IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KENSHAWN DENWIDDIE,

Plaintiff, ORDER

v. 04-C-471-C

JOSEPH SCIBANA,

Defendant.

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Plaintiff Kenshawn Denwiddie, an inmate at the Federal Correctional Institution in Oxford, Wisconsin, has filed a pleading styled as a civil complaint and has paid the $150 filing fee. In his complaint, plaintiff seeks money damages as compensation for his alleged illegal custody, and a declaration that the defendant is in violation of the Administrative Procedure Act.

The first question to be addressed is whether this court can consider in the context of a civil action each of the claims plaintiff raises in his complaint or whether some of his claims may be considered only in a habeas corpus action. I conclude that all but one of plaintiff's claims under the Administrative Procedure Act are properly heard in a civil action and the remaining claim must be dismissed without prejudice to his raising it in a habeas

corpus action pursuant to 28 U.S.C. § 2241. In particular, I conclude that plaintiff cannot raise his claim that the Bureau of Prisons' method of calculating his good conduct time constitutes an abuse of its legal authority under the Administrative Procedure Act, because a decision on this claim would necessarily require a determination whether plaintiff is entitled to additional good time credits, which is a claim that must be raised in a habeas corpus action. As for plaintiff's remaining claims, I conclude that plaintiff's claim is legally frivolous that the Bureau of Prisons violated the Administrative Procedure Act by failing to publish for notice and comment its intention to interpret 18 U.S.C. § 3621(e)(2)(B)'s "nonviolent offense" provision to preclude persons convicted of violations of 18 U.S.C. § 922(g), and interpret 18 U.S.C. § 3624(b) to allow calculation of good conduct time on the basis of time served rather than the sentence imposed, because the Bureau of Prisons did publish notice and allow comment with respect to these issues. In addition, I conclude that plaintiff's claim that the Bureau of Prisons abused its legal authority in deciding to exclude from eligibility for early release under 18 U.S.C. § 3624(b) persons convicted of violations of 18 U.S.C. § 922(g) is legally meritless, because the law is already settled against plaintiff on this issue.

Although plaintiff has paid the filing fee in full, because he is a prisoner, his complaint must be screened pursuant to 28 U.S.C. § 1915A. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972).

However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous or 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. 42 U.S.C. § 1915(e).

The allegations of fact in plaintiff's complaint are scant. Liberally construing them, I understand plaintiff to be alleging the following facts:

ALLEGATIONS OF FACT

Plaintiff was convicted of selling a gun. (The docket sheet in the District Court for the Northern District of Illinois for plaintiff's criminal case, 02-CR-50047-ALL, reveals that plaintiff was convicted of one count of violating 18 U.S.C. § 922(g), unlawfully transporting a firearm.) He is serving his sentence at the Federal Correctional Institution in Oxford, Wisconsin. Defendant Joseph Scibana is the warden of the Oxford institution.

Plaintiff completed a Residential Drug Abuse Program. Nevertheless, defendant has denied him eligibility for early release under 18 U.S.C. § 3621(B), because the Bureau of Prisons determined in a program statement that crimes for violation of § 922(g) constitute crimes of violence. The Bureau of Prisons failed to publish the program statement before implementing it and failed to exercise proper agency discretion in interpreting § 3621(B).

The Bureau of Prisons failed to publish program statement 5880.28 and to exercise proper agency discretion when it interpreted 18 U.S.C. § 3624(b) to permit good conduct

time to be awarded on the basis of a prisoner's time served rather than the sentence imposed.

DISCUSSION

Allegations that the Bureau of Prisons failed to publish program statements and abused its exercise of agency discretion in drafting them are claims ordinarily cognizable in a civil action alleging violations of the Administrative Procedure Act, 5 U.S.C. § 701-706. Bunn v. Conley, 309 F.3d 1002 (7th Cir. 2002); Bush v. Pitzer, 133 F.3d 455 (7th Cir. 1997) ("2241 [habeas corpus] does not permit review of prison . . . decisions after the fashion of the Administrative Procedure Act.") In such an action, however, a plaintiff cannot recover money damages, because the United States has not waived its sovereign immunity with respect to such claims. Czerkies v. U.S. Dept. of Labor, 73 F.3d 1435 (7th Cir. 1996). The only relief available to a plaintiff challenging an agency's alleged wrongful implementation of a regulation under the act is a declaration that the regulation is invalid.

In this case, plaintiff wants among other things a declaration that the Bureau of Prisons violated the Administrative Procedure Act by interpreting 18 U.S.C. § 3624(b) to allow calculation of good conduct time on the basis of time served rather than the sentence imposed. Although he asks for money damages at the rate of $1500 a day for every day he is in alleged illegal custody resulting from the alleged abuse of authority, the Supreme Court

has held on multiple occasions that when a person can obtain relief for a violation of federal law through a petition for a writ of habeas corpus, he may not bring a claim for money damages in a civil action until he has prevailed on his habeas corpus claim. Preiser v. Rodriguez, 411 U.S. 475 (1973). Even when a person seeks only damages and not release, habeas corpus remains the sole federal remedy when a ruling in the plaintiff's favor would call into question the validity of his confinement. Heck v. Humphrey, 512 U.S. 477 (1994).

I have already decided the question whether the Bureau of Prisons abused its authority in the manner it interpreted 18 U.S.C. § 3624(b) in a habeas corpus action, White v. Scibana, 314 F. Supp. 2d 834 (W.D. Wis. 2004). It is unnecessary to consider the same question in the context of an action brought under the Administrative Procedure Act. Even if there were some reason to revisit the issue in the context of a civil action, the question whether plaintiff Denwiddie is entitled to a declaration that the Bureau of Prisons abused is authority in interpreting § 3624(b) is so inextricably intertwined with the relief he reasonably would be entitled to (reinstatement of good time credits) that a favorable ruling would necessarily imply the invalidity of the loss of good time credits. Clarke v. Stalder, 154 F.3d 186, 189 (5th Cir. 1998); Kerr v. Orellana, 969 F. Supp. 357, 358 (E.D. Va. 1997). Therefore, if plaintiff wishes judicial review of the Bureau of Prisons' legal authority to calculate his good conduct time as it does, his only avenue of relief is by way of a habeas corpus petition. Apparently, plaintiff has figured this out already. On August 13, 2004, he

filed a separate petition for a writ of habeas corpus raising the identical issues raised in this action. Although plaintiff wrote the case number for this action on his habeas corpus forms, the habeas corpus action will be assigned a new case number and plaintiff will have to pay the $5 filing fee or move for leave to proceed in forma pauperis.

Plaintiff's remaining Administrative Procedure Act claims do not call into question the validity of his custody. White v. Henman, 977 F.2d 292, 295 (7th Cir. 1992) (violation of administrative rule not same thing as violation of Constitution or federal law). Therefore, I can consider them on their merits.

Plaintiff alleges that the Bureau of Prisons failed to publish for notice and comment its intention to interpret 18 U.S.C. § 3621(e)(2)(B)'s "nonviolent offense" provision to preclude persons convicted of violations of 18 U.S.C. § 922(g) and its intention to interpret 18 U.S.C. § 3624(b) to allow calculation of good conduct time on the basis of time served rather than the sentence imposed. However, the Bureau of Prisons did publish notice and allow comment with respect to these issues. See 65 Fed. Reg. 80745 (Dec. 22, 2000) (notice and request for comment on BOP intent to "exclude [from eligibility for early release under 18 U.S.C. § 3621(e)(2)(B)] inmates whose current offense is a felony that involved the carrying, possession or use of a firearm or other dangerous weapon or explosives . . . or . . . that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another. . . ."); and 62 Fed. Reg. 50786 (Sept. 26, 1997) (notice and

request for comment on BOP intent to figure amount of good conduct time earned on basis of time served).

Finally, plaintiff contends that defendant acted unreasonably in interpreting 18 U.S.C. § 3621(e)(2)(B)'s "nonviolent offense" provision to preclude persons convicted of violations of 18 U.S.C. § 922(g). In Bush, 133 F.3d at 455, the court of appeals noted that § 3621(e)(2)(B) "permits but does not compel early release. . . ." Thus, even if plaintiff were to be entitled to a declaration that Program Statement 5162.02 is invalid (not Program Statement 5330.10, as plaintiff alleges), such a ruling would not call into question the validity of his confinement. But plaintiff is not entitled to such a ruling because the issue already has been decided against him.

In Parsons v. Pitzer, 149 F.3d 734 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit held

> The BOP's program statements are internal agency interpretations of its statutory regulations." Program Statement 5162.02 . . . lists numerous offenses and categorizes them as either crimes of violence in all cases or crimes of violence in some cases depending upon the facts in a particular case. . .The statement specifically lists a violation of 18 U.S.C. § 922(g) as a crime of violence in all cases. The BOP's program statement does not expand the definition of the term "crime of violence" as that term is used in 18 U.S.C. § 924(c)(3); rather it identifies those crimes that fall within either category of crimes of violence. There is nothing inconsistent with the Bureau's regulation as compared to its interpretation of that regulation, as articulated in the program statement. The BOP's interpretation does not violate either the Constitution or a federal statute, and therefore we must give the agency's interpretation its due deference.

Therefore, plaintiff fails to state a claim that the Bureau of Prisons violated the Administrative Procedure Act by failing to reasonably interpret 18 U.S.C. § 3621(e)(2)(B)'s "nonviolent offense" provision to preclude persons convicted of violations of 18 U.S.C. § 922(g).

ORDER

IT IS ORDERED that

1. This action is DISMISSED pursuant to 28 U.S.C. § 1915A because plaintiff's claims of violation of the Administrative Procedure Act are either legally meritless or must be raised in the context of a habeas corpus action.

2. The clerk of court is directed to enter judgment for defendants and close this case.

3. 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 failure to choose the correct procedural vehicle for

raising a claim is not one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g).

Entered this 17th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge