

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

KENNETH JONES,

Plaintiff,

v.

ORDER
05-C-527-C

K. ROSSI BURTON, CHRISTINE
HINES and RICK HILGEDORF,
in their individual/personal and
official capacities,

Defendants.

Plaintiff is a federal prisoner currently confined at the Federal Correctional Institution in Oxford, Wisconsin. He filed this civil action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and 28 U.S.C. § 1331, seeking return of a wrist watch he believed prison officials had confiscated in violation of his procedural due process rights. In an order dated September 26, 2005, I screened plaintiff's complaint under 28 U.S.C. § 1915A and concluded that it failed to state a claim upon which relief may be granted. In particular, I found that because plaintiff had available to him a three-tiered inmate complaint review process in which to challenge the propriety of the

taking of his watch, he had a post-deprivation remedy that satisfied due process. Now plaintiff has filed a notice of appeal. The notice is not accompanied by the \$255 fee for filing an appeal. Therefore, I construe the notice as including a request for leave to proceed in forma pauperis on appeal.

Plaintiff's request for leave to proceed in forma pauperis on appeal is governed by the 1996 Prison Litigation Reform Act. This means that this court must determine first whether plaintiff's request must be denied either because he has three strikes against him under 28 U.S.C. § 1915(g) or because the appeal is not taken in good faith. Plaintiff does not have three strikes against him. However, in Haines v. Washington, 131 F.3d 1248 (1997), the court of appeals suggested that when a district court dismisses an action under 28 U.S.C. § 1915A for failure to state a claim, it ordinarily should not find good faith for an appeal except in rare circumstances, which the district court is to articulate in allowing the appeal to go forward. This is such a case.

In cases filed by *state* prisoners who claim a deprivation of property without due process and who seek the return of the property, I have found consistently that Wisconsin's replevin statutes provide the prisoners with a procedure to recover property. For this reason, they cannot succeed on a claim that the state has failed to offer them a suitable post-deprivation remedy. Here, however, the plaintiff is a *federal* prisoner. If he wanted money damages in lieu of his watch, I would find his due process claim legally meritless because the

Federal Tort Claims Act provides him with a constitutionally adequate post-deprivation remedy. However, there is no federal replevin statute through which plaintiff might recover the property he wants returned. His only post-deprivation remedy is an administrative remedy provided by the Bureau of Prisons. Although I have determined in this lawsuit that the Bureau of Prisons' inmate complaint procedures constitute an adequate post-deprivation remedy, the court of appeals may differ with this opinion. Therefore, I do not intend to certify that plaintiff's appeal is not taken in good faith.

The only other hurdle to plaintiff's proceeding with his appeal in forma pauperis is the requirement that he make an initial partial payment of the filing fee that has been calculated from a certified copy of his trust fund account statement for the six-month period immediately preceding the filing of his notice of appeal. 28 U.S.C. § 1915(a)(2). Plaintiff has not submitted the necessary trust fund account statement. Until he does so, I cannot determine whether he is indigent and, if he is, the amount of the initial partial payment he must make.

Accordingly, IT IS ORDERED that plaintiff may have until November 16, 2005, in which to submit a certified copy of his trust fund account statement for the six-month period beginning approximately April 24, 2005 to approximately October 24, 2005. If, by November 16, 2005, plaintiff fails to submit the required trust account statement or show cause for his failure to do so, I will deny his request for leave to proceed in forma pauperis

on the ground that he has failed to show that he is entitled to indigent status on appeal.

Entered this 27th day of October, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge