

DISTRICT COURT, EL PASO COUNTY, COLORADO Court address: P.O. Box 2980 270 S. Tejon Colorado Springs, CO 80901-2980 Phone Number: (719) 448-7502	COURT USE ONLY <hr/> Case Number: 09CV470 Division 7 Courtroom 402
THOMAS SPITZ, Plaintiff, v. DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS and WARDEN, BENT COUNTY CORRECTIONAL FACILITY, Defendants.	
ORDER REGARDING DEFENDANTS' MOTION TO DISMISS	

The court, having reviewed Defendants' Motion to Dismiss and the Response and Reply, submits the following findings:

STATEMENT OF FACTS

Plaintiff, proceeding *pro se*, was sentenced in April of 2001 to serve an indeterminate sentence of two years to life in the Department of Corrections based on a conviction for a sex offense. Plaintiff alleges that he has been denied the opportunity to participate in sex offender treatment which is a statutory prerequisite to allow plaintiff to "proceed through the system and to parole". (Complaint p.4 ¶9.) Plaintiff's claim is in the nature of extraordinary relief pursuant to C.R.C.P. 106 from the defendants' denial to allow him to participate in certain sex offender treatment programs.

Defendants move for dismissal of the Complaint pursuant to C.R.C.P. 12(b)(1) and (5) contending that plaintiff cannot demonstrate that he has a right to sex offender treatment or that CDOC has a duty to provide it. Citing *Beebe v. Heil*, 333 F.Supp.2d 1011 (D.Colo.2004), defense distinguishes this case from the situation of an inmate initially admitted to sex offender treatment but later terminated, who was found to have a cognizable liberty interest in being retained in sex offender treatment which could not be

arbitrarily terminated. It is on this basis that defendants allege that this court is without jurisdiction to proceed further and that plaintiff has failed to state a claim upon which relief may be granted.

STANDARD OF REVIEW

Regarding the issue of the court's jurisdiction, plaintiff has the burden to prove jurisdiction. *Padilla ex rel. Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176 (Colo. 2001); *Bazemore v. Colo. State Lottery Div.*, 64 P.3d 876 (Colo. App. 2002). In determining whether the Complaint fails to state claims upon which relief may be granted, the court must accept all statements of material fact as true and not grant the motion unless it then appears that it is beyond doubt that plaintiff can prove no set of facts that would entitle him to relief. *Verrier v. Colo. Dept. of Corrections*, 77 P.3d. 873 (Colo. App. 2003).

ANALYSIS AND ORDER

Central to defendants' argument is the proposition that mandamus can not be granted because plaintiff has no constitutional right to participate in the type of rehabilitation program at issue in this case. The cases cited by defendants do not, however, stand for the proposition that a prison inmate has no right to participate in rehabilitation programs. See, *Battle v. Anderson*, 564 F.2d 388, 403 (10th Cir. 2001); *Ramos v. Lamm*, 639 F.2d 559,566 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). The court stated in *Battle* (also cited in *Ramos*), "We believe that while an inmate does not have a federal constitutional right to rehabilitation he is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being." *Battle* at p. 403. Both cases cited by defense involve inmate suits

challenging prison conditions in state facilities. The issue in this case does not ask us to determine whether an inmate has a right to rehabilitation generally but whether an inmate has the right to participate in certain programs in light of the unique statutory scheme governing sex offender indeterminate sentencing.

In review of the statutes governing indeterminate sentencing and parole eligibility, the court concludes that plaintiff does have a right to participate in sex offender treatment but cautions that this right is not absolute.

Pursuant to C.R.S. § 16-11.7-103(4)(b) CDOC has created and administers a program for the treatment of sex offender inmates pursuant to a mandate that such treatment be made available to and utilized by offenders who are sentenced to probation, community corrections or prison. In addition, administrative rules exist (AR 700-19) for the process of screening, identifying, classifying and prioritizing inmates for placement in treatment. Pursuant to C.R.S. § 18-1.3-1006, participation and progress in sex offender treatment is a central consideration in the parole board's decision whether to grant parole. "In determining whether to release the sex offender on parole, the parole board shall determine whether the sex offender has successfully progressed in treatment and would not pose an undue threat to the community...". C.R.S. § 18-1.3-1006(1)(a). An individual, therefore, arbitrarily denied the opportunity to participate in sex offender treatment may, in-effect, be denied the opportunity to be considered for parole based on the relevant law.

It is appropriate for the court to liberally interpret plaintiff's pro se Complaint to suggest that he has been denied an opportunity for sex offender treatment without cause. Plaintiff alleges that he is not being offered sex offender treatment despite the fact that he

was sentenced in 2001 to a 2 year to life indeterminate sentence and should have received the benefit of treatment in order to be seriously considered for parole. The court is well aware of the fact that several factors presumably affect an individual's access to treatment. Certainly it is unlikely the resources exist to provide all inmates the expected treatment immediately upon entry into prison. A reasonable scheme must be devised and administered to prioritize access given an individual's length of sentence, parole eligibility date and numerous other considerations. It is also true that an individual inmate may jeopardize or delay their own opportunity for treatment based on behavioral, disciplinary or other obstacles. Providing consideration to plaintiff's concerns in the light most favorable to his Complaint and providing all reasonable inferences in his favor, as the court is required to do at this point, defendants can not demonstrate that plaintiff can not establish facts that would support a claim that he was denied access to treatment and an opportunity to be at least considered for parole under existing law.

Plaintiff cites *Beebe v. Heil*, 333 F.Supp.2d 1011 (D. Colo. 2004) for the proposition that precedent supports his claim of a due process right to obtain sex offender treatment in prison. In *Beebe*, the federal district court declined to dismiss plaintiff's complaint which asked the court to intercede where plaintiff claims to have been terminated from sex offender treatment without cause. As in this case, *Beebe* asserted that under the statutory scheme in Colorado, an inmate required to undergo sex offender treatment to be considered for parole had a constitutional right not to be denied treatment without due process. The court in *Beebe* found that the statutory language at issue regarding sex offender treatment and parole eligibility in Colorado did entitle the inmate to some minimal due process before inmate could be deprived of treatment. The district

Done this 4th day of February, 2010

BY THE COURT

A handwritten signature in cursive script, appearing to read "David A. Gilbert".

David A. Gilbert
District Court Judge