

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

JOSEPH JOHN WURZINGER,

Plaintiff,

v.

DEPUTY JOHN MULROONEY,
DEPUTY ANTHONY GISCHIA,
JOHN E. CHAREWICZ, and
DEPUTY JOHN DOES I-IV,

Defendants.

OPINION AND ORDER

15-cv-014-bbc

Pro se plaintiff Joseph John Wurzinger has filed a proposed complaint under 42 U.S.C. § 1983 in which he contends that defendant John Mulrooney, a deputy sheriff in Portage County, executed a traffic stop against plaintiff without reasonable suspicion, that defendants Mulrooney and Anthony Gischia arrested him and that “several deputies” took a sample of his blood without probable cause in violation of the Fourth Amendment. Plaintiff also alleges that he incurred scrapes, swelling and bruises when defendants Mulrooney and Gischia forced him to the ground after he “tensed up” when they attempted to arrest him. In addition, plaintiff names defendant John E. Charewicz but does not allege any facts against him. Because plaintiff has failed to state a claim against defendant Charewicz, he will be dismissed from the suit. Finally, plaintiff asks to stay the case. Dkt. ## 1 and 6.

Plaintiff alleges the following allegations facts in his complaint.

ALLEGATIONS OF FACT

On December 30, 2012, at approximately 3:09 pm, defendant Mulrooney received an anonymous tip that two pickup trucks (one green Chevy S-10 and one Ford) were being driven on a snowmobile or pipeline trail. At 3:14 pm, defendant Mulrooney arrived in the area of the entrance to the pipeline trail and observed plaintiff make a Y-turn in the roadway. Defendant Mulrooney pulled plaintiff over, made him exit his vehicle and began asking him questions, such as how many drinks plaintiff had had that day. Plaintiff responded “Not enough.” Defendant Mulrooney asked plaintiff to perform a field sobriety test, but plaintiff refused, saying that there was no reason to, because he wasn’t going to pass. Plt.’s Cpt., dkt. #1, at 5. Plaintiff then asked to make a phone call and attempted to call his girlfriend to ask her to pick up the truck. When no one answered the phone, plaintiff asked whether he could try again, but defendant Mulrooney refused. Plaintiff became upset and threw his phone. Id. Defendant Mulrooney then approached plaintiff to arrest him, but plaintiff “tensed up.” Id. Together with defendant Gischia, defendant Mulrooney “threw [plaintiff] to the ground and handcuffed [him.]” Id. In the process, plaintiff sustained scrapes and bruises and a swollen knee.

Defendants Gischia and Mulrooney took plaintiff to the hospital to draw his blood for alcohol testing. Plaintiff refused consent, but unnamed deputy defendants forced him to submit.

OPINION

A. Stop

Under the Fourth Amendment, an officer may conduct a stop for investigatory purposes only when the officer has particularized and reasonable suspicion that the suspect is engaged in illegal activity. Navarette v. California, 134 S. Ct. 1683, 1687 (2014). Reasonable suspicion “is dependent upon both the content of information possessed by police and its degree of reliability” and is based on the totality of the circumstances. Alabama v. White, 496 U.S. 325, 330 (1990). It is more than a hunch but less than a preponderance of the evidence or probable cause. Navarette, 134 S. Ct. at 1687.

With respect to anonymous tips, the United States Supreme Court has held that the tip alone is seldom sufficient for reasonable suspicion. Id. at 1688. For an anonymous tip to provide reasonable suspicion, it must “demonstrate ‘sufficient indicia of reliability . . . ,’” id. (quoting White, 496 U.S. at 327). Such indicia may confirmable identifying information of the suspect or vehicle, an eyewitness account, explicit details of criminal activity, contemporaneous reporting or use of the 911 call system (because it may be traceable to the caller). Id.

In this case, plaintiff says the only basis for pulling him over was an anonymous call and his completion of a Y-turn near the entrance of a pipeline trail. Although he alleges that the anonymous caller described two pickup trucks driving in the snowmobile or pipeline trail five minutes before defendants Mulrooney and Gischia arrived on the scene, plaintiff does not say whether his vehicle fits the description of either truck or whether the caller used the

911 system. If these were the only facts of which defendants were aware when they executed the stop, I cannot conclude as a matter of law that the information was sufficiently reliable to provide reasonable suspicion for a traffic stop. At this stage, plaintiff's allegations are sufficient to state a claim against defendants Mulrooney and Gischia for violating the Fourth Amendment's prohibition against unreasonable seizures in connection with the stop.

B. Arrest

After the traffic stop, plaintiff admitted to defendant Mulrooney that he had been drinking and would not pass a field sobriety test. He also acted upset, threw his phone and tensed up when approached by defendant Mulrooney. Because probable cause is a complete defense to a false arrest claim, these facts gave defendants Gischia and Mulrooney probable cause to arrest plaintiff for criminal behavior. Montano v. City of Chicago, 535 F.3d 558, 568 (7th Cir. 2008) (police had probable cause to arrest plaintiffs for drinking in public way when plaintiffs admitted to holding beer bottles in street). See also Sroga v. Weiglen, 649 F.3d 604, 608 (7th Cir. 2011) ("The existence of probable cause to arrest a suspect for any offense, even one that was not identified by the officers on the scene or in the charging documents, will defeat a Fourth Amendment false-arrest claim.").

Thus, plaintiff's arrest would be a violation of his Fourth Amendment rights only if the law held that an initial illegal traffic stop "tainted" an arrest. Many courts, including this one, have rejected that view. Whitwell v. Hoyt, No. 04-C-0981-C, 2006 WL 469634, at *4 (W.D. Wis. Feb. 27, 2006) (Crabb, J.). See also Townes v. City of New York, 176 F.3d 138,

149 (2d Cir. 1999) (“[T]he fruit of the poisonous tree doctrine is not available to assist a § 1983 claimant.”); Wren v. Towe, 130 F.3d 1154, 1158 (5th Cir.1997) (“inappropriate” to apply exclusionary rule in civil § 1983 cases); Bernardi v. Klein, 682 F. Supp. 2d 894, 902 (W.D. Wis. 2010) (Crocker, M.J.); Padilla v. Miller, 143 F. Supp. 2d 479, 491 (M.D. Pa. 2001) (“[T]he courts that have addressed the issue have uniformly concluded that the exclusionary rule is not applicable in a § 1983 action.”) (listing cases); Mejia v. City of New York, 119 F. Supp. 2d 232, 254 n. 27 (E.D.N.Y. 2000); Reich v. Minnicus, 886 F. Supp. 674, 681 (S.D. Ind. 1993) (declining to apply rule in case before it).

Courts have held that the “fruit of the poisonous tree” doctrine is inapplicable in civil cases because “the exclusionary rule is not constitutionally required” and “[t]he deterrence achieved by applying the exclusionary rule to criminal cases and by allowing civil liability for Fourth Amendment violations is sufficient; any additional deterrence to be gained by applying the rule to civil cases would be outweighed by the societal cost of excluding the evidence.” Whitwell, 2006 WL 469634, at *4. However, because neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has considered this question and plaintiff has not an opportunity to argue that Whitwell is distinguishable or decided incorrectly, I will allow plaintiff to proceed on this claim. Plaintiff should know that if, at a later stage in this case, defendants file a motion to dismiss or a motion for summary judgment, he will have to show why an allegedly illegal stop should be held to taintan otherwise lawful arrest.

C. Blood Draw

Plaintiff contends that the drawing of his blood ordered by police officers violated his rights to be free from unreasonable search and seizure under the Fourth Amendment. Blood draws ordered by police officers qualify as searches under the Fourth Amendment, which means that they are legal only if the officers have either: (1) consent from the suspect; (2) probable cause and a warrant; or (3) probable cause, together with exigent circumstances. Seiser v. City of Chicago, 762 F.3d 647, 656 (7th Cir. 2014). In this case, plaintiff alleges that he did not provide consent and it is reasonable to infer from plaintiff's allegations that defendants did not have a warrant. (I also construe plaintiff's allegation that "several deputies" forcibly took the blood sample as a reference to John Does I-IV.)

From plaintiff's version of events, in which he admits that he was driving while intoxicated, I can conclude that probable cause existed for drawing his blood. The question is whether there were exigent circumstances. The Supreme Court has held that the "natural dissipation of alcohol in the blood may support a finding of exigency in a specific case . . . [but] it does not do so categorically." Missouri v. McNeely, 133 S. Ct. 1552, 1563 (2013). In this case, plaintiff does not identify any exigent circumstances that defendants may have had, so I will grant plaintiff leave to proceed on this claim. Of course, defendants are free to ask the court to revisit this issue in the context of a motion for summary judgment.

D. Application of Heck

Plaintiff acknowledges in his complaint that he was convicted for the drunk driving

incident. In this circumstance, it is necessary to consider whether plaintiff's suit is barred by the holding in Heck v. Humphrey, 512 U.S. 477 (1984). Under Heck, the 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.” Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (quoting Heck, 512 U.S. at 487).

The Court of Appeals for the Seventh Circuit has explained that in a suit for damages, “Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so in all cases these claims can go forward.” Id. at 648-49 (emphasizing that “a search can be unlawful but the conviction entirely proper or the reverse, and . . . some injury from a violation of the [F]ourth [A]mendment is unrelated to conviction”) (ellipses in original) (quoting Gonzalez v. Entress, 133 F.3d 551, 553 (7th Cir. 1998)). Unless the court can say with certainty that success on a § 1983 claim would necessarily impugn the validity of the plaintiff's conviction, Heck does not apply. In this case, it is too early to tell whether success on plaintiff's claims would imply that his conviction is invalid. Defendants are free to raise this issue on their own in a motion for summary judgment.

E. Defendants

Plaintiff names John E. Charewicz, Portage County Sheriff, as a defendant in the caption of his complaint but does not allege any facts against him. A defendant cannot be

held liable under § 1983 unless he can be shown to be personally responsible for the constitutional violations; Charewicz's status as a supervisor is not sufficient on its own to show liability under § 1983. Rasche v. Village of Beecher, 336 F.3d 588, 597 (7th Cir. 2003); Alejo v. Heller, 328 F.3d 930, 937 (7th Cir. 2003); Palmer v. Marion County, 327 F.3d 588, 593-94 (7th Cir. 2003); Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988). Because plaintiff has not alleged any facts against this defendant, he will be dismissed from the suit.

Further, I note that plaintiff is proceeding against four John Does. Eventually, plaintiff will be required to amend the caption of his complaint with the names of the John Doe defendants. Plaintiff will be given an opportunity to conduct discovery on the identity of John Does I-IV.

F. Motion to Stay

In his complaint, plaintiff asks the court to “stay these proceedings until Plaintiffs state convictions are reversed and/or vacated.” Plt.'s Cpt., dkt. #1, at 9. Further, plaintiff has filed a motion in which he says that the state court has rescheduled his hearing to March 13, 2015, and he asks for “a continuance on that hold until the state court renders its decision.” Plt.'s Mot., dkt. #6, at 1. The motion to stay will be denied. At this stage in the proceedings, there is no scheduling order and nothing is required of plaintiff. Moreover, it is too early to determine whether Heck will be applied to bar his suit. Thus, the case provides no reason to await the conclusion of his state court hearing. If plaintiff means that

he cannot prosecute this case because of the time he must devote to his appeal, that is also not reason to stay the case. Plaintiff says that he filed this action when he did because of the statute of limitations. Although I do not see why the statute of limitations would have required filing at this time, it was plaintiff's choice to file the case when he did. His attention to other cases would not be an excuse for delaying this one.

ORDER

IT IS ORDERED that

1. Plaintiff Joseph John Wurzinger is GRANTED leave to proceed on his claims that under the Fourth Amendment (1) defendants Mulrooney and Gischia stopped him illegally without reasonable suspicion; and (2) these defendants would not have arrested him in violation of the Fourth Amendment but for the illegal stop; and his claim that (3) defendants John Does I-IV drew his blood in the absence of exigent circumstances.

2. Plaintiff's complaint is DISMISSED as to all other claims because he has not shown that they are claims upon which relief may be granted.

3. Plaintiff is denied leave to proceed against defendant John E. Charewicz because he has failed to state a claim against this defendant.

3. Plaintiff's motions to stay the case, dkt. ## 1 and 6, are DENIED.

4. For the time being, plaintiff must send defendants Mulrooney and Gischia 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.

5. 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.

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 defendants. Plaintiff should not attempt to serve defendants on his own at this time. 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.

8. 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 accounts until the filing fee has been paid in full.

Entered this 4th day of March, 2015.

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