IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE WILLIAMS,

ORDER

Petitioner,

01-C-284-C

v.

GERALD BERGE, JON LITSCHER, JOHN RAY, KAREN GOULIE, ELLEN K. RAY, JOHN SHARPE, BRAD HOMPE and JULIE BIGGAR,

Respondents.

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This is a proposed civil action for injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Willie Williams, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, alleges that respondents violated his right to be free from unreasonable searches and seizures by taking a deocyribonucleic acid (DNA) sample from him without consent, violated his right of due process and conspired to do so by dismissing his inmate complaints regarding the DNA collection and used excessive force against him. Petitioner alleges also that respondents violated state laws.

Petitioner 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. Petitioner has submitted a trust fund statement demonstrating that 100% of his income is being taken to pay fees in other cases. Therefore, although he has not made the initial partial payment required under § 1915(b)(1), he is permitted to bring this action pursuant to 28 U.S.C. § 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).

Because I find that petitioner fails to state a claim upon which relief may be granted, I will deny him leave to proceed on his claims to be free from unreasonable searches and seizures and excessive force. I will deny him leave to proceed on his due process and conspiracy claims because the claims are legally frivolous. Because petitioner has not raised a viable federal law claim, I decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over petitioner's state law claims.

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

ALLEGATIONS OF FACT

A. Parties

Petitioner Willie Williams is an inmate at Supermax Correctional Institution in Boscobel, Wisconsin. Respondent Jon Litscher is Secretary of the Department of Corrections. Respondents John Ray, Karen L. Gourlie, Ellen K. Ray and Julie Biggar are inmate complaint examiners. Respondent Gerald Berge is warden at Supermax; respondents John Sharpe and Brad Hompe are unit managers.

B. DNA Sampling

On March 16, 2001, respondent Sharpe distributed a memorandum stating that staff would be conducting a DNA sample collection from March 19, 2001 to April 2, 2001. The

memorandum described the collection process in which a cotton swab would be rubbed inside the offender's cheek and stated that the sampling was mandatory for all inmates other than those who have already given a sample. Attached to the memorandum was additional information about the DNA sample collection, which stated that DNA sampling was mandatory for offenders who were convicted under certain statutes and those "who are in prison on or after January 1, 2000, for a felony committed in Wisconsin." Respondent Berge also distributed a memorandum that did not state clearly that inmates who did not meet the criteria under the new DNA sample law did not have to participate in the collection. Petitioner explained to the warden and to all other respondents that he was sentenced under Wis. Stat. § 943.32(1)(a) and not any of the statutes listed on the memorandum. Petitioner refused to submit to the sample collection.

Petitioner believes respondent Berge sent respondents Sharpe and Hompe to speak with petitioner in order to intimidate him. Respondent Sharpe pointed to the line in the memo that reads "offenders who are in prison on or after January 1, 2000 for a felony committed in Wisconsin" and suggested that the phrase referred to petitioner. Both respondents Sharpe and Hompe threatened petitioner verbally, telling him what would happen if he did not submit to the sample collection. On May 1, 2001, respondent Berge sent another memorandum to petitioner informing him that on May 3, 2001 staff would try to take another sample, with force if necessary. Petitioner wrote respondents Ellen Ray and

Goulie in Madison and talked to respondent unit managers Sharpe and Hompe. On May 3, 2001, respondent Berge ordered correctional officers to take a DNA sample from petitioner forcefully. A "full force tactic team" of correctional officers forced petitioner to give a DNA sample and then placed him in a cell wearing only his underwear and socks. Petitioner believes staff placed him in that particular cell to torment him because there is a door near the cell that slams every half hour, depriving petitioner of sleep. Staff wrote petitioner a conduct report and "started [his] 8-360 over."

C. Inmate Complaint Review System

Petitioner filed an inmate complaint, stating that he did not meet the criteria of inmates who are required to submit to DNA sampling. The Secretary of the Department of Corrections is supposed to review inmate complaints in the final step of review. However, 100 out of 100 inmate grievances are dismissed without ever being addressed by the Secretary. Instead, respondents Goulie and John Ray routinely rubber stamp petitioner's complaints with a dismissal by the Secretary. Petitioner believes that complaint examiners Goulie and Ray did not conduct an honest investigation of two of his inmate complaints and instead are dismissing them as frivolous.

D. Physical Assault

On April 5, 2001, correctional officers Kruger and Trefz escorted petitioner to a strip cell at the back of the alpha unit. While the officers were in petitioner's cell, they made remarks about petitioner's having been charged with assault. The officers also commented about petitioner's "outie" belly button. This verbal taunting continued until petitioner asked Kruger if he was going to threaten petitioner with bodily harm again if he turned his head. Kruger asked if he had to. Petitioner responded "yes, because there isn't any such rule or policy in the level one Supermax inmate handbook." This exchange started the correctional officers' assault on petitioner.

After being cuffed and escorted into the hallway, petitioner's left ankle cuff came off. Petitioner does not know how the cuff fell off. Trefz reattached the cuff. When they arrived at the strip cell, there was no mat for kneeling. "Unit manager was called by [petitioner] on this." Petitioner has heard and read lies justifying why Sergeant Ever slammed petitioner on the floor. After correctional officers Trefz and Kruger returned petitioner to his cell, petitioner discovered three of his possessions in disarray. The arms of his eyeglasses were broken, all of his legal papers had been rearranged and disorganized and his new lip balm had been rolled out of the container and dumped into the toilet.

Petitioner believes that Kruger looks for opportunities to beat him up. Kruger comes to petitioner's cell any chance he gets to escort him. Petitioner believes that Kruger hates

him; he can see it in his eyes.

DISCUSSION

A. Fourth Amendment Unreasonable Search and Seizure

I understand petitioner to contend that respondents violated his right to reasonable search and seizure by taking a DNA cheek swab sample from him by force. To pass constitutional muster under the Fourth Amendment, a search must be reasonable. "Reasonableness" is determined by balancing the intrusiveness of the search of the individual against the legitimate interest of the government in conducting the search. Delaware v. Prouse, 440 U.S. 648, 654 (1979). Although reasonableness is measured generally by a warrant demonstrating probable cause, Griffin v. Wisconsin, 483 U.S. 868 (1987), no case has established "a per se Fourth Amendment requirement of probable cause, or even a lesser degree of individualized suspicion, when government officials conduct a limited search for the purpose of ascertaining and recording the identity of a person who is lawfully confined to prison." Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992)), cert. denied, 113 S. Ct. 472 (1992). Nonetheless, a search that may be undertaken without a warrant must be reasonable in order to comply with the dictates of the Fourth Amendment. Id. at 307. The reasonableness of taking a specimen from petitioner under these circumstances is determined by balancing petitioner's privacy interest against the government's interest in establishing and

maintaining a DNA data bank. Id.

Generally, DNA analysis involves the evaluation of blood cells. Id.; see, e.g., United States v. Bonds, 12 F.3d 540, 550 (6th Cir. 1993). The United States Supreme Court has stated repeatedly that the privacy interest infringed by a blood test is minimal because the intrusion caused by the taking of a blood sample is "not significant." See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); Winston v. Lee, 470 U.S. 753, 761 (1985); Schmerber v. California, 384 U.S. 757, 771 (1966). Here, the DNA analysis involves the evaluation of skin and saliva cells collected from the mouth and cheek. Several courts, including this one, have found that blood and saliva DNA testing require the same constitutional analysis and have held that the taking of a saliva sample does not violate an inmate's Fourth Amendment right to privacy. See Shelton v. Gudmanson, 934 F. Supp. 1048 (W.D. Wis. 1996) (swabbing cheek of sex offenders for DNA data bank did not violate Fourth Amendment); Schlicher v. (NPN) Peters, I & I, 103 F.3d 940 (10th Cir. 1996) (collection of blood and saliva samples from inmates convicted of certain offenses did not constitute unreasonable search and seizure); Vanderlinden v. State of Kansas, 874 F. Supp. 1210 (D. Kan. 1995) (collection of blood and saliva specimens from certain convicted felons not unconstitutional intrusion on inmates' privacy interests).

