

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

EARL D. PHIFFER,

Plaintiff,

v.

JOHN DOE, Sheriff, JOHN DOE, Officer One,
JOHN DOE, Officer Two, JOHN DOE, Officer Three,
JOHN DOE, Officer Four, JOHN DOE, Officer Five,
JOHN DOE, Officer Six, JOHN DOE, Officer Seven,
Hon. MICHAEL J. BYRON, A.D.A., MR. GERALD
URBIK and Atty. MR. JOSHUA KLAFF, in their
individual and official capacities,

Defendants.

ORDER

09-cv-285-slc¹

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983.

Plaintiff Earl D. Phiffer, who is presently confined at the Columbia Correctional Institution

¹ While this court has a judicial vacancy, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. It is this court's expectation that the parties in a case assigned to the magistrate judge will give deliberate thought to providing consent for the magistrate judge to preside over all aspects of their case, so as to insure that all cases filed in the Western District of Wisconsin receive the attention they deserve in a timely manner. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the sole purpose of issuing this order, I am assuming jurisdiction over the case.

in Portage, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. He has also filed a motion for appointment of counsel. From the financial affidavit plaintiff has given the court, I conclude that he is unable to prepay the full fee for filing this lawsuit. Plaintiff has paid the initial partial payment of \$7.15 as required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, because plaintiff is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny him leave to proceed if he has had three or more lawsuits or appeals dismissed for lack of legal merit, 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. After examining petitioner's complaint, I find that plaintiff has failed to state a claim upon which relief may be granted and he will be denied leave to proceed under the in forma pauperis statute. Further, because plaintiff's complaint will be dismissed, his motion for appointment of counsel is moot.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Earl D. Phiffer is a prisoner confined at the Columbia Correctional Institution in Portage, Wisconsin. Defendant John Doe, Sheriff is the superintendent of the Rock County Sheriff's Department. Defendants John Doe, Officer One through John Doe, Officer Seven are Rock County deputy sheriffs. Defendant Michael J. Byron is a circuit judge for Rock County. Defendant Gerald Urbik is an assistant district attorney in Rock County and defendant Joshua Klaff was plaintiff's appointed attorney.

B. Plaintiff's State Criminal Case

In January 2003, plaintiff was charged in Rock County, Wisconsin with obstructing justice and attempting to flee a traffic officer as a repeat offender. On January 8, 2008, a jury found plaintiff guilty of both charges.

Jury selection took place on January 7, 2008. Initially, plaintiff was present, but after a discussion with the judge about wanting a new attorney and a transfer of venue, defendant Judge Byron directed plaintiff to participate in jury selection via video camera. Defendant Byron ordered plaintiff strapped to a chair with a mask covering his face at the Rock County Sheriff's Department. Plaintiff did not want to be strapped to a chair, so when the seven Doe defendants enforced the judge's order, plaintiff was hurt in the process. Plaintiff was placed on camera and only Judge Byron could see and hear him. Defendants Urbik and Klaff were aware that plaintiff was attending the jury selection via video camera and that he was

strapped to a chair with a mask covering his face. Plaintiff remained strapped to the chair for a couple of hours. After the selection, while still strapped in the chair, plaintiff asked a deputy to call defendant Klaff so that he could insure that he was present in court at the trial the next day.

DISCUSSION

Although plaintiff cites Eighth Amendment “excessive force” case law in his complaint, I understand his actual claim to be that having to be strapped to a chair with a mask covering his face during selection of a jury for his criminal trial was a cruel and unusual condition of confinement in violation of his rights under the Eighth Amendment. The Eighth Amendment prohibits cruel and unusual punishment, which the Supreme Court has defined to mean that prisoners are entitled to the “minimal civilized measure of life’s necessities.” Rhodes v. Chapman, 452 U.S. 337, 347 (1981). In other words, a prisoner should not face prison conditions that involve “the wanton and unnecessary infliction of pain.” Id.

A prisoner’s challenge to his conditions of confinement requires a two-step analysis: (1) “whether the conditions at issue were sufficiently serious so that a prison official’s act or omission results in the denial of the minimal civilized measure of life’s necessities,” and (2) “whether prison officials acted with deliberate indifference to the condition in question.”

Townsend v. Fuchs, 522 F.3d 765, 773 (7th Cir. 2008) (internal quotations omitted). The first step is an objective one, which means that the alleged condition must be objectively, sufficiently serious. Delaney v. DeTella, 256 F.3d 679, 683 (7th Cir. 2001). Although providing the minimal civilized measure of life's necessities does not entitle prisoners to comfortable condition, Rhodes, 452 U.S. at 349, it does require food, shelter, safety, health care, heat and clothing. E.g., Freeman v. Berge, 441 F.3d 543, 546 (7th Cir. 2006); Gillis v. Litscher, 468 F.3d 488, 493 (7th Cir. 2006).

Although being strapped to a chair with a mask over his face was an unpleasant experience, the circumstances were not so serious as to deprive of any of life's necessities. Plaintiff was able to speak and thus able to breathe while wearing the mask for a couple of hours. Although plaintiff does not allege as much, even if I were to assume he was denied food while strapped in the chair, it would be unreasonable to infer that going without food for a couple of hours is objectively, sufficiently serious to be considered a deprivation of the necessity of food.

Further, plaintiff alleges that he was able to participate in the jury selection while strapped in the chair by voicing concerns to the judge. If he had been denied any of the minimal civilized measures of life's necessities, it is difficult to imagine how he would have been able to participate in the jury selection even via video. Being strapped in a chair wearing a mask was undoubtedly uncomfortable, but none of plaintiff's allegations allow the

inference that it was an objectively, sufficiently serious condition that deprived plaintiff of any of life's necessities. Accordingly, plaintiff has failed to state a claim upon which relief can be granted.

ORDER

IT IS ORDERED that:

1. Plaintiff Earl D. Phiffer's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED and this case is DISMISSED for failure to state a claim upon which relief may be granted;

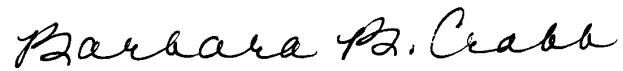
2. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Columbia Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full;

3. Because I have dismissed one or more claims asserted in plaintiff's complaint for one of the reasons listed in 28 U.S.C. § 1915(g), a strike will be recorded against plaintiff;

4. The clerk of court is directed to close this case;
5. Plaintiff's motion to appoint counsel is DENIED as moot.

Entered this 7th day of July, 2009.

BY THE COURT:

A handwritten signature in cursive script, reading "Barbara B. Crabb".

BARBARA B. CRABB
District Judge