

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

ERIC T. ALSTON,

Plaintiff,

v.

THE CITY OF MADISON, NOBLE WRAY,
TOM WOODMANSEE, CORY NELSON,
SAMANTHA KELLOGG, PAIGE VALENTA,
DAVID MAHONEY, GARY JACKSON,
DALLAS S. NEVILLE, ART THURMER,
KENT HANSON, DIANE POSPYHALLA/PASVAHALA,
CHRIS COLE, KELLY JACKSON,
MARC PAULSON, DON BATES,
RODNEY WILSON, BETH WHITAKER,
ISMAEL OZANEE, NICKOLAS GANSER,
JOHN VAUDREUIL, KATHY DAYTON
and BRIAN REYNOLDS,

Defendants.

OPINION AND ORDER

13-cv-635-bbc

Pro se prisoner Eric Alston has filed a proposed complaint under 42 U.S.C. § 1983 in which he alleges that various public officials engaged in a campaign of harassment against him that ended with the revocation of his probation in 2012. Plaintiff has made an initial partial payment of the filing fee as required by 28 U.S.C. § 1915(b)(1). Having screened the complaint as required by 28 U.S.C. § 1915A, I conclude that plaintiff's challenge to the revocation of his parole is barred by the doctrine articulated in Heck v. Humphrey, 512 U.S. 477 (1994). However, I will allow him to proceed on claims that defendants Samantha

Kellogg, Paige Valenta, Tom Woodmansee, Cory Nelson, Noble Wray and the City of Madison forced him to be a part of the Focused Deterrence program, in violation of the equal protection clause and the due process clause and that defendant Brian Reynolds issued a warrant for plaintiff's arrest without any suspicion of wrongdoing, in violation of the Fourth Amendment. I am dismissing the complaint as to all other defendants.

Plaintiff fairly alleges the following facts in his complaint.

ALLEGATIONS OF FACT

The Madison Police Department has been harassing plaintiff Eric Alston since the early 1990s. The harassment took the form of false accusations of various types of illegal conduct.

On November 2, 2011, plaintiff attended an office visit with his probation agent, defendant Brian Reynolds, to discuss employment opportunities. Reynolds told plaintiff that he knew of a program that could help plaintiff find full-time employment. Although plaintiff "got the impression that [the program] was not for" him, he also "got the impression from . . . Reynolds that [he] had to take the program or else, if [he] did not it would affect [his] probation status."

On November 8, 2011, when plaintiff attended the program, he discovered that it was not about employment opportunities. Instead, it was called a "Notification" for "the most violent, repeat criminal offenders in the Madison area." A Notification is a "community presentation given to select offenders during which the offenders are quite literally notified

that their prolific, violent behavior must cease or severe consequences will follow.” It is part of the “Focused Deterrence” program, which is overseen by the special investigation unit of the police department. Defendants Samantha Kellogg, Paige Valenta, Tom Woodmansee and Cory Nelson are members of that unit.

Speakers at the program included defendants Noble Wray (the chief of the Madison Police Department), David Mahoney (the Dane County sheriff), Gary Jackson (representing the U.S. Drug Enforcement Agency), Dallas Neville (the United States Marshal), Art Thurmer (representing the Wisconsin Department of Corrections), Kent Hanson (a federal probation agent), Diane Pasvahala (the resident director of the Bureau of Alcohol, Tobacco and Firearms), Chris Cole (the regional director of the Federal Bureau of Investigation), Marci Paulson (representing the city attorney’s office), Don Bates (the chief of police for Fitchburg), Rodney Wilson (representing Madison Area Crime Stoppers), Ismael Ozanne (the Madison city attorney) and John Vaudreuil (the United States Attorney).

These law enforcement officers told plaintiff that he was “one of the most violent repeat criminal offenders” in the city and that he would be treated differently by the criminal justice system. In particular, he would be “under a microscope,” subject to intense scrutiny and “aggressively” prosecuted to the fullest extent of the law. Defendant Nelson stated that he had “been chasing [plaintiff] since the early 1990’s.” On October 9, 2012, and May 13, 2013 plaintiff “was placed on the local news” as an example by defendant Vaudreuil “on how this program works.”

Plaintiff wondered how he was placed on the list because he has not been convicted

of any violent crimes. When plaintiff asked defendant Kellogg why he was selected, Kellogg stated that plaintiff “like[s] to run” and that plaintiff’s “name keeps coming up.” Of the 50 men in the program, approximately 95 percent of them are African-American. Plaintiff believes that he has been subject to racial profiling and discrimination. (Plaintiff does not identify his race in his complaint, but I will assume that he is African-American.)

On November 16, 2011, defendant Reynolds issued a warrant for plaintiff’s arrest for a missed home visit, even though plaintiff and Reynolds had agreed to reschedule the visit to December 2, 2011. The warrant “was publicized in the local news.” Plaintiff believes that Reynolds’s supervisor, Kathy Dayton, and the special investigation unit pressured Reynolds to issue the warrant.

On December 2, 2011, plaintiff contacted Reynolds to ask him about the warrant. Reynolds told plaintiff to turn himself in, stating, “We are tired of you.” Plaintiff then talked to defendant Kellogg, who told plaintiff that he was being charged for battery, but did not say why. On December 6, 2011, plaintiff turned himself in, “declaring his innocen[ce] to the probation allegation and new criminal charge.”

In December 2012, plaintiff was charged with battery, disorderly conduct, intimidating a victim and obstructing an officer. Defendant Nickolas Ganser was the prosecuting attorney. At the conclusion of the criminal trial, a jury found plaintiff guilty of obstructing an officer and not guilty of the other charges. (Plaintiff does not discuss any of the evidence presented at the trial.)

On April 24, 2012, a revocation hearing was held. (Plaintiff does not say whether

the hearing was held before or after his trial. However, Wisconsin's online court records indicate that the verdict in plaintiff's criminal case was rendered on April 11, 2012.) Defendant Beth Whitaker was the administrative law judge; defendant Ganser represented the Department of Corrections. Whitaker acknowledged at the hearing that members of the special investigation unit had spoken to her previously about the Focused Deterrence program, telling her that members of the program were "high risk," that "the program was intended as a last chance" and that "it would be expected that [members of the program] wouldn't be given another chance." However, Whitaker went on to say that "What I didn't hear is that we were expected, that they expected us to revoke people when the violations weren't proven, so I think to that extent, I mean I don't think at any point that they suggested that we revoke people that hadn't done anything." At the conclusion of the hearing, Whitaker revoked plaintiff's parole. (Plaintiff does not identify the charges at issue in the revocation proceeding or the reasons Whitaker gave for revoking his parole.)

OPINION

Plaintiff does not divide his complaint into discrete claims, but my own review of his allegations reveal the following potential claims:

- defendants have forced him to be a part of the Focused Deterrence program, which subjects him to heightened scrutiny and a label as one of the "most violent repeat criminal offenders," in violation of the equal protection clause and the due process clause;
- defendants issued a warrant for his arrest without any suspicion of wrongdoing, in violation of the Fourth Amendment;

- the decision to revoke plaintiff's probation is invalid because defendant Whitaker was biased and she allowed defendant Ganser to represent the Department of Corrections even though he had been the prosecuting attorney in plaintiff's criminal case, in violation of the due process clause.

With respect to the various acts of alleged harassment that occurred in the 1990s, I understand plaintiff to be including those allegations for context. I do not understand him to be raising separate claims for those incidents because he does not identify any individual defendants that he wishes to sue. In any event, the statute of limitations for those incidents expired long ago. Reget v. City of La Crosse, 595 F.3d 691, 694 (7th Cir. 2010) (statute of limitations for § 1983 claims brought in Wisconsin is six years).

A. Placement in Focused Deterrence Program

I understand plaintiff to allege that defendants placed him in the Focused Deterrence Program because of his race, in violation of the equal protection clause. Because plaintiff alleges that he does not meet the criteria for inclusion in the program and nearly everyone in the program is African-American, I conclude that he has stated a claim upon which relief may be granted under the equal protection clause. Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010) (to state a claim for discrimination, plaintiff need only "give enough details about the subject-matter of the case to present a story that holds together"). At summary judgment or trial, plaintiff will have to come forward with specific evidence showing that defendants chose to place plaintiff in the Focused Deterrence Program because of his race rather than for some other reason.

In addition, I understand plaintiff to be raising a claim under the due process clause.

Public officials may violate an individual's right to due process if they injure his reputation and alter his legal status without giving him an opportunity to clear his name. Mann v. Vogel, 707 F.3d 872, 878 (7th Cir. 2013). For example, the Court of Appeals for the Seventh Circuit has held that an individual may be entitled to a hearing before he is placed on a sex offender registry if placement is coupled with legal changes such as reporting requirements and restrictions on where the individual can live. Schepers v. Commissioner, Indiana Dept. of Correction, 691 F.3d 909, 914-15 (7th Cir. 2012). In this case, plaintiff alleges that defendants have harmed his reputation by labeling him as one of the city's "most violent repeat criminal offenders" and changed his legal status by subjecting him to heightened scrutiny and penalizing perceived violations more harshly. Accordingly, I will allow plaintiff to proceed under the due process clause as well. At summary judgment or trial, plaintiff will have to come forward with specific evidence showing both that defendants have injured his reputation and that they have altered his legal status.

With respect to the issue of which defendants plaintiff may sue on these claims, plaintiff alleges that defendants Kellogg, Valenta, Woodmansee and Nelson are members of the unit that ran the program, so I will infer at this stage that they are responsible for placing plaintiff in the program. In addition, because plaintiff alleges that the program was sanctioned by the Madison Police Department, I will allow him to proceed against defendant Wray and the city as well. However, plaintiff names as defendants various other individuals who were speakers at the program, but he does not allege that any of those defendants had control over plaintiff's placement in the program. Accordingly, I am dismissing the

complaint as to defendants Mahoney, Jackson, Neville, Thurmer, Hanson, Pasvahala, Cole, Jackson, Paulson, Bates, Wilson, Ozanne and Vaudreuil.

B. Arrest and Revocation Proceedings

Plaintiff cannot challenge the validity of the decision to revoke his probation in a lawsuit brought under § 1983. If a plaintiff is challenging the legality of his confinement under federal law, he first must raise that claim in a petition for a writ of habeas corpus, after exhausting his remedies in state court. Preiser v. Rodriguez, 411 U.S. 475 (1973). Even when a person seeks only damages and not release, habeas corpus remains the sole federal remedy when a ruling in the plaintiff's favor would “necessarily imply” that he is incarcerated in violation of federal law. Heck v. Humphrey, 512 U.S. 477 (1994). This rule applies not just to criminal convictions, but to parole and probation revocations as well. Knowlin v. Thompson, 207 F.3d 907, 909 (7th Cir. 2000) (claim that “would necessarily imply the invalidity of [prisoner’s] Wisconsin parole revocation . . . cannot be shown through a § 1983 suit”); Antonelli v. Foster, 104 F.3d 899 (7th Cir.1997) (Heck barred plaintiff’s claim that he had been detained unlawfully pursuant to a parole violator warrant).

In this case, plaintiff is alleging that his probation revocation is invalid because defendant Whitaker was biased and she allowed Ganser to represent the Department of Corrections even though he was the prosecuting attorney in plaintiff’s criminal case. Before he can bring a lawsuit under § 1983 for these alleged violations, he must succeed in overturning the revocation decision in state court. If that is not successful, he must file a

petition for a writ of habeas corpus under § 2254. Accordingly, I am dismissing plaintiff's claims against defendants Whitaker and Ganser.

Plaintiff's claim that defendant Reynolds issued an arrest warrant for plaintiff in violation of the Fourth Amendment is not barred by Heck. As noted above, the rule in Heck applies only if a ruling in the plaintiff's favor *necessarily* implies that the revocation decision is invalid. As the Court of Appeals for the Seventh Circuit has observed, an illegal search or arrest does not necessarily taint a later adjudication. Evans v. Poskon, 603 F.3d 362, 363-64 (7th Cir. 2010) ("Many claims that concern how police conduct searches or arrests are compatible with a conviction."). Although it is possible that more developed facts could show that plaintiff's Fourth Amendment claim is incompatible with the decision to revoke his probation, at this time, with only the facts alleged in the complaint to consider, I cannot say that it is.

With respect to the merits of plaintiff's Fourth Amendment claim, the court of appeals has held that the seizure of a probationer or parolee is valid if the defendant has a reasonable suspicion that the probationer or parolee violated the law or his terms of supervision. Knox v. Smith, 342 F.3d 651, 657 (7th Cir. 2003). In this case, plaintiff alleges that defendant Reynolds had *no* basis for issuing the arrest warrant, so I conclude that plaintiff may proceed on a claim against Reynolds. However, I am dismissing this claim as to defendant Dayton and unnamed members of the special investigation unit. Although plaintiff says that he believes that Dayton was "pressured" into issuing the warrant by these other officials, he provides no basis for that belief. Even at the pleading stage, a plaintiff

cannot sustain a claim by simply guessing that a particular defendant violated his rights. Engel v. Buchan, 710 F.3d 698, 709 (7th Cir. 2013) (“[T]he plaintiff must allege more than a sheer possibility that a defendant has acted unlawfully.”). If plaintiff uncovers facts during discovery showing that other decision makers were involved, he may file a motion for leave to amend his complaint under Fed. R. Civ. P. 15.

C. Motion for Assistance in Recruiting Counsel

Plaintiff accompanied his complaint with a motion for appointment of counsel. Because the court has no statutory authority to require a lawyer to represent a particular litigant, Pruitt v. Mote, 503 F.3d 647, 653 (7th Cir. 2007), I am construing his motion as one seeking court assistance in recruiting counsel under 28 U.S.C. § 1915(e)(1). Before a district court can consider such motions, it must first find that the plaintiff has made reasonable efforts to find a lawyer on his own and that were unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must submit letters from at least three lawyers who he asked to represent him in this case and who turned him down. In his motion, plaintiff lists three names of lawyers, but he did not submit the rejection letters. Before the court can consider plaintiff’s request, he must submit at least three letters.

Even if plaintiff had complied with Jackson, he has not shown that appointment of counsel is necessary in this case. Ideally, every deserving litigant would be represented by

counsel, but, unfortunately, the pro se litigants who file lawsuits in this district vastly outnumber the lawyers who are willing and able to provide representation. For this reason, assistance in recruiting counsel is appropriate only when the plaintiff demonstrates that his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. Pruitt, 503 F.3d at 654-55 (7th Cir. 2007). In this case, it is too early to make that determination.

Thus far, plaintiff has not demonstrated any reason to believe that he cannot represent himself competently in this case. His complaint is relatively clear, well-organized and shows his familiarity with the legal concepts that are relevant to his case. Plaintiff lists several reasons for his belief that counsel is necessary, but these apply to the majority of pro se litigants (limitations imposed by plaintiff's imprisonment, the existence of disputed facts, lack of legal training) or are speculative at this stage in the case (inability to conduct adequate discovery, inability to find assistance from other prisoners).

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. If later developments in the case show that plaintiff is unable to represent himself, he is free to renew his motion for court assistance in recruiting counsel at that time.

ORDER

IT IS ORDERED that

1. Plaintiff Eric Alston is GRANTED leave to proceed on the following claims: (a) defendants Samantha Kellogg, Paige Valenta, Tom Woodmansee, Cory Nelson, Noble Wray and City of Madison have forced him to be a part of the Focused Deterrence program, in violation of the equal protection clause and the due process clause and; (2) defendant Brian Reynolds issued a warrant for plaintiff's arrest without any suspicion of wrongdoing, in violation of the Fourth Amendment.

2. Plaintiff is DENIED leave to proceed on his claim that defendants Beth Whitaker and Nickolas Ganser violated his right to due process because the claim is barred by Heck v. Humphrey, 512 U.S. 477 (1994).

3. Plaintiff is DENIED leave to proceed on all other claims for his failure to state a claim upon which relief may be granted.

4. Plaintiff's complaint is DISMISSED as to defendants David Mahoney, Gary Jackson, Dallas Neville, Art Thurmer, Kent Hanson, Diane Pasvahala, Chris Cole, Kelly Jackson, Marci Paulson, Don Bates, Rodney Wilson, Ismael Ozanne, Kathy Dayton, John Vaudreuil, Beth Whitaker and Nickolas Ganser.

5. Plaintiff's motion for assistance in appointing counsel, dkt. #2, is DENIED.

6. For the time being, plaintiff must send defendants 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 defendants, he should serve the lawyer directly rather than defendants. The

court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

7. 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 his documents.

8. Plaintiff is obligated to pay the unpaid balance of their 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 accounts until the filing fee has been paid in full.

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

Entered this 28th day of October, 2013.

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