IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE D. SANDBERG, Jr.,

ORDER

Petitioner,

00-C-716-C

v.

MRS. PEGGY THRAN, MS. CAROL BRIONES,
MS. STEPHANIE JOHNSON, MS. DEANNE
THORSEN, MS. KARN PARENTEAU,

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 La Crosse County Jail in La Crosse, 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 and that petitioner presently has no means with which to pay an initial partial payment of the $150 fee for filing his complaint. Therefore, although he has not made the initial partial payment required under § 1915(b)(1), petitioner

is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

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 contends that he was illegally confined past the end of his sentence. He will be granted leave to proceed on his substantive due process and false imprisonment claims.

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

ALLEGATIONS OF FACT

All respondents are employed at Jackson Correctional Institution. Respondent Peggy Thran is Institution Registrar and respondents Carol Briones, Stephanie Johnson, Deanne Thorsen and Karen Parenteau are clerks.

Petitioner was an inmate at Jackson Correctional Institution serving a sentence for a conviction in La Crosse County. Petitioner was not discharged from confinement at the completion of his sentence but was kept confined illegally until December 16, 1999, because one of more of respondents negligently, recklessly or intentionally calculated the date on which petitioner should have been discharged improperly or delayed its calculation.

DISCUSSION

Petitioner contends that he was kept in illegal custody at Jackson Correctional Institution because of the "negligent, reckless or intentional actions" of respondents. 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 v. Humphrey, 512 U.S. 477 (1994)). However,

petitioner is no longer confined at Jackson Correctional Institution and it appears that he was released from the challenged confinement in December 1999. A majority of Supreme Court justices have discussed Heck's application to ex-prisoners such as petitioner:

> The better view, then is that a former prisoner, no longer "in custody," may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.

Spencer v. Kemna, 523 U.S. 1 (1998) (Souter, J., concurring and joined by O'Connor, Ginsburg & Breyer, JJ). See also id. at 25 n.8 (Stevens, J. dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under 42 U.S.C. § 1983."). The Court of Appeals for the Seventh Circuit has recognized that "five justices [of the Supreme Court] now hold the view that a § 1983 action must be available to challenge constitutional wrongs where federal habeas is not available." DeWalt v. Carter, 224, F.3d 607, 617 (7th Cir. 2000) (citing Spencer). Therefore, it appears that petitioner's claim may be brought under § 1983 and is not barred by his failure to "prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." Heck, 512 U.S. at 487. (I note that petitioner is "in custody" currently at the La Crosse County Jail. If petitioner's present incarceration is related to the

sentence for which he was imprisoned at Jackson Correctional Institution, as it would be if, for example, he is in custody for violating provisions of his supervised release from that sentence, then the reasoning of Spencer does not apply and petitioner would have to seek relief through a writ of habeas corpus.)

Petitioner provides few facts for use in determining whether he has stated a cognizable claim. To the extent that he is attempting to bring a procedural due process claim, such a claim is barred because Wisconsin has adequate state remedies for false imprisonment. See Guenther v. Holmgreen, 738 F.2d 879, 882 (7th Cir. 1984) ("Because of the availability of these state tort remedies, it could be said that Wisconsin has done all that the Fourteenth Amendment requires in this context to guarantee Guenther procedural due process."). Petitioner's allegation that respondents may have acted intentionally does not affect the outcome of his procedural due process claim. False arrest and imprisonment are intentional torts that the court of appeals held in Guenther had adequate state law remedies, see Hood v. City of Chicago, 927 F.2d 312, 314 (7th Cir. 1991). Because petitioner fails to state when he was sentenced and the term of the sentence, it is impossible to determine from his complaint whether he had served the entire term of his sentence or whether he believed he was eligible for early release. A prisoner "has no substantive due process right to an early release from prison." Toney-El v. Franzen, 777 F.2d 1224, 1227 (7th Cir. 1985) (reversing directed verdict in favor of prisoner who alleged prison

officials violated his constitutional rights by allowing him to remain incarcerated for 306 days beyond his release date after miscalculation of good conduct credits).

To succeed on a substantive due process claim, petitioner must prove that respondents acted with deliberate indifference. See Collignon v. Milwaukee County, 163 F.3d 982, 988 (7th Cir. 1998). Petitioner has alleged that his injury resulted from "the negligent, reckless or intentional actions" of respondents. Because the allegation that respondents may have acted intentionally in miscalculating his release date suggests that respondents may have been deliberately indifferent to petitioner's constitutional rights, I will allow petitioner to proceed on his claim that respondents violated his right to substantive due process in violation of the Fourteenth Amendment. I will also exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over petitioner's state law claim of false imprisonment.

Petitioner requests that this court make copies of his complaint to be served on respondents. Enclosed with this order is a copy of petitioner's complaint from which he may make handwritten copies for each respondent. In the future, petitioner should make a copy for himself and for respondents before he sends any papers to the court.

ORDER

IT IS ORDERED that

1. Petitioner Christopher J. Scarver's request for leave to proceed in forma pauperis on his substantive due process claim that he was deprived of liberty in violation of the Fourteenth Amendment and on his state law claim of false imprisonment is GRANTED.

2. Petitioner's request for leave to proceed in forma pauperis on his procedural due process claim under the Fourteenth Amendment is DENIED for his failure to state a claim upon which relief may be granted.

3. The unpaid balance of petitioner's filing fee is $150; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2) at such time as funds to do so exist in his prison account.

4. Service of this complaint will be made promptly after petitioner submits to the clerk of court five copies of his complaint, five completed marshals service form and six completed summonses, one for each respondent and one for the court. Enclosed with a copy of this order are sets of the necessary forms. If petitioner fails to submit the completed marshals service and summons forms before January 4, 2001, his complaint will be subject to dismissal for failure to prosecute.

5. In addition, petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondents, he should serve the lawyer directly

rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondent or to respondent's attorney.

Entered this 15th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge