

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WAYNE NEAL

v.

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE ET AL.

CIVIL ACTION

NO. 96-7923

Broderick, J.

June 18, 1997

Plaintiff Wayne Neal, a prisoner at the State Correctional Institution in Graterford, Pennsylvania, has filed a pro se civil rights complaint pursuant to 42 U.S.C. § 1983 seeking relief for an allegedly unconstitutional detention for violation of parole. Plaintiff alleges that Defendants have detained him without first conducting a probable cause hearing after his arrest for driving while under the influence of alcohol and committing a parole violation. Plaintiff also claims that Defendants have imprisoned him beyond his original maximum sentence by not giving him credit for time he has spent in prison and while on parole prior to his arrest.

Presently before the Court is Defendants' motion to quash Plaintiff's "notice of service," to strike Plaintiff's affidavit for entry of default, and to dismiss the complaint pursuant to both Rule 4(m) of the Federal Rules of Civil Procedure and Section 805 of the Prison Litigation Reform Act of 1995, codified at 28 U.S.C. § 1915A (West Supp. 1997). For the reasons set forth below, Plaintiff's claims will be dismissed for failure to

state a claim upon which relief may be granted.

I. STANDARD OF REVIEW

On April 26, 1996, Congress enacted the Prison Litigation Reform Act ("PLRA") as Title VIII of the Omnibus Consolidated Receptions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996). Section 805 of the PLRA, codified in a new section of the United States Code, requires federal courts to engage in a preliminary screening of civil cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a) (West Supp. 1997). Here, Plaintiff is a prisoner as defined by § 1915A(c) and the Defendants are a governmental entity, the Pennsylvania Board of Probation and Parole, and a number of its officers and employees.

In reviewing a complaint pursuant to 28 U.S.C. § 1915A, the Court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b). Pro se complaints, however, must be liberally construed. Haines v. Kerner, 404 U.S. 519, 520 (1972).

The Court adopts the familiar standard for Rule 12(b)(6) of the Federal Rules of Civil Procedure in determining whether the complaint fails to state a claim upon which relief may be granted

under 28 U.S.C. § 1915A(b)(1). The Court must accept as true all factual allegations contained in the complaint as well as all reasonable inferences that may be drawn from those allegations and view them in the light most favorable to the plaintiff. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The Court should not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

II. DISCUSSION

Plaintiff has failed to properly serve Defendants in accordance with Rule 4 of the Federal Rules of Civil Procedure because he mailed Defendants his complaint without obtaining waiver of service under Rule 4(d). Moreover, even though counsel for Defendants notified Plaintiff by letter on January 17, 1997 that he did not properly serve his complaint, the 120-day period for effectuating service under Rule 4(m) has now expired. Accordingly, the Court could quash Plaintiff's "notice of service," strike the affidavit of default, and dismiss the action pursuant to Rule 4(m). However, the Court will not dismiss the complaint on this ground, since even if the Court granted Plaintiff additional time to effectuate proper service, the complaint should be dismissed because it fails to state a claim upon which relief may be granted.

The facts alleged in the complaint, construed liberally in a

light most favorable to the Plaintiff, do not state a claim upon which relief may be granted under 42 U.S.C. § 1983. Plaintiff's allegations challenge the fact or duration of his confinement. Plaintiff seeks a declaratory judgment that Defendants are detaining him in excess of his original maximum sentence and without probable cause in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He also seeks "other relief" but does not specifically mention money damages.

Plaintiff's request for a declaratory judgment that he is being unlawfully incarcerated after the expiration of his original maximum sentence is not cognizable under § 1983. Such a request must be brought as an application for a writ of habeas corpus under 28 U.S.C. § 2254. "[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

Consequently, Plaintiff's claim under 42 U.S.C. § 1983 will be dismissed for failure to state a claim upon which relief may be granted. In order to seek release from state custody in a federal cause of action, Plaintiff must file a petition for writ of habeas corpus under 28 U.S.C. § 2254 after he has exhausted the remedies available in Pennsylvania for challenging the parole board's calculation of his maximum sentence date. The Plaintiff

should be aware, however, that under Pennsylvania law a parolee may not receive credit on his first sentence for time incarcerated on a subsequent sentence or for time spent while at liberty on parole after being recommitted as a convicted parole violator. Hines v. Pennsylvania Bd. of Probation and Parole, 420 A.2d 381, 384 (Pa. 1980) (cited in Houser v. Pennsylvania Bd. of Probation and Parole, 675 A.2d 787, 789 (Pa. Commw. 1996)); Houser v. Pennsylvania Bd. of Probation and Parole, 682 A.2d 1365, 1368 (Pa. Commw. 1996), appeal denied, 692 A.2d 568 (Pa. 1997).

Finally, Plaintiff's request for an order requiring Defendants to conduct a probable cause hearing before detaining him for a possible violation of parole must also be dismissed for failure to state a claim upon which relief may be granted.

The United States Supreme Court has held that a person released on parole has a liberty interest in remaining on parole, and that his parole cannot be revoked unless certain procedures are followed. Morrissey v. Brewer, 408 U.S. 471 (1972). Promptly following arrest, the state must provide an initial informal hearing "in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." Id. at 485. This hearing must be conducted by an independent officer, not the parole officer. Id. Later, the state must provide a formal revocation hearing before determining that the facts warrant

revocation of parole. Id. at 487-89.

The facts alleged in the complaint indicate that the Defendants have followed the procedures required by Morrissey. The Board of Probation and Parole scheduled a preliminary detention hearing for Plaintiff on September 12, 1996 before a hearing examiner. Plaintiff waived his right to the preliminary detention hearing and requested that his violation/revocation hearing be continued until after disposition of his criminal charge for driving while under the influence of alcohol. Accordingly, Plaintiff's claim that he is being unlawfully detained without a probable cause hearing will be dismissed for failure to state a claim upon which relief may be granted.

An appropriate Order follows.

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ORDER

AND NOW, this 18th day of June, 1997; for the reasons set forth in the Court's Memorandum of this date;

IT IS ORDERED: Defendants' motion to quash "notice of service," strike affidavit of default, and dismiss this action (Document No. 14) is GRANTED; and Plaintiff's complaint is DISMISSED pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim upon which relief may be granted.

IT IS FURTHER ORDERED: Plaintiff's pending motions for appointment of counsel, for default judgment, to amend discovery exhibits, and for application of bail pending complaint (Document Nos. 6, 7, 11 & 13) are DISMISSED AS MOOT.

RAYMOND J. BRODERICK, J.