IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM FREDERICK WILLIAMS,

Petitioner,

v.

WILLIAM J. WATSON, GRETCHEN L. HAYWARD, JULIE SCHWAEMLE, ROBERT KIASER, SARA PETZOLD,

Respondents.

ORDER

03-C-707-C

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This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Dane County Jail in Madison, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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 petitioner may not sue a public defender under 42 U.S.C. § 1983 and because he has not shown there is diversity of citizenship between him and respondent Watson, I will deny petitioner's request for leave to proceed on his due process claim against Watson. I will deny his request for leave to proceed on his due process claim against all respondents because Wisconsin law provides a remedy for malicious prosecution. Finally, I will deny petitioner's request for leave to proceed on his equal protection claim because he fails to allege any facts about race discrimination.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner William Frederick Williams is presently confined at the Dane County jail in Madison, Wisconsin. On April 14, 1997, petitioner was arrested and charged with domestic disorderly conduct and battery of a police officer. In June 1997, the Wisconsin public defender's office appointed respondent William J. Watson, an attorney, to represent petitioner in case number 97 CF 725. When Watson visited petitioner, Watson acted strange and smelled of alcohol. In addition, Watson ignored petitioner's recommendation to use several key witnesses to defend the charges, even though petitioner's previous attorney in the same case, Stan Kaufman, had decided that the witnesses were important alibi witnesses. Rather, Watson tried to persuade petitioner to enter a guilty plea to the charges. Respondents Gretchen Hayward and Julie Schwaemle, assistant district attorneys, and Sara Petzold, a police officer, conspired with Watson to deprive petitioner of his alibi witnesses.

Petitioner submitted written and oral complaints about Watson to the public defender's office, but to no avail. In addition, he filed several complaints with the Wisconsin board of attorneys professional responsibilities. The board dismissed the complaints. When Watson learned of these complaints, he became extremely vindictive and intentionally sabotaged petitioner's case by working to support the prosecution's theory.

On November 19, 1997, petitioner appeared in Dane County Circuit Court for a jury trial. While petitioner was in the "bull pen" for the trial, respondent Petzold

approached petitioner with a warrant alleging that petitioner had violated Wis. Stat. § 946.45 (bail jumping) [sic: should be § 956.49]. This statute applies to offenders released from custody under chapter 969 who intentionally fail to comply with the terms of his or her bond. Petitioner was never released on bail in case number 97 CF 725; he remained in custody from the date of his arrest until May 13, 2003. Respondents Schwaemle and Hayward, as well as Robert Kiaser, assistant district attorney, conspired with respondents Petzold and Watson in charging petitioner with bail jumping. Even though all respondents knew that "being released from custody" is an essential element in Wis. Stat. § 946.49, respondents charged and prosecuted him with bail jumping in order to discourage him from going to trial and to force him to enter a guilty plea in case number 97 CF 725. As a result of being found guilty of bail jumping, petitioner received a six-year sentence.

Despite respondent Kiaser's attempt to uphold the bail jumping conviction, at a post-conviction hearing, petitioner's bail jumping conviction was reversed and dismissed as a matter of law. Petitioner filed complaints with the board of attorneys professional responsibilities against respondents Hayward, Schwaemle and Kiaser. The board dismissed the complaints. Petitioner complained also to the police and fire commission about respondent Petzold. The commission dismissed the complaint.

DISCUSSION

Petitioner argues that respondent Watson provided ineffective counsel and therefore violated his right to due process when he ignored petitioner's recommendation to use certain alibi witnesses and when Watson appeared drunk during his initial visit. Petitioner argues also that all respondents maliciously prosecuted and racially discriminated against him in violation of his equal protection and due process rights under the Fourteenth Amendment when they issued a warrant and charged him with bail jumping and failed to account for his alibi witnesses. Finally, petitioner argues that respondents violated his right to compulsory process for obtaining witnesses in his favor. I construe this argument as part of petitioner's due process claim.

A. Due Process

Petitioner's claim against Watson fails because Watson served as his public defender. In Polk County v. Dodson, 454 U.S. 312 (1981), the Supreme Court held that a public defender does not act "under color of state law" when representing an indigent client and is therefore not subject to suit under § 1983. Finding that the attorney's functions and obligations were "in no way dependent on state authority," the Court stressed that "except for the source of payment, [the] relationship became identical to that existing between any other lawyer and client." Id. at 318. In Thomas v. Howard, 455 F.2d 228 (3d Cir. 1972) (per curiam), the court made it clear that the acts of private counsel in representing a client

do not constitute state action.

I conclude that petitioner's claim for damages against his lawyer is limited to a state law claim of legal malpractice. This court's power to hear state law claims arises only under 28 U.S.C. §1332, the statute governing diversity jurisdiction. Petitioner does not assert jurisdiction under this statute. However, even if he had, he has failed to establish the existence of diversity of citizenship in his allegations of fact, as is his burden. Cameron v. Hodges, 127 U.S. 322 (1888). For diversity to exist, petitioner and Watson would need to be citizens of different states. 28 U.S.C. § 1332.

Petitioner's claim for malicious prosecution against all respondents fails because Wisconsin law provides a remedy for such a claim. "Malicious prosecution is not a constitutional tort unless the state provides no remedy for malicious prosecution." Gauger v. Hendle, 349 F.3d 354, 359 (7th Cir. 2003) (stating that warrant is legal process and so complaint about conduct pursuant to it is a challenge to legal process and thus resembles malicious prosecution); Strid v. Converse, 111 Wis. 2d 418, 331 N.W.2d 350 (1983) (noting six elements for claim of malicious prosecution in Wisconsin).

Even if Wisconsin law did not provide a remedy for malicious prosecution, I note that petitioner's claim against respondents Hayward, Schwaemle and Kiaser would fail because respondents are prosecutors entitled to absolute immunity. In Buckley v. Fitzsimmons, 509 U.S. 259 (1993), and Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court held

that prosecutors are entitled to absolute immunity when they act as advocates for the state in preparing for and initiating a prosecution but are protected only by qualified immunity when engaged in investigatory conduct such as evidence gathering. Buckley, 509 U.S. at 272-73; see also Newsome v. McCabe, 256 F.3d 747, 749 (7th Cir. 2001) (absolute immunity forecloses action against prosecutor in case where prosecutor declined to put plaintiff on trial a second time after court vacated his conviction). Petitioner fails to allege facts that show that respondents Hayward, Schwaemle and Kiaser were not preparing for and initiating a prosecution against him when they brought the charges against him. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) (complaint must give defendant sufficient notice of claim to enable him to file answer).

Because there is no constitutional tort of malicious prosecution under 42 U.S.C. § 1983 in Wisconsin, I will deny petitioner's request for leave to proceed in forma pauperis on his due process claims against respondents Watson, Hayward, Schwaemle, Kiaser and Petzold.

B. Equal Protection

Under the legal theory portion of his complaint, petitioner states that he was "racially discriminated against." From this statement, I have construed his complaint liberally as alleging that each named respondent's conduct was motivated by a desire to discriminate against him on the basis of his race.

Racism in any form is reprehensible. The equal protection clause of the Fifth and Fourteenth Amendments prohibits government actors from applying different legal standards to similarly situated individuals. See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). It does not follow, however, that a petitioner can state a claim merely by alleging that respondents were motivated by racism. Discriminatory intent may be established by showing an unequal application of a policy, but conclusory allegations of racism are insufficient. Minority Policy Officers Ass'n v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986).

Petitioner does not allege any facts to support his claim that respondents' actions toward him were different from actions they would have taken against a person of another race under the same or similar circumstances. His unsupported and conclusory claim of racism is the precise kind of discrimination claim that fails at the outset. Therefore, I will deny petitioner leave to proceed in forma pauperis on his claim that the respondents discriminated against him on account of his race.

ORDER

IT IS ORDERED that:

1. Petitioner William Frederick Williams's request for leave to proceed in forma pauperis on his due process and equal protection claims is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is $144.84; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

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

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

Entered this 26th day of January, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge