COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3035 **Cir. Ct. No. 2007CV4165**

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

LEONARD COLLINS,

PLAINTIFF-APPELLANT,

V.

MARK HEISE, RENEE CHYBA AND ROSIE EICKHOFF,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Leonard Collins appeals an order dismissing his 42 U.S.C. § 1983 complaint against three employees of the Wisconsin Department of Corrections, Mark Heise, Renee Chyba, and Rosie Eickhoff. The court dismissed the action on the defendants' motion to dismiss the complaint. Collins contends

that the complaint presented legally valid causes of action and that it was error to dismiss it. We disagree, and affirm.

¶2 Collins' complaint alleged the following. He has been serving a prison sentence in Wisconsin prisons since 1976. Heise is the director of the Bureau of Offender Classification and Movement of the Department of Corrections. Chyba is the AODA residential unit manager at Kettle Moraine Institution where Collins is incarcerated. Eickhoff is the head of the program review committee at Kettle Moraine.

¶3 In 1989 documents were placed in Collins' personnel file erroneously identifying him as a heroin user. In subsequent years the Department of Corrections has tried to force him to undergo AODA treatment as a heroin user. He has refused, and by refusing has lost the opportunity for parole or transfer to a minimum security institution. Most recently, the defendants have induced him to sign an AODA treatment contract by telling him that he will not be paroled or transferred until he completes treatment. Additionally, the defendants and others in the Department of Corrections have failed or refused to remove the erroneous information about heroin use from his file.

¶4 Based on these allegations, Collins claimed that the defendants violated his First Amendment right by suppressing his efforts to contest his placement in an AODA program, and his Fourteenth Amendment due process right to protection from "arbitrary government interference." In addition to monetary damages, he requested an order for removal of references to heroin use from his file, and for his removal from the AODA residential treatment program at Kettle Moraine. The trial court dismissed the complaint on its conclusion that the

factual allegations in the complaint failed to show a violation of a liberty interest protected by the Fourteenth Amendment or any First Amendment violation.

¶5 A motion to dismiss tests the legal sufficiency of the plaintiff's complaint. ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). When reviewing a motion to dismiss, the court must accept as true the facts alleged in the complaint. ***Walberg v. St. Francis Home, Inc.***, 2005 WI 64, ¶6, 281 Wis. 2d 99, 697 N.W.2d 36. A complaint should be liberally construed, and a plaintiff's claims should be dismissed only "if it is 'quite clear' that there are no conditions under which that plaintiff could recover." ***Doe v. Archdiocese of Milwaukee***, 2005 WI 123, ¶20, 284 Wis. 2d 307, 700 N.W.2d 180 (citations omitted).

¶6 Collins' complaint claims that the defendants suppressed his right to contest the AODA placement, thus violating his First Amendment rights. However, his complaint alleged facts showing that he fully and freely exercised his freedom to speak on the matter of his AODA placement on multiple occasions. His complaint states, and documents attached to it show, that he has repeatedly filed appeals of program review committee decisions on his need for AODA treatment and raised the matter in inmate complaints as well. There is no allegation that the defendants or anyone else ever interfered with his resort to these administrative remedies.

¶7 Collins' complaint also fails to allege facts supporting a due process claim. A person claiming a procedural due process violation must establish state deprivation of a constitutionally protected interest in life, liberty, or property. *See* ***Capoun Revocable Trust v. Ansari***, 2000 WI App 83, ¶15, 234 Wis. 2d 335, 610 N.W.2d 129. The same is true of a substantive due process claim. *See* ***Dane***

County Dep't of Human Servs. v. Ponn P., 2005 WI 32, ¶20, 279 Wis. 2d 169, 694 N.W.2d 344. Here, Collins claims that he has been deprived of discretionary parole or transfer to a less restrictive institution until what he claims is unnecessary treatment is completed. However, he does not have a protected interest in discretionary parole, ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶7, 246 Wis. 2d 814, 632 N.W.2d 878, or in transfer to a less restrictive prison institution. *See* ***Santiago v. Ware***, 205 Wis. 2d 295, 318-22, 556 N.W.2d 356 (Ct. App. 1996). Consequently, the deprivations he claims do not give rise to a 42 U.S.C. § 1983 claim.

¶8 Nor does his claim of compelled participation in treatment set forth a 42 U.S.C. § 1983 claim. The allegations of the complaint make clear that Collins' participation in AODA treatment is "compelled" only in the sense that it is necessary to obtain certain privileges he seeks. By his own admission he remains legally free to decline participation, and in fact has on repeated occasions. In any event, Collins does not have a constitutionally protected liberty interest in avoiding a prison treatment program. *See* ***Bollig v. Fiedler***, 863 F. Supp. 848-49 (E.D. Wis. 1994) (prisoner has due process right to be free of forced treatment only when it involves administration of mind-altering drugs or transfer to different degree or kind of confinement).

¶9 Collins also contends that the circuit court erred by denying his motion to find the defendants in contempt during the circuit court proceeding because they did not reply to his brief opposing the motion to dismiss the complaint. His argument is meritless because he filed the first brief in the matter and did not respond to the subsequently filed defendants' brief. There was nothing to reply to, and no requirement that the defendants file a reply brief in any event.

By the Court.—Order affirmed.

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