

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

JULIAN MILLER,

Petitioner,

v.

FRED LINDER, MATTHEW FRANK, CHRISTINE
TANNER, JOHN PAQUIN, NATHAN WHITE and
UNIDENTIFIED DOUGLAS COUNTY JAIL STAFF,

Respondents.

OPINION and ORDER

05-C-539-C

This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Waupun Correctional Institution in Waupun, 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. 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.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Julian Miller is currently incarcerated at the Waupun Correctional Institution in Waupun, Wisconsin. Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections. Respondent Fred Linder is Jail Administrator at the Douglas County jail. Respondents Christine Tanner, John Paquin and Nathan White are employed by the Department of Corrections as Contract Monitoring Unit Specialists.

The Department of Corrections has a contract with the Douglas County jail to use the jail to house inmates in the department's custody. In February 2005, petitioner was assessed and evaluated at the Dodge Correctional Institution and classified "medium custody." That same month, he was transferred to the Douglas County jail for temporary placement until space became available at the Jackson Correctional Institution or the Prairie du Chien Correctional Institution. After arriving at the jail, petitioner was given a rulebook

and classified “maximum custody” under the jail’s classification system.

On April 13, 2005, petitioner participated in a “nonviolent sitdown strike” in the jail’s D Block along with a dozen other inmates. A Correctional Emergency Response Team raided D Block, at which point petitioner ran back to his cell. At some point after the raid, an unidentified staff member yelled, “You have 30 days lockdown!” Pursuant to the lockdown, petitioner was placed in “supermax” status at the jail. Before the lockdown, petitioner could be in the dayroom for 14 hours each day. During the lockdown, he was allowed out of his cell for only one hour each day. He was not allowed to use the telephone, library or law library and was not given recreation or allowed to purchase items from the canteen. In addition, he could not participate in any programs and was not allowed to attend church. Petitioner did not receive a disciplinary ticket from respondent Linder or a hearing at the same time pretrial detainees received tickets and hearings. He remained in “supermax” status at the jail from April 13 to April 28, 2005.

At some point later, petitioner was transferred from the Douglas County jail to the Jackson Correctional Institution. Respondent Linder sent an email to respondent White stating that petitioner’s placement in lockdown on April 13, 2005 was not a disciplinary sanction but rather a change in his classification status. Respondent White contacted respondents Tanner and Paquin. On May 9, 2005, the Contract Monitoring Unit faxed respondent Linder’s email to Lt. Burlingame at the Jackson Correctional Institution. While

petitioner was in general population at Jackson, he was placed in temporary lock-up. He did not receive notice before being placed in temporary lock-up. On May 19, 2005, petitioner received a disciplinary ticket for participating in a riot at the Douglas County jail and disobeying orders. On May 25, 2005, petitioner received a sentence of 240 days in disciplinary segregation, referral to the Program Review Committee and reassignment to the Wisconsin Secure Program Facility.

DISCUSSION

I understand petitioner to allege that his due process rights were violated when he was (1) placed in lockdown at the Douglas County jail without receiving notice or a hearing; (2) not given notice before being placed in temporary lock-up at the Jackson Correctional Institution; and (3) sentenced to be transferred to the Wisconsin Secure Program Facility. I understand also that petitioner is alleging that his rights under the equal protection clause were violated when he did not receive a disciplinary ticket or hearing at the same time as the pretrial detainees involved in the strike. Also, I understand petitioner to allege that his rights under the double jeopardy clause were violated because he was placed in lockdown at the Douglas County jail and later sentenced to a term in segregated confinement after he was transferred to the Jackson Correctional Institution. Finally, I understand petitioner to allege several violations of his rights under Wisconsin law.

A. Due Process

1. Placement in lockdown at Douglas County jail

Petitioner alleges that an unidentified staff member at the Douglas County Jail and respondent Linder violated his due process rights by failing to provide him a hearing before placing him in lockdown, where his privileges were temporarily revoked. Before petitioner is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. DeWalt v. Carter, 224 F.3d 607, 613 (7th Cir. 2000). Petitioner alleges that he was placed in lockdown for approximately two weeks after participating in a nonviolent sitdown strike at the Douglas County jail. Placement in temporary lockdown does not implicate a liberty interest. Russ v. Young, 895 F.2d 1149 (7th Cir. 1990). Temporary lockdown of the sort petitioner allegedly experienced is designed to isolate inmates suspected of wrongdoing and allow prison officials to investigate disturbances to ascertain whether further disciplinary action is needed. When a disciplinary investigation is ongoing, prison officials are not constitutionally required to provide inmates with procedural safeguards before removing them from the general prison population. Because petitioner's placement in a temporary lockdown status does not implicate a liberty interest, he will be denied leave to proceed on this claim.

2. Lack of notice before placement in temporary lockup

I understand petitioner to allege that his due process rights were violated because he was not given notice or a hearing before being placed in temporary lockup at the Jackson Correctional Institution. Because placement in temporary lockup does not implicate a liberty interest, Russ, 895 F.2d 1149, petitioner was not entitled to notice or a hearing prior to being placed in that status. Therefore, he will be denied leave to proceed on this claim.

3. Transfer to Wisconsin Secure Program Facility

Petitioner appears to allege that after he was found guilty of the charges stemming from the incident at the Douglas County jail, he was sentenced to reassignment at the Wisconsin Secure Program Facility. From previous cases filed in this court, I am aware that the facility is the most secure correctional institution in the state, that inmates housed there live in extremely isolating conditions and that almost every aspect of their daily life is controlled and monitored. In a recent decision, the Supreme Court held that a prison inmate had a liberty interest in avoiding assignment to Ohio's "supermax" prison, in which inmates are housed in conditions similar to those at the Wisconsin Secure Program Facility. Wilkinson v. Austin, 125 S. Ct. 2384 (2005). Therefore, I understand petitioner to allege that his assignment to the facility violates due process. However, petitioner has not stated a due process claim because he has not made any allegations regarding the process he received before being sentenced to placement at the facility. He alleges only that he was

issued a disciplinary ticket at the Jackson Correctional Institution and that he was sentenced to 240 days in segregated confinement, a referral to the Program Review Committee and an assignment to the facility. Because he has not alleged that his disciplinary hearing and subsequent reassignment were not accompanied by proper procedures, petitioner has failed to state a claim and will be denied leave to proceed.

B. Equal Protection

I understand petitioner to allege that his rights under the equal protection clause were violated when he did not receive a disciplinary ticket or disciplinary hearing at the same time the pretrial detainees involved in the sitdown strike received tickets and hearings. However, he concedes that he received a disciplinary ticket for participating in a riot and disobeying orders on May 19, 2005, after he had been transferred from the jail to the Jackson Correctional Institution. Thus, petitioner's equal protection claim turns on whether he was entitled to notice and a hearing at the same time as the other persons who were involved in the sitdown strike. The equal protection clause does not entitle petitioner to the same process at the same time as the other individuals in custody at the same jail. Moreover, petitioner has not alleged that he was treated differently from similarly situated individuals. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) (equal protection clause prohibits government actors from applying different legal standards to

similarly situated individuals). Petitioner alleges that he was a state prisoner detained in the Douglas County jail temporarily. This means that he is not similarly situated to pretrial detainees in the custody of Douglas County. Even if petitioner was similarly situated to the pretrial detainees, the Constitution does not require prison officials to treat inmates identically down to the smallest detail. The fact that petitioner's discipline was not determined until he had been transferred into a state correctional institution does not mean that he was the victim of the intentional discrimination or uneven enforcement of the laws prohibited by the equal protection clause. Because his allegations are insufficient to state an equal protection claim, petitioner will be denied leave to proceed on this claim.

C. Double Jeopardy

I understand petitioner to allege that his rights under the double jeopardy clause were violated because he was placed in lockdown at the Douglas County jail and later sentenced to 240 days in segregated confinement after he was issued a disciplinary ticket for participating in a riot at the Jackson Correctional Institution. "The Fifth Amendment's Double Jeopardy Clause protects individuals against three types of violations: prosecuting a defendant again for the same conduct after an acquittal; prosecuting a defendant for the same crime after conviction; and subjecting a defendant to multiple punishments for the same crime." Garrity v. Fiedler, 41 F.3d 1150, 1151-52 (7th Cir. 1994). None of these

three situations is present in this case. The fact that petitioner was placed in a temporary lockdown and later sentenced to a period of segregated confinement does not mean that he has been punished more than once under the Fifth Amendment because prison discipline does not constitute “punishment” for purposes of the double jeopardy clause. Hudson v. United States, 522 U.S. 93, 99 (1997) (“The Clause protects only against the imposition of multiple criminal punishments for the same offense”). Because petitioner’s allegations fail to state a double jeopardy claim, he will be denied leave to proceed on this claim.

D. State Law Claims

Finally, I understand petitioner to allege that the conditions of his confinement in lockdown at the Douglas County jail violated several provisions of the Wisconsin Administrative Code. Because I am denying plaintiff leave to proceed on his federal claims, I will decline to exercise supplemental jurisdiction over his state law claims. If petitioner wishes to pursue these claims, he may do so in state court.

ORDER

IT IS ORDERED that

1. Petitioner Julian Miller’s request for leave to proceed in forma pauperis on his due process, equal protection and double jeopardy claims raised in this lawsuit is 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 \$248.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will not be recorded against petitioner pursuant to § 1915(g) because he has alleged state law claims that a state court might find meritorious.

4. The clerk of court is directed to close the file.

Entered this 20th day of October, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge