

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

KENNETH PARRISH,

Plaintiff,

v.

DEBORAH McCULLOCH and CAPTAIN
WILLIAM PARKER,

Defendants.

OPINION AND ORDER

12-cv-750-bbc

In his proposed complaint for compensatory and declaratory relief, pro se plaintiff Kenneth Parrish contends that defendants Deborah McCulloch and William Parker violated his right of access to the courts by holding his mail for insufficient postage, which caused his notice of appeal from the denial of his petition for habeas corpus to be late and the Court of Appeals for the Seventh Circuit to dismiss his appeal. Parrish v. McCulloch, 481 F. App'x 254 (7th Cir. 2012).

Plaintiff has made an initial partial payment of the filing fee under 28 U.S.C. § 1915(b)(1), so I must screen his complaint to determine whether it states a claim upon which relief may be granted, as required by 28 U.S.C. §§ 1915(e)(2). Having reviewed the complaint, I conclude that plaintiff will be allowed to proceed, although I note that plaintiff will face two difficult hurdles at subsequent stages of this litigation.

For purposes of this screening order, I construe the complaint liberally and accept plaintiff's allegations as true. Plaintiff's complaint is difficult to understand, because it

consists primarily of transcribed portions from past court orders, as well as letters and other documents, without context. Accordingly, I have supplemented plaintiff's allegations with facts taken from the judicial dockets for plaintiff's habeas petition and appeal.

ALLEGATIONS OF FACT

Plaintiff Kenneth Parrish is a civilly committed sex offender at the Sand Ridge Secure Treatment Center. Defendant Deborah McCulloch is the director of the treatment center and defendant William Parker is its supervisor of mailroom and property.

After a state psychologist concluded that plaintiff no longer had borderline personality disorder but still had anti-social personality disorder, plaintiff filed a petition for discharge under Wis. Stat. Ch. 980, arguing that he no longer qualified for confinement as a "sexually violent person." Wisconsin v. Parrish, Case No. 1998CI000012 (Milwaukee Co.). After the circuit court denied his petition without a hearing, he filed an appeal in which he argued that he was entitled to an evidentiary hearing on the petition. Wisconsin v. Parrish, Appeal No. 2011AP002029 (Wis. Ct. App.). On May 22, 2012, the Wisconsin Court of Appeals affirmed the denial of his petition.

Plaintiff then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin, in which he argued (among other things) that anti-social personality disorder is an insufficient basis for confinement and that his due process rights were violated during his petition for discharge. Parrish v. McCulloch, Case No. 11-cv-419-rtr (E.D. Wis.). In an ordered dated December 7, 2011, Judge Rudolph Randa found that plaintiff's commitment did not violate due process and dismissed the

petition, but also issued a certificate of appealability on the issue of whether anti-social personality disorder alone is sufficient for civil commitment. As the respondent for plaintiff's habeas petition, defendant McCulloch filed a motion to vacate the certificate of appealability, which Judge Randa denied.

Plaintiff placed a notice of appeal of his habeas action in the institutional mail on January 4, 2012, two days before the deadline. Instead of prepaying the postage, plaintiff submitted a request for postage to be paid from his trust account. Unfortunately for plaintiff, the account had insufficient funds. Patients at Sand Ridge receive payroll accounts every two weeks verifying they have funds for deductions. The treatment center delayed mailing his notice of appeal for three weeks, until January 23, 2012, without informing him that it was holding the mail. The record of activity in plaintiff's trust account confirms this information.

Having not received the notice of appeal, Judge Randa entered an order dated January 17, 2012, directing plaintiff to file a motion for extension of time by February 6 if he wished to preserve appellate jurisdiction. Plaintiff filed a motion for an extension of time, but Judge Randa denied the motion because it was incoherent.

Before the Court of Appeals for the Seventh Circuit, plaintiff argued that his appeal was timely under the mailbox rule, because he placed the mail with postage prepaid into the institutional mail before the deadline. In an unpublished opinion, the court of appeals concluded that plaintiff submitted the mail without prepayment, that he filed a request that postage be paid from his trust account, and that the trust account had insufficient funds. Parrish v. McCulloch, 481 F. App'x 254 (7th Cir. 2012). Plaintiff submitted to the court of

appeals a letter from defendant McCulloch, in which she confirmed that the treatment center held plaintiff's notice of appeal for insufficient funds without informing him (portions of the letter are also transcribed in his complaint in this case). Nevertheless, the court dismissed plaintiff's appeal, "[b]ecause Parrish did not pay for postage before the notice of appeal was due." *Id.* at 255.

OPINION

Prisoners have a constitutional right to "meaningful access to the courts" for the purpose of challenging their confinement and the conditions of their confinement. Bounds v. Smith, 430 U.S. 817, 821-22 (1977). To state a claim for denial of the right of access to the courts, a prisoner must allege that the defendants engaged in conduct that caused him "actual injury," which means it caused him to lose a lawsuit or chance to sue on a non-frivolous argument. Lewis v. Casey, 518 U.S. 343, 350-54 (1996); Christopher v. Harbury, 536 U.S. 403, 413-14 (2002). The intentional delay of legal mail may violate a prisoner's right of access to the courts. Harrell v. Cook, 169 F.3d 428, 432 (7th Cir. 1999) (negligent conduct that interfered with right of access to courts fails to state a claim under § 1983).

Plaintiff's allegations are sufficient to infer actual injury. He lost his chance to appeal the dismissal of his habeas petition because his notice of appeal was late. He received a certificate of appealability on whether a diagnosis of antisocial personality disorder is sufficient to justify civil commitment, which demonstrates that plaintiff had a non-frivolous claim. Although the court will allow plaintiff to proceed on his denial of access to the courts claim, he should know that he will face two difficulties at later stages of this litigation.

First, some facts in the complaint suggest that plaintiff, not defendants, caused his notice of appeal to be late. The court of appeals concluded that plaintiff's filing was untimely because plaintiff did not prepay postage. Parrish, 481 F. App'x at 255. It reached this conclusion despite also noting that plaintiff asked for funds to be withdrawn from his trust account and the mail room did not inform him the funds were insufficient. The effect of these findings by the court of appeals on the present litigation is unclear. The court held that plaintiff's appeal was not timely under the mailbox rule, but it does not appear to have addressed explicitly whether defendants' failure to inform plaintiff that his account had insufficient funds was good cause for an extension of the deadline (presumably because plaintiff waived the argument before the district court).

Although plaintiff is responsible for ensuring his notice of appeal was mailed on time, it seems *possible* for him to prove that defendants were responsible ultimately for the delay. For instance, if plaintiff had no way to check his trust account balance and had to rely on the mail room to process his request, then defendants contributed to the delay and might be held responsible for his default. On the other hand, if patients can check their account balances easily, then plaintiff is responsible for carelessly submitting mail without prepaying postage, ensuring his trust account contained sufficient funds or making a legal loan request. The allegations in the complaint do not resolve this issue. Plaintiff alleges that he receives "payroll" every two weeks, but he does not state what he believed the balance of his trust account was when he tried to mail the notice of appeal or whether he could have checked the balance on his own. Reading the complaint generously in plaintiff's favor, as I must at screening, one may infer that the primary fault lies with defendants.

Second, plaintiff's should also know that on summary judgment, he will be required to prove that defendants deliberately failed to inform him that the funds were insufficient. It is not enough for him to prove that the defendants acted carelessly or negligently. Harrell v. Cook, 169 F.3d at 432.

ORDER

IT IS ORDERED that

1. Plaintiff Kenneth Parrish is GRANTED leave to proceed in forma pauperis on his claim that defendants Deborah McCulloch and William Parker violated his right of access to the courts by interfering with his appeal to the Court of Appeals for the Seventh Circuit.

2. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf of the state defendants.

3. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not

have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 17th day of December, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge