IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GLENN T. TURNER,

Plaintiff, OPINION and ORDER

v. 11-cv-708-bbc

WILLIAM POLLARD, MICHAEL BAENEN,
PETER ERICKSEN, LT. SWIEKATOWSKI,
TOM CAMPBELL, RICK RAEMISCH
and CAPTAIN M. DELVAUX,

Defendants.

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Pro se plaintiff Glenn Turner has filed a motion for reconsideration of an order dated March 26, 2012, dkt. #11, along with a notice of appeal of the same order. Presumably, plaintiff intended the notice of appeal to be contingent on a denial of his motion for reconsideration. Because the court has not entered a final judgment, I construe plaintiff's notice as including a motion for leave to file an interlocutory appeal under 28 U.S.C. § 1292(b). In addition, because plaintiff's notice of appeal is not accompanied by the $455 fee for filing an appeal, I construe the notice to include a request for leave to proceed in

forma pauperis on appeal. I am denying all of these motions.

OPINION

A. Motion for Reconsideration

In the March 26 order, I severed some of plaintiff's claims under Fed. R. Civ. P. 20 and 21 and screened the remaining claims under 28 U.S.C. § 1915. I allowed plaintiff to proceed on claims that defendants disciplined him for conduct that was protected by the First Amendment and that defendant Swiekatowski attempted to instigate other prisoners to assault plaintiff, in violation of the Eighth Amendment. However, I dismissed plaintiff's claim that he was denied due process at a disciplinary hearing as well as his equal protection claims for his failure to state a claim upon which relief may be granted.

In his motion for reconsideration, plaintiff challenges the dismissal of his due process claims that (1) various defendants relied on false evidence to find him guilty of engaging in gang-related activity; and (2) defendant Delvaux refused plaintiff's request to review the statements submitted by three confidential informants. In the March 26 order, I assumed that plaintiff's discipline of 360 days in segregation triggered the protections of the due process clause because it is an "atypical and significant hardship" under Sandin v. Conner, 515 U.S. 472 (1995). See also Marion v. Columbia Correctional Institution, 559 F.3d 693, 697 (7th Cir. 2009) (prisoner stated claim under due process clause by alleging that he was

placed in segregation for 240 days without due process). However, I questioned whether plaintiff was entitled to anything more than notice of the reasons for the discipline and an opportunity to rebut those reasons, under the standard in Wilkinson v. Austin, 545 U.S. 209 (2005). Plaintiff acknowledges that he was given the reasons for the decision and the opportunity to rebut those reasons, so if the Wilkinson standard is controlling, he could not prevail on his due process claim.

Plaintiff challenges this view on the ground that the Wisconsin Administrative Code provides additional procedural guarantees, but that code has no bearing on a claim under the due process clause. "The Supreme Court has made [it] clear [that] the requirement of due process is not defined by state rules and regulations, but is an independent determination." Boyd v. Owen, 481 F.3d 520, 524 (7th Cir. 2007) (citing Cleveland Bd. Of Education v. Loudermill, 470 U.S. 532, 541(1985)). See also Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) ("procedural protections do not in and of themselves create cognizable liberty or property interests"). If plaintiff believes that defendants violated his rights under the administrative code, his remedy is a writ of certiorari filed in state court, not a federal lawsuit under 42 U.S.C. § 1983.

Although I believed it likely that Wilkinson applied the appropriate standard, I assumed for the purpose of screening that plaintiff was entitled to the same procedural protections as prisoners who lose good conduct time, which are (1) written notice of the

claimed violation at least 24 hours before hearing; (2) an opportunity to call witnesses and present documentary evidence (when consistent with institutional safety) to an impartial decision-maker; and (3) a written statement by the fact-finder of the evidence relied on and the reasons for the disciplinary action. Wolff v. McDonnell, 418 U.S. 539 (1974); Scruggs v. Jordan, 485 F.3d 934, 939 (7th Cir. 2007). However, even under this standard, all of plaintiff's due process claims failed.

Plaintiff's allegation that defendants used false evidence against him did not state a claim upon which relief may be granted because the Court of Appeals for the Seventh Circuit has stated on multiple occasions that it "will not overturn a disciplinary decision solely because evidence indicates the claim was fraudulent." McPherson v. McBride, 188 F.3d 784, 787 (7th Cir. 1999); see also Lagerstrom v. Kingston, 463 F.3d 621, 624-25 (7th Cir. 2006); Hanrahan v. Lane, 747 F.2d 1137, 1141 (7th Cir. 1984) ("We find that an allegation that a prison guard planted false evidence which implicates an inmate in a disciplinary infraction fails to state a claim for which relief can be granted where the procedural due process protections as required in Wolff v. McDonnell are provided."). These cases are not distinguishable.

Plaintiff cites Napue v. Illinois, 360 U.S. 264 (1959), and Morrison v. Levre, 592 F. Supp. 1052 (S.D.N.Y. 1984), but neither of these cases can save his claim. Napue was not about disciplinary hearings, but criminal trials, at which the accused has a much wider array

of procedural rights. Henderson v. United States Parole Commission, 13 F.3d 1073, 1077 (7th Cir. 1994) ("Prison disciplinary hearings, like the one at issue in this case, are not criminal prosecutions and the full panoply of rights accorded criminal defendants are not available."). Although the court in Morrison applied a rule similar to Napue in the context of a prison disciplinary ruling, I am bound by the decisions of the Court of Appeals for the Seventh Circuit, not by those of a district court in another circuit.

With respect to the witness statements of the confidential informants, I noted that plaintiff did not *ask* defendant Delvaux to see the statements; he only asked to call the informants as witnesses, writing that he had the "right to question them. They all lied on me." Dkt. #10-7 (exh. F). Delvaux denied that request on the ground that "there is [a] risk of harm if they testify," a conclusion that plaintiff does not challenge now. In addition, I noted that defendant Campbell (the hearing officer) summarized the statements for plaintiff and plaintiff failed to explain why he needed the exact wording.

In his motion for reconsideration, plaintiff does not deny that he never asked Delvaux to see the statements, but he points to Wis. Admin. Code § DOC 303.81(5):

> If the institution finds that testifying would pose a risk of harm to the witness, the committee may consider a corroborated, signed statement under oath from that witness without revealing the witness's identity or a corroborated signed statement from a staff member getting the statement from that witness. The adjustment committee shall reveal the contents of the statement to the accused inmate, though the adjustment committee may edit the statement to avoid revealing the identity of the witness.

To the extent § DOC 303.81(5) imposes an obligation on prison staff, it is on the individual presiding over the disciplinary hearing, which in this case was defendant Campbell, not defendant Delvaux. Further, as noted above, the administrative regulations have no bearing on plaintiff's claim under the due process clause.

With respect to Campbell's summary of the statements, plaintiff says it was inadequate because he did not receive the "dates, times and location of various incidents and activities or names." Dkt. #17, at 10. Campbell did not rely on that type of information in his decision, so it is not clear how it could have helped plaintiff and plaintiff does not explain further. In any event, he identifies no reason to believe that the statements themselves were more specific.

Plaintiff also challenges the dismissal of various claims after I concluded that they were not joined properly under Fed. R. Civ. P. 20 and 21. He cites Lee v. Cook County, Illinois, 635 F.3d 969, 971 (7th Cir. 2011), in which the court stated, "[w]hen a federal civil action is severed, it is not dismissed. Instead, the clerk of court creates multiple docket numbers for the action already on file, and the severed claims proceed as if suits had been filed separately."

Plaintiff's reliance on Lee is misplaced because it was he who chose to dismiss the claims rather than pursue them in a separate case. In an order dated December 13, 2011, dkt. #6, I informed plaintiff that his complaint encompassed claims that belonged in several

separate lawsuits. Accordingly, I gave plaintiff the following instructions:

> 1. Plaintiff Glenn Turner may have until December 28, 2011, to identify for the court whether he wishes to proceed with Lawsuit #1, Lawsuit #2, Lawsuit #3, Lawsuit #4, Lawsuit #5 OR Lawsuit #6 under the number assigned to this case. Plaintiff must pick one and only one of these lawsuits to proceed under case no. 11-cv-708-bbc.
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> 2. Plaintiff may have until December 28, 2011, to advise the court of which other lawsuits he wishes to pursue under separate case numbers, if any, and which lawsuits he will withdraw voluntarily, if any.
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> 3. For any lawsuit that plaintiff dismisses voluntarily, he will not owe a filing fee.
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> 4. For each lawsuit plaintiff chooses to pursue, he will owe a separate $350 filing fee and will be assessed an initial partial payment.

In response to that order, plaintiff did not inform the court that he wished to pursue any of his claims under separate case numbers. Initially, he attempted to persuade the court that his claims were joined properly. Dkt. #7. However, after I rejected that argument, dkt. #8, plaintiff informed the court that "he will pursue under case no. 11-cv-708-bbc claims articulated in Lawsuit #2," dkt. #9, which were the claims I screened in the March 26 order. Plaintiff did not say that he wanted the court to open new cases for any other claims.

If plaintiff wishes to proceed with any of the severed claims in a separate lawsuit, he remains free to inform the court of his wish to do so. However, for each additional lawsuit he pursues, he will be assessed another filing fee and will have to make another initial partial payment under 28 U.S.C. § 1915(b)(1).

B. Motion for Leave to File an Interlocutory Appeal

The March 26 order is not a final judgment or order that may be appealed. In rare instances, a party may appeal a non-final decision. 28 U.S.C. § 1292 states in relevant part,

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

I purposely did not include in the March 26 order a finding that an interlocutory appeal would be proper. That order does not involve a controlling question of law as to which there is substantial ground for difference of opinion, and a prompt appeal from the order will not materially advance the ultimate termination of this litigation. Indeed, it will serve only to delay it. Plaintiff has not developed any argument to the contrary.

Unfortunately, plaintiff's impulsive submission of his notice of appeal is not only futile, it is costly. As plaintiff should be aware, because he is a prisoner, he must pay the full cost of filing a notice of appeal. He owes the money whether his appeal is meritorious, procedurally defective or lacking in legal merit. If he were to qualify for indigent status, he would be allowed to pay the fee in monthly installments, beginning with an initial partial payment. However, if his appeal is certified as not having been taken in good faith, he may not proceed in forma pauperis and instead, he must pay the full amount of the fee

immediately.

Because plaintiff has failed to make any showing that his is one of the rare cases in which an interlocutory appeal is appropriate, I must certify that plaintiff's appeal is not taken in good faith. This means that plaintiff cannot proceed with his appeal without prepaying the $455 filing fee unless the court of appeals gives him permission to do so. Pursuant to Fed. R. App. P. 24, plaintiff has 30 days from the date of this order in which to ask the court of appeals to review this court's denial of leave to proceed in forma pauperis on appeal. His motion must be accompanied by an affidavit as described in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order. Plaintiff should be aware that if the court of appeals agrees with this court that the appeal is not taken in good faith, it will send him an order requiring him to pay all of the filing fee by a set deadline. If plaintiff fails to pay the fee within the deadline set, the court of appeals ordinarily will dismiss the appeal and order this court to arrange for collection of the fee from plaintiff's prison account

ORDER

IT IS ORDERED that

1. Plaintiff Glenn Turner's motion for reconsideration, dkt. #17, is DENIED.

2. Plaintiff's motion for the court to certify that an interlocutory appeal may taken from the March 26, 2012 order is DENIED.

3. Plaintiff's request for leave to proceed in forma pauperis on appeal is DENIED. I certify that plaintiff's appeal is not taken in good faith. The clerk of court is directed to insure that plaintiff's obligation to pay the $455 fee for filing his appeal is reflected in the court's financial record.

Entered this 16th day of April, 2012.

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