

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 18-2468

RODNEY MINTER and ANTHONY BERTOLONE,

Plaintiffs/Appellants,

vs.

JERRY BARTRUFF, in his Official Capacity as Director of the IDOC; KATRINA CARTER, in her Official Capacity as Interim Deputy Director of Offender Services of the IDOC; KRIS WEITZELL, in her Official Capacity as Warden of the Newton Correctional Facility; TERRY MAPES, in his Official Capacity as Warden of the Newton Correctional Facility; IOWA DEPARTMENT OF CORRECTIONS,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION
HON. CHARLES R. WOLLE, SENIOR JUDGE

BRIEF OF THE APPELLEES

THOMAS J. MILLER
Attorney General of Iowa

WILLIAM A. HILL
Assistant Attorney General
Special Litigation Division
Hoover State Office Building
Des Moines, IA 50319
Telephone: (515) 281-6162
ATTORNEYS FOR APPELLEES

SUMMARY AND NOTICE REGARDING ORAL ARGUMENT

The Appellants, Rodney Minter and Anthony Bertolone, both Iowa prison inmates, brought this action alleging violations of the United States Constitution and Iowa Constitution. The offenders claimed that their rights were violated based on the alleged delay in their participation in the Iowa Department of Corrections' sex offender treatment program. The offenders asserted that by delaying their access to treatment, that their right to a parole was denied. While there is a priority system for treatment participation based on the proximity to an offender's discharge date, the offenders claimed that such a system was inadequate.

In response, the Iowa prison officials, requested dismissal as the allegations failed to state a claim and lacked a jurisdictional basis. Specifically, the Iowa Supreme Court has held that there is a postconviction procedure under Iowa law that allows an offender to challenge the delay in admission into a sex offender treatment program. *See Belk v. State*, 905 N.W.2d 185, 191-2 (Iowa 2017). As the offenders did not exhaust such a procedure, the Iowa prison officials argued that the claim should be dismissed. The trial court agreed and dismissed the matter. *See Addendum*, pp 1-5.

On appeal, the issues raised on appeal are complex and oral argument of ten (10) minutes will help to clarify the issues raised on appeal.

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JURISDICTIONAL STATEMENT

The Appellants, Rodney Minter, an offender at Newton Correctional Facility and Anthony Bertolone, an offender at the Clarinda Correctional Facility, brought this action alleging violations of the United States Constitution and Iowa Constitution. The jurisdictional basis of the claim was 42 U.S.C. § 1983. The Appellees, all Iowa prison officials, filed a motion to dismiss asserting that the allegations failed to state a claim and lacked a jurisdictional basis. The trial court granted the Iowa prison official's motion to dismiss in a June 8, 2018 Order. *See* Addendum, pp 1-5. Stemming from that decision, the Appellants filed a timely notice of appeal.

The jurisdictional basis on appeal is 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT PROPERLY GRANTED THE IOWA PRISON OFFICIALS MOTION TO DISMISS THE ALLEGATIONS OF TWO OFFENDERS WHO CLAIMED THAT THEY WERE NOT TIMELY PLACED IN THE SEX OFFENDER TREATMENT PROGRAM WHEN THEY FAILED TO EXHAUST SUCH A CLAIM IN THE IOWA COURT SYSTEM?**

Authorities:

Belk v. State, 905 N.W.2d 185 (Iowa 2017)

Edwards v. Carpenter, 529 U.S. 446 (2000)

Heck v. Humphrey, 512 U.S. 477 (1994)

Lyon v. Vande Krol, 305 F.3d 806 (8th Cir. 2002)

STATEMENT OF THE CASE

Nature of the Case. The Appellants, Rodney Minter, an offender at Newton Correctional Facility (“NCF”) and Anthony Bertolone, an offender at the Clarinda Correctional Facility (“CCF”), brought this action pursuant to 42 U.S.C. §1983. The offenders alleged that Jerry Bartruff (Director of the Iowa Department of Corrections (“IDOC”), Katrina Carter (Deputy Director of Offender Services of the IDOC); Kris Weitzell (Warden of NCF), Terry Mapes (former NCF Warden) and the IDOC violated their constitutional rights with regard to the timing of their placement in the sex offender treatment program (“SOTP”). In response to the allegations the Iowa prison officials filed a motion to dismiss asserting that the allegations failed to state a claim and lacked subject matter jurisdiction. The trial court, in an order dated June 8, 2018, granted the motion. Addendum, pp. 1-5. This appeal followed.

Course of Proceedings. The Appellants, Rodney Minter and Anthony Bertolone, brought this action pursuant to 42 U.S.C. §1983. Appendix, p. 2. The offenders alleged that Jerry Bartruff , Katrina Carter, Kris Weitzell, Terry Mapes and the IDOC violated their constitutional rights with regard to the timing of their placement in the SOTP. *Id.*, pp. 1-36.

In response to the allegations, the Iowa prison officials filed a motion to dismiss arguing that the allegations failed to state a claim and lacked a subject matter jurisdiction. *Id.*, pp. 37-38. The offenders resisted the motion, *Id.* pp. 42-44, and a hearing on the motion was held on April 17, 2018. Addendum, p. 1. In an order dated June 8, 2018, the trial court granted the Iowa prison officials' motion to dismiss. *Id.*, pp. 1-5. The offenders filed a timely notice of appeal.

Facts. The factual background of this case is limited as the matter was submitted on a motion to dismiss. The offenders were both convicted of sexual abuse and were sent to prison. Appendix, pp. 11-12. Minter was convicted of second degree sexual abuse on February 23, 2013 in *State v. Minter*, FECR 063303 (Mahaska County, Iowa) and ordered to serve a twenty five year sentence. *Id.*, p. 11. Bertolone was convicted of 5 separate counts of 3rd degree sexual abuse on June 18, 2012 in *State v. Bertolone*, FECR 239544 (Polk County, Iowa) and was ordered to serve a ten year concurrent term for Counts I, I, and II and consecutive ten year terms for Count IV and V. *Id.*, p. 12; *see also State v. Bertolone*, 842 N.W.2d 387, 2013 WL 6116863 (Iowa App. 2013).

As a result, of their conviction and incarceration, both offenders asserted that they are subjected to an “automatic treatment” requirement as a result of their convictions of sexually based offenses. Appendix, pp. 11-12. Both offenders

claimed that they are willing to complete treatment, but were unable to yet participate in treatment. *Id.*, pp. 12-13. As a result, they claim that their ability to be paroled was denied.

As detailed by the trial court:

Plaintiffs assert they are required to participate in and complete SOTP, and they cannot accrue earned-time credits or be considered for parole until they participate in and complete SOTP. Plaintiffs assert that, unlike inmates who are promptly placed in one of the multiple treatment programs for substance abuse or domestic violence, SOTP currently is offered only by the Department of Corrections and only at the Newton Correctional Facility. Plaintiffs assert SOTP treatment takes, on average, eighteen months to complete, but the backlog of inmates waiting to get into SOTP means, as a practical matter, they will not start SOTP until they are close to eighteen months from their release dates in 2021 and 2023.

Addendum, p. 2.

SUMMARY OF THE ARGUMENT

Two Iowa offenders claimed that their admission to a sex offender treatment program at an Iowa prison was delayed due to a prison policy establishing a priority for treatment based on the scheduled discharge date of the offender. As a result of the purported delay of their admission into such a treatment program caused by such a policy, they have claimed that their potential

release to a parole has been denied. Stemming from such a parole denial, the offenders have requested the relief to be placed in the treatment program closer to their admission into prison, rather than awaiting placement prior to their anticipated discharge date. *See Belk v. State*, 905 N.W.2d 185, 192 (Iowa 2017) (“Again, it is important to note, Belk’s claim is not about the actions of the IBOP in denying him parole. Rather, Belk is claiming the actions of the IDOC—in delaying his access to SOTP based on his tentative discharge date and then recommending against his parole to the IBOP because of his failure to complete SOTP—has unconstitutionally violated his protected liberty interest”).

In *Belk*, the Iowa Supreme Court considered such an issue (after the offenders had filed their petition in this action) and held that offenders could pursue the claim as to the delayed admission into treatment under Iowa’s postconviction relief process. *Belk v. State*, 905 N.W.2d 185, 192 (Iowa 2017). As a result, the offenders were required to exhaust all administrative remedies under Iowa’s postconviction relief statute as to such claims prior to filing the present action.

In considering such a challenge, the trial court held that the case should be dismissed without prejudice for the offender to pursue a postconviction relief claim. Addendum, p. 4. Further, even assuming that the claim was considered, it

would still be premature until the underlying decision was reversed or invalidated.

Id. Therefore, the action was dismissed.

On appeal, the Iowa prison officials argue that the offenders are required to present such an issue in Iowa's postconviction relief process prior to pursuing such a claim in this court. If there is a state postconviction process available, exhaustion requires that a federal court give the state court the first chance to decide questions of alleged constitutional errors. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Further, pursuant to 42 U.S.C. 1997e(a), offenders must exhaust all administrative remedies prior to bringing an action (i.e. file a grievance). *See Lyon v. Vande Krol*, 305 F.3d 806 (8th Cir. 2002). Finally, even assuming that the offender's claim of a constitution violation could proceed, the claim would be barred until the underlying result had been reversed or invalidated. *See Heck v. Humphrey*, 512 U.S. 477 (1994).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED THE IOWA PRISON OFFICIALS MOTION TO DISMISS THE ALLEGATIONS OF TWO OFFENDERS WHO CLAIMED THAT THEY WERE NOT TIMELY PLACED IN THE SEX OFFENDER TREATMENT PROGRAM WHEN THEY FAILED TO EXHAUST SUCH A CLAIM IN THE IOWA COURT SYSTEM.

Standard of Review: On appeal, review is de novo for a district court's grant of a motion to dismiss under Rule 12(b)(6). *Martin v. Iowa*, 752 F.3d 725 (8th Cir. 2014). In analyzing a motion to dismiss, a court must accept the allegations contained in the complaint as true and make all reasonable inferences in favor of the nonmoving party. *Id.*

Argument: Two Iowa offenders claimed that their admission to a sex offender treatment program at an Iowa prison was improperly delayed. Stemming from the delay of their admission into such a treatment program, the offenders claimed that their potential release on parole has been denied. The Iowa prison officials requested to dismiss the action for failing to state a claim and that the action lacked a jurisdictional basis – which was granted by the trial court. Addendum, pp. 1-5. While on appeal the offenders insist that their claims be allowed to proceed, there is not a basis to allow such an action to continue.

The basis of the claim of the offenders is Iowa's sex offender treatment

program (“SOTP”). The parameters of Iowa’s SOTP program have been extensively litigated-- and after the case filed by the offenders was filed-- the Iowa Supreme Court released two decisions which impacted the treatment program.

First, in *Belk v. State*, 905 N.W.2d 185 (Iowa 2017) the Iowa Supreme Court considered whether the postconviction relief claim of an offender who claim that his access to SOTP was delayed until he was closer to his discharge date. *Id.* at 187. As a result of the delay, the offender had claimed he did not have a meaningful chance for parole until he completed SOTP. *Id.* In considering the viability of such a claim under Iowa’s postconviction relief statute, the Iowa Supreme Court concluded:

In light of the foregoing authorities, we conclude an inmate may proceed under Iowa Code section 822.2(1)(e) when alleging an unconstitutional denial of his or her liberty interest based on the IDOC’s failure to offer SOTP when SOTP is a necessary prerequisite to parole. That section applies when “the person is otherwise unlawfully held in custody or other restraint.” Iowa Code § 822.2(1)(e).

Id. The rationale was based on the proposition that the challenge was not based on whether he received a parole, but whether in delaying his access to SOTP based on his tentative discharge date and then recommending against his parole to the Iowa Board of Parole because of his failure to complete SOTP—has unconstitutionally violated his protected liberty interest. *Id.*

Second, in *State v. Iowa District Court of Jones County*, 902 N.W.2d 811 (Iowa 2017) the Iowa Supreme Court considered a challenge to the procedures used by the Iowa Department of Corrections in determining when an offender would be entitled to earned time credits for their participation in SOTP. Specifically, the Iowa Supreme Court upheld that interpretation of Iowa Code Section 903A.2 as halting the ongoing accrual of earned time after removal from or refusal to participate in SOTP without forfeiture of previously accrued earned time. *Id.* at 818; *see also Holm v. State*, 767 N.W.2d 409, 414, 418 (Iowa 2009).

The allegations raised by the offenders in this action are identical to the issues raised by the offender in *Belk*. The offenders have requested the relief to be placed in SOTP closer to their admission into prison, rather than awaiting placement prior to their anticipated discharge date. The problem with such a claim is that they can not pursue such a claim without exhausting available remedies in the Iowa court system.

There are two potential remedies that must be pursued by the offenders prior to proceeding in the present claim. First, the offenders would have to pursue the remedies available as outlined in *Belk* – and pursue a claim under Iowa’s postconviction relief statute. Second, to the extent applicable, the offenders may have to proceed with an administrative grievance in the prison’s grievance system.

Until such remedies have been exhausted and completed, they do not have the ability to proceed in the present action.

First, the offenders must pursue their claim under Iowa's postconviction relief statute. The rationale is clear, grounded in federalism and comity, exhaustion principles apply at all stages of state proceedings and require that federal courts give state courts the first chance to correct federal constitutional errors that occur in state proceedings. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Similar to federal habeas corpus review, a party must "exhaust" their federal claims in the appropriate state forum, giving the state courts an opportunity to decide the merits of any constitutional issues raised. *See* 28 U.S.C. § 2254(b), (c).

The allegations of the offenders do not contain allegations that the Iowa postconviction relief process were completed as to such issues. There are state court remedies available and the Iowa courts have a forum to rule upon the issue raised by the offenders. While the offenders may doubt the effectiveness of such a remedy, that does not excuse exhaustion. *See Booth v. Churner*, 532 U.S. 731 (2001) (Prison Litigation Reform Act requires administrative exhaustion even where grievance process does not permit award of money damages and prisoner seeks only money damages, as long as grievance tribunal has authority to take

some responsive action). If such an issue is considered, the Iowa Supreme Court in *Belk* held that there is a remedy for this specific claim and the fact that the offenders did not exhaust requires dismissal without prejudice of any claim.¹

Second, even assuming that offenders may have exhausted Iowa's postconviction process, they still would have to complete the institutional grievance process. Specifically, the Prison Litigation Reform Act of 1996 ("PLRA") amended 42 U.S.C. §§ 1997e(a) to require that inmates who have civil rights claims must first exhaust all administrative remedies before bringing an action under §1983. *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct.2378, 2383, 165 L.Ed.2d 368 (2006); *Lyon v. Vande Krol*, 305 F.3d 806 (8th Cir. 2002) (en banc).

An offender must exhaust a claim against the prison officials or Iowa Board of Parole the in the contact of a prison grievance. *Lyon v. Vande Krol*, 305 F.3d 806 (8th Cir. 2002) (en banc) (prison grievance). As well, a grievance with regard to a parole challenge or exhaustion through the Iowa Board of Parole administrative process – exhaustion of administrative remedies is required. *Martin v. Iowa*, 752 F.3d 725 (8th Cir. 2014) (exhaustion required with respect to

¹Even assuming the offenders exhausted such claims, if they did not have the issue successfully resolved in the postconviction relief process, they would be barred from litigating the claim until it had been reversed or invalidated. *Heck v. Humphrey*, 512 U.S. 477 (1994)

parole issue).

The trial court held that the claim of the offenders should be dismissed holding that:

The court concludes that this case must be dismissed without prejudice. Section 1997e(a) requires prisoners to exhaust administrative remedies before filing suit under § 1983, and plaintiffs have not exhausted their available postconviction remedies. Plaintiffs argue there is no procedure in place to encourage the Department of Corrections to provide them SOTP, and if there were, “no doubt it would operate ‘as a simple dead end-with officers unable or consistently unwillingly to provide any relief to aggrieved inmates.’” ECF No. 10-1 at 9 (quoting *Ross v. Blake*, 136 S.Ct. 1850, 1859 (2016)). But the Iowa Supreme Court has held inmates like the plaintiffs may challenge the delay in receiving SOTP and the denial of earned time through Iowa’s postconviction procedures. *See Belk*, 905 N.W.2d at 191-92. Even assuming § 1997e(a) is limited to administrative remedies provided by the Department of Corrections, plaintiffs’ suit would be premature based on *Heck*. Plaintiffs argue *Heck* does not bar their claims because they allege they are denied treatment for an indeterminable amount of time and success on their claims will not necessarily imply they must be released on parole. Yet plaintiffs acknowledge that participation in SOTP will allow them to accrue earned-time credit, and their requested relief includes recalculation and restoration of their earned-time credit. Because success on their claims would necessarily imply the invalidity of their lost earned-time credits, they do not yet have a cause of action under § 1983. *See Balisok*, 520 U.S. at 647-49. Plaintiffs’ federal claims must be dismissed, and the court declines to exercise jurisdiction over the supplemental state-law claims. *See* 28 U.S.C. § 1367(c)(3).

Addendum, pp. 4-5.

The result is that there are postconviction relief procedures in Iowa for an offender to challenge the priority of their participation in the SOTP. However, the offenders in this action have not availed themselves to such procedures. As a result, this matter must be dismissed without prejudice.

CONCLUSION

The decision of the trial court must be affirmed.

THOMAS J. MILLER
Attorney General of Iowa

/S/ WILLIAM A. HILL
WILLIAM A. HILL (AT0003532)
Assistant Attorney General
Special Litigation Division
Hoover State Office Building
Des Moines, IA 50319
(515) 281-6162
FAX: (515) 281-4902
Email: William.Hill@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

COMES NOW Appellee, through undersigned counsel, and certifies that the contents of the Appellees' Brief in the above-captioned case are WordPerfect 12.0 format in Times New Roman, 14 point, and contains 2,804 words.

/s/WILLIAM A. HILL

WILLIAM A. HILL (AT0003532)

Assistant Attorney General

Special Litigation Division

Hoover State Office Building

Des Moines, IA 50319

Telephone: (515) 281-6162

Fax: (515) 281-4902

Email: William.Hill@ag.iowa.gov

COST CERTIFICATE

The certified cost of printing this brief was \$85.80. *See* Eighth Circuit Rule 39A(a)(1), (2) (allowing charges for ten copies of brief, plus one copy for each party, @ \$2.00 per cover, \$2.00 per binding, and \$0.15 per page).

/s/WILLIAM A. HILL

WILLIAM A. HILL (AT0003532)

Assistant Attorney General

Special Litigation Division

Hoover State Office Building

Des Moines, IA 50319

Telephone: (515) 281-6162

Fax: (515) 281-4902

Email: William.Hill@ag.iowa.gov

CERTIFICATE OF FILING

I hereby certify that on, October 9th, 2018, I electronically filed Defendants-Appellees' Brief and Argument with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

CERTIFICATE OF SERVICE

I, William A. Hill, Assistant Attorney General for the State of Iowa, hereby certify that I mailed ten (10) copies of this Appellee Brief _____ day of October, 2018, to: Michael E. Gans, Clerk of Court, United States Court of Appeals, 111 South 10th Street, St. Louis, MO 63101. One (1) copy mailed to the following:

Alfredo Parrish
Parrish Kruidenier Dunn
Boles Gible Gentry
Brown & Bergmann L.L.P.
2910 Grand Avenue
Des Moines, IA 50321

Attorney for Appellants

/s/WILLIAM A. HILL
WILLIAM A. HILL (AT0003532)
Assistant Attorney General
Special Litigation Division
Hoover State Office Building
Des Moines, IA 50319
Telephone: (515) 281-6162
Fax: (515) 281-4902
Email: William.Hill@ag.iowa.gov