IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDRE CALMESE,

Petitioner,

ORDER

06-C-644-C

v.

JUDGE FREDERIC FLEISHAUER,
ATTORNEY DANA DUNCAN,
ASSISTANT D.A. DAVID R. KNAAPEN,
JUDGE DANIEL MOESER,
MADISON POLICE DEPARTMENT,
DANE COUNTY,

Respondents.

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This is a proposed civil action for monetary and injunctive relief brought under 42 U.S.C. § 1983. Petitioner Andre Calmese, who is acting pro se, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 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. (The return address on petitioner's complaint is the University of Wisconsin hospital, so it appears that petitioner is not a prisoner currently and is therefore not subject

to the requirements of the Prison Litigation Reform Act.)

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the action is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a defendant who is immune from such relief, the case must be dismissed promptly pursuant to 28 U.S.C. §1915(e)(2).

Even liberally construing petitioner's complaint, it is difficult to determine the nature of his claims. To begin with, petitioner's complaint, which is a form provided by the court, says very little. He alleges that he was "arrested – jailed and deprived of [his] constitutional rights (since 3/06) due to hearsay and made up allegations." The rest of the document is virtually incomprehensible. Petitioner refers to "their (policy) of (status conferences)" and says that "when they snitch — they are released to continue their work for the state." He concludes by citing the Declaration of Independence. He requests $7,000,000 from each defendant, a "federal investigation" of his allegations, criminal prosecution and imprisonment of respondents. In the margins of the complaint, he requests a temporary restraining order against the Madison Police Department, though he does not say what he wants the department to be restrained from doing.

There are several attachments to petitioner's complaint. The first document appears to be a copy of a paper filed in the Circuit Court for Dane County, although it does not

contain a caption or a case number. In the document, petitioner asks Judge Fleishauer to relieve Dana Duncan from representing him because he has not "received any due proces[s]." Petitioner goes on to make a number of discovery demands before concluding that "These Prior Proceeding[s] are in direct violation" of a number of constitutional rights, including the right to be free from unreasonable searches and seizures, to be provided with due process and equal protection of the law and to be guaranteed a speedy trial.

Second, petitioner attached a piece of paper that he titled, "Fed. Temp. Rest. Order." He alleges that he was "illegally evicted" from his home by the Madison Police Department because the department violated "a forthcoming tem. rest. order that was to take effect 11/9/06." It appears that petitioner believes the restraining order should not have taken effect until twenty-four hours before a hearing that was scheduled on November 10, 2006.

Finally, petitioner filed a copy of an order by a Dane County Circuit Court Commissioner, in which the commissioner found that a woman petitioner lived with was "in imminent danger of physical harm" because petitioner either had or was likely to engage in domestic abuse. The commissioner ordered petitioner to "avoid [the woman's] residence and/or any location temporarily occupied by the petitioner."

From these documents, I can surmise a number of a claims that petitioner may be intending to assert: (1) he was arrested and jailed in March 2006, in violation of his right to be free from unreasonable searches and seizures; (2) the criminal proceedings following

that arrest violated his right to due process and other constitutional rights and should be enjoined; (3) the police violated the harassment injunction by enforcing it too soon; and (4) the harassment injunction itself is somehow illegal. All of these claims suffer from a number of serious defects.

First, petitioner has named as respondents a number of parties who cannot be sued under 42 U.S.C. § 1983. Judges have absolute immunity from suit in cases in which the plaintiff is complaining about actions of the judge in his or her capacity as a judge. Loubser v. Thacker, 440 F.3d 439, 442 (7th Cir. 2006). Prosecutors, too, have absolute immunity for actions taken as an advocate of the state in the context of judicial proceedings. Smith v. Power, 346 F.3d 740 (7th Cir. 2003). Petitioner does not include any specific allegations in any of the documents he filed relating to Judge Fleishauer, Judge Moeser or Assistant District Attorney David Knaapen. However, because all of petitioner's allegations relate to judicial proceedings, I can only conclude that petitioner is seeking to hold these respondents liable for actions they took in their official capacity. Accordingly, these respondents must be dismissed.

I gather from petitioner's documents that respondent Dana Duncan is or was petitioner's criminal defense lawyer. Although criminal defense lawyers are not entitled to immunity, they cannot be sued under § 1983 because they do not act "under color of law," or under the authority of the state. Polk County v. Dobson, 454 U.S. 312, 318 (1981).

Thus, respondent Duncan must be dismissed as well.

Further, to the extent that petitioner is seeking to enjoin an ongoing criminal prosecution or the civil harassment proceedings, district courts are generally required to abstain from issuing injunctions against ongoing state court proceedings, particularly with respect to criminal cases. Younger v. Harris, 401 U.S. 37 (1971) ("the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions"). See also 28 U.S.C. § 2283. If petitioner believes that his rights are being violated in the context of those proceedings, he may raise these claims before the state court judge or on appeal. General Auto Service Station LLC v. City of Chicago, 319 F.3d 902, 904 (7th Cir. 2003) (abstention generally proper in cases in which party has opportunity to raise constitutional arguments in state court). He may not do an end run around the state judicial process by filing an action in federal court under § 1983. (The civil proceedings against petitioner may have concluded on November 10, after the scheduled hearing. If so, petitioner is nevertheless barred from using a federal district court to challenge a state court judgment. If he disagrees with the circuit court's decision, he should take his case to the state court of appeals. Ritter v. Ross, 992 F.2d 750, 755 (7th Cir. 1993).)

Similarly, if petitioner believes that Madison police officers violated the temporary restraining order, his recourse is in the court that issued the injunction. This court is without jurisdiction to enforce (or limit the enforcement of) a state court order on a matter

of state law. Cf. Nelson v. Murphy, 44 F.3d 497, 502 (7th Cir. 1994) ("Violation of a state court's order is contempt of court, not a violation of the Constitution.").

This leaves petitioner's claim that he was unlawfully arrested in March 2006 on the basis of false allegations. As with petitioner's other claims, he does not identify the party he believes is responsible for the alleged wrongdoing, but presumably this claim is directed against the Madison Police Department. This claim is potentially barred by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), under which a party may not bring a civil rights action to challenge conduct during the investigation and prosecution of a criminal case if the plaintiff's success would "necessarily imply" the invalidity of the plaintiff's conviction, unless the conviction has already been overturned. Although it appears from petitioner's allegations that the criminal prosecution is ongoing, that is, he has not yet been convicted, the court of appeals has held that the rule of Heck "applies not only to convicted persons but also to plaintiffs . . . who as yet only face prosecution." Wiley v. City of Chicago, 361 F.3d 994, 996 (7th Cir. 2004). The court of appeals has stated that, in most cases, a claim for false arrest does not "necessarily" call the validity of a prosecution into question because a conviction may still be valid even if the initial arrest was unlawful. Wallace v. City of Chicago, 440 F.3d 421 (7th Cir. 2006), cert. granted, Wallace v. City of Chicago, 126 S. Ct. 2891 (2006). However, in cases in which the constitutional violation invalidates *all* of the evidence, Heck would apply because a prosecution without any evidence cannot stand.

Wiley, 361 F.3d at 997.

I cannot determine at this stage whether Heck applies. Although petitioner alleges that the evidence used to arrest him was fabricated, it is possible that there is other evidence, developed later that would support a conviction.

I must dismiss this claim nevertheless. Petitioner has named no individual police officers in his complaint. Rather, he has named only the Madison Police Department. Under Fed. R. Civ. P. 17(b), state law determines whether a particular entity has the capacity to be sued. As other courts have recognized, Wisconsin municipalities may be sued, Wis. Stat. § 62.25, but individual agencies and departments may not, including police departments. Grow v. City of Milwaukee, 84 F. Supp. 2d 990, 995-96 (E.D. Wis.2000); Buchanan v. City of Kenosha, 57 F. Supp. 2d 675, 678 (E.D. Wis. 1999).

Even if I construed this claim as being brought against the City of Madison rather than the police department, it would have to be dismissed. Under § 1983, a municipality may not be held liable simply because it employs an individual who may have violated the law; rather, a city is liable only if it had a policy or custom that caused the constitutional violation. Monell v. Dep't of Social Services, 436 U.S. 658, 694 (1978). Because there is no suggestion in petitioner's complaint that the city had a policy of arresting people on the basis of knowingly false allegations, any claim against the city would have to be dismissed.

Finally, petitioner includes no allegations against respondent Dane County in any of

the documents he filed. Accordingly, I must dismiss any claims against it for failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. The court ABSTAINS from hearing petitioner Andre Calmese's claims that this court should enjoin his criminal and civil proceedings in state court.

2. Respondents Frederic Fleishauer, David Knaapen and Daniel Moeser are DISMISSED because they are absolutely immune from suit.

3. Respondent Dana Duncan is DISMISSED because Duncan did not act under color of law.

4. Respondent Madison Police Department is DISMISSED because it is not a suable entity under Fed. R. Civ. P 17(b).

5. Respondent Dane County is DISMISSED for petitioner's failure to state a claim upon which relief may be granted.

6. The clerk is directed to close this case.

Entered this 17th day of November, 2006.

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