

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 court of appeals reversed his state criminal conviction and remanded the case for a new trial. The Wisconsin Supreme Court ultimately reversed the ruling of the court of appeals and reinstated the conviction. However, plaintiff seeks compensation for the time he was held in prison from the date the court of appeals reversed his conviction and the date the Supreme Court reinstated it, arguing that as a pretrial detainee, he should have been held in a county jail and not a state prison.

In an order entered March 6, 2013, I denied plaintiff's leave to proceed on his claims, concluding that he had failed to state a claim under the Constitution. Dkt. #5. I explained that plaintiff did not have a right under the constitution to be held in a county jail. Rather,

as a pretrial detainee, the Fourteenth Amendment due process clause prohibited the government from punishing plaintiff, but did not prohibit it from confining him in a penal institution. Moreover, the due process clause does not give rise to a liberty interest in being detained in a county jail, rather than a state prison. Bell v. Wolfish, 441 U.S. 520, 537 (1979). Plaintiff had alleged no facts suggesting that his confinement in a state prison constituted punishment in violation of the due process clause.

Now before the court is plaintiff's motion for reconsideration, dkt. #8, and motion for leave to amend his complaint. Dkt. #9. In his motion for reconsideration, plaintiff contends that he was not relying solely on the due process clause as the source of his liberty interest. Rather, plaintiff contends that several state statutes gave rise to his liberty interest in being confined to a county jail. Specifically, he relies on Wis. Stat. § 973.02, which states that "a sentence of less than one year shall be to the county jail, a sentence of more than one year shall be to the Wisconsin state prisons . . . , and a sentence of one year may be to either the Wisconsin state prisons or the county jail." He also relies on Wis. Stat. § 972.13(5), which states that "[a] copy of the judgment [of conviction] shall constitute authority for the sheriff to execute the sentence." Plaintiff contends because he had not been convicted of a sentence of more than one year and because the sheriff did not have a copy of a valid judgment of conviction, the government was prohibited from holding him in a state prison without a valid conviction. In other words, these statutes gave plaintiff a liberty interest in being free from state prison.

Plaintiff's argument is not persuasive. Although state law may create liberty interests

that trigger the due process protections of the Fourteenth Amendment, Wolff v. McDonnell, 418 U.S. 539, 557 (1974), nothing in the language of these statutes suggests that they were intended to confer due process rights on pretrial detainees. Moreover, plaintiff has not alleged that he was denied any particular process. He is not seeking a hearing or a chance to present evidence or witnesses on the legality of his detention. Rather, he is challenging the state's compliance with state law and contends that he should have been released automatically when his conviction was overturned. Such a claim is not a constitutional claim; it is a state law claim. Plaintiff may have been able to assert his claim in a state certiorari or other proceeding in state court, but he may not assert the claim under 42 U.S.C. § 1983.

Finally, plaintiff suggests in his motion for reconsideration and motion for leave to amend his complaint that his detention in state prison violated his constitutional rights because he was confined in a small cell for 23-24 hours a day. Plaintiff contends that these conditions constituted punishment in violation of his due process rights. However, plaintiff made similar allegations in case number 11-cv-437-slc, and his claims were dismissed ultimately for his failure to exhaust his administrative remedies. Dkt. #27 in 11-cv-437-slc (Op. & Order, March 1, 2012). Before I would consider reopening the present case and granting plaintiff leave to amend his complaint, plaintiff would need to show that he exhausted his administrative remedies with respect to these claims. Because plaintiff has not made that showing, I am denying his motion for leave to amend his complaint.

ORDER

IT IS ORDERED that plaintiff Tony Payano's motion for reconsideration, dkt. #8, and motion for leave to amend his complaint, dkt. #9, are DENIED.

Entered this 30<sup>th</sup> day of April, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge