

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

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MARCEL T. WARE,

Plaintiff,

v.

JEAN KRAINTZ,

Defendant.

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OPINION AND ORDER

11-cv-213-slc<sup>1</sup>

Plaintiff Marcel Ware is suing the registrar for the Dodge Correctional Institution under 42 U.S.C. § 1983 for keeping him incarcerated too long. In particular, he alleges that a judge's order required him to be released on July 4, 2005, but defendant Jean Kraintz "intentionally misinterpreted the court's order" and refused to release him until July 28, 2005. He asks for \$100,000 in damages.

Plaintiff has made an initial partial payment of the filing fee in accordance with 28 U.S.C. § 1915(b)(1). Because plaintiff is a prisoner, I must screen his complaint to determine whether it states a claim upon which relief may be granted. 28 U.S.C. § 1915A.

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<sup>1</sup> I assuming jurisdiction over this case for the purpose of this order.

(Plaintiff is now incarcerated at the Waupun Correctional Institution, but I assume this is related to a different sentence from the one he was serving in 2005.)

Generally, a prisoner may not challenge the validity of his confinement in a proceeding under § 1983. Heck v. Humphrey, 512 U.S. 477 (1994); Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973). However, I have assumed in other cases that relief under § 1983 may be available when a habeas petition is now moot and the prisoner did not have an adequate opportunity to challenge his confinement while he was still incarcerated. E.g., Virsnieks v. Wisconsin Dept. of Health and Family Services, 2008 WL 2704578, \*2 (W.D. Wis. 2008) (citing Spencer v. Kemna, 523 U.S. 1, 21 (1998) (Ginsburg, J., concurring)). For the purpose of this screening order, I will assume that plaintiff can no longer obtain relief under § 2254 and that he did not have sufficient time to file a habeas petition while confined.

Having reviewed plaintiff's complaint, I conclude that he may proceed on a claim that defendant violated his rights under the Eighth Amendment because she continued to detain him despite knowing that state law required his release. When a prisoner is incarcerated beyond the date authorized by state law, the prisoner's custodian may be liable under the Constitution if she disregards a substantial risk that the prisoner is being held illegally. Campbell v. Peters, 256 F.3d 695, 700-01 (7th Cir. 2001); Armstrong v. Squadrito, 152 F.3d 564, 577 (7th Cir. 1998); Felce v. Fielder, 974 F.2d 1484, 1490 (7th Cir. 1992); Russell v.

Lazar, 300 F. Supp. 2d 716, 720 (E.D. Wis. 2004). I understand plaintiff to be alleging that defendant knew that plaintiff was entitled to be released on July 4, 2005, but she intentionally miscalculated his sentence to detain him another 24 days. This is sufficient to state a claim upon which relief may be granted.

At summary judgment or trial, plaintiff will be required to show that state law required his release before July 28, 2005, and that defendant consciously disregarded a substantial risk that plaintiff was being detained unlawfully. If it turns out that defendant simply made a mistake (or that she was not responsible for determining plaintiff's release date), plaintiff's complaint may be dismissed.

## ORDER

IT IS ORDERED that

1. Plaintiff Marcel Ware is GRANTED leave to proceed on his claim that defendant Jean Krintz detained plaintiff beyond the date authorized by state law, in violation of the Eighth Amendment.

2. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents plaintiff submits that do not show on the court's copy that

he has sent a copy to defendant or to defendant's attorney.

3. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of documents.

4. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendant.

5. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust

fund account until the filing fee has been paid in full.

Entered this 15th day of April, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge