

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

FRED ODELL,
CLEOPATRA ODELL ODELL,
VERONICA LEE ODELL and
LIBBY ODELL PALM,

Petitioners,

v.

ORDER

02-C-0691-C

JON LITSCHER, WILLIAM LUNDSTROM,
STEPHANIE JONES, KARI BERG,
PAUL HUMPHREY, MARGUERITE
MOELLER and THOMAS BORGAN,

Respondents.

This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Fred Odell alleges on his own behalf as well as his daughters' (petitioners Cleopatra, Veronica and Libby Odell) that respondents violated the Constitution by: (1) confining him in prison and subjecting him to parole; (2) denying him prescribed surgery for his heart, prostate and kidney problems; (3) humiliating him by shackling him in handcuffs and leg irons and allowing guards to observe him during medical exams; (4) requiring him

to re-use urethral catheters; and (5) allowing prisoners with contagious diseases to serve him food.

Petitioner Fred Odell is a former prisoner who is unemployed and receives monthly income of \$609 in social security payments. Under this court's indigency standard, petitioner may proceed without any prepayment of fees and costs.

Because petitioner is not a lawyer, his request for leave to proceed in forma pauperis on behalf of his daughters will be denied. Because petitioner has not shown that his conviction has been overturned, he cannot sue for monetary damages on his claims that his conviction and parole were unconstitutional. Because at this early stage of the proceedings petitioner has alleged facts sufficient to show that unknown respondents were deliberately indifferent to his serious medical needs by denying his prescribed surgery for his heart, prostate and kidney problems and requiring him to re-use his urethral catheter, I will grant his request for leave to proceed as to these two claims against respondent Thomas Borgan, the warden, for the sole purpose of discovering the name of the individuals who are allegedly responsible for denying him his medical treatment and requiring him to re-use his catheters. Because petitioner has failed to state a claim upon which relief can be granted on his remaining claims, I will deny his request for leave to proceed as to these claims.

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, leave to proceed in

forma pauperis will be denied if, even under a liberal construction, the petitioner'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. See 42 U.S.C. § 1915e.

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

ALLEGATIONS OF FACT

Petitioner is a citizen of Wisconsin and a former inmate. Respondent Jon Litscher is Secretary of the Department of Corrections. Respondent William Lundstrom is deputy administrator of the Division of Hearings and Appeals. Respondents Stephanie Jones and Kari Berg are probation and parole supervisors. Respondent Paul Humphrey is a Dane County assistant district attorney. Marguerite Moeller is a lawyer at the Wisconsin Department of Justice. Defendant Thomas Borgan is the warden of the Fox Lake Correctional Institution.

On February 25, 1994, petitioner was convicted on charges of retail theft, disorderly conduct and being a repeat offender.

Petitioner was subjected to imprisonment, disciplinary hearings, prison food detrimental to his health, inadequate prison medical treatment, unwarranted dental, optical and medical expenses and monitored telephone calls, which at times cost as much as \$7 for

a 15-minute call. Petitioner was required to live in a prison death row compound. Petitioner was subject to the parole system, including monitoring devices, demeaning and frightening parole reports, obstructive travel permits and payment of parole supervision fees. Because of his incarceration, petitioner was deprived of the company of his children.

Petitioner was denied necessary and prescribed surgery for his heart and prostate problems as well as kidney failure. The medical problems have deteriorated to the extent that it is unsafe for petitioner to undergo surgery.

Petitioner was humiliated when he was paraded about in public while restrained in iron shackles and handcuffs and when prison guards looked on while medical practitioners performed tests and examinations on his rectum and penis.

Petitioner contracted urinary tract infections because he was required to re-use urethral catheters.

Petitioner was subjected to being inflicted with contagious diseases such as shingles, hepatitis, AIDS and other fatal diseases because prisoners suffering from these diseases were allowed to serve him food and handle his utensils.

DISCUSSION

A. The Children's Claims

Because petitioner Fred Odell is not a lawyer, he may not file suit "on behalf" of his

children. Although petitioner is permitted to represent himself pro se, as a non-lawyer he has no authority to appear as his children's legal representative. See Navin v. Park Ridge School District 64, 270 F.3d 1147 (7th Cir. 2001) (non-lawyer father free to represent himself, but has no authority to appear as child's legal representative); see also Johns v. County of San Diego, 114 F.3d 874, 876-77 (9th Cir. 1997). Petitioner may opt to obtain counsel for his children or let the children wait until they are old enough to pursue their claims for themselves if they are not old enough to do so now, but petitioner cannot represent his children. Accordingly, petitioner will be denied leave to proceed his children's claims and petitioners Cleopatra, Veronica and Libby Odell shall be removed from the caption of this case.

B. Confinement and Parole

To the extent that petitioner may be complaining that his convictions and parole were illegal and that he continues to suffer collateral consequences of his conviction, he must file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Moreover, petitioner is suing for monetary relief only. In Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), the Supreme Court held that in order to recover monetary damages under § 1983 for an allegedly unconstitutional conviction or imprisonment, a plaintiff must prove that his conviction or sentence has been reversed on direct appeal, expunged by executive order,

declared invalid by a state tribunal or called into question by a federal court's issuance of a writ of habeas corpus. He cannot bring a damages claim that "necessarily demonstrates the invalidity of the conviction," id. at 481-82, although he may contest his conviction on appeal or by collateral attack, Gonzalez v. Entress, 133 F.3d 551 (7th Cir. 1998). Accordingly, petitioner will be denied leave to proceed in forma pauperis on his claims that he was confined in prison and subjected to parole.

C. Medical Care

I understand petitioner to allege that he received inadequate medical care while incarcerated in violation of the Eighth Amendment because (1) he was denied needed and prescribed surgery for his heart, prostate and kidney problems; and (2) he was required to re-use urethral catheters, which resulted in urinary tract infections.

The Eighth Amendment requires the government "to provide medical care for those whom it is punishing by incarceration." Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim of cruel and unusual punishment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. Therefore, petitioner must allege facts from which a court can draw the conclusion that he had a serious medical need and that respondent was deliberately indifferent to this need.

Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Attempting to define “serious medical needs,” the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez, 111 F.3d at 1371. Petitioner has alleged that he was prescribed medical treatment for heart, prostate and kidney problems. These allegations are sufficient to suggest that petitioner had serious medical needs.

To be deliberately indifferent, an “official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Farmer, 511 U. S. at 837. It is not enough that he “should have known” of the risk. Rather, the official must know there is a risk and consciously disregard it. Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508, 511 (7th Cir. 1999). Although deliberate indifference may be found where “the medical treatment is ‘so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner’s condition,’” Snipes, 95 F.3d at 592 (citations omitted), inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). “[D]ifferences in opinion between the patient and the doctor [regarding medical treatment]

never give rise to a constitutional claim.” Higgins v. Correctional Medical Services of Illinois, Inc., 8 F. Supp 2d. 821, 830 (N.D. Ill. 1998).

Petitioner does not allege who denied him prescribed medical surgery for his heart, prostate and kidney conditions or who required him to re-use urethral catheters. However, his allegations are sufficient to support an inference that prison officials were deliberately indifferent to his medical needs in violation of the Eighth Amendment. Therefore, I will allow him to proceed on this claim against respondent Borgan, the warden, for the sole purpose of discovering the name of the prison officials who were allegedly responsible. See Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981). Once petitioner learns the name of the persons directly responsible for denying him his surgery and requiring him to re-use his urethral catheter, he will have to amend his complaint to name those individuals as respondents in place of respondent Borgan. If petitioner fails to disclose the name of the respondent to be added and amend his complaint within 90 days of the date of this order, he may face dismissal of his complaint for failure to prosecute.

D. Remaining Claims

To the extent that petitioner claims that he suffered humiliation from being shackled in handcuffs and leg irons and observed during medical exams and that he was served food by prisoners with contagious diseases, these allegations do not rise to the level of a

constitutional violation. First, the fact that respondents shackled petitioner in public and allowed guards to remain in the room during medical exams is not an atypical or significant hardship in relation to the ordinary incidents of prison life. See generally Sandin v. Conner, 515 U.S. 472, 484 (1995). Second, because petitioner does not allege that he contracted any contagious disease as a result of the alleged food service practice, he has not suffered an injury. Accordingly, petitioner will be denied leave to proceed on these claims.

ORDER

IT IS ORDERED that

1. Petitioner Fred Odell's request for leave to proceed in forma pauperis on behalf of his daughters is DENIED; petitioners Cleopatra Odell Odell, Veronica Lee Odell and Libby Odell Palm shall be removed from the caption of this case;

2. Petitioner's request for leave to proceed in forma pauperis is DENIED as to his claims that in violation of the constitution respondents (a) confined him in prison and subjected him to the parole system; (b) humiliated him by shackling him and allowing guards to observe him during medical exams; and (c) allowing prisoners with contagious diseases to serve him food.

3. Petitioner's request for leave to proceed in forma pauperis on his claims that in violation of the Eighth Amendment he was (a) denied medical surgery for his heart, prostate

and kidney problems and (b) required to re-use his urethral catheters against respondent Thomas Borgan is GRANTED for the sole purpose of discovering the name of the individuals who were allegedly responsible. Once petitioner learns the names of the persons directly responsible, he will have to amend his complaint to name those individuals as respondents in place of respondent Borgan; and

4. All respondents except respondent Thomas Borgan are DISMISSED from this lawsuit.

Entered this 6th day of January, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge