IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE C. SIMPSON,

Plaintiff,

v.

GOV. SCOTT WALKER, GARY H. HAMBLIN,
M.S. OLSEN, T. LE BRECK, and W. BURNS,

Defendants.

ORDER

11-cv-838-bbc

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Plaintiff Willie C. Simpson, an inmate at the Wisconsin Secure Program Facility, brings this civil complaint under 42 U.S.C. § 1983, alleging that defendant state officials violated the Constitution's ex post facto clause by retroactively applying Wisconsin's Truth-in-Sentencing law to his sentences for sexual assault of a child and thereby eliminating his parole eligibility. Presently before the court are several motions filed by plaintiff: (1) a motion to voluntarily dismiss his claim regarding one of his two convictions at issue in the case, dkt. #34; (2) a motion for a preliminary injunction, dkt. #23, in which he asks the court to order defendants to provide him parole eligibility for his sexual assault convictions; and (3) a motion for sanctions against defendants for bad faith conduct, dkt. #32.

Because defendants do not object to plaintiff's motion to voluntarily dismiss his claim regarding one of his convictions, I will grant plaintiff's motion as unopposed. I will deny plaintiff's motion for preliminary injunctive relief because I conclude that plaintiff has failed

to show a likelihood of success on the merits of his claim. Further, because I find it undisputed that plaintiff remains eligible for parole and that defendants did not retroactively apply Wisconsin's Truth-in-Sentencing law to plaintiff's sentence, I will dismiss plaintiff's remaining claim with prejudice. Finally, I will deny plaintiff's motion for sanctions.

UNDISPUTED FACTS

Plaintiff Willie C. Simpson is a prisoner at the Wisconsin Secure Program Facility. Plaintiff was convicted of second-degree sexual assault, § 948.02(2), for events occurring in November 1996. On July 11, 1997, he was given a 15-year stayed sentence and five years' probation for this conviction. On May 11, 2000, plaintiff was convicted of two counts of first-degree sexual assault, § 948.02(1), for having sexual contact with a minor between January 1, 1998 and September 21, 1999. Plaintiff received an additional 50-year prison sentence following this conviction.

On October 2, 2003, the Wisconsin Department of Corrections Bureau of Classification and Movement Review Committee issued an inmate classification report pertaining to plaintiff. The classification report listed plaintiff's parole eligibility date as August 5, 2015, his release date as September 15, 2042 and his discharge date as May 5, 2064. On October 22, 2010, the committee issued another inmate classification report regarding plaintiff. The report listed plaintiff's parole eligibility date as August 5, 2015, his release date as December 16, 2042 and his discharge date as May 5, 2064. Unlike the 2003 inmate classification report, the 2010 report included a sentence stating that "[i]nmate is

sentenced under New Law." Dkt. #25, Ex. 1, at 3. On August 19, 2011, another report by the committee listed plaintiff's parole eligibility date as August 5, 2015, his release date as January 5, 2043 and his discharge date as May 5, 2064. The 2011 report included the same sentence as the 2010 report, that "[i]nmate is sentenced under New Law." Dkt. #25, Ex. 1, at 4.

Inmates who are placed in adjustment, program or controlled segregation status have their release dates extended by a number of days equal to 50 percent of the number of days spent in segregation status. The changes in plaintiff's release dates are the result of disciplinary hearing dispositions for conduct violations.

DISCUSSION

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); see also Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 389 (7th Cir. 1984). "A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008) (internal quotation marks and citations omitted). The plaintiff must show he has some likelihood of success on the merits, that he is likely to suffer irreparable harm without an injunction, that the harm he would suffer without the injunction is greater

than the harm that preliminary relief would inflict on the defendants and that the injunction is in the public interest. Id. at 20.

The United States Constitution prohibits ex post facto laws. Article I, §§ 9-10. To fall within the ex post facto prohibition, "a law must be retrospective—that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it,' . . . by altering the definition of criminal conduct or increasing the punishment for the crime." Lynce v. Mathis, 519 U.S. 433, 441 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)).

Plaintiff contends that defendants are denying him parole eligibility by retroactively applying Wisconsin's Truth-in-Sentencing law to his sentence computation and thereby increasing the punishment of his crime beyond what it was at the time plaintiff committed his offenses, in violation of the ex post facto clause. Plaintiff's entire claim rests upon his interpretation of the term "New Law" in his 2010 and 2011 inmate classification reports. In particular, plaintiff argues that the term "New Law" means the Truth-in-Sentencing law. He argues that because Truth-in-Sentencing eliminated parole, the alleged application of Truth-in-Sentencing to his sentence eliminated his parole eligibility. However, plaintiff offers no evidence showing that the phrase "New Law" means Truth-in-Sentencing or that defendants revoked his parole eligibility.

Contrary to plaintiff's assertions, the meaning of the term "New Law" is not an open question. An inmate's sentence may be governed by one of three sentencing laws depending on when he committed his offense. The "Old Law" applies to offenses committed before

June 1, 1984. Wis. Admin. Code § DOC 302.21(2); see also State ex rel. Larry v. Schwarz, 212 Wis. 2d 639, 570 N.W.2d 61, *2-4 (Ct. App. 1997) (unpublished opinion) (distinguishing between "New Law" and "Old Law" sentences). The "New Law" applies to offenses committed between June 1, 1984 and December 31, 1999. Wis. Admin. Code § DOC 302.21(2); see also State ex rel. Larry, 212 Wis. 2d 639 at *2-4; Brenda R. Mayrack, *The Implications of State Ex Rel. Thomas v. Schwarz for Wisconsin Sentencing Policy After Truth-in-Sentencing II*, 2008 WIS. L. REV. 181, 187-88 (2008) (describing the sentencing scheme known as "New Law" in place before Truth-in-Sentencing). "Truth-in-Sentencing" applies to offenses committed on or after December 31, 1999 and abolishes parole. Wis. Stat. § 973.01 (2009-10). Because plaintiff committed both of his offenses between June 1, 1984 and December 31, 1999, the "New Law," 1983 Wisconsin Act 528, applied to his sentence calculation. Wis. Stat. § 53.11 (1983). The 2010 and 2011 inmate classification reports' use of the term "New Law" is a reference to the law under which plaintiff was originally sentenced.

Furthermore, plaintiff's own proposed findings of fact make clear that plaintiff has a parole eligibility date of August 5, 2015, and that no subsequent inmate classification report changed that date. Dkt. #24, ¶¶ 6-8. Plaintiff cannot credibly argue that defendants stripped him of his parole eligibility when his parole eligibility date has remained constant in each of his inmate classification reports. As with his argument about the meaning of "New Law," plaintiff offers no evidence to support his contention that defendants have revoked his parole eligibility. To the contrary, the inmate classification reports conclusively

establish that plaintiff remains eligible for parole. Dkt. #25, Ex. 1, at 3-4, 8. Accordingly, I will deny his motion for preliminary injunctive relief.

In the August 9, 2012 Preliminary Pretrial Conference Order in this case, Magistrate Judge Stephen Crocker stated that limited scheduling was sufficient in this suit because of the nature of plaintiff's claim and that the lawsuit could likely be decided on plaintiff's motion for preliminary injunction. Dkt. #30, at 1. I agree. Plaintiff has offered no evidence to support his claim that defendants retroactively applied Wisconsin's Truth-in-Sentencing law to his convictions and revoked his parole eligibility. Rather, the undisputed facts and relevant law shows that plaintiff remains eligible for parole and that the term "New Law" mentioned in the classification reports refers to the specific law in place when the state sentenced plaintiff for his offenses. Plaintiff has no chance of success on the merits of his suit because it depends solely on his misinterpretation of the classification reports and Wisconsin sentencing law. Accordingly, I will dismiss plaintiff's suit with prejudice on the court's own motion for failing to state a claim upon which relief may be granted. 28 U.S.C § 1915(e)(2)(b)(ii) ("[T]he court shall dismiss the [in forma pauperis] case at any time if the court determines that . . . the action or appeal . . . fails to state a claim on which relief may be granted."). To the extent that plaintiff has filed a motion to voluntarily withdraw his ex post facto claim regarding his sentence of conviction under § 948.02(1), I will grant the motion as unopposed but note that any remaining ex post facto claim that plaintiff might wish to bring in the future rests on Wisconsin sentencing law as described above, and thus no subsequent lawsuit will be meritorious unless he can point to facts indicating that his

parole eligibility has been taken away.

Finally, plaintiff has filed a motion for sanctions against defendants on the grounds that they misrepresented facts to the court in bad faith. Dkt. #32. Specifically, plaintiff argues that defendants made two false statements to the court: (1) that plaintiff's parole eligibility date for his November 1996 offense has always been August 5, 2015; and (2) that the term "New Law" refers to 1983 Wisconsin Act 528. Id. at 2-3. In support of his first claim, plaintiff offers a Department of Corrections admission computation form showing his original parole eligibility date for his November 1996 offense as March 2, 2006. Dkt. #33, Ex. 1, at 1. He then points to another form filled out after he committed his 1998 and 1999 offenses showing that his parole eligibility date was changed to August 5, 2015. Id. at 2. Whether plaintiff is concerned that his parole date for the November 1996 offense has not always remained "unchanged" or whether he is concerned that his August 5, 2015 parole eligibility date is more accurately described as his parole eligibility date for his cumulative sentence including all offenses, both issues are irrelevant with regards to his ex post facto challenge. Plaintiff's own exhibit, dkt. #33, ex. 1, demonstrates the proper computation of a parole eligibility date for an inmate who has a consecutive sentence added to an initial sentence. Wis. Stat. § 304.06(1)(b) (parole eligibility occurs after inmate serves 25 percent of sentence); see also Wis. Admin. Code § PAC 1.05(2)(c)(2) (explaining that when incarceration follows parole revocation and a new sentence is imposed, "parole eligibility shall be established at 6 months from the custody date . . . or in accordance with the eligibility of the new sentence"). Defendants followed this procedure when they computed

plaintiff's cumulative parole date for all his offenses. Dkt. #33, Ex. 1, at 2. The parole date that defendants determined, August 5, 2015, has remained constant in each of plaintiff's recent inmate classification reports. See dkt. #25, Ex. 1, at 3-4, 8. Perhaps defendants could have been made it clearer that plaintiff's parole eligibility date of August 5, 2015 was determined with regard to all of plaintiffs offenses, not just the November 1996 offense. Regardless, to the extent that defendants made an error in their proposed findings of fact on an irrelevant point, the error is not a basis for sanctions. As for plaintiff's second argument, I have already determined from the relevant legal authorities that the term "New Law" means 1983 Wisconsin Act 528 and not Wisconsin's Truth-in-Sentencing law. For these reasons, I will deny plaintiff's motion for sanctions.

ORDER

IT IS ORDERED that

1. Plaintiff Willie C. Simpson's motion to voluntarily withdraw his ex post facto claim regarding his sentence of conviction under § 948.02(1), dkt. #34, is GRANTED.

2. Plaintiff's motion for preliminary injunction, dkt. #23, is DENIED.

3. On its own motion, the court DISMISSES plaintiff's lawsuit for failing to state a claim upon which relief may be granted.

4. Plaintiff's motion for sanctions against defendants, dkt. #32, is DENIED.

Entered this 29th day of November, 2012.

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