IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEONARD LAMONT JONES,

ORDER

Petitioner,

00-C-515-C

v.

KENNETH FARMER and
KEVIN LINSMEIER,

Respondents.

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This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the North Fork Correctional Facility in Sayre, Oklahoma, 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 has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or 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.

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

ALLEGATIONS OF FACT

At approximately 4:49 a.m. on February 1, 1997, petitioner was asleep in a car that was legally parked in front of his apartment on Moland Street in Madison, Wisconsin. The car's engine was running. Respondent Linsmeier, a Madison police officer, pounded on the window to attract petitioner's attention. When petitioner opened the window, respondent Linsmeier told petitioner to exit the car to take a field sobriety test. Petitioner told respondent Linsmeier that he was still sleepy and asked if he could take a breathalyzer test. Respondent Linsmeier told petitioner to exit the car and that he was under arrest for refusing to take a field sobriety test. Petitioner said that he had not refused to take any test. Respondent Linsmeier told petitioner that his failure to exit the car immediately would result in his passenger window being smashed with a metal bar by a fireman who was standing nearby. To avoid being hit in the face

with glass, petitioner opened the door and got out of the car. Respondent Linsmeier put handcuffs on petitioner and searched petitioner. Respondent Linsmeier found $1,783 on petitioner's person; respondent Linsmeier seized the money and put petitioner in the back seat of his marked police car.

Next, respondent Linsmeier searched the car in which petitioner had been sleeping. Petitioner did not consent to the search of his person or the car. After the search, respondent Linsmeier took petitioner to the police station and administered a breathalyzer test. Petitioner "blew a zero," meaning that no intoxicants registered on the breathalyzer machine. Petitioner asked respondent Linsmeier why his $1,783 was not being placed in his jail account. Respondent Linsmeier replied, "I'm keeping that." Respondent Linsmeier did not reply when petitioner asked him why. Respondent Linsmeier did not give petitioner a receipt for the $1,783. Respondent Linsmeier did not give petitioner any type of post-seizure notice telling him how he might contest the seizure. Respondent Linsmeier did not give petitioner notice of a hearing where he might contest the seizure.

Between February 1, 1997 and March 17, 1997, petitioner spoke to respondent Linsmeier over the telephone several times requesting that respondent Linsmeier return his $1,783. Each time, respondent Linsmeier refused. At some time between February 1, 1997 and March 17, 1997, petitioner spoke to one of respondent Linsmeier's police supervisors, who

told petitioner that although respondent Linsmeier had no right to seize the money in question, only respondent Linsmeier could authorize its return.

At some time between February 1, 1997 and March 17, 1997, petitioner spoke to respondent Farmer, an assistant district attorney for Dane County. Respondent Farmer told petitioner that although respondent Farmer could not prove that the $1,783 was drug-related, he would not order its return because if he did so the police would be angry at him. Respondent Farmer did not give petitioner post-seizure notice. No forfeiture hearing was held to determine if the $1,783 was guilty res.

DISCUSSION

I understand petitioner to be alleging two claims: (1) that respondent Linsmeier seized petitioner's money without probable cause in violation of the Fourth Amendment and (2) that respondents Linsmeier and Farmer failed to provide petitioner with a forfeiture hearing or with post-seizure notice of petitioner's right to contest the seizure and the time and date of a forfeiture hearing in violation of the due process clause of the Fourteenth Amendment. Because petitioner does not challenge prison conditions, 42 U.S.C. § 1997e's requirement that a prisoner exhaust available administrative remedies before bringing an action does not apply.

Petitioner starts out on the wrong foot by being less than forthright on his complaint in response to the question whether he has begun other lawsuits in state or federal court relating to the same facts involved in this action. Petitioner indicated the answer was no, but a case involving petitioner and arising out of the same facts was resolved by the Wisconsin Supreme Court. See In re Return of Property in State v. Jones, 226 Wis. 2d 565, 594 N.W.2d 738 (1999) (holding that the cash constituted contraband under Wis. Stat. § 968.13(1)(a) and as such did not need to be returned to petitioner even though criminal charges were not filed). Presumably, petitioner initiated that action; if he did not, his failure to report that action on the complaint was at least misleading.

I. UNLAWFUL SEIZURE

The Wisconsin Supreme Court opinion sheds light on the facts relevant to the analysis whether petitioner's money was unlawfully seized in violation of the Fourth Amendment. When petitioner exited his car, respondent Linsmeier placed him under arrest for operating a motor vehicle while intoxicated. See Jones, 226 Wis. 2d at 571, 594 N.W.2d at 741. Respondent Linsmeier discovered the $1,783 in cash when he conducted a search of petitioner incident to the arrest; respondent Linsmeier testified in state court that "based on his training and experience, he believed the money was drug-related." Id. Dane County Circuit Court

Judge Jack F. Aulik determined that the arrest and search were valid and that the cash was contraband and subject to forfeiture under Wis. Stat. § 968.20. See Jones, 226 Wis. 2d at 572-73, 594 N.W.2d at 742. Even if the issue had not already been determined by the state court, petitioner's claim is legally frivolous.

In United States v. Robinson, 414 U.S. 218 (1973), the Supreme Court addressed the authority of a police officer to search the person of one who has been validly arrested and taken into custody.

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

Id. at 235. Because respondent Linsmeier searched petitioner and seized the money incident to a lawful custodial arrest for operating a vehicle while intoxicated, the search and seizure did not violate the Fourth Amendment.

II. DUE PROCESS

The Supreme Court has held "that unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984). Wis. Stat. § 968.20, Return of Property Seized, provides such a postdeprivation remedy. Petitioner's argument is slightly different, however. He claims that his due process rights were violated by respondents Linsmeier's and Farmer's failure to provide him with a forfeiture hearing or with post-seizure notice of his right to contest the seizure and the time and date of a forfeiture hearing. Section 968.20 does not require any notice of a hearing and the Wisconsin Supreme Court held in petitioner's case in that court that because the state had not initiated a forfeiture action, petitioner was limited to the procedures in § 968.20. See Jones, 226 Wis. 2d at 585, 594 N.W.2d at 747-48. The fact that the statute is on the books is sufficient notice to petitioner of its existence. Furthermore, petitioner was not injured by any failure of respondents to provide him with notice of a hearing because petitioner filed a motion for return of all money confiscated from him and received a hearing under § 968.20. See id. at 572-73, 594 N.W.2d at 742; In re Return of Property in State v. Jones, No. 97-3306, 1998 WL 79019, at *1 (Wis. App. Feb. 26, 1998). Petitioner will be denied leave to proceed on his claim under the Fourteenth Amendment because his claim is legally frivolous.

ORDER

IT IS ORDERED that

1. Petitioner Leonard Lamont Jones's request for leave to proceed in forma pauperis on his claims under the Fourth and Fourteenth Amendments is DENIED with prejudice because the claims are legally frivolous and this action is DISMISSED;

2. The unpaid balance of petitioner's filing fee is $134.78; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to enter judgment and close the file.

Entered this 18th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge