

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

EDWIN CLAY,

Petitioner,

v.

JOSEPH SCIBANA,

Respondent.

ORDER

04-C-631-C

In this civil action, petitioner challenges the Federal Bureau of Prisons' practice of deducting 50% of his monthly income under the Inmate Financial Responsibility Program. He contends that the practice violates 18 U.S.C. § 3572(d), which has been interpreted to bar a sentencing court from delegating the task of setting a restitution payment schedule. In an order dated October 27, 2004, I held that petitioner could not challenge the legality of the sentencing judge's alleged delegation of authority in this court. Such a challenge calls into question the legality of petitioner's sentence and for that reason, can be brought only in the court that sentenced petitioner and only pursuant to 28 U.S.C. § 2255. However, I also held that petitioner could bring a challenge to the Bureau's action in setting a withholding schedule on the ground that the Bureau was usurping judicial authority. See

Matheny v. Morrison, 307 F.3d 709, 711-12 (8th Cir. 2002). This challenge would attack the execution rather than the imposition of a sentence and would not be subject to the jurisdictional requirements of § 2255.

I gave petitioner until November 22, 2004, in which to inform the court whether he wished to have his complaint construed as a petition for habeas relief under § 2241, in which case I would deny his petition, or a civil action under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), in which case he would be subject to the 1996 Prison Litigation Refrom Act and the act's requirement that he pay the civil action filing fee of \$150 rather than the \$5 filing fee for habeas petitions. In response, petitioner submitted a motion indicating that he wished his petition be treated as a Bivens action. In an order dated November 23, 2004, I accepted petitioner's choice and gave him until December 13, 2004, in which to pay \$16.58 as an initial partial payment of the \$150 fee.

Petitioner has now paid the initial partial payment due required under § 1915(b)(1). This payment was required before I could decide definitively whether petitioner would be allowed to proceed in forma pauperis in this action. I now conclude that petitioner should be allowed to proceed. As I noted in the order of October 27, 2004, it is well settled in this circuit that although a sentencing court may not delegate authority to set an installment payment schedule, United States v. Pandiello, 184 F.3d 687, 688 (7th Cir. 1999), it may choose to provide for immediate payment of the fine, in which case the Bureau of Prisons

is within its rights to use the Inmate Financial Responsibility Program to insure that inmates make good-faith progress toward satisfying their court-ordered restitution obligation, McGhee v. Clark, 166 F.3d 884, 886 (7th Cir. 1999). Thus, if it turns out that petitioner's sentencing judge required immediate payment of petitioner's restitution obligation, petitioner's claim will fail. However, because there is no indication in petitioner's complaint that this was the case, I must construe his complaint liberally to allege that the Bureau of Prisons is over stepping its bounds. Therefore, petitioner will be allowed to proceed in forma pauperis. See id. (suggesting that Bureau's withholding schedule may not conflict directly with sentencing judge's restitution order).

Petitioner submitted documentation of exhaustion of administrative remedies with his complaint. I did not consider those papers to be a part of petitioner's complaint. They are being held in the file of this case in the event respondents wish to examine them.

In addition, petitioner has filed a motion for appointment of counsel in this case. I stayed a decision on this motion earlier. I will now lift that stay and deny the motion. Before the court can appoint counsel in a civil action such as this, it must consider whether the petitioner is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). As I noted in the order dated December 1, petitioner has

demonstrated an ability to locate and comprehend appropriate legal authority and advance coherent arguments, suggesting that he is not in need of counsel. Furthermore, there is no reason to think that the appointment of counsel would make a difference in this case. The Inmate Financial Responsibility Program “has been uniformly upheld against constitutional attack” in the past. McGhee v. Clark, 166 F.3d at 886. Finally, the issue in this case is extremely narrow: what did petitioner’s sentencing judge order with respect to restitution payments and does the Federal Bureau’s practice of withholding 50% of petitioner’s monthly income conflict directly with this order? These are not issues of great complexity and certainly not beyond petitioner’s demonstrated capacity to represent himself.

ORDER

IT IS ORDERED that

1. Petitioner Edwin Clay is GRANTED leave to proceed on his claim that respondent Joseph Scibana usurped judicial discretion by deducting 50% of petitioner’s monthly income under the Inmate Financial Responsibility Program.
2. The stay on plaintiff’s motion for appointment of counsel is lifted and the motion is DENIED.
3. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will

be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

4. Petitioner should keep 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.

5. The unpaid balance of petitioner's filing fee is \$133.42; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

6. The court will arrange for service of petitioner's complaint on respondent.

Entered this 31st day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge