IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ANDRE CALMESE,

OPINION and ORDER

Plaintiff,

04-C-946-C

v.

PROB. OFF. CRAIG LEFFLER;
SUP'S DIANNE BINK and DIONNE BOEDEKER;
WARDEN JOHN HUSZ; and
REGIONAL CHIEF JAN CUMMINGS,

Defendants.

- -

This is a civil action for monetary relief under 42 U.S.C. § 1983 and Wisconsin law. Plaintiff Andre Calmese was granted leave to proceed in forma pauperis on his claims that his detention in the Milwaukee Secure Detention Facility from January 28, 2004 to March 24, 2004 violated his rights under the Fourth and Fourteenth Amendments and constituted false imprisonment under Wisconsin law. Jurisdiction is present. 28 U.S.C. §§ 1331, 1367.

Presently before the court is defendants' motion for summary judgment. For the reasons stated below, defendants' motion will be granted in its entirety. Defendants are entitled to summary judgment with respect to plaintiff's Fourth and Fourteenth Amendment

claims because the undisputed facts show that plaintiff admitted to conduct that violated a term of his parole release on January 28, 2004. In addition, defendants are entitled to summary judgment with respect to plaintiff's false imprisonment claim because plaintiff has not complied with Wisconsin's notice of claim requirement.

From the proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

Defendant Craig Leffler has been employed by the Wisconsin Department of Corrections' Division of Community Corrections as a probation and parole agent since June 4, 2001. His duties include supervising individuals convicted of felonies and misdemeanors, meeting with them at his office and their residences and representing the department at revocation hearings.

Defendant Dionne Boedeker was employed by the department as a corrections field supervisor at the time of the relevant events in this case. Her duties included but were not limited to operating and administering a field unit of probation and parole agents who were charged with monitoring the treatment and living conditions of all offenders assigned to the unit as well as the development, implementation and monitoring of programs and services. Also, defendant Boedeker supervised and monitored all field unit staff.

Since October 1997, defendant Dianne Bink has been employed as a corrections field supervisor. Her duties include the supervision of probation and parole agents at the Milwaukee Secure Detention Facility who work as liaisons for the field probation and parole agents. Liaisons have general responsibility for facilitating requests that field agents make through the Division of Community Corrections' computer system. The liaisons will serve documents and obtain statements from offenders in custody at the Milwaukee Secure Detention Facility and forward all information either by inter-office mail or the computer. Neither the liaisons nor Bink has any authority over the offender's custody status. They facilitate the exchange of information and paperwork between the agent and the offender.

Defendant John Husz is employed by the department as Warden of the Milwaukee Secure Detention Facility. He has held this position since October 2001. His duties and responsibilities are set forth in Wis. Stat. § 302.04. Generally, he is responsible for the facility's overall administration and operation and for the security and safety of staff and the inmates at the facility.

Defendant Jan Cummings is employed as the Regional Chief of Region 3, Milwaukee County. She has held this position since 1991. In her capacity as Regional Chief, defendant Cummings has administrative oversight for probation and parole, overseeing day-to-day operations of probation and parole and maintaining relationships between the department and the community.

Plaintiff Andre Calmese was placed on parole supervision after being released from prison. On November 26, 2002, defendant Craig Leffler was designated as plaintiff's parole officer. His supervisor was defendant Boedeker; she consulted with defendant Leffler on decisions to seek parole revocation. Before plaintiff was released from prison, he signed and received a copy of the rules of his supervision. According to those rules, plaintiff was to attend any alcohol and drug abuse program to which he was assigned and was not to use or possess illegal substances. On December 8, 2003, plaintiff met with defendant Leffler and discussed a drug treatment program called Project Return. (Before this meeting, plaintiff completed a treatment program at the Salvation Army's Adult Rehabilitation Facility.) On January 28, 2004, plaintiff reported to defendant Leffler's office. Defendant Leffler obtained a urine sample from plaintiff and sent it for testing that day. The test came back positive for THC, which indicated that he had been using marijuana. This violated the rules of plaintiff's parole supervision. Also at the January 28, 2004 meeting, plaintiff admitted that he had not been attending meetings for a drug treatment program called Project Return. His failure to attend the program violated several rules of his parole supervision. (The parties dispute most of the facts regarding this program. I will discuss the factual disputes below.) Plaintiff was taken into custody that day and placed at the Milwaukee Secure Detention Facility pending an investigation. He never signed any document modifying the conditions of his parole to include participation in the Project Return program.

Under normal circumstances, plaintiff would have had the right to a preliminary hearing regarding the violations of his supervised release. However, in addition to his admission on January 28, 2004, plaintiff provided a written statement on February 9, 2004 that included the following:

> I never asked for an ATR. I got myself into these facilities. The only one Craig helped me with was Genesis and Project Return but I couldn't go cause I had no bus fare. I did my own outpatient programs. I asked Craig about Project Return. He made a call and got me on the waiting list. I was at the rescue mission where I had been since Thanksgiving.

Because he admitted not attending Project Return, petitioner was not afforded a preliminary hearing.

On or about February 11, 2004, defendant Leffler spoke with Boedeker. He informed her that plaintiff had violated parole rules by using marijuana and by neglecting to participate in the Project Return meetings. Defendant Boedeker agreed with defendant Leffler that the Division of Community Corrections should seek revocation of plaintiff's parole. The next day, plaintiff received and signed a form DOC 414, Notice of Violation, Recommended Action and Statement of Hearing Rights. Among other things, the form stated that no preliminary hearing was required because plaintiff had provided a signed statement in which he admitted violating a condition of his parole.

On February 19, 2004, defendant Leffler wrote to plaintiff in response to numerous letters plaintiff had been sending to various officials. In his letter, defendant Leffler repeated

the reasons why plaintiff's parole had been revoked. At some point, the Wisconsin Division of Hearings and Appeals notified defendant Leffler that the final parole revocation hearing set for March 11, 2004 was postponed to March 25, 2004 at the request of plaintiff's attorney. An alternative to revocation was proposed, but because the final hearing date was scheduled after plaintiff's discharge date of March 24, 2004, it was determined that the revocation request would be withdrawn. Plaintiff was placed in general population at the Milwaukee Secure Detention Facility because there was no time to find him a room at a halfway house. He was discharged from supervision by the Department of Corrections on March 24, 2004.

Defendant Bink was not involved personally in the decision to detain plaintiff on a parole hold at the Milwaukee Secure Detention Facility or the decision to seek revocation of his parole. Similarly, defendant Husz was not involved in deciding whether and how long to confine a parolee at the facility. Defendants Husz and Cummings did not participate in the decisions to revoke plaintiff's parole, confine plaintiff at the facility or decline to offer plaintiff a preliminary hearing.

Plaintiff did not file a notice of claim with the attorney general asserting a claim of false imprisonment against defendants Leffler, Bink, Boedeker, Husz or Cummings.

DISCUSSION

A. Fourteenth Amendment

Plaintiff was granted leave to proceed on a claim that he was detained from January 28, 2004 to March 24, 2004 in violation of his rights under the due process clause of the Fourteenth Amendment. In granting plaintiff leave to proceed on this claim, I noted that in Morrissey v. Brewer, 408 U.S. 471 (1972), the Supreme Court held that an individual on parole has a protectible liberty interest associated with his status as a parolee and that, under the due process clause of the Fourteenth Amendment, he is entitled to two hearings in connection with the revocation of his parole: a preliminary hearing soon after he is initially detained and a hearing before a final decision on revocation is made. This case concerns only plaintiff's due process right to a preliminary hearing because it is undisputed that his parole was not revoked.

In Morrissey, 408 U.S. at 485, the Court stated that the purpose of the preliminary hearing is "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." The Court required also that the hearing occur "as promptly as convenient after arrest" and that "someone not directly involved in the case" make the probable cause determination. Id. However, when a parolee admits committing acts that violate the conditions of his parole, a preliminary hearing is not constitutionally required. United

States v. Holland, 850 F.2d 1048, 1050-51 (5th Cir. 1988). In this case, defendants' failure to conduct a preliminary hearing concerning plaintiff's parole revocation did not violate his due process rights because plaintiff admitted to conduct that violated a term of his parole.

It is undisputed that a condition of plaintiff's parole was attendance at any alcohol and drug abuse program to which he was assigned. Moreover, it is undisputed that, when plaintiff met with defendant Leffler on January 28, 2004, he admitted that he had not been attending meetings for the Project Return drug treatment program. His failure to attend the meetings violated a term of his parole.

The parties dispute almost all of the facts surrounding plaintiff's enrollment in Project Return. According to defendants, plaintiff met with defendant Leffler on December 8, 2003, at which time defendant Leffler told plaintiff that he had been enrolled in Project Return and that participation in the program was a mandatory condition of his parole. In addition, defendant Leffler told plaintiff where and when the meetings would be held. On January 7, 2004, plaintiff and defendant Leffler met again. Plaintiff admitted that he had not been attending Project Return meetings but alleged that he did not have means to get himself to the meetings. At the meeting, defendant Leffler gave him bus tickets so he could attend treatment. However, plaintiff chose to use the tickets for other purposes and continued to miss meetings.

Plaintiff disputes much of this account. He asserts that defendant Leffler did not

enroll him in Project Return at their meeting on December 8, 2003. Instead, he contends that defendant Leffler only placed him on a waiting list for the program at the meeting. Plaintiff asserts further that