

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

ISMAEL AGUILA,

Plaintiff,

MEMORANDUM and ORDER
06-C-602

v.

DAVID DRESSER, MICHAEL HAACK,
RYAN MICHELS, OFFICER SPADE,
OFFICER SMITH and BERNIE ALBRIGHT,

Defendants

Plaintiff Aguila was allowed to proceed on his claim that defendants David Dresser, Michael Haack, Ryan Michels, Officer Spade, Officer Smith and Bernie Albright violated his rights under the Alien Tort Statute. In his complaint plaintiff alleges that defendants failed to notify him of his right to have the Cuban Consulate notified of his arrest.

On January 29, 2007 defendants Michels, Spade and Smith moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavit and brief in support thereof. Defendants Dresser, Haack and Albright moved for summary judgment on February 12, 2007. Plaintiff cross moved for summary judgment that same date. Plaintiff's response to the defendants' motions for summary judgment were to be filed not later than March 5, 2008 and have not been filed to date.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motions for summary judgment the Court finds there is no genuine dispute as to any of the following material facts.

Plaintiff Ismael Aguila is currently incarcerated at the Waupun Correctional Institution, Waupun, Wisconsin. David Dresser is a full-time police sergeant employed by the City of Verona. Bernie Albright and Michael Haack are police officers for the City of Verona. Ryan Michels, Clint Spade and Timothy Smith are police officers employed by the City of Fitchburg.

A little after 4:00 a.m. on May 20, 2005 Officers Spade and Michels stopped a vehicle that was swerving in its lane of traffic. Shortly thereafter Officer Smith, Officer Haack and Sergeant Dresser arrived on the scene.

Michels approached the stopped vehicle and observed a black male looking at a woman on her stomach in the back seat of the vehicle. The driver rolled down the window and showed Michels a Wisconsin Fishing license with the name of Antonio Medina, a black male, with the date of birth of May 22, 1960. Michels performed a record check which showed no matches for the name and date of birth that the driver had provided. The driver also stated his name was Antonio Alexander Barrientos-Medina but Michels found no matches for this name either. The woman was transported to the hospital.

Officer Smith advised Michels that he had located a medicine packet during the consent search of the vehicle with the name of Ismael Aguila on it. Michels found this name on the computer and an indication there was an outstanding Department of Corrections'

warrant for Ismael Aguila. The photo of Ismael Aguila matched the driver's appearance.

Michels offered this information to the driver who continued to assert that his name was Antonio Medina. Michels told the driver that he was placing him under arrest. Officer Michels handcuffed the driver and transported him to the Dane County Jail.

At the Dane County Jail Michels completed a booking form for Aguila who informed him that he was born in Cuba but was a United States Citizen. Michels had no knowledge that plaintiff was a Cuban national. Officers Spade and Smith had no knowledge of plaintiff's place of birth or citizenship.

Defendant Dresser noted in his report that plaintiff spoke with a Cuban accent. Neither Officer Haack or Sergeant Dresser knew on May 20, 2005 that plaintiff was a Cuban citizen.

At the Dane County Jail in the Intake Area there is posted notification to arresting officers of the requirements in arresting Foreign Nationals and citizens.

On May 23, 2005 Officer Bernie Albright interviewed plaintiff at the Dane County Jail. Plaintiff consented to the interview and was read his Miranda rights. During this interview plaintiff admitted that he had given a false name to Fitchburg in an attempt to escape detection on a parole violation. Plaintiff did not advise Officer Albright during this interview that he was a Cuban citizen.

Plaintiff's criminal history record shown on eTime website indicated plaintiff was a Cuban citizen. None of the defendants had access to this information on May 20 or May 23, 2005.

After plaintiff was ordered deported he filed an Application for Asylum and for Withholding of Removal on October 5, 2003. He alleged that the Cuban government would torture Plaintiff and his family if he were removed to Cuba. Plaintiff's removal was deferred based upon these allegations on February 5, 2004 pursuant to Article 3 of the U.N. Convention Against torture.

MEMORANDUM

Plaintiff claims the defendants violated his rights provided to him under the Vienna Convention on Consular Relations. Defendants contend that they did not violate plaintiff's rights because he did not identify himself as a Cuban national.

In opposing defendants' motion for summary judgment plaintiff cannot rest on the mere allegations of the pleadings but must submit evidence that there is a genuine issue of material fact for trial. Plaintiff has submitted no affidavits or evidence that contradict the affidavits submitted by the defendants. There is no genuine issue of material fact, and this case can be decided on summary judgment as a matter of law.

Article 36, Paragraph 1(b) of the Vienna Convention on Consular Relations provides in pertinent part as follows:

If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

The United States Court of Appeals for the Seventh Circuit held that this section of Article 36 created a private right of action to enforce the individual's rights. Jogi v. Voges 425 F.3d 367 (7th Cir. 2005). This action can be brought either under the Alien Tort Statute or 28 U.S.C. §1331.

At the time of his arrest plaintiff offered officers a false name. When he was booked in the Dane County Jail under his own name he advised officers that he was a United States Citizen. Plaintiff failed to notify any of the defendants that he was a Cuban citizen. This may have been because he did not want to return to Cuba.

Because plaintiff did not advise officers that he was a Cuban national they had no duty to advise him of his rights under Article 36. As a matter of law plaintiff's rights under Article 36 were not violated by defendants. Accordingly defendants' motions for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claims must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that defendants' motions for summary judgment are GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 8th day of March, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge