

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

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TYLON C. CHRISTIAN,

Petitioner,

v.

DOUGLAS TIMMERMAN, KATHERINE  
DAYTON, NEIL LANE, DENISE SYMDON,  
MARCIA GOODWIN, and CAROLE BRIONES,

Respondents.  
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ORDER

03-C-688-C

This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Jackson Correctional Institution in Black River Falls, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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).

Because petitioner fails to state a § 1983 claim, I will deny his requests for leave to proceed in forma pauperis and for appointment of counsel.

In his complaint, petitioner alleges the following facts.

## ALLEGATIONS OF FACT

### A. The Parties

Petitioner Tylon C. Christian is a prisoner presently confined at the Jackson Correctional Institution. Respondents Douglas Zimmermann, Katherine Dayton, Neil Lane

and Marcia Goodwin are probation and parole agents for the Wisconsin Department of Corrections. Respondent Denise Symdon is a regional chief for the Wisconsin Department of Corrections. Respondent Carol Briones is a central records administrator for the Wisconsin Department of Corrections.

### B. Alleged Constitutional Violations

On July 17, 1998, petitioner was sentenced to four concurrent three-year prison sentences and one 45-day consecutive sentence. The Wisconsin Department of Corrections released petitioner from prison on February 15, 2000, and placed him on parole for one year. Upon his release from prison, petitioner fulfilled a condition of his parole by reporting to his parole agent consistently for approximately five months. After that time, he reported to his parole agent twice, changed residences multiple times without informing his parole agent and gave his agent a false address. The Department of Corrections deemed him an absconder, warned him of the consequences of absconding and detained him in jail several times.

On February 15, 2001 and March 1, 2001, respondents Briones and Timmermann failed to submit a form pursuant to Wis. Stat. § 304.078, which restores the civil rights of those who are convicted of crimes and serve out their sentence. Instead, Briones waited to submit the form until August 20, 2002.

On February 14, 2001 and March 1, 2001, respondent Timmermann failed to file a

Department of Corrections 503 form, causing the extension of petitioner's parole time. On March 21, 2001, Timmermann visited petitioner in the Iowa County jail. Petitioner informed Timmermann that he should no longer be on parole. That same day, Timmermann entered several statements in a chronological log, stating that petitioner was not home for a scheduled home visit, that he owed a lot of restitution and that he gave his parole agent a false address. Between March 27, 2001 and April 3, 2001, Timmerman told petitioner that Timmermann could hold petitioner on parole for failing to pay probation and parole costs. Timmermann filed an order to detain petitioner on March 27, 2001 and October 2, 2001. In addition, in October 2001, Timmerman and Goodwin took statements from petitioner while he was detained in the Iowa County jail in which petitioner admitted to failing to report to his parole agent since March 2001, changing jobs and residences without informing his agent, drinking a lot of beer and being involved in a situation in which another individual was hurt on September 28, 2001.

On June 22, 2001, Timmermann requested that petitioner be apprehended. On July 12, 2001, Timmermann submitted Department of Corrections form 44, noting the apprehension request and recommending that petitioner's time be "stopped" as of February 27, 2001, for petitioner's failure to pay court obligations and regularly report to his parole agent. Respondents Dayton and Symdon approved the form 44.

On December 5, 2001, after being released from the Dane County jail, petitioner

failed to report to his probation agent. He was arrested on April 18, 2002. Between December 5, 2001, and April 18, 2002, petitioner consumed alcohol, cocaine and marijuana several times and failed to pay child support in violation of the probation and parole rules. On April, 3, 2002, petitioner drove a vehicle without the permission of the vehicle's owner and eluded police officers by failing to pull over and stop the vehicle he was driving.

In May 2002, Timmermann submitted Department of Corrections forms 414, 414A and 429 to revoke petitioner's parole for multiple violations of parole conditions and to request a revocation hearing. (Timmermann amended forms 414 and 414A once during this time.) Respondent Dayton signed form 429, requesting a hearing for revoking petitioner's parole. Respondent Lane served petitioner forms 414 and 414A, as amended. Petitioner's lawyer, Janice Balistreri, asked Timmermann why petitioner was still on parole in May 2002, to which Timmermann replied that he had stopped petitioner's time for absconding.

## DISCUSSION

Petitioner argues that respondents' actions between February 14, 2001 and August 20, 2002 deprived him of his Fifth, Eighth, and Fourteenth Amendments rights, as well as his right to vote and serve on a jury. However, petitioner argues also that his incarceration during this time period was illegal. Although petitioner seeks monetary relief under 28

U.S.C. § 1983 for alleged violations of his constitutional rights, in essence, petitioner is challenging the legality of his confinement between February 2001 and August 2002. The habeas corpus statute, 28 U.S.C. § 2254, provides the sole remedy for challenging the validity of alleged illegal custody. Heck v. Humphrey, 512 U.S. 477 (1994). Even though petitioner is seeking money damages for his alleged unlawful custody rather than release from his present custody, petitioner may proceed under § 1983 only if the custody he challenges “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.” Id. at 487. Petitioner does not allege that his custody between February 2001 and August 2002 has been declared invalid. Therefore, he cannot proceed under § 1983 for monetary damages on a claim that his custody was illegal.

Even if petitioner is not challenging the validity of his custody but is claiming only that respondents’ failure to complete certain forms violated his civil rights under the Fifth, Eighth and Fourteenth Amendments, his claim is legally frivolous. Petitioner does not contest that he committed parole violations and he does not allege that respondents denied him a fair hearing or notice when making decisions regarding his parole status. It is not a violation of the Constitution to deprive a convicted felon of the ability to vote or serve on a jury. See, e.g., United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) (agreeing with

other circuits that excluding convicted felons from jury service does not violate constitutional guarantee of equal protection); Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (state law stripping convicted felons of their right to vote does not violate equal protection clause of Fourteenth Amendment).

Perhaps petitioner has a claim that respondents violated provisions of Wis. Stat. § 304.078 when they failed to file a form to restore his civil rights in a timely manner. However, a violation of a state statute does not rise to the level of a constitutional violation. Snowden v. Hughes, 321 U.S. 1 (1944) (“Mere violation of a state statute does not infringe the federal Constitution.”). That is a claim petitioner will have to raise in state court if he wishes to pursue it.

Because petitioner does not state a claim upon which relief may be granted in this court, I will deny him leave to proceed in forma pauperis and deny his request for appointment of counsel as moot.

#### ORDER

IT IS ORDERED that:

I. Petitioner Tylon C. Christian’s requests for leave to proceed in forma pauperis on his § 1983 claim and for appointment of counsel are DENIED and this case is DISMISSED with prejudice for petitioner’s failure to state claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is \$140.23; 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 close the file.

Entered this 31st day of December, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge