IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE WILLIAMS,

OPINION AND ORDER

Petitioner,

01-C-241-C

v.

LT. HIGBEE; CAPT. THOMURE;
SGT. EVERS; JOHN RAY;
ELLEN K. RAY; C.O. BAUSCH;
C.O. JAMES; UNIT MANAGER LINDA HODDY-TRIPP; and
TIM DOUMA,

Respondents.

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This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Supermax Correctional Institute in Boscobel, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Although petitioner has no means by which to pay the initial partial payment required under § 1915(b)(1), he is permitted to bring this action pursuant to § 1915(b)(4).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner will be denied leave to proceed in forma pauperis on his due process claims, Fourth Amendment claim and conditions of confinement claim for his failure to state a claim upon which relief may be granted and he will be granted leaved to proceed in forma pauperis on his excessive force claim against respondents Bausch, Evers and Hoddy-Tripp. A decision on petitioner's request for leave to proceed on his access to the courts claim will be stayed until June 6, 2001, so that petitioner can inform the court of the nature of the action that

was dismissed as a result of respondents' actions and allege specifically which respondents destroyed legal materials related to a case that was dismissed.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Willie Williams is a prisoner at Supermax Correctional Institution in Boscobel, Wisconsin. Respondents Sgt. Evers, Bausch and James are correctional officers. Respondents John Ray and Ellen Ray are institution complaint examiners. Respondent Linda Hoddy-Tripp is a unit manager. Respondent Tim Douma is the security director. Respondent Thomure is a captain and respondent Higbee is a lieutenant.

On April 15, 2000, petitioner was placed in a cell with inmate Bruce Sanders and ordered to sleep on a mat. When petitioner used the toilet, Sanders began arguing with petitioner about how Sanders wanted to place a sheet up in the cell so he would not have to see petitioner using the toilet. Sanders had a problem with anyone who was in the cell with him. When petitioner got up from the toilet, he told respondent Evers that he had been threatened and that he wanted to see a "white shirt" or a sergeant about being moved to another cell. When respondent Evers returned to petitioner's cell, he said that petitioner could see a "white shirt." Petitioner was handcuffed and escorted to a room in the DS-II unit. Petitioner met with respondent Higbee and told Higbee that Sanders had started to

argue with him and had approached him while he was sitting on the toilet. Petitioner asked respondent Higbee to move him to another cell in DS-II. Petitioner was told that he was going to DS-I. When petitioner asked for his property that was in his cell, respondent Higbee called respondent Evers and ordered him to get petitioner's property. Petitioner told respondents Evers and Higbee where his property was in his cell but he never received any of it.

Petitioner contacted respondents Higbee and Evers about his property and wrote an inmate grievance, which was dismissed. Respondent Higbee had told petitioner that he had ordered respondent Evers to secure his property; when respondent John Ray was investigating petitioner's grievance, respondent Higbee told Ray something different. Petitioner spoke to respondent Evers but he never got anything other than abuse from Evers. Respondent Evers told the other correctional officers and inmates that petitioner was a homosexual and had been sexually assaulted. Respondent Thomure conducted an investigation into petitioner's missing property. Respondents Thomure, Higbee, Ray and Evers took part in destroying petitioner's paralegal manuals. Petitioner had cases that were dismissed because of his lack of materials.

On October 20, 2000, respondent Thomure and two other correctional officers escorted petitioner to DS-I. Petitioner asked for and was given a large black trash bag for his property. Petitioner packed his property and set it outside his cell. Respondent

Thomure told petitioner that sergeant Hinicle and correctional officer Hesslberg had to check all of petitioner's property before it could be turned over to the property room. When petitioner received the inventory slip, he learned that somehow a wire had been pulled out of his headphones. When petitioner asked respondents Thomure and John Ray about his headphones, he could not get an answer. When petitioner demanded to see a "white shirt" after learning that his headphones were damaged, respondent Thomure said he would hold an investigation. Disregarding the fact that petitioner had requested a 30-day waiting period to complete his grievance, respondent Thomure held a hearing and ordered that petitioner's headphones be destroyed. Petitioner appealed respondent Thomure's decision.

Petitioner spoke to respondent Douma two or three times and wrote him over ten times. Petitioner told respondent Douma that respondent James had taken one of his legal briefs, that respondent Evers had destroyed some of his property and that he was missing a paralegal manual. Petitioner had a sworn affidavit by correctional officer Don Dittberner who told petitioner he would testify that respondent Higbee had told respondent Evers to secure petitioner's property. Respondent Douma denied petitioner's grievances and refused to consider affidavits from three other inmates in which they averred that respondent James had taken one of petitioner's legal briefs and stated that he was going to throw it away.

On February 3, 2001, respondent Bausch and another correctional officer searched petitioner's cell. Petitioner heard lieutenant Gerl instruct a sergeant whose name is

unknown to document whether petitioner demanded the presence of a "white shirt" during a search of his cell and to place him in observation if he did. On February 5, 2001, respondents Bausch and Evers came to petitioner's cell and said they wanted to search it. Lieutenant Gerl was concerned that petitioner had demanded that a "white shirt" be present during a search of his cell. Respondents Bausch and Evers cuffed petitioner's wrists and ankles. Respondent Bausch twisted petitioner's wrist backwards as he was putting a bull strap on petitioner's right wrist.

Petitioner noticed that respondent Hoddy-Tripp was 5 or 6 feet away. Petitioner was strapped to a door and ordered to kneel, which he did. Petitioner was ordered to look straight ahead; when he turned his head to the left, respondents Bausch and Evers yanked petitioner from his knees. Petitioner's right arm was still strapped to the door and his wrists and ankles were cuffed. Respondents Bausch and Evers both had their knees in petitioner's back and were bending petitioner's hands back to an unbearably painful point. Respondent Evers was chanting. Petitioner was ordered to kneel again and his ankle cuffs were removed. Respondents Evers, Bausch and Hoddy-Tripp all participated in the attack on petitioner.

Petitioner was placed in the strip search cell and ordered to strip, which he did. Petitioner was then ordered to take his hair down. When petitioner complained that his wrists were swollen, lieutenant Berg told petitioner that he had to take his hair down or he would be left in the strip cell until he did or a correctional officer would take his hair down

for him. When petitioner complained again about his swollen wrists, he was told that he could see a nurse when the search was finished. An hour later, petitioner's search was completed and a nurse documented that petitioner had cuts on both his hands and his right wrist. Petitioner was then ordered to submit to a body cavity search. The correctional officer acted as though he could not see each time petitioner showed him that there was nothing between his buttocks. After the officer had looked four or five times, lieutenant Berg ordered a correctional officer to spread petitioner's buttocks and look between them.

Petitioner heard respondent Hoddy-Tripp tell respondents Evers and Bausch to slam petitioner and put him in the control cell. Petitioner was not given any clothes except for underwear and socks. He was not given a blanket or sheets. When petitioner asked for clothing, he was told he could not have any. Because petitioner was cold, he tore the mat open and got into it. The next morning, a lieutenant told petitioner that she had been ordered to take the mat and give him a different one. The new mat was rubber and was hard and flat. Petitioner stayed in a control cell for two days with nothing to wear. When petitioner was moved to a non-control cell, he was ordered to sleep on a rubber mat for fourteen days pursuant to the order of the security director or deputy warden even though he was not a threat to himself or others.

According to Supermax Correctional Institution's resource guide for inmates, correctional officers are to escort inmates with handcuffs on their wrists behind their backs,

make inmates kneel and cuff their ankles, hold them when escorting them, place one end of a bull strap on the inmate's right wrist and the other end on a 6 feet tall steel door once they arrive at the strip search cell.

On February 12, 2001, petitioner filed grievance #SMCI-2001-4918 and received an acknowledgment of the complaint from complaint examiner respondent Ellen Ray. On March 12, 2001, respondent Ellen Ray made comments that were outside the scope of her job as complaint examiner. Respondent Ellen Ray should not have concluded that petitioner committed any offense, including assault. Petitioner never got a copy of the conduct report and did not attend a hearing. Petitioner did not authorize respondent Ellen Ray to look at his medical reports.

OPINION

A. Due Process

Petitioner alleges that his rights under the due process clause of the Fourteenth Amendment have been violated because respondents Higbee, Evers, Thomure and John Ray deprived him of his personal property, including legal materials and a pair of headphones. This allegation does not state a claim. It is well-established that as long as state remedies are available for the loss of property, neither intentional nor negligent deprivation of property gives rise to a constitutional violation. See Daniels v. Williams, 474 U.S. 327 (1986);

Hudson v. Palmer, 468 U.S. 517 (1984). In Hudson, the United States Supreme Court held that an inmate has no due process claim for the intentional deprivation of property if the state has made available to him a suitable post-deprivation remedy. In Daniels, the Court concluded that a due process claim does not arise from a state official's negligent act that causes unintended loss of property or injury to property.

The state of Wisconsin provides several post-deprivation procedures for challenging the taking of property. According to Article I, §9 of the Wisconsin Constitution,

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without delay, conformably to the laws.

Sections 810 and 893 of the Wisconsin Statutes provide plaintiff with replevin and tort remedies. Specifically, § 810.01 provides a remedy for the retrieval of wrongfully taken or detained property. Section 893 contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property. Petitioner has not alleged that the state has refused to provide him with a post-deprivation remedy. The existence of these remedies defeats any claim he might have that respondents deprived him of his property without due process of law.

Petitioner also alleges that respondent Ellen Ray made extraneous comments in response to plaintiff's inmate grievance and that respondent Douma dismissed petitioner's

grievances about his missing property. Petitioner does not allege that the inmate complaint review system procedures were applied to him unfairly. Petitioner has failed to state a viable claim of due process violations under the Fourteenth Amendment.

B. Access to the Courts

I understand petitioner to be alleging that respondents Thomure, Higbee, John Ray, Evers and James have impeded his constitutional right of access to the courts by throwing away his paralegal manual and taking one of his legal briefs along with other legal research material. It is well established that inmates have a fundamental constitutional right of access to the courts. See Bounds v. Smith, 430 U.S. 817, 821 (1977). To state a claim, the prisoner must allege facts from which an inference can be drawn of "actual injury." See Lewis v. Casey, 518 U.S. 343, 349 (1996). This rule is derived from the doctrine of standing, see id., and requires the prisoner to demonstrate that a non-frivolous legal claim has been frustrated or impeded. See id. at 353-54 nn. 3-4 and related text. In light of Lewis, a plaintiff must plead at least general factual allegations of injury resulting from defendants' conduct or suffer dismissal of his complaint for failure to state a claim upon which relief may be granted.

In order to bring a viable access to the courts claim, petitioner must allege that he had a specific non-frivolous case that he had filed and was dismissed as a result of defendant's

actions. Petitioner's allegation that he had cases dismissed because of respondents' actions is too vague to meet the injury requirement under Lewis. However, prisoners are entitled to "'reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" Id. at 351 (quoting Bounds, 430 U.S. at 825). As a result, I will stay a decision on petitioner's request for leave to proceed in forma pauperis to allow him time to inform the court of the nature of the action that was dismissed and specify which respondents destroyed legal materials that were related to a case that was dismissed.

C. Excessive Force

I understand petitioner to be alleging that respondents Bausch, Evers and Hoddy-Tripp violated his Eighth Amendment rights by using excessive force. Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992) To determine whether force was used appropriately, a court considers factual allegations as to the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. See Whitley v. Albers, 475 U.S. 312, 321 (1986). In this case,

petitioner alleges that respondents Bausch and Evers acted under the direction of respondent Hoddy-Tripp when they cuffed petitioner's wrists and ankles, put a bull strap on petitioner's right wrist, ordered petitioner to kneel, put their knees in his back and bent his hands back to an unbearably painful point. Petitioner's allegations are sufficient to state a claim of excessive force against respondents Bausch, Evers and Hoddy-Tripp, all of whom are alleged to have been personally involved in the incident.

D. Fourth Amendment

Petitioner alleges that he was subjected to cell searches, strip searches and body cavity searches. The Fourth Amendment requires that searches and seizures be reasonable. See Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998). In determining whether a particular search is reasonable under the Fourth Amendment, courts balance the need for the search against the invasion of personal rights that the search entails. See Bell v. Wolfish, 441 U.S. 520, 559 (1979). In Bell, 441 U.S. at 520, pretrial detainees at a New York City facility alleged that the policy of conducting body cavity searches following visits from outsiders violated their Fourth Amendment rights. On the merits, the Supreme Court found that the searches were reasonable in light of the circumstances. See id. at 558-60. The Court held that reasonableness must be determined by balancing

the need for the search against the invasion of personal rights, as revealed by four factors: "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." See id. at 559. The court held that the danger of contraband entering the facility was so significant that it outweighed the intrusive nature of the search. See id. at 560.

In Peckham, 141 F.3d at 696, the Seventh Circuit held that it did not violate the Fourth Amendment's proscription on unreasonable searches and seizures to strip search a state prisoner upon his arrival at the correctional facility, his return to the facility after medical appointment or court proceeding, his completion of a contact visit with a non-prisoner or a general search of a cell block. The court noted that, "given the considerable deference prison officials enjoy to run their institutions it is difficult to conjure up too may real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment." Id. at 697. Petitioner's allegation that he was subjected to a strip search and body cavity search on one occasion following a search of his cell is insufficient to state a claim under the Fourth Amendment.

E. Eighth Amendment: Conditions of Confinement

In order to state a claim under the Eighth Amendment, plaintiff's allegations about prison conditions must satisfy a test that involves both a subjective and objective

component. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). The objective component focuses on whether the conditions "exceeded contemporary bounds of decency of a mature, civilized society." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994) (citing Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)). The subjective component focuses on intent: "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford, 17 F.3d at 1579. In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834. Deliberate indifference "'implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.'" Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)).

The Eighth Amendment imposes a duty on prison officials to provide adequate shelter, although conditions may be harsh and uncomfortable. See Dixon, 114 F.3d at 642. In order to violate the Eighth Amendment, deprivations must be "unquestioned and serious" and contrary to "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Plaintiff's allegations that he was put in a control cell without any sheets or blankets or any clothes except for underwear and socks for two days do not support an Eighth Amendment violation. Petitioner does not allege that the conditions of his cell posed a threat to his health or safety or that the cell was uncomfortable in any other

way. His request for leave to proceed in forma pauperis on this claim will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Willie Williams's request for leave to proceed in forma pauperis on his due process claims, Fourth Amendment claim and conditions of confinement claim is DENIED for his failure to state a claim upon which relief may be granted;

2. Petitioner's request for leave to proceed in forma pauperis on his access to the courts claim is STAYED until June 6, 2001 to allow petitioner to inform the court of the nature of the action that was dismissed as a result of respondents' actions and specify which respondents destroyed legal materials that were related to a case that was dismissed.

3. Petitioner's request for leave to proceed in forma pauperis on his excessive force claim against respondents Bausch, Evers and Hoddy-Tripp is GRANTED.

4. The unpaid balance of petitioners' filing fee is $150; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

5. Service of this complaint will be made after a decision is made on plaintiff's

request for leave to proceed in forma pauperis on his access to the courts claim.

Entered this 24thday of May, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge