

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

RONALD WOLFE, JR.,

Petitioner,

v.

JON E. LITSCHER, Department of Corrections;
JOHN BETT, Warden, Dodge Correctional
Institution; GARY McCAUGHTRY, Warden,
Waupun Correctional Institution; SUE
WALLINTIN, Business Manager, Waupun
Correctional Institution,

Respondents.

ORDER

03-C-302-C

In an order entered in this case on July 7, 2003, I denied petitioner leave to proceed in forma pauperis on his claims that defendants are depriving him of his right to procedural due process by garnishing his prison wages and seizing monetary gifts he receives from his family and friends in order to pay off legal loans and an institution restitution order stemming from a disciplinary infraction, both of which financial obligations were incurred during a previous period of incarceration. I found that although petitioner has a protected property interest in the funds on deposit in his prison account, including money sent to him

from sources outside the prison, he does not have a protected property interest in receiving prison wages or controlling the use of funds in his account. Moreover, I found that even if petitioner could establish that he had a property interest in controlling the funds being withheld or deducted from his inmate account to satisfy his restitution obligation, he had received all the process he was due when he was afforded a disciplinary hearing and obtained review of the disciplinary committee's findings in a subsequent state court action.

Now petitioner has filed a "Motion for Reconsideration and Notice of Appeal." I construe petitioner's motion for reconsideration as a motion pursuant to Fed. R. Civ. P. 59 to alter or amend the July 7, 2003 judgment dismissing his claims, recording a strike against him and closing the case. In addition, I construe the motion as including an alternative notice of appeal and a request for leave to proceed in forma pauperis on appeal.

In support of his motion to alter or amend the judgment, petitioner argues that Wis. Stats. 301.31 and 301.328(2) grant him a property interest in the use of his wages and other money deposited in his prison account. He contends that under these statutes, the state cannot collect on unpaid debts incurred prior to his discharge from prison without obtaining a civil judgment in state court. However, nothing in the statutes petitioner cites grants him a protected property interest in controlling the money in his prison account.

Wis. Stat. § 301.31 grants the Department of Corrections the authority to pay wages to prisoners and directs that the officers in charge of institutions maintain control of wages

for the benefit of the prisoner, the prisoner's family and "other obligations specified in this section [§ 301]." The other obligations include charges for "some or all of the costs to the department of the prisoner's incarceration," Wis. Stat. § 301.325, and litigation loans, Wis. Stat. § 301.328.

Wis. Stat. § 301.328 sets out a procedure that the Department of Corrections may use to recover legal loans from prisoners who fail to repay them. It does not extend a property right to prisoners in the use of their money. To the contrary, Wis. Admin. Code § DOC 309.51(1) states:

. . . No inmate may receive more than \$200 annually under this subsection, except that any amount of the debt the inmate repays during the year may be advanced to the inmate again without counting against the \$200 loan limit. The \$200 loan limit may be exceeded with the superintendent's approval if the inmate demonstrates an extraordinary need, such as a court order requiring submission of specified documents. *The institution shall charge any amount advanced under this subsection to the inmate's general account for future repayment. An inmate may be permitted to retain in the inmate's general account an amount of money specified, in writing, by the bureau of adult institutions that is not subject to repayment of the loan.*

(Emphasis added.) Far from granting petitioner an interest in controlling his money, this regulation almost compels appropriation of funds in prisoners' general account to insure repayment of their loans. Although the institution appears to have the option to allow petitioner to retain some money, I see nothing to indicate that this option must be exercised.

If petitioner believes that prison officials are required to follow the procedure

established in Wis. Stat. § 301.328 before recovering unpaid legal loans or restitution obligations he incurred in a prior period of incarceration, he is free to file an action in state court. However, respondents' alleged violation of a state statute does not make out a claim of a violation of federal law cognizable in a civil action in this court. Therefore, petitioner's motion to alter or amend the July 7, 2003 judgment will be denied.

Petitioner asks that if the motion to alter or amend the judgment is denied, the court consider his motion as including an alternative notice of appeal. Because petitioner has not paid the fee for filing his notice of appeal, I construe the notice as including a request for leave to proceed in forma pauperis on appeal.

A district court has authority to deny a prisoner's request for leave to proceed in forma pauperis under 28 U.S.C. § 1915 on one or more of the following grounds: the prisoner has not established indigence, the appeal is in bad faith or the prisoner has three strikes. § 1915(a)(1),(3) and (g). Sperow v. Melvin, 153 F.3d 780 (7th Cir 1998). Petitioner's request will be denied because his appeal is in bad faith.

In Lucien v. Roegner, 682 F.2d 625, 626 (7th Cir. 1982), the court of appeals instructed district courts to find bad faith where a petitioner is appealing the same claims the court found to be without legal merit in denying petitioner leave to proceed on his complaint. See Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000). Because petitioner is attempting to raise on appeal the same legally frivolous claims he raised in his complaint in

this court, I must deny his request for leave to proceed in forma pauperis on appeal and certify his appeal as not being taken in good faith.

A prisoner whose appeal is certified as not having been taken in good faith owes the \$105 fee in full immediately. If the money does not presently exist in his prison account, then prison officials are required to calculate monthly payments according to the formula set out in 28 U.S.C. § 1915(b)(2) and forward those payments to the court until the debt is satisfied. If the prisoner has sufficient funds in his regular account to pay the full \$105, it must be remitted promptly to the clerk of court in one payment.

If he wishes, petitioner may delay payment of the fee if, within thirty days of the date of this order, he challenges in the court of appeals the certification that his appeal is not taken in good faith. See Fed. R. App. P. 24(a)(5). However, petitioner should be aware that if he brings such a challenge and the court of appeals determines that this court was correct that the appeal is not taken in good faith, then the court of appeals may record a second strike against petitioner and the payment will once again be due in full immediately. Petitioner's failure to pay the fee for any reason other than his lack of money to do so will be understood as giving up his right to file future suits in forma pauperis. See Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996).

ORDER

IT IS ORDERED that petitioner's motion to alter or amend the July 7, 2003 judgment dismissing this action as legally frivolous is DENIED.

Further, IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on appeal is DENIED. I certify that his appeal is not taken in good faith.

Entered this 30th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge