

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

LANCE SLIZEWSKI,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendant.

OPINION and ORDER

10-cv-665-slc¹

Pro se plaintiff Lance Slizewski has filed a proposed complaint and made an initial partial payment in accordance with 28 U.S.C. § 1915(b)(1). The allegations in his complaint consist of two sentences:

Between the months of February and June 2010 while I was incarcerated at Dodge Correctional Institution two of my properly placed telephone calls to my Attorney Ben Schulenberg were recorded. During that time I was talking to my attorney about my defen[s]e on a serious felony case.

Because plaintiff is a prisoner, I must screen the complaint to determine whether it states a

¹ Because consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action, I am assuming jurisdiction over the case for the purpose of this order.

claim upon which relief may be granted. 28 U.S.C. §§ 1915(e)(2) and 1915A. Although plaintiff's allegations are sparse, I conclude that he has included enough facts to state a plausible claim under the First Amendment, Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968. However, because plaintiff may not sue the Wisconsin Department of Corrections for constitutional violations, I am substituting the warden of the Dodge prison to give plaintiff an opportunity to discover the person or persons responsible for the alleged violations.

OPINION

“The attorney-client privilege is one of the oldest recognized privileges for confidential communications.” Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998). It “is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.” Id. (internal quotations omitted). However, a violation of the privilege is not necessarily a violation of the Constitution. Guajardo-Palma v. Martinson, 622 F.3d 801, 803 (7th Cir. 2010). See also Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985) (“Standing alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right.”). Thus, the first question in evaluating plaintiff's claim is whether plaintiff's allegations implicate a constitutional right or other federal law. There are

several possibilities and I will address each in turn.

A. Access to Courts and Assistance of Counsel

One possibility is the Sixth Amendment right to effective assistance of counsel and the right to have meaningful access to the courts. The Court of Appeals for the Seventh Circuit has recognized the importance of confidential communication between the client and his lawyer in the context of guaranteeing these rights. Guajardo-Palma, 622 F.3d at 802 (“A practice of prison officials reading mail between a prisoner and his lawyer in a criminal case would raise serious issues under the Sixth Amendment (and its application, by interpretation of the Fourteenth Amendment, to state criminal defendants), which guarantees a right to counsel in criminal cases.”); Dreher v. Sielaff, 636 F.2d 1141, 1143 (7th Cir. 1980) (“The Fourteenth Amendment guarantees meaningful access to courts, [and] . . . the opportunity to communicate privately with an attorney is an important part of that meaningful access.”)

The problem with these legal theories is that both require the plaintiff to show that his ability to litigate or receive a fair trial was somehow impaired. Weatherford v. Bursey, 429 U.S. 545, 552 (1977) (“[T]here can be no Sixth Amendment violation” for violating lawyer-client confidentiality unless it “created at least a realistic possibility of injury to [the accused] or benefit to the State.”); Guajardo, 622 F.3d at 805 (“We think there must . . . b[e] a showing of hindrance [to a lawsuit] in a claim of interference with a prisoner’s

communications with his lawyer.”). See also Andersen v. County of Becker, 2009 WL 3164769, *12 (D. Minn. 2009) (dismissing plaintiffs’ claim under Sixth Amendment for recording conversations with his lawyer because “no information overheard in the phone conversations was ever used against them”). Plaintiff’s sparse complaint includes no allegations suggesting that prison officials used information from his discussions with his lawyer to harm his defense.

Even if plaintiff included these allegations, it is unlikely he could bring such a claim in a civil lawsuit because doing so would necessarily imply that he did not receive a fair trial and that his conviction is invalid. E.g., Julian v. Bartley, 495 F.3d 487, 500 (7th Cir. 2007) (ordering new trial after finding ineffective assistance of counsel). See also Strickland v. Washington, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part, dissenting in part)(“a finding of ineffective assistance of counsel requires a new trial”). “[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.” Heck v. Humphrey, 512 U.S. 477, 487 (1994). See also Horacek v. Seaman, 2009 WL 2928546, *10-11 (E.D. Mich. 2009) (dismissing Sixth Amendment claim under reasoning in Heck). Because plaintiff does not allege that prison officials interfered with the criminal proceeding or that, if they did, his

conviction has been invalidated through other means, he may not proceed on a claim under the Sixth Amendment or the right to have access to the courts.

B. First Amendment

“[U]nreasonable restrictions on [a] prisoner's telephone access may . . . violate the First and Fourteenth Amendments.” Tucker v. Randall, 948 F.2d 388, 391 (7th Cir. 1991). In this case, plaintiff does not allege that prison officials have prohibited him from speaking on the telephone or even unreasonably restricted the amount of time that he may use it. Rather, he alleges only that prison officials recorded his calls.

The court of appeals has declined to find that it is unreasonable for prison officials to monitor personal calls of prisoners, Martin v. Tyson, 845 F.2d 1451, 1458 (7th Cir. 1988), but the court suggested in Tucker that a different rule might be appropriate with respect to legal calls. A narrow reading of Tucker suggests that First Amendment protections are coextensive with the Sixth Amendment because the court stated that “[p]rison officials may tape a prisoner's telephone conversations with an attorney *only if such taping does not substantially affect the prisoner's right to confer with counsel.*” Id. However, in Czapiewski v. Bartow, 2008 WL 5262801, *4 (W.D. Wis. 2008), I assumed that recording a prisoner's telephone calls with his lawyer may implicate the First Amendment regardless of the effect it may have on the prisoner's representation. I will do the same for the purpose of screening

plaintiff's complaint.

Alleged violations of a prisoner's First Amendment rights are governed by the standard set forth in Turner v. Safley, 482 U.S. 78 (1987), which is whether the restriction on the publication is reasonably related to a legitimate penological interest. In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether alternatives for exercising the right remain to the prisoner; what impact accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Id. at 89. Because an assessment under Turner requires a district court to evaluate the prison officials' reasons for the restriction, the Court of Appeals for the Seventh Circuit has suggested that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest. E.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009) (holding that it was error for district court to conclude without evidentiary record that policy was reasonably related to legitimate interest); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004) (same).

C. Fourth Amendment

A prisoner's right of privacy under the Fourth Amendment is significantly limited by

the fact of incarceration because of the security needs of prison officials. E.g., Hudson v. Palmer, 468 U.S. 517, 527 (1984) (prisoners have no reasonable expectation of privacy in their cells); Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995) (no Fourth Amendment violation when officer of opposite sex views prisoner naked). However, some courts have held or assumed that prisoners have a reasonable expectation of privacy in the conversations they have with their lawyers, at least under some circumstances. Sherbrooke v. City of Pelican Rapids, 513 F.3d 809, 815 (8th Cir. 2008); United States v. Novak, 531 F.3d 99, 101 (1st Cir.2008) (O'Connor, J.); Andersen, 2009 WL 3164769, at *10 -11. Accordingly, I will allow plaintiff to proceed on a claim under the Fourth Amendment.

The parties are free at summary judgment or trial to raise any issues regarding the scope of the Fourth Amendment with respect to this case. Further, if plaintiff had notice that his conversations would be recorded, that may constitute consent, which would mean that prison officials did not violate plaintiff's Fourth Amendment rights. Novak, 531 F.3d at 101 ("A telephone call can be monitored and recorded without violating the Fourth Amendment so long as one participant in the call consents to the monitoring.")

D. Statutory Claim

Under 18 U.S.C. § 2511(1)(a) of the Omnibus Crime Control and Safe Streets Act, anyone who "intentionally intercepts, endeavors to intercept, or procures any other person

to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . shall be subject to suit as provided in subsection (5).” Subsection 5 creates a civil cause of action for any violation of the statute. 18 U.S.C. § 2520(a). A number of courts have recognized that the Act applies to communication in prison. E.g., United States v. Paul, 614 F.2d 115, 117 (6th Cir. 1980); Campiti v. Walonis, 611 F.2d 387, 392 (1st Cir. 1979); Andersen, 2009 WL 3164769, at *14. Accordingly, I will allow plaintiff to proceed on a claim under § 2520(a). Again, however, prison officials may not be held liable under the Act if the prisoner had notice of the recording. United States v. Balon, 384 F.3d 38, 44 (2d Cir. 2004) (“So long as a prisoner is provided notice that his communications will be recorded and he is in fact aware of the monitoring program [but] nevertheless uses the telephones, by that use he impliedly consents to be monitored for purposes of” the Act) (internal quotations omitted).

E. Proper Parties

The only defendant plaintiff named in the complaint is the Wisconsin Department of Corrections. However, the department cannot be sued for constitutional violations because it is not a “person” within the meaning of 42 U.S.C. § 1983, which is the statute that authorizes money damages for such violations. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65-66 (1989).

Presumably, plaintiff chose to sue the department because he does not know which individual or individuals is responsible for the alleged recording. "[W]hen 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 Department, 95 F.3d 548, 555 (7th Cir. 1996). In particular, if a prisoner does not know the name of the person or persons responsible, the court may allow him to proceed against the warden for purpose of determining the defendant's identity. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981).

Accordingly, plaintiff will be granted leave to proceed against Jim Schwochert, Warden of the Dodge prison, for the purpose of discovering the names of the individuals who are allegedly responsible for recording his calls with his lawyer. Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendant or defendants and will set a deadline within which plaintiff is to amend his complaint to include the proper parties.

ORDER

IT IS ORDERED that

1. Warden Jim Schwochert is SUBSTITUTED for defendant Wisconsin Department of Corrections.

2. Plaintiff Lance Slizewski is GRANTED leave to proceed on his claim that prison staff recorded telephone call's with plaintiff's lawyer, in violation of the First Amendment, the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

3. For the remainder of this lawsuit, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendant or to defendant's attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of documents.

5. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust

fund account until the filing fees have been paid in full.

6. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendant.

Entered this 24th day of November, 2010.

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