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

JACKIE L. PHILLIPS,

Plaintiff,

v.

EDWARD WALL, DENISE SYMDON,[1] KITTY RHOADES, DOUG BELLILE, NATHAN DEAL, and STEVE UPTON,

Defendants.

OPINION & ORDER

16-cv-176-jdp

Pro se plaintiff Jackie Phillips is in the custody of the Wisconsin Department of Health Services (DHS), pursuant to Chapter 980 of the Wisconsin Statutes. Plaintiff has filed a proposed complaint under 42 U.S.C. § 1983, in which he alleges that his detention and the terms of his parole violate his constitutional rights. Dkt. 1. With his complaint, plaintiff has filed a motion for a temporary restraining order, Dkt. 3, a motion for leave to amend his complaint to state claims on behalf of an entire class of plaintiffs, Dkt. 6, and a motion for assistance recruiting counsel, Dkt. 8. Plaintiff has made an initial partial payment of the filing fee, as directed by the court.

The next step in this case is for me 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 monetary damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915. In screening any pro se litigant's complaint, I must read

---

[1] Plaintiff misspells the name of the administrator of the Wisconsin Department of Corrections—Division of Community Corrections: Denise Symdon. *See* Dkt. 1, at 1. Based on publicly available information from the division's website, I have amended the caption to provide the correct spelling.

the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). After reviewing the complaint with this principle in mind, I conclude that plaintiff cannot proceed with his claims under 42 U.S.C. § 1983 because he is seeking release from custody. Thus, his challenges would have to be brought under a habeas corpus statute. I will dismiss this case without prejudice and I will deny plaintiff's additional motions.

ALLEGATIONS OF FACT

Plaintiff is currently detained and receiving treatment at the Sand Ridge Secure Treatment Center, located in Mauston, Wisconsin. Defendants include several Wisconsin and Georgia officials whom plaintiff contends are responsible for his continued commitment at Sand Ridge.

In 1988, plaintiff pleaded no contest to three counts of first-degree sexual assault. Later that year, the Wisconsin Circuit Court for Dane County sentenced him to 17 years and 6 months in prison on each count. In 2008, while plaintiff was still in prison, staff gave him information about Wisconsin's sexually violent persons program. Plaintiff agreed to participate in the program. But below his signature on the consent form, plaintiff wrote:

> Although—for legal reasons—the state and this form claims that participation in the SVP treatment program is voluntary. However, I have been forced to sign this form inasmuch forced to participate in the SVP treatment program by my parole agent whom this institution (SRSTC) contacted my parole agent who then threaten[ed] to revoke my parole if I do not sign this form inasmuch participate in the SVP treatment program which has caused me great emotional pain and mental anguish.

Dkt. 1-5, at 9. Based on the publicly available docket sheet, it appears that plaintiff was released on parole later in 2008. But in 2012, the Department of Corrections (DOC) revoked plaintiff's parole and sent him back to prison.

In December 2014, as plaintiff neared his mandatory release date, staff provided him with a list of conditions that would govern his parole. Several conditions related to plaintiff's conviction for a sex offense, and they required, among other things, that plaintiff participate in and successfully complete a sex offender treatment program. According to plaintiff, part of participating in a treatment program involved undergoing polygraph testing, which could have led to plaintiff divulging incriminating information that authorities might have investigated and used to pursue criminal charges against him. Plaintiff signed the list of conditions, although he crossed out a few provisions with which he disagreed.

Several critical events occurred in the months leading up to plaintiff's mandatory release date, February 10, 2015. On January 7, the state filed an extradition action against plaintiff, at the State of Georgia's request. Plaintiff had an active detainer in Georgia for a criminal charge of failing to register as a sex offender, and Georgia wanted to take him into custody after he finished serving his prison sentence in Wisconsin. At an initial hearing in the Wisconsin extradition action, plaintiff signed a written waiver of his rights to formal extradition proceedings and voluntarily agreed to return to Georgia to answer the criminal charges pending against him.

A few weeks later, before plaintiff had been released on parole, a psychologist examined him to determine whether he met the requirements for civil commitment under Chapter 980 as a sexually violent person. Plaintiff declined to directly participate in the examination, leaving the psychologist to prepare a report based on plaintiff's physical and mental health records, juvenile records, and correctional records.

On February 9, 2015, Wisconsin served plaintiff with a petition for civil commitment pursuant to Chapter 980. The next day, plaintiff was released from prison and taken to Sand

Ridge to await a Wisconsin court's decision on the state's Chapter 980 petition. Plaintiff's counsel moved to dismiss the petition for lack of jurisdiction, arguing that Wisconsin had lost jurisdiction over plaintiff when he waived extradition to Georgia. The state court denied the motion to dismiss and, after a hearing on March 18, 2015, found probable cause to detain plaintiff until trial. After modifying the schedule at plaintiff's request, the state court is now scheduled to begin a jury trial on October 3, 2016.

Plaintiff filed his complaint in this court on March 18, 2016.

ANALYSIS

Plaintiff identifies three issues in his complaint. First, he alleges that Wisconsin gave up jurisdiction over him when he waived his right to extradition proceedings. According to plaintiff, Wisconsin violated his due process and equal protection rights by initiating the Chapter 980 petition without jurisdiction over him, and his continued detention at Sand Ridge is therefore unlawful. Second, plaintiff alleges that Georgia has effectively given up any right to prosecute him by not taking him into custody after he waived extradition. Third, plaintiff alleges that the conditions governing his parole (which require him to undergo and complete treatment, which in turn requires plaintiff to submit to polygraph testing and possibly incriminate himself) violate his constitutional rights against self-incrimination. Plaintiff is seeking injunctive and declaratory relief only, not monetary damages. He asks me to (1) "order the state of Georgia to exonerate him from any case they have already waived interdiction on"; (2) "vacate any order to detain him under Wisconsin Chapter 980"; and (3) "remove any rule that requires him to give up his [F]ifth [A]mendment rights. Or not participate in treatment." Dkt. 1, at 16.

I cannot grant plaintiff leave to proceed because his complaint has at least two foundational deficiencies. The first deficiency is that plaintiff has not identified how the specific defendants named in his complaint were involved in violating plaintiff's constitutional rights. Section "1983 lawsuits against individuals require personal involvement in the alleged constitutional deprivation to support a viable claim." *Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003). Here, plaintiff has named only supervisory officials as defendants: Edward Wall, the former secretary of DOC; Denise Symdon, the administrator of the DOC's Division of Community Corrections; Kitty Rhoades, the secretary of DHS; Doug Bellile, the director of Sand Ridge; Nathan Deal, the Governor of Georgia; and Steve Upton, the director of the Georgia Department of Corrections—Division of Field Operations. "However, § 1983 does not allow actions against individuals merely for their supervisory role of others. An individual cannot be held liable in a § 1983 action unless he caused or participated in the alleged constitutional deprivation." *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000) (citations, internal quotation marks, and alterations omitted).

The second deficiency is that plaintiff is challenging Wisconsin's (and Georgia's) custody over him, rather than the conditions of his confinement. These are challenges to the fact of plaintiff's confinement, and so he must pursue them under a habeas corpus statute, not under § 1983. *See Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005) ("[A] prisoner in state custody cannot use a § 1983 action to challenge 'the fact or duration of his confinement.'"); *Moran v. Sondalle*, 218 F.3d 647, 650-51 (7th Cir. 2000) ("State prisoners who want to challenge their convictions, their sentences, or administrative orders revoking good-time credits or equivalent sentence-shortening devices, must seek habeas corpus, because they contest the fact or duration of custody."). The same is true for plaintiff's challenges to the

conditions of his parole, which require him to comply with treatment rules that he believes are unconstitutional. A prisoner who seeks relief from one or more conditions of his parole must bring an action under a habeas corpus statute, not under § 1983. *Williams v. Wisconsin*, 336 F.3d 576, 580 (7th Cir. 2003).

The Seventh Circuit has directed district courts to avoid "converting" § 1983 complaints into petitions for writs of habeas corpus. "Normally, collateral attacks disguised as civil rights actions should be dismissed without—rather than with—prejudice. That resolution allows the plaintiff to decide whether to refile the action as a collateral attack after exhausting available state remedies." *Id.*; *see also Moore v. Pemberton*, 110 F.3d 22, 24 (7th Cir. 1997) (per curiam); *Patrick v. Wisconsin*, No. 13-cv-231, 2014 WL 576153, at *4 (W.D. Wis. Feb. 12, 2014). I will follow this approach in plaintiff's case. Although plaintiff could conceivably recast his allegations as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, he would first have to seek relief in state court before I could address the merits of his claims. This is because federal courts may not entertain habeas petitions from prisoners being held in state custody unless they have exhausted their available state remedies before seeking federal habeas relief. *See* 28 U.S.C. § 2254(b); *Malone v. Walls,* 538 F.3d 744, 753 (7th Cir. 2008).

It seems unlikely that plaintiff has exhausted his state remedies for the issues that he identifies in his complaint. With regard to plaintiff's Wisconsin sentence, he does not appear to have challenged the conditions of his parole. And the Chapter 980 proceedings are still ongoing—the trial will not occur for several months. If the trial does not go plaintiff's way, then he would still need to pursue his claims through a complete round of appellate review in the state courts, which would take more time. As for plaintiff's claims regarding the criminal charges against him in Georgia, that is likely a matter that plaintiff will have to exhaust in the

Georgia state courts before seeking habeas relief. *See Esposito v. Mintz*, 726 F.2d 371, 373 (7th Cir. 1984) ("[A] habeas corpus petition challenging only the validity of a state detainer must be brought pursuant to 28 U.S.C. § 2254 and . . . the petitioner must show that he has exhausted available state remedies before applying to a Federal district court for relief."); *Armstrong v. Grams*, No. 09-cv-483, 2009 WL 2476546, at *3 (W.D. Wis. Aug. 11, 2009) ("I note that whether Wisconsin is the proper forum in which to challenge New Mexico's detainer is a matter in serious doubt."). Thus, I will dismiss plaintiff's case without prejudice to him collaterally attacking his civil commitment and the terms of his extended supervision through a petition for a writ of habeas corpus.

Because I am dismissing this case, I will deny plaintiff's motions for a temporary restraining order, for leave to file an amended complaint, and for appointment of counsel. The first and third motions are unnecessary because this case will be closed. As for plaintiff's motion to amend his complaint, it is not clear whether the proposed class of plaintiffs would be challenging an issue with extradition, an issue with the terms of their extended supervision, or both. Regardless, these challenges would go to the fact of the class members' confinement and not to the conditions of their confinement. As explained above, habeas corpus is the proper method for presenting these types of challenges. Plaintiff's proposed amendments to his complaint would not change the substantive nature of this case, and so I will deny his motion for leave to amend.

ORDER

IT IS ORDERED that:

1. Plaintiff Jackie Phillips is DENIED leave to proceed and this case is DISMISSED without prejudice.

2. Plaintiff's motion for a temporary restraining order and a preliminary injunction, Dkt. 3, is DENIED.

3. Plaintiff's motion for leave to file an amended complaint, Dkt. 6, is DENIED.

4. Plaintiff's motion for appointment of counsel, Dkt. 8, is DENIED.

5. The clerk of court is directed to close this case.

Entered June 7, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge