

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

THOMAS W. SHELLEY,

Petitioner,

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, COUNTY OF MARATHON,
LANCE LEONHARD, ROBERT DICKMAN
and JOHN WALLACE,

Respondents.

ORDER

08-cv-647-bbc

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. In a previous order, I determined that petitioner Thomas Shelley does not qualify for in forma pauperis status because he has struck out under 28 U.S.C. § 1915(g), and therefore, is required to pay the full filing fee before continuing this lawsuit. Dkt. #10. He has now

paid the full filing fee.

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 petitioner 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 conclude that petitioner's claims for violations of his rights under the Fourth and Fifth Amendments as well as his federal wiretapping claim must be stayed and this case will be closed administratively until the conclusion of the pending state criminal proceedings against petitioner. However, petitioner's malicious prosecution claim will be dismissed for failure to state a claim upon which relief may be granted.

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

ALLEGATIONS OF FACT

A. Petitioner's Arrest

On January 11, 2008, petitioner was arrested for the manufacture, possession and intent to deliver non-narcotics, in violation of several subsections of Wis. Stat. § 961.41.

The following respondents 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. Petitioner was not arrested on a warrant. Instead, he was arrested after a controlled purchase of some non-narcotics by an undercover officer. When respondent Lechleitner provided petitioner the controlled buy money for the non-narcotics, petitioner would not count it and passed it to respondent Withers. Thus, when petitioner was arrested he was not in possession of any of the controlled buy money. After petitioner was arrested and handcuffed, he was placed in the back of a police car, but he was not read his Miranda rights.

B. Petitioner's Time in Jail

After his arrest, petitioner was taken to the Marathon County jail where respondents Holz and Pauls attempted to interrogate him without recording the interrogation. Petitioner refused to respond and a recorder was obtained. After the recorder was obtained, petitioner signed a "Constitutional Waiver," but he hand wrote "temporary" next to his signature. During the interrogation, petitioner noted that the only property he was found to possess on arrest was his prescribed Adderall. After noting what property he possessed, petitioner stated, "Stop the tape . . . want a lawyer." Although the recorder was shut off, respondents Holz and Pauls continued to question petitioner about a robbery at Young's Pharmacy.

Holz and Pauls offered to “go to bat” for petitioner if he provided information about the robbery.

After the interrogation ended, petitioner was moved to Bullpen 2. While there, he asked to be permitted to call his attorney. The corrections officer on duty told petitioner he did not get a phone call and that her supervisor told her that petitioner was not allowed to make any phone calls. Although petitioner 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. Petitioner was not permitted to make a phone call until the morning of January 14, 2008.

C. Petitioner’s Criminal Case

Petitioner is being prosecuted in the state court criminal case, 2008CF000242, that resulted from his January 11, 2008 arrest. He has been charged with three felonies and has pleaded not guilty to all three charges. A pre-trial conference was set for January 6, 2009. Respondent Leonhard is the attorney prosecuting petitioner.

DISCUSSION

I understand petitioner to be asserting several claims that fall into one of four categories: (1) false arrest and imprisonment in violation of the Fourth Amendment,

Wallace v. Kato, 549 U.S. 384 (2007); (2) failure to inform petitioner 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); (3) wiretapping claims; and (4) a malicious prosecution claim.

A. False Arrest and Imprisonment

“False arrest and false imprisonment overlap; the former is a species of the latter.” Kato, 549 U.S. at 388. “[F]alse imprisonment consists of detention without legal process, false imprisonment ends once the victim becomes held *pursuant to such process*—when, for example, he is bound over by a magistrate or arraigned on charges.” Id. at 389 (emphasis in original) (citations omitted). I understand petitioner to allege that he was arrested without a warrant or probable cause because he did not possess any money involved in the controlled purchase of non-narcotics; instead, he merely passed the money from one person to another. Accepting petitioner’s allegations as true, as I must at this stage of the litigation, the time from when petitioner was arrested until he was bound over or arraigned could be time during which he was detained without legal process.

Nonetheless, there is a problem with allowing petitioner to go forward on his false

arrest and imprisonment claim. Because petitioner's alleged false arrest led to the charges that are the basis for the current state court criminal proceedings against him, evidence obtained from the false arrest might be needed to convict petitioner in state court. E.g., Wallace v. City of Chicago, 440 F.3d 421, 425 (7th Cir. 2006) (“[I]t is often the case that the prosecution cannot proceed without the fruits of an unlawful arrest.”). Thus, ruling on petitioner's false arrest claim may have an effect on petitioner's criminal proceeding. In other words, if petitioner is convicted of the current charges against him and the conviction relies on evidence obtained from his arrest, then a decision on his false arrest claim might render his conviction invalid. Therein lies the problem.

If petitioner's false arrest claim would invalidate a criminal conviction, he would be barred from bringing the claim unless the criminal conviction had been invalidated. Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). However, petitioner's criminal case is still pending. Therefore, no one can know whether he will be convicted and whether a judgment in his favor on his false arrest claim would necessarily imply the invalidity of his conviction. These uncertainties leave the court in a precarious situation. The Supreme Court's solution to the situation is “to stay the civil action until the criminal case . . . is ended.” Kato, 549 U.S. at 394. Therefore, I will do just that by staying and administratively closing this case until petitioner is either convicted or the criminal charges against him are dismissed. Petitioner should be aware that “[i]f [he] is ultimately convicted, and if the stayed civil suit

would impugn [his] conviction, Heck will require dismissal [of this case]; otherwise, the civil action will proceed, absent some other bar to suit.” Kato, 549 U.S. at 394.

B. Fifth Amendment Claims

The stay is appropriate with respect to petitioner’s Fifth Amendment claims because they too are intertwined with the current state criminal proceedings against petitioner. Further, besides the potential problem that ruling on his Fifth Amendment claims may impugn a future criminal conviction, there are additional problems with ruling on those claims while his criminal case remains open.

In Younger v. Harris, 401 U.S. 37, 53 (1971), the Supreme Court held that federal courts should abstain from enjoining ongoing criminal proceedings absent extraordinary circumstances involving irreparable injury. The Court’s holding, which has come to be known as the Younger doctrine, was based on the “longstanding public policy against federal court interference with state court proceedings,” which arose from “the notion of ‘comity,’ that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.” Id. at 43-44. The scope of the Younger doctrine has been expanded beyond cases for injunctive relief to cases requesting

damages where “the potential for federal-state friction is obvious.” Simpson v. Rowan, 73 F.3d 134, 138 (7th Cir. 1995).

In this case, although petitioner brings § 1983 claims for damages, his claims raise constitutional issues that are potentially subject to adjudication in the state court criminal proceedings in which he is a defendant. For example, if he was not informed of his Miranda rights and if he was interrogated despite his request for an attorney, any statements made to the police could be excluded from his criminal trial. Thus, to avoid offending the principle of “comity,” it is appropriate that I abstain from addressing petitioner’s Fifth Amendment claims and stay this case.

C. Wiretapping Claims

Petitioner alleges that all respondents illegally wiretapped his oral and electronic communications on January 10 and 11. The Wisconsin state electronic surveillance control laws are criminal, not civil, statutes, Wis. Stat. §§ 968.27 - .37. Thus, petitioner cannot sue respondents civilly for violations of those laws. With respect to federal electronic surveillance control laws, the recovery of civil damages for the illegal interception of oral or electronic communication is authorized, 18 U.S.C. § 2520. However, if respondents illegally intercepted petitioner’s oral or electronic communications, those communications could not be used as evidence in his criminal proceedings. 18 U.S.C. § 2515. Like petitioner’s Fifth

Amendment claims, his federal wiretapping claim runs afoul of the Younger doctrine because the claim raises issues that are potentially subject to adjudication in the state court criminal proceedings in which he is a defendant. Therefore, I must abstain from addressing petitioner's federal wiretapping claim.

D. Malicious Prosecution Claim

Regardless of the stay that will be placed on petitioner's Fourth and Fifth Amendment and federal wiretapping claims, his malicious prosecution claim must be dismissed for failure to state a claim. The Court of Appeals for the Seventh Circuit has made it clear that malicious prosecution is not a constitutional tort unless the state does not provide any remedy for malicious prosecution. Newsome v. McCabe, 256 F.3d 747, 750 (7th Cir. 2001) ("the existence of a tort claim under state law knocks out any constitutional theory of malicious prosecution"). The state of Wisconsin recognizes the tort of malicious prosecution. E.g., Strid v. Converse, 111 Wis. 2d 418, 331 N.W.2d 350 (1983); Whispering Springs Corp. v. Town of Empire, 183 Wis. 2d 396, 515 N.W.2d 469 (Ct. App. 1994). One of the six essential elements of a claim for malicious prosecution is that "the *former* proceedings must have *terminated* in favor of the defendant therein." Strid, 111 Wis. 2d at 423, 331 N.W.2d at 353-54 (emphasis added). What would be considered petitioner's "former proceedings," that is, his current criminal case, have not terminated as

of yet. Therefore, petitioner cannot state a claim for malicious prosecution and respondents County of Marathon, Leonhard, Dickman and Wallace must be dismissed from this case.

E. Summary

In sum, because petitioner is asserting claims whose resolution may conflict with or invalidate state court criminal proceedings against him, this case will be stayed and closed administratively. Petitioner may move to reopen the case immediately upon resolution of his criminal case, which would include any relevant state collateral review proceedings. In this circumstance, the parties will be entitled to all such rights as they had when the case was administratively closed. However, petitioner should be aware that if the criminal case results in his conviction, reopening this case may result in dismissal without prejudice if a judgment in his favor in this case would imply the invalidity of his conviction.

ORDER

IT IS ORDERED that

1. Petitioner Thomas W. Shelley's request for leave to proceed in forma pauperis is DENIED with respect to his malicious prosecution claim and that claim is DISMISSED without prejudice.

2. Respondents County of Marathon, Lance Leonhard, Robert Dickman and John Wallace are DISMISSED from this case.

3. Because one or more claims asserted in petitioner's complaint have been dismissed for one of the reasons listed in 28 U.S.C. § 1915(g), a strike will be recorded against petitioner.

4. Petitioner's Fourth and Fifth Amendment claims for money damages are STAYED until the conclusion of the pending state criminal proceedings, including any relevant state collateral review proceedings.

5. The clerk of court is directed to close this case administratively. If after the conclusion of the pending state criminal proceedings petitioner wishes to resume proceedings in this case, the case will be reopened immediately upon motion, with the parties retaining all rights they would have had the case not been closed for administrative purposes.

Entered this 21st day of January, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge