

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

TYLON C. CHRISTIAN,

Plaintiff,

v.

DOUGLAS TIMMERMAN and
KATHERINE DAYTON,

Defendants.

ORDER

03-C-688-C

This civil action, brought pursuant to 42 U.S.C. § 1983, is scheduled for trial on January 30, 2006. On December 5, 2003, plaintiff filed his complaint in this case contending that defendants had violated his rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. After an initial screening under 28 U.S.C. § 1915(e)(2), the case was dismissed for failure to state a claim upon which relief could be granted.

Plaintiff appealed to the Court of Appeals for the Seventh Circuit and, on December 28, 2004, the dismissal was vacated and the case remanded to this court for further proceedings. In an unpublished decision, the Court of Appeals stated that plaintiff's

“grievance allows both fourth and fifth amendment characterizations.” 120 Fed. Appx. 632, 633 (7th Cir. 2004) (unpublished opinion). Therefore, in an order dated January 31, 2005, I granted plaintiff leave to proceed on his claims that defendants had arrested and detained him without probable cause and due process of law in violation of his Fourth and Fifth Amendment rights.

Now, plaintiff has filed a “motion for leave to proceed on Eighth Amendment violation and Fourteenth Amendment violation” claims, which I construe as a motion to reconsider the January 31, 2005 order. Eleven months have passed since that order was entered. During that time the deadline for filing dispositive motions and engaging in discovery has passed. It would be unjust to permit plaintiff to add additional claims at this late date, and his motion could be denied on that ground alone.

However, even if plaintiff’s motion had been timely filed, it would be denied. Plaintiff was denied leave to proceed on an Eighth Amendment claim because he alleged no facts that would permit the court to conclude that defendants had violated the Eighth Amendment. In his complaint, plaintiff did not allege that he was treated with excessive force, subjected to cruel and unusual punishment or that his serious health or safety needs had been met with deliberate indifference by defendants. Without such allegations, no Eighth Amendment claim exists.

With respect to his Fourteenth Amendment claim, plaintiff’s motion is unnecessary.

Plaintiff is proceeding on a claim that defendants violated his due process rights when they arrested and detained him. The Fifth Amendment guarantees that the federal government will not deprive any person of his liberty without due process of law. U.S. Const. amend. V. The Fourteenth Amendment extends Fifth Amendment protection to citizens detained by state governments. U.S. Const. amend. XIV, § 1. Therefore, whether plaintiff's due process claim is characterized as arising under the Fourteenth Amendment or under the Fifth Amendment by way of the Fourteenth, it remains the same claim. At trial, plaintiff will bear the burden of proving that defendants denied him liberty without due process when they detained him on alleged "parole holds."

As a final matter, plaintiff states that the court has "changed" his motion "to a fourth amendment claim that plaintiff neither claimed in his complaint *nor believes he can litigate*." (Emphasis added.) From this statement, it appears that plaintiff is conceding that defendants had probable cause to arrest him on April 18, 2002. Because it makes little sense to require plaintiff to prosecute a claim he has not alleged and is unable to prove, I will dismiss plaintiff's Fourth Amendment claim from this lawsuit unless defendant advises the court and opposing counsel before January 3, 2006, that he wants to go forward on this claim. If he does not respond, he will proceed to trial on January 30, 2006 on his due process claim only.

ORDER

IT IS ORDERED that plaintiff's motion to reconsider the January 31, 2005 order is DENIED.

FURTHER, IT IS ORDERED that plaintiff's claim that state officials arrested him without probable cause in violation of his Fourth Amendment rights is DISMISSED. He will proceed to trial only on his claim that state officials detained him without due process of law in violation of the Fourteenth Amendment.

Entered this 20th day of December, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge