

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

LERVOLTIS LUCKETT,

Petitioner,

ORDER

v.

08-cv-449-slc

PETER HUIBREGTSE, Warden,
NURSE MORA,
ELLEN RAY, Examiner,
NURSE AMY and
DR. COX,

Respondents.

On August 27, 2008, I assessed petitioner Lockett an initial partial payment of the \$350 filing fee in the amount of \$.40 and gave him until September 15, 2008, in which to make the payment. Now petitioner has submitted a letter postmarked August 29, 2008, that I construe as a motion to waive the initial partial payment.

In his motion, petitioner says that he cannot make the initial partial payment because he “do[es]n’t have any money in [his] regular account” and has “only 24 [cents] in [his] release account.” I note too, from an updated trust fund account statement petitioner submitted on August 22, 2008, that he had \$4.00 deposited to his account as recently as August 7, 2008.

Under § 1915(b)(4), a prisoner may not be prohibited from bringing a lawsuit if “the prisoner has no assets and no means by which to pay the initial partial filing fee.” Petitioner may think he falls into the category of prisoners who have “no means” to make an initial partial payment, but controlling authority holds otherwise. His immediate shortage of income is not

sufficient by itself to allow me to conclude that he lacks the means to pay the initial partial payment pursuant to 28 U.S.C. § 1915(b)(4). In Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1997), the court of appeals stated,

[I]t is not enough that the prisoner lack assets on the date he files. If that were so, then a prisoner could squander his trust account and avoid the fee. Section 1915(b)(4) comes into play only when the prisoner has no assets and no means by which to pay the initial partial filing fee. A prisoner with periodic income has “means” even when he lacks “assets.”

Further, in measuring periodic income, § 1915 requires courts to look backward in time rather than forward. In other words, in determining whether a prisoner has the means to pay, the court cannot consider representations the prisoner makes about his future income or lack of it. Rather, the court must look at the prisoner’s income from the previous six months. 28 U.S.C. § 1915(a)(2).

In this case, I calculated petitioner’s initial partial payment based on information he provided in his trust fund account statement. This statement showed that for the six-month period immediately preceding the filing of the complaint, petitioner received a handful of small deposits to his account. True, all of his income appears to be taken to pay various debts as soon as it is deposited to petitioner’s account. However, that does not mean that petitioner will be unable to make the payment he has been ordered to pay in this case. Initial partial payments assessed under § 1915(b)(1) are to receive priority over petitioner’s other debts. Walker v. O’Brien, 216 F.3d 626, 628 (7th Cir. 2000)(initial partial payments are to “come off the top” of all deposits to prisoner’s account). Thus, the fact that petitioner owes money for other debts

does not prevent him from utilizing new deposits to make an initial partial payment in this case. Therefore, petitioner's motion to waive the initial partial payment of the filing fee will be denied.

Two final matters require comment. In his motion, petitioner says that he cannot make the "payment of 40.00 dollar[s]." However, the amount of petitioner's initial partial payment is 40 *cents* and not 40 dollars. Although this clarification may change petitioner's expectation with regard to his ability to pay, it may well be that it is too late for him to arrange to make the payment from the next deposit to his account. Therefore, I am willing to allow him an extension of time to October 6, 2008, in which to pay the initial partial filing fee. If, however, by October 6, 2008, petitioner does not make the payment, I will consider that he has withdrawn this action and he will not owe the filing fee.

ORDER

IT IS ORDERED that petitioner's motion to waive the initial partial payment (dkt. #9) is DENIED.

Further, IT IS ORDERED, that petitioner may have an enlargement of time to October 6, 2008, in which to submit a check or money order made payable to the clerk of court in the amount of \$.40. If, by October 6, 2008, petitioner fails to make the initial partial payment, he will be held to have withdrawn this action voluntarily. In that event, the clerk of

court is directed to close this file without prejudice to petitioner's filing his case at a later date.

Entered this 5th day of September, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge