COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1542 **Cir. Ct. No. 00-CV-3082**

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

SPENCER MCCLAIN,

PLAINTIFF-APPELLANT,

V.

JERRY SMITH, JR., ARELY GONNERING, FRED MELENDEZ, JEANNE HUIBREGTSE AND JOHN HUSZ,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 PER CURIAM. Spencer McClain appeals pro se from the order dismissing his action against the Wisconsin Parole Commission (Commission) and against several parole commissioners individually on the ground that the complaint fails to state a claim upon which relief can be granted. McClain is a

Wisconsin inmate housed in Whiteville Correctional Facility in Whiteville, Tennessee. In February 2000, Parole Commissioner Arely Gonnering conducted a parole hearing via telephone with McClain and denied McClain parole. McClain challenged this parole denial in circuit court, and the circuit court dismissed his complaint for failure to state a claim. McClain contends the circuit court erroneously dismissed his complaint because it shows he is entitled to relief under 42 U.S.C. § 1983 and on various state law grounds. We disagree and affirm the circuit court's order dismissing the complaint.

¶3 In determining whether a complaint should be dismissed, the facts pleaded and all reasonable inferences from the pleadings are taken as true. The legal sufficiency of the complaint is a question of law, which this court reviews without deference to the trial court. ***Irby v. Macht***, 184 Wis. 2d 831, 836, 522 N.W.2d 9 (1994), *overruled on other grounds*, ***Sandin v. Conner*** 515 U.S. 472 (1995).

¶4 We first turn to McClain's 42 U.S.C. § 1983 claims. Section 1983 itself is not a source of substantive rights. ***Baker v. McCollan,*** 443 U.S. 137, 144 n.3 (1979). Rather, § 1983 provides a remedy to those who, because of state action, are deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States. ***Gomez v. Toledo***, 446 U.S. 635, 638 (1980). To state a claim under § 1983, the plaintiff must allege: (1) that the defendant deprived the plaintiff of a right secured by the Constitution or the laws of the United States; and (2) that the defendant acted under color of law. ***Id.*** at 640.

¶5 McClain makes 42 U.S.C. § 1983 claims based on both the Equal Protection Clause and on the Due Process Clause of the United States

Constitution. We look first at his equal protection claims and then examine his due process claim.

¶6 The Equal Protection Clause guarantees that "all persons similarly situated should be treated alike." ***City of Cleburne v. Cleburne Living Ctr.***, 473 U.S. 432, 439 (1985). To state a claim under the Equal Protection Clause, a plaintiff must show that the defendant "intentionally discriminated against her [or him] because of her [or his] membership in a particular class." ***Gray v. Lacke***, 885 F.2d 399, 414 (7th Cir. 1989).

¶7 McClain argues his complaint states a claim based on denial of equal protection on two independent grounds. First, he alleges that the Commission provides out-of-state inmates with unlawful parole hearings while it provides in-state inmates with lawful parole hearings. Second, he alleges in a conclusory manner that the Commission grants parole to in-state inmates, but not to out-of state inmates.

¶8 McClain's first equal protection claim fails because out-of-state parole hearings are not unlawful. The legislature has authorized the Department of Corrections to contract with another state or private individual for the confinement of persons in custody of the department. WIS. STAT. § 301.21(1m)(a) and (2m)(a) (1999-2000).[1] Pursuant to these contracts, the department may "transfer any inmates it deems appropriate for incarceration at facilities in other states." ***Evers v. Sullivan***, 2000 WI App 144, ¶16, 237 Wis. 2d 759, 615 N.W.2d 680, *rev'd denied*, 2000 WI 121, 239 Wis. 2d 312, 619 N.W.2d 94 (Wis. Oct. 17,

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

2000) (No. 00-0127). While housed in a facility in another state, if an inmate is to receive a parole hearing, such hearing "shall be conducted by the … [C]ommission under rules of the [D]epartment [of Corrections.]" Section 301.21(2m)(c). Thus, the Commission has authority to conduct parole hearings at both in-state and out-of-state facilities, and in-state and out-of-state inmates are not treated differently in this respect.

¶9 McClain's second equal protection claim—that the Commission grants parole to in-state inmates but not to out-of-state inmates—fails as well. McClain has not alleged that the Commission has intentionally denied parole to out-of-state inmates due to that status. It is the nature of a discretionary parole scheme to treat all inmates differently based on their individual characteristics. McClain's own pleadings demonstrate that in his case the Commission examined his record and applied various criteria in reaching a decision, none of which related to McClain being housed out of state. McClain has made no specific allegations showing that similarly situated in-state inmates were granted parole.

¶10 We now turn to McClain's due process claim. To state a claim under the Due Process Clause, the "plaintiff must show a deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' without due process of law. The requirement of procedural due process is met if a state provides adequate post-deprivation remedies." ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶53, 235 Wis. 2d 610, 612 N.W.2d 59 (citations omitted).

¶11 McClain alleges that the Commission infringed upon his right to procedural due process when it allegedly did not follow its own mandated procedures. This claim fails for two reasons. First, there is no liberty interest in Wisconsin's discretionary parole scheme. ***State ex rel. Gendrich v. Litscher***,

2001 WI App 163, ¶7, 246 Wis. 2d 826, 632 N.W.2d 878. Second, even if the Commission's procedures had deprived McClain of a protected liberty interest, there is no denial of due process because of the availability of certiorari review to correct any procedural deficiencies. *See* ***Irby***, 184 Wis. 2d at 850-51. We may not treat the complaint as a petition for certiorari review, since McClain failed to file it within six months of accrual of his claim, as required by common law. ***State ex rel. Czapiewski v. Milwaukee City Serv. Comm'n***, 54 Wis. 2d 535, 539, 196 N.W.2d 742 (1972).

¶12 Finally, we consider McClain's state law claims. McClain alleges that individual commissioners violated WIS. STAT. § 304.01(2) because their conduct did not comport with the procedures set forth therein. Such challenges to procedural deficiencies are properly addressed by way of certiorari review, ***State ex rel. Johnson v. Cady***, 50 Wis. 2d 540, 549-50, 185 N.W.2d 306 (1971), and, as we have already stated, this complaint was not filed within the time required for certiorari review. McClain also contends that the commissioners subjected him to intentional infliction of emotional distress by subjecting him to a "longer more harsh sentence." He claims this has caused him "pain, injury and emotional trauma." Even assuming that the conduct McClain alleges could state a claim for intentional infliction of emotional distress, WIS. STAT. § 893.82(3) requires a claimant to notify the attorney general before suing individual state employees, and the claimant must plead compliance with the statute, ***Yotvat v. Roth***, 95 Wis. 2d 357, 360-61, 290 N.W.2d 524 (Ct. App. 1980) (interpreting WIS. STAT. § 895.45, now § 893.82). McClain's complaint does not allege compliance.

¶13 Since McClain fails to state any claim for relief, we affirm the circuit court's order dismissing the complaint.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.