct in finding that petitioner's second claim was also untimely and barred by the statute of limitations.

Petitioner, however, seeks to avoid application of the three month limitation period by characterizing his injury as ongoing in nature, i.e., unlawful incarceration. Petitioner then contends that because his injury is ongoing, the statute of limitations begins to run anew each day that he is detained. Petitioner's contention, however, ignores basic legal principles which establish when a cause of action accrues. A cause of action accrues and a statute of limitations commences running when the injured party has the right to bring an action to enforce his rights. An injury cannot be characterized as ongoing in nature simply because the injured party continues to suffer the consequences of the initial wrongful conduct. If petitioner's contention were accurate, the statute of limitations would not commence running in a personal injury suit until the plaintiff's physical injuries had healed. Obviously, neither the legislature or the courts intended such a result.

Moreover, even if petitioner's contention were correct and petitioner's injury was ongoing, the illegal condition, i.e., the failure to conduct a timely hearing, was remedied in July, 1984 when the Board of Pardons conducted a consolidated initial and parole revocation hearing. Thus, the illegal condition of confinement was removed at that time and petitioner was no longer detained unlawfully. Therefore, petitioner's cause of action accrued no later than July, 1984, and under the three month limitation period, petitioner was required to commence suit by

October, 1984. Yet even under this questionable line of reasoning, petitioner waited six months beyond this date to commence suit and therefore, the limitation period still operates as a bar to his claims.

Petitioner also contends that the statute of limitations governing the filing of habeas corpus petitions is not controlling in this instance because the limitation period is tolled during the period of petitioner's incarceration. The tolling statute is contained in Utah Code Ann. § 78-12-36 and provides, in pertinent part, as follows:

If a person entitled to bring an action, other than for recovery of real property, is at the time the cause of action accrued either:

* * *

(3) imprisoned on a criminal charge or in execution under the sentence of a criminal court for a term less than for life;

The time of such disability is not a part of the time limit for the commencement of that action.

Utah Code Ann. § 78-12-36 (1953 as amended 1975).

It is a well established principle of statutory construction, that where two statutes are in apparent conflict, the more recent enactment is controlling. Murray City v. Hall, 663 P.2d 1314 (Utah 1983). In the present case, the limitation period governing habeas corpus claims is a more recent enactment than the general tolling provision. The general tolling provision was enacted in 1975 and closely paralleled an earlier enactment. The limitation period for habeas corpus claims was enacted in 1979. Thus, the three month limitation period enacted in 1979 controls over the previously enacted tolling statute.

In addition, this Court has concluded that narrowly drawn, specific language in an act controls over the more general, comprehensive language of an act. Rammel v. Smith, 560 P.2d 1108 (Utah 1977); Osuala v. Aetna Life and Casualty, 608 P.2d 242 (Utah 1980). The tolling provision contained in Utah Code Ann. § 78-12-36 (1975) governs prisoners and legal claims generally. By contrast, the legislature has enacted a very specific limitation period for habeas corpus petitions. Again, applying basic principles of statutory construction, it is evident that the specific limitation period enacted for habeas corpus claims controls over the more general language of the tolling statute.

Finally, this Court has stated that statutes should be construed in a logical manner to avoid interpretations which may be confusing or which would render the statute meaningless. Curtis v. Harmon Electronics, Inc., 575 P.2d 1044 (Utah 1978). If petitioner's interpretation is correct and the statute of limitations on a habeas corpus claim does not commence running until the prisoner is released, the petitioner's claim would be moot, since the relief sought in an application for habeas corpus is either release or removal of the unlawful conditions of confinement. Accordingly, the limitation period for filing writs of habeas corpus would be rendered meaningless since there would be no limitation period at all.

A similar result was rejected by this Court in Spain v. Stewart, 639 P.2d 166 (Utah 1981), where the plaintiff, a probationer, brought a petition for a writ of habeas corpus protesting the legality of his confinement in a county jail. He

claimed that he had not been timely taken before the magistrate for a bail hearing and had not been provided with a written statement of the alleged probation violation. The district court heard the petition and ordered that the petitioner be taken before a magistrate and bail fixed. Bail was promptly set and the petitioner was released. When the district court learned that petitioner had been released on bail, it dismissed the habeas corpus petition because the case was moot. The petitioner appealed this decision, claiming that the issue was not moot because he remained under the restrictive conditions of bail. This court disagreed and held that once the preliminary hearing was held and bail fixed, the illegal condition had been removed and the case was, therefore, moot. Thus, this Court has evidenced a clear intent to consider petitions for habeas corpus only when the judicial relief sought will actually affect the rights of the litigants. Duran v. Morris, 635 P.2d 43 (Utah 1981). A contrary interpretation of the legislation would utterly defeat such a result.

Therefore, applying these basic principles of statutory construction to the present case, it is evident that petitioner's interpretation of the conflicting statutes is erroneous. Such an interpretation is illogical and renders the limitation period placed on filing habeas corpus petitions meaningless. Moreover, it completely undermines the legislature's intent to specifically limit the time frame for filing these types of claims because under petitioner's interpretation, there would be no limitation at all.

Finally, petitioner's interpretation of the legislation ignores the realities of a modern correctional system and the fact that the rationale underlying the enactment of the tolling statute no longer applies. The tolling statute was enacted during a period of time when prisoners faced insurmountable legal and practical difficulties in initiating and prosecuting claims. In addition, prisoners were considered to be "stripped" of their civil rights and thereby lacked the legal capacity to sue. See Utah Code Ann. § 76-1-37 (1953, repealed 1973) and Major v. Arizona State Prison, 642 F.2d 311 (9th Cir. 1981). Prisoners today no longer operate under these disabilities. Prisoners have the legal capacity to sue and are constitutionally guaranteed access to the courts. In fact, state prisoners in Utah are provided with direct access to legal counsel to assist them in the preparation of their claims and the initiation of legal action. Therefore, application of the tolling statute in the context of habeas corpus claims is unwarranted under these circumstances.

In summary, the trial court was correct in its determination that petitioner's claims are barred by the three month statute of limitations. Neither the nature of the injury or the tolling provisions contained in Utah Code Ann. § 78-12-36 afford petitioner relief from that provision.

POINT II

THE TRIAL COURT WAS CORRECT IN FINDING THAT
ABSENT A SHOWING OF PREJUDICE, PETITIONER IS
NOT ENTITLED TO RELEASE.

Petitioner claims that the trial court erred in requiring the petitioner to show that he was prejudiced by the

Board's failure to conduct timely parole hearings. As a consequence, petitioner maintains that he is entitled to immediate release from prison. Utah Code Ann. § 77-27-11 is the statute governing the revocation of parole in Utah. The statute, however, does not specify the period of time within which a revocation hearing must be held.

In Morrissey v. Brewer, 408 U.S. 471 (1972), the Supreme Court held that a parole revocation hearing must be conducted within a reasonable period of time of the parolee's detention. In mandating this hearing, however, the Court declined to adopt a rigid time frame for all revocation hearings and stated: "We cannot write a code of procedure; that is the responsibility of each State." *Id.* at 488. Instead, the Court set forth the general requirement that the hearing must be held within a reasonable period of time.

What constitutes a reasonable period of time is far from settled among the lower courts. Contrary to the argument asserted in petitioner's brief, ninety days is not considered "per se unreasonable." See, e.g., State v. Percy, 99 Wis.2d 459, 299 N.W.2d 886 (Ct. App. 1980). However, rather than adopting a specific standard, most courts, both state and federal, look to the individual circumstances of the case in determining whether a delay in conducting a revocation hearing is unreasonable. See, e.g., Commonwealth v. Dorsey, 476 A.2d 1308 (Pa. Super. 1984) (delay of three months is not unreasonable when there is no showing of malice); Commonwealth v. Whitfield, 421 A.2d 1142 (Pa. Super. 1980) (delay of over four months after conviction for new

offense is not unreasonable); State v. Percy, supra (trial court has discretion to decide if seven month delay is unreasonable). In fact, at least one court has found that the requirement that revocation hearings be held within a reasonable time is applicable only when the parolee is returned to custody solely for a parole violation. Semick v. Department of Corrections, 447 A.2d 707 (Del. Super. 1984).

However, regardless of whether the delay in conducting the parole hearings in this case was unreasonable, respondents contend that the appropriate remedy in the case of a procedural deficiency is to remedy that deficiency, not to release the petitioner. Habeas corpus is an extraordinary writ, and an order of release pursuant to it should be granted only when other remedies are unavailable. Application of Downing, 103 Idaho 689, 652 P.2d 193 (1982).

This Court has held that habeas corpus petitions will be granted only when the petitioner can show "substantial and prejudicial denial of the constitutional right to due process of law." Morishita v. Morris, 621 P.2d 691 (Utah 1980). In Morishita, the plaintiff was charged with violating the conditions of probation and committed to the Utah State Prison to serve the remainder of his sentence. The Court, however, failed to make written findings of fact or conclusions of law, as mandated by Rule 52(a), Utah Rules of Civil Procedure.

Even though the trial court had clearly violated a statutory requirement, this court denied habeas corpus relief, finding that an action for the extraordinary writ "will not lie in

the absence of a claim of fundamental unfairness in the trial or a substantial and prejudicial denial of a person's constitutional rights." Id. at 693. The error of failing to enter findings of fact and conclusions of law did not rise to that level.

The requirement of establishing prejudice is widely accepted in the context of proving a procedural violation which warrants the release of a prisoner. Contrary to the petitioner's assertions, this rule is found in both state and federal court decisions. See, e.g., Smith v. United States, 577 F.2d 1025 (5th Cir. 1978); Carmel v. United States Parole Commission, 489 F.Supp. 113 (S.D.N.Y. 1980); In Re Caudillo, 164 Cal. Rptr. 692, 610 P.2d 1021 (1980); In Matter of Knoke, 17 Wash. App. 874, 565 P.2d 1187 (1977); Carrion v. State, 113 Ariz. 303, 552 P.2d 1197 (1976).

For example, in Sacasas v. Rison, 755 F.2d 1533 (11th Cir. 1985), the petitioner was granted parole after serving ten years of his sentence. Several years later, the petitioner was arrested on drug charges and the Parole Commission revoked his parole. Petitioner brought a habeas corpus action, contending that the Commission failed to hold a "termination of supervision hearing" five years after his release on parole as required by federal statute. The Commission conceded that it had indeed failed to hold the hearing within the statutorily prescribed period. Despite this failure, however, the Eleventh Circuit Court looked to the likely outcome of the termination hearing, assuming that a timely hearing had been held. The Court concluded that given the parolee's violations of the conditions of parole, the Commission would not have terminated supervision. Based on this

conclusion, the court found that the Commission's failure to hold the hearing did not result in any actual prejudice to the petitioner. Because no prejudice was shown, the court found that the appropriate remedy was not release, but a mandate to the Commission to hold the hearing. See also, Carmel, supra, (where the Parole Commission failed to conduct a revocation hearing within the statutorily prescribed period of time. The Court held that the "appropriate remedy was not release from custody but the compulsion of a prompt decision by the Commission." 489 F.Supp. at 115).

While it is true that the federal decisions rely to a certain extent on federal legislation and its history, the underlying reasoning of those decisions applies to state procedures as well. It would be entirely unprecedented to conclude that whenever a minor violation in statutory procedures or due process occurs that release from confinement is mandated. This is particularly true where less drastic means would remedy or alleviate the alleged injury. This court has expressed its hesitation to grant habeas corpus relief or to intrude into the operations or management of the internal affairs of the prison; and will do so "only in an unusual exigency where it appears that there is a likelihood that some such oppression or injustice is occurring that it would be unconscionable not to examine into the alleged grievance." Ziegler v. Miliken, 583 P.2d 1175 (Utah 1978).

In the present case, petitioner has not been prejudiced by the delay in the revocation hearing or the initial hearing.

Petitioner has not shown that any evidence was unavailable to him, that witnesses disappeared or that memories of key events faded. Indeed, petitioner did not even attempt to introduce any evidence at the Board hearing. Petitioner simply pled guilty to the charges based upon the criminal convictions and the Board decided to revoke his parole and set a rehearing date for the future. Moreover, even if the hearing had been conducted in a timely manner, it is inconceivable that the Board of Pardons would have reinstated petitioner's parole given the serious nature of the offenses which petitioner committed while on parole. Thus, the trial court was correct in refusing to grant petitioner's relief absent a showing of prejudice.

Finally, petitioner claims that the Board failed to promptly notify him of its decision to revoke his parole. However, the statute requiring prompt notification does not define what constitutes "prompt" notification and petitioner fails to cite any case law to support his claim.

However, even if the notice of the decision were deficient, it is clear under Morishita, supra, that the proper remedy is to correct the notice, not to release the petitioner. See also, People ex rel. Haskins v. Waters, 87 A.2d 657, 448 N.Y.S.2d 513 (1982).

In summary, the petitioner has failed to show that he was prejudiced by the Board's failure to conduct a timely hearing or the failure to provide him with prompt notification of the decision to revoke. Accordingly, the petitioner is not entitled to release.

CONCLUSION

The petitioner's application for a writ of habeas corpus was properly denied by the lower court because it was barred by the statute of limitations and because petitioner failed to show that he was prejudiced by the Board's delay in conducting a parole hearing. Accordingly, the trial court's decision should be affirmed and petitioner's writ dismissed.

Dated this 1st day of April, 1986.

Carlie Christensen

CARLIE CHRISTENSEN
Assistant Attorney General
Attorney for Appellees

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Brief of Respondents, postage prepaid, to Mary C. Corporon, Attorney for Plaintiff/Appellant, Suite 1100 Boston Building, 9 Exchange Place, Salt Lake City, Utah 84111, on this the 16th day of April, 1986.

Carle Christensen