**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

June 17, 1997

**NOTICE**



**No. 96-1491**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**NORMAN O. BROWN,**

**PLAINTIFF-APPELLANT,**

**V.**

**RICHARD ARTISON AND MILWAUKEE COUNTY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County: JOHN E. McCORMICK, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Norman O. Brown appeals from an order dismissing his complaint against Richard Artison and Milwaukee County. Brown claims the trial court erred in granting Artison's motion to dismiss. Because the trial court erred in granting the motion to dismiss, we reverse and remand for further proceedings.

## I. BACKGROUND

Brown filed a complaint pursuant to 42 U.S.C. § 1983 alleging that his civil rights were violated when he was held as a pretrial detainee in the Milwaukee County Jail under unconstitutional living conditions. Specifically, he alleged that: (1) he was kept in an overcrowded "bullpen" during his eighteen days of confinement; (2) he was deprived of recreation; (3) the shower/bathroom facilities available were unsanitary; (3) he was denied free postage and supplies for legal mail; (4) he was denied reading material; and (5) he was forced to sleep on the bare floor for the entire length of confinement.

Artison filed a motion to dismiss. The trial court granted the motion. Brown now appeals.

## II. DISCUSSION

The issue raised in this case is whether the trial court erred in dismissing Brown's complaint. Whether a complaint states a claim is a question of law that we determine without deference to the trial court's decision. *See* ***Williams v. Security Sav. & Loan Ass'n***, 120 Wis.2d 480, 482, 355 N.W.2d 370, 372 (Ct. App. 1984). "A claim should not be dismissed … unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 732, 275 N.W.2d 660, 664 (1979).

Thus, we must review Brown's complaint to determine whether there are any conditions under which Brown could recover. *See* ***Wilson v. Continental Ins. Cos.,*** 87 Wis.2d 310, 317, 274 N.W.2d 679, 683 (1979). In doing so, we note that we must assume that the facts as pleaded are true. *See*

***Stefanovich v. Iowa Nat'l Mut. Ins. Co.***, 86 Wis.2d 161, 164, 271 N.W.2d 867, 868-69 (1978).

***Bell v. Wolfish***, 441 U.S. 520 (1979) provides us with the legal framework with which to evaluate Brown's complaint. ***Bell*** provided in pertinent part:

> In evaluating the constitutionally of conditions or restrictions of pretrial detention that implicate only the protection against deprivations of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.…
>
> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it.]" Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal–if it is arbitrary or purposeless– a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

***Id.*** at 535, 538-39 (citations and footnote omitted). The trial court held that all of Brown's allegedly unconstitutional conditions were not intended to punish Brown and were serving a legitimate governmental purpose. Although the trial court's conclusion may be correct with respect to several of Brown's complaints– deprivation of a shower is not a constitutional violation, *see* ***Davenport v. DeRobertis***, 844 F.2d 1310 (7th Cir.), *cert. denied*, 488 U.S. 908 (1988); denial of

exercise or recreation does not amount to a constitutional violation, *see* ***Green v. Ferrell***, 801 F.2d 765 (5th Cir. 1986)–the trial court failed to address at all Brown's complaint regarding sleeping on the bare floor. Oddly enough, Artison fails to address this specific complaint as well.

Having reviewed the pertinent case law as well as Brown's complaint, we conclude that Brown's complaint does state a claim for relief at least with respect to his allegation that he was forced to sleep on the bare floor. Brown may be able to show that that particular condition of pretrial detention was not reasonably related to a legitimate goal, that it was arbitrary or purposeless and therefore constituted punishment that may not constitutionally be inflicted upon Brown. ***Bell,*** in fact, acknowledged that "confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amount[] to punishment." ***Id.***, 441 U.S. 542. Accordingly, it was error for the trial court to dismiss the complaint. We reverse the trial court's order and remand for further proceedings.[1]

*By the Court.*—Order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[1] We observe that Brown provided this court with an excellent *pro se* brief. Nevertheless, we refer him to contact the Legal Aid Society should he desire some professional legal assistance in pursuing his claim.