

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEN GEORGE

CIVIL ACTION

NO. 98-3

v.

DONALD T. VAUGHN, et al.

MEMORANDUM

Broderick, J.

April 20, 1998

Petitioner Ben George is currently incarcerated at the State Correctional Institution in Graterford, Pennsylvania. On January 2, 1998, petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 challenging a decision by the Pennsylvania Board of Probation and Parole denying him parole. The United States Magistrate Judge to whom the petition was referred filed a Report and Recommendation on January 13, 1998 recommending that the petition be summarily dismissed for failure to exhaust state court remedies. The petitioner filed timely objections. Having conducted a de novo review, the Court will not adopt the Magistrate Judge's Report and Recommendation to summarily dismiss the petition for failure to exhaust state court remedies in view of the fact that the Court will deny the habeas petition on the merits.

I. BACKGROUND

As set forth in the petition for a writ of habeas corpus, the petitioner was arrested in Delaware County for possession with intent to deliver a controlled substance (Docket No. 921-96). The petitioner was sentenced to serve one to two years imprisonment, effective August 23, 1996. Therefore, his minimum term of imprisonment expired on August 23, 1997 and his maximum term expires on August 23, 1998. Petitioner sought to be released on parole following his minimum term of imprisonment and was recommended for parole by prison officials in July, 1997. However, after appearing before the Pennsylvania Board of Probation and Parole on October 22, 1997, the petitioner was denied parole and directed to spend a period of time in a community corrections center.

The petitioner filed the instant habeas petition on January 2, 1998. In his petition, the petitioner claims that the decision of the Pennsylvania Board of Probation and Parole denying him parole deprived him of a liberty interest without due process and constituted cruel and unusual punishment.

II. STANDARD OF REVIEW

Although the Magistrate Judge recommended that the habeas petition be considered under 28 U.S.C. § 2254, the petitioner filed for relief pursuant to 28 U.S.C. § 2241(c)(3) and the Court has determined that § 2241 is the proper avenue for relief in the instant case. See Bennett v. Soto, 850 F.2d 161, 163 (3d Cir. 1988) ("Ordinarily, a federal habeas corpus challenge to a parole

board's decision is properly brought under 28 U.S.C. § 2241").

Under 28 U.S.C. § 2241(c)(3), "The writ of habeas corpus shall not extend to a prisoner unless . . . He is in custody in violation of the Constitution or laws or treaties of the United States." When a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . . [T]he court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(C).

III. DISCUSSION

The Magistrate Judge recommended that the petition be summarily dismissed for failure to exhaust state remedies. Although it is not clear whether any remedies are available in Pennsylvania to challenge a denial of parole by the Pennsylvania Board of Probation and Parole, compare Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766 (Pa. Commw. Ct. 1997) with Burkett v. Love, 89 F.3d 135 (3d Cir. 1996), the Court has determined that the instant petition should be denied on the merits regardless of the exhaustion issue. "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. §

2254(b)(2).

It is well-settled that parole is not a protected liberty interest in Pennsylvania. "[I]n Pennsylvania, a prisoner has no constitutionally protected liberty interest in being released from confinement prior to the expiration of his or her maximum term [of imprisonment]." Weaver, 688 A.2d at 770. See also Burkett, 89 F.3d at 139; Bradley v. Dragovich, No. 97-7660, 1998 WL 150944, at *2 (E.D. Pa. March 27, 1998) (Padova, J.); Tubbs v. Pennsylvania Board of Probation and Parole, 620 A.2d 584, 586 (Pa. Commw. Ct. 1993); Reider v. Pennsylvania Board of Probation and Parole, 514 A.2d 967, 971 (Pa. Commw. Ct. 1986). "Under Pennsylvania law, the sentence imposed for a criminal offense is the maximum term; the minimum term merely sets the date prior to which a prisoner may not be paroled." Brown v. Pennsylvania Board of Probation and Parole, 668 A.2d 218, 220 (Pa. Commw. Ct. 1995) (citation omitted). "Prisoners have no absolute right to parole, but rather only the right to petition for parole upon the expiration of the minimum term." Id.

Thus, the petitioner's claim cannot constitute a procedural due process violation, since he did not have a protected liberty interest in parole. See supra; Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7-10 (1979).

Moreover, the petitioner has not alleged any type of action by the Pennsylvania Board of Probation and Parole which might give rise to a substantive due process violation, such as denial of parole on the basis of race, political belief, religion or other

impermissible criteria. See Perry v. Sindermann, 408 U.S. 593, 597 (1972); Burkett, 89 F.3d at 139-40 (citing Block v. Potter, 631 F.2d 233, 236 (3d Cir. 1980)). Finally, the petitioner's claim that his denial of parole constitutes cruel and unusual punishment has no merit. The decision to deny parole was within the parole board's discretion, and the denial does not extend the petitioner's maximum term of imprisonment. See Lustgarden v. Gunter, 966 F.2d 552, 555 (10th Cir. 1992) ("Denial of parole under a statute dictating discretion in parole determination does not constitute cruel and unusual punishment.").

Accordingly, for the foregoing reasons, the Court will not adopt the Magistrate Judge's Recommendation that the petitioner's habeas petition be summarily dismissed for failure to exhaust state court remedies in view of the fact that the Court will deny the petition on the merits. There is no basis for a certificate of appealability. 28 U.S.C. § 2253(c).

An appropriate Order follows.

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ORDER

AND NOW, this 20th day of April, 1998; upon consideration of the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241; after a de novo review of the Report and Recommendation of Arnold C. Rapoport, United States Magistrate Judge, filed on January 13, 1998, and the petitioner's objections thereto; and for the reasons set forth in the Court's Memorandum of this date;

IT IS ORDERED:

1. The Magistrate's Report and Recommendation is not adopted.
2. The petition for a writ of habeas corpus is DENIED.
3. A certificate of appealability is not granted.
4. The petitioner's motion to compel this Court to rule (Document No. 5) is DISMISSED AS MOOT.

RAYMOND J. BRODERICK, J.