

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

JEFFREY M. SCHREIBER,

Petitioner,

ORDER

v.

02-C-350-C

Portage Police Department Officers PETERSON,
TAYLOR, MALCHOW, FEHD and SCOTT;
Columbia County District Attorney JANE
KOHLWAY,¹

Respondents.

This is a proposed civil action for declaratory and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Jeffrey M. Schreiber, who is presently confined at a correctional facility in Crown Point, Indiana, alleges that respondent police officers violated his rights to due process and equal protection by refusing to prevent “interference with custody of parent” and that respondent Jane Kohlway, a district attorney, violated his First Amendment right to petition the government for the redress of grievances by refusing to

¹ In the caption of his complaint, plaintiff misspelled defendant Fehd’s name and later wrote to correct it. The caption of this order reflects the corrected spelling.

prosecute the perpetrator and respondent police officers. He seeks leave to proceed in this action 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, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed 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.

Petitioner's request for leave to proceed in forma pauperis on his claims that respondents Peterson, Taylor, Malchow, Fehd and Scott violated his rights to due process and equal protection will be denied for petitioner's failure to state a claim upon which relief can be granted. His request for leave to proceed on his claim that respondent Kohlway violated his First Amendment right to petition the government for redress of grievances will be denied because the claim is legally frivolous.

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

ALLEGATIONS OF FACT

Petitioner Jeffrey M. Schreiber is an inmate at a correctional facility in Crown Point, Indiana. Respondents Peterson, Taylor, Malchow, Fehd and Scott are Portage Police Department officers. Respondent Jane Kohlway is the Columbia County District Attorney.

On May 23, 1997, respondents Peterson and Taylor “refused to intervene to prevent or cease the occurrence of interference with custody by a parent . . . from taking place.” Interference with parental custody is a criminal activity under Wisconsin Statutes. Other respondents engaged in the same activity on the following dates: respondent Peterson on December 24, 1999; respondent Malchow on December 30, 1999; respondent Fehd on July 23, 2000; and respondent Scott on August 20, 2000.

On March 8, 2000, respondent Kohlway refused to prosecute or file charges against the perpetrator for five counts of interfering with parental custody and against respondent police officers for misconduct in public office.

DISCUSSION

A. Due Process and Equal Protection

Petitioner alleges that respondents Peterson, Taylor, Malchow, Fehd and Scott violated his Fourteenth Amendment rights to due process and equal protection by “refus[ing] to intervene to prevent or cease the occurrence of interference with custody by a parent . .

. from taking place.”

Petitioner’s allegations are so minimal that they do not allow the inference that his constitutional rights have been violated. A claim that government officials violated due process requires proof of both inadequate procedures and interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). It is impossible to determine from petitioner’s allegations what procedures he has been denied or even that he has standing to claims that his parental rights have been violated.

The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Construing petitioner’s allegations liberally, it is not possible to infer that he has been treated differently from similarly situated individuals. The complaint does not offer any suggestion how respondents treated petitioner, let alone how that treatment was different from others in petitioner’s same position. More generally, it is unclear how petitioner’s constitutional rights may have been implicated by respondents’ acts and whether he has sustained an actual injury. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (stating prerequisites for establishing standing to sue under "case or controversy" requirement of Article III of Constitution). Even under the liberal pleading requirements of Federal Rule of Civil Procedure 8(a), petitioner’s complaint does not specify the "bare minimum facts necessary to put the defendant on notice of the claim so that he can

file an answer." Higgs v. Carver, 286 F.3d 437, 438 (7th Cir. 2002). Moreover, in general matters of family law are not cognizable in federal court. For these reasons, petitioner's request for leave to proceed on his claims that defendants violated his Fourteenth Amendment rights to due process and equal protection will be denied for failure to state a claim upon which relief can be granted.

B. Petition the Government for the Redress of Grievances

Petitioner alleges that respondent Kohlway violated his First Amendment right to petition the government for the redress of grievances by refusing to prosecute "the perpetrator" for interfering with parental custody or respondent police officers for not preventing that interference.

Under Wisconsin law, a prosecutor has "broad discretion in determining whether to charge an accused, which offenses to charge, under which statute to charge, whether to charge a single count or multiple counts when the conduct may be viewed as one continuing offense, and whether to join all offenses in a single prosecution or to bring successive prosecutions." Wisconsin v. Krueger, 224 Wis. 2d 59, 67, 588 N. W.2d 921, 924 (1999). "With reference to prosecutorial discretion, Wisconsin case law has repeatedly held that the discretion whether to charge and how to charge vests solely with the district attorney." Wisconsin v. Lindsey, 203 Wis. 2d 423, 440, 554 N.W.2d 215, 221 (Ct. App. 1996). See

also Wisconsin v. Jones, 217 Wis. 2d 57, 64, 576 N.W.2d 580, 583 (Ct. App. 1998) ("Wisconsin case law has repeatedly noted that '[t]he discretion resting with the district attorney in determining whether to commence a [criminal] prosecution is almost limitless"). Petitioner's allegations against respondent Kohlway are insufficient to establish that she violated petitioner's constitutional rights by refusing to prosecute either the perpetrator or respondent police officers. His request for leave to proceed in forma pauperis on his claim that respondent Kohlway violated his right to petition the government for the redress of grievances will be denied as legally frivolous.

ORDER

IT IS ORDERED that

1. Petitioner Jeffrey M. Schreiber's request for leave to proceed in forma pauperis on his claims that respondents Peterson, Taylor, Malchow, Fehd and Scott violated his Fourteenth Amendment rights to due process and equal protection is DENIED for failure to state a claim upon which relief can be granted;

2. Petitioner's request for leave to proceed on his claim that respondent Jane Kohlway violated his First Amendment right to petition the government for redress of grievances is DENIED because the claim is legally frivolous;

3. A strike will be recorded against petitioner pursuant to § 1915(g);

4. The unpaid balance of petitioner's filing fee is \$135.16; 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 29th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge