

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

WENDELL DWAYNE O'NEAL
202 Honorway
Madison, Alabama 35758

Petitioner,

v.

TONY ATWAL, MARK F. ANDERSON,
LAWRENCE HAMMERLING and STATE
PUBLIC DEFENDER OFFICE,
2221 University Ave., Southeast
Suite 425
Minneapolis, MN 55414,
jointly and severally,

Respondents.

This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. §§ 1983, 1985 and 1988. Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the fees and costs of instituting this lawsuit.

In addressing any pro se litigant's complaint, the court must construe the complaint

liberally, Haines v. Kerner, 404 U.S. 519, 521 (1972), and grant leave to proceed if there is an arguable basis for a claim in fact or law. 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 against a defendant who is immune from such relief, the case must be dismissed promptly pursuant to 28 U.S.C. § 1915(e)(2). Unfortunately for petitioner, his allegations fail to state a claim under §§ 1983 or 1985.

Petitioner asserts six claims in his proposed complaint and a supplement he filed with the court on December 27, 2005. Although his allegations are not entirely clear, it appears that petitioner pled guilty to a charge of attempted robbery in Minnesota on December 9, 2004 and later sought to have his sentence reduced and appeal his conviction on the ground that his guilty plea was wrongfully obtained. He has named as respondents three attorneys employed as public defenders by the Minnesota Office of the State Public Defender, Tony Atwal, Mark Anderson and Lawrence Hammerling. It appears that respondent Atwal represented petitioner in connection with his guilty plea.

In his first two claims, petitioner alleges that respondent Atwal (1) assured him that his sentence of 28 months was legal when in fact it was the result of an erroneous application of Minnesota's sentencing guidelines and (2) declined to represent him in connection with either his appeal or his post-conviction motion to vacate his plea, leaving petitioner to research, draft and file his own post-conviction motion. Petitioner alleges that respondent

Atwal's actions and failure to represent him denied him effective assistance of counsel. These allegations are insufficient to state a claim under 42 U.S.C. § 1983. To state a claim under that statute, a plaintiff must allege that a party acting under color of state law deprived the plaintiff of a federal right. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Lehn v. Holmes, 364 F.3d 862, 872 (7th Cir. 2004). It is well settled that a public defender does not act under color of state law for the purpose of § 1983 when providing representation to an indigent client. Polk County v. Dodson, 454 U.S. 312, 317 (1981); Sceifers v. Trigg, 46 F.3d 701, 704 (7th Cir. 1995). (For the same reason, petitioner's allegation that the Minnesota State Public Defender's Office failed to properly train and supervise respondents Atwal, Anderson and Hammerling is insufficient to state a claim.)

In the supplement to his complaint, petitioner alleges that respondent Atwal "sought to deny plaintiff assistance on appeal . . . to conceal events, and protect the integrities of police, district attorney, physicians, trial counsel, magistrate judges, alleged complainants, and other interested, or involved parties, which or whom caused arrests, and orchestrated aforesaid unlawful conviction." ¶ 9. Further, he alleges that respondent Anderson "collaborated, conspired, or constructively sought to acquiesce/defend defendants Atwal and State Public Defenders Office's denials of appellate representation to plaintiff in (2) two different cases of unlawful conviction," Id. at ¶ 12, and intercepted a "confidential fax" sent to respondent Hammerling requesting appointment of counsel and payment for petitioner's

court records in connection with his appeal. From these allegations, I understand petitioner to allege that respondents engaged in a conspiracy to deprive him of his right to effective assistance of counsel under 42 U.S.C. § 1985. Section 1985(3) provides in relevant part that if “two or more persons in any state or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation.” Although the statute does not contain an explicit requirement of state action or participation by a state actor, the Supreme Court has stated that the statute “does not apply . . . to private conspiracies that are ‘aimed at a right that is by definition a right only against state interference,’ but applies only to such conspiracies as are ‘aimed at interfering with rights . . . protected against private, as well as official, encroachment.’” Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 278 (1993) (quoting United Brotherhood of Carpenters and Joiners of America v. Scott, 463 U.S. 825, 833 (1983)). See also Browkaw v. Mercer County, 235 F.3d 1000, 1024 (7th Cir. 2000). In other words, because respondents Atwal, Anderson and Hammerling are not state actors, petitioner must allege that they conspired to deprive him of a right that the Constitution protects from private as well as governmental interference in order to state a claim under § 1985(3). Petitioner alleges that respondents conspired to deprive him of his right to effective assistance of counsel on appeal. The Constitution prevents only the

government from interfering with that right. Therefore, petitioner's allegations fail to state a claim.

Finally, petitioner alleges a claim for intentional infliction of emotional distress. This is a state law claim and petitioner does not indicate which state's law is the source for his claim. However, a plaintiff does not have to plead legal theories or identify governing law in his complaint. Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005). Petitioner's allegations suggest that federal jurisdiction exists over this claim under the diversity statute, 28 U.S.C. § 1332 (a)(1), which requires that petitioner and respondents be citizens of different states and that more than \$75,000.00 be at stake. Petitioner alleges that respondents Atwal, Anderson and Hammerling are employed in Minnesota. For himself, he lists an address in Madison, Alabama. (Petitioner appears to have filed his complaint in this court during a short time that he was residing in a homeless shelter in this city.) He requests damages of \$100,000,000 (one hundred million) from each respondent. At this stage of the proceedings, I find these allegations sufficient to suggest that this court has jurisdiction over petitioner's claim. Therefore, I will allow him to proceed in forma pauperis on this claim.

Petitioner should be aware that although I have granted him leave to proceed on his state law claim, it is unlikely that his case will survive a motion to dismiss brought by respondents. Nothing in petitioner's allegations suggests that his state law claim arose in this district or that respondents are subject to personal jurisdiction in this state. Finally, I

will caution petitioner that it is his responsibility to keep this court and respondents advised of any change in his address. His failure to remain in communication with this court about his whereabouts may result in dismissal of the case for petitioner's failure to prosecute.

ORDER

IT IS ORDERED that

1. Petitioner Wendell Dwayne O'Neal's request for leave to proceed in forma pauperis is DENIED with respect to his claims under 42 U.S.C. §§ 1983 and 1985(3);

2. Petitioner's request for leave to proceed in forma pauperis is GRANTED with respect to his state law claim of intentional infliction of emotional distress.

3. Service of this complaint will be made promptly after petitioner submits to the clerk of court one completed marshal service form and one completed summons for each respondent, plus one (1) additional summons including the names of all respondents. Enclosed with a copy of this order is a set of the necessary forms. If petitioner fails to submit the completed marshals service and summons forms before February 13, 2006, his complaint will be subject to dismissal for his failure to prosecute.

In addition, petitioner should be aware of the requirement that he send each respondent a copy of every paper or document that he files with the court. Once respondents' attorney is known, petitioner should send one copy of all documents to the

lawyers rather than to the respondents directly. Petitioner should retain 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. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to each respondent or to respondents' attorney, once he or she is known.

Entered this 13th day of January, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge