IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANTHONY L. WILSON,

Plaintiff,

vs.

PHIL PLUMMER, et al.,

Defendants.

Case No. 3:12-cv-337

District Judge Timothy S. Black
Magistrate Judge Michael J. Newman

ORDER AND REPORT & RECOMMENDATION[1]

This is a pro se 42 U.S.C. § 1983 case. In 2007, Plaintiff Anthony Wilson was convicted of complicity to commit felonious assault, with a firearm specification, in the Montgomery County, Ohio Court of Common Pleas. He is currently serving his sentence at the London Correctional Institution. See State v. Wilson, No. 22581, 2009 WL 282079, at *1, 2009 Ohio App. LEXIS 460, at *3 (Ohio Ct. App. Feb. 6, 2009). While serving his prison term, Plaintiff has continued to appeal and collaterally attack his conviction. In March 2010, he moved for leave to file a delayed motion for a new trial in the Montgomery County Common Pleas Court, claiming he had newly discovered evidence. See doc. 29-9 at PageID 279. The Common Pleas Court appointed counsel to represent Plaintiff on that matter, and scheduled a hearing. See id. at PageID 278-79. While that motion was pending, Plaintiff was held in the Montgomery County Detention Center (the "Montgomery County Jail") during several periods of time between June and November 2010. This § 1983 case arises out of Plaintiff's detention there. He claims that several named and unnamed Defendants -- all Montgomery County Jail Officers -- violated his constitutional rights by denying him access to the courts (the Montgomery County Common Pleas

[1] Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

Court, the Supreme Court of Ohio, and this Court), depriving him of adequate meals, and retaliating against him for attempting to access the courts.

I.

In lieu of filing an answer to Plaintiff's complaint, Defendants filed a joint motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Doc. 7. At that time, the Court determined that Plaintiff's complaint, as initially pled, did not satisfy Fed. R. Civ. P. 8(a). Doc. 22. Recognizing Plaintiff's pro se status, and in the interest of justice, the Court, acting sua sponte, afforded Plaintiff additional time to file an amended complaint in accordance with Rule 8(a). Id. Plaintiff then filed a more detailed amended complaint in compliance with the Court's Order and Defendant's motion to dismiss Plaintiff's initial complaint was denied as moot. See doc. 25 and Notation Order of April 11, 2013.

Now before the Court is Defendants' joint motion to dismiss the amended complaint (doc. 26); Plaintiff's memorandum in opposition (doc. 29); and Defendants' reply memorandum (doc. 30). Further, Plaintiff moved to file a surreply. Doc. 33. Given that the motion is unopposed, and in the interest of justice, the Court **GRANTS** Plaintiff's motion to file a surreply (doc. 33). The Clerk is **ORDERED** to docket Plaintiff's attached memorandum (doc. 33-1) as "Plaintiff's Surreply to Defendants' Motion to Dismiss."

II.

While pro se parties must satisfy basic pleading requirements, Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989), their pleadings must be liberally construed and "held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007). The pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when

the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556).

The Court has carefully reviewed Plaintiff's amended complaint, as well as the parties' memoranda, and finds, at this early juncture in the case, that dismissal as a general matter is unwarranted. With one exception, Plaintiff has plausibly stated several claims upon which relief can be granted.

A.

Having carefully scrutinized the amended complaint, the Court finds Plaintiff has alleged three instances of being denied access to the courts -- a well-established constitutional right. See Bounds v. Smith, 430 U.S. 817, 828 (1977). First, he claims that he was unsuccessful on his motion for leave to file a delayed motion for a new trial in the Montgomery County Common Pleas Court because Defendants denied him access to his legal materials. See, e.g., doc. 25 at PageID 202. That claim fails, however, because Plaintiff was represented by counsel on that matter before the Montgomery County Common Pleas Court. See docs. 10-1, 29-9 at PageID 278-79; see also Holt v. Pitts, 702 F.2d 639, 640-41 (6th Cir. 1983) (holding that an inmate's constitutional right of access to the courts was not violated when he was represented by appointed counsel). Second, Plaintiff complains that he was unable to file a pro se memorandum in support of jurisdiction in the Supreme Court of Ohio.[2] See, e.g., doc. 25 at PageID 202. That claim can proceed because he was not represented by counsel on that matter, and he arguably states a claim for denial of access to the courts. Third, Plaintiff alleges that, as a result of Defendants' actions, he was unable to file an application to proceed in forma pauperis in this Court and thereby

[2] With respect to this sub-claim, Plaintiff appears to refer to Ohio Supreme Court Case No. 2010-1731 (an appeal from the Ohio Second District Court of Appeals decision, State v. Wilson, No. 23313, 2010 WL 2891529, 2010 Ohio App. LEXIS 2950 (Ohio Ct. App. July 23, 2010)). The Court may consider these state court records without converting the motion to dismiss into a summary judgment motion. See Buck v. Thomas M. Cooley Law Sch., 597 F.3d 812, 816 (6th Cir. 2010).

challenge the conditions of his confinement in the Montgomery County Jail. See, e.g., doc. 25 at PageID 200. Although Plaintiff complains of his conditions of confinement in the Montgomery County Jail in this lawsuit, the Court notes that there is a difference between complaining of the jail conditions now instead of during his confinement. Cf. Abdur-Rahman v. Mich. Dep't of Corr., 65 F.3d 489, 491 (6th Cir. 1995). For example, Plaintiff could have sought injunctive relief, had he been able to file a lawsuit in this Court during his confinement. To that end, he has arguably stated an access-to-the-courts claim with respect to his inability to challenge the conditions of confinement in this Court, and that claim may also proceed. Finally, Plaintiff claims injuries resulting from these alleged actions – e.g., he was unable to file a complaint and missed filing deadlines -- as required to prevail on an access-to-the-courts claim. See Lewis v. Casey, 518 U.S. 343, 346 (1996); Harbin-Bey v. Rutter, 420 F.3d 571, 578 (6th Cir. 2005).

B.

In addition, Plaintiff states a violation of his Eighth Amendment right to be free from cruel and unusual punishment based on an alleged deprivation of food. See Bellamy v. Bradley, 729 F.2d 416, 419 (6th Cir. 1984). He claims he was fed peanut butter and jelly "for breakfast, lunch, and dinner," see doc. 25 at PageID 205; he was served "diet meals with a[n] indigestible soap liquid taste," see id.; and he was "refused…meal trays," see id. at PageID 213-14. Further, Plaintiff sufficiently alleges one or more injuries as a result of these deprivations -- i.e., he allegedly "receiv[ed] medical treatment…for the loss of extreme weight and [was] placed on special diet meals," and the peanut butter and jelly meals "alter[ed] [his] sugar levels and digestive trac[t]." See id. at PageID 205, 214; Richmond v. Settles, 450 F. App'x 448, 456 (6th Cir. 2011) (noting that a plaintiff must allege his health suffered as a result of meal deprivation).[3]

[3] Defendants make a cursory argument that they are entitled to qualified immunity with respect to Plaintiff's Eighth Amendment claims. See doc. 26 at PageID 237; doc. 30 at PageID 299-300. Given

C.

Furthermore, Plaintiff arguably states a First Amendment retaliation claim against Defendants. He claims that he engaged in protected activity (e.g., seeking access to the courts); adverse actions were taken against him (e.g., Defendants refused to provide him with jail request forms, gave him indigestible food and denied him meals, and encouraged other inmates to commit physical acts against him); and these alleged retaliatory actions were motivated by Plaintiff's requests to file grievances. See, e.g., doc. 25 at PageID 205, 207-08, 215; see also Thaddeus-X v. Blatter, 175 F.3d 378, 394-400 (6th Cir. 1999) (en banc) (discussing the elements of a prisoner's First Amendment retaliation claim).

D.

Finally, the Court is not persuaded, at this time, by Defendants' argument -- that Plaintiff's complaint should be dismissed on statute of limitations grounds. The statute of limitations for a § 1983 action in Ohio is two years. Banks v. City of Whitehall, 344 F. 3d 550, 553 (6th Cir. 2003). In his amended complaint, Plaintiff alleges the events underlying this § 1983 action occurred during several periods of time in which he was an inmate in the Montgomery County Jail awaiting a hearing on his motion for a new trial: June 10, 2010 through June 24, 2010; July 27, 2010 through September 16, 2010; and October 13, 2010 through November 3, 2010. See, e.g., doc. 25 at PageID 202-03, see also doc. 25-1 at PageID 222-23. Plaintiff initiated this § 1983 action on October 3, 2012.[4] Thus, the events which allegedly occurred during October 13, 2010 through November 3, 2010 are not time-barred.

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their failure to develop this argument, the Court deems it waived for purposes of their dismissal motion. See Dillery v. City of Sandusky, 398 F.3d 562, 569 (6th Cir. 2005). If Defendants wish to raise this or other arguments again, they may do so in a motion for summary judgment, if appropriate.

[4] Plaintiff's motion to proceed in forma pauperis ("IFP") in this Court is dated October 3, 2012. See doc. 1 at PageID 7. The IFP motion was received and docketed by the District Court Clerk's office on October 11, 2010, see doc. 1, and his complaint was formally docketed on a later date when the IFP motion was granted. See doc. 3. Under the prison mailbox rule, Plaintiff's complaint is deemed filed, for statute of limitations purposes, on October 3, 2012. See Scott v. Evans, 116 F. App'x 699, 701 (6th Cir. 2004).

For those claims premised on events occurring before October 3, 2010, the Court finds that the limitations period could arguably be extended under the "continuing violation" doctrine. This doctrine extends the statute of limitations where a claim arises out of continuing acts violating the plaintiff's rights. See *Tolbert v. State of Ohio Dep't* of Transp., 172 F.3d 934, 940 (6th Cir.1999). While recognizing that this Circuit rarely applies this doctrine to civil rights actions, Sharpe v. Cureton, 319 F.3d 259, 267 (6th Cir. 2003), the Court finds Plaintiff has alleged sufficient facts to plausibly support its application in order to survive a motion to dismiss.

III.

Based on the foregoing analysis, the Court therefore **RECOMMENDS** that:

1. Defendants' joint motion to dismiss Plaintiff's amended complaint (doc. 26) be **GRANTED IN PART AND DENIED IN PART**;

2. With respect to Plaintiff's access-to-the-courts claim -- premised on the denial of his motion for leave to file a delayed motion for a new trial in the Montgomery County Common Pleas Court due to Defendants' alleged refusal to provide him with his legal materials -- the motion be **GRANTED**;

3. With respect to all other claims, the motion be **DENIED**; and

4. The Order staying discovery pending the Court's ruling on the motion to dismiss (doc. 28) be **LIFTED**.

September 13, 2013

s/ **Michael J. Newman**
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within **FOURTEEN** days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to **SEVENTEEN** days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B)(C), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within **FOURTEEN** days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. See United States v. Walters, 638 F. 2d 947 (6th Cir. 1981); Thomas v. Arn, 474 U.S. 140 (1985).