

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

DARRELL L. BROADNAX,

Plaintiff,

v.

OFFICER TOMMY WILSON,
OFFICER STEVEN BOEHM,
OFFICER/SQUAD 2151 VAN ERDEN,
EDWARD WALL, AND AGENT REIF,

Defendants.

OPINION and ORDER

13-cv-533-bbc

In this proposed civil action for monetary relief, plaintiff Darrell Broadnax contends that defendants Tommy Wilson, Steven Boehm, Edward Wall, Agent Reif, and Officer/Squad 2151 Van Erden violated his rights under the United States Constitution and state law when they wrongfully arrested him and used excessive 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). However, plaintiff also 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 reviewing plaintiff's complaint, I conclude that he may proceed on false arrest, retaliation and excessive force claims against defendants Wilson and the two Department of Corrections officers plaintiff claims accompanied Wilson. However, I will stay a decision on plaintiff's state law claims and service of the complaint on defendants so that plaintiff may amend his complaint to provide information about his compliance with the state law notice of claim provision and further clarification about which of the named defendants are responsible for each particular claim he wishes to bring.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

On the afternoon of July 10, 2013, defendants Officer Tommy Wilson and two Wisconsin Department of Corrections officers approached plaintiff Darrell Broadnax's residence in Milwaukee, Wisconsin. Plaintiff informed the officers that the person they were searching for did not reside at the residence. Defendant Wilson attempted to enter the home without permission or search warrant. Plaintiff informed Wilson that he was not allowed in the house.

Plaintiff proceeded to call 911 because defendant Wilson continued to try to force entry into the house. Ultimately, Wilson did not succeed in forcing entry into the house. The 911 call seemed to anger Wilson and he subsequently placed plaintiff under arrest with

the help of the other defendants present. While defendants wrestled plaintiff to the ground and cuffed him, plaintiff informed Wilson that he was going to press charges against him. Wilson responded, “You won’t be the first person to try and do so.” After argument ensued, Wilson began to “brutalize” plaintiff by kneeling on plaintiff’s neck and spine in between his shoulder blades, causing pain. When placing plaintiff in the back of the newly arrived transport, Wilson punched plaintiff in the face repeatedly with a closed fist. Wilson dragged plaintiff back out of the vehicle and slammed him against the pavement, slammed his face against the wheel well of the vehicle, and kneeled on his neck and spine again. All of this occurred in view of plaintiff’s neighbors, house mates, and family members. Once at the station, plaintiff requested to speak with someone from the Internal Affairs Department but was not allowed to.

Because of this incident, plaintiff is constantly concerned about who could be coming to his door and what will happen to him if he sits outside again. He also avoids any law enforcement officers he meets.

DISCUSSION

A. Constitutional Claims

The Fourth Amendment, as applied to the states through the Fourteenth Amendment, protects individuals against unreasonable searches and seizures of their person, homes and effects, without a warrant supported by probable cause. Plaintiff brings two Fourth

Amendment claims: (1) defendant Wilson (and his unidentified Department of Corrections companions) wrongfully arrested him; and (2) defendant Wilson used excessive force in arresting him, while the Department of Corrections officials watched. In addition, I construe plaintiff's complaint as including a First Amendment retaliation claim regarding his arrest.

I. Wrongful arrest and retaliation

To state a claim for violation of his Fourth Amendment right to protection from unreasonable seizure for wrongful arrest, plaintiff must allege facts from which it can be inferred that defendants arrested plaintiff without an arrest warrant or probable cause. United States v. Watson, 423 U.S. 411, 417 (1976). As the Supreme Court stated in Pierson v. Ray, 386 U.S. 547, 555 (1967), “a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved.” See also Schertz v. Waupaca County, 875 F.2d 578, 581 (7th Cir. 1989) (“lack of probable cause is an essential element of [a wrongful arrest] claim” (citing Guenter v. Holmgreen, 738 F.2d 879, 889 (7th Cir. 1984))). Therefore, plaintiff must allege facts showing that there was no warrant for his arrest *and* there was no probable cause for his arrest.

Given plaintiff's allegations, I conclude that he states a wrongful arrest claim against defendant Wilson and the Department of Corrections officers. First, I can assume that Wilson did not have a warrant to arrest plaintiff because he was initially looking for a

different individual altogether. Second, the defendants lacked probable cause to arrest him. Prior to the arrest, plaintiff informed Wilson that he could not enter the house because he had neither a search warrant nor consent (because, according to plaintiff, defendant Wilson never entered the home, there is not a claim for unlawful search), plaintiff was not the person of interest to the officer and he was not on probation or parole. These facts suggest that Wilson did not mistake plaintiff for the individual he was looking for. Hill v. California, 401 U.S. 797, 802 (1971) (arrest is valid under the Fourth Amendment if the arresting officers (1) had probable cause to arrest the person sought and (2) reasonably believed that the person arrested was the person sought). Furthermore, when Wilson tried to enter the house, plaintiff called 911, and Wilson and the Department of Corrections officers arrested plaintiff while the 911 call was in progress. From plaintiff's allegations, I can infer that plaintiff was arrested for not consenting to a search of the house and for calling the police to complain about Wilson's actions. Thus plaintiff may proceed on his wrongful arrest claim.

Plaintiff may also proceed on a First Amendment retaliation claim. The elements of this claim are (1) plaintiff engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity; and (3) the First Amendment activity was at least a motivating factor in the police officer's decision. Kidwell v. Eisenhauer, 679 F.3d 957, 964 (7th Cir. 2012). From the allegations plaintiff has provided, I can infer that defendants arrested plaintiff in part for complaining about

Wilson's actions. There seems little doubt that an arrest would deter future such activity by plaintiff.

2. Excessive Force

Next, plaintiff contends that defendant Wilson violated his right to be free from unreasonable seizure by using excessive force while arresting him. To state a claim for violation of his Fourth Amendment right to be protected from the use of excessive force, plaintiff must allege facts from which it can be inferred that a reasonable officer on the scene would not need to use that much force. Graham v. Connor, 490 U.S. 386, 397 (1989). Therefore, the question is whether plaintiff alleges facts that would allow the inference that defendant Wilson used more force than was necessary in the situation.

Plaintiff's allegations are sufficient to support an excessive force claim against defendant Wilson. Plaintiff alleges that after he was cuffed and in the back seat of the police car, Wilson forcibly removed him from the car and slammed him into the pavement, slammed his face into the wheel well of the vehicle and knelt on his neck and spine between his shoulder blades. It may turn out when the facts are developed that Wilson had reason to take these actions but at this point, it is hard to imagine what reason he would have had. Therefore, plaintiff may proceed on his claim that defendant Wilson violated his Fourth Amendment rights by using excessive force.

In addition, an officer may be liable for failing to intervene or prevent another law

enforcement officer from infringing the constitutional rights of a citizen if the officer knows “(1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement officer, and the officer had a realistic opportunity to intervene to prevent the harm from occurring.” Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994). Although plaintiff’s allegations are vague, he seems to be alleging that the two Department of Corrections officers were bystanders who saw defendant Wilson’s excessive force and did nothing to stop him. This suffices to allow plaintiff to proceed on claims against the Department of Corrections officers as well.

B. State Law Claims

Finally, plaintiff raises several state law claims against defendants, including (1) defamation; (2) negligent infliction of emotional distress; and (3) intentional infliction of emotional distress. 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 defendants 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 whether to grant plaintiff leave to proceed on his state law claims and stay service of the complaint on defendants. Plaintiff will be given an opportunity to amend his complaint to include information about the notice of claim and statement of relief and whether the claim has been disallowed. If plaintiff fails to amend his complaint, I will deny him leave to proceed on his state law claims and those claims will be dismissed.

C. Identities of Defendants

At the same time that plaintiff amends his complaint with notice-of-claim information, he should provide more information regarding which defendants are liable for each of his claims. It is easy to ascertain how plaintiff believes that defendant Wilson has violated his constitutional rights, and he has been allowed to proceed against him on several claims. Also, plaintiff has been allowed to proceed on claims against the two “Department of Corrections officers,” but plaintiff does not explain which of the other four named defendants these officers are. Even if plaintiff would have identified the two officers, he does not explain how the remaining two defendants have violated his rights. Plaintiff’s amended

complaint should explain with precision which defendants he believes are responsible for each particular claim he wishes to bring. If plaintiff cannot identify the two Department of Corrections officers who assisted defendant Wilson, the court will allow him to proceed against them as “John Doe” defendants, and further proceedings will be held in an effort to ascertain their identities.

D. Venue

Plaintiff alleges that the actions taken against him occurred in Milwaukee. It may be that plaintiff has brought his action in the wrong court, because Milwaukee is in the Eastern District of Wisconsin. However, it is too easy to tell whether the case is properly venued. Moreover, it is a defect that can be waived by defendants.

ORDER

IT IS ORDERED that

1. Plaintiff Darrell Broadnax is GRANTED leave to proceed on the following claims:
 - a. Defendants Tommy Wilson and “two Department of Corrections officers” wrongfully arrested him.
 - b. Defendants Wilson and Department of Corrections officers retaliated against him.
 - c. Defendant Wilson used excessive force against plaintiff and Department of

Corrections officers failed to intervene to stop him.

2. Plaintiff may have until October 28, 2013 in which to amend his complaint to include information about the state law notice of claim provision as well as further information detailing which defendants he believes are responsible for each particular claim he wishes to bring.

3. Service of the complaint on defendants is STAYED pending screening of plaintiff's amended complaint.

Entered this 8th day of October, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge