IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT ROTH,

Petitioner,

v.

ORDER

05-C-148-C

ERIC LUNDELL and HOWARD CAMERON, sued in their individual capacities; and JAMES ALEXANDER and MARY AHLSTROM, sued in individual and official capacities,

Respondents.

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This is a proposed civil action for monetary relief brought under 42 U.S.C. § 1983. At the time he filed his complaint, petitioner Robert Roth was confined at the Dodge Correctional Institution in Waupun, Wisconsin. By letter dated April 18, 2005, petitioner informed the court that he has been transferred to the Waupun Correctional Institution in Waupun, Wisconsin. Petitioner asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit he 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). Along with his complaint,

he has filed a motion for appointment of counsel.

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); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Robert Roth is currently serving a fifteen-year prison sentence at the

Waupun Correctional Institution. At all relevant times, respondent Eric Lundell was employed as a circuit court judge and respondent Howard Cameron was a lawyer employed by the State of Wisconsin as a public defender. At all relevant times, respondent James Alexander was employed as the Executive Director of the Wisconsin Judicial Commission, which is responsible for monitoring the conduct of judges in Wisconsin. Respondent Mary Ahlstrom was employed as an investigator for the Wisconsin Office of Lawyer Regulation, which is responsible for monitoring the conduct of lawyers licensed to practice in Wisconsin.

B. Relevant Events

In March 1999, petitioner was charged with multiple counts of failure to pay child support, a felony offense in Wisconsin. At an initial hearing that month, respondent Cameron was appointed to represent petitioner in connection with the charges. Petitioner informed respondent Cameron that he suffered from acute anxiety and demanded a jury trial be held promptly. Respondent Cameron told petitioner that a trial would not be necessary because the state wanted only to collect the money he owed.

At a pretrial conference held on April 28, 1999, respondent Cameron requested that a preliminary hearing be held promptly. Respondent Lundell set the preliminary hearing for April 30, but respondent Cameron cancelled the hearing because he disagreed with the defense petitioner wished to pursue. Cameron told petitioner to ask the court to appoint

another attorney to represent him because he disagreed with the defense petitioner wished to assert. In June 1999, another preliminary hearing was held at which the mother of petitioner's child testified. (The mother is also the child's custodial parent.) In September 1999, petitioner informed respondents Cameron and Lundell that he needed psychiatric help for anxiety attacks and a related emotional breakdown. In October 1999, respondent Lundell set petitioner's case for trial on December 21-22, 1999.

The day before the trial was to begin, respondent Cameron filed a motion to withdraw as petitioner's attorney. On the day petitioner's trial was to begin, the court held a hearing to discuss the conflicts between petitioner and respondent Cameron. At the hearing, petitioner alleged that respondent Cameron had committed misconduct and told respondent Lundell that he did not trust respondent Cameron. However, respondent Lundell denied the motion to withdraw. In addition, he told the prosecutor that petitioner's case "may not be the appropriate case to go to the mat with," and informed petitioner that a jury would "take about one minute and you would be found not guilty, if it would even take one minute, okay?" Respondent Lundell closed the hearing by setting the next hearing in the case for February 2000.

Desperate to end the delays in his case, petitioner complained to the Wisconsin Judicial Commission and the Office of Lawyer Regulation, where he made contact with respondents Alexander and Ahlstrom. Respondent Alexander told him that respondent

Lundell had made a "bad decision" by not holding petitioner's trial sooner but that his actions did not constitute judicial misconduct. Respondent Ahlstrom investigated respondent Cameron's conduct but closed her investigation when petitioner failed to retain an attorney in connection with the investigation.

In January 2000, respondent Cameron told petitioner that he could get the charges against him dropped by buying a "deferred prosecution agreement" for $25.00. Petitioner accepted the agreement at a February hearing. Some time after the hearing, respondent Cameron informed petitioner that there were additional costs associated with the agreement that petitioner had not known about before he accepted the agreement. At the next hearing, petitioner withdrew his acceptance of the agreement and told respondent Lundell that he had not been aware of the additional charges when he accepted the agreement. Petitioner expressed his distrust of respondent Cameron again and requested that respondent Cameron be removed from his case. Respondent Lundell denied petitioner's request as well as respondent Cameron's second motion to withdraw.

In March 2000, respondent Cameron requested a psychiatric evaluation of petitioner. Respondent Lundell granted the request. The evaluation indicated that petitioner was competent but had "serious mental health issues." In April 2000, petitioner renewed his request to have a new attorney appointed to represent him, explaining to respondent Lundell that respondent Cameron refused to let his case go to trial despite petitioner's clearly

expressed need for a prompt trial. Petitioner stated further that respondent Cameron was exploiting petitioner's anxiety disorder. Respondent Lundell denied petitioner's request a third time. Also in April, petitioner filed a motion to dismiss the charges because of the state's lack of jurisdiction. (Petitioner does not indicate the outcome of this motion. Presumably, it was denied.) Respondent Lundell told the prosecutor assigned to petitioner's case that he "honestly wouldn't look forward to a jury trial in this matter." He postponed petitioner's case for another month, telling petitioner that his decision "sort of infringes on your right to a speedy trial."

In May 2000, respondent Lundell suggested that defendant Cameron file a motion to dismiss the charges on the basis of petitioner's mental state. Lundell set a hearing on the motion for June and assured petitioner that he would receive a jury trial. Still desperate to end the case, petitioner submitted complaints to respondent Alexander and then governor Tommy Thompson. Neither Alexander nor Thompson responded to petitioner's complaints.

By June, petitioner was so distraught that his business failed and he experienced mounting financial hardships. He was unable to afford psychiatric treatment. That month, respondents Lundell and Cameron met outside petitioner's presence. At the meeting, it was agreed that the charges against petitioner would be dismissed because of a lack of evidence. In addition to the mental anguish and financial hardship petitioner experienced, his physical health declined while the charges were pending. Because he could no longer afford medicine

to treat his anxiety attacks, petitioner began using marijuana and alcohol.

Some time after the charges against petitioner were dismissed, he attempted to "get some answers" from respondents Lundell and Cameron. Petitioner expressed himself to respondents using "a variety of analogies and metaphors" that were misleading and frightened respondents. They complained to the authorities, who arrested petitioner immediately. He was placed in jail and remained there because he could not afford to pay his $100,000.00 bail. Petitioner represented himself at his trial because he could not afford a lawyer and the court denied his request for counsel. A court-appointed psychiatrist informed the court that petitioner was mentally ill but his trial continued. After he was convicted of threatening respondents Lundell and Cameron, the court determined that petitioner was eligible to have a lawyer appointed to represent him. The court appointed counsel for petitioner and he was sentenced to fifteen years in prison.

DISCUSSION

I understand petitioner to allege that respondents violated his Eighth Amendment protection against cruel and unusual punishment and his Sixth Amendment right to a speedy trial by delaying resolution of his case for more than a year. In addition, I understand petitioner to be alleging that respondent Lundell violated his Sixth Amendment rights to counsel by repeatedly refusing to allow respondent Cameron to withdraw from representing

petitioner. Petitioner will be denied leave to proceed on each these claims.

A. Judicial Immunity

Before delving into the substance of petitioner's allegations, I note that respondent Lundell is alleged to be a state circuit court judge who postponed petitioner's trial and refused to allow respondent Cameron to withdraw from representing petitioner. Few doctrines are more solidly established at common law than the absolute immunity of judges from liability for their judicial acts, even when they act maliciously or corruptly. Mireles v. Waco, 502 U.S. 9 (1991). This immunity is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, which has an interest in a judiciary free to exercise its function without fear of harassment by unsatisfied litigants. Pierson v. Ray, 386 U.S. 547, 554 (1967). The scope of judicial immunity is defined by the functions it protects, not by the person to whom it attaches. Forrester v. White, 484 U.S. 219 (1988). However, it is unquestioned that immunity applies to "the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court." Id. Because petitioner's claims against respondent Lundell are based on his dissatisfaction with this respondent's judicial decisions, I conclude that there is no arguable basis in fact or law for his claims against respondent Lundell.

B. Eighth Amendment

Petitioner contends that the conduct of respondent Cameron during the pendency of the child support charges inflicted cruel and unusual punishment on him in violation of the Eighth Amendment. He argues that respondent Cameron was aware of his mental disabilities and his need for a prompt resolution to his case but nonetheless allowed the case to remain pending for more than a year. In addition, he faults respondents Alexander and Ahlstrom for failing to intervene on his behalf before the charges were dismissed. Petitioner will be denied leave to proceed on this claim because his allegations do not state a claim under the Eighth Amendment.

The Eighth Amendment's protection against cruel and unusual punishment applies only to an individual who has been convicted of a crime. Brown v. Budz, 398 F.3d 904, 910 (7th Cir. 2005) ("[t]he Eighth Amendment's prohibition on cruel and unusual punishment gives rise to the constitutional rights of a convicted state prisoner"); Bailey v. Andrews, 811 F.2d 366, 373 (7th Cir. 1987) ("the [E]ighth [A]mendment right to be free from cruel and unusual punishment is applicable only to sentenced criminals"). The amendment does not apply to an individual who has not been convicted of a crime. To put it another way, an individual who has not been convicted of a crime cannot be "punished" for the purpose of the Eighth Amendment. In this case, petitioner contends that the delays in resolving his case attributable to respondent Cameron caused his business to fail and

caused him mental and physical anguish. The Eighth Amendment does not apply to events that occur before an individual is convicted of a crime. Because petitioner's allegations concern events that occurred in the pre-trial phase of his case, they are insufficient to state a claim under the Eighth Amendment.

C. Sixth Amendment

I understand petitioner to allege that respondents Cameron and Alexander violated his Sixth Amendment right to a speedy trial. Initially, I note that petitioner confuses his constitutional right to a speedy trial with his right to a speedy trial under Wisconsin law. He notes correctly that Wisconsin law requires that the trial of an individual charged with a felony offense commence within 90 days of the date on which a party demands it. Wis. Stat. § 971.10(2)(a). A fair reading of petitioner's allegations suggests that he was not brought to trial within 90 days of the date he requested a trial. However, it is well-established that a violation of state law, by itself, is not a sufficient basis for a claim under 42 U.S.C. § 1983. J.H. ex rel. Higgin v. Johnson, 346 F.3d 788, 793 (7th Cir. 2003); Tierney v. Vahle, 304 F.3d 734, 741 (7th Cir. 2002). Section 1983 provides a civil remedy only for violations of rights conferred by federal law or the federal constitution. Thus, even a clear violation of petitioner's state law right to a speedy trial would not support a claim under § 1983. In addition, it is clear that petitioner's allegations do not give rise to a claim

that his Sixth Amendment right to a speedy trial was violated because petitioner affirmatively states that the failure to pay child support charges against him were dismissed. Because no trial ever occurred, and none is necessary given that the charges were dropped, petitioner cannot prove a violation of his Sixth Amendment right to a speedy trial.

Petitioner's frustration with the slow pace of the wheels of justice is evident. However, the Constitution does not provide a remedy for the anxiety, stress and financial loss that sometimes accompany criminal charges.

ORDER

IT IS ORDERED that

1. Petitioner Robert Roth's request for leave to proceed in forma pauperis on his claim that respondent Lundell violated his Sixth Amendment right to counsel is DENIED;

2. Petitioner's request for leave to proceed in forma pauperis on his claim that respondents Lundell, Cameron, Alexander and Ahlstrom violated his Eighth Amendment protection against cruel and unusual punishment DENIED;

3. Petitioner's request for leave to proceed in forma pauperis on his claim that respondents Cameron and Alexander violated his Sixth Amendment right to a speedy trial is DENIED;

4. Petitioner's motion for appointment of counsel is DENIED as moot;

5. This case is DISMISSED with prejudice for petitioner's failure to state claim upon which relief may be granted;

6. The unpaid balance of petitioner's filing fee is $239.94; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

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

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

Entered this 4th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge