IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KENNETH SHERMAN,

Petitioner,

v.

RANDALL HOENISH,
CHIEF DEPUTY REED
and ROBERT DICKMAN,

Respondents.

ORDER

04-C-0437-C

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Kettle Moraine Correctional Institution in Plymouth, 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner filed an amended complaint before this court screened his initial complaint. Accordingly, his amended complaint will be treated as the operative pleading. In his amended complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Kenneth Sherman is an inmate currently confined at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Respondent Randall Hoenish is the sheriff of Marathon County, Wisconsin and is responsible for the operations and policies of the county jail. Respondent Reedis is the deputy sheriff of Marathon County and also has

responsibility for overseeing the county jail. Respondent Robert Dickman is the administrator of the Marathon County jail and oversees its day to day operations.

On March 24, 2003, petitioner was arrested by probation officer Bachuber on a probation hold. After his arrest, plaintiff was placed in the Marathon County jail. On March 26, 2003, petitioner placed a direct phone call from the jail to officer Bachuber to discuss the probation hold. On May 12, 2003, petitioner learned that officer Bachuber had a recording of the phone conversation of March 26. Officer Bachuber played the recording at petitioner's parole revocation proceeding, which was held four days later. Petitioner objected to the use of the recording at the hearing, but the judge ruled that its admission was harmless error.

At some point after the hearing, petitioner filed a complaint about the recording with officer Bachuber's supervisor, who dismissed the complaint. In addition, petitioner filed a grievance with respondent Dickman, who never responded.

On February 4, 2004, petitioner learned that it was respondents who had recorded the conversation, not officer Bachuber as he had previously believed. At the time petitioner made his call to officer Bachuber, jail rules stated that all recorded or monitored calls would be preceded by a message indicating as much. Petitioner had not been notified that his call could be monitored or recorded and at the time he made the call. In addition, the rules provided that only collect calls would be monitored or recorded.

Petitioner submitted another grievance to respondent Hoenish on May 17, 2004.[1] Respondent Reed answered this complaint on May 24, 2004, indicating that jail policies would not be changed and attaching copies of the jail's policy that had been revised on March 15, 2004 to allow recording of any telephone conversation without warning.

OPINION

A. Procedural Stance

Before turning to the merits of petitioner's claims, it is necessary to determine whether § 1983 is the appropriate vehicle for his claims. In Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court held that a petition for a writ of habeas corpus under 28 U.S.C. § 2254 "is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." The Court of Appeals for the Seventh Circuit has held that "when a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice" for failure to state a claim upon which relief may be granted. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477).

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[1] In his complaint, petitioner indicated that he submitted this complaint on May 17, 2003 and received a response on May 24, 2004. I will assume that the "2003" was in error as it appears to be inconsistent with his other alleged facts. The specific date has no bearing on the merits of petitioner's claims.

Petitioner alleges that the recording of his telephone call violated the Fourth Amendment and therefore, should not have been allowed as evidence at his parole revocation hearing, which I assume resulted in his current confinement. Had petitioner alleged no more, I would have dismissed his claim pursuant to the rule set out in Copus and instructed him to file his grievance as a habeas petition. However, petitioner has indicated that he raised his Fourth Amendment objection at the hearing and that the judge ruled the admission of the tape harmless error. Because the judge ruled that the admission of the recording had no bearing on the outcome of that hearing, a determination that the recording violated petitioner's rights would not implicate the validity of his confinement. Accordingly, petitioner's claims may be maintained as a suit under § 1983.

B. Fourth Amendment

Petitioner contends that respondents violated his rights under the Fourth Amendment when they recorded his telephone conversation with officer Bachuber. The Fourth Amendment protects inmates against unreasonable searches and seizures by prison officials. See, e.g., Boyd v. United States, 116 U.S. 616 (1886); Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998). People have a right to be secure in their "persons, houses, papers and effects." Oliver v. United States, 466 U.S. 170, 176-77 (1983). However, the Fourth Amendment is implicated only when the state intrudes upon an

interest in which a person has a "reasonable expectation of privacy." New York v. Class, 475 U.S. 106, 112 (1986) (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

In Katz, 389 U.S. at 353, the Supreme Court held that government officers violated the petitioner's rights under the Fourth Amendment when they used an electronic device to listen to and record a telephone conversation he had made from a telephone booth without first obtaining judicial authorization. However, petitioner's conversation was significantly different from the one in Katz. Unlike a caller using a telephone booth, where one can close the door and feel secure that his words will not be overheard, petitioner made his phone call from a jail where "surveillance has traditionally been the order of the day." United States v. Sababu, 891 F.2d 1308, 1329 (7th Cir. 1989) (additional citations omitted).

Although prisoners do not forfeit all of their rights under the Fourth Amendment, their expectation of privacy while in custody is significantly diminished. Hudson v. Palmer, 468 U. S. 517 (1984) (prisoner had no reasonable expectation of privacy in his prison cell). It is well settled that inmates do not have a right to privacy in their cells, id., or in visiting rooms, Lanza v. New York, 370 U.S. 139 (1962). The Court of Appeals for the Seventh Circuit has held that there is no reasonable expectation of privacy on prison phone lines. Sababu, 891 F.2d at 1329; United States v. Fekes, 879 F.2d 1562, 1566 n. 6 (7th Cir. 1989) (recording of phone calls from inmate on prison phone lines does not impinge

unreasonably on inmate's privacy expectation). Even assuming that petitioner was not informed expressly that the jail might monitor his calls, he should have been on constructive notice by virtue of the very fact that he was being held in pris on and using the jail's phone lines. See Sababu, 891 F.2d at 1329 (awareness of other security measures at prison should have reduced expectation of privacy). Because petitioner had no reasonable expectation of privacy on prison phone lines, he will not be allowed to proceed on his claim that respondents violated his rights under the Fourth Amendment by recording a telephone call he made from the Marathon County Jail.

B. Federal Wiretapping Statute

Next, petitioner claims that by recording his conversation, respondents violated the federal wiretapping statute, 18 U.S.C. §§ 2510 et seq., by recording his phone conversation with officer Bachuber. Generally speaking, the statute forbids intentional or attempted interceptions of electronic communications. 18 U.S.C. § 2511(1)(a). It provides a cause of action for civil damages for its violation. 18 U.S.C. § 2520. Excluded from the statute's coverage, however, is any telephone or telephone equipment that is used "by an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a)(ii). Respondents are law enforcement officers of Marathon County, Wisconsin. They qualify as "investigative or law enforcement officers." This term is defined to include "any officer

of the United States or of a State or political subdivision thereof, who is empowered by law to make investigations of or to make arrests for offenses enumerated in this chapter . . . ." 18 U.S.C. § 2510(7). The Court of Appeals for the Seventh Circuit has held that the exception in § 2510(5)(a)(ii) applies when a prison official records telephone conversations made by inmates while incarcerated on facility phone lines. Fekes, 879 F.2d at 1565-66. Because petitioner's claim falls within the statutory exclusion under § 2510(5)(a)(ii), he will not be allowed to proceed on his claim under the Federal Wire Tapping Statute.

C. State Law Claims

Finally, petitioner alleges that respondents' actions violated Wis. Stat. § 968.28. District courts have supplemental jurisdiction over claims arising under state law when they are so related to claims arising under federal law that they form part of same case or controversy. 28 U.S.C. § 1367(a); Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999). Because petitioner is not being allowed to proceed on either of his claims arising under federal law, he has no claim on which supplemental jurisdiction over his state law claims could attach. Accordingly, petitioner will be denied leave to proceed on his claim under Wis. Stat. § 968.28. (This provision authorizes the attorney general and district attorneys to approve a request by a law enforcement officer to apply for judicial authorization of an interception of electronic or wire communications. Although it is

unlikely that petitioner has any rights under this provision, such a determination is beyond this court's jurisdiction.)

D. Motion for Appointment of Counsel

In addition to his complaints, petitioner has filed a motion for appointment of counsel. Because petitioner is being denied leave to proceed on all of his claims, his motion for appointment of counsel will be denied as moot.

ORDER

IT IS ORDERED that

1. Petitioner Kenneth Sherman will be DENIED leave to proceed on his claims that respondent Randall Hoenish, Chief Deputy Reed and Robert Dickman violated petitioner's rights under the Fourth Amendment, the Federal Wiretapping Statute or Wis. Stat. § 968.28 when they recorded a telephone conversation he had with probation officer Bachuber while incarcerated at the Marathon County Jail and this case is DISMISSED;

2. Petitioner's motion for appointment of counsel will be DENIED as moot;

3. The unpaid balance of petitioner's filing fee is $143.80; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is

dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because petitioner's state law claims are part of the action and the court did not dismiss those claims for one of the reasons enumerated in § 1915(g), a strike will not be recorded against petitioner under § 1915(g);

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

Entered this 25th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge