IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RAYMOND K. HEDGESPETH, JR.,

OPINION and ORDER

Plaintiff,

13-cv-167-bbc

v.

THE STATE OF WISCONSIN,
DEPARTMENT OF HEALTH SERVICES and
ALL EMPLOYEES CONNECTED TO THE
COMMITMENT OF CHAPTER 980 AND
ALL THE PATIENTS SO CONFINED,

Defendants.

- -

Plaintiff Raymond Hedgespeth is a patient at Sand Ridge Secure Treatment Center in Mauston, Wisconsin who has been civilly committed under Wis. Stat. ch. 980 as a "sexually violent person." In this proposed civil action for monetary and injunctive relief, plaintiff challenges various conditions of his confinement on both federal and state law grounds. Plaintiff's status as a chapter 980 patient means that he is not subject to the restrictions on prisoner litigation in the Prison Litigation Reform Act. However, because plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, I must screen his complaint and dismiss it if it 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. § 1915(e)(2)(B).

As an initial matter, plaintiff cannot sue the State of Wisconsin or the Department of Health Services under 42 U.S.C. § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 65-71 (1989) (states and state agencies are not "persons" who may be sued for constitutional violations under § 1983). Also, naming "all employees connected to the commitment of chapter 980" as defendants is not proper because plaintiff's complaint does not contain allegations suggesting that all Department of Health Services employees involved with chapter 980 are responsible for the implementation or application of the policies that plaintiff is challenging or that all employees have taken actions causing injury to plaintiff. However, as discussed below, I will not give plaintiff leave to amend his complaint to name a proper defendant because he has failed to state any claim upon which relief may be granted.

Plaintiff states that he is attempting to bring a class action that challenges the "totality of circumstances" affecting patients civilly committed under chapter 980. Dkt. #1 at 13. He cites the First, Fourth, Sixth, Eighth, Thirteenth and Fourteenth Amendments and ex post facto clause of the Constitution, as well as several state statutes and regulations. However, much of plaintiff's complaint consists of generalities about conditions at Sand Ridge Secure Treatment Center, arguments about the legal standards that should apply to plaintiff's claims and assertions about the stigma attached to convicted sex offenders, the mindset of institution staff and why plaintiff and other patients deserve better treatment than they are receiving. Plaintiff's complaint is 62 single-spaced pages but, despite its length, it contains few specific facts suggesting how the conditions at Sand Ridge implicate any

constitutional rights of plaintiff and other patients. The excessive length and argumentative nature of plaintiff's complaint makes it difficult to identify which specific policies or conditions he is challenging or the legal grounds on which he is relying.

Plaintiff's claims appear to fall into four categories: (1) the constitutionality of Wis. Stat. ch. 980; (2) the adequacy of the procedures and standards used to determine whether patients are sexually violent persons; (3) various policies at Sand Ridge Security Treatment Center; and (4) the quality of treatment offered to chapter 980 patients. Claims falling into the first two categories will be dismissed because they are barred by Heck v. Humphrey, 512 U.S. 477 (1994). Several claims falling in the second category will be dismissed because they have been resolved previously in other cases and plaintiff identifies no persuasive reason why those decisions should be revisited. Plaintiff's remaining claims challenging policies at Sand Ridge and the adequacy of treatment will be dismissed because plaintiff has failed to state a claim under the Constitution.

With respect to plaintiff's state law claims, I will decline to exercise supplemental jurisdiction over those. Therefore, I am dismissing plaintiff's complaint in full. I note that plaintiff requests in his complaint that the court assist him in recruiting counsel to represent him in this action. Because I am denying plaintiff leave to proceed on any of his claims, I will also deny his request for assistance in recruiting counsel.

DISCUSSION

A. The Constitutionality of Chapter 980 and Standards Governing Commitment

Plaintiff asserts several challenges to his commitment under chapter 980 and the statutory scheme governing civil commitment and release. He contends that the procedures applied in determining whether patients are sexually violent persons are unlawful because the state is permitted to rely on assumptions about predisposition and diagnoses of "paraphilia not otherwise specified" or "antisocial personality disorder" as bases for commitment under chapter 980. He contends that the evaluations of individuals for chapter 980 commitment should be more thorough and he challenges the type of evidence the state is permitted to introduce at commitment hearings, including evidence of crimes that occurred in the distant past. He argues that the entire premise of civil commitment under chapter 980 is a conspiracy and "witch hunt" that results in unconstitutional punishment.

These claims are essentially challenges to the fact or duration of plaintiff's commitment and to the constitutionality of chapter 980 generally. Such claims are barred by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), which prohibits a plaintiff from bringing claims for damages under § 1983 if judgment in favor of the plaintiff would "necessarily imply the invalidity of his conviction or sentence." If, as plaintiff contends, the statutes, procedures and standards governing the civil commitment and release of sexually violent persons are invalid, the state would have no authority to detain plaintiff and his confinement would be invalid. Thus, if plaintiff believes the statutes and procedures are unconstitutional or that there was something specific about his initial or continuing

commitment hearings that was unlawful, he must first exhaust his state judicial remedies and, if he is unsuccessful, file a petition for writ of habeas corpus under 28 U.S.C. § 2254. Until he has successfully challenged his confinement through those means, he may not seek damages under § 1983.

Additionally, to the extent that plaintiff is attempting to challenge the standards governing supervised release rather than his initial commitment under chapter 980, he cannot state a claim under the Constitution because there is no general constitutional right to discretionary parole or supervised release from custody. Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 7-11 (1979); In re Commitment of West, 2011 WI 83, ¶¶ 83-89, 336 Wis. 2d 578, 616-17, 800 N.W.2d 929, 947-48 (analogizing supervised release under Wis. Stat. § 980.08 to criminal parole and finding no protected liberty interest).

B. Challenges to Specific Policies at Sand Ridge Secure Treatment Center

Plaintiff identifies several policies at Sand Ridge Secure Treatment Center as unconstitutional. He contends that the policies at Sand Ridge have impinged on his right to free speech under the First Amendment by monitoring and limiting phone calls, prohibiting internet access, censoring movies, video games and other media and charging plaintiff for television service. Plaintiff challenges the constitutionality of institution policies requiring patients to wear prison attire and submit to strip searches when they are transported in and out of the institution. He also complains that his movement within and

outside the facility is restricted and that he does not have access to sufficient recreational opportunities.

Most of these claims have been resolved against plaintiff's position by this court, the court of appeals or other district courts in Wisconsin. With respect to his First Amendment claims, plaintiff raised challenges to Sand Ridge's policies regarding movies, media storage, computer ownership, internet access, video games and gaming equipment in a previous case. Magistrate Judge Stephen Crocker concluded that the institution's policies did not violate the Constitution because they were reasonably related to legitimate institutional interests. Hedgespeth v. Bartow, 09-CV-246-SLC, 2010 WL 2990897, *1 (W.D. Wis. July 27, 2010). I reached the same conclusion regarding the video game policy in Stewart v. Easterday, 10-cv-409-bbc, dkt. #87 (W.D. Wis. Sept. 19, 2011). I have also concluded that the institution's policy of monitoring and limiting telephone calls is constitutional. Walker v. Hayden, 07-C-675-BBC, 2008 WL 2485576, *1 (W.D. Wis. June 18, 2008) aff'd, 302 F. App'x 466 (7th Cir. 2008). See also Hendrickson v. Nelson, No. 05-C-1305, 2006 WL 2334838, *2 (E.D. Wis. Aug. 10, 2006) (same). Plaintiff advances no persuasive reason to reexamine any of these rulings. I am also not persuaded that charging plaintiff for television service could amount to a constitutional violation.

Plaintiff's claims relating to institutional security policies are also foreclosed. In a previous case brought by plaintiff in this court, I concluded that the strip search policy was a legitimate security policy. Hedgespeth v. State, 11-cv-76-slc, dkt. #5 (W.D. Wis. Mar. 17, 2011) (dismissed at § 1915 screening stage). In other cases, I have concluded that routine

searches of patients' living quarters at Sand Ridge Secure Treatment Center were constitutional, Walker, 2008 WL 2485576, at *1; Riley v. Doyle, No. 06-C-575-C, 2006 WL 2947453, *5 (W.D. Wis. Oct. 16, 2006), as was the requirement that patients wear institutional clothing. Walker, 2008 WL 2485576, *1; Laxton v. Watters, 348 F. Supp. 2d 1024, 1031 (W.D. Wis. 2004). The court of appeals has held that it is constitutional to place civil detainees in restraints during transport. Thielman v. Leean, 282 F.3d 478, 480, 482 (7th Cir. 2002). Further, plaintiff's claim that he does not have free rein to leave the facility fails for reasons similar to these other claims: plaintiff's freedom may be restricted to "advance goals such as preventing escape and assuring the safety of others." Allison v. Snyder, 332 F.3d 1076, 1078-79 (7th Cir. 2003). Plaintiff has not alleged any facts suggesting that these previous rulings should not govern his claims.

Finally, plaintiff's allegations regarding recreational opportunities do not state a constitutional claim. He states that Sand Ridge has a yard and gym that are open six hours a day, seven days a week. Patients have access to walking areas, horseshoe pits, bocce ball, football, basketballs and hoops, softball, volleyball, badminton and exercise equipment. The indoor fitness center has treadmills. Such a wide selection of recreational opportunities does not amount to a constitutional violation.

C. Claims Challenging the Adequacy of Treatment

Plaintiff devotes several pages of his complaint to his claim that the treatment provided to patients committed under chapter 980 at Sand Ridge Secure Treatment Center

is constitutionally inadequate. Plaintiff's primary complaint with the treatment seems to be that it is not individualized. He alleges that every patient is subject to the same treatment regime regardless of the patient's history or needs. Plaintiff argues that the treatment is counter-therapeutic and does not help patients rehabilitate and reenter society.

Although the Supreme Court has considered the availability of treatment when evaluating the constitutionality of state statutes involving civil commitment of sexually violent persons, it has not addressed specifically whether the Constitution entitles civilly committed sex offenders to a certain standard of treatment. E.g. Seling v. Young, 531 U.S. 250, 262-63, 266 (2001) (holding that Washington's sexually violent predator commitment scheme was nonpunitive and noting specifically that it required treatment for sexually violent persons, but stating that issues of standard of treatment and conditions of commitment were not before Court); Kansas v. Hendricks, 521 U.S. 346, 367-68 (1997) (holding that Kansas's civil commitment statute was nonpunitive even though treatment was merely an ancillary goal and treatment for condition may not be possible); Allen v. Illinois, 478 U.S. 364, 369-70 (1986) (holding that Illinois Sexually Dangerous Persons Act was not "criminal" statute and finding significant the statute's treatment requirement). The circuits seem to be split as to whether a person civilly committed as a sexually violent person has a due process right to a certain level of treatment and, in particular, treatment that may lead to his release. Compare Strutton v. Meade, 668 F.3d 549, 557 (8th Cir. 2012) (civilly committed sex offender "does not have a fundamental due process right to sex offender treatment"), with Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000) ("Fourteenth

Amendment Due Process Clause requires states to provide civilly-committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released.").

Plaintiff contends that this court should apply the standard adopted by the Ninth Circuit and hold that he is entitled to treatment that may lead to his eventual release. Plaintiff argues that such treatment must include, at a minimum, a comprehensive individualized treatment plan, individual counseling with trained psychiatrists and psychologists, more frequent personal interaction with staff, vocational training, family involvement, community access programs and less emphasis on group therapy.

However, in addressing the treatment issue, the Court of Appeals for the Seventh Circuit has concluded that civilly committed sexually violent persons "are entitled to some treatment, and what that treatment entails must be decided by mental health professionals." Allison, 332 F.3d at 1081. See also West v. Schwebke, 333 F.3d 745, 748 (7th Cir. 2003). The court of appeals based this standard on Youngberg v. Romeo, 457 U.S. 307 (1982). In Youngberg, the Court considered whether a person with a profound developmental disability who had been committed involuntarily had a constitutional right to treatment. Youngberg, 457 U.S. at 324. The Court concluded that civilly committed individuals "enjoy constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." Id. The state is thus obligated to provide "such training as an appropriate professional would consider reasonable to ensure [the patient's] safety and to facilitate his

ability to function free from bodily restraints." Id. The Supreme Court emphasized that "decisions made by the appropriate professional are entitled to a presumption of correctness." Id.

In applying Youngberg to cases involving patients civilly committed as sexually violent persons, the Court of Appeals for the Seventh Circuit has explained that there is not one type of treatment required. It stated in West that

> states are entitled to experiment. Detainees need not receive optimal treatment, and the Constitution does not immediately fall into line behind the majority view of a committee appointed by the American Psychiatric Association. In a world of uncertainty about how best to deal with sexually dangerous persons, there is room for both disagreement and trial-and-error; all the Constitution requires is that punishment be avoided and medical judgment be exercised.

West, 333 F.3d at 749. Thus, so long as the state is relying on professional judgment to develop and provide treatment, the state is complying with constitutional requirements. Allison, 332 F.3d at 1081. See also Hendricks, 521 U.S. at 368, n.4 ("States enjoy wide latitude in developing treatment regimens.").

Plaintiff's allegations suggest that he disagrees with the treatment regimen provided to patients at Sand Ridge Secure Treatment Center, not that the state is failing to provide treatment or failing to use medical judgment in applying treatment. Plaintiff even alleges in his complaint that the state touts its treatment regimen as "state of the art" and that it hired a treatment director that was purported to be the "best in the world." Dkt. #1 at 30. He admits that the state has a detailed treatment regimen in place that consists of assignments and group therapy. Although plaintiff is dissatisfied with the treatment, a mere

disagreement with prescribed treatment does not establish a constitutional deprivation. Allison, 332 F.3d at 1080; Garvin v. Armstrong, 236 F.3d 896, 899 (7th Cir. 2001) (difference in opinion regarding treatment does not give rise to constitutional violation); Seibert v. Schedel, 89 F. App'x 588, 589 (7th Cir. 2004) (affirming § 1915(e)(2) dismissal of inadequate treatment claim brought by patient committed at Wisconsin Resource Center under Wis. Stat. ch. 980 on grounds that "difference in opinion regarding treatment does not give rise to a constitutional violation").

D. Challenge to Requirement that Patients Pay for their Treatment

Plaintiff alleges in his complaint that the Department of Health Services has notified patients committed under chapter 980 that they will be required to pay for their cost of care and treatment if they ever have money to do so. Plaintiff contends this would be unconstitutional under the ex post facto clause and would violate his right to equal protection because the department does not charge any other involuntarily committed patients for their treatment. He also argues that it would be an excessive fee and would violate his right to due process.

Under Wis. Stat. § 980.12, the Department of Health Services must pay for "all costs relating to the evaluation, treatment, and care of persons evaluated or committed" under chapter 980. If plaintiff had alleged facts suggesting that he was actually being charged for his care and treatment, he may have stated a claim upon which relief may be granted. However, plaintiff has not alleged that he has been required to pay for his treatment and

care. Rather, he says only that department staff have told him that he may have to pay in the future. Thus, any claim based on a requirement to pay is not ripe because it is not clear whether the department will actually charge or attempt to charge plaintiff for his care and treatment. Texas v. United States, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotations omitted).

E. State Law Claims

Plaintiff's complaint contains several pages of discussion about Wisconsin statutes relating to chapter 980 patients and civilly committed individuals generally. He contends that current Department of Health Services' policies violate Wisconsin law in various ways. However, because plaintiff has not stated a claim arising under federal law, I decline to exercise supplemental jurisdiction over his state law claims. 28 U.S.C. § 1367(a) (district courts have supplemental jurisdiction over claims so related to claims in action that they form part of same case or controversy); see also Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or refuse jurisdiction over state law claims). If plaintiff wishes to pursue his state law claims, he must do so in state court.

ORDER

IT IS ORDERED that

1. Plaintiff Raymond K. Hedgespeth Jr. is DENIED leave to proceed on his claims

that defendants State of Wisconsin, Department of Health Services and all employees connected to the commitment of Chapter 980 and all the patients so confined violated his rights under the Constitution. I decline to exercise subject matter jurisdiction over plaintiff's claims arising under state law.

2. Plaintiff's motion for assistance in recruiting counsel is DENIED.

3. The clerk of court is directed to close this case.

Entered this 14th day of August, 2013.

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