

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

SILVAN FLEMING,

Petitioner,

v.

JON E. LITSCHER,
Secretary of the Department of Corrections,

Respondent.

OPINION AND
ORDER

00-C-708-C

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Silvan Fleming is presently confined at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Petitioner alleges that respondent Jon E. Litscher violated his rights by illegally imprisoning petitioner beyond his mandatory release date. He 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). Subject matter jurisdiction exists pursuant to 28 U.S.C. §§ 1331, 1343(a)(3).

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. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner will be denied leave to proceed in forma pauperis on his Fourteenth Amendment due process claim for failure to state a claim upon which relief may be granted.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is a prisoner at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Respondent Jon Litscher is the Secretary of the Wisconsin Department of Corrections.

Petitioner is currently serving three concurrent sentences. On December 1, 1999, at the sentencing hearing for his most recent conviction, petitioner was sentenced to two years of imprisonment to begin that day. At the hearing, it was noted that petitioner had accumulated credit for time spent in Dane County jail awaiting sentencing for the three convictions (84 days, 7 days and 77 days respectively). The transcript of the hearing indicates that the credit days were to be added together and the total was to be subtracted from the concurrent two year sentence, resulting in an overall credit of 168 days. In contrast to the ruling, the judgments of conviction indicate that the credits apply to each sentence individually, resulting in a reduced credit. On August 25, 2000, a telephone conference took place to re-examine petitioner's time credit. Petitioner states that at the conclusion of the hearing, he was credited with 164 days. Later, petitioner was informed that he was credited with only 90 days. According to petitioner's calculations, his mandatory release date was October 17, 2000, a date which has come and gone.

OPINION

From petitioner's allegations, one central claim can be made out: Respondent Litscher is keeping petitioner in illegal custody. Petitioner frames his argument as a violation of due process for which he seeks monetary relief under 28 U.S.C. § 1983. However, illegal custody is not a cognizable claim under § 1983. Because petitioner is challenging the fact of his imprisonment, he must file a petition for a writ of habeas corpus under 28 U.S.C. § 2254.

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 petition must be denied without inquiring into its 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.

ORDER

IT IS ORDERED that:

(1) Petitioner 's request for leave to proceed in forma pauperis on his claim is DENIED and the action is DISMISSED without prejudice for petitioner's failure to state a claim upon which relief may be granted;

(2) 28 U.S.C. § 1915(g) directs the court to enter a strike when an " action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted" Because the merits were not addressed and the claim is dismissed without prejudice, a strike will not be recorded against petitioner under § 1915(g);

(3) The unpaid balance of petitioner's filing fee is \$139.17; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and

(4) The clerk of court is directed to close the file.

Entered this 7th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge