IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES A. JONES,

Plaintiff,

v.

JO ANN SKALSKI, SCOTT GRADY, KESHA A. MARSON, ULLA HINTZ, LOIS REMMERS, BRAD KOSBOB, KEN LAUER, SANDRA JOHNSON, JIM MULVEY and MICKEY McCASH,

Defendants.

OPINION and ORDER

10-cv-766-bbc

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The question in this case is whether any of the defendants violated plaintiff James Jones's clearly established rights under the Eighth Amendment by keeping him incarcerated after state law mandated his release. In particular, plaintiff says that his release was required by Wis. Stat. § 302.045(3m) because he had completed the "Challenge Incarceration Program," but defendants detained him anyway because he hugged a staff member during the program's graduation.

Two motions for summary judgment are before the court, one filed by defendant Ulla Hintze and the other filed by the remaining defendants. Although plaintiff's situation is a

sympathetic one, I am granting defendants' motions because plaintiff did not have a clearly established right to be released. This makes it unnecessary to resolve defendants alternative arguments. For the purpose of deciding defendants' motions, I will assume that all of them were acting under color of law and were personally involved in the decision to detain plaintiff.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

On May 14, 2008, plaintiff entered into the Challenge Incarceration Program. The same day he signed an agreement that included the following provisions:

> As authorized pursuant to sec. 302.045 of the Wisconsin Statutes, I agree to participate in the Department of Corrections Challenge Incarceration Program. I understand that my participation in the program is a privilege that may be revoked at any time at the sole discretion of the Challenge Incarceration Program's Superintendent.
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> * * *
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> I understand and agree that I must abide by all rules and policies of the center until I am released, per the order of the court.

On November 21, 2008, defendant Jo Ann Skalski, the superintendent of the facility where plaintiff was participating in the program, wrote a letter to Judge James Daley at the

Circuit Court for Rock County to inform him that plaintiff had "completed the Challenge Incarceration Program. . . . The Department is requesting the Court authorizing the inmate's release and conversion of the remaining confinement time to extended supervision." Defendant Sandra Johnson, an office associate, mistakenly mailed this letter to Judge Charles H. Constantine at the Racine County Circuit Court for Racine County.

On November 24, 2008, plaintiff attended his graduation ceremony for the program. During the ceremony, plaintiff attempted to hug defendant Kesha Marson, plaintiff's social worker, placing his left hand on Marson's left shoulder before she stepped back to avoid being hugged. (The parties dispute whether Marson told plaintiff not to hug her. They also dispute whether plaintiff attempted to hug defendant Ulla Hintze, an alcohol and drug counselor.)

On November 25, 2008, plaintiff met with his "treatment team," which included defendants Scott Grady, Marson and Hintze. The team decided to place plaintiff in "quitter status" because of the incident at graduation and because plaintiff refused to take responsibility for his actions. A program participant may be placed in "quitter status" when he fails to comply with the rules of the program. (The parties do not explain the consequences of placement in "quitter status.")

On December 1, 2008, Judge Constantine signed an amended judgment of conviction for plaintiff and directed the Department of Corrections to "effectuate the change from

Confinement to Extended Supervision upon receipt of this order." The following day, Judge Constantine "voided" the order after determining that he was not the sentencing judge. (Apparently, Judge Constantine did not forward defendant Skalski's letter to Judge Daly.)

When the treatment team discovered that defendant Skalski's letter had been sent to the wrong judge, the members met with plaintiff to discuss his options. After the team determined that plaintiff continued to refuse to take responsibility for his actions, they recommended to "the superintendent committee" that he be terminated from the Challenge Incarceration Program. That committee (which included defendants Johnson, Brad Kosbob, Jim Mulvey and Ken Lauer) altered the recommendation to a "90-day extension" so that plaintiff could "learn and apply societal boundaries, etiquette and rules of behavior as well as [Challenge Incarceration Program] principles to lead a crime free and drug free life." Dfts.' PFOF ¶ 73, dkt. #74. Defendant Skalski modified that recommendation to a "28-day extension." When defendant refused to accept that extension, he was terminated from the program.

Plaintiff filed a grievance, which was denied by the examiner and defendant Grady, a captain. On appeal, David Andraska "affirmed with modification," writing: "Notify the sentencing court of successful completion and also inform the court of the inmate's unacceptable behavior after completion and voluntary termination from program." Under the heading "reasons," Andraska wrote: "Per CIP Procedure PR-4A-1, Inmate successfully

met the program graduation criteria but due to inmate conduct after completion and prior to release, Judge to make determination on whether to grant early release."

On May 14, 2009, defendant Skalski sent a letter to Judge Daly in which she explained the situation, in accordance with Andraska's decision. On May 21, 2009, Judge Daly signed an amended judgment of conviction, directing the department to place plaintiff on extended supervision. On May 27, 2009, plaintiff was released.

OPINION

The parties agree that prisoners have a right under the Eighth Amendment to be released upon the completion of their sentence. However, the law is less clear regarding when prison officials may be held liable for violating that right.

The Court of Appeals for the Seventh Circuit has decided only one case addressing this issue. In Campbell v. Peters, 256 F.3d 695 (7th Cir. 2001), the plaintiff contended that prison officials violated the Eighth Amendment by keeping him incarcerated after they revoked his good time credits unlawfully. The court acknowledged that the plaintiff's claim turned to some extent on state law because it was state law that governed plaintiff's entitlement to good conduct time. Id. at 700. However, the court emphasized that an "error of state law" was not enough to prove an Eighth Amendment violation; the plaintiff must show that "the extended incarceration [is] also . . . the product of deliberate

indifference." Id. at 700.

Unfortunately, the court did not explain the standard further. Instead, it assumed that the plaintiff was " kept in prison beyond the release date dictated by state law" and then turned to the question of qualified immunity, which is whether the defendants violated "clearly established" Constitutional law. Id. It concluded that the defendants could not be held liable because "[a]t the time of the revocation of Campbell's credits, it was not apparent that this kind of state law mistake rose to the level of an Eighth Amendment violation." Id. at 701. In reaching this conclusion, the court relied on several factors: (1) defendants were "responding to Campbell's inquiries, even if ultimately in a mistaken way"; (2) the relevant statute did not "expressly prohibit" the defendants' decision to revoke good time; (3) although a state trial court ultimately agreed with the plaintiff's interpretation, this was long after defendant's decision and a state trial court's decision cannot "clearly establish" the law for qualified immunity purposes.

This analysis seems to mix the question of qualified immunity with the question of "deliberate indifference," which is whether the defendants disregarded a substantial risk of serious harm to the plaintiff. Farmer v. Brennan, 511 U.S. 825 (1994). The court seemed to acknowledge this when it concluded that the defendants "did not act in violation of clearly established law or with deliberate indifference to its requirements." Campbell, 256 F.3d at 702. This is understandable because the two concepts tend to merge in a claim for

unlawful detention. In that context, the "serious harm" for the purpose of deliberate indifference is detention in violation of the law. E.g., Armstrong v. Squadrito, 152 F.3d 564 (7th Cir. 1998); Collins v. Aguirre, 2007 WL 2005262, *7-8 (W.D. Wis. 2007). Thus, both issues require the court to determine what the law requires. However, to be precise, the question for deliberate indifference in this case is whether defendants were *subjectively* aware of a substantial risk that they were violating *state* law regarding plaintiff's detention. The question for qualified immunity is an objective one, that is, whether clearly established federal law prohibited defendants' actions.

Regardless how one frames the legal issues, Campbell suggests that plaintiff cannot prevail unless he shows that defendants detained him in violation of state law *and* the violation was intentional or obvious. Farmer, 511 U.S. at 842 ("a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious"); Boyd v. Owen, 481 F.3d 520, 527 (7th Cir. 2007) ("[Q]ualified immunity protects the defendants unless the unconstitutionality of their actions was apparent, either because a case on point or closely analogous establishes the unconstitutionality of their actions, or because the contours of the right are so established as to make the unconstitutionality obvious.").

Plaintiff cannot show that defendants acted in violation of state law, let alone that any violation was intentional or any mistake was obvious. At issue in this case are plaintiff's rights and defendants' responsibilities under Wis. Stat. § 302.045, which governs the

"Challenge Incarceration Program" (often called "boot camp") and provides an opportunity for a prisoner to obtain early release. E.g., State v. Schladweiler, 2009 WI App 77, ¶ 9, 322 Wis. 2d 642, 649, 777 N.W.2d 114, 117; State v. Steele, 2001 WI App 160, ¶ 7, 246 Wis. 2d 744, 748, 632 N.W.2d 112, 115.

Plaintiff says that defendants violated § 302.045(3m); which reads as follows:

> Release to extended supervision. (a) Except as provided in sub. (4), if the department determines that an inmate serving the term of confinement in prison portion of a bifurcated sentence imposed under s. 973.01 has successfully completed the challenge incarceration program, the department shall inform the court that sentenced the inmate.
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> (b) Upon being informed by the department under par. (a) that an inmate whom the court sentenced under s. 973.01 has successfully completed the challenge incarceration program, the court shall modify the inmate's bifurcated sentence as follows:
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> 1. The court shall reduce the term of confinement in prison portion of the inmate's bifurcated sentence in a manner that provides for the release of the inmate to extended supervision within 30 days of the date on which the court receives the information from the department under par. (a).
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> 2. The court shall lengthen the term of extended supervision imposed so that the total length of the bifurcated sentence originally imposed does not change.
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> (c) The court may not increase the total length of the bifurcated sentence when modifying a bifurcated sentence under par. (b).
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> (d) Upon receiving a court order modifying an inmate's bifurcated sentence, the department shall release the inmate within 6 working days, as defined in s. 227.01(14) and as computed in s. 990.001(4).

The *only* part of this provision that requires officials to release a prisoner at a

particular time is § 302.045(3m)(d), which is triggered when a court orders the department to modify the prisoner's sentence. However, plaintiff does not argue that any of the defendants violated this provision. Rather, it is undisputed that plaintiff was released six days after the court issued an order under § 302.045(3m)(d).

Plaintiff's argument is not that defendants defied an order to release him, but rather that they failed to comply with other parts of § 302.045(3m) that could *lead* to his release. Arguably, the Eighth Amendment is not implicated when the alleged causal connection between potential release and the alleged state law violation is so attenuated. Campbell and all of the other cases cited by plaintiff involved alleged failures to calculate a sentence properly. Correcting the calculation error would have required the prisoner's immediate release, not simply set off a chain of events for release. E.g., Moore v. Tartler, 986 F.2d 682, 687 (3d Cir. 1993) (misinterpretation of court's sentencing order); Alexander v. Perrill, 916 F.2d 1392 (9th Cir. 1990) (miscalculation of sentence); Sample v. Diecks, 885 F.2d 1099, 1102-03 (3d Cir. 1989) (incorrect calculation of prisoner's sentence); Haygood v. Younger, 769 F.2d 1350, 1355 (9th Cir. 1985) (refusal to investigate "computational error"); Watford v. Miller, 2010 WL 1257812, *5 (E.D. Wis. 2010) (improper calculation of mandatory release date); Russell v. Lazar, 300 F. Supp. 2d 716, 724 (E.D. Wis. 2004) (improper calculation of mandatory release date). Because defendants do not raise this issue, I decline to resolve the case on this ground.

This does not save plaintiff's claim. Plaintiff does not deny that the statute gives the department the discretion to determine when a prisoner has successfully completed the Challenge Incarceration Program. In addition, he does not argue that defendant Johnson violated his rights when she mistakenly sent notice of his completion of the program to the wrong judge. Rather, his position is that once defendants discovered this mistake, the statute obligated them to forward an amended judgment of conviction to the proper court. Plt.'s Br., dkt. #64, at 2 ("Upon discovering that the release paperwork had been sent to the wrong Judge, the defendants' only course of action should have been to notify the proper court.").

Plaintiff's argument raises an obvious question that he does not answer persuasively: what provision in § 302.45(3m) required defendants to send out a new notice even after they determined that he had violated program rules? He points to § 302.45(3m)(a): "if the department determines that an inmate serving the term of confinement in prison portion of a bifurcated sentence imposed under s. 973.01 has successfully completed the challenge incarceration program, the department shall inform the court that sentenced the inmate."

At first look, this provision may seem to help plaintiff because it uses the word "shall," which is usually interpreted as mandatory. Matlin v. City of Sheboygan, 2001 WI App 179, ¶ 5, 247 Wis. 2d 270, 634 N W.2d 115 ("Use of the word 'shall' creates a presumption that the statute is mandatory."). However, plaintiff has failed to show that any

of the defendants failed to comply with this provision, or at least that they did so with deliberate indifference. Skalski attempted to contact the court on November 24 when she believed that plaintiff had completed the program. By the time defendants learned that the notice had gone to the wrong court, they already had determined that plaintiff had violated a program rule, so they decided not to send another notice at the time. At that point, defendants no longer believed that plaintiff had "successfully completed" the program, so the mandatory language did not apply. Plaintiff's position seems to be that § 302.045(3m) prohibited defendants from changing their minds once they sent out the first notice, but he points to no language in the statute that compels such a conclusion. Although it may be true that defendants would have been powerless to act once the sentencing judge issued an amended judgment, I see no language in the statute that restricted their discretion until that time. At best, the statute is ambiguous on this issue, which means that defendants cannot be held liable under the logic of Campbell.

It is true that Andraska stated in the administrative appeal that notice must be sent to the court because plaintiff "successfully met the program graduation criteria," which supports plaintiff's view that successful completion of the program was not contingent on appropriate behavior at the graduation ceremony. Again, however, plaintiff does not cite any law, policy or procedure that any of the defendants violated by acting as they did. (Andraska cited an internal policy in his decision, but neither side relied on it or identified

the language in that policy.) Further, even Andraska seemed confused because he directed staff to "inform the court of the inmate's unacceptable behavior" and to allow the "Judge to make determination on whether to grant early release," even though the statute is clear that the department has the responsibility to determine whether the prisoner's behavior merits early release; once the court receives the notice, it has no discretion to keep the prisoner detained. Wis. Stat. 302.045(1)(b) ("Upon being informed by the department under par. (a) that an inmate whom the court sentenced under s. 973.01 has successfully completed the challenge incarceration program, the court shall modify the inmate's bifurcated sentence . . .").

Even if I assume that Andraska's decision was correct and represented the view of the department, that simply means that defendants may have had an obligation at that point to send a notice. That is what they did. Although Andraska's decision is not dated, plaintiff does not argue that defendant Skalski failed to comply that decision in a timely manner. Accordingly, plaintiff cannot prevail on his claim under the Eighth Amendment.

Plaintiff includes a section in his brief on the due process clause. However, I dismissed plaintiff's claim under the due process clause in the order screening his complaint because he did not identify any procedures to which he was entitled but did not receive. Taake v. County of Monroe, 530 F.3d 538, 543 (7th Cir. 2008) (no due process claim if plaintiff does not identify additional process he was due). Plaintiff did not seek

reconsideration of that decision and he still does not identify any additional procedures he should have received. Accordingly, I decline to consider that argument.

Plaintiff's frustration is understandable. When he attended his graduation ceremony for the Challenge Incarceration Program, he believed that his release from prison was days away. If it had not been for a mistake in mailing, it is likely that he would have been released shortly after graduation. Further, it may well be that he tried to hug defendant Marson simply as an expression of joy and thanks to an important mentor and that defendants overreacted when they concluded that he had engaged in such inappropriate behavior that his release date needed to be pushed back. However, the task of this court is not to evaluate the wisdom or general fairness of defendants' actions, but only to decide whether defendants violated plaintiff's clearly established rights under the Eighth Amendment. Because plaintiff has not identified any duty under state or federal law that defendants breached, I must grant their motions for summary judgment.

ORDER

IT IS ORDERED that the motions for summary judgment filed by defendants Ulla Hintze, dkt. #50, and defendants Jo Ann Skalski, Scott Grady, Kesha Marson, Lois Remmers, Brad Kosbob, Ken Lauer, Sandra Johnson, Jim Mulvey and Mickey McCash, dkt. #72, are GRANTED. The clerk of court is directed to enter judgment in favor of defendants

and close this case.

Entered this 30th day of January, 2012.

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