IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDRE CALMESE,

ORDER

Petitioner,

04-C-946-C

v.

PROB. OFF. CRAIG LEFFLER;
SUP'S DIANNE BINK and DIONNE BOEDEKER;
WARDEN JOHN HUSZ; and
REGIONAL CHIEF JAN CUMMINGS,

Respondents.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner 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.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972), and grant leave to proceed if there is an arguable basis in law or fact for a claim. Neitzke v. Williams, 490 U.S. 319 (1989). However, if the action is frivolous or malicious, fails to state a claim upon

which relief may be granted or seeks monetary relief from a defendant who is immune from such relief, the case must be dismissed promptly pursuant to 28 U.S.C. § 1915.

Petitioner has submitted attachments to his complaint that are necessary to understand his claims. I will consider these submissions as part of his pleading. Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002). In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Andre Calmese is an individual residing at 505 Conklin Place in Madison, Wisconsin. Respondent Craig Leffler is petitioner's probation officer. Respondents Dianne Bink and Dionne Boedeker are liaisons with the Wisconsin Department of Corrections. Respondent John Husz is warden of the Milwaukee Secure Detention Facility and respondent Jan Cummings is the Regional Chief for Milwaukee Region Community Corrections.

Petitioner was taken into custody on January 28, 2004 for alleged violations of his probation and held at the Milwaukee Secure Detention Facility in Milwaukee, Wisconsin. He received legal revocation papers but did not receive a preliminary hearing at that time. Petitioner believed his incarceration was unlawful and wrote to respondents Bink, Boedeker, Husz and Cummings to express his disapproval. On February 19, 2004, respondent Leffler

wrote to petitioner, explaining that petitioner had been taken into custody because he was missing group meetings in his assigned treatment program in violation of the terms of his probation agreement. Leffler told petitioner that his revocation hearing was scheduled for March 11, 2004 and wrote the following:

> In your letter you indicate that you have been denied the right of due process and the right to a preliminary hearing. When you were served with the DOC-414 on 2/12/04, you should have been read your hearing rights. These rights are located on the first page of the Notice of Violation and Statement of Hearing Rights under the heading Hearing Rights. Under normal circumstances you would have had the right to a Preliminary Hearing, however you have given a signed statement admitting you did not go to out-patient treatment. In that regard, you have admitted allegation #1 [of the alleged probation violations.]

On February 24, 2004, petitioner received a letter from Barbara K. Due, an attorney with the Wisconsin State Public Defender's Office. Due informed petitioner that she had been assigned to represent him in connection with his probation revocation and that his hearing was scheduled for March 24, 2004. At the bottom of this letter, the following has been written in what appears to be petitioner's handwriting: "held from 1/28/04 to 3/24/04 < 56 days." Petitioner does not indicate whether his revocation hearing ever occurred or whether his probation was revoked. In any event, I conclude from the handwritten note that he was released after 56 days of confinement and that his probation was not revoked.

Petitioner wrote another letter to respondent Husz on February 26, 2004 in which he claimed that his constitutional rights were being violated. The letter was referred to

respondent Boedeker, who wrote a letter to petitioner dated March 10, 2004. At the bottom of this letter the following has been written in what appears to be petitioner's handwriting: "Why am I still here," "I meet with Ms. Due on 3/10/04 - In which I was told the Dept. had no plans or grounds to rev. me just to kept me until 3/24/04 - discharge."

DISCUSSION

A. Due Process and Probation Revocation

An individual on parole has a protectible liberty interest associated with his status as a parolee. Morrissey v. Brewer, 408 U.S. 471, 482 (1972). Consequently, parole may not be revoked without due process of law. In Morrissey, 408 U.S. at 485-88, the Supreme Court held that persons detained because of suspected parole violations are entitled to two separate hearings under the due process clause of the Fourteenth Amendment: a preliminary hearing soon after the individual's initial detention and a hearing before a final decision on revocation is made. These rights were extended to persons on probation in Gagnon v. Scarpelli, 411 U.S. 778 (1973). Because I understand petitioner's allegations as conceding that his probation was not revoked, I will limit discussion of his due process claim to his right to a preliminary hearing. The requirements of this preliminary hearing were laid out in general terms in Morrissey. The primary function of this initial inquiry is "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has

committed acts that would constitute a violation of parole conditions." Morrissey, 408 U.S. at 485. The Court stated that the parolee was entitled to receive adequate notice of the hearing, present evidence and confront adverse witnesses before a detached decision-maker and receive a written summary of the hearing officer's findings. Id. at 486-87.

I understand petitioner to allege that he was detained from January 28, 2004 to March 24, 2004, at which time he was released and that he did not receive a preliminary hearing after his initial detention in violation of the due process clause of the Fourteenth Amendment. Petitioner alleges that respondent Leffler told him that he was not entitled to a preliminary hearing after he was taken into custody because he had signed a statement admitting that he violated the terms of his probation in at least one respect. If petitioner admitted to an act that would constitute grounds for revocation of his probation, the purpose behind the preliminary hearing would be served and he would have no constitutional claim. However, the handwriting at the bottom of the March 10, 2004 letter from respondent Boedeker can be construed liberally to allege that petitioner was detained without probable cause or reasonable suspicion to believe that he had violated any of the conditions of his probation. Therefore, I will grant petitioner leave to proceed on his due process claim. Because it is impossible to ascertain which respondents were personally involved in the decision to detain petitioner, I will allow this claim to go forward against all five respondents. However, I note that this claim may be vulnerable to dismissal because of

lack of personal involvement of the named defendants. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation).

B. Fourth Amendment

Individuals on probation are not entitled to the full protections of the Fourth Amendment accorded to free citizens. Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (probationers do not enjoy "'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'") (citing Morrissey, 408 U.S. at 480); see also United States v. Knights, 534 U.S. 112 (2001). The seizure of a probationer need not be supported by probable cause to pass constitutional muster. In Knox v. Smith, 342 F.3d 651, 657 (7th Cir. 2003), the Court of Appeals for the Seventh Circuit stated that the seizure of a parolee "based on only reasonable suspicion" that the parolee had violated a term of his mandatory supervised release agreement did not violate the Fourth Amendment.

Applying this standard, and again construing the allegations of the complaint liberally in petitioner's favor, I conclude that petitioner has stated a claim under the Fourth Amendment because he alleges that respondents had no grounds for detaining him. As noted above, because it is impossible to ascertain which respondents were personally

involved in the decision to detain petitioner, I will allow this claim to go forward against all five respondents. However, as with petitioner's due process claim, I note that this claim may be vulnerable to dismissal because of lack of personal involvement.

C. False Imprisonment

Finally, I note that Wisconsin recognizes the intentional tort of false imprisonment, which is defined as the unlawful restraint by one person of the physical liberty of another. Herbst v. Wuennenberg, 83 Wis. 2d 768, 774, 266 N.W.2d 391, 395 (1978); Lane v. Collins, 29 Wis. 2d 66, 69, 138 N.W.2d 264, 266 (1965). The Wisconsin Supreme Court has adopted the definition of false imprisonment found in Restatement (Second) of Torts, § 35. Maniaci v. Marquette University, 50 Wis. 2d 287, 295, 184 N.W.2d 168, 172 (1971). According to the Restatement, an individual is liable for false imprisonment if (1) he acts intending to confine another within boundaries fixed by the actor; (2) his act directly or indirectly results in such confinement; and (3) the person confined is conscious of the confinement or is harmed by it. Petitioner's allegations are sufficient to state a claim for false imprisonment under Wisconsin law, although I repeat that it is unclear which of the respondents is responsible for petitioner's detention. For now, I will exercise supplemental jurisdiction over this claim because it is arises from the same facts as the claims over which this court has original jurisdiction. 28 U.S.C. 1367.

ORDER

IT IS ORDERED that petitioner Andre Calmese's request for leave to proceed in forma pauperis against respondents Craig Leffler, Dianne Bink, Dionne Boedeker, John Husz and Jan Cummings is GRANTED with respect to petitioner's claims that his detention in the Milwaukee Secure Detention Facility from January 28, 2004 to March 24, 2004 violated his rights under the Fourth and Fourteenth Amendments and constituted false imprisonment under Wisconsin law.

For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. 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.

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.

Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney

General for service on the state defendants.

Entered this 13th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge