IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN E. BROWN,

ORDER

Petitioner,

03-C-177-C

v.

MADISON POLICE DEPARTMENT, P.O. LAURA WALKER, P.O. DEAN BALDUKAS, JUDGE: TODD E. MUERER, DET. WILLIAM LAHR, P.O. JAMES MOROVIC, JOSEPH R. DURKIN, JUDGE: ROBERT A. DeCHAMBEAU, P.O. JEN KREUGER, P.O. ERIK L. LEE, P.O. CARRIE HEMMING, JUDGE MOSIER, SA: CHONH HER, CAROL HOWE and KATHERINE M. OLSEN of Yonkers,

Respondents.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Dane County jail in Madison, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the fees and costs of instituting this lawsuit and has no assets

or means with which to pay the initial partial filing fee required by 28 U.S.C. § 1915(b)(1). Accordingly, I will review petitioner's request for leave to proceed in forma pauperis without first requiring payment of an initial partial filing fee. 28 U.S.C. § 1915(b)(4).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Respondents Laura Walker, Jim Morovic, Dean Baldukas, Erik Lee, Jen Kreuger and Carrie Hemming are Madison police officers. Respondent William Lahr is a detective. Respondents Robert A. DeChambeau, Todd E. Muerer and Judge Mosier [properly Moeser] are Dane County circuit court judges. Respondent Chonh Her is an employee of The Sports Authority. Respondents Carol Howe and Katherine M. Olsen are Yonkers department store

employees.

On September 15, 2002, at approximately 12:50 p.m., respondents Walker, Morovic and Baldukas investigated petitioner for being a party to the crime of identity theft and detained him on the basis of circumstantial evidence. Petitioner was held at the Madison police station for 12 hours, from approximately 1:00 p.m until 1:00 a.m the next day. During this time, petitioner was not given food or water. He was placed in a holding cell without plumbing and had to urinate on the floor to relieve himself. Respondents Walker, Morovic and Baldukas never read petitioner his rights. Respondents Walker, Morovic and Baldukas went off duty at around 9:20 p.m. on September 15, 2002, when respondents Lee, Kreuger and Hemming began their shift.

On September 15, 2002, respondent Lahr wrote a probable cause affidavit regarding the identity theft charge. Respondent Lahr's summary statement of probable cause contained only circumstantial evidence. Respondent DeChambeau found that probable cause existed for petitioner's arrest, but he could not have read the allegations against petitioner.

At approximately 1:30 a.m. on September 16, 2002, respondents Lee and Hemming transported petitioner to the Dane County jail where he was booked into the jail without the opportunity to post bond. Petitioner did not receive food or water until 5:30 a.m. on September 16, 2002. Petitioner did not receive a bond until September 20, 2002, at his

initial appearance. Respondent Muerer gave petitioner a high and excessive bail of $30,000 and respondent Mosier imposed another $13,000 on top of that.

On September 11, 2002, and November 7, 2002, respondent Lahr tried to build a case against petitioner by falsifying statements and evidence. Respondent Lahr procured three false witnesses with whom petitioner never had contact. Respondent Lahr coerced respondents Her, Howe and Olson into making statements that petitioner had made purchases at the stores where they worked. On the dates of the alleged purchases, petitioner was at work at the Michauds apartments, where he is employed as a maintenance worker. Since September 16, 2002, petitioner has been unable to work because he is being held on the basis of circumstantial evidence. Petitioner has been terminated from his job and lost his apartment.

OPINION

A. Improperly Named Respondents

Petitioner cannot proceed against several of the respondents he has identified in his complaint. First, petitioner alleges that three judges, respondents DeChambeau, Muerer and Mosier, imposed excessive bail and erred in finding that probable cause existed for his arrest. Judges cannot be sued for money damages (the only relief petitioner seeks) for performing judicial acts, even when the acts result in unfairness and injustice to a litigant. Mireles v.

Waco, 502 U.S. 9 (1991). This immunity is not intended to protect or benefit a malicious or corrupt judge. It is intended to protect the important public interest in maintaining an environment in which judges can do their jobs without fearing harassment by unsatisfied litigants. Pierson v. Ray, 386 U.S. 547, 554 (1967). The claims against respondents DeChambeau, Muerer and Mosier appear to be based solely on petitioner's dissatisfaction with actions those respondents took in their capacity as judges. The law protects respondents DeChambeau, Muerer and Mosier from having to defend this lawsuit. This means that petitioner cannot go forward on his claim that he is being subjected to excessive bail in violation of the Eighth Amendment. See Clay v. Allen, 242 F.3d 679, 682 (5th Cir. 2001) (judge absolutely immune from money damages on excessive bail claim). Even if petitioner were seeking his release before trial instead of money damages on his excessive bail claim, he would have to file a petition for a writ of habeas corpus after exhausting his state court remedies, not a suit under 42 U.S.C. § 1983. See, e.g., United States ex rel. Garcia v. O'Grady, 812 F.2d 347 (7th Cir. 1987).

Second, petitioner's claims against respondents Her, Howe and Olsen must also be dismissed. These respondents are private citizens, not state actors, and therefore are not amenable to suit under 42 U.S.C. § 1983. Although a private citizen "can be brought within the grasp of section 1983" when the citizen "conspire[s] with a public employee to deprive the plaintiff of his constitutional rights," Proffitt v. Ridgway, 279 F.3d 503, 507 (7th Cir.

2002), petitioner's allegation that respondents Her, Howe and Olsen were "coerced" by a law enforcement officer into making false statements against him is not compatible with a conspiracy claim. See Brokaw v. Mercer County, 235 F.3d 1000, 1016 (7th Cir. 2000) (plaintiff must show private citizens were willful participants in joint activity with state actors to establish § 1983 liability through conspiracy theory). Accordingly, respondents Her, Howe and Olsen will be dismissed.

Finally, respondents Joseph R. Durkin and the Madison Police Department will be dismissed. To recover damages for alleged constitutional violations, petitioner must establish each respondent's personal responsibility for the claimed deprivation. Other than in the caption, petitioner does not mention respondents Durkin or the Madison Police Department in his proposed complaint. The doctrine of supervisory liability, under which a superior may be held liable for a subordinate's tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Accordingly, petitioner has stated no claim against these two respondents.

B. Conditions of Confinement

Petitioner alleges that certain conditions of his confinement shortly after his arrest violated the Eighth Amendment. In order to state a claim under the Eighth Amendment, petitioner's allegations about prison conditions must satisfy a test that involves both a

subjective and objective component. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). The objective component focuses on whether the conditions "exceeded contemporary bounds of decency of a mature, civilized society." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994) (citing Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)). The subjective component focuses on intent: "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford, 17 F.3d at 1579. In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834. Deliberate indifference " 'implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.'" Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)).

Although petitioner's allegations are somewhat disjointed, I understand him to allege that he did not receive any food or water from 1:00 p.m on September 15, until 5:30 a.m on September 16, when he was transferred to the Dane County jail. The Eighth Amendment imposes a duty on prison officials to provide inmates adequate food, clothing, and shelter, although conditions may be harsh and uncomfortable. See Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001); Dixon, 114 F.3d at 642. In order to violate the Eighth Amendment, deprivations must be "unquestioned and serious" and contrary to "the minimal

civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The withholding of food is not "a per se objective violation of the Constitution; instead, a court must assess the amount and duration of the deprivation." Reed v. McBride, 178 F.3d 849, 853 (7th Cir. 1999); Talib v. Gilley, 138 F.3d 211, 214 n.3 (5th Cir. 1998) ("The deprivation of food constitutes cruel and unusual punishment only if it denies a prisoner the 'minimal civilized measure of life's necessities.'") (citations omitted). The Court of Appeals for the Seventh Circuit has held that an inmate who alleged that prison officials withheld food from him on many occasions for three to five days at a time stated a claim under the Eighth Amendment. Reed, 178 F.3d at 853-54. The Court of Appeals for the Eighth Circuit concluded that denying an inmate food for 32 hours was objectively serious enough to violate the Eighth Amendment. See Simmons v. Cook, 154 F.3d 805, 808 (8th Cir. 1998). However, other courts have noted that not every denial of food violates the Constitution. See Talib, 138 F.3d at 214, n.3 (noting it was doubtful inmate "was denied anything close to a minimal measure of life's necessities" when he was denied fifty meals in five months).

I conclude that petitioner's factual allegations do not satisfy the objective component of the Eighth Amendment inquiry. Petitioner's allegations indicate that at most, he missed lunch and dinner on September 15. I am not convinced that missing two meals on a single occasion exceeds contemporary bounds of decency in a mature, civilized society or that petitioner was denied the minimal civilized measure of life's necessities. See Hudson v.

McMillian, 503 U.S. 1, 8-9 (1992) (noting that "extreme deprivations are required to make out a conditions-of-confinement claim"). Accordingly, petitioner will be denied leave to proceed on this claim for his failure to state a claim upon which relief may be granted.

I also understand petitioner to allege that he was kept in a cell with no toilet for 12 hours, forcing him to urinate on the floor. The Court of Appeals for the Seventh Circuit has held that an inmate's allegations that he was kept in a filthy, roach-infested cell without toilet paper for five days and without soap, tooth paste or a tooth brush for ten days did not "reach unconstitutional proportions." Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988). Harris makes the duration and extent of the allegedly unconstitutional conditions relevant to the Eighth Amendment inquiry. Id. ("[I]solated instance of negligence temporarily inconveniencing only one inmate" does not typically implicate Eighth Amendment). Particularly in the absence of an allegation that petitioner asked to use a bathroom and was denied permission, I cannot conclude that petitioner's claim rises to the level of a constitutional violation. Petitioner cannot proceed on this claim because he fails to state a claim upon which relief may be granted.

C. Claims Related to Criminal Case

Petitioner also asserts claims relating to his pending state court criminal case. First, petitioner alleges that he was never read the warnings required by Miranda v. Arizona, 384

U.S. 436. The Court of Appeals for the Seventh Circuit has indicated that the failure to advise a criminal suspect of his Miranda rights does not give rise to civil liability under 42 U.S.C. § 1983. Thornton v. Buchmann, 392 F.2d 870, 874 (7th Cir. 1968); see also Jones v. Cannon, 174 F.3d 1271, 1290-91 (11th Cir. 1999) ("failing to follow Miranda" does not create "a cause of action for money damages under § 1983"); Giuffre v. Bissell, 31 F.3d 1241, 1256 (3d Cir. 1994) ("[V]iolations of prophylactic Miranda procedures do not amount to violations of the Constitution itself"); Warren v. City of Lincoln, 864 F.2d 1436, 1442 (8th Cir. 1989) (remedy "for a Miranda violation is the exclusion from evidence of any compelled self-incrimination, not a section 1983 action"); Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976); but see Cooper v. Dupnik, 963 F.2d 1220, 1237 (9th Cir. 1992) (recognizing claims under § 1983 arising from officers' intentional failure to give Miranda warnings).

Petitioner also alleges that respondent Lahr falsified evidence against him, including coercing false statements from three witnesses with whom petitioner never had contact. In Heck v. Humphrey, 512 U.S. 477, 487 (1994), the Supreme Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." The Court noted that "a § 1983 cause

of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." Id. at 489-90. Of course, in this case, petitioner has not yet been convicted, much less sentenced. His criminal case is pending in state court. In Smith v. Holtz, 87 F.3d 108, 110 (3d Cir. 1996), the Court of Appeals for the Third Circuit considered the question "whether, under the teachings of Heck, a claim is cognizable under § 1983 where its success would necessarily imply the invalidity of a future conviction that might be entered on a pending criminal charge." Like this case, Smith involved claims brought under § 1983 that police officials had concealed and fabricated evidence. Id. at 111. The court of appeals concluded that "such [claims are] not cognizable under § 1983" because "success on these claims would have necessarily implied the invalidity of any future conviction on the still pending criminal charges." Id. at 110, 112. If such claims "could proceed while criminal proceedings are ongoing, there would be a potential for inconsistent determinations in the civil and criminal cases and the criminal defendant would be able to collaterally attack the prosecution in a civil suit." Id. at 113; see also Covington v. City of New York, 171 F.3d 117, 124 (2d Cir. 1999) (same); Simpson v. Rowan, 73 F.3d 134, 136 (7th Cir. 1995) (§ 1983 malicious prosecution claim barred by Heck because of pending criminal proceedings). Accordingly, petitioner's claim that respondent Bahr manufactured evidence against him will be dismissed without prejudice to petitioner's filing a new lawsuit at a later date on this claim provided it is not still barred by

Heck. See Simpson, 73 F.3d at 136 (dismissing without prejudice claims barred by Heck).

To summarize, petitioner's claims against respondents Muerer, DeChambeau and Mosier relating to excessive bail and an erroneous probable cause determination are legally frivolous because these respondents are immune from suit for money damages. Petitioner's claims against respondents Her, Howe and Olsen are legally frivolous because these respondents are not state actors and thus are not amenable to suit under § 1983. Petitioner's lawsuit against respondents Durkin and the Madison Police Department is legally frivolous because petitioner does not make any allegations against them in his complaint and cannot sue them under a theory of respondeat superior. Petitioner fails to state an Eighth Amendment claim on which relief can be granted when he alleges that respondents Walker, Baldukas, Morovic, Kreuger, Lee and Hemming denied him food and a toilet and failed to read him his Miranda rights. Finally, petitioner's claim that respondent Lahr manufactured evidence against him is barred at this time by the Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994), and thus is legally frivolous.

ORDER

IT IS ORDERED that petitioner John E. Brown's request for leave to proceed in forma pauperis in this action is DENIED and this case is DISMISSED. A strike is recorded against plaintiff pursuant to 28 U.S.C. § 1915(g). The unpaid balance of petitioner's filing

fee is $150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

Entered this 15th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge