

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

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ROBERT D. McGRATH,

Plaintiff,

OPINION  
AND ORDER

v.

06-C-343-C

LENARD WELLS and  
LAURA MOFFIT,

Defendants.  
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In this proposed civil action for monetary relief, plaintiff Robert D. McGrath, a prisoner at the Oakhill Correctional Institution in Oregon, Wisconsin, contends that his constitutional rights were violated when defendant Lenard Wells singled him out for differential treatment in connection with his consideration for parole, defendant Laura Moffit vindictively altered the date of his offense on his judgment of conviction in order to make him ineligible for nondiscretionary parole release and unidentified prison officials placed him in segregation while investigating allegations that he had stolen a pair of blue jeans.

Although plaintiff has paid the filing fee in full, the court must screen his complaint

pursuant to 28 U.S.C. § 1915A. In screening, the court must examine plaintiff's claims, interpreting them broadly, and dismiss any that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

Because it is unclear whether plaintiff remains incarcerated, I will stay a decision whether to grant him leave to proceed against defendant Moffit in order to provide plaintiff an opportunity to inform the court whether he has been released from prison. Although I will stay service of plaintiff's complaint pending clarification of the status of his claim against defendant Moffit, plaintiff will be granted leave to proceed against defendant Wells on his claim that Wells singled him out for differential treatment in connection with plaintiff's parole application and will be denied leave to proceed on his claim that he was denied due process in connection with his temporary placement in segregation because he had no protected interest in avoiding placement there.

In addition to his complaint, petitioner has filed a "Petition for a Temporary Restraining Order and Preliminary Injunction." Because plaintiff asks only that the court order defendants to obey the law, a duty they are already obliged to undertake, his motion will be denied as unnecessary.

From a review of electronic records maintained on the Wisconsin Circuit Court Access Program (CCAP), the complaint and documents attached to the complaint, I understand plaintiff to allege the following.

## ALLEGATIONS OF FACT

### A. Parties

Plaintiff Robert D. McGrath is an inmate confined at the Oakhill Correctional Institution in Oregon, Wisconsin.

Defendant Lenard Wells is the former chair of the Wisconsin Parole Commission.

Defendant Laura Moffit is deputy clerk of court for Sauk County, Wisconsin.

### B. Judgment of Conviction

\_\_\_\_\_ On June 8, 1994, a complaint was filed in Sauk County Case Number 94CF113, charging plaintiff with 28 counts of first degree sexual assault of a child. (It is not clear when each count was alleged to have occurred.) On January 4, 1995, plaintiff pleaded no contest to two counts of first degree sexual assault of a child. The remaining 26 counts were dismissed on the prosecution's motion.

Before plaintiff's sentencing hearing was held, Tom Sprecher, a probation and parole agent employed by the Wisconsin Department of Corrections, conducted a presentence

investigation and completed the Wisconsin Sentencing Guidelines Scoresheet, which calculated the advisory sentence recommended under the Wisconsin sentencing guidelines then in effect. The presentence report face sheet and the sentencing scoresheets both list the crimes to which plaintiff pleaded, and indicate that one count of sexual assault was committed in December 1993 and the other was committed in April 1994. The scoresheets are signed by the sentencing judge.

On April 4, 1995, plaintiff was sentenced to 15 years' incarceration on count 1 and to 15 years' probation on count 2. Although the sentencing guidelines worksheet and the presentence face sheet list plaintiff's offense dates as 12/93 and 4/94, the judgments of conviction issued in plaintiff's case list the offense dates as 4/24/94 and 5/94. The judgments of conviction are signed by defendant Moffit and dated April 4, 1995.

Defendant Moffit fraudulently and maliciously altered the dates on which plaintiff was alleged to have committed his offenses in order to insure that he would be subject to Wis. Stat. § 302.11(1g)(am), which states that an inmate serving a sentence for a serious felony committed on or after April 21, 1994, is not entitled to release after serving two-thirds of his sentence. If the dates on plaintiff's judgment of conviction had been entered correctly as 12/93 and 4/94, plaintiff would have been released on April 4, 2005.

On May 25, 2006, a hearing was held in Sauk County court to address plaintiff's request for amended judgments of conviction. After hearing from plaintiff and from the

state, the court ruled in plaintiff's favor and amended the judgments of conviction to reflect that plaintiff had committed count 1 (for which he received a 15 year prison sentence) "in or about April 1994" and count 2 (for which he received 15 years' concurrent probation) "in or about December 1993."

A second hearing was held in Sauk County Court on June 30, 2006. On July 12, 2006, the court issued an order finding that "the state ha[d] not met its burden of establishing a date certain for the offenses." The court held that it "could not find that the offense in count 1 of the j[udgment] o[f] c[onviction] occurred on or after April 21, 1994."

### C. Parole Procedures

Both of plaintiff's victims are on his prison visitation list and come to visit him often. Defendant Wells and his staff know where the victims live and have their home addresses and phone numbers on file. Nevertheless, defendant Wells failed to notify plaintiff's victims or their mothers that plaintiff had applied for parole, or to inform them of plaintiff's scheduled parole hearings.

Other inmates and their family members have written to defendant Wells and received personal responses. When plaintiff and his family, friends and victims write to defendant Wells, they receive no personal response. Defendant Wells does not respond to phone calls and letters regarding plaintiff because he does not want to hear that plaintiff's

family, friends and victims want him to be released to come home to help his wife. Even when plaintiff wrote defendant Wells to explain that his judgment of conviction had been entered in error, Wells did not respond personally, but merely returned plaintiff's correspondence with an unsigned cover letter. Defendant Wells has "ignored plaintiff in all manners possible."

#### D. Neck Injury

On September 14, 2005, plaintiff injured his neck while he was working at the Oakhill Correctional Institution. Plaintiff will never recover fully from this injury.

#### E. Segregation

On June 30, 2005, plaintiff was placed in temporary lock up for 13 days while prison staff members investigated whether plaintiff had stolen a pair of jeans. Other inmates told prison staff that plaintiff was not involved in the theft. Following a hearing at which plaintiff professed his innocence, prison staff continued to keep plaintiff in "segregation" until "after the guilty party was released from segregation."

### OPINION

#### A. Screening

In this lawsuit, plaintiff raises three distinct claims: that (1) by inserting incorrect offense dates into plaintiff's original judgments of conviction in Case No. 94CF113, defendant Moffit violated his right to substantive due process and effectively detained him for more than 14 months beyond his release date; (2) by refusing to accord plaintiff the same procedural protections and opportunities to be heard as other inmates, defendant Wells violated plaintiff's rights to equal protection; and (3) by confining plaintiff in segregation for 13 days while investigating unfounded allegations against him, unidentified prison officials violated plaintiff's right to procedural due process. (Plaintiff mentions a work-related injury, but has not suggested that the injury was the result of any wrongful actions on the part of any defendant. I will ignore the allegations regarding his neck injury; they are not relevant to the legal claims at issue in this lawsuit.)

#### 1. Substantive due process

Substantive due process is implicated when the government exercises power without reasonable justification, and is most often described as an abuse of government power that "shocks the conscience." Tun v. Whitticker, 398 F.3d 899, 900 (7th Cir. 2005). "The nub of a substantive due process claim is that some things the state just cannot do, no matter how much process it provides." Miller v. Henman, 804 F.2d 421, 427 (7th Cir.1986). Rather than guaranteeing an individual the right to a fair decision making procedure, the

concept of substantive due process prevents the state from taking certain actions even if it provides procedural safeguards, by protecting citizens against government conduct that is arbitrary or without reasonable justification. Tun, 398 F.3d at 902.

However, as the Supreme Court has emphasized, “only the most egregious official conduct can be said to be arbitrary in the constitutional sense.” County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). Cases abound in which government action was criticized but found not to shock the conscience. See, e.g., id. (police officer did not violate substantive due process rights of passenger killed in high speed chase); Galdikas v. Fagan, 342 F.3d 684, 690-91 (7th Cir. 2003) (allegations that school officials induced students to enroll in master's program by knowingly and falsely representing that program was accredited and took other steps to prevent accreditation not sufficiently egregious to shock conscience), overruled on other grounds by Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004).

Plaintiff contends that defendant Moffit violated his substantive due process rights by maliciously altering the dates of his judgment of conviction in order to insure that he would remain confined beyond his alleged mandatory release date of April 4, 2005, and that as a result of Moffit’s actions, he has been confined illegally for at least 15 months. If plaintiff’s allegations are true, I cannot say that a jury would be unable to find that defendant Moffit’s conduct shocked the conscience. Therefore, plaintiff has stated a claim against defendant Moffit under the Fourteenth Amendment.



However, a procedural obstacle may block plaintiff's claim against defendant Moffit. Plaintiff frames this lawsuit as a civil action for monetary relief under 42 U.S.C. § 1983 and requests \$10,000 per day for each day he has been "illegally" confined. Before plaintiff could receive the monetary relief he seeks, he would need to establish that defendant Moffit's actions led to his illegal confinement. He could not prevail on this claim without undermining the validity of his present custody.

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" so the plaintiff may refile it as a petition for a writ of habeas corpus, which is the exclusive remedy for a prisoner wishing to challenge the fact or duration of his confinement. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996); see also Heck v. Humphrey, 512 U.S. 477, 481 (1994). The question, then, is whether plaintiff is challenging his continued custody or whether his custody has terminated.

At the time petitioner filed his petition, he indicated that he was incarcerated. However, there is reason to believe that he may no longer be in prison. According to plaintiff's complaint, which was filed June 26, 2006, the state court amended plaintiff's judgments of convictions in May 2006; however, he remained incarcerated at the time the complaint was filed because questions remained regarding the effect of the amendments on

the validity of plaintiff's confinement.

The amended forms indicate that plaintiff's sentence is being served for a crime committed in April 1994. Under Wisconsin law, inmates who committed crimes before April 21, 1994 are entitled to mandatory parole release upon completion of two-thirds of their prison sentences. Wis. Stat. § 302.11(1). However, inmates who committed certain serious felonies after April 21, 1994, are subject to Wisconsin's presumptive mandatory release provision, which makes parole discretionary rather than mandatory after two-thirds of a sentence has been completed. Wis. Stat. § 302.11(1g)(am). Because the most recent version of plaintiff's judgment of conviction lists his offense date as "April 1994," it is not immediately apparent whether his sentence is subject to § 302.11(1g).

Although plaintiff has not informed the court of any change in his custodial status, the publicly available summary of the order issued by the Sauk County court on July 12, 2006 indicates that the state court ruled in plaintiff's favor on July 12, 2006, holding that the state had not proven that plaintiff's offenses were committed after April 21, 1994. The logical consequence of such a ruling would be the invalidation of petitioner's custody and his release.

If petitioner is no longer incarcerated, his action against defendant Moffit could be brought properly under 28 U.S.C. § 1983. However, if he remains incarcerated, his only remedy would be to file a petition for a writ of habeas corpus under 28 U.S.C. § 2254.

Heck, 512 U.S. at 481. Because petitioner's status is unclear with respect to his confinement and because the propriety of his lawsuit against defendant Moffit turns on whether he remains incarcerated, I will stay a decision on whether to grant petitioner leave to proceed on this claim by giving him until August 7, 2006 in which to inform the court in writing whether he remains incarcerated. If petitioner has been released, he will be granted leave to proceed on his claim that defendant Moffit violated his right to due process. However, if petitioner remains confined, his claim against defendant Moffit will be dismissed without prejudice.

## 2. Equal protection

Plaintiff contends that his right to equal protection was violated when defendant Wells refused to give him the same procedural protections and opportunities as other inmates in connection with plaintiff's parole application. An equal protection violation occurs only when different legal standards are arbitrarily applied to similarly situated individuals. Smith on Behalf of Smith v. Severn, 129 F.3d 419, 429 (7th Cir. 1997). Although equal protection claims are most commonly brought by members of disfavored classes of citizens or by citizens attempting to enforce fundamental rights, courts have recognized that successful equal protection claims can be brought by a "class of one," when a plaintiff alleges that he "has been intentionally treated differently from others similarly

situated without a rational basis for the difference in treatment.” Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). A “class of one” plaintiff may demonstrate that he has suffered intentional, irrational, and arbitrary treatment “either by showing that he was treated differently from identically situated persons for no rational reason, or that he was treated worse than less deserving individuals for no rational reason.” Bell v. Duperrault, 367 F.3d 703, 707 (7th Cir. 2004).

Here, plaintiff alleges that although defendant Wells responded to inquiries from family and friends of other inmates applying for parole, Wells refused to return phone calls or letters sent to him by plaintiff’s family and friends. In addition, plaintiff alleges that defendant Wells did not notify plaintiff’s victims or their adult guardians about plaintiff’s parole hearings, as he may have been required to do under Wisconsin law, see Wis. Stat. § 304.06(1)(c)(3), and that defendant Wells refused to respond to plaintiff’s correspondence in any meaningful way, although Wells did respond to inquiries from other parole applicants. According to plaintiff, the only explanation for defendant Wells’s behavior is that Wells has arbitrarily discriminated against plaintiff in violation of the Fourteenth Amendment. Plaintiff has stated a claim that defendant Wells has violated his right to equal protection and will be given leave to proceed on this claim. (In order to simplify scheduling and other procedural matter in this case, the filing of answers in this case, I will stay service on defendant Wells until after the court has determined whether plaintiff’s claim against

Moffit may proceed also.)

### 3. Procedural due process & segregation

Almost in passing, plaintiff alleges that on June 30, 2005, he was placed in segregation for 13 days during which unidentified prison staff members investigated allegations that plaintiff had stolen a pair of jeans. It is unclear what claim plaintiff is trying to make with regard to these facts, but it seems reasonable to assume that he is challenging the process afforded him in connection with his placement in temporary lockup.

The first hurdle plaintiff faces with respect to this claim is his failure to name as defendants the persons responsible for placing him in lockup. Plaintiff does not allege that defendant Wells or defendant Moffit are in any way connected with his placement and there is no reason to think they would be. However, because plaintiff is proceeding pro se he is entitled to significant leniency with respect to his pleading. “When the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not specifically named in the caption of the complaint, the [] court must provide the plaintiff with an opportunity to amend the complaint,” and “must assist the plaintiff in conducting the necessary investigation” when he “faces barriers to determining the identities of the unnamed defendants.” Donald v. Cook County Sheriff's Dept., 95 F.3d 548, 555 (7th Cir. 1996).

The question then is whether plaintiff has stated a claim against any conceivable defendants with regard to his short-term confinement in temporary lockup. He has not. A procedural due process claim against government officials requires proof of inadequate procedures as well as interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests “will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” In the prison context, these protected liberty interests are essentially limited to the loss of good time credits or placement for an indeterminate period of time in one of this country’s “supermax” prisons. As the Court of Appeals for the Seventh Circuit noted in Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997):

Every state must have somewhere in its prison system single-person cells in which prisoners are sometimes confined not because they have misbehaved but simply because the prison has no other space, wishes to protect some prisoners from others, wishes to keep prisoners isolated from one another in order to minimize the risk of riots or other disturbances, wishes to prevent the spread of disease, and so forth. Almost 6 percent of the nation's prison inmates are in segregation, Criminal Justice Institute, Inc., *Corrections Yearbook* 22 (1997), and it appears that the great majority of these are not in disciplinary segregation (see Criminal Justice Institute, Inc., *Corrections Yearbook: Adult Corrections* 27 (1995), showing that in 1995 almost 5 percent of all prison inmates were in nondisciplinary segregation) . . . Under Sandin this possibility is probably enough to prevent him from complaining successfully of a deprivation of liberty if he is transferred into segregation for

a disciplinary infraction.

The type of confinement the court describes is known in Wisconsin as “temporary lockup,” a “nonpunitive segregated status allowing an inmate to be removed from the general population pending further administrative action.” Wis. Admin Code §§ DOC 303.02(22); 303.11.

When the sanction a plaintiff challenges is solely his “confinement in disciplinary segregation for a period that does not exceed the remaining term of the prisoner's incarceration,” the court of appeals has stated that “ it is difficult to see how after Sandin it can be made the basis of a suit complaining about a deprivation of liberty.” Wagner, 128 F.3d at 1176. Plaintiff's placement in temporary lockup did not extend the overall length of his sentence. Moreover, his placement was of limited duration and there is no indication that the conditions were atypical in any way. Accordingly, plaintiff was not deprived of a liberty interest and therefore he will be denied leave to proceed on his due process claim against unidentified prison officials.

#### B. Petition

In plaintiff's “Petition for a Temporary Restraining Order and Preliminary Injunction” he asks the court to issue an order prohibiting the defendants “from threatening acts or harassment” against him. Plaintiff does not allege that he is being harassed presently

or indicate why he fears future harassment, other than by virtue of his having filed a lawsuit. Defendants are obliged to follow the law, and the law prohibits individuals from engaging in conduct that constitutes harassment. See, e.g., Wis. Stat. § 947.013. Because an order from this court would have no more force than existing law, plaintiff's "petition" will be denied as unnecessary.

## ORDER

IT IS ORDERED that

1. Plaintiff is DENIED leave to proceed on his claims that unidentified prison officials deprived him of his right to due process by placing him in temporary lockup for 13 days.

2. Plaintiff Robert D. McGrath is GRANTED leave to proceed on his claim that defendant Wells violated his right to equal protection by treating him less favorably than other similarly situated parole applicants.

3. A decision is STAYED on plaintiff's claim that defendant Moffit violated his right to substantive due process by arbitrarily altering the offense dates listed on his judgment of conviction. Plaintiff may have until August 7, 2006, in which to inform the court in writing whether he remains incarcerated. If he fails to respond by August 7, 2006, plaintiff's claim against defendant Moffit will be DISMISSED without prejudice.



3. Service on defendant Wells is STAYED pending a decision whether plaintiff will be proceeding against defendant Moffit in this action.

4. Plaintiff's Petition for a Temporary Restraining Order and Preliminary Injunction is DENIED.

Entered this 17th day of July, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge