

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

ORLANDO LARRY,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS
and JOANNE ANDERSON,

Respondents.

ORDER

06-C-223-C

This is a proposed civil action for monetary relief under 42 U.S.C. § 1983. Petitioner Orlando Larry contends that his due process rights were violated while he was detained at the Dane County jail pending a probation revocation hearing. 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. He does not appear to be a prisoner. His complaint reveals that he is living at a street address in Madison, Wisconsin. Therefore, he is not subject to the 1996 Prison Litigation Reform Act. From the financial affidavit petitioner submitted, I conclude that he 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).

The allegations in petitioner's complaint are succinct. I have reproduced them in their entirety below.

They held me in custody pending a final revocation hearing, (of my probation), long past the perscribed [sic] time limit in which they were allowed to hold me pending the hearing.

On October 21, 2005, I was placed on a probation hold but the hearing didn't take place until Feb. 2006, I was held in custody the entire time.

In another case petitioner has filed in this court, Larry v. Dane County Jail, 06-C-197-C, petitioner alleged that he was detained at the Dane County jail during this time. Petitioner attached to his complaint in the present case a document with the notation "Notice of Rescheduled Final Revocation Hearing." According to this document, petitioner's revocation hearing was scheduled to occur on January 24, 2006 but was rescheduled for February 1, 2006. Also attached to petitioner's complaint is a copy of the decision of the administrative law judge who presided at his revocation hearing. That document indicates that petitioner's hearing was held on February 1, 2006 and that petitioner was represented by counsel.

Further, the document indicates that petitioner was charged with four violations of his parole: one count of failing to report to his probation officer, two counts of having contact with a woman named Lakeshia Collier and one count of driving a vehicle without a valid license. At the hearing, petitioner admitted not reporting to his probation officer on one occasion and to having contact with Collier on more than one occasion. The administrative law judge revoked petitioner's probation and ordered that he be returned to the Circuit Court for Dane County for sentencing in connection with a case in which petitioner had been convicted of two misdemeanor charges. The judge ordered also that petitioner was to be credited with time served from 2/22/05 to 4/28/05; from 08/09/05 to 08/15/05; and continuously from 10/21/05 to the date of sentencing.

In his request for relief, petitioner appears to seek a declaration that he was held in custody between October 21, 2005 and the time of his final revocation hearing in violation of Wisconsin law. However, petitioner may not pursue a state law claim in this court. This court is concerned only with determining whether his allegations are sufficient to state a claim under federal law. In addition, petitioner asks for money damages "for each day that [he] was held illegally."

As an initial matter, I note that petitioner's complaint is properly filed as a civil action seeking money damages under 42 U.S.C. § 1983. If petitioner were still in custody, and if a decision in his favor would be tantamount to a decision on the validity of his confinement,

his grievance would have to be raised in a petition for a writ of habeas corpus. Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475 488-90 (1973)). Here, however, any claim petitioner might have had that the failure to provide him a preliminary hearing rendered his custody illegal was mooted when petitioner received a final revocation hearing at which he was found guilty of probation violations. The only remedy available to petitioner if he proves respondents violated his due process rights by failing to afford him a preliminary hearing is nominal damages of \$1. He would be unable to prove compensatory damages, because he was credited with the time he served.

After reviewing his allegations and the documents attached to his complaint, I find it possible that petitioner has stated a claim under the due process clause of the Fourteenth Amendment. However, because critical facts are missing, I will require petitioner to provide them before granting him leave to proceed on this claim.

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 is made on revocation. These rights were extended to persons on probation in Gagnon v.

Scarpelli, 411 U.S. 778 (1973).

There is no indication in petitioner's allegations that he received a preliminary hearing after his detention in October 2005. In Morrissey, 408 U.S. at 485, the Court stated that the purpose of the preliminary hearing 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." The Court required that the hearing occur "as promptly as convenient after arrest" and that "someone not directly involved in the case" make the probable cause determination. Id.

The right to a preliminary hearing is not absolute, however. In the wake of Morrissey and Gagnon, courts have highlighted several situations in which a preliminary hearing is not required. Because the hearing is intended to determine whether probable cause exists to detain a probationer, a preliminary hearing is not required if the probationer is not taken into custody pending a final hearing. United States v. Sciuto, 531 F.2d 842, 846 (7th Cir. 1976) (preliminary hearing required only where probationer held in custody pending final revocation hearing). This exception does not apply in the present case because petitioner was held at the Dane County jail after being taken into custody on October 21, 2005. The second situation in which a probationer need not be afforded a preliminary hearing is if a notice of revocation is filed while he is detained pursuant to another criminal charge or to a sentence imposed for a subsequent offense. United States v. Saykally, 777 F.2d 1286,

1287 n.2 (7th Cir. 1985). Again, this exception does not appear to apply in the present case.

Finally, when a probationer admits committing acts that violate the conditions of his probation, a preliminary hearing is not constitutionally required. United States v. Holland, 850 F.2d 1048, 1050-51 (5th Cir. 1988). According to the administrative law judge's decision, petitioner admitted at his final hearing to two of the four violations charged: he had failed to report to his probation officer and he had had ongoing contact with Lakeshia Collier. It is not clear from petitioner's complaint whether he admitted to these things any time before his final hearing. This information is critical to a determination whether petitioner has any chance of proving a due process violation. Accordingly, I will give petitioner a short amount of time to supply this information to the court.

ORDER

IT IS ORDERED that a decision whether to grant petitioner Orlando Larry's request for leave to proceed in forma pauperis is STAYED. Petitioner may have until May 19, 2006, in which to submit a supplement to his complaint indicating whether, within a short time before or after he was placed in custody, he admitted to his probation officer or any other law enforcement officer that he had not reported to his probation officer on or about August 30, 2005, or that he had had contact with Lakeshia Collier. If, by May 19, 2006,

petitioner fails to respond to this order, I will assume that he did admit to at least one violation of the terms of his probation and deny his request for leave to proceed in forma pauperis for his failure to state a claim upon which relief may be granted.

Entered this 12th day of May, 2006.

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