IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ORLANDO LARRY,

Plaintiff,

v.

JoANNE ANDERSON,

Defendant.

OPINION AND ORDER

06-C-223-C

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In this action, plaintiff Orlando Larry contended that he had been denied a preliminary hearing following his detention for violations of the conditions of his probation, in violation of his Fourteenth Amendment right to due process. At the outset, when I screened plaintiff's complaint in an order dated May 12, 2006, I told him that he would not be entitled to a preliminary hearing if sometime soon after he was detained, he admitted to violating one or more conditions of his probation. Therefore, I stayed a decision whether to grant him leave to proceed in forma pauperis on his due process claim and asked him to submit a supplement to his complaint, indicating whether he had admitted to his probation officer or any other law enforcement officer when he was detained that he had engaged in conduct that violated the terms of his probation. A full description of what followed is set

out in this court's order of December 7, 2006. In that order, I granted defendant's motion for summary judgment and ordered plaintiff to show cause why he should not be sanctioned in the amount of $150 for his deliberate failure to disclose the entirety of his written statement to defendant in response to this court's May 12 order directing him to do so. (The missing page of that statement showed that plaintiff had admitted to violating Rule 16 of the conditions of his probation.) Judgment dismissing the case was entered on December 8, 2006.

Now, plaintiff has moved pursuant to Fed. R. Civ. P. 59 to alter or amend the December 8 judgment. In addition, plaintiff has responded to the order to show cause why he should not be sanctioned for deliberately failing to disclose to this court the entirety of his statement to defendant as he was directed to do.

In support of his Rule 59 motion, plaintiff argues that I erred in finding as fact that he was not given a preliminary hearing because he admitted to violating Rule 16 of the conditions of his probation. He contends that he has "new evidence" to prove that defendant told him he was not entitled to a preliminary hearing because he had admitted to violating Rules 3 and 4 of the conditions of his probation, not because he had admitted to violating Rule 16, and that the statement he gave his probation officer does not support a finding that he admitted to violating Rules 3 and 4.

Plaintiff's "new evidence" does nothing to refute the undisputed facts that Rule 16

of plaintiff's conditions of probation required him to report to his agent as directed for scheduled and unscheduled appointments and that plaintiff admitted to violating this rule in the statement he gave to his probation officer following his detention. Therefore, I will deny plaintiff's Rule 59 motion. Moreover, I conclude that plaintiff has not shown cause why he should not be sanctioned for deliberately withholding material information from this court.

In his Rule 59 motion, plaintiff notes that when I ruled on defendant's motion for summary judgment, I found undisputed two statements of fact proposed by defendants: proposed fact #12, that Rule 16 of plaintiff's rules of supervision required him to report to his probation agent as directed for scheduled and unscheduled appointments; and proposed fact #28, that the reason plaintiff was not given a preliminary hearing was because he admitted to violating Rule 16 in his written statement of October 31, 2005. In support of the motion, plaintiff has submitted a document he describes as "new evidence." It is an unauthenticated copy of a form document titled "Waivers." At the top of the form, plaintiff's name has been typed into a box marked "Offender Name." Midway down the page is a section titled, "Decision on Offender's Custody after Waiver of Preliminary Hearing or When no Preliminary Hearing is Required for the Following Reasons." Below this heading is a box checked next to the statement, "You have given a signed statement admitting the violations #3 and #4." The form is signed by a Kathy Dayton on November

1, 2005.

As an initial matter I note that the "Waiver" form is not "new evidence" that plaintiff discovered after his case was closed. It is an identical copy of a document he submitted to the court with a motion for summary judgment he filed after defendant's motion for summary judgment was ripe for decision. In an order dated October 13, 2006, I told plaintiff that I was disregarding his separate motion because it concerned the precise issue the parties had addressed in connection with defendant's motion. Subsequently, plaintiff moved for reconsideration of the decision not to allow him to file his own motion. At that time, plaintiff complained that he had not received defendant's response to his request for production of documents until after briefing had closed on defendant's motion. Curiously, he did not point out then that one of those documents would show that he had been told he was not entitled to a preliminary hearing because in the statement he provided to his probation officer he had admitted to violating Rules 3 and 4. Even assuming plaintiff had drawn the court's attention to this possible discrepancy in defendant's proposed finding of fact #28 and that I had allowed him to submit the document for consideration in connection with defendant's motion, it would not have changed the outcome of the motion.

True, Kathy Dayton's suggestion on the November 1, 2005 "Waiver" form that plaintiff had given a signed statement admitting to violations of Rules 3 and 4 of the conditions of his probation appears to be out of sync with the questions plaintiff had been

asked to answer in his statement. Rule 3 states, "You shall make every effort to accept the opportunities and counseling offered by supervision." Rule 4 states, "You shall inform your agent of your whereabouts and activities as he/she directs." In the December 7 opinion and order, I found as material and undisputed that on the three-page written statement that plaintiff had given defendant, the following question and plaintiff's answer appeared:

> Did you report to your agent on August 30, 2005 as scheduled or thereafter, until your arrest on 10/21/05? Why not?
>
> I reported by telephone that I was aware of the fact that I may've missed our scheduled appointment due to me starting work and training and that if there was anything specific that she wanted me to do, to leave me a message on my answering service. Her message stated Orlando Larry contact Joanne Anderson at 266-???? 266-5079

I found that plaintiff's admission to missing an appointment was an admission to a violation of a condition of plaintiff's probation, in particular, Rule 16, which states, "You shall report to your agent as directed for scheduled and unscheduled appointments." Clearly, the question was not tailored to discern with precision whether plaintiff would admit to failing to make an effort to accept "opportunities and counseling offered by supervision" (Rule 3) or failing to inform his probation officer of his whereabouts and activities as she directed (Rule 4). But that is neither here nor there. If plaintiff admitted to violating one of the terms of his probation, which I found that he did, he was not constitutionally entitled to a preliminary hearing. The law governing waivers to a preliminary hearing does not require

that a plaintiff be afforded a preliminary hearing if government officials misstate the particular condition of probation that the probationer admitted to violating. As I have explained to plaintiff already, the purpose of a 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." Morrissey v. Brewer, 408 U.S. 471, 485 (1972). Plaintiff's response to the question posed to him concerning his failure to report for a scheduled appointment constituted an admission to a violation of Rule 16 of the conditions of his probation. It was proper for this court to conclude that defendant did not violate plaintiff's constitutional right to a preliminary hearing.

With disjointed logic, plaintiff argues that the waiver form also proves that he was justified in failing to disclose to this court at the outset of his case the full statement he gave to defendant following his detention and that, therefore, he should not be subject to a $150 sanction. As I understand plaintiff's argument, it is this: the waiver form says plaintiff admitted to violating conditions 3 and 4; pages 2 and 3 of his statement concern questions pertaining to conditions 3 and 4; page 1 had nothing to do with conditions 3 and 4; therefore, he was justified in failing to show the court page 1 of his statement. He concludes by saying,

> Your Honor, initially when I filed this claim I knew that because of the defendants hidden motives and your limited insight of the preorchestration of their true intentions that you would fall into agreement with them for

> procedural purposes, so I withheld the first page to my statements and submitted the last two pages because I knew that, despite the plots of the defendants, it was those 2 documents that was gonna magnify the truth of how and why the defendants denied me a preliminary revocation hearing, when I was entitled to one, and how they were justified in their actions. The record will clearly reflect that their decision to deny me a preliminary hearing was based solely on the contents of the submitted documents on page 2 of 3 of my statements and not the first of 3 pages that I withheld.
>
> Because of the defendants conduct I was forced to commit an act of dishonesty out of self preservation in efforts to protect my constitutional rights to due process of the law under the United States Constitution and expose the misconduct of the defendants in the process.

The questions plaintiff answered on pages 2 and 3 of his statement had nothing to do with Rules 3 and 4 of the conditions of his probation. They sought information whether plaintiff had contacted a woman he was forbidden to contact under the terms of the conditions of his probation and whether he had driven the woman's car or been stopped by the police. The critical page of plaintiff's statement was the first page, on which he admitted to violating Rule 16 of the conditions of his probation. Plaintiff admits that he was aware that the admission was there and that this court would likely dismiss his case after seeing it. His conduct warrants a sanction sufficient to deter him or other litigants from withholding information that is ordered produced simply because the information might be prejudicial.

ORDER

IT IS ORDERED that plaintiff's motion brought pursuant to Fed. R. Civ. P. 59 to

alter or amend the judgment entered in this case on December 8, 2006, is DENIED.

Further, IT IS ORDERED that plaintiff is to pay a sanction to this court in the amount of $150 for his failure to disclose the entirety of his statement to defendant, as ordered by the court on May 12, 2006. This sanction must be paid before plaintiff will be allowed to proceed in any further action in this court, unless the action alleges imminent danger of serious physical harm.

Entered this 21st day of December, 2006.

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