IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM FLOWERS,

Petitioner,

v.

DR. DAVID THORTON, JANE and JOHN DOE, as employees of the Department of Health and Family Services,

Respondents.

ORDER

01-C-0629-C

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This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined as an involuntary patient at the Sand Ridge Secure Treatment Facility in Mauston, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, pursuant to 28 U.S.C. §

1915(e)(2), if a litigant is requesting leave to proceed in forma pauperis, the court must deny leave to proceed if the action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a defendant who is immune from such relief. Petitioner's request for leave to proceed in forma pauperis will be denied because his claim that respondents violated his Fourteenth Amendment rights is legally frivolous.

In evaluating petitioner's proposed action, I have reviewed petitioner's complaint as well as a document accompanying his complaint titled "Affidavit as to Experimental Diagnostic Procedures." In his complaint and accompanying affidavit, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Flowers is confined at the Sand Ridge Secure Treatment Facility in Mauston, Wisconsin pursuant to Wisconsin's Sexually Violent Persons Law, Wis. Stats. ch. 980. Respondent Dr. David Thorton is an employee of the Wisconsin Department of Health and Family Services, who is responsible for training and supervising Department personnel who treat petitioner. Respondents Jane and John Doe are individuals employed by the Department of Health and Family Services.

On December 20, 1996, a state court ordered petitioner transferred to an appropriate facility for evaluation to determine whether he was a sexually violent person under Wis.

Stats. ch. 980. On January 27, 1997, Dr. Dennis Doren of Mendota Mental Institute concluded that petitioner suffered from alcohol dependency and antisocial personality disorder. It was further determined that petitioner's antisocial personality disorder predisposed him to commit sexually violent acts. On February 28, 1998, petitioner was indefinitely committed.

According to the Diagnostic and Statistical Manual of Mental Disorders, in order for a subject to be given the clinical diagnosis of an antisocial personality, there must exist evidence that the subject suffered conduct disorder before age 15. When he was confined at the Wisconsin Resource Center, petitioner told staff psychologist George Recknagel that certain provisions of the Wisconsin statutes entitled petitioner to inspect and copy information in the Department of Health and Family Services' possession concerning petitioner's juvenile history. However, petitioner was not allowed to inspect this information. Instead, Recknagel wrote petitioner a letter regarding the requested information. In the letter, Recknagel maintained that the evidence demonstrating that petitioner had a conduct disorder before age 15 came from petitioner's "own self-report during a [sic] earlier interview by the psychologist for your Special Purpose Evaluation." However, petitioner never participated in the Special Purpose Evaluation referred to in Recknagel's letter and therefore could not have provided any such information.

In the letter, Recknagel informed petitioner further that petitioner's diagnosis was

being changed from "Antisocial Personality Disorder" to "Personality Disorder Not Otherwise Specified, with Antisocial Features." According to the letter,

> [t]his change was made because I had not located evidence of a Conduct Disorder. Your history of adult criminal behavior was sufficient for a diagnosis of Personality Disorder NOS with Antisocial Features. Dr. Doren and I both recognize that such a difference is inconsequential in terms of meeting Chapter 980 requirements.

According to the Diagnostic and Statistical Manual of Mental Disorders,

> Personality Disorder Not Otherwise Specified is a category provided for two situations: 1) the individual's personality pattern meets the general criteria for a Personality Disorder and traits of several different Personality Disorders are present, but the criteria for any specific Personality Disorder are not met; or 2) the individual's personality pattern meets the general criteria for a Personality Disorder, but the individual is considered to have a Personality Disorder that is not included in the classification (e.g., Passive-aggressive personality disorder).

Petitioner's "Personality Disorder Not Otherwise Specified" diagnosis is incorrect because he does not satisfy the criteria for either of these two situations. Rather, he merely has some features of an antisocial personality, not traits of several different personality disorders. Every person in the United States has some features of the personality disorders listed in the Diagnostic and Statistical Manual of Mental Disorders. Petitioner's diagnosis is an underdeveloped and essentially non-existent disorder that cannot be determined by use of the diagnostic procedures in the Manual.

The Sand Ridge Secure Treatment Facility has not staffed petitioner or given him a care plan. Rather, they merely ask him whether he is going to accept treatment. Petitioner

does not have a mental condition for the Sand Ridge Secure Treatment Facility to treat or cure. Petitioner has been diagnosed with a non-existent disorder as a result of the experimental diagnostic techniques used by respondents.

OPINION

Fourteenth Amendment

Petitioner contends that respondents are violating his Fourteenth Amendment substantive due process rights by diagnosing him using "experimental" diagnostic techniques that are not generally accepted in the mental health field. Petitioner seeks an injunction ordering respondents to cease treating him for the disorder identified by the "experimental" techniques. It is abundantly clear from the facts alleged by petitioner that he is actually challenging the validity of his confinement. Although petitioner alleges that he has been diagnosed using an "experimental" procedure, his factual allegations demonstrate that he simply disagrees with his diagnosis: he does not believe that he has a "Personality Disorder Not Otherwise Specified" as defined by Diagnostic and Statistical Manual of Mental Disorders. Because he believes respondents have misdiagnosed him, he labels their diagnostic methods "experimental" and asks that he not be subjected to treatment for a disorder identified by the allegedly experimental techniques. Were this court to agree that petitioner has not been validly diagnosed with a mental disorder, petitioner's confinement

under chapter 980 would be invalid because petitioner would have no identified disorder for respondents to treat. Stripped of artifice, then, petitioner's essential argument is that he has been misdiagnosed and that he "doesn't suffer any condition for the purpose of confinement under chapter 980." For purposes of this suit the merits of petitioner's argument regarding his diagnosis are irrelevant because, as petitioner has been informed by this court before, a challenge to the validity of his confinement cannot be brought under § 1983, but instead must be brought in a petition for habeas corpus under 28 U.S.C. § 2254.

I note first that petitioner has previously filed a § 1983 action in this court in which he alleged that Department of Health and Family Services employees "made diagnoses from the Diagnostic and Statistical Manual of Mental Disorders without using any of the manual's objective criteria, and sometimes have made diagnoses that do not exist in the manual." Von Flowers v. Leean, 00-C-695-C, slip op. at 3 (order entered December 2, 2000).[1] In that case, petitioner was informed by the court that "[t]o the extent that petitioner is challenging the validity of his confinement as a result of his diagnosis, this claim cannot be brought under § 1983" and that a petition for habeas corpus under 28 U.S.C. § 2254 is the exclusive remedy for a person in state custody challenging the fact or duration

[1]In that case petitioner referred to himself as William Von Flowers, while here he refers to himself as William Flowers.

of his confinement. Id. at 5 (citations omitted). I note also that petitioner has previously "mounted a civil rights challenge to Wisconsin's sexual predator law under 42 U.S.C. § 1983" and that he has also sought contempt sanctions against Wisconsin officials who, in implementing the state's sexually violent persons law, allegedly "violat[ed] a 1976 district court injunction regarding the due process rights of persons committed pursuant to Wisconsin's involuntary civil commitment statute." Von Flowers v. Leean, No. 99-2999, 2000 WL 554518, at *1 (7th Cir. May 3, 2000). In those two suits, petitioner's claims were rejected by the United States District Court for the Eastern District of Wisconsin on the grounds that petitioner was essentially "challenging the validity of his confinement and [therefore] must proceed under 28 U.S.C. § 2254." Id. Petitioner appealed the district court's ruling in the second suit, and the Court of Appeals for the Seventh Circuit affirmed. Id. at *2.

There is no doubt that petitioner is challenging the validity of his confinement in this suit. Among other things, he alleges in his complaint that respondents' diagnostic procedures "make[] it impossible for the Flowers' [sic] to escape a personality disorder diagnosis;" that "every single American can be given" the diagnosis he has received from respondents; that his diagnosis is "inherently bogus;" that he "lack[s] a mental condition for this institution to treat and/or cure;" that he "doesn't suffer any condition for the purpose of confinement under chapter 980;" and that "[t]here's no justification for attempting

treatment upon a person not ill."

Petitioner "cannot bring a § 1983 claim that involves issues cognizable in habeas corpus until he complies with the procedural prerequisites for relief under § 2254." Clayton-EL v. Fisher, 96 F.3d 236, 242 (7th Cir. 1996). Petitioner's claim in this case involves issues cognizable in habeas corpus because a judgment in his favor would necessarily imply the invalidity of his confinement. Although the only relief petitioner seeks are money damages and an injunction prohibiting respondents from treating him for an illness diagnosed using "experimental" techniques, petitioner's asserted *injury* stems from respondents' efforts to treat him for an allegedly non-existent mental illness. It is "[t]he injury alleged in a claim – and not the relief sought in the claim – [that] determines whether a claim implicates issues cognizable in habeas corpus." Id. Thus, the mere fact that petitioner does not request an injunction ordering his release does not allow him to proceed under § 1983. Because petitioner's claim that he has been misdiagnosed clearly implicates the validity of his confinement, he cannot proceed under § 1983 until he shows that his order of commitment has already been invalidated or has been called into question by a federal court's issuance of a writ of habeas corpus under 28 U.S.C. § 2254. Heck v. Humphrey, 512 U.S. 477, 486-87 (U.S. 1994).

Finally, I note that petitioner's effort to liken his situation to that of the plaintiff's in Turay v. Seling, 108 F. Supp 2d. 1148 (W.D. Wash. 2000) is unavailing. In that case,

persons civilly committed under Washington's sexually violent predators law challenged their conditions of confinement by alleging that the state was providing constitutionally inadequate mental health treatment. However, the Turay court specifically noted that "no question is raised herein as to the validity of any resident's commitment." Id. at 1152. As noted above, petitioner's allegations raise a host of questions about the validity of his confinement, making his case different from Turay.

State Law Claims

Petitioner's proposed complaint alleges violations of a variety of Wisconsin statutory provisions related to the rights of civilly committed patients. Because petitioner will be denied leave to proceed on his Fourteenth Amendment due process claim, he has no viable federal law claim. I decline to exercise supplemental jurisdiction over his state law claims. 28 U.S.C. § 1367(c)(3). Petitioner may seek to bring his state law claims in an appropriate state court.

Appointment of Counsel

Petitioner has also filed two motions for appointment of counsel. Because petitioner will be denied leave to proceed on all of his claims, I do not consider these motions.

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed in forma pauperis is DENIED and his Fourteenth Amendment claim is DISMISSED with prejudice as legally frivolous;

2. Petitioner's state law claims are DISMISSED without prejudice to his refiling them in an appropriate state court;

3. Petitioner's motion for appointment of counsel is DENIED;

Entered this 31st day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge