

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

ERIC G. NASH,

Petitioner,

ORDER

v.

01-C-630-C

JON LITSCHER, GERALD BERGE,
JOHN BELL, JOHN RAY, STEPHEN
PUCKETT, TRINA HANSON, JOHN
AND JANE DOES 1-10; P. PETZER,
OFFICER NUNN, JOHN AND JANE
DOES 1-10,

Respondents.

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Eric G. Nash, who is presently confined at the Columbia Correctional Institution in Portage, Wisconsin, alleges that respondents violated his Eighth Amendment right to be free from cruel and unusual punishment, his Fourth Amendment right to be free from unreasonable searches and his Fourteenth Amendment right to due process and to gain access to the courts. He also contends that respondents conspired to violate his constitutional rights. He 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 the initial partial payment required under § 1915(b)(1).

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, even with a liberal reading, petitioner's complaint fails to state a claim upon which he could prevail.

Petitioner will be denied leave to proceed on his Eighth Amendment claim of unconstitutional conditions of confinement, his Fourth Amendment claim that he has been subjected to unreasonable searches and his Fourteenth Amendment claims of denial of access to the courts and due process regarding the transfer and stay at Supermax because the claims fail to state a claim upon which relief can be granted. In addition, petitioner will be denied leave to proceed on his claims of conspiracy and due process regarding the inmate complaint system and the loss of pay because these claims are legally frivolous.

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

ALLEGATIONS OF FACT

A. Parties

Petitioner Eric G. Nash is incarcerated at Columbia Correctional Institution in

Portage, Wisconsin. At all times relevant to this complaint, he was incarcerated at Whiteville Correctional Facility in Tennessee and at Supermax Correctional Institution in Boscobel, Wisconsin. Respondent Jon Litscher is Secretary of the Wisconsin Department of Corrections. Respondent Gerald Berge is the warden of Supermax. Respondent John Bell is the institution complaint examiner of Supermax. Respondent John Ray is the correctional complaint examiner of the institution. Respondent Stephen Puckett is Director of the Office of Offender Classification. Respondent Trina Hanson is the Program Coordinator of Supermax. Respondent P. Petzer is the warden of Whiteville. Respondent Officer Nunn is the chief security officer of Whiteville. Respondents John and Jane Does 1-10 are individuals who participated in the alleged constitutional violations against petitioner but whose identities are unknown to petitioner.

B. Due Process: Transfer to Supermax

On or about December 8, 1999, petitioner was taken out of general population and placed in segregation pending an investigation. On January 12, 2000, petitioner was taken out of his cell and was told that he was going to see the program review committee. Petitioner was placed in chains and was walked away from where the program review committee meetings are held. Petitioner was scared because he thought that he was going to be beaten by the guards again. Petitioner asked where he was being taken, then

respondent program review committee members John and Jane Does appeared and told petitioner that he was being transferred to Supermax. Petitioner told respondent committee members that he had done nothing wrong, that he had not received a conduct report or a due process hearing and that sending him to Supermax was in violation of his rights because he could not appeal the decision. Respondents John and Jane Does told petitioner as he was being taken outside the institution that “this is your PRC hearing.” Petitioner was placed on a bus and transported to Supermax.

C. Unreasonable Searches

On January 13, 2000, petitioner arrived at Supermax and was placed in program segregation. In program segregation, petitioner was subjected to harassment and humiliation by frequent cell searches, strip searches and body pat down searches by respondents John and Jane Does.

D. Conditions of Confinement

At Supermax, respondents Does 1-10 subjected petitioner to harsh conditions of confinement. Petitioner was subjected to lights in his cell that were illuminated 24 hours a day. Staff told petitioner to sleep without his head being covered and then woke him throughout the night when he did not comply. Petitioner was monitored 24 hours a day by

video camera. Petitioner was subjected to extreme heat and extreme cold in his cell because of the poor temperature control at Supermax. These conditions caused petitioner to have chronic sleep deprivation, headaches, eye pain and psychological symptoms, including depression.

E. Due Process: Remaining at Supermax and Inmate Complaint Review System

On March 21, 2000, petitioner received a notice that he was being placed in temporary lock-up pending an administrative confinement hearing. Petitioner gave a written statement, stating that he has received no conduct report to date and asking whether a conduct report had been issued, the names of the people that had held the conduct report hearing in his absence and why he had not received a disposition on the conduct report.

On April 6, 2000, petitioner asked for the attendance of four witnesses who could clear him of all allegations surrounding an incident that occurred at Whiteville Correctional Facility in Tennessee and that resulted in petitioner being sent to Supermax, pending a conduct report. On April 10, 2000, a security staff member denied all witnesses requested by petitioner, stating that the incident is not part of the administrative confinement record at Supermax, but allowed one additional witness, Don Paul, to give a statement.

Petitioner was taken to the hearing at which he listed his objections to the hearing in written form. The administrative confinement committee affirmed petitioner's

administrative confinement without performing an investigation or calling any of petitioner's requested witnesses. On April 10, 2000, after the hearing, petitioner filed inmate complaint no. SMCI-2000-10508, alleging due process rights violations, and inmate complaint no. SMCI-2000-10653, alleging an unjust hearing. Both complaints were dismissed by respondent Bell, appealed to the correction complaint examiner, affirmed by respondent Ray and affirmed by respondent Litscher.

On April 14, 2000, petitioner filed an appeal to the administrative confinement committee decision to the warden, respondent Gerald Berge, who remanded the decision to the committee on April 26, 2000, for the purpose of including petitioner's witness.

On November 6, 2000, petitioner received a decision on the remand in which the administrative confinement committee reaffirmed petitioner's administrative confinement. Petitioner appealed to respondent Berge. On November 28, 2000, respondent Berge remanded again the administrative confinement committee decision for the purpose of including the witness statement. Petitioner filed inmate complaint no. SMCI-2000-33917.

On January 7, 2001, the administrative confinement committee included the witness statement and affirmed petitioner's administrative confinement. Petitioner appealed the decision and respondent Berge affirmed it on March 9, 2001. Petitioner sought review of the administrative confinement committee and respondent Berge's decision affirming his custody and placement. He appealed these decisions to respondent Puckett, who affirmed

them without any investigation. Petitioner repeated his attempts to have respondents investigate the false allegations, his unlawful detention at Supermax and the violation of his due process rights, but his administrative remedies had been exhausted.

On or about April 15, 2001, the court issued a decision in another inmate's case reversing the administrative confinement committee decision that had affirmed five other inmates' administrative confinement at Supermax, on the ground that the confinement was based on false allegations and due process violations. The Department of Corrections then conducted its own investigation of the incident that occurred at Whiteville Correctional Facility in Tennessee. This incident was the basis for the transfer of petitioner and 28 other inmates to Supermax and their placement in administrative confinement there. At the end of the investigation, it was determined that the allegations against petitioner and 28 other inmates were false and that petitioner, as well as 15 others, had been confined unlawfully at Supermax. On or about July 27, 2001, petitioner was transferred to Dodge Correctional Institution and finally to Columbia Correctional Institution.

F. Access to the Courts

Through the chain of command, respondents issued orders and conspired to hold inmates' mail and clean up their records by deleting references to the reasons why petitioner was transferred to Supermax, so that petitioner could not file a lawsuit on the constitutional

violations.

G. Due Process: Loss of Wages

Before being transferred to Supermax, petitioner received wages in the amount of \$36.00 a month. If petitioner had not been confined at Supermax for a period of 18 months, he would have earned \$648.00. Petitioner filed an inmate complaint (no. CCI-2001-24356) for the loss of wages for a period of 18 months. On September 14, 2001, respondent corrections complaint examiner Ray dismissed the complaint. The dismissal was affirmed by respondent Litscher.

DISCUSSION

A. Due Process: Transfer to Supermax

Petitioner alleges that respondents Petzer, Nunn and Does 1-10 violated his right to due process by transferring him to Supermax without any kind of a due process hearing to determine whether he met the criteria for placement at Supermax or whether the decision was based on credible evidence. However, prisoners do not have a liberty interest in remaining out of segregation status so long as that period of confinement does not exceed the remaining term of their incarceration. Wagner, 128 F.3d at 1176. In addition, the due process clause does not limit interprison transfers even when the new institution is much

more disagreeable. Meachum v. Fano, 427 U.S. 215, 225 (1976). The “Constitution does not mandate a nationwide rule requiring certain procedural formalities, such as a hearing, prior to a transfer.” Shango v. Jurich, 681 F.2d 1091, 1098 (7th Cir. 1982). The only limitation on the power of state officials to transfer an inmate from one institution to another is that officials may not transfer the inmate as punishment for his exercise of his fundamental constitutional rights or for an impermissible reason. Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978). Petitioner does not allege that he was transferred to Supermax because he exercised a constitutional right or that the transfer took place for an impermissible reason. Instead, he alleges only that he was denied a due process hearing before the transfer. Petitioner’s request for leave to proceed in forma pauperis as to this portion of his due process claim will be denied for failure to state a claim upon which relief may be granted.

B. Unreasonable Searches

Petitioner contends that respondents Does 1-10 subjected him to harassment and humiliation by frequent cell searches, strip searches and body patdown searches, without cause in violation of the Fourth Amendment. In Bell v. Wolfish, 441 U.S. 520 (1979), 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 this case, petitioner’s allegations are so conclusory that it is not possible to determine who searched him, on how many occasions or under what circumstances. “Frequent” searches are a fact of prison life; the allegations do not suggest that the searches were unreasonable or did not serve a legitimate penological interest. Petitioner’s request for leave to proceed on his Fourth Amendment claim for unreasonable searches will be denied for failure to state a claim.

C. Conditions of Confinement

I understand petitioner to contend that respondents Litscher, Berge and Does 1-10 violated his rights under the Eighth Amendment by subjecting him to cruel and unusual conditions of confinement at Supermax. Petitioner alleges that the following make up the unconstitutional conditions: extremely low and high cell temperatures; 24 hour a day illumination; policy of having to sleep with nothing covering his head; and constant video

monitoring. Although elements of petitioner's claim overlap with the conditions of confinement claim in Jones 'El v. Berge, No. 00-C-421-C, petitioner is not a member of the class in Jones 'El. Petitioner was transferred out of Supermax on or about July 27, 2001, and the class in Jones 'El was certified on August 14, 2001, defined as "all persons who are now, or will in the future be, confined" at Supermax. Because petitioner is not a class member, he cannot rely on the plaintiffs in Jones 'El to prove the liability portion of his claims. In other words, petitioner's complaint must state a claim on its own.

In order to state a claim under the Eighth Amendment, petitioner'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).

Petitioner contends that respondents violated his Eighth Amendment rights by subjecting him to constant illumination; hourly bed checks throughout the night; extreme temperatures; and constant video monitoring. Petitioner alleges that he suffered physically and mentally as a result of the totality of these conditions.

Although petitioner alleges several conditions that are harsh and uncomfortable, his allegations do not suggest that the conditions at the institution violated “contemporary standards of decency.” Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986). Even if constant illumination, extreme temperatures and video monitoring are combined, they do not suggest that petitioner was deprived of “the minimal civilized measure of life's necessities.” Rhodes, 452 U.S. at 347. Unlike the plaintiffs in Jones ‘El who alleged additional conditions of confinement such as sensory deprivation, lack of recreation and video visits, petitioner has not alleged facts sufficient to suggest that his Eighth Amendment rights have been violated. Petitioner’s request to proceed in forma pauperis on his Eighth

Amendment conditions of confinement claim will be denied for his failure to state a claim upon which relief can be granted.

D. Due Process: Remaining at Supermax and Inmate Complaint Review System

The Fourteenth Amendment prevents the state from depriving someone of life, liberty or property without due process of law -- usually in the form of notice and some kind of hearing by an impartial decision maker. A procedural due process violation against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. See Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty).

Petitioner contends that respondents Berge and Does 1-10 violated his rights under

the due process clause by denying him the opportunity to call witnesses on his own behalf and to present evidence to show that his placement at Supermax was improper. However, this claim fails for the same reasons as petitioner's claim that he was denied due process when he was transferred to Supermax. Petitioner does not allege that he was held at Supermax beyond the term of his incarceration or that he has lost good time credits because of his placement at Supermax. Id. Petitioner has not alleged facts sufficient to establish that remaining at Supermax implicates a liberty interest under Sandin. Petitioner's request for leave to proceed in forma pauperis will be denied for failure to state a claim upon which relief may be granted.

In addition, petitioner alleges that respondents Litscher, Berge, Bell, Ray, Puckett, Hanson and Does 1-10 violated his right to due process by denying his complaints and by failing to maintain a proper system for reviewing petitioner's inmate complaints. 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); Studway v. Feltman, 764 F. Supp. 133, 134 (W.D. Wis. 1991). Because respondents' acts do not implicate a liberty interest, petitioner's right to due process has not been violated. His request for leave to proceed on this aspect of his due process claim will be denied because it is legally frivolous.

E. Access to the Courts

Petitioner contends that respondents Litscher, Berge, Bell, Ray, Puckett, Hanson and Does 1-10 conspired to hold mail, to destroy records and files and to delete any references of the incident that form the basis for petitioner's incarceration at Supermax, effectively depriving petitioner of the right to bring civil suit to recover damages. It is well established that prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. at 539, 578-80 (1974); Procunier v. Martinez, 416 U.S. 396, 419 (1974). The right of access is grounded in the due process and equal protection clauses of the Fourteenth Amendment. Murray v. Giarratano, 492 U.S. 1, 6 (1989). To insure meaningful access, states have the affirmative obligation to provide inmates with "adequate law libraries or adequate assistance from persons trained in the law." Bounds, 430 U.S. at 828.

To have standing to bring a claim of denial of access to the courts, a plaintiff must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). The plaintiff must have suffered injury "over and above the denial." Walters v. Edgar, 163 F. 3d 430, 433-34 (7th Cir. 1998) (citing Lewis, 518 U.S. 343). At a minimum, the plaintiff must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." Id. at 434; see also Lujan v. Defenders of Wildlife, 504 U.S.

555, 561 (1992) (plaintiff may sustain burden of establishing standing through factual allegations of complaint).

Petitioner asserts that respondents held his mail and destroyed any reference to the reason for petitioner's incarceration at Supermax, effectively preventing him from succeeding in a lawsuit challenging his transfer to Supermax. Although it may be true that petitioner would have a difficult time substantiating his claim that he was transferred to Supermax improperly without the allegedly destroyed and withheld documents, I have already determined that his transfer to Supermax did not violate the due process clause on the basis of petitioner's allegations alone. Thus, petitioner's allegations of fact do not suggest that respondents' acts have denied him access to the courts. Simply put, petitioner does not allege injury over and above the inconvenience caused by respondents' acts. Specifically, he does not allege that because of these acts, a nonfrivolous legal action of his was dismissed or the time for filing such an action ran out. Thus, petitioner's request for leave to proceed on his claim that respondents Litscher, Berge, Bell, Ray, Puckett, Hanson and Does 1-10 violated petitioners' right of access to the courts will be dismissed for failure to state a claim upon which relief may be granted.

F. Due Process: Loss of Wages

Petitioner contends that respondents Litscher, Ray, Petzer, Nunn and Does 1-10

violated his rights under the due process clause by depriving him of his protected liberty interest in receiving his paycheck while he was incarcerated at Supermax. In Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit held that the loss of “social and rehabilitative activities” are not “atypical and significant hardships” that are constitutionally actionable rights under Sandin, 515 U.S. 472. In Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992), the court held expressly that a prisoner has no protected liberty interest in a prison job. Petitioner’s contention that the revocation of his prison job when he was transferred to Supermax violates his constitutional right to due process is legally frivolous.

G. 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 respondents Petzer, Nunn and Does 1-10 conspired to give false statements so that petitioner would be transferred to Supermax. Petitioner also alleges that respondents Litscher, Berge, Bell, Ray,

Puckett, Hanson and Does 1-10 conspired to hold mail, to destroy records and files and to delete any references of the incident that form the basis for petitioner's incarceration at Supermax.

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. Despite petitioner's bald assertion that Petzer and Nunn as well as Litscher, Berge, Bell, Ray, Puckett, Hanson acted in conspiracy, the alleged facts do not suggest that they either acted unlawfully or committed a lawful act through unlawful means. Thus, petitioner will be denied leave to proceed in forma pauperis on his conspiracy claim because the claim is legally frivolous.

ORDER

IT IS ORDERED that

1. Petitioner Eric G. Nash's request for leave to proceed in forma pauperis is DENIED as to his conditions of confinement claim, his unreasonable searches claim, his access to the courts claim and his due process claim regarding his transfer to and his remaining at Supermax for failure to state a claim upon which relief can be granted. His request for leave to proceed in forma pauperis is DENIED as to his conspiracy claim and his due process claim regarding the inmate complaint review system and the loss of pay because

the claims are legally frivolous.

2. A strike will be recorded against plaintiff in accordance with 28 U.S.C. § 1915(g).
3. The unpaid balance of petitioner's filing fee is \$147.26; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.
4. The clerk of court is directed to enter judgment for respondents and close this case.

Entered this 2nd day of January, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge