IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS W. SHELLEY,

ORDER

Plaintiff,

08-cv-647-bbc

v.

MICHAEL J. LECHLEITNER, RANDELL HOENISCH, GARY A. SCHNECK, DETECTIVE MILHAUSEN and GRAUDEN, CHAD BILLEB, TROY PAULS, JENNY HOLZ, CAPTAIN SLEETER and VERCIMACK, OFFICER GOFF, DEPUTY SCHEFFLER and ANDY BUSS, MICHAEL WILLIAMS, UNKNOWN REGION SIX AGENT(S), CHRISTOPHER L. WITHERS and his AGENT and his AGENT'S SUPERVISOR,

Defendants.

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This is a proposed civil action for monetary relief, brought by plaintiff Thomas Shelley under 42 U.S.C. § 1983. Plaintiff's claims arise from his January 11, 2008 arrest and subsequent interrogation. In a previous order, I explained that I could not consider plaintiff's claims for violations of his rights under the Fourth and Fifth Amendments or his federal wiretapping claim because resolution of those claims could impugn the potential

convictions he faced in his ongoing criminal case. I stayed the proceedings regarding his Fourth Amendment, Fifth Amendment and federal wiretapping claims pursuant to Wallace v. Kato, 549 U.S. 384, 393-94 (2007) ("it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended"), and had the case administratively closed. Also, I dismissed plaintiff's malicious prosecution claim because plaintiff failed to state a claim upon which relief could be granted.

Now plaintiff has filed two motions to reopen this case, stating that his criminal case has been resolved. After considering the allegations in plaintiff's complaint as well as the history of his criminal case, I conclude that the case should be reopened, but that the complaint violates Fed. R. Civ. P. 8. I will give plaintiff a chance to submit a proposed amended complaint that more clearly explains the basis for his claims.

From a review of electronic records maintained on the Wisconsin Circuit Court Access Program (CCAP) and plaintiff's complaint, I understand plaintiff to allege the following facts.

ALLEGATIONS OF FACT

A. Plaintiff's Arrest

On January 11, 2008, plaintiff was arrested for the manufacture, possession or intent

to deliver non-narcotics, in violation of several subsections of Wis. Stat. § 961.41. The following defendants were present at the arrest: Williams, Sleeter, Vercimack, Goff, Lechleitner, Schneck, Hoenisch, Milhausen, Grauden, Billeb, Pauls, Holz, Scheffler, Buss, unknown Region Six agents, Withers and his agent and his agent's supervisor. Plaintiff was not arrested on a warrant. Instead, he was arrested after a controlled purchase of some non-narcotics by an undercover officer. When defendant Lechleitner provided plaintiff the controlled buy money for the non-narcotics, plaintiff would not count it and passed it to defendant Withers. Thus, when plaintiff was arrested he was not in possession of any of the controlled buy money. After plaintiff was arrested and handcuffed, he was placed in the back of a police car, but he was not read his Miranda rights.

B. Plaintiff's Time in Jail

After his arrest, plaintiff was taken to the Marathon County jail, where defendants Holz and Pauls attempted to interrogate him without recording the interrogation. Plaintiff refused to respond and a recorder was obtained. After the recorder was obtained, plaintiff signed a "Constitutional Waiver," but he hand wrote "temporary" next to his signature. During the interrogation, plaintiff noted that the only property he was found to possess on arrest was his prescribed Adderall. After noting what property he possessed, plaintiff stated, "Stop the tape . . . want a lawyer." Although the recorder was shut off, defendants Holz and

Pauls continued to question plaintiff about a robbery at Young's Pharmacy. Holz and Pauls offered to "go to bat" for plaintiff if he provided information about the robbery.

After the interrogation ended, plaintiff was moved to Bullpen 2. While there, he asked to be permitted to call his attorney. The corrections officer on duty told plaintiff he did not get a phone call and that her supervisor told her that plaintiff was not allowed to make any phone calls. Although plaintiff continued to ask other corrections officers about calling his lawyer, he was not permitted to make any phone calls because a "no phone calls" tag was placed on his cell door. Plaintiff was not permitted to make a phone call until the morning of January 14, 2008.

C. Plaintiff's Criminal Case

Plaintiff was prosecuted in the state court criminal case 2008CF000242. Plaintiff pleaded no contest to a count of manufacture, distribution or delivery of a non-narcotic drug. Counts of falsely presenting a noncontrolled substance and possession with the intent to manufacture, distribute or deliver a noncontrolled substance were dismissed and read into his sentence. He was given a sentence of seven years in prison, which was stayed and imposed, as well of three years of probation.

DISCUSSION

A. Motions to Reopen the Case

Plaintiff has filed two motions to reopen this case, arguing that "all acts on January 11, 2008 were dismissed on 11-13-2009." Review of plaintiff's criminal proceedings show that this is not the case; although two of the counts were dismissed, he pleaded no contest to the count of manufacture, distribution or delivery of a non-narcotic drug and was thus convicted of that crime. However, the fact that plaintiff was convicted does not necessarily mean that his motions to reopen the case should be denied. The result of plaintiff's criminal proceedings raise the question whether his claims are barred under Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), which forbids a plaintiff from bringing claims for damages if judgment in favor of the plaintiff would "*necessarily* imply the invalidity of his conviction or sentence." (Emphasis added.).

Many claims similar to plaintiff's do not run afoul of Heck because finding that a plaintiff's rights were violated may not necessarily undermine that plaintiff's conviction, given the presence of other evidence and the limitations of the exclusionary rule. Id. at 487 n.7; Dominguez v. Hendley, 545 F.3d 585, 589 (7th Cir. 2008). It is too early to tell whether plaintiff's claims would be barred by Heck. Because it is defendants' burden to show that success by plaintiff in this action would necessarily invalidate his conviction, Sanford v. Motts, 258 F.3d 1117, 1119 (9th Cir. 2001), I will grant plaintiff's first motion

to reopen the case. His second motion will denied as unnecessary. As the case proceeds, defendants will be free to file a motion to dismiss the case pursuant to Heck, but they will have to support the motion by producing plaintiff's plea hearing transcript or other evidence showing the factual basis for plaintiff's conviction.

B. Screening Plaintiff's Claims

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, because plaintiff is a prisoner, the court is required to screen his complaint and dismiss his case if the 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. § 1915A. I understand plaintiff to be asserting several claims that fall into three categories: (1) false arrest and imprisonment in violation of the Fourth Amendment, Wallace, 549 U.S. 384; (2) the failure by the police to inform him of his Miranda rights, Miranda v. Arizona, 384 U.S. 436 (1966), and a failure to stop interrogating him after he requested an attorney, Edwards v. Arizona, 451 U.S. 477 (1981), in violation of his Fifth Amendment right to be free from self-incrimination, Sornberger v. City of Knoxville, Illinois, 434 F.3d 1006 (7th Cir. 2006); and (3) violations of the federal wiretapping statutes, 18 U.S.C. §§ 2510 et seq.

I cannot determine whether plaintiff's claims may proceed because plaintiff does not include enough detail in his complaint to satisfy Rule 8 of the Federal Rules of Civil Procedure. Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 also requires that the complaint contain enough allegations of fact to make a claim for relief "plausible" on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007); Aschcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (holding that plausibility standard set forth in Twombly applies to "all civil actions"). For a complaint to state a "plausible" claim for relief under Twombly and Iqbal, the complaint must include enough detail about what each defendant did to show a real possibility (and not just a guess) that plaintiff might be able to prove each element of his claims after he has an opportunity to fully investigate them. Twombly, 550 U.S. at 555; Riley v. Vilsack, 665 F. Supp. 2d 994, 1004 (W.D. Wis. 2009). In determining whether the details in the complaint satisfy this standard, a district court should disregard "mere conclusory statements" and consider only the factual allegations. Iqbal, 129 S. Ct. at 1949.

Plaintiff's allegations fall short of answering certain key questions. First, plaintiff does not explain precisely who violated his rights. For instance, he alleges that more than 20 of the named defendants were present at his arrest, but he does not explain which defendants arrested him out and which ones failed to read him his Miranda rights. Liability under § 1983 must be based on a defendant's personal involvement in the violation. Palmer v.

Marion County, 327 F.3d 588, 594 (7th Cir. 2003); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). This means that plaintiff cannot state a claim by vaguely asserting that a large group of law enforcement officers violated his rights.

Also, plaintiff alleges that "(ALL) defendants . . . violated 18 U.S.C. §§ 2510 to 2520 [part of the federal wiretapping statutes]." A conclusory statement that defendants violated the law is not enough to state a claim. Instead, plaintiff will have to explain the facts underlying his wiretapping claims: what did the defendants do that violated the wiretapping statutes? Moreover, as with his Fourth Amendment claims, it seems highly unlikely that *all* of the named defendants wiretapped plaintiff.

I will give plaintiff a chance to correct these problems. Plaintiff may have until October 12, 2010 to submit a proposed amended complaint in which he describes in more detail how each of the named defendants violated his rights. If plaintiff does not know the identity of a defendant who took a particular action to violate his rights, he should name that defendant as "John Doe," and then explain how that defendant was involved.

ORDER

IT IS ORDERED that

1. Plaintiff Thomas W. Shelley's first motion to reopen this case, dkt. #16, is GRANTED.

2. Plaintiff's second motion to reopen the case, dkt. #18, is DENIED as unnecessary.

3. Plaintiff's complaint is DISMISSED because it is in violation of Fed. R. Civ. P. 8.

4. Plaintiff may have until October 12, 2010, in which to submit a proposed amended complaint that conforms to Rule 8. If, by October 12, 2010, plaintiff fails to respond to this order, the clerk of court is directed to close this case for plaintiff's failure to prosecute.

5. If, by October 12, 2010, plaintiff submits a proposed amended complaint as required by this order, I will take that complaint under advisement for screening under to 28 U.S.C. § 1915A.

Entered this 22d day of September, 2010.

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