IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WENDELL DWAYNE O'NEAL
202 Honorway
Madison, Alabama 35758,

Plaintiff,

v.

TONY ATWAL, MARK F. ANDERSON, LAWRENCE HAMMERLING and STATE PUBLIC DEFENDER OFFICE,
2221 University Ave., Southeast
Suite 425
Minneapolis, MN 55414,
jointly and severally,

Defendants.

ORDER

05-C-739-C

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In the space of two weeks, from January 6 to January 20, 2006, pro se plaintiff Wendell O'Neal filed three lawsuits in this court. They were assigned Case Nos. 05-C-739-C, 06-C-35-C and 06-C-40-C. After filing each lawsuit, plaintiff began filing proposed amended complaints and other motions at a frenetic pace. In addition, he began calling the clerk's office multiple times each day to inquire about the status of documents he had filed. In light of the pace at which plaintiff filed these documents, in a memorandum dated

February 2, 2006, I informed plaintiff that this court would take no further action in any of his cases until I was satisfied that plaintiff had finished filing preliminary documents. Specifically, I told him that the court would not consider his motions and requests for leave to proceed in forma pauperis until he went at least two weeks without filing additional materials in his cases. More than a month has passed since that order and plaintiff has not submitted any new filings in any of his cases. This order will address only the outstanding motions in Case No. 05-C-739-C. Screening orders in Case Nos. 06-C-35-C and 06-C-40-C will follow shortly.

A. Background

In his original complaint in Case No. 05-C-739-C, plaintiff named as defendants three attorneys employed by the Minnesota Public Defender's Office, Tony Atwal, Mark Anderson and Lawrence Hammerling, as well as the office itself. Plaintiff alleged that defendant Atwal, who represented him on a charge of attempted robbery in Minnesota state court to which he pled guilty, denied him effective assistance of counsel by declining to represent him in connection with his efforts to vacate his plea and appeal his conviction. Also, he alleged that defendants Atwal and Anderson conspired with unnamed police officers, lawyers, judges and others responsible for his arrest and unlawful conviction. Finally, he alleged that the public defender's office failed to properly train and supervise defendants

Atwal, Anderson and Hammerling. I denied plaintiff leave to proceed in forma pauperis on his claims under 42 U.S.C. §§ 1983 and 1985, primarily because public defenders do not act under color of state law when representing indigent clients. Sceifers v. Trigg, 46 F.3d 701, 704 (7th Cir. 1995). However, I granted him leave to proceed in forma pauperis on a claim of intentional infliction of emotional distress against defendants Atwal, Anderson and Hammerling. (Although the screening order was not specific on the point, plaintiff was not granted leave to proceed against the Minnesota State Public Defender's Office. It will be dismissed from this case.)

At present, the court's docket indicates that plaintiff has filed the following documents since that order: a motion for reconsideration (dkt. #3), a document entitled "Amended Civil Rights Complaint" (dkt. #4) and a motion to consolidate this case with case no. 06-C-40-C (dkt. #6). Because plaintiff is proceeding pro se, I must construe his allegations liberally. Haines v. Kerner, 404 U.S. 519 (1972). Even under a liberal construction, the allegations in these documents are muddled, disjointed and confusing. As difficult as plaintiff's filings are to comprehend, it is clear that he believes fervently that he has been wronged by various police officers, lawyers, judges and private citizens. The thrust of his complaints is that there is a wide-ranging conspiracy that includes judges, police officers, prosecutors, defense attorneys and private citizens intent on convicting plaintiff of baseless criminal charges and obstructing his efforts to secure meaningful appellate review

of his convictions. Plaintiff's submissions reveal a disorganized and troubled yet determined mind. It is unlikely that any order from this court will dissuade him from seeking relief for these perceived harms through the judicial system. Nonetheless, this court has an obligation to review plaintiff's filings and explain why his allegations are too disorganized or incredible to state viable claims for relief.

B. Motion for Reconsideration

Plaintiff moves for reconsideration of his claim that defendant Atwal conspired to deny him counsel in connection with his appeal in Minnesota state court. First, he argues that defendant Atwal's decision not to represent him on appeal was part of a conspiracy to protect persons acting under color of state law, such as the police officers who arrested him and the prosecutors who handled his case. Plaintiff is correct that private citizens who conspire with state actors may be held liable under 42 U.S.C. § 1983. Starnes v. Capital Cities Media, Inc., 39 F.3d 1394, 1396 (7th Cir. 1994). However, to state a claim for conspiracy, plaintiff must "indicate the parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with." Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002).

Plaintiff has not met two of these requirements. He has identified defendant Atwal as an alleged conspirator but he has not identified the rest of the alleged conspirators by

name. Also, he has not alleged an approximate date on which the parties formed their "agreement." Without these minimal facts, plaintiff's allegations fail to give respondent Atwal notice of the basis for plaintiff's conspiracy claim.

In addition, the purpose of this alleged conspiracy is simply not believable. A district court may deny a plaintiff leave to proceed in forma pauperis if his allegations are legally frivolous. A frivolousness finding is appropriate when the facts alleged are "clearly baseless," meaning fanciful, fantastic, delusional, irrational, or wholly incredible. Denton v. Hernandez, 504 U.S. 25, 32-33 (1992). Plaintiff's allegations concerning defendant Atwal's participation in a conspiracy to deny him counsel meet this standard. Plaintiff alleges that respondent Atwal conspired to "conceal events, and protect integrities" of the state officials who he believes falsely arrested and convicted him. Mot. for Reconsideration, dkt. #3, ¶ A. Despite what plaintiff may sincerely believe, it is highly unlikely that law enforcement officials, attorneys and judges charged with upholding the law would engage in a concerted effort to frame him and allow him to be convicted of a crime he did not commit.

Second, plaintiff argues that even though defendants Atwal, Anderson and Hammerling are not state actors, he stated a viable conspiracy claim against them because private conspiracies are actionable under §§ 1983 and 1985(3). He cites Griffin v. Breckenridge, 403 U.S. 88, 102 (1971), in which the Supreme Court held that § 1985(3) reaches private conspiracies so long as there is "some racial, or . . . class-based, invidiously

discriminatory animus behind the conspirators' action." Griffin is inapplicable to this case, however, because plaintiff did not allege in his original complaint that defendants conspired to deprive him of any of his constitutional rights because of his race or his membership in any other class. Indeed, from the attachments to his original complaint, it appears that defendant Atwal declined to represent plaintiff because he believed that plaintiff's efforts to withdraw his guilty plea lacked legal merit.

Plaintiff argues also that a private citizen may qualify as a state actor where state law compels the citizen to act. Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970). I presume he means that because Minnesota law required defendants to represent him, they can be considered state actors. This theory is of no help to plaintiff because, as I noted in the screening order, the Supreme Court has held that a public defender "does not act under state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Polk County v. Dodson, 454 U.S. 312, 317 (1981).

Moreover, it appears that Minnesota law did not entitle plaintiff to representation in connection with his effort to withdraw his guilty plea. In his motion for reconsideration, plaintiff cites Minn. Stat. 590.05, which provides as follows:

> A person financially unable to obtain counsel who desires to pursue [a post conviction remedy] may apply for representation by the state public defender. The state public defender shall represent such person under the applicable provisions of sections 611.14 to 611.27, if the person has not already had a direct appeal of the conviction. *If, however, the person pled guilty and received a*

> *presumptive sentence or a downward departure in sentence, and the state public defender reviewed the person's case and determined that there was no basis for an appeal of the conviction or of the sentence, then the state public defender may decline to represent the person in a postconviction remedy case.* The state public defender may represent, without charge, all other persons pursuing a postconviction remedy under section 590.01, who are financially unable to obtain counsel.

(Emphasis added.)

Attached to plaintiff's original complaint is a copy of a letter from defendant Atwal dated March 14, 2005. In the letter, defendant Atwal states that plaintiff pled guilty to a charge of attempted simple robbery and received a presumptive sentence of 28 months. In addition, defendant Atwal stated that plaintiff could not appeal his conviction without first filing a motion to withdraw his plea in the district court that accepted the plea. Atwal's letter concludes as follows:

> If you still want to withdraw your guilty plea, you would need to file a petition for post-conviction relief and have [the trial judge] hear the motion and decide the issue. But, our office would not represent you and you would have to hire a private attorney. Minn. Stat. 590.05.
>
> On March 7, 2005, I did file a notice of appeal to the court of appeals to preserve your right to appeal. But, because the plea withdrawal issue was not raised with the district court, the court of appeals will not take the case. I will have to withdraw that notice.

Cpt., dkt. #2, ex. D. The contents of defendant Atwal's letter indicate that plaintiff was not the victim of a conspiracy to deprive him of his right to counsel. Instead, it appears that Minnesota law did not entitle him to counsel in connection with his motion to withdraw his

plea. In addition, until plaintiff obtained a ruling on his plea withdrawal motion, there was no court ruling to challenge in the Minnesota appellate court.

In sum, plaintiff has not demonstrated that I erred in denying him leave to proceed in forma pauperis on his conspiracy claims under §§ 1983 and 1985(3). Therefore, his motion for reconsideration will respect to these claims will be denied. I turn now to the allegations in plaintiff's "Amended Civil Rights Complaint."

C. "Amended Civil Rights Complaint"

Ordinarily, an amended complaint replaces the original complaint and becomes the sole operative pleading in a case. However, because the allegations in plaintiff's "Amended Civil Rights Complaint" do not appear designed to replace the allegations in his original complaint completely, I will construe the document as part of plaintiff's motion for reconsideration. The allegations in this document are confusing and disorganized. The first paragraph is not numbered and begins in mid-sentence. Plaintiff clusters the rest of his allegations under two headings: paragraphs 2–9 are grouped under the heading "conspiracy to deny access to court" and paragraphs 10–12 are grouped under the heading "conspiracy to deny procedural due process." In addition to defendants Atwal, Anderson, Hammerling and State Public Defender's Office, plaintiff names as a defendant Y. Vang, a St. Paul, Minnesota police officer.

1. "Conspiracy to deny access to court"

In paragraph 2 of the "Amended Civil Rights Complaint," plaintiff states that defendants

> ignored his petitioned request for financial determination to obtain related court file, specifically, on account that such determination had been made upon appointment of Defendant Atwal, who withdrew as counsel, abandoning the appeal to avoid sanction for failure to file timely appellate proceedings i.e. brief, etc. therefore, no response was given regarding request for said court file for appeal, in Propria Persona, which Plaintiff was forced to file, without access to trial court records.

It appears that plaintiff is alleging that defendants Atwal, Anderson and Hammerling ignored his request for a determination whether he would be required to pay for his court file in connection with his appeal. This allegation fails to state a claim for two reasons. First, the defendants are not state actors. Second, although the Constitution requires a state to provide an indigent defendant with a free transcript of his trial where the state extends the right to appeal, Griffin v. Illinois, 351 U.S. 12, 18 (1956), plaintiff has not alleged that defendants deprived him of a free transcript. Plaintiff concedes that a determination of his financial status had been made "upon appointment of Defendant Atwal." Nothing in the Constitution entitled plaintiff to another determination of his financial status with respect to his appeal.

In paragraphs 3-9, plaintiff broadens the scope of the alleged conspiracy against him to the point that the court can hardly make sense of his allegations. The following excerpts

illustrate the nature of his allegations:

> 3. Again, plaintiff alleges open conspiracy against defendants to deny his civil rights to appeal related trial court conviction, based upon the foregoings, and further intent to render him homeless as a matter of governmental assault, being convicted, by coersed [sic] guilty plea of a violent offense i.e. alleged Attempt Simple Robbery which, in effect, rendered him ineligible for housing i.e. public or Section 8, by federal statute, due to subjection to fixed income on the basis of puesdo-mental [sic] illness designation and, theoretical, unemployability [sic], for true reasons of race, political and religious beliefs.
>
> 4. Plaintiff alleges that Defendants take part in a governmental conspiracy against him, for aforestated reasons and intents, stemming from the state of Michigan . . . which, as detailed in complaint began during the 1970s for political activism as a youth against the county of Oakland, Michigan; and resulted in justified assault on the basis of his membership, as Legal Advisor, for the Melanic Islamic Palace of the Rising Sun, Inc., by the F.B.I., which played part in said organization being classified S.T.G. (Security Threat Group), and its members directed to relinquish membership, literature and all paraphenalia, or become subject to Level 5, Administrative Segregation, in both state & federal penal institutions, in the state of Michigan; . . .
>
> 6. Plaintiff has indeed experienced a governmental COINTELPRO type assault against him, inclusive of the use of family members, whom without success would not have been as likely regarding convictions of current appeal . . .
>
> 7. Plaintiff has experienced a variety of assaults since aforesaid conviction of appeal sought and, conspiratorially denied, through miscellaneous attempts by herein Defendants, including, but not limited to theft of both property and currency, by Defendant Y. Vang, St. Paul Police Officer, who responded to a 911 call made by a security personnel at the Radisson Hotel, St. Paul, Minnesota, August 14, 2005, subsequent to Plaintiff having initiated said police contact to obtain his wallet taken by P.O. Higgins, St. Paul Police, 2 weeks prior, which prevented him from accessing funds from either his bank account or EBT (Electronic Benefit) card, resulting in becoming stranded while commuting, and subjected to a drugging, for a subsequent orchestrated

> traffic related accident against his physical well being, in La Porte, Indiana, subsequent to leaving an F.B.I. office with complaint against them for past and present assaults related to S.T.G., supra, designation, prior to aforesaid assault by defendant Fang, supra, upon return arrival to St. Paul, Minnesota.
>
> 9. Plaintiff has further experienced a multiplicity of assaults designed to cause hospitalization, to substantiate and justify his mental illness status, through covert means, including, but not limited to banking, credit, homeless status, utilities i.e. cellular phone use and or access, pursuant towards establishing his social and personal discredit; routinely, a patented COINTELPRO objective; again, designed to maintain disadvantage in defending himself, and establishing an address, where he would be able to receive mail, and accomplish of the niceties and conveniences, as other do, absent S.T.G., supra, designation, MI.

Although it is far from clear, it appears that plaintiff believes the actions of defendants are part of a larger conspiracy against him that began during the 1970s when plaintiff was a member of an Islamic religious group. Plaintiff lists as objectives of this vast conspiracy the goals of (1) making him appear mentally ill; (2) rendering him ineligible for public housing; (3) discrediting him; and (4) interfering with his right to appeal his attempted robbery conviction. He alleges that "defendants" participated in the conspiracy by denying him the chance to appeal his attempted robbery conviction and that Officer Vang participated by stealing property and currency from petitioner. Instead of narrowing and clarifying the basis for petitioner's conspiracy claim, these allegations expand the scope of the conspiracy, introduce irrelevant events and confuse the reader. Not surprisingly, they do not address the reasons why I denied plaintiff leave to proceed on the conspiracy claims

in his original complaint.

2. "Conspiracy to deny procedural due process"

In paragraph 10, plaintiff alleges that defendants Atwal, Anderson and Hammerling conspired with other, unidentified individuals to deny him an "appellate opportunity" by refusing to turn over his "file of conviction" which he needed for his appeal. This allegation fails to state a claim of conspiracy against defendants under § 1983 or § 1985(3) because the defendants are not state actors and because plaintiff has not alleged that they conspired to deprive him of a right that the Constitution protects against interference by private parties. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993).

Like paragraphs 3-9, paragraphs 11 and 12 consist of confusing and irrelevant allegations that do not correct errors in plaintiff's original complaint or state claims for relief:

> 11. Herein parties mentioned, governmental agents or their accessories, have unwittingly attempted, by all means, to lable [sic] Plaintiff a drug addict, in concerted efforts to justify aforesaid manufactured charges against him, which manifested subsequent to initial assaults designed to discredit, since 1993, upon release from the Michigan Dept. of Corrections; affiliation with the M.I.P.R.S., Inc., and participation in activism, by and through further affiliation with other activist or religious groups, in Detroit, Michigan; to the extent of importing private citizens for such employment, to induce, introduce, supply, or otherwise attempt to cause him drug usage, which he avoids, by all means, being knowledgeable of such tactics and purpose.
>
> 12. Defendants governmental authorities have further subjected Plaintiff to homelessness, and caused mental illness designation, to otherwise justify

> physical assault by persons within such categories, and or his death, which the same sought to justify involving drug usage, or affiliations with persons involved. In effect, Plaintiff is a governmental target for both political and religious reasons, and Defendants are employed to destroy him, through orchestrated efforts, not necessarily completely known to them, which is why he cannot identify places or times, or persons at orientation of assignments, however, he can and now does present the facts of scenario at level of herein complaint against Defendants.

In paragraph 11, plaintiff appears to allege that defendants have attempted to cause him to use drugs by having "private citizens" supply him with drugs and have attempted to label him a drug addict. In paragraph 12, plaintiff alleges that defendants have caused him to become homeless and have caused him to be diagnosed as mentally ill and that defendants are "employed to destroy him." These allegations are legally frivolous under the standard set out in Denton, 504 U.S. at 32-33. Nothing in them convinces me that I erred in denying plaintiff leave to proceed in forma pauperis on his conspiracy claims. Moreover, neither of these paragraphs contain allegations sufficient to state any constitutional claim.

C. Motion for Consolidation

Plaintiff seeks to consolidate the present case with Case No. 06-C-40-C, apparently because the state actors with whom defendant Atwal allegedly conspired are named as defendants in that case. Rule 42 of the Federal Rules of Civil Procedure governs the consolidation and separation of actions in federal courts. Rule 42(a) allows courts to join

pending actions that involve common questions of fact or law when joinder would avoid unnecessary costs or delay. It would be inappropriate to rule on this motion before screening plaintiff's complaint in Case No. 06-C-40-C. Therefore, I will reserve a ruling on this motion until I have screened plaintiff's complaint in that case.

D. Service of Process

A word is necessary concerning service of process in this case. In the screening order, I ordered plaintiff to submit a completed marshal service form and summons for each of the three defendants and one additional summons including the names of all three defendants by February 13, 2006. In light of the February 2 memorandum, which may have given plaintiff the impression that he was not to submit these forms, I will give plaintiff a short extension to submit them. Plaintiff may have until March 17, 2006 in which to submit the service and summons forms described in the court's February 13, 2006 order.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for reconsideration, dkt. #3, is DENIED;

2. Plaintiff's "Amended Civil Rights Complaint," dkt. #4, is construed part of his motion for reconsideration and is DENIED. The only claim that remains pending in this

case is plaintiff's claim for intentional infliction of emotional distress.

4. Defendant Minnesota State Public Defender Office is DISMISSED from this case.

5. A decision is STAYED on plaintiff's motion for consolidation until I have screened his proposed complaint in Case No. 06-C-40-C.

6. Plaintiff may have until March 17, 2006 to submit to the clerk of court one completed marshal service form and one completed summons for each defendant, plus one additional summons including the names of all defendants. If plaintiff fails to submit the completed marshals service and summons forms before March 17, 2006, his complaint will be subject to dismissal for his failure to prosecute.

Entered this 8th day of March, 2006.

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