The constitutionality of state programs establishing data banks of convicted felons' DNA has been addressed in a growing number of reported federal cases. See Rise v. Oregon,

59 F.3d 1556 (9th Cir. 1995); Jones, 962 F.2d 302; Vanderlinden v. Kansas, 874 F.Supp. 1210 (D. Kan. 1995); Sanders v. Coman, 864 F.Supp. 496 (E.D. N.C. 1994); Ryncarz v. Eikenberry, 824 F. Supp. 1493, 1500 (E.D. Wash. 1993). In each of these cases, the court held that the Fourth Amendment does not prevent the taking of blood samples for use in creating a DNA bank. State courts have followed suit. People v. Wealer, 636 N.E.2d 1129 (Ill. App. Ct. 1994), cert. denied, 642 N.E.2d 1299 (1994); In re Orozco, 878 P.2d 432 (Or. 1994); State v. Olivas, 856 P.2d 1076 (1993).

These courts have found only limited privacy interests in information that can be devined from DNA samples. Rise, 59 F.3d at 1559 (gathering of genetic information for identification purposes from convicted murderer's or sexual offender's blood once the blood has been drawn does not constitute more than minimal intrusion upon plaintiff's Fourth Amendment interests); Jones, 962 F.2d at 307 (inmates who were to be tested had limited privacy interests). In each of these cases, the courts have found that the government's interest in maintaining a permanent identification record of convicted felons for resolving past and future crimes outweighs those minimal privacy interests. The Fourth Circuit described Virginia's DNA data bank as a "dramatic new tool for the law enforcement effort to match suspects and criminal conduct," noting that DNA analysis was superior to fingerprinting and photographing because DNA cannot be altered or disguised." Jones, 962 F.2d at 307. The court noted also the high rate of recidivism among violent criminals in the

nation and in Virginia. Id. at 305-06. The Ninth Circuit found high rates of recidivism among certain types of murderers and sexual offenders and added that "investigations of murders and sexual offenses are more likely to yield the types of evidence from which DNA information can be derived." Rise, 59 F.3d at 1561. The creation of a DNA data bank increases the capacity of the state to prosecute crimes accurately, by providing evidence that can exculpate an accused just as well as it can implicate him. Id.

In this case, petitioner alleges that collecting a sample of cells from the cheek violates his Fourth Amendment privacy interests. In Shelton, 934 F. Supp. at 1051, the inmate plaintiff made a similar claim, with the only difference that DNA samples were collected from inmates convicted of sex crimes only. In Shelton, I found that the state had demonstrated that Wisconsin's interest in the DNA data bank as to sex offenders was similar to that of the states in which such banks had been upheld against constitutional challenge. In particular, I found that "the government had a significant interest in maintaining a permanent identification record of convicted felons for resolving past and future crimes; the intrusion was minimal; the inmates had only a very limited privacy interest at stake; and the sampling was carried out pursuant to state regulations that required the testing of every inmate falling within a certain category, thus ensuring that arbitrary testing decisions would not be made. Id. Because these same interests apply to this case in which petitioner challenges the state's collection of DNA samples from all "offenders who are in prison on or

after January 1, 2000, for a felony committed in Wisconsin," I conclude that petitioner fails to state a claim upon which relief may be granted on his claim for Fourth Amendment right to privacy. Petitioner will be denied leave to proceed on this claim.

B. Due Process

Petitioner alleges that respondents John Ray and Goulie are violating his right to due process by routinely rubber stamping his inmate complaints as "dismissed," without allowing respondent Litscher the opportunity to review them. I understand petitioner to allege that respondents violate his right to due process under the Fourteenth Amendment by not following proper procedures in the inmate complaint review system.

The adoption of mere procedural guidelines does not give rise to a protected liberty interest. Culbert v. Young, 834 F.2d 624, 628 (7th Cir. 1987), cert. denied, 485 U.S. 990 (1988); Studway v. Feltman, 764 F. Supp. 133, 134 (W.D. Wis. 1991). In Studway, the plaintiff contended that the defendant's failure to conduct a disciplinary hearing within 21 days of the conduct charged violated his due process rights. In granting the defendant's motion to dismiss the complaint, I concluded that the failure to hold a disciplinary hearing within the 21-day time period established in Wis. Admin. Code § DOC 303.76(3) did not place a substantive limit on the decisionmaker's determination of what conduct may be subject to prison discipline, but that it was merely a procedural regulation that did not give

rise to a constitutional claim. 764 F. Supp. at 135.

Petitioner's claim fails for the reasons set out in Studway. Petitioner alleges that respondents Goulie and John Ray are dismissing his inmate complaints without an honest investigation. The fact of conducting an investigation into inmate complaints is a procedural rule that does not give rise to a protected liberty interest. Petitioner may have a state law claim for violation of the regulation but he does not have a federal constitutional claim. Petitioner will be denied leave to proceed on his Fourteenth Amendment due process claim against respondents Goulie and John Ray because the claim is legally frivolous.

C. Conspiracy

To establish a claim of civil conspiracy, petitioner must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Petitioner alleges that respondent inmate complaint examiners conspired to rubber stamp his inmate complaints as "dismissed." Because I have found that petitioner's due process challenge of the alleged rubber stamping is legally frivolous, petitioner's claim for conspiracy must also fail. In a

conspiracy claim, two or more persons must act in concert to commit an unlawful act or to commit a lawful act by unlawful means. Neither scenario is present in this case. Thus, petitioner will be denied leave to proceed in forma pauperis on his conspiracy claim because the claim is legally frivolous.

D. 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." 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. Whitley v. Albers, 475 U.S. 312, 321 (1986).

In this case, petitioner alleges without further detail that Sergeant Evers used excessive force when he slammed petitioner on the floor and that correctional officer Kruger is waiting for the chance to assault petitioner. Petitioner's claim is deficient for several reasons. First, the individuals who petitioner named as directly involved in the assault or imminent assault are not named as respondents in this case. Next, even if the alleged

assaulters had been named, petitioner has not alleged facts from which it could be inferred that these individuals used, or wanted to use, force that was incommensurate to the perceived need for force, that petitioner sustained any injury or that the individuals did not take any steps to mitigate the severity of the force. Finally, it appears that petitioner has raised the same claim against respondent Evers in a separate lawsuit, no. 01-C-241-C, that is currently before this court. For these reasons, petitioner will be denied leave to proceed on his claim for excessive force because he fails to state a claim upon which relief may be granted as to this claim.

E. State Law Claims

Petitioner alleges that respondents violated state law when they forced him to submit to DNA collection despite the fact that petitioner believes the memorandum distributed on the collection indicated that he was not required to submit a sample. Petitioner further alleges that Trefz and Kruger damaged his eyeglasses, legal papers and chapstick when they conducted a search of his cell, which is also a state law claim. See Hudson v. Palmer, 468 U.S. 517 (1984) (as long as state remedies are available for loss of property, neither intentional nor negligent deprivation of property gives rise to a constitutional violation). The Court of Appeals for the Seventh Circuit has recognized that "a district court ha[s] the discretion to retain or to refuse jurisdiction over state law claims." Groce v. Eli Lilly & Co.,

193 F.3d 496, 500 (7th. Cir. 1999). Because petitioner has not raised a viable federal law claim, I decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over petitioner's state law claims. See 28 U.S.C. § 1367(c)(3).

ORDER

IT IS ORDERED that

1. Petitioner Willie William's request for leave to proceed in forma pauperis on his claims for right to privacy and excessive force is DENIED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. Petitioner's request for leave to proceed in forma pauperis on his claims for due process and conspiracy is DENIED because the claims are legally frivolous;

3. 28 U.S.C. § 1915(g) directs the court to enter a strike when an " action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because the state law claims do not fall under one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g);

4. The unpaid balance of petitioner's filing fee is $150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and

5. The clerk of court is directed to close the file.

Entered this 6thday of September, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge