

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

JEFFREY SCHREIBER,

Petitioner,

ORDER

v.

02-C-351-C

DARRYL KUHL; LORI VINGE; DAVID
KNAAPEN; JAMES MILLER; JANE
KOHLWAY; RICHARD REHM; MARY
ANN KAUFMAN; MARK BENNETT;
MARC GUMZ; RICHARD DUFOUR; and
STEVE ROWE,

Respondents.

This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Jeffrey M. Schreiber, who is presently confined at a correctional facility in Crown Point, Indiana, contends that respondents violated his rights to a speedy trial under the Sixth Amendment, to due process under the Fourteenth Amendment, freedom from cruel and unusual punishment under the Eighth Amendment and to the assistance of counsel under the Sixth Amendment by failing to inform him about the nature of the detainer lodged against him and by refusing to cooperate with the necessary

state offices regarding his demand for disposition. He contends that respondent Lori Vinge violated his constitutional right against self-incrimination by forcing him to provide a statement that could be used against him in a revocation proceeding and that respondent Richard Dufour, a district attorney, violated his First Amendment right to petition the government for the redress of grievances by refusing to prosecute respondents.

Petitioner 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. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief.

Petitioner will be denied leave to proceed in forma pauperis on his claims that he was denied a speedy trial and the assistance of counsel under the Sixth Amendment, due process under the Fourteenth Amendment and to freedom from cruel and unusual punishment under

the Eighth Amendment, because these claims call into question the validity of his present confinement and therefore must be brought in a petition for habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner will be denied leave to proceed on his claim that respondent Vinge forced him to incriminate himself in a revocation hearing because this claim calls into question the constitutionality of the revocation. Petitioner's request for leave to proceed on his claim that respondent Dufour violated his First Amendment right to petition the government for redress of grievances will be denied because the claim is legally frivolous.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

At all times relevant to this complaint, petitioner Jeffrey M. Schreiber was an inmate at Columbia County Jail in Portage, Wisconsin. Currently he is an inmate at a correctional facility in Crown Point, Indiana. Respondent Darryl Kuhl is a captain at Columbia County Jail. Respondent Lori Vinge is a Department of Corrections probation agent. Respondent Davis Knaapen is a state public defender. Respondent James Miller is a circuit court judge. Respondent Jane Kohlway is the Columbia County District Attorney. Respondent Richard Rehm is a circuit court judge. Respondent Mary Ann Kaufman is a child support agent. Respondent Mark Bennett is corporation counsel. Respondent Marc Gumz is a state public defender. Respondent Richard Dufour is the Marquette County District Attorney.

Respondent Steve Rowe is a Columbia County sheriff.

On eleven occasions between August 17, 2001 and February 3, 2002, respondents Kuhl, Rowe and other jail officials withheld information from petitioner about the source and contents of a detainer lodged against him. They failed or refused to provide petitioner the certificate mentioned within the agreement on detainees when disposition of the underlying charges was requested by petitioner. They failed to inform petitioner of his right to seek disposition of the underlying charges as required by the agreement on detainees.

Respondents Vinge, Knaapen, Miller, Kohlway, Rehm, Kaufmann, Bennett and Gumz knew about the detainer and were aware that petitioner was seeking disposition of the underlying charges. These respondents failed or refused to cooperate with the appropriate agencies, departments or employees of the state as directed by the agreement on detainees.

On August 14, 2001, respondent Vinge forced petitioner to provide a statement that would be used against petitioner in his revocation proceedings. At this time, petitioner did not have counsel even though he specifically asked for a lawyer. On September 5, 2001, respondent Vinge obtained petitioner's signature on a form that relinquished his rights without first notifying counsel or having counsel present. At the time, respondent Vinge knew that petitioner was represented by counsel, had psychological problems and was easily influenced.

Respondent Dufour refused to bring charges against officials for misconduct in public

office.

DISCUSSION

A. Due Process, Speedy Trial, Counsel and Cruel and Unusual Punishment

As a preliminary matter, it must be determined whether a civil action brought pursuant to 42 U.S.C. § 1983 is the appropriate vehicle for reviewing a matter relating to alleged pre-transfer violations of the detainer agreement. The Interstate Agreement on Detainers is an interstate compact that addresses the transportation of prisoners from one state to another state for the purpose of standing trial in the second state. The Interstate Agreement on Detainers provides that when a person is incarcerated in one state and extradited to another state to stand trial, he is due certain procedural protections, such as the right to a speedy trial.

Petitioner describes respondents' actions as violating his constitutional rights to a speedy trial and the assistance of counsel under the Sixth Amendment, to due process under the Fourteenth Amendment and to freedom from cruel and unusual punishment under the Eighth Amendment. Reduced to their essence, petitioner's allegations supporting these claims amount to a challenge to the validity of his confinement in Indiana. He alleges that respondents Kuhl and Rowe failed to inform him about the nature of the detainer lodged against him, including the fact that he could demand his right to seek prompt disposition

of the underlying charges. Petitioner alleges that respondents Vinge, Knaapen, Miller, Kohlway, Rehm, Kaufmann, Bennett and Gumz knew that he wanted to dispose of the underlying charges but these respondents refused to cooperate with the necessary state offices. A review of these allegations leads to the conclusion that it would be impossible to rule in petitioner's favor on these claims without calling into question the validity of his confinement in Indiana. If petitioner was denied a speedy trial, as he contends, his Indiana conviction may be illegal.

Under Preiser v. Rodriguez, 411 U.S. 475 (1973), a petition for habeas corpus under 28 U.S.C. § 2254 "is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser, 411 U.S. at 488-90). The Court of Appeals for the Seventh Circuit has held that "when a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice" for failure to state a claim upon which relief may be granted rather than convert it into a petition for habeas corpus under § 2254. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477). Thus, petitioner's claims concerning his detainer must be denied without inquiring into their merits. Petitioner may file a petition for habeas corpus pursuant to 28 U.S.C. § 2254 after exhausting available state court remedies if he wishes to challenge the validity of his confinement.

To the extent that petitioner may be alleging that respondents violated certain provisions of the Interstate Agreement on Detainers, adopted in Wisconsin as Wis. Stat. §§ 976.05 and 976.06, or provisions of the Wisconsin Administrative Code, petitioner may have state law claims that he can pursue in state court. He cannot bring claims of violations of state statutes or administrative regulations in federal court under 42 U.S.C. § 1983, because the federal courts are prohibited under the Eleventh Amendment from entertaining such suits. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (Ex parte Young, 209 U.S. 123 (1908) does not apply in suits asserting that state officials have violated state laws or administrative regulations).

B. Revocation Proceedings

From the petition, it is not possible to tell whether petitioner is in custody in Indiana because of a revocation of probation or parole or because of a new criminal conviction. If it is the former, he may not have a separate claim against defendant Vinge based on the allegation that she forced him to incriminate himself. Whatever his claim is, it suffers from the same infirmity as the claims against the other respondents except Dufour. Determining the constitutionality of defendant Vinge's actions would be tantamount to deciding the constitutionality of petitioner's custody arising out of the revocation proceeding, something this court cannot do in a § 1983 action.

C. Right to Petition the Government for the Redress of Grievances

Petitioner alleges that respondent Dufour, a district attorney, violated his First Amendment right to petition the government for the redress of grievances by refusing to file charges against officials for misconduct in public office relating to the detainer. Under Wisconsin law, a prosecutor has "broad discretion in determining whether to charge an accused, which offenses to charge, under which statute to charge, whether to charge a single count or multiple counts when the conduct may be viewed as one continuing offense, and whether to join all offenses in a single prosecution or to bring successive prosecutions." Wisconsin v. Krueger, 224 Wis. 2d 59, 67, 588 N.W.2d 921, 924 (1999). "With reference to prosecutorial discretion, Wisconsin case law has repeatedly held that the discretion whether to charge and how to charge vests solely with the district attorney." Wisconsin v. Lindsey, 203 Wis. 2d 423, 440, 554 N.W.2d 215, 221 (Ct. App. 1996). See also Wisconsin v. Jones, 217 Wis. 2d 57, 64, 576 N.W.2d 580, 583 (Ct. App. 1998) ("Wisconsin case law has repeatedly noted that '[t]he discretion resting with the district attorney in determining whether to commence a [criminal] prosecution is almost limitless . . ."). Petitioner's allegations that respondent Dufour violated his constitutional rights by refusing to prosecute officials involved in the detainer is legally frivolous.

ORDER

IT IS ORDERED that

1. Petitioner Jeffrey M. Schreiber is DENIED leave to proceed in forma pauperis on his claims that respondents Darryl Kuhl, Lori Vinge, David Knaapen, James Millerl, Jane Kohlway, Richard Rehm, Mary Ann Kaufman, Mark Bennett, Marc Gumz and Steve Rowe violated his constitutional right to due process, a speedy trial and the assistance of counsel and freedom from cruel and unusual punishment because these claims call into question the validity of his revocation and confinement in Indiana and may be heard only in a habeas corpus action after petitioner has exhausted available state court remedies;

2. Petitioner is DENIED leave to proceed in forma pauperis on his claim that respondent Lori Vinge violated his right to be free from self-incrimination because this claim too calls into question the validity of petitioner's revocation and may be heard only in a habeas corpus action after petitioner has exhausted available state court remedies;

3. Petitioner is DENIED leave to proceed against Richard Dufour on his claim that this respondent violated his First Amendment right to petition the government for redress of grievances because the claim is legally frivolous.

4. A strike will not be recorded against petitioner because dismissal for bringing an action as a civil action instead of a habeas corpus action is not one of the grounds warranting a strike under 28 U.S.C. § 1915(g);

5. The unpaid balance of petitioner's filing fee is \$135.16; this amount is to be paid

in monthly payments according to 28 U.S.C. § 1915(b)(2); and

6. This action is DISMISSED.

Entered this 5th day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge