

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ERIC W. POIRIER,

Plaintiff,

v.

JAMES E. DOYLE, JAMES SCHANSBERG,  
KEITH CRIVELLO, DIANE NELSON,  
CHERYL R. SCHINDLER, WILLIAM R.  
GLASS, MARY REPPE and DEAN C. MEYER,

Defendants.

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OPINION AND  
ORDER

00-C-0382-C

Pro se plaintiff Eric W. Poirier is an inmate at Racine Correctional Institution. He filed a complaint in the United States District Court for the Eastern District of Wisconsin in which he sought leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. In an order entered on February 3, 2000, Judge Lynn Adelman granted plaintiff leave to proceed in forma pauperis on his claims that (1) on two occasions, his parole was revoked in violation of the double jeopardy clause for charges for which he was acquitted by a jury; (2) his second parole revocation violated the double jeopardy clause because it was based on the same conduct that served as the basis of his first revocation and the criminal complaint filed in Rusk County; and

(3) the prosecution of a criminal complaint in Rusk County violated the double jeopardy clause because he was charged with the same crime in Chippewa County. Judge Adelman granted plaintiff leave to proceed in forma pauperis against the following defendants.

<b>Defendant</b>	<b>Position</b>
James Doyle (in his individual capacity)	Attorney General for the state of Wisconsin
James Schansberg	parole agent (Chippewa Falls)
Keith Crivello	parole agent supervisor (Chippewa Falls)
Diane Nelson (deceased)	parole agent (Rusk County)
Cheryl Schindler	parole agents (Rusk County)
William Glass	investigator with Chippewa County Sheriff's Department
Dean Meyer	Sheriff of Rusk County
Mary Reppe	Deputy Sheriff of Chippewa County

Plaintiff originally filed three separate but related civil cases. Judge Adelman allowed plaintiff to amend the complaint in case 99-C-1255 to incorporate the allegations of the complaints filed in cases 99-C-1256 and 99-C-1257. In screening the case, Judge Adelman addressed plaintiff's original complaint (99-C-1255), the first amendment (originally case 99-C-1256) and second amendment (originally case 99-C-1257), treating the three complaints as a merged amended complaint.

Presently before the court is plaintiff's motion to amend his complaint pursuant to Fed. R. Civ. P. 15 and defendant Dean C. Meyer's motion to dismiss plaintiff's complaint against him pursuant to Fed. R. Civ. P. 12(b)(6).

For the purpose of deciding defendant Meyer's motion to dismiss, the allegations in the complaint are accepted as true.

#### ALLEGATIONS OF FACT

Defendant Dean C. Meyer is the sheriff of Rusk County. Plaintiff was convicted of second degree reckless endangerment as a party to the crime in case 90-CF-139, imprisoned until his mandatory release date and released on parole. In 1995, plaintiff was charged in Chippewa County, case 95-CF-200, with being a felon in possession, theft of a firearm and burglary. As a result of the charged conduct, plaintiff's parole agent from case 90-CF-139 placed a parole hold on plaintiff on September 30, 1995. On November 14, 1995, defendant Meyer was at a crime scene when a second search warrant was served. He took David Seekamp (one of the state's witnesses) into custody at Rusk County jail and then released him. On March 28, 1996, plaintiff was acquitted on all three charges in case 95-CF-200. At a parole revocation hearing on April 4, 1996, plaintiff's parole was revoked on the basis of the same conduct for which he had been acquitted. Plaintiff returned to prison for another year, three

months and 21 days. It appears that he was released from prison on January 14, 1997.

On March 14, 1996, defendant Meyer showed district attorney Buslee the police report of defendant investigator William Glass and defendant deputy Mary Reppe as well as statements from three of the state's witnesses. On March 22, 1996, plaintiff was served with a criminal complaint and summons from Rusk County, case 96-CF-13, for the identical conduct and offenses as in Chippewa County's case 95-CF-200. This was six days before plaintiff was to have a jury trial in Chippewa County. On April 16, 1996, plaintiff was transported to a Rusk County courtroom, where he tried to explain to defendant Meyer that he had been acquitted of the same charges just a few weeks earlier in Chippewa County. Defendant Meyer laughed and walked away. On April 22, 1997, a parole hold was again placed on plaintiff regarding his parole in 90-CF-139. On June 11, 1997, plaintiff had a second revocation hearing because of the Rusk County charges. His parole was again revoked and plaintiff was incarcerated until April 22, 1998. On February 26, 1999, plaintiff went to trial on the charges in case 96-CF-13 and was acquitted on all counts.

## OPINION

### I. MOTION TO DISMISS

#### A. Standard

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, (1984)); Gossmeier v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997)).

#### B. Defendant Meyer

Plaintiff has been granted leave to proceed on his claims of double jeopardy. Defendant Meyer contends that he is not a proper defendant in this case because he was not personally involved in prosecuting plaintiff or revoking his parole. Instead, the sole allegations against defendant Meyer are that he took someone other than plaintiff into custody, that he showed a district attorney the police report and witness statements and that he failed to stop the prosecution of plaintiff even though he knew that plaintiff had been acquitted of the same charges. The final allegation is the only one that relates to plaintiff's claim of double jeopardy because of his prosecution on the same charges on two different occasions. Defendant contends

that he cannot be held liable on this claim because he did not have the authority to prosecute plaintiff or to prevent the district attorney from prosecuting him.

Under Wisconsin law, a prosecutor has “broad discretion in determining whether to charge an accused, which offenses to charge, under which statute to charge, whether to charge a single count or multiple counts when the conduct may be viewed as one continuing offense, and whether to join all offenses in a single prosecution or to bring successive prosecutions.” Wisconsin v. Krueger, 224 Wis. 2d 59, 67, 588 N.W.2d 921, 924 (1999). “With reference to prosecutorial discretion, Wisconsin case law has repeatedly held that the discretion whether to charge and how to charge vests solely with the district attorney.” Wisconsin v. Lindsey, 203 Wis. 2d 423, 440, 554 N.W.2d 215, 221 (Ct. App. 1996). See also Wisconsin v. Jones, 217 Wis. 2d 57, 64, 576 N.W.2d 580, 583 (Ct. App. 1998) (“Wisconsin case law has repeatedly noted that '[t]he discretion resting with the district attorney in determining whether to commence a [criminal] prosecution is almost limitless . . . .”). Plaintiff's allegations against defendant Meyer are insufficient to establish that he violated plaintiff's constitutional rights by subjecting him to double jeopardy. Accordingly, defendant Meyer's motion to dismiss will be granted.

## II. MOTION TO AMEND

Plaintiff has filed a motion titled “Motion Under Fed. R. Civ. P. 15(b) or Amended Pleadings to Include Allegations.” In his motion, plaintiff summarizes what is happening in his life to date in an attempt to bring additional claims against additional defendants, including denial of access to the courts, denial of due process and denial of adequate medical care. The additional allegations set forth in plaintiff’s motion bear no relation to the allegations in his original complaint. If plaintiff wants to bring additional claims against new defendants, he must file a separate lawsuit; he cannot expand the present case to include these claims.

As I noted earlier, the only claims on which plaintiff has been allowed to proceed in this case are his claims of double jeopardy. The complaint does not include a retaliation claim against Racine Correctional Institution officials. Indeed, in situations in which a plaintiff alleges that prison officials are retaliating against him by denying him his legal work, it is the policy of this court to require that the claim be presented in a separate lawsuit unless it appears that the alleged interference would directly and physically impair the plaintiff’s ability to prosecute his lawsuit. Even if prison officials are denying plaintiff access to his legal materials while he is in temporary lock-up, he has not alleged facts sufficient to demonstrate that prison officials have presented a direct, physical impairment to his prosecuting his claims in this case. To the extent that plaintiff alleges that a judge in the Eastern District of Wisconsin has dismissed a separate case because prison officials had denied him access to his legal materials for 81 days, he must

file a separate lawsuit. He cannot amend his complaint to include allegations against new defendants concerning alleged constitutional violations that have occurred since the filing of his original complaint that are wholly unrelated to the allegations in his original complaint. His motion to amend his complaint will be denied.

ORDER

IT IS ORDERED that

1. Defendant Dean C. Meyer's motion to dismiss is GRANTED; and
2. Plaintiff Eric Poirier's motion to amend his complaint is DENIED.

Entered this 26th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB  
District Judge