

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

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TONY PAYANO,

Plaintiff,

v.

THOMAS L. POTTER and  
GREGORY GRAMS,

Defendants.  
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ORDER

12-cv-889-bbc

In this civil action for monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff Tony Payano, an inmate at the Wisconsin Secure Program Facility, contends that defendants Thomas Potter and Gregory Grams violated his constitutional rights by confining him in prison after the reversal of his state criminal conviction. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment of the filing fee.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). Having reviewed plaintiff's allegations, I

conclude that plaintiff may not proceed with his claims because they are either barred by Preiser v. Rodriguez, 411 U.S. 475 (1973), and Heck v. Humphrey, 512 U.S. 477 (1994), or because plaintiff has failed to state a claim under the Constitution. Therefore, I am dismissing plaintiff's complaint.

In his complaint, plaintiff alleges the following facts.

#### ALLEGATIONS OF FACT

In 2006, plaintiff Tony Payano was convicted in the Circuit Court for Milwaukee County of one count of second-degree reckless injury while using a dangerous weapon, under Wis. Stat. §§ 940.23(2)(a) and 939.63, and two counts of second-degree recklessly endangering safety while using a dangerous weapon in violation of Wis. Stat. §§ 941.30(2) and 939.63. He was sentenced to 17 1/2 years of imprisonment and was incarcerated at the Columbia Correctional Institution, where defendant Gregory Grams was the warden.

On April 15, 2008, the Wisconsin Court of Appeals reversed the judgment of conviction and remanded the case for a new trial. State v. Payano, 2008 WI App 74, 312 Wis. 2d 224, 752 N.W.2d 378. On April 20, 2008, plaintiff wrote to defendant Grams, asking to be released from custody or transferred to the custody of Milwaukee County. Defendant Thomas Potter, an assistant district attorney for Milwaukee County at the time, filed a request with the trial court that plaintiff remain incarcerated at the Columbia Correctional Institution. Grams refused to release plaintiff and he remained in custody at the prison. On July 21, 2009, the Wisconsin Supreme Court reversed the decision of the court

of appeals and reinstated plaintiff's convictions. State v. Payano, 2009 WI 86, 320 Wis. 2d 348, 768 N.W.2d 832.

## DISCUSSION

Plaintiff contends that defendants Grams and Potter violated his rights under the Eighth and Fourteenth Amendments by failing to release him from state custody after his conviction was reversed by the court of appeals. Plaintiff seeks monetary compensation for the time period from April 15, 2008 when his conviction was vacated, to July 21, 2009 when his conviction was reinstated.

As an initial matter, there is a question whether plaintiff can challenge his confinement during the period from April 15, 2008 to July 21, 2009 in a lawsuit brought under 42 U.S.C. § 1983. In Preiser v. Rodriguez, 411 U.S. 475 (1973), the Supreme Court held that a prisoner cannot bring an action under § 1983 challenging “the fact or duration of his confinement.” Id. at 489. See also Nelson v. Campbell, 541 U.S. 637, 646–47 (2004); Heck v. Humphrey, 512 U.S. 477 (1994). A plaintiff challenging the legality of his confinement under federal law must first raise that claim in a petition for a writ of habeas corpus, after exhausting his remedies in state court. Wilkinson v. Dotson, 544 U.S. 74, 81 (2005); Heck, 512 U.S. at 487; Burd v. Sessler, 702 F.3d 429, 432 (7th Cir. 2012). The rule in Preiser and Heck applies even if a plaintiff is seeking only damages in his § 1983 lawsuit and can no longer seek release from confinement. Burd, 702 F.3d at 432-36. The Court of Appeals for the Seventh Circuit explained recently that the rule “applies where a § 1983 plaintiff could

have sought collateral relief at an earlier time but declined the opportunity and waited until collateral relief became unavailable before suing.” Id. at 436.

In this case, plaintiff’s claim is a challenge to his confinement in state prison and would necessarily call the legality of that confinement into doubt. Additionally, plaintiff had more than one year in which he could have challenged his confinement collaterally and he has not alleged that he was prohibited from seeking relief through the state courts or through a habeas proceeding during that year.

It is not clear, however, whether the rules set forth in Preiser and Heck apply in a case such as this in which the prisoner has successfully challenged his conviction. Generally, a prisoner may not bring a claim challenging his conviction or confinement “unless and until the inmate obtains a favorable termination of a state, or federal habeas, challenge to his conviction or sentence.” Nelson, 541 U.S. at 646 (citing Heck, 512 U.S. at 487). In this case, plaintiff brought a successful state challenge to his conviction and his conviction was vacated. Thus, he arguably satisfied the “favorable termination” requirement of Heck and Preiser. On the other hand, the Wisconsin Court of Appeals did not order plaintiff to be released from state custody, so plaintiff did not bring a successful state or federal habeas challenge to the “fact or duration of his confinement” in state prison.

Even if this is a situation in which plaintiff’s claims were not barred by the rules in Preiser and Heck, I would dismiss plaintiff’s claims for failure to state a claim upon which relief may be granted. Plaintiff contends that from April 15, 2008 until July 21, 2009, he was technically a pretrial detainee as opposed to a convicted prisoner. Assuming this is true, the

Fourteenth Amendment due process clause applies to plaintiff's claim. Forrest v. Prine, 620 F.3d 739, 743 (7th Cir. 2010); Estate of Moreland v. Dieter, 395 F.3d 747, 758 (7th Cir. 2005). The due process clause prohibits the government from punishing a pretrial detainee. Bell v. Wolfish, 441 U.S. 520, 535 (1979). However, the Fourteenth Amendment does not prohibit the government from confining a pretrial detainee in a penal institution. "[T]he Government [] may detain [a pretrial detainee] to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." Id. at 536-37.

Plaintiff does not allege that he was subjected to any conditions at the Columbia Correctional Institution that constituted "punishment." Plaintiff suggests that he should have been released to the custody of Milwaukee County to be detained in the county jail, but he does not explain why he believes it would have been permissible for the government to hold him in a jail but not a prison. The due process clause does not require the government to place pretrial detainees in a specific facility. As the Supreme Court explained in Bell,

Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain.

Id. at 537. In sum, the mere fact that plaintiff was detained in a state prison pending a new trial does not state a claim under the Fourteenth Amendment.

## ORDER

IT IS ORDERED that

1. Plaintiff Tony Payano is DENIED leave to proceed on his claim that defendants Thomas Potter and Gregory Grams violated his constitutional rights by confining him in prison after the reversal of his state criminal conviction. Plaintiff's complaint is DISMISSED for failure to state a claim upon which relief may be granted.

2. A strike will be recorded in accordance with 28 U.S.C. § 1915(g).

3. 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). This court will notify the officials at the Wisconsin Secure Program Facility of that institution's obligation to deduct payments until the filing fee has been paid in full.

4. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 21st day of February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge