

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

ERIC T. HALL,

Plaintiff,

v.

OPINION AND ORDER

12-cv-788-bbc

RICHARD ANDERSON, GREGORY GREGERSON,
BRYAN LEE, KRAMER, PETER JOHNSON,
RICHARD GEARHART, DITLEFSON,
MARK OTT, FRANK TOMLANOVICH,
CHARISE ROSGA-ANDERSON,
JOHN DOE (1), JOHN DOE (2),
J.B. VAN HOLLEN, MARIE BETH VARRIALE,
JENNIFER NAUGLE, SAMANTHA DELFOSSE,
DENISE JONES, MICHAEL FELTON,
JEFF MOESSNER, MELISSA BROWN and
KRISTI GRUEBELE,

Defendants.

Plaintiff Eric Hall, a prisoner at the Green Bay Correctional Institution in Green Bay, Wisconsin has submitted a proposed complaint under 42 U.S.C. § 1983, alleging that various law enforcement officials conspired against him to frame him for the theft of two trucks. Plaintiff has made the initial partial payment as directed by the court and has submitted a motion asking for the court's assistance in finding him counsel.

The next step in the case is to screen the complaint under 28 U.S.C. § 1915 to determine whether any portion 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. Plaintiff is a pro se litigant, which means his complaint will be construed liberally as it is reviewed for these potential defects. Haines v. Kerner, 404 U.S. 519, 521 (1972). After examining plaintiff's complaint, I conclude that plaintiff may proceed on claims that defendants violated his rights under the Fourth Amendment by falsely arresting and imprisoning him, conducting illegal searches and maliciously causing him to be prosecuted. His motion for the court to assist him in recruiting counsel to represent him will be denied.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

On May 12, 2010, a 2004 Ford F150 pickup truck was stolen in Osseo, Wisconsin. On May 14, 2010, the truck was found on the side of a road. Defendant deputy Bryan Lee took nine DNA samples from the truck and sent them to the Wisconsin Crime Lab, informing staff there that he believed that plaintiff's DNA would be found in the truck.

On July 21, 2010, defendant DNA analysts Mary Beth Varriale and Jennifer Naugle conspired with Lee to create a false DNA report stating that plaintiff's DNA matched the sample taken from the truck's steering wheel. Lee contacted plaintiff's parole agent (plaintiff identifies his parole agent as one of two people, defendants Jeff Moessner or Melissa Brown), stating that plaintiff's DNA was found in the stolen truck and sent the agent a copy of the false DNA report. Moessner or Brown conspired with Lee, Varriale, Naugle and defendant

probation supervisor Michael Felton to put together a false arrest warrant.

On August 10, 2010, Moessner or Brown had plaintiff arrested on a false probation violation and placed in the Eau Claire County jail. Lee obtained a search warrant to take plaintiff's DNA, took two mouth swabs from plaintiff and sent the swabs to the crime lab. On August 30, defendant Samantha Delfosse tested the samples and concluded that plaintiff was excluded as a source.

Defendants Sheriff Kramer, Trempealeau County Police Chief Gregory Gregerson, Lee, Felton, Brown, Moessner, Varriale and Naugle were all aware that plaintiff was excluded as a suspect but none of them did anything to get him released from jail. None of them informed plaintiff or his attorney about the DNA test results. Plaintiff was imprisoned until November 10, 2010.

On November 14, 2010, a Ford F350 pickup truck was stolen in Neillsville, Wisconsin. On December 23, 2010, the Polk County Sheriff's Department recovered the stolen truck on the side of the road. Defendant deputies Gearhart and Ditlefson searched the truck and claimed to remove several items from it. Plaintiff believes that defendants Lee, Gearhart, Ditlefson, Mark Ott and DNA analyst Denise Jones conspired to plant the DNA earlier taken from plaintiff on items taken from the truck. Ott sent plaintiff's DNA sample to the crime lab. On March 9, 2011, Jones reported that she found plaintiff's DNA on one of the items recovered from the truck. On March 10, 2011, Gearhart contacted Gruebele and Felton and together they fabricated a false arrest warrant. Later that day, Gearhart obtained a search warrant, and he and defendant deputies Charise Rosga-Anderson, Frank

Tomlanovich and John Doe 1 and 2 searched his house and arrested plaintiff for a false parole violation. No evidence was found linking plaintiff to any crimes.

On March 11, 2011, Gearhart, Rosga-Anderson, Tomlanovich and Doe deputies became aware that plaintiff owned a vehicle parked in the parking lot of the residence from which they arrested plaintiff. They obtained an expanded search warrant and searched the vehicle. They also obtained another DNA sample from plaintiff. Gearhart obtained and executed a search warrant for plaintiff's phone records. Plaintiff's parole was revoked and he was falsely imprisoned for 42 months. On November 29, 2011, plaintiff was charged with burglary, theft and driving a vehicle without the owner's consent. On July 30, 2012, the charges were dismissed.

OPINION

A. Substantive Claims

I understand plaintiff to be bringing claims for false arrest and imprisonment as well as illegal searches, all in violation of the Fourth Amendment. In addition, I understand him to be bringing claims for malicious prosecution. As an initial matter, I note that plaintiff believes that the various defendants in this case have acted as part of a wide ranging conspiracy against him. Although his allegations that various defendants "conspired against him" are borderline conclusory, construing his allegations generously at this point of the proceedings, I understand him to be alleging that each of the defendants who conspired against him were aware that the evidence used to convict him was false.

1. Fourth Amendment Claims

“False arrest and false imprisonment overlap; the former is a species of the latter.” Wallace v. Kato, 549 U.S. 384, 388 (2007). In order to prove a false arrest claim, plaintiff must show that defendants arrested him without probable cause while acting under color of law. Seventh Circuit Pattern Civil Jury Instructions 7.05. With regard to plaintiff’s first arrest, he does not name as defendants the officers who arrested him. With regard to the second arrest, he states that defendants Gearhart, Rosga-Anderson, Tomlanovich and John Doe deputies arrested him, and I can infer from the remainder of plaintiff’s allegations that these defendants were all aware that the DNA evidence implicating him was planted, so plaintiff may proceed on false arrest claims against these defendants. Similarly, he states Fourth Amendment claims against these defendants for false imprisonment following his arrest. Although the details of the events are somewhat difficult to understand, I conclude also that plaintiff states false imprisonment claims against defendants Kramer and Gregerson for keeping plaintiff in jail despite knowing the evidence against him was false.

However, the contours of plaintiff’s false imprisonment claims are murky, because such claims consist of detention without legal process.

[A]a 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. Thereafter, unlawful detention forms part of the damages for the “entirely distinct” tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process.

Kato, 549 U.S. at 389-90 (emphasis in original) (citations omitted). Plaintiff states that he was imprisoned twice following revocation of his parole or probation. Thus it seems that at

some point, plaintiff received process in the form of revocation proceedings. Any detention following that point is the basis for malicious prosecution claims rather than false imprisonment. Those claims are discussed in detail below.

Plaintiff alleges also that defendants performed several illegal searches in conjunction with the false arrests: (1) defendant Lee took plaintiff's DNA; (2) defendants Gearhart, Rosga-Anderson, Tomlanovich and Doe deputies searched his house and vehicle and took a DNA sample; and (3) Gearhart obtained and executed a search warrant for plaintiff's phone records. Because plaintiff alleges that each defendant knew that only false evidence implicated him in the crimes, yet conducted the searches anyway, I conclude that he states Fourth Amendment claims regarding each of these searches.

2. Malicious prosecution

The Court of Appeals for the Seventh Circuit has interpreted the Supreme Court's opinion in Albright v. Oliver, 510 U.S. 266 (1994), to preclude federal suits for "constitutional torts of malicious prosecution when state courts are open to such challenges." Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001). See also Avila v. Pappas, 591 F.3d 552 (7th Cir. 2010). Wisconsin recognizes a cause of action for malicious prosecution. Whispering Springs Corp. v. Town of Empire, 183 Wis. 2d 396, 515 N.W.2d 469 (Wis. App. Ct. 1994). Therefore, plaintiff cannot state a federal cause of action for malicious prosecution.

However, federal courts may exercise supplemental jurisdiction over state law claims

that are "so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Plaintiff's malicious prosecution claims are part of the same case or controversy as his federal claims for violation of his Fourth Amendment rights.

The elements of a claim for malicious prosecution in Wisconsin are: (1) the initiation or continuation of judicial proceedings by, or at the instance of, the defendant; (2) malice on the part of the defendant; (3) want of probable cause; (4) termination of the proceedings in favor of the current plaintiff; and (5) injury or damage to the current plaintiff.

Whispering Springs Corp., 183 Wis. 2d 396, 404, 515 N.W.2d 469, 472.

Because plaintiff alleges that defendants Lee, Varriale, Naugle, Felton, Gearhart, Ditlefson, Ott, Jones, Gruebele, Rosga-Anderson, Tomlanovich and Doe deputies worked together to have criminal proceedings brought against plaintiff on the basis of false evidence, I conclude that he states malicious prosecution claims against these defendants. E.g., Ackerman v. Hatfield, 2004 WI App 236, ¶¶ 8, 15, 277 Wis. 2d 858, 691 N.W.2d 396 (plaintiff could sustain malicious prosecution claim against defendant for filing Department of Regulation and Licensing complaint against him); see also Hambly v. Lewis, 2012 WI App 106, ¶ 6, 344 Wis. 2d 299, 821 N.W.2d 414 (unpublished opinion) (plaintiff states malicious prosecution claim against person who made false statements to police); Keefe v. Marx, 2010 WI App 71, ¶¶ 4-5, 325 Wis. 2d 400, 786 N.W.2d 488 (unpublished opinion) (plaintiff successfully brought malicious prosecution claim against defendant for making false statements to police).

Plaintiff alleges that his parole agent was involved in bringing about the false prosecution, but he does not identify precisely who his parole agent is. He states that either defendants Jeff Moessner or Melissa Brown worked with the other defendants. Because plaintiff is unable to pin down the identity of the parole agent at this point, I conclude that it is appropriate to allow him to proceed against a John Doe parole agent. Moessner and Brown will be dismissed from the suit for the time being, but plaintiff will be given an opportunity to add the correct defendant at a later date. At the preliminary pretrial conference, Magistrate Judge Stephen Crocker will explain the process for plaintiff to identify the Doe parole agent (and the Doe deputies also in this case) through the discovery process and amend his complaint to add these defendants' actual names.

Finally, to the extent that plaintiff seems to be bringing a malicious prosecution claim against DNA analyst Samantha Delfosse, he has no allegations suggesting that Delfosse played a role in the institution of revocation proceedings. Rather, the only allegation regarding this defendant is that she issued a report excluding plaintiff as a source in the first robbery. Therefore, plaintiff fails to state a claim against Delfosse.

3. Remaining defendants

Plaintiff names J.B. Van Hollen, Richard Anderson and Peter Johnson as defendants, but he fails to make any allegations about these defendants or say what they did to violate his rights. Accordingly, those defendants will be dismissed from the case.

B. Motion for Assistance in Recruiting Counsel

In deciding whether to assist plaintiff with recruiting counsel, I must first find that plaintiff has made a reasonable effort to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such an effort. Jackson v. County of McLean, 953 F.2d 1070, 1073 (7th Cir. 1992). To prove that he has made a reasonable effort to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he has asked to represent him in this case and who turned him down. Armstrong v. Wisconsin, 2012 WL 4467570, *4 (W.D. Wis. Sept. 26, 2012). It does not appear that plaintiff has done so because one of the three letters he includes appears to have been returned to him as undeliverable.

Moreover, even if plaintiff had submitted proof that three lawyers had declined to represent him, I would deny his motion for recruitment of counsel at this point because it is too early to tell whether the complexity of the case will outstrip plaintiff's ability to litigate it. Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). Although plaintiff states that he lacks legal knowledge and skill, this is true for almost every pro se litigant. Shortly after defendants file their answer, the court will hold a preliminary pretrial conference at which plaintiff will be provided with information about how to use discovery techniques to gather the evidence he needs to prove his claims as well as copies of this court's procedures for filing or opposing dispositive motions and for calling witnesses. Plaintiff is free to renew his motion at a later time if he finds himself incapable of representing himself as the case proceeds, but he will have to indicate that he has contacted three lawyers who he has asked

to represent him in this case and who turned him down.

ORDER

IT IS ORDERED that

1. Plaintiff Eric Hall is GRANTED leave to proceed on the following claims:

a. Defendants Richard Gearhart, Charise Rosga-Anderson, Frank Tomlanovich and John Doe deputies falsely arrested him, in violation of the Fourth Amendment.

b. Defendants Gearhart, Rosga-Anderson, Tomlanovich, Doe deputies, Sheriff Kramer and Gregory Gregerson falsely imprisoned plaintiff, in violation of the Fourth Amendment.

c. Defendants Lee, Gearhart, Rosga-Anderson, Tomlanovich, Doe deputies, Marie Beth Varriale, Jennifer Naugle, Michael Felton, Mark Ott, Deputy Ditlefson, Denise Jones and Kristi Gruebele and John Doe parole agent maliciously caused plaintiff to be falsely prosecuted.

d. Defendants Bryan Lee, Gearhart, Rosga-Anderson, Tomlanovich and Doe deputies illegally searched plaintiff and his property, in violation of the Fourth Amendment.

2. Plaintiff is DENIED leave to proceed on his malicious prosecution claim against defendant Samantha Delfosse and the claim against Delfosse is DISMISSED for failure to state a claim upon which relief may be granted.

3. Defendants Delfosse, J.B. Van Hollen, Richard Anderson and Peter Johnson are DISMISSED from the case.

4. Plaintiff's motion for the court to assist him in recruiting counsel, dkt. #2, is DENIED without prejudice.

5. Copies of plaintiff's complaint and this order are being forwarded to the United States Marshal for service on defendants.

6. For the remainder of the lawsuit, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer or lawyers, if any, will be representing defendants, he should serve the lawyers directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorneys.

7. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 13th day of February, 2013.

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