

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Arthuly Shaw, :
 :
 Petitioner, :
 :
 v. : No. 3:01cv1981(JBA)
 :
 United States Parole :
 Commission, :
 :
 Respondent. :

Ruling on Petition for Writ of Habeas Corpus [Doc. #1]

Arthuly Shaw filed a petition for a writ of habeas corpus on October 19, 2001, asking the Court to order the United States Parole Commission to hold a parole revocation hearing. The Court issued an order to show cause directing the Government to explain why such an order should not issue. The Government responded and asked that the petition be dismissed, as a hearing had been held since Shaw's filing and he could demonstrate no prejudice from any delay. Thereafter, Shaw submitted a reply brief, and the Government, at the Court's invitation [Doc. #7], responded with a sur-reply. The Court held an evidentiary hearing on August 20, 2002, at which Shaw was the only witness.

As set out below, the Court concludes that because Shaw has demonstrated no prejudice from the Commission's admitted delay in holding his revocation hearing, the petition must be denied.

I. Background¹

On July 18, 1987, Shaw was sentenced by the late Hon. T.F. Gilroy Daly, U.S.D.J., to six years imprisonment followed by a seven year special parole term, for a drug offense. He began his parole on March 9, 1993. While on parole, Shaw was arrested for assault, and the Parole Commission issued a warrant for his arrest for parole violations for failing to report the assault arrest and falsely indicating on his monthly supervision reports that he had not been arrested. As a consequence, Shaw's parole was revoked, he served eight months in prison and was re-paroled on March 9, 1999. Additionally, he forfeited all credit for the time he had already spent on parole, and was re-scheduled to remain on parole until July 9, 2005.

Shaw had two other brushes with the law in late 2000, when he was arrested on November 24, 2000 for breach of the peace following a domestic dispute and on December 5, 2000 for selling narcotics. Based on these two incidents, the Parole Commission issued another warrant for his arrest, again charging him with violating the terms of his parole. Pursuant to that warrant, Shaw was arrested on February 12, 2001, and has been in custody since that time. On February 27, 2001, Shaw requested a postponement of the preliminary interview to which he was

¹The following facts are taken from the papers submitted by counsel as exhibits to their respective memoranda, and, where noted, from Shaw's testimony at the hearing.

entitled, and the interview was subsequently held on April 27, 2001.

At the April 27 preliminary interview, U.S. Probation Officer ("USPO") Michael Guglielmo concluded that probable cause existed to believe that Shaw had violated his parole due to the narcotics arrest but not due to the alleged breach of the peace. Shaw then signed a form requesting a local revocation hearing. On the form, he indicated that he "request[s] to review tape of surveillance [and] testimony of witnesses (adverse & voluntary)." He made the following requests for the full revocation hearing: "tape of surveillance by Bpt PD" and "Wilfredo Ayala." [Doc. # 8 Ex. 14]. The USPO's report gives some context to Shaw's requests:

Shaw wished to review a tape of the arrest that would support the assertion that the arresting officers were told to detain everyone who was dressed in black. In addition, he would like to glean testimony from one of those arrested - one Wilfredo Ayala who would support his theory in addition to clearing the parolee of any complicity.

[Doc. #8 Ex. 14]. Shaw's written request for witnesses does not include any witness related to the breach of the peace charge.

Shaw remained in custody pending a full revocation hearing, which was scheduled for July 26, 2001, but was cancelled and not rescheduled. By letter dated May 22, 2001, the Commission supplemented Charge 1, which had previously consisted only of breach of the peace, with an allegation of unlawful entry. [Doc. #8 Ex. 15]. The Commission sent Shaw a letter on May 30, 2001,

informing him that the Commission "has found probable cause to believe that you have violated the conditions of your special parole and has ordered a hearing to determine whether or not your release should be revoked." [Doc. #8 Ex. 16]. The letter indicates that [t]he specific charge[s] upon which these finding[s] are based" were both the breach of the peace allegation and the narcotics violation, and notes separately that the recently-added unlawful entry allegation "will be considered at the time of your hearing." Id.

In preparation for the hearing, the Commission sent Shaw's attorney a letter on July 9, 2001, informing him that a hearing had been scheduled for July 26, 2001, and that

The following adverse witnesses will be subpoenaed:

Officer Edward Rivera
Bridgeport Police Department

Officer Raymond Ryan
Bridgeport Police Department

Ms. Kim Bond

Ms. Cynthia Wilson

The following adverse witnesses have been denied:

No police surveillance tape for charge 2, where offense occurred.

Wilfredo Ayala appears to be a co-defendant in this case.

[Doc. #8 Ex. 17].

A July 9, 2001 Memorandum [Doc. #8 Ex. 22] from Sheila Sporn, a Victim Witness Coordinator for the Commission, to the

hearing examiner indicates Sporl's attempts to contact witnesses Bond and Wilson to obtain their appearance at the scheduled July 26 hearing:

As neither Ms. Bond nor Ms. Wilson could be reached by telephone, an additional letter asking them to call this writer at the USPC upon receipt. Senior USPO Lopez checked as many records and drove to the home sites listed above for Ms. Bond and Ms. Wilson for address verification this date.

[Doc. #8 Ex. 22].

Shaw's scheduled hearing was cancelled pending disposition of state charges, [Doc. #8 Ex. 18], and was not rescheduled. On October 12, 2001, he filed this petition for a writ of habeas corpus, claiming that a hearing had not been timely held, and that he was thus being held illegally.² The Court issued an order to show cause, ordering that the Parole Commission respond to the petition by November 29, 2001. [Doc. #2].

On November 8, 2001, the Commission sent notice to Shaw that a new hearing had been scheduled for November 14, 2001. [Doc. #8 Ex. 19]. This notice, however, listed only two adverse witnesses: "The following adverse witnesses will be subpoenaed: Officer(s) Edward Rivera & Raymond Ryan - Bridgeport P.D. All

²Shaw's petition invokes the 120 day deadline of 18 U.S.C. § 4208(a) ("Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsection (b)(2) of section 4205 or released on parole and whose parole has been revoked shall be held not later than one hundred and twenty days following such prisoner's imprisonment or reimprisonment in a Federal institution, as the case may be."), but later briefing addresses the sixty day requirement of 18 U.S.C. § 4214(a)(1)(B).

other relevant information regarding your hearing remains unchanged." A November 6, 2001 letter from the Commission to Kim Bond notified Bond that her "presence as a witness is required in the local revocation hearing for the above-named subject that is to be conducted by the U.S. Parole Commission," and asked Bond to telephone the writer, a victim witness coordinator, as soon as possible. [Doc. #8 Ex. 23].

The hearing was held on November 14 with USPO Ray Lopez and Officers Rivera and Ryan present as witnesses. Shaw testified that he never stalked or threatened Bond, corroborated in absentia by USPO Lopez's testimony regarding his conversations with Bond: "USPO Lopez indicated that he spoke to Ms. Barn [sic] on 11/27/2000 and [she] indicated to him that the subject never threatened or stalked her and that the entire situation was only a misunderstanding in regard to the Breach of the Peace." [Doc. #8 Ex. 20 at 4].

The examiner concluded that Shaw had in fact violated his parole and recommended that Shaw's parole be revoked. He based his findings regarding the breach of the peace and unlawful entry charges solely on the testimony of Officer Rivera and "documentation submitted by USPO Lopez dated 12/28/2000," id. at 7, apparently discrediting Shaw's version of the events as well as the purported significance of USPO Lopez's recitation of his conversations with Bond. The examiner also inferred, based on Bond's and Wilson's absence from the hearing, that "both

individuals are frightful [sic] of the subject." Id. at 9. Additionally, he noted what he perceived to be the seriousness of Shaw's 1987 conviction: "In viewing the inmate's criminal background specifically the instant offense once can deem the subject to be a more serious risk than reflected in his SFS. In the instant offense the subject was considered a top lieutenant in his cousins' drug ring and wire tapped in which there were two conversations in which the subject was making arrangements to have two individuals killed." Id. The examiner concluded that "[b]ased on [Shaw's] overall conduct[,] full accountability is warranted." Id.

II. Discussion

The initial basis of Shaw's October 12, 2001 petition has now become moot, as a hearing has been held. The Government's response to the petition, filed after the hearing, requests that the Court dismiss the petition as moot. Shaw's reply, however, argues that both the revocation hearing and notice of the Commission's decision were untimely, and that the remedy for such untimeliness is his immediate release from custody. The Government responds to this new argument by asserting that Shaw can demonstrate no prejudice from any delay, and reiterating that the petition must be dismissed as moot.

The Court is thus presented with the narrow question of whether the delay in holding the revocation hearing and the

alleged delay in sending notice of the determination provide a basis for habeas relief.³

A. Timeliness of Revocation Hearing

The revocation hearing was clearly untimely. The law provides for a hearing within sixty days of a probable cause determination:

"[A]ny alleged parole violator . . . shall be accorded the opportunity to have . . . upon a finding of probable cause . . . a revocation hearing at or reasonably near the place of the alleged parole violation or arrest within sixty days of such determination of probable cause

18 U.S.C. § 4214(a). Here, probable cause was determined on May 30, 2001.⁴ Sixty days later falls on Sunday, July 29, 2001, but Shaw's hearing was not held for nearly four months more.

In Heath v. United States Parole Commission, 788 F.2d 85, 89 (2d Cir. 1986), the Second Circuit, relying on the legislative history of the provisions at issue, determined that "absent prejudice or bad faith on the Commission's part, the appropriate remedy [for an untimely revocation hearing] is not a writ of

³While Shaw has also raised other issues related to, inter alia, the conduct of the hearing, his underlying conviction, and the 1998 revocation of parole in pro se filings with the Court, the Court has determined and counsel has agreed that those matters are properly advanced outside the confines of this case, which has from its inception concerned only this narrow timeliness issue.

⁴Shaw argues that probable cause was determined on April 27, 2001, when the probable cause hearing was held, but the actual determination was by letter dated May 30, 2001.

habeas corpus, but a writ of mandamus to compel compliance with the statute." See also Guida v. Nelson, 603 F.2d 261, 263 (2d Cir. 1979) ("[Petitioner's] claim of delay [in holding a revocation hearing] in excess of the statutory limit . . . appears accurate, and he will have the opportunity to show what, if any, prejudice may have resulted from the delay."); United States v. Sanchez, 225 F.3d 172, 176-177 (2d Cir. 2000). Thus, Shaw's assertion that the 60 day time limit is akin to the Speedy Trial Act and requires dismissal of the charges if not strictly complied with is unavailing,⁵ and he must show prejudice resulting from the delay in order to obtain relief under § 2241.

Shaw asserts that he was prejudiced by the Commission's delay. First, he claims that the Commission denied his request for a surveillance tape and his request for the testimony of Wilfredo Ayala, a co-defendant in the case. Shaw has not pointed to any connection between the delay and the Commission's denial of this evidence. The Commission denied these requests on July 9, 2001, several weeks before the deadline for holding a hearing had expired, based on its determination that no surveillance tape existed and that Ayala was a co-defendant in the case. Without

⁵Additionally, the Sanchez court noted that "the full range of procedural safeguards associated with a criminal trial" do not attach to supervised release hearings, 225 F.3d at 175 (citing Black v. Romano, 471 U.S. 606, 613 (1985)), which are "the same as those afforded for revocation of parole or probation," id. (citing United States v. Meeks, 25 F.3d 1117, 1121 (2d Cir. 1994)).

reaching the merits of either determination, the record is clear that the absence of the tape and Ayala was decided before the first hearing was even scheduled and thus was not affected by the Commission's delay in ultimately holding the hearing.

Second, Shaw argues that "[d]ue to the additional delay, contact was apparently lost" with two additional witnesses he planned to call, Kim Bond and Cynthia Wilson. The July 9, 2001 letter to Shaw's attorney from the Parole Commission indicates that Bond and Wilson were to be subpoenaed as adverse witnesses for the scheduled July hearing, but the July 9, 2001 Parole Commission memorandum indicates that neither Bond or Wilson could be reached by telephone or by driving to their homes (although Shaw and his counsel were unaware of the lack of success in having the witnesses make contact for the hearing).

While the petition alleges that the Commission lost contact with Bond and Wilson because of the delay, the July 9 memorandum discloses that in July (before the timely-scheduled but thereafter cancelled revocation hearing) the Commission was unable to contact Bond and Wilson. While Shaw testified at the hearing that USPO Lopez was capable at all times of contacting Bond and Wilson, the record belies this contention, as it shows that the Parole Commission and Lopez attempted, unsuccessfully, to contact Bond and Wilson. Petitioner's contention that the July 9, 2001 letter to his attorney lulled him into believing that Bond and Wilson would be appearing as witnesses, thus he

took no independent steps to ensure their appearance, is not evidence of prejudice because nothing in the record shows that Bond and Wilson would have appeared for the July 26, 2001 hearing with Shaw's additional efforts. Thus there is no difference caused by the delay between what Shaw received at the November hearing (i.e., a hearing without Bond and Wilson) and what he would have received at the July hearing had it proceeded as scheduled.

Finally, even assuming arguendo that Bond and Wilson would have appeared at the July hearing, the record does not support a conclusion that the result of the November hearing was different as a result of their absence. The examiner had before him USPO Guglielmo's May 7, 2001 report, in which Guglielmo concluded based in part on "conversations between [Guglielmo] and the alleged victim, Kim Bond," that probable cause did not exist as to the breach of the peace charge. [Doc. #8 Ex. 14] at 3. He also had Lopez's rendition of Bond's statement that she was never stalked or threatened and that the matter was a misunderstanding. Finally, he had Shaw's testimony to the same effect. Nonetheless, the examiner credited the police officer's testimony and concluded that the charge was sufficiently proved. On this record, it does not appear that the absence of Bond and Wilson from the November hearing caused by the delay or resulted in omission of what Shaw claims their testimony would have been.

In sum, while the record shows that the revocation hearing

was not timely, Shaw has failed to show any prejudice resulting from the untimeliness. He has shown no connection between his claims of prejudice (the absence of the tape and witnesses Ayala, Bond and Wilson at the hearing) and the delay in holding the hearing. In fact, all the evidence indicates that the same evidence and witnesses would have been absent from the timely-scheduled July 26, 2001 hearing, inasmuch as by July 9 the Commission had already determined that the tape and Ayala would not be allowed, and had already memorialized the failed efforts to make contact with Bond and Wilson. In the absence of any prejudice, the petition lacks merit.

B. Timeliness of Notice

Shaw next contends that notice of the revocation decision was not provided within twenty-one days. The law provides that "[t]he Commission shall furnish the parolee with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the revocation hearing." 18 U.S.C. 4214(c). The hearing was held on November 14, 2001. Excluding Thanksgiving (a federal holiday), notice was required to have been furnished by December 6, 2001. The notice sent to Shaw was dated December 6, 2001. Shaw argues that because of mailing time "presumably it reached petitioner a day or more later," although no evidence has been presented as to the actual day that Shaw received the notice.

The Commission's internal operating procedures provide that "within 21 days an official decision will be mailed." USPC Guidelines, Notes, § 2.50-09 (emphasis added). Inasmuch as the statute's requirement that notice be "furnished" is ambiguous as to whether it requires that notice be actually received or only mailed by the twenty-first day, the Court finds the Commission's guidelines providing that mailing the notice is a sufficiently reasonable and practical application of the term "furnish" to be persuasive and entitled to deference, as the Commission is the agency charged with administering the statute. See United States v. Mead Corp., 533 U.S. 218 (2001). Alternatively, even if the statute should be interpreted as requiring receipt of the notice by the twenty-first day, and assuming that Shaw did not actually receive notice by the twenty-first day, Shaw has made no demonstration of prejudice from any delay in such receipt. Since prejudice is a prerequisite for § 2241 relief for a delayed hearing, Heath, 788 F.2d at 89, the Court concludes that prejudice is similarly required when the complaint is of delayed notice of the outcome of a hearing.

III. Conclusion

The narrow issue presented by Shaw's habeas petition is whether the delay in holding the revocation hearing and the alleged delay in sending notice of the determination provide a basis for habeas relief. The Court concludes that on this

record, no such basis has been shown. The Court does not review the propriety of the Commission's procedures for calling witnesses and procuring evidence, or of the Commission's decision to revoke Shaw's parole, as such questions are outside the narrow confines of this petition.

For the reasons set out above, the Petition for a Writ of Habeas Corpus [Doc. #1] is DENIED. The Clerk is directed to close this case.

IT IS SO ORDERED.

/s/

Janet Bond Arterton
United States District Judge

Dated at New Haven, Connecticut, this 6th day of September, 2002.