N.D.A.G. Letter to Emmer (June 10, 1991)

June 10, 1991

Mr. Warren R. Emmer
Director
Division of Parole/Probation
P.O. Box 5521
Bismarck, ND 58502-5521

Dear Mr. Emmer:

Thank you for your May 13, 1991 letter. It is my opinion that a parolee facing revocation of parole is not necessarily entitled to a preliminary hearing when not in custody.

The United States Supreme Court has determined, for federal Constitutional purposes that a preliminary hearing is not required for parolees not in custody. See Moody v. Daggett, 429 U.S. 78, (1976), Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Morrissey v. Brewer, 408 U.S. 471 (1972). In Gagnon, the Court held that before a parolee can be denied what conditional liberty he possesses, he or she must be afforded due process, which includes a preliminary hearing. Id. at 782. The Court in Gagnon stated that the time for a preliminary hearing is to be at the time of the parolee's arrest. Id. Following Gagnon, it would appear that a preliminary hearing is not required when the parolee is not under arrest.

In Moody, the question before the Court was whether a preliminary hearing is required "before the parolee is taken into custody as a parole violator." Moody, at 86. The Court held "that there is no requirement for an immediate hearing," when the parole violator is not in custody for parole violation. Id. Again, pursuant to Moody, it appears that custody based on a parole violation is a pre-requisite to the right to a preliminary hearing.

The requirement of a preliminary hearing is explained in United States v. Sciuto, 531 F.2d 842 (7th Cir. 1976). The court in Sciuto stated that "The reason for requiring a preliminary hearing was that the conditional liberty of a probationer or parolee, like the more complete liberty of others, cannot constitutionally be infringed without probable cause. This reason for requiring a preliminary hearing is not present when, as here, the probationer is not held in custody to await the revocation hearing." Id. at 846 (citations omitted). Thus, a parolee is not entitled to a preliminary hearing when not in custody on a parole violation under the federal Constitution.

While states may not limit rights granted pursuant to the federal Constitution, states may grant rights in excess of those granted by the federal Constitution. City of Bismarck v. Altevogt, 353 N.W.2d 760 (N.D. 1984). The question then becomes whether section 12-59-15 of the North Dakota Century Code expands a parolee's rights by requiring a preliminary hearing for a parolee who is not in custody. Section 12-59-15 of the North

Dakota Century Code was revised in 1977 to include a provision or a preliminary hearing for parolees accused of violating their parole. 1977 N.D. Sess. Laws ch. 116. The relevant provisions of the statute were recommended to the Legislature at least in part due to a Supreme Court decision. Hearings on H.B. 1226 Before the Committee on Judiciary, February 23, 1977 (Statement of Irv Riedman, Pardon Board, Bismarck, North Dakota). While the Supreme Court decision is not named, the facts surrounding the recommendation indicate that the likely impetus was Morrissey, Gagnon, or Moody. Thus, the intent was to adopt the federal protections.

The language of the statute itself is further evidence of the Legislature's intent not to expand on the federal protections. "The parolee shall be entitled to a preliminary hearing, as promptly as is convenient after the arrest . . ." N.D.C.C. § 12-59-15 (emphasis added). The language of the statute indicates that the entitlement to a preliminary hearing does not arise until after the parolee is arrested.

Based on the foregoing, it is my opinion that a parolee is not entitled to a preliminary hearing when not in custody for the parole violation.

I trust this responds to your inquiry.

Sincerely,

Nicholas J. Spaeth

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