IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DIONTA REMARO CHEVELLE HAYWOOD,

Plaintiff,

v.

MARATHON COUNTY SHERIFF
and RICKY BELL,

Defendants.

ORDER

3:07-cv-00341-bbc

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This case has been closed since August 24, 2007. Now, however, plaintiff Dionta Remaro Chevelle Haywood has filed an untitled document that I construe as a motion to reopen the case and to appoint him counsel. Before addressing the motions, a review of the history of the case is in order.

On August 3, 2007, I granted plaintiff leave to proceed in forma pauperis on his claims that defendants Ricky Bell and an unknown correctional officer used excessive force against plaintiff on April 20, 2005. I allowed plaintiff to proceed against the Marathon County Sheriff for the sole purpose of identifying the unknown correctional officer. In the same order, I stayed a decision whether plaintiff could proceed on his claim that unknown individuals were deliberately indifferent to his serious medical needs, because plaintiff had

alleged too few facts to allow a determination whether he stated a claim under federal law. I gave plaintiff until August 17, 2007, in which to provide the necessary additional information. Subsequently, the copy of the order that was mailed to plaintiff was returned to the court because plaintiff could not be located at the address he had provided the court. Therefore, on August 24, 2007, I dismissed plaintiff's case without prejudice for his failure to prosecute.

On November 25, 2007, plaintiff wrote to the court to ask for appointment of counsel to help him prosecute his case. In his communication, plaintiff said that he had been informed that "district courts can provide legal counsel in situations where the plaintiff is not financially able to obtain legal counsel." In an order dated December 5, 2007, I denied plaintiff's motion explaining,

> It is not the court's practice to appoint counsel outside the context of a pending lawsuit. If plaintiff wishes to pursue the matter, he will first have to move to reopen the case himself, unless he is able to find a lawyer to do it for him. If the court permits plaintiff to proceed with the lawsuit, he will then be able to renew his request for appointment of counsel. However, plaintiff should be aware that before counsel can be appointed in any case, he must make reasonable efforts to secure counsel on his or her own. Before asking the court to appoint counsel, plaintiff should be prepared to provide proof that he has contacted at least three lawyers to request representation and that all of his requests were declined.

That brings us to the present. In his current motion, it appears that plaintiff's requests to reopen and to appoint him counsel are intertwined. Plaintiff says that he,

> ha[s] an order dated December 5, 2007 that states before counsel can be appointed, [he] has to reopen the case himself and present to the court at least three pieces of proof that show he[] tried to obtain legal counsel on his own. If the paperwork [he] has sent is sufficient enough, [he] would like to reopen case file 07-C-341-C on the grounds that [he would be] notified that [he] could receive legal counsel . . . ."

Plaintiff seems to believe that if he succeeds in reopening his case, a lawyer will be appointed to represent him so long as he makes a showing that he has tried to find a lawyer on his own and his efforts have been unsuccessful. This assumption is incorrect. Simply because plaintiff has satisfied the threshold obligation of attempting to find a lawyer on his own does not mean that appointment of counsel is appropriate in this case.

The test for determining whether to appoint counsel for a pro se litigant is two-fold. "[T]he question is whether the difficulty of the case—factually and legally—exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself." Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir. 2007). It is far too early to determine whether this is a factually difficult case. At this stage it is unclear on which claims plaintiff will be allowed to proceed because he has not provided crucial information requested by the court. Once this information has been provided I will be able to explain to plaintiff the law that has been established with regard to his individual claims. At this point, however, it does not appear that this case is so complex that he will be unable to litigate it on his own. Nothing in plaintiff's motion or in the record thus far indicates that he lacks the ability to

draft and file his submissions. As helpful as it would be to plaintiff and to the court to have the assistance of counsel, I solicit such help only in rare instances in which the plaintiff is unusually handicapped in presenting his case and the issue raised is unusually complex. Only a limited number of lawyers are capable of representing indigent plaintiffs in civil cases and willing to do so without any compensation and without reimbursement for expenses. Federal courts and federal plaintiffs are not the only supplicants for help from this limited group.

Because I am not convinced that plaintiff is incapable of litigating this lawsuit on his own I will deny his motion for appointment of counsel. However, I will stay a decision on plaintiff's motion to reopen, in light of the fact that this request may have been made solely on the incorrect assumption that I would be appointing counsel to represent him. If plaintiff intends to continue with this lawsuit he must either file the addendum to his complaint that was requested in this court's August 3 order or advise the court that he wishes to dismiss voluntarily his claim that an unnamed individual or individuals failed to provide him with adequate medical care on April 20, 2005.

As a final matter, plaintiff should be aware that if he decides to pursue his case and then at some future time during the proceeding fails to notify the court of any change in his address, this case will be dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b). In other words, the dismissal would serve as an adjudication on the merits of plaintiff's complaint in

defendants' favor.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for appointment of counsel is DENIED.

2. A decision on plaintiff's motion to reopen this case is STAYED. Plaintiff will have until February 11, 2008, in which to advise the court whether he intends to litigate this lawsuit without the assistance of counsel. If plaintiff intends to continue with this lawsuit, he may have until February 11, 2008 in which either to file an addendum to his complaint that includes the information requested in the August 3, 2007 order regarding his claim that an unnamed individual or individuals failed to provide him with adequate medical care on April 20, 2005 or advise the court that he wishes to dismiss this claim voluntarily. (A copy of the August 3 order is enclosed to plaintiff with this order.)

3. If, by February 11, 2008, plaintiff fails to respond to this order, I will deny his

motion to reopen.

Entered this 28th day of January, 2008.

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

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DIONTA REMARO CHEVELLE HAYWOOD,

Petitioner,

OPINION and ORDER

07-C-341-C

v.

MARATHON COUNTY SHERIFF DEPARTMENT
and RICKY BELL,

Respondents.

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This is a proposed civil action for monetary relief brought under 42 U.S.C. § 1983. Petitioner Dionta Remaro Chevelle Haywood, who is presently incarcerated at the Marathon County jail in Wausau, Wisconsin, contends that respondent Ricky Bell violated his constitutional rights by using excessive force against him during an altercation on April 20, 2005 and that respondents Ricky Bell and Marathon County Sheriff's Department violated his constitutional rights by failing to provide him with adequate medical care after he was injured in the altercation. Petitioner requests leave to proceed in forma pauperis under 28 U.S.C. § 1915 and has made the initial partial payment required under that statute.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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. 28 U.S.C. § 1915(e)(2).

From petitioner's complaint and the attached materials, I draw the following factual allegations.

ALLEGATIONS OF FACT

Petitioner is a prisoner at the Marathon County jail in Wausau, Wisconsin. At times relevant to this complaint, he was a pretrial detainee. Respondent Ricky Bell is a correctional officer at the Marathon County jail. Respondent Marathon County Sheriff's Department operates the Marathon County jail.

At approximately 7:15 a.m. on April 20, 2005, petitioner was walking slowly to pick up his breakfast tray. His slow pace "delayed [his] presence in the breakfast line." When he arrived at the door to pick up his breakfast tray, respondent Bell "implied" that the tray should have been placed on the floor for petitioner because he was walking slowly. Petitioner responded "no big deal." Respondent Bell apparently found petitioner's behavior disrespectful and ordered petitioner to return to his cell for a 24 hour disciplinary lockdown

for disrespect to an officer.

Petitioner began walking back to his cell, which was located on the upper tier of the jail. In "an obscene manner" respondent Bell ordered petitioner to move faster. Petitioner responded with a "verbal obscenity." In response, respondent Bell approached petitioner from behind, wrapped his hands around petitioner's neck and began to "choke/strangle" petitioner. Petitioner felt that he was beginning to suffocate; as a "defensive reaction" petitioner turned around and hit respondent Bell with his breakfast tray.

Petitioner's action provoked a physical altercation between him and respondent Bell. Several other correctional officers intervened and sprayed petitioner in the face with pepper spray, threw him to the ground face down and proceeded to handcuff him. When the other officers restrained petitioner, he did not resist. However, while petitioner was being restrained one of the officers hit him in the back of the head, causing an injury to the front of petitioner's head when it hit the floor.

After the altercation, respondent Marathon County Sheriff's Department did not allow petitioner to receive any medical care. He was sent to a hospital to have a blood sample drawn for an HIV/AIDS test because the correctional officers had been exposed to his blood. Respondent Marathon County Sheriff's Department failed to investigate the altercation.

DISCUSSION

A. Liability of Respondent Marathon County Sheriff's Department

Petitioner asserts that respondent Marathon County Sheriff's Department did not permit him to receive any medical care after his altercation on April 20, 2005 with respondent Bell and the other jail officers and failed to investigate the altercation. I note that the relationship between the sheriff's department and the county is not clear from petitioner's complaint. However, in Whiting v. Marathon County Sheriff's Dept., 382 F.3d 700, 704 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit found that the Marathon County Sheriff's Department was a division of the county and not a suable entity itself. Therefore, petitioner's claims against respondent Marathon County Sheriff's Department will be dismissed.

B. April 20, 2005 Altercation

Petitioner alleges that after he and respondent Bell engaged in an obscenity-laced verbal exchange, respondent Bell approached him from behind and began choking petitioner to the point that he believed he would suffocate. Because petitioner was a pretrial detainee at the time of this incident, his claim that respondent Bell used excessive force against him arises under the Fourteenth Amendment's due process guarantee, rather than the Eighth Amendment. Graham v. Connor, 490 U.S. 386, 395 n. 10 (1989) (holding that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to

punishment"); Dorsey v. St. Joseph County Jail Officials, 98 F.3d 1527, 1528 (7th Cir. 1996). Although the precise standard for evaluating whether force used against a pre-trial detainee was excessive under the circumstances remains somewhat murky, Wilson v. Williams, 83 F.3d 870, 875 (7th Cir. 1996), protections for pre-trial detainees under the Due Process Clause are "at least as great as the Eighth Amendment protections available to a convicted prisoner." Washington v. LaPorte County Sheriff's Dept., 306 F.3d 515, 517 (7th Cir. 2002) (quoting City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983)).

Because jail officials must sometimes use force to maintain order, the central inquiry in an excessive force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court must consider any safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. Whitley v. Albers, 475 U.S. 312, 321 (1986); Outlaw v. Newkirk, 259 F. 3d 833, 837 (7th Cir. 2001).

Under any conceivable formulation of the standard for excessive force, petitioner's allegation that respondent Bell approached him from behind and began choking him with

no more threat or provocation than a verbal exchange is sufficient to state an excessive force claim. In addition, petitioner's allegation that an unknown officer hit him in the back of the head after he ceased resisting states a claim of excessive force. However, from the facts alleged, respondent Bell's use of force to subdue petitioner after petitioner hit him with a tray cannot make out a due process claim of unjustified punishment. Nor can petitioner's claim that other correctional officers used pepper spray to stop the altercation. Nothing in these allegations allows an inference to be drawn that the force used was more than necessary under the circumstances.

Petitioner does not identify the person who allegedly struck him in the back of the head after he ceased resisting. However, "when the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Dept., 95 F.3d 548, 555 (7th Cir. 1996). The Marathon County sheriff is in the best position to identify the unnamed officers involved in the April 20, 2005 incident. Therefore, the Marathon County sheriff will be named as a party in this case for the sole purpose of identifying the unnamed officer who petitioner alleges used excessive force against him after he had ceased resisting the officers. Duncan v. Duckworth, 644 F.2d 653 (7th Cir. 1981) (if prisoner does not know name of defendant, court may allow him to proceed against administrator for purpose of

determining defendants' identity).

C. Failure to Investigate Altercation

Petitioner contends that his rights were violated when the correctional officers failed to conduct an adequate investigation of the altercation on April 20, 2005. However, petitioner's allegation is insufficient to state a claim under § 1983 because petitioner does not have a constitutional right to a thorough investigation. Alexander v. City of South Bend, 433 F.3d 550, 555 (7th Cir. 2006).

D. Medical Care

Next, I understand petitioner to contend that unnamed individuals violated his rights under the due process clause by failing to provide him with adequate medical treatment after his altercation with respondent Bell. In determining whether the right to adequate medical care has been violated, the court of appeals has held that the standard under the due process clause is the same as that under the Eighth Amendment: whether the defendants were "deliberately indifferent" to a "serious medical need." Murphy v. Walker, 51 F.3d 714 (7th Cir. 1995).

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person.

Johnson v. Snyder, 444 F.3d 579, 584 -85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if otherwise subjects the detainee to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials were aware that the detainee needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, petitioner's claim has three elements:

(1) Did petitioner have a serious medical need?

(2) Did respondents know that petitioner needed treatment?

(3) Despite their awareness of the need, did respondents fail to take reasonable measures to provide the necessary treatment?

Petitioner does not have to allege the facts necessary to establish each of these elements at the pleading stage, but they provide the framework for determining whether petitioner has alleged enough to give respondents notice of his claim and whether there is a set of facts consistent with petitioner's allegations that would provide him with relief. Kolupa v. Roselle Park District, 438 F.3d 713, 715 (7th Cir. 2006); Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005).

Petitioner states that he needed medical care and that he suffered an injury to the

front of his head after a correctional officer hit him in the back of the head and his head hit the floor. It is possible that a head injury sustained in this manner could cause significant physical harm and require medical treatment; therefore, it could constitute a serious medical need. Accordingly, at this early stage I conclude that petitioner's allegations are sufficient to suggest that his injuries from the altercation constituted a serious medical need.

More difficult to determine is whether the actions of any of the unnamed individuals satisfy the remaining two elements: that they knew petitioner needed treatment and that they failed to take reasonable measures to provide the treatment. Petitioner's allegations are sparse at best. He alleges that he was injured and did not receive medical care. Although petitioner is silent regarding what specifically he believes the correctional officers did wrong, I cannot assume at this stage that respondents' actions were proper. Kolupa, 438 F.3d at 715 ("Silence is just silence and does not justify dismissal unless Rule 9(b) requires details. Arguments that rest on negative implications from silence are poorly disguised demands for fact pleading").

Although it would be inappropriate to dismiss these claims on the basis of the lack of facts alleged in the complaint, it would be a disservice to both petitioner and the unnamed respondents to permit claims to proceed that will inevitably fail when more facts are revealed. In Hoskins v. Poelestra, 320 F.3d 761, 764 (7th Cir. 2003), the court of appeals held that district courts may call on the plaintiff to provide additional allegations in

situations like this one, in which the facts alleged are so sparse that it is difficult to determine whether the petitioner has a viable claim. Accordingly, petitioner may have until August 17, 2007, in which to file an addendum to his complaint that includes allegations on the following subjects:

(1) who failed to provide petitioner medical care; if petitioner does not know the names of these individuals, he should provide any information he has;

(2) what injury petitioner sustained when his head was pushed to the floor;

(3) what, if anything, petitioner told the individuals or the individuals could see for themselves about his injury;

(4) when petitioner was taken to the hospital for the HIV/AIDS test; and

(5) whether he was prevented from asking for medical attention at the hospital.

If, by August 17, petitioner does not file an addendum, I will assume that he does not wish to proceed with his claim of deliberate indifference to his medical needs against unnamed individuals and I will dismiss that claim. If petitioner provides this information and I find that he has stated a claim against any individual, he will be granted leave to proceed against the sheriff of Marathon County for the purpose of discovering the name of that person.

ORDER

IT IS ORDERED that

1. Petitioner Dionta Remaro Chevelle Haywood is GRANTED leave to proceed in forma pauperis on his claim that respondent Ricky Bell used excessive force against him at the Marathon County Jail on April 20, 2005.

2. Petitioner is DENIED leave to proceed against respondent Marathon County Sheriff's Department.

3. Respondent Marathon County Sheriff's Department is DISMISSED from this case.

4. Petitioner is GRANTED leave to proceed in forma pauperis against the Marathon County sheriff on his claim that an unknown correctional officer slammed petitioner's head to the floor after he had ceased resisting. Once he learns the name of the individual, he will have to amend his complaint to name that person or persons in place of respondent Marathon County sheriff and the Marathon County sheriff will be dismissed from this case.

5. The decision whether to grant petitioner leave to proceed is STAYED with respect to petitioner's claims that an unnamed individual or individuals failed to provide him with adequate medical care after the altercation on April 20, 2005. Petitioner may have until August 17, 2007, in which to file an addendum to his complaint that includes allegations describing (1) who failed to provide petitioner medical care, if petitioner does not know the

names of these individuals, he should provide any information he has; (2) what injury petitioner sustained when his head was pushed to the floor; (3) what, if anything, petitioner told the individuals or the individuals could see for themselves about his injury; (4) when petitioner was taken to the hospital for the HIV/AIDS test; and (5) whether he was prevented from asking for medical attention at the hospital. If, by August 17, 2007, petitioner does not file an addendum with the court, I will assume that he does not wish to proceed with his claim of deliberate indifference to his medical needs against unnamed respondents and I will dismiss that claim.

6. Once petitioner has filed his addendum, I will determine whether he should be granted leave to proceed on his medical care claim against any individual. If so, he will be granted leave to proceed against the Marathon County sheriff for the sole purpose of discovering the name of the individual. Once he learns the name of the individual or individuals responsible, he will have to amend his complaint to name them in place of respondent Marathon County sheriff and the Marathon County sheriff will be dismissed from this case.

7. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

8. The unpaid balance of petitioner's filing fee is $348.80; petitioner is obligated to

pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 3rd day of August, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge