

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

ALGEN M. LAMON,

Petitioner,

ORDER

v.

05-C-745-C

COLLINS BRUMFIELD and
JOHN FAHRNEY, in their
official capacities,

Respondents.

This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner Algen M. Lamon, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

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. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner contends that defendants maliciously prosecuted him in violation of the Fourth, Fifth, Eighth and Fourteenth Amendments.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Algen M. Lamon is a Wisconsin state inmate housed at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Respondents Collins Brumfield and John Fahrney are residents of Beloit, Wisconsin.

On or about January 4, 2001, respondent Brumfield alleged that plaintiff possessed a firearm and had robbed him. On January 16, 2001, petitioner was arrested and taken into police custody. At a preliminary hearing on January 22, respondent Brumfield testified that

petitioner possessed a firearm and had robbed him. Petitioner pleaded “not guilty” to the charges of possession of a firearm and robbery.

On or about June 11, 2001, respondent Fahrney testified that plaintiff had possessed a firearm and robbed respondent Brumfield. A trial took place from July 16 through 18, 2001. Respondent Brumfield testified that he had not been robbed and no money had been taken from him. Respondent Fahrney testified that petitioner had admitted to possessing a firearm and robbing respondent Brumfield.

On July 18, 2001, the jury found petitioner “not guilty” of possessing a firearm and robbery.

DISCUSSION

A. Constitutional Violations

Petitioner contends that defendants maliciously prosecuted him in violation of the Fourth, Fifth, Eighth and Fourteenth Amendments. Petitioner fails to state a claim upon which relief may be granted. The Court of Appeals for the Seventh Circuit has made it clear that malicious prosecution is not a constitutional tort unless the state does not provide any remedy for malicious prosecution. Newsome v. McCabe, 256 F.3d 747, 750 (7th Cir. 2001) (“the existence of a tort claim under state law knocks out any constitutional theory of malicious prosecution”).

The state of Wisconsin recognizes the tort of malicious prosecution. See, e.g., Strid v. Converse, 111 Wis. 2d 418, 331 N.W.2d 350 (1983); Maniaci v. Marquette University, 50 Wis.2d 287, 184 N.W.2d 168 (1971); Whispering Springs Corp. v. Town of Empire, 183 Wis. 2d 396, 515 N.W.2d 469 (Ct. App. 1994). Accordingly, petitioner is not entitled to a constitutional remedy for the alleged malicious prosecution and petitioner will be denied leave to proceed on this claim.

I note also that petitioner's constitutional claim is deficient because petitioner failed to allege facts suggesting that respondents are state actors.¹ Moreover, even if respondents are state actors, petitioner's claim is deficient because, to the extent that he is attempting to sue respondents because of their testimony at his trial, trial witnesses are absolutely immune from liability under § 1983. Briscoe v. LaHue, 663 F.2d 713, 721 (7th Cir. 1981).

B. State Law Claim

Petitioner asks this court to exercise supplemental jurisdiction over his claim that respondents' actions constituted a malicious prosecution under state tort law. Because I am denying petitioner leave to proceed on his federal claim, I will decline to exercise

¹Petitioner has submitted a "declaration" to the court where he states that respondent Fahrney told petitioner that he was "investigating 01-CF-165," so it is possible, though not obvious, that respondent Fahrney was a state actor.

supplemental jurisdiction over his state law claim. If petitioner wishes to pursue this claim, he may do so in state court.

C. Appointment of Counsel

Petitioner has asked this court to appoint him an attorney to represent him in this lawsuit. Because petitioner will be denied leave to proceed in this lawsuit, his motion for appointment of counsel will be denied as moot.

ORDER

IT IS ORDERED that

1. Petitioner Algen M. Lamon is DENIED leave to proceed on his claim that respondents maliciously prosecuted him in violation of his constitutional rights;
2. I decline to exercise supplemental jurisdiction over petitioner's state law claim;

3. Petitioner Algen M. Lamon's motion for appointment of counsel is DENIED;
4. A strike will not be recorded against petitioner because I am declining to exercise supplemental jurisdiction over his state law claim; thus I did not dismiss the action for one of the reasons set forth in 28 U. S.C. § 1915(g); and
5. The clerk of court is directed to close the file.

Entered this 6th day of January, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge