

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KENNETH FOWLER,

Petitioner,

OPINION AND ORDER

v.

01-C-0624-C

DANIEL J. BENIK and
CAPT. D. MORGAN,

Respondents.

This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Kenneth Fowler, who is currently an inmate at Whiteville Correctional Facility in Whiteville, Tennessee, alleges that respondents destroyed his personal property in violation of his due process rights under the Fourteenth Amendment. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing petitioner's pro se complaint, the court must construe it liberally, Haines v. Kerner, 404 U.S. 519, 521 (1972), and grant leave to proceed if there is an arguable basis for a claim in fact or law. Neitzke v. Williams, 490 U.S. 319 (1989).

Because petitioner has not alleged that state of Wisconsin has refused to provide him

with a post-deprivation remedy, his complaint will be dismissed as legally frivolous.

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

ALLEGATIONS OF FACT

Petitioner Kenneth Fowler is an inmate confined at Whiteville Correctional Facility in Whiteville, Tennessee. Respondent Daniel J. Benik was the warden of Columbia Correctional Institution in Portage, Wisconsin, at the time of the alleged events. Respondent Capt. Morgan is the property room supervisor at Columbia Correctional Institution.

On January 20, 2000, petitioner was transferred from Whiteville Correctional Facility to Columbia Correctional Institution in order to attend a criminal court proceeding in Wisconsin. When petitioner was sent to Wisconsin, property officials at Whiteville packed his property and transferred it to Columbia.

On January 4, 2000, petitioner's property was received at Columbia, but the property officials deemed it as "not allowed." (Petitioner never alleges what the disallowed property items were.) Petitioner asked that Columbia store his disallowed property until his transfer back to Whiteville after completion of his court proceedings. Respondent Morgan told petitioner that his property would not be stored. Petitioner then filed an inmate complaint (CCI-2000-20818).

On July 21, 2000, the inmate complaint examiner dismissed petitioner's complaint because the property was "not allowed pursuant to Red Book Policy, Property Policy and Procedure, VI. Approved Articles List." The Red Book contains an outdated and erroneous property list for out-of-state correctional facilities. That same day, respondent Benik issued his reviewer's decision, concurring with the inmate complaint examiner's dismissal.

On August 7, 2000, petitioner was called to the Columbia property room where his disallowed property items had been stored. (Petitioner does not explain why his property had been stored even though he was told it would not be stored). Petitioner was told that he had to complete a "Tennessee Transfer Property Disposition" form, which required him to choose between having his disallowed personal property shipped outside the prison system or destroyed. He refused to sign the form, arguing that these property items were the same items that he had been allowed at Whiteville and that if the items were shipped outside the prison system, they would not be allowed to re-enter the Whiteville facility. Petitioner asked the Columbia property official to forward his property to Whiteville and let Whiteville determine the outcome of his property. After petitioner returned to Whiteville, he discovered that none of his property had been transferred.

On November 12, 2000, petitioner wrote to respondent Morgan to ask about his property. On November 24, 2000, respondent Morgan advised petitioner that his property had been destroyed pursuant to institution policy because petitioner had failed to designate

what he wanted done with it on the Tennessee Transfer Property Disposition form.

OPINION

Petitioner contends that respondents destroyed his personal property in violation of his due process rights under the Fourteenth Amendment. However, as long as state remedies are available, neither intentional nor negligent deprivation of property gives rise to a constitutional violation. Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984). In Hudson, the 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 extended that holding to negligent as well as intentional deprivations. Because petitioner has not alleged that the state of Wisconsin has refused to provide him with a post-deprivation remedy, he has failed to allege a constitutionally adequate claim under Hudson. Therefore, petitioner's complaint will be dismissed as legally frivolous.

ORDER

IT IS ORDERED that

1. Petitioner Kenneth Fowler's request for leave to proceed in forma pauperis against respondents Daniel J. Benik and Capt. D. Morgan is DENIED as legally frivolous;

2. The unpaid balance of petitioner's filing fee is \$137.65; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2);
3. A strike will be recorded against petitioner pursuant to § 1915(g); and
4. The clerk of courts is directed to close this file.

Entered this 30th day of January, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge