IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PHILLIP S. DUNN,

OPINION AND ORDER

Plaintiff,

15-cv-430-bbc

v.

RONALD TISCHER, RYAN SECORD,
ANDREW DITTMAN, SHAWN KUDRON,
DAN ULRICH, NATHAN POKE and
THE CITY OF LA CROSSE, WISCONSIN,

Defendants.

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Pro se plaintiff Phillip Dunn has responded to the court's July 30, 2015 order to file an amended complaint that gives fair notice of his claims, as required by Fed. R. Civ. P. 8. In addition, he has filed a motion to reconsider the dismissal with prejudice of Elliot Levine, Jessica Skemp and Patricia O'Neil.

In the July 30, 2015 order, I noted that most of plaintiff's allegations seemed to arise out of state criminal proceedings, although plaintiff did not describe those proceedings and he provided little context for any of his allegations. However, I understood plaintiff to be raising the following claims:

- Jessica Skemp, a state prosecutor, violated his rights by filing a criminal complaint against him;
- Patricia O'Neil, his public defender, violated his rights by failing to argue an

issue about sentence credit;

- Elliot Levine, a state court judge, violated his rights by denying his request for a sentence modification;
- various unnamed officers violated his rights by entering his home without his consent in October 2014 and by conducting an unlawful traffic stop in December 2014; and
- the city of La Crosse should be held liable for "negligent supervision" and a "pattern and practice" of violating constitutional rights.

The first question I raised in the July 30, 2015 order was whether some of plaintiff's claims were barred because they called into the question the validity of a conviction or sentence. Matz v. Klotka, 769 F.3d 517, 530-31 (7th Cir. 2014) ("[The plaintiff] cannot pursue a § 1983 claim for damages . . . because success on his claim would call into question his sentence."); Helman v. Duhaime, 742 F.3d 760, 762 (7th Cir. 2014) ("[A] district court must dismiss a § 1983 action if a judgment in favor of the plaintiff in that § 1983 action would necessarily imply the invalidity of his criminal conviction or sentence."). However, for the purpose of the screening order, I assumed that plaintiff was entitled to an exception to the rule because he was no longer incarcerated and his confinement was not long enough to enable him to bring a petition for a writ of habeas corpus. Burd v. Sessler, 702 F.3d 429, 435 (7th Cir. 2012) ("[W]here a plaintiff cannot obtain collateral relief to satisfy [the] favorable termination requirement, his action may proceed under § 1983 without running afoul of [the requirement.]").

This assumption did not help plaintiff because his claims failed for other reasons. With respect to Levine and Skemp, I concluded that they were entitled to absolute immunity because plaintiff was alleging that they violated his rights while they were performing judicial or prosecutorial functions. Coleman v. Dunlap, 695 F.3d 650, 652 (7th Cir. 2012); Lewis v. Mills, 677 F.3d 324, 330 (7th Cir. 2012). Plaintiff could not sue O'Neil because, as a public defender, she was not acting "under color of law" within the meaning of 42 U.S.C. § 1983 (the law that allows individuals to obtain damages for constitutional violations) when she was representing plaintiff. Polk County v. Dodson, 454 U.S. 312, 317-18 (1981). Accordingly, I dismissed with prejudice plaintiff's claims against Levine, Skemp and O'Neil.

I concluded that plaintiff's claims against the police officers and the city could not proceed because plaintiff did not allege enough facts to provide fair notice of his claims. However, I gave plaintiff an opportunity to file an amended complaint. Having reviewed plaintiff's motion for reconsideration and amended complaint, I reach the following conclusions: (1) I am denying plaintiff's motion for reconsideration; (2) I am allowing plaintiff to proceed on claims that defendants Dan Ulrich, Nathan Poke, Shawn Kudron and Ryan Secord violated his rights under the Fourth Amendment; and (3) I am dismissing the amended complaint as to all other claims and defendants.

OPINION

A. Motion for Reconsideration

In his motion for reconsideration, plaintiff argues that the court should revive his claims against Levine, Skemp and O'Neil because their conduct was egregious and in blatant violation of the law. He cites various rules of professional conduct that he believes they violated.

Plaintiff's support for his claims against Levine, Skemp and O'Neil is limited to conclusory allegations, but even if I assume that his allegations are true, he cannot prevail. It is well established by the cases cited above and others that individuals may not be sued under § 1983 when they are acting as a judge, prosecutor or public defender. There is no exception for egregious conduct or conduct that violates ethical codes; that is what *absolute* immunity means. E.g., Mireles v. Waco, 502 U.S. 9, 11 (1991) ("[J]udicial immunity is not overcome by allegations of bad faith or malice."). Although judges, prosecutors and public defenders can be sued when they perform functions outside their traditional roles, plaintiff's allegations relate to the Skemp's, O'Neil's and Levine's core job functions. Kalina v. Fletcher, 522 U.S. 118, 129 (1997) (prosecutor entitled to immunity for charging decision); Bearce v. Kennedy, 946 F. Supp. 694, 697 (E.D. Wis. 1996) (judge entitled to immunity for sentencing); Perkins v. Holtzhouser, No. 13-CV-908-GPM, 2013 WL 5984385, at *2 (S.D. Ill. Nov. 12, 2013) (public defender cannot be sued under § 1983 for failing to make argument). There is another exception for judicial immunity when a judge acts without jurisdiction, Stump v. Sparkman, 435 U.S. 349, 355 (1978), but plaintiff does not allege

that Levine had no jurisdiction to sentence him. Rather, plaintiff is alleging that the sentence was incorrect. Accordingly, I see no error in dismissing plaintiff's claims against Levine, Skemp and O'Neil. As I informed plaintiff in the previous order, if he believed these individuals violated his rights, his remedy was an appeal, not a civil lawsuit for damages.

Plaintiff included Levine, Skemp and O'Neil in his amended complaint, but he did not add any allegations suggesting that they are not entitled to immunity. He includes a new allegation that Levine issued a warrant in error, but that is another judicial act, so Levine is entitled to immunity for that conduct as well. As a result, I have disregarded plaintiff's new allegations against Levine, Skemp and O'Neil and defendants may do the same when answering the amended complaint.

B. Amended Complaint

1. Fourth Amendment claims against defendants Dan Ulrich, Nathan Poke, Shawn Kudron and Ryan Secord

With respect to plaintiff's claims against the individual police officers, I conclude that plaintiff has alleged the bare minium necessary to state a claim upon which relief may be granted under the Fourth Amendment. First, he alleges that, on October 28, 2014, defendants Dan Ulrich, Nathan Poke, Shawn Kudron and Ryan Secord (all police officers) "force[d] their way in" plaintiff's home and "kick[ed] in [his] bedroom door" while he and his girlfriend were sleeping. Am. Cpt., dkt. #7 at ¶ 20. Plaintiff does not say why these defendants entered his home. Although he says they arrived "after a neighbor complaint,"

id., he does not provide any details. Plaintiff does not allege expressly that he was arrested and he does not identify what he was accused of doing, but he alleges elsewhere in the complaint that he was "on bond," after the search, dkt. #7 at ¶ 22, so it is reasonable to infer that he was arrested.

At this point, I will assume that defendants did not have adequate justification to enter his home. Generally, an officer may not enter a private home without consent, a warrant or exigent circumstances. Kentucky v. King, 563 U.S. 452 (2011); Vinson v. Vermilion County, Illinois, 776 F.3d 924, 929 (7th Cir. 2015). Plaintiff says that defendants entered without his consent, that they were "looking around in order to find something usable to obtain a warrant," Am. Cpt., dkt. #7, at ¶ 20, and that they later lied about having permission to enter, id., suggesting that they did not believe they had authority to enter. Although later in his complaint plaintiff refers to a warrant that defendants obtained, id., he seems to be alleging that they obtained it *after* they entered the house and seized him. Id. ("I sat in a squad car and/or couch for three hours until the investigator could get Judge Elliot Levine to sign a search warrant."). It is possible that the neighbor's complaint could provide exigent circumstances, but I cannot make that determination without additional factual development. Further, even if defendants had authority to enter, plaintiff may have a claim regarding the way in which they conducted the search, such as by kicking his door in. Petkus v. Richland County, 767 F.3d 647, 650-51 (7th Cir. 2014). At summary judgment or trial, it will be plaintiff's burden to prove that the search, seizure and arrest were unreasonable.

Second, plaintiff alleges that, on December 3, 2014, defendants Ulrich and Poke subjected him to a traffic stop. In this instance, plaintiff seems to admit that defendants had a warrant for an unpaid fine, but he also alleges that the fine "doesn't exist." Am. Cpt., dkt. #7, at ¶ 22. If Ulrich and Poke reasonably believed that the warrant was valid, they cannot be held liable for stopping plaintiff because the warrant would have given defendants reasonable suspicion for doing so. Bailey v. City of Chicago, 779 F.3d 689, 695 (7th Cir. 2015) (determination whether officers' action is legal made from facts officers knew when seizure occurred). Plaintiff says that pulling him over for a fine shows that defendants were "focus[ed] o[n] revenue rather than public safety," but an officer's motivations are irrelevant under the Fourth Amendment. A citizen may be seized and arrested for a criminal offense, even if the offense can be punished by a fine only. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001). At this stage of the proceedings, I will assume that defendants knew that they had no basis to stop him and I will allow him to proceed on that claim.

Plaintiff alleges that defendants Ulruich and Poke arrested him during the stop, but I am not allowing him to proceed on that claim because he admits that defendants discovered after stopping him that he was driving without a valid license. Because that is a valid basis for arresting plaintiff, the arrest was lawful even if defendants had an ulterior motive. Jackson v. Parker, 627 F.3d 634, 638 (7th Cir. 2010) ("Even if [the officer's] motivation in stopping [the plaintiff] was to frame him . . ., the constitutional reasonableness of a traffic stop does not depend on the subjective motivations of the individual officer involved."). Further, if officers have a valid basis for an arrest, a plaintiff

in a civil suit cannot obtain damages for that arrest simply because the officers may have violated the Fourth Amendment when stopping him. Whitwell v. Hoyt, No. 04–C–981–C, 2006 WL 469634 (W.D. Wis. Feb. 26, 2006) ("fruit of the poisonous tree" doctrine does not apply to civil cases under Fourth Amendment). Accord Townes v. City of New York, 176 F.3d 138, 149 (2d Cir.1999); Wren v. Towe, 130 F.3d 1154, 1158 (5th Cir. 1997); Bernardi v. Klein, 682 F. Supp. 2d 894, 902 (W.D. Wis. 2010); Nixon v. Applegate, 2008 WL 471677, *4 (D.S.C. 2008); Padilla v. Miller, 143 F. Supp. 2d 479 (M.D. Pa.2001); 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 (S.D. Ind.1993).

I note that plaintiff acknowledges that he was on probation in 2013 and at least part of 2014. If plaintiff was on probation when the October 2014 and December 2014 events occurred, that could affect that standard of review for plaintiff's claims. United States v. Jones, 152 F.3d 680, 686 (7th Cir. 1998) ("In the case of parolees and probationers, th[e] expectation [of privacy] is significantly limited by the supervisory relationship and restrictions imposed on the individual by the State."). See also United States v. White, 781 F.3d 858, 861 (7th Cir. 2015). For example, a warrant may not be required to justify the search of a probationer's home; reasonable suspicion that the probationer or parolee violated the law or his terms of supervision may be sufficient. Green v. Butler, 420 F.3d 689, 699 (7th Cir. 2005). A similar rule applies to the arrest of a probationer. Knox v. Smith, 342 F.3d 651, 657 (7th Cir. 2003) ("[A] seizure of [a probationer] based on only reasonable suspicion would satisfy the Fourth Amendment standard."). However, because it is

reasonable to infer from plaintiff's allegations that the individual police officers had no justification for their actions, it is unnecessary to ask plaintiff to clarify whether he was on probation. If after discover, the facts show plaintiff was on probation, defendants are free to raise this issue again in a motion for summary judgment.

2. Claims against the city

I am dismissing plaintiff's claim against the city. As I explained to plaintiff in the July 30, 2015 order, the city cannot be held liable under § 1983 unless it had an unconstitutional policy or custom. King v. Kramer, 763 F.3d 635, 649 (7th Cir. 2014). In his amended complaint, plaintiff attempts to show that a policy existed by alleging that unnamed police officers mistreated him on three previous occasions. However, the incidents plaintiff alleges are not sufficient to show an unconstitutional policy.

First, plaintiff says that, on September 29, 2013, officers woke him while he was sleeping in "a legally parked car" and demanded his name because there had been a report of "suspicious activity" in the area. When plaintiff refused, they held him for 45 minutes until they discovered a probation warrant against him and arrested him. Second, plaintiff says that, on December 31, 2013, while plaintiff was walking outside, officers demanded his name because they were investigating a 911 call that had come from the area ten minutes earlier. Again, plaintiff refused, but he showed them a receipt from food he had just purchased, showing he had been on the other side of town. When they threatened to put him in jail, he gave them a false name. When they could not identify him, he was arrested

for obstructing an officer. Third, plaintiff says that, on June 10, 2014, officers demanded his name "after [his] sister's boyfriend was pulled over." Although plaintiff refused to give his name, his sister's boyfriend identified him after officers threatened the boyfriend with "an additional charge." Plaintiff was then arrested because of a probation warrant. Am. Cpt, dkt. #7, at ¶¶ 14-16.

Although a pattern of unconstitutional conduct can provide grounds for inferring that the city had an unconstitutional policy, Shields v. Illinois Dept. of Corrections, 746 F.3d 782, 796 (7th Cir. 2014), plaintiff's allegations do not state a claim against the city. As an initial matter, it is impossible to determine from the few facts plaintiff alleges whether the officers in these instances were justified in stopping and questioning plaintiff. However, even if I assume that officers violated plaintiff's Fourth Amendment rights, plaintiffs' claim against the city must be dismissed for two reasons. First, the court of appeals has held that a small number of previous incidents is not sufficient to show a "widespread practice that . . . is so permanent and well settled as to constitute a custom or usage." Gable v. City of Chicago, 296 F.3d 531, 537 (7th Cir. 2002). See also Grieveson v. Anderson, 538 F.3d 763, 774-75 (7th Cir. 2008) (four prior incidents not enough to show widespread practice). Second, the previous incidents allegedly establishing a widespread practice must be sufficiently similar to the violation alleged in the complaint to show that the city was on notice of that particular problem. Connick v. Thompson, 563 U.S. 51 (2011); Hahn v. Walsh, 762 F.3d 617, 637-38 (7th Cir. 2014). In this case, the previous incidents plaintiff discusses seem to relate to officers allegedly demanding identification from individuals

without adequate justification. However, the October and December 2014 incidents have nothing to do with that. Plaintiff cannot rely on a general allegation that police officers had a history of harassing him.

3. Defendants Ronald Tischer and Andrew Dittman

This leaves plaintiff's claims against Ronald Tischer and Andrew Dittman. Plaintiff identifies these defendants as the chief of police and an investigator, respectfully. However, he includes no substantive allegations against them in his complaint. Accordingly, I am dismissing the complaint as to those defendants as well.

ORDER

IT IS ORDERED that

1. Plaintiff Phillip S. Dunn is GRANTED leave to proceed on the following claims: (1) in October 2014, Dan Ulrich, Nathan Poke, Shawn Kudron and Ryan Secord seized him and searched his home without adequate justification and in an unreasonable manner, in violation of the Fourth Amendment; and (2) in December 2014, defendants Ulrich and Poke seized plaintiff without adequate justification, in violation of the Fourth Amendment.

2. Plaintiff is DENIED leave to proceed on all other claims for his failure to state a claim upon which relief may be granted and the amended complaint is DISMISSED as to defendants Elliot Levine, Jessica Skemp, Ronald Tischer, Patricia O'Neil, Andrew Dittman and the City of La Crosse.

3. Plaintiff's motion for reconsideration, dkt. #8, is DENIED.

4. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer 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' attorney.

5. 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.

6. Summonses and copies of plaintiff's complaint and this order are being forwarded to the United States Marshal, so that the Marshal may make reasonable efforts to serve defendants Dan Ulrich, Nathan Poke, Shawn Kudron and Ryan Secord. Williams v. Werlinger, 795 F.3d 759 (7th Cir. 2015).

Entered this 5th day of October, 2015.

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