

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

JOHNSON CARTER,

Petitioner,

OPINION and ORDER

v.

07-C-365-C

MARATHON COUNTY DISTRICT ATTORNEY'S
OFFICE and ASST. D.A. ROSA DELGADO, in
official capacity and personal capacity,

Respondents.

This is a proposed civil action for declaratory, injunctive and monetary relief brought under 42 U.S.C. § 1983. Petitioner Johnson Carter, a prisoner at the Jackson Correctional Institution in Black River Falls, Wisconsin, contends that respondents Marathon County District Attorney's Office and Asst. D.A. Rosa Delgado violated his constitutional rights when they refused to honor a prior plea agreement and pursued criminal charges against him. 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, I draw the following factual allegations. (Petitioner's complaint includes numerous allegations that are immaterial to this decision and have been disregarded as a result.)

ALLEGATIONS OF FACT

Petitioner Johnson Carter is a prisoner who is presently incarcerated at the Jackson Correctional Institution in Black River Falls, Wisconsin. Respondent Marathon County District Attorney's Office is responsible for criminal prosecutions in Marathon County, Wisconsin. Respondent Rosa Delgado is an assistant district attorney in the Marathon County District Attorney's office.

Sometime in February or March 2003, petitioner was arrested by a Wausau police officer. After petitioner was arrested, Wisconsin Department of Justice agent Ron Gallman instructed the police officer to deliver petitioner to the Wausau Police Department instead

of the jail. Petitioner was held at the police department until Gallman arrived. Agent Gallman proposed that petitioner could become an informant to “work off” his charges with the district attorney. Agent Gallman called respondent Delgado to propose an arrangement in which petitioner “could do numerous drug buys involving people they wanted whom they haven’t been able to get” and that, in exchange, petitioner would “work off” his charges. Respondent Delgado agreed with this proposal and petitioner was released from custody.

Neither respondent Delgado nor agent Gallman indicated that their agreement with petitioner was “limited” to certain charges. At the time, petitioner faced charges in fourteen cases.

Over the following three months, petitioner engaged in numerous “control drug buys.” (Although it is not entirely clear from petitioner’s complaint, I understand him to allege that these were the transactions proposed by agent Gallman.) As petitioner was “winding things up,” he was informed that he faced too many charges for respondent Delgado to honor her earlier agreement with him. Respondent Delgado pursued charges against petitioner in many of the cases that had been pending at the time he had agreed with her and agent Gallman to “work off” the charges against him. After petitioner was convicted, he sought post-conviction relief and Judge Bain determined that respondent Delgado had incorrectly charged petitioner with bail jumping in many of these cases.

DISCUSSION

Petitioner's complaint boils down to an allegation that it was unfair for respondent Delgado to refuse to honor her agreement with him after he had lived up to his end of the bargain. However, respondent Delgado is protected from suit by the doctrine of absolute prosecutorial immunity. Kalina v. Fletcher, 522 U.S. 118 (1997) ("A state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is not amenable to suit under § 1983."). In deciding to prosecute petitioner in spite of her prior agreement with him, respondent Delgado was "performing functions that require the exercise of prosecutorial discretion." Id. at 125; see also Buckley v. Fitzsimmons, 59 U.S. 259 (1993) (stating that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in his role as an advocate for the State, are entitled to the protections of absolute immunity"). Therefore, petitioner's complaint will be dismissed with respect to respondent Delgado.

Next, petitioner's theory of liability with respect to respondent Marathon County District Attorney's Office is not clear. However, respondent Marathon County District Attorney's Office would also receive absolute immunity regarding decisions related to petitioner's prosecution. Moreover, to the extent petitioner seeks damages against respondent District Attorney's Office for the actions of its employee, respondent Delgado, such a claim is not permitted under § 1983. Gentry v. Duckworth, 65 F.3d 555, 561 (7th

Cir. 1995) (liability under § 1983 must be based on defendant's personal involvement in constitutional violation, supervisory status is not basis for liability). Therefore, petitioner's complaint will be dismissed with respect to respondent Marathon County District Attorney's Office as well.

ORDER

IT IS ORDERED that

1. Petitioner Johnson Carter is denied leave to proceed in forma pauperis on his claims that respondents Marathon County District Attorney's Office and Asst. D.A. Rosa Delgado violated his constitutional rights when they refused to honor a prior plea agreement and pursued criminal charges against him;
2. This case is DISMISSED with prejudice for petitioner's failure to state claim upon which relief may be granted;
3. The unpaid balance of petitioner's filing fee is \$348.30; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);
4. A strike will be recorded against petitioner pursuant to § 1915(g); and

5. The clerk of court is directed to close the file.

Entered this 3d day of August, 2007.

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