

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

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TRAVIS J. HUSS,

Plaintiff,

v.

THOMAS J. GRITTON, MICHAEL BALSUS,  
JOY MERBACH, POLLY EBBINGER,  
ADAM SCHWAHN, KD, JOSEPH HILDEBRAND,  
JOHN DOE REGIONAL CHIEF and  
JOHN DOE ADMINISTRATIVE LAW JUDGE,

Defendants.  
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OPINION AND ORDER

13-cv-766-bbc

Plaintiff Travis Huss, a prisoner incarcerated at the Redgranite Correctional Institution, has filed a proposed complaint under 42 U.S.C. § 1983 against court officers and probation staff concerning time he served in custody on an illegally long sentence. Plaintiff seeks leave to proceed in forma pauperis with his claims and has made an initial partial payment of the filing fee as directed by the court.

The next step is to screen plaintiff's complaint and dismiss any portion that 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. 28 U.S.C. § 1915. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010). After

reviewing plaintiff's complaint, I conclude that he may not proceed on claims against any of the named defendants, and the case will be dismissed.

The following facts are drawn from plaintiff's complaint.

#### ALLEGATIONS OF FACT

Plaintiff Travis Huss is a prisoner incarcerated at the Redgranite Correctional Institution. On March 10, 2003, plaintiff was arrested for operating a vehicle while intoxicated, a class H felony in Wisconsin. Plaintiff also had two pending operation after revocation charges. The court appointed Joseph Hildebrand to represent plaintiff. On March 25, 2003, Hildebrand told plaintiff that he would file a motion to switch judges because his case had been assigned to a "hang 'em" judge. However, on April 24, 2003, plaintiff had an arraignment hearing before defendant Winnebago County Judge Thomas Gritton, the original judge assigned to the case. Plaintiff asked Hildebrand why he did not file a motion to switch judges, and Hildebrand told him "he had a change of heart" and that it would look bad to switch judges at that point.

On June 6, 2003, defendant Hildebrand told plaintiff the state had proposed a plea offer whereby plaintiff would have one of the operating after revocation charges dismissed and he would plead guilty to the other operating after revocation charge as well as the operating while intoxicated charge. In return, defendant Assistant District Attorney Michael Baskus would recommend six months in jail and three years' probation on the operating while intoxicated charge, to run concurrently with a term of 60 days in jail on the operation

after revocation charge.

During the sentencing, a different assistant district attorney, Joan Aguado (a non-defendant) breached the plea deal, recommending one year of initial confinement on the operating while intoxicated charge, 60 days of jail to run concurrently on the operating after revocation charge, a 32-month revocation of plaintiff's driver's license, a "600 dollar fine times 3" and vehicle seizure. During the hearing, plaintiff asked defendant Hildebrand about the breach of the plea agreement, and Hildebrand responded, "Don't worry about it, it's up to the judge anyway, just say yes to what he asks you, I know what I'm doing trust me." Plaintiff answered yes to each of defendant Judge Gritton's questions. Ultimately, defendant Gritton accepted the plea agreement and sentenced plaintiff to 18 months of initial confinement followed by six years of probation, even though the maximum penalty for a class H felony is only six total years.

On March 27, 2007, after plaintiff's release, he was arrested for substantial battery and disorderly conduct. On June 18, 2007, defendant John Doe administrative law judge concluded that plaintiff had violated the terms of his probation on his 2003 conviction. The administrative law judge ignored plaintiff's argument that his sentence on the previous case exceeded the statutory maximum and that he should not have been on probation at that point.

On August 13, 2007, plaintiff came before defendant Gritton for re-sentencing following probation revocation. Gritton discussed the possibility that he had sentenced plaintiff to longer probation than Wisconsin statutes allowed for a class H felony. Assistant District Attorney Balskus did not concede that the probation was too long and suggested

that plaintiff's counsel file a motion raising the issue. (It is unclear whether a motion was ever filed). Ultimately, Gritton allowed the previous sentence to stand and sentenced plaintiff to an additional two years of prison and three years of extended supervision.

On September 19, 2007, plaintiff was transferred to the Dodge Correctional Institution, where he submitted a complaint that his sentence was illegal. Defendant "KD," the registrar at the prison, performed a sentence computation (plaintiff does not say what this computation revealed) but did not inform the court of any error.

In December 2007, plaintiff filed a post conviction motion regarding his sentence, and on January 17, 2008, defendant Gritton granted the motion, stating that the court did not have the authority to give him more than three years of probation and that this three-year term had expired by the time he was re-sentenced, so the court did not have jurisdiction to revoke his probation or re-sentence him. Gritton "commuted" plaintiff's sentence and ordered him discharged.

## OPINION

Plaintiff states that his rights under the Fourth, Sixth, Eighth and Fourteenth Amendments were violated by the various defendants' roles in contributing to his overly long sentence and subsequent revocation pursuant to that sentence. I conclude that the proper way to think of this claim is as a violation of plaintiff's Eighth Amendment rights, resulting in his being held in custody beyond the legally authorized term. Cf. Campbell v. Peters, 256 F.3d 695, 700 (7th Cir. 2001) (plaintiff may bring Eighth Amendment claim for being

incarcerated longer than he should have been); see also Burke v. Johnston, 452 F.3d 665, 667 (7th Cir. 2006) (claim against Department of Corrections officials for failing to grant proper jail credit, resulting in incarceration without legal basis, raises Eighth Amendment claim).

The next issue is identifying the proper defendant for such a claim. Plaintiff names a litany of possible defendants, but he fails to state an Eighth Amendment claim against any of them. For starters, defendant assistant attorney general Balskus is immune from suit for his actions in court as a prosecutor, Millspaugh v. County Department of Public Welfare of Wabash County, 937 F.2d 1172, 1175 (7th Cir. 1991), and defendant defense attorney Hildebrand cannot be sued under 42 U.S.C. § 1983 because criminal defense attorneys are not considered to be acting under “color of law” when they represent a client, Fries v. Helsper, 146 F.3d 452, 457 (7th Cir. 1998). Plaintiff names several Department of Corrections officials as defendants in regard to his revocation proceedings, but all of them acted under a facially valid court order sentencing plaintiff, so plaintiff cannot sustain an Eighth Amendment claim against them. Shaw v. Germain, 496 F. App'x 646, 649 (7th Cir. 2012) (“The defendants all worked for the Department of Corrections, and none of them had authority to amend a sentencing order issued by an Illinois court . . . . [Plaintiff] should have sought relief from the state court. That reason alone defeats his suit . . . .”).

The proper defendant is the person who imposed the illegal sentence, Judge Gritton, whom plaintiff includes as a defendant in this lawsuit. Unfortunately for plaintiff, he cannot succeed on a claim against Gritton because he has absolute judicial immunity from damages

liability for his judicial acts. The doctrine of judicial immunity establishes the absolute immunity of judges from damages for all actions taken as part of their judicial (as opposed to executive or administrative) functions, even if they act maliciously or corruptly. Mireles v. Waco, 502 U.S. 9 (1991). Courts have explained that this immunity is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, which has an interest in a judiciary free to exercise its function without fear of harassment by unsatisfied litigants. Pierson v. Ray, 286 U.S. 547, 554 (1967). It is clear that Gritton's alleged actions were judicial acts, so he is immune from suit.

Because plaintiff cannot proceed on claims against any of the named defendants, I will dismiss this lawsuit and assess him a "strike" under 28 U.S.C. § 1915(g).

#### ORDER

IT IS ORDERED that

1. Plaintiff Travis Huss is DENIED leave to proceed on his Eighth Amendment claims for wrongful incarceration.
2. This case is DISMISSED for plaintiff's failure to state a claim upon which relief may be granted.
3. The clerk of court is directed to enter judgment in favor of defendants and close this case.
4. A strike will be recorded in accordance with 28 U.S.C. § 1915(g).
5. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly

payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fees have been paid in full.

Entered this 4th day of March, 2014.

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