

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

KEVIN P. BRADLEY,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
CATHY STEPP, Secretary of the Department of Natural Resources,
in her official capacity, MACK HANNON, Conservation Officer,
in his official capacity, TIMOTHY EBERT, Conservation Officer
in his official capacity and JOHN DOE,

Defendants.

ORDER

11-cv-694-bbc

In this proposed civil action for monetary relief, plaintiff Kevin Bradley contends that defendants Mack Hannon, Timothy Ebert, Cathy Stepp and John Doe and the Wisconsin Department of Natural Resources violated his rights under the United States Constitution and state law when they entered his vacant property, searched his van, chased him and used physical force against him.

Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and cannot afford to make an initial partial payment. Because plaintiff is proceeding under the in forma pauperis statute, I must screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money

damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B).

After reviewing plaintiff's complaint, I conclude that he may proceed on his claim that defendants Hannon and Ebert violated his rights under the Fourth Amendment by conducting an unreasonable search of his van. However, plaintiff may not proceed on his claims that defendants Cathy Stepp and the Department of Natural Resources instituted a policy that encouraged unlawful searches because plaintiff has alleged no facts to support such a claim. Additionally, plaintiff may not proceed on his claim that defendants violated his right to equal protection by searching his van. With respect to plaintiff's state law claims, I cannot determine whether plaintiff may proceed on any claim because plaintiff has not stated whether he has complied with Wisconsin's notice of claim statute. I will give plaintiff an opportunity to supplement his complaint with this information. Finally, I will dismiss John Doe from the case because plaintiff has not made any allegations involving a John Doe.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

On October 22, 2010, plaintiff Kevin Bradley was sleeping in his van on his vacant property in Minocqua, Wisconsin. His van was parked in a driveway and was not visible from the public road. At approximately 10:38 p.m., defendants Mike Hannon and Timothy

Ebert, both conservation wardens for the Wisconsin Department of Natural Resources, drove up to plaintiff's van and began rummaging through his personal property that was outside. Then they banged on plaintiff's van and began searching through it with their flashlights. At this point, defendants had not identified themselves as conservation wardens. Plaintiff has a heart condition that is aggravated by stressful situations and he began to feel a high level of anxiety. He got out of the van and began to run away. Defendants chased plaintiff and defendant Hannon shouted "Police!" Plaintiff stopped running and waited on the ground for defendants to catch up to him. When Hannon arrived, he struck plaintiff violently on the head. After this, plaintiff thought defendants might not be police and he stood up. Hannon punched plaintiff in the chest, knocking him down, and the two engaged in a struggle on the ground. Ebert arrived on the scene and plaintiff noticed defendants' badges.

Plaintiff began to shout angrily at defendants and threatened to take legal action against defendant Hannon for excessive force. Hannon accused plaintiff of battery. Plaintiff was arrested. He asked defendants to refrain from handcuffing him because he has claustrophobia but when they refused he allowed himself to be handcuffed. Plaintiff was taken to a jail and held in a cell for three days. He could not contact his family. When he asked to talk to someone about his claustrophobia, his request was denied. Plaintiff was informed that he could face 10 years in prison and a \$20,000 fine. This caused him to become suicidal.

Ultimately, plaintiff was charged with battery to an officer and fleeing an officer. He pleaded no contest to fleeing an officer in order to avoid the felony charge of battery.

DISCUSSION

A. Fourth Amendment

Plaintiff contends that defendants Hannon and Ebert violated his right to be free from unreasonable searches by searching his vehicle with flashlights while it was parked on his private land. Additionally, he contends that the Wisconsin Department of Natural Resources violated the Fourth Amendment by instituting a policy that encourages unlawful searches.

The Fourth Amendment, as applied to the states through the Fourteenth Amendment, protects individuals against unreasonable searches and seizures of their persons, homes and effects, without a warrant supported by probable cause. U.S. Const. amend. IV. The protections afforded by the Fourth Amendment apply not only to the activities of criminal authorities, but to those of civil authorities as well. Michael C. v. Gresbach, 526 F.3d 1008, 1014 (7th Cir. 2008) (citing New Jersey v. T.L.O., 469 U.S. 325, 335 (1985)).

To state a claim for violation of his Fourth Amendment right to protection from unreasonable searches, plaintiff must allege facts from which it can be inferred that defendants' conduct constituted a "search" within the meaning of the Fourth Amendment and that the search was unreasonable. Christensen v. County of Boone, 483 F.3d 454, 459

(7th Cir. 2007). A search takes place when the state intrudes upon an individual's legitimate interest in privacy. Id. (citations omitted). This expectation must be one that society is willing to accept. Katz v. United States, 389 U.S. 347, 353 (1967). Additionally, "a plaintiff invoking the Fourth Amendment must show that he has attempted to keep the object of the search private." Christensen, 483 F.3d at 459 (citing Katz, 389 U.S. at 351 ("[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.")). See also United States v. French, 291 F.3d 945, 951 (7th Cir. 2002) (search will be found unconstitutional only if complainant has reasonable expectation of privacy in area that was searched).

I am skeptical whether plaintiff will be able to prove that he had a reasonable expectation of privacy in his van that was parked in his driveway on his vacant land. State employees have the same legal right to enter private property as other visitors or delivery people. United States v. LePage, 477 F.3d 485, 488 (7th Cir. 2007) (citing United States v. French, 291 F.3d 945, 953 (7th Cir. 2002)). See also Bleavins v. Bartels, 422 F.3d 445, 454 (7th Cir. 2005) ("Generally, there is no expectation of privacy in a driveway, particularly where . . . it is open to observation and use by the public."); United States v. Evans, 27 F.3d 1219, 1229 (Fed. Cir. 1994) (agents' approach to garage did not implicate Fourth Amendment where there was no evidence that defendant had reasonable expectation of privacy in driveway).

On the other hand, plaintiff alleges that his van was parked on his driveway on vacant

land that presumably does not receive many visitors or deliveries. Additionally, plaintiff's van was not visible from the road and defendants approached the van after 10:30 p.m. Under these circumstances, plaintiff may be able to prove that he had a reasonable expectation of privacy in his van and that defendants violated his rights by searching his van with flashlights. United States v. Brookins, 345 F.3d 231, 237 n.8 (4th Cir. 2003) (suggesting that "heightened privacy interests may be triggered when a vehicle is encountered on private property"). Thus, I will let plaintiff proceed on his claim against defendants Hannon and Ebert.

Plaintiff may not proceed on his claims against the Department of Natural Resources or Cathy Stepp in her role as Secretary of the Department. Plaintiff has not alleged any facts to support his claim that the department has a policy encouraging unlawful searches. Additionally, defendant Stepp cannot be held liable for Hannon's and Ebert's actions simply because they are her subordinates. Aschroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) ("Only persons who cause or participate in the violations are responsible."). Thus, I will dismiss plaintiff's Fourth Amendment claims against these defendants.

B. Equal Protection

Plaintiff contends that all defendants violated his right to equal protection under the Fourteenth Amendment by targeting his van for search because it was in poor condition. In

other words, plaintiff contends that defendants targeted him for search because of his apparent low economic status.

Under the equal protection clause of the Fourteenth Amendment, government officials must have at least a rational basis for different treatment, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985), and in the case of different treatment because of race, even more is required. Johnson v. California, 543 U.S. 499, 506 (2005) (heightened scrutiny applies).

Plaintiff's allegations do not imply that defendants treated him differently from similarly situated persons of higher economic status or that defendants acted without a rational basis. It is not irrational for wardens to be suspicious of a vehicle in poor condition that appears to be abandoned on vacant land. Thus, I will dismiss plaintiff's equal protection claim.

C. State Law Claims

Finally, plaintiff raises several state law claims against defendants, including (1) negligent failure to supervise and train; (2) negligent infliction of emotional distress; and (3) expungement of public records. I cannot determine whether plaintiff may proceed on these state law claims at this time. When an individual intends to sue a "governmental subdivision or agency" or an "officer, official, agent or employee" of the subdivision, "for acts done in their official capacity or in the course of their agency or employment," Wisconsin

law imposes notice requirements on the individual. Wis. Stat. § 893.80(1). First, the claimant must give the defendant notice of claim within 120 days of the injury. Wis. Stat. § 893.80(1)(a). Second, the claimant must present defendants an itemized statement of the relief sought and allow them an opportunity to disallow the claim. Wis. Stat. § 893.80(1)(b). The individual cannot bring suit until he or she complies with these requirements. Orthmann v. Apple River Campground, Inc., 757 F.2d 909, 911 (7th Cir. 1985). Plaintiff has not said whether he has complied with the requirements of Wis. Stat. § 893.80(1). Because this is a threshold requirement for filing a state law claim against defendants, I will stay a decision on whether to grant plaintiff leave to proceed on his state law claims and give him an opportunity to supplement his complaint with information about the notice of claim and statement of relief and whether the claim has been disallowed. If plaintiff fails to supplement his complaint, I will deny him leave to proceed on his state law claims and those claims will be dismissed.

ORDER

IT IS ORDERED that

1. Plaintiff Kevin Bradley is GRANTED leave to proceed on his claim that defendants Mark Hannon and Timothy Ebert violated his right to be free from unreasonable searches under the Fourth Amendment.
2. Plaintiff is DENIED leave to proceed on the following claims:

a. Defendants the Wisconsin Department of Natural Resources and Cathy Stepp violated his rights under the Fourth Amendment by instituting a policy that encouraged unlawful searches; and

b. Defendants Hannon, Ebert, Stepp, John Doe and the Wisconsin Department of Natural Resources violated his right to equal protection under the Fourteenth Amendment.

3. Defendant John Doe is DISMISSED from the case.

4. A decision on plaintiff's request for leave to proceed on his state law claims is STAYED. Plaintiff may have until December 15, 2011, in which to supplement his complaint with information about his compliance with notice requirements under Wis. Stat. § 893.80(1). If plaintiff does not submit a supplement to his complaint on or before that date, his state law claims against defendants will be dismissed and defendants the Wisconsin Department of Natural Resources and Cathy Stepp will be dismissed from the case.

5. Service of the complaint on defendants is STAYED pending receipt and screening of plaintiff's supplement to the complaint.

Entered this 2d day of December, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge