IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DOUGLAS K. UHDE,

Petitioner, ORDER

v. 03-C-323-C

Adams County, Wisconsin Sheriff's Office
LARRY J. WARREN, SHERIFF;
MARK K. BITSKY, Deputy Sheriff;
GARY A. SILKA, Deputy Sheriff and Detective;
TAMMY L. KROETZ, Deputy Sheriff,
State of Wisconsin Secretary P. SCOTT HASSETT;
BRIAN EZMAN, Warden Badge Number 211;
JIM GOLD, Chief of Police, City of Adams;
MATTHEW SHERD, Police Officer,

Respondents.

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This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Douglas Uhde, who is currently confined at the Stanley Correctional Institution in Stanley, Wisconsin, requests leave to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915. I understand petitioner to be alleging several constitutional violations. First, he contends that respondents Matthew Sherd and Mark Bitsky violated his right under the Fourth Amendment to be free from unreasonable searches and seizures when they entered

his home and searched his automobile and his person without consent and then placed him in handcuffs and arrested him. Second, he contends that respondent Tammy Kroetz violated his Fourth Amendment rights when she later entered his residence without his consent. Third, he contends that respondents Bitsky and Silka violated his right to due process under the Fourteenth Amendment when they planted evidence in his car. Fourth, he contends that respondent Silka violated his right to counsel and right to remain silent under the Fifth Amendment when they ignored his request for an attorney and questioned him without providing him with Miranda warnings.

From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if, on three or more previous occasions, the prisoner has had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief.

I conclude that petitioner has stated a claim upon which relief may be granted with

respect to his claims that respondents Sherd, Bitsky and Kroetz violated his right to be free from unreasonable searches and seizures and that respondents Bitsky and Silka violated his right to due process. However, because current law does not recognize a cause of action under § 1983 for a failure to provide Miranda warnings or disregarding a suspect's request for an attorney during questioning, these claims must be dismissed. In addition, I must dismiss respondents Adams County, Wisconsin's Sheriff's Office, Larry Warren, Scott Hassett, Brian Ezman and Jim Gold, because petitioner has alleged no facts that would allow me to infer that they were personally involved in the alleged constitutional violations.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

On August 20, 2001, respondent Mark Bitsky, a deputy sheriff for Adams County, directed respondent Matthew Sherd, a police officer, to enter petitioner Douglas Uhde's residence "without announcement, permission, legal authority or valid warrant." After entering the "mud room" of the residence, Sherd knocked on an inner door, which petitioner answered. Respondent Sherd told petitioner to exit the residence and petitioner complied.

Outside, after questioning petitioner about his activities that evening, respondent Sherd told petitioner that he wished to search petitioner's car, including the trunk. Petitioner responded that he objected to the search unless his attorney was present. Sherd

shrugged his shoulders and began searching the petitioner's car. After this search, petitioner demanded to see an attorney, but respondent Sherd only laughed.

Respondent Bitsky soon arrived. He told petitioner that he did not have shoes on. When petitioner went inside to retrieve a pair of shoes, respondents Sherd and Bitsky followed him in without his consent. He told them to leave. When they did not, petitioner walked outside again without his shoes. Sherd and Bitsky followed.

Respondent Bitsky began to question petitioner about his whereabouts that evening. Petitioner stated that he had been "looking for corn." Bitsky asked petitioner for consent to search his car. Again, petitioner insisted that his attorney be present. In response, respondents Sherd and Bitsky placed petitioner in handcuffs, searched him and confiscated his car keys. When petitioner asked why respondents were not providing him with Miranda warnings, they responded that he was not under arrest.

Respondent Bitsky searched the car and discovered an unloaded shotgun under a blanket in the back seat. When Bitsky asked petitioner who owned the gun, petitioner acknowledged that it belonged to him. Respondent Bitsky told respondent Sherd to place petitioner in the back seat of the police car.

Next, another deputy sheriff arrived, respondent Gary Silka. He and respondent Bitsky told petitioner that he was under arrest and they were going to impound his car at the Adams County Wisconsin Sheriff's Office. After petitioner was taken into custody, another

deputy sheriff, respondent Tammy Kroetz entered his residence without consent. She spoke with petitioner's girlfriend and directed her to produce a pair of petitioner's shoes, which were then confiscated as evidence.

Respondents Bitsky and Silka summoned to the residence respondent Brian Ezman, who was an employee of the Department of Natural Resources. Bitsky and Silka conspired to have respondent Ezman "take responsibility for the illegal searches and seizures."

At the direction of respondent Silka, respondent Bitsky confiscated the shotgun from petitioner's car. Silka, Bitsky and Ezman placed five unexploded cartridges into the shotgun. In addition, they placed "paint and wood fibers upon the muzzle end of the aforementioned shotgun to make it appear as if the aforementioned shotgun had been used, by the Plaintiff, in an Armed Burglary."

On August 21, 2001, respondent Silka began questioning petitioner at 5:30 a.m. After petitioner made repeated requests for counsel, Silka provided petitioner with Miranda warnings, but did not provide him with an attorney. Silka then placed petitioner in "segregation status" for several days, making it impossible for him to communicate with his family.

On September 17, 2001, a search warrant was issued for petitioner's car. The justification for the warrant was the evidence discovered as a result of the first search. Respondents Bitsky and Silka searched petitioner's car again, this time finding "cable ties"

that petitioner used in fixing cars. Bitsky and Silka altered these items to make them appear as if they were "some type of restraints and/or bondage ('handcuffs') instruments."

Respondents Adams County, Wisconsin Sheriff's Office, Larry Warren and Jim Gold permitted these acts "by knowingly allowing a system that allowed for such illegal acts to occur."

DISCUSSION

A. § 2254 vs. § 1983

A threshold question is whether petitioner may pursue a claim under 42 U.S.C. § 1983 or whether he must instead file a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Although petitioner does not indicate in his complaint whether he was convicted as a result of respondents' actions, a review of Wisconsin's Consolidated Court Automation Program reveals that on August 22, 2001, the state charged petitioner with burglary, carrying a concealed weapon, possession of a short-barreled rifle and possession of a firearm as a felon. He pleaded no contest to each of the charges on January 28, 2002, and was sentenced to several years in prison. See State v. Uhde, No. 01-CF-69 (Adams County Circuit Court).

Petitioner is not seeking release from prison, only money damages ($60,000,000). However, regardless of the relief requested, petitioner may not pursue an action under § 1983 if a judgment by this court would "necessarily imply the invalidity of his conviction." Heck v. Humphrey, 512 U.S. 477, 487 (1994). In such a case, the Supreme Court has held

that unless the conviction has already been declared invalid, a petitioner's sole remedy is a writ of habeas corpus under 28 U.S.C. § 2254. Id.

Petitioner is challenging police searches that led up to his conviction. If these searches violated the Fourth Amendment, then it may be that any evidence seized during a search should have been suppressed. See Mapp v. Ohio, 367 U.S. 643 (1961). Although a violation of the Fourth Amendment *could* call into question the validity of petitioner's conviction, the court of appeals has stated that it would not *necessarily* do so. Copus v. City Edgerton, 151 F.3d 646, 648 (7th Cir. 1998). The court explained, "[I]t is possible for an individual to be properly convicted though he is unlawfully arrested, or his home unlawfully searched." Id. at 649. Because of this possibility, petitioner is not barred from proceeding under § 1983 for his Fourth Amendment claims. Id.; see also Jones v. Puckett, 160 F. Supp. 1016 (W.D. Wis. 2001) (Heck does not bar § 1983 claims asserting Fourth Amendment violations). The same goes for petitioner's claim that respondents falsified evidence against him. See Nesses v. Shepherd, 68 F.3d 1003 (7th Cir. 1995).

B. Proper Parties

Another preliminary issue is whether all of the respondents named in petitioner's proposed complaint are proper parties to this lawsuit. In an action under 42 U.S.C. § 1983, a defendant may not be held liable for a constitutional violation unless he or she was

personally involved in the illegal conduct, meaning that the defendant directed or participated in the violation. Doyle v. Camelot Care Centers, 305 F.3d 603, 614-15 (7th Cir. 2002). Further, a governmental body may not be held liable unless the individual defendants acted pursuant to an official policy. White v. City of Markham, 310 F.3d 989, 998 (7th Cir. 2002) (no municipal liability under § 1983 unless a policy or custom of the entity was the "moving force" behind the constitutional deprivation).

Petitioner alleges that the sheriff's office, Larry Warren and Jim Gold are liable "by knowingly allowing a system" that would permit the other respondents to violate his rights. He goes on to state that he wishes to hold these defendants liable under the doctrine of respondeat superior. However, under § 1983 a supervisor or municipality cannot be held liable simply because of an employment relationship. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003). There is nothing in petitioner's complaint to suggest that the sheriff's office had a policy or custom of violating constitutional rights or that respondents Warren and Gold directed or participated in the actions of the other respondents. Accordingly, these three respondents will be dismissed.

Respondents Scott Hassett and Brian Ezman will also be dismissed. Petitioner makes no reference to Hassett in the body of his complaint so I cannot reasonably infer that he had any personal involvement in the alleged constitutional violations. With respect to Ezman, petitioner alleges only that he was to "take responsibility" for the other respondents' actions.

He does not allege that Ezman participated in, directed or consented to any of the actions of respondents Bitsky, Silka or Kroetz.

B. Unreasonable Searches and Seizures

The majority of petitioner's claims involve searches of his home, his car and his person. The Fourth Amendment prohibits "unreasonable" searches and seizures of "persons, houses, papers, and effects." The general rule is that, to be reasonable, a search must be authorized by a valid warrant. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987). However, this rule has numerous exceptions. For example, no warrant is required if the suspect gives an officer consent to search, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), if exigent circumstances exist, Payton v, New York, 445 U.S. 573, 59 (1980), if the search is limited to a frisk and the officer has reasonable suspicion to believe that the suspect has a weapon, Terry v. Ohio, 392 U.S. 1, 21 (1968), if the object of the search is an automobile and the officer has probable cause to believe that it contains contraband, Pennsylvania v. Labron, 518 U.S. 938, 940 (1996), or if the search is conducted incident to a valid arrest, United States v. Robinson, 414 U.S. 218 (1973). Further, the Supreme Court has held that the Fourth Amendment is not implicated unless the individual has a reasonable expectation of privacy in the area that is searched. Florida v. Riley, 488 U.S. 445 (1989). A warrantless arrest may be valid if the officer has probable cause to believe that the suspect has committed

a crime. United States v. Watson, 423 U.S. 411 (1977).

On the basis of the facts alleged in petitioner's complaint, it is impossible to know whether respondents Bitsky, Silka and Kroetz were justified in conducting the searches they did and arresting petitioner. Because there may be a set of facts consistent with petitioner's allegations that would entitle him to relief, petitioner will be allowed to proceed on his Fourth Amendment claims against these three respondents. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002). However, petitioner should be aware that if he asserted and lost a Fourth Amendment claim during his criminal proceedings, he may not relitigate the issue in a civil suit. Allen v. McCurry, 449 U.S. 90 (1980); Guenther v. Holmgreen, 738 F.2d 879 (7th Cir. 1984).

C. Planting Evidence

The Supreme Court held long ago that using falsified evidence in an effort to obtain a conviction is a denial of due process under the Fourteenth Amendment. Napue v. People of the State of Illinois, (1959). In Smith v. Springer, 859 F.2d 31 (7th Cir. 1988), and Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988), the court of appeals recognized a cause of action under § 1983 for an officer's fabrication of evidence. See also Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (assuming that state officer's fabrication of evidence would create liability under § 1983). Therefore, I will allow petitioner to proceed on this

claim against Bitsky and Silka. However, to recover compensatory damages for this claim, petitioner will have to show that he was injured by respondents. Nesses, 68 F.3d at 1005. As noted above, if petitioner's injury is that he would not have been convicted absent the falsified evidence, then his § 1983 claim is barred by Heck.

D. Failure to Provide Miranda Warnings and Failure to Provide Counsel

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that before police officers may interrogate a suspect that is in custody, they must inform the suspect of his right to remain silent and his right to an attorney. In Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that once a suspect expresses his desire to speak with police in the presence of an attorney, officers may not continue to interrogate the suspect until an attorney is present. The Court of Appeals for the Seventh Circuit has indicated that the failure to advise a criminal suspect of his Miranda rights does not give rise to civil liability under 42 U.S.C. § 1983. Thornton v. Buchmann, 392 F.2d 870, 874 (7th Cir. 1968). Other courts have explained that a failure to follow Miranda does not create a cause of action under § 1983 because a violation of Miranda is not a violation of the Fifth Amendment. See Jones v. Cannon, 174 F.3d 1271, 1290-91 (11th Cir. 1999) ("failing to follow Miranda" does not create "a cause of action for money damages under § 1983"); Giuffre v. Bissell, 31 F.3d 1241, 1256 (3d Cir. 1994) ("[V]iolations of prophylactic Miranda

procedures do not amount to violations of the Constitution itself"); Warren v. City of Lincoln, 864 F.2d 1436, 1442 (8th Cir. 1989) (remedy "for a Miranda violation is the exclusion from evidence of any compelled self-incrimination, not a section 1983 action"); Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976); but see Cooper v. Dupnik, 963 F.2d 1220, 1237 (9th Cir. 1992) (recognizing claims under § 1983 arising from officers' intentional failure to give Miranda warnings).

Some courts have suggested that the Supreme Court repudiated this rationale in Dickerson v. United States, 530 U.S. 428 (2000), which stated that Miranda announced a "constitutional rule." See United States v. Faulkingham, 295 F.3d 85, 90 (1st Cir. 2001); United States v. Patane, 304 F.3d 1013 (10th Cir. 2002), cert. granted, 123 S. Ct. 1788 (2003). However, the Supreme Court has not held that a violation of Miranda is a violation of the Fifth Amendment or that an individual may bring an action under § 1983 for a failure to provide Miranda warnings. See Chavez v. Martinez, 123 S. Ct. 1994, 2003 (2003) (plurality opinion) (referring to Miranda as a "prophylactic rule"); id. at 2007 n.1 (Souter, J., concurring) (noting that Court had not decided whether absence of Miranda warnings may be basis for § 1983 action). In the absence of clear Supreme Court authority, I must adhere to the rule of Thornton. Further, because the right to counsel announced in Edwards is derived from the holding in Miranda, I must conclude that § 1983 does not provide a remedy for an officer's refusal to stop questioning after a suspect has requested to speak with

an attorney. Accordingly, these claims must be dismissed for failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Petitioner Douglas Uhde's request for leave to proceed in forma pauperis is GRANTED with respect to his claims that (1) respondents Mark Bitsky and Gary Silka violated petitioner's right to be free from unreasonable searches and seizures under the Fourth Amendment when they entered his house, searched his automobile and his person without his consent, placed him in handcuffs and arrested him; (2) respondent Tammy Kroetz violated his Fourth Amendment rights when she entered his house without his consent; and (3) respondents Bitsky and Silka fabricated evidence against petitioner in violation of his right to due process under the Fourth Amendment.

2. Petitioner's request for leave to proceed is DENIED with respect to his claims that respondent Silka, Sherd and Bitsky failed to provide him with Miranda warnings and disregarded his request for an attorney and these claims are DISMISSED for petitioner's failure to state a claim upon which relief may be granted.

3. Respondents Adams County, Wisconsin Sheriff's Office, Larry Warren. P. Scott Hassett, Brian Ezman and Jim Gold are DISMISSED from this action.

4. The unpaid balance of petitioner's filing fee is $145.85; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

5. Because petitioner has included the addresses of each of the respondents in this case, the clerk of court will forward completed Marshals Service and summons forms to the U.S. Marshals, who will serve petitioner's complaint on respondents Mark Bitsky, Gary Silka, Matthew Sherd and Tammy Kroetz at the provided addresses. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to defendant or to defendant's attorney.

6. Petitioner 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.

Entered this 22nd day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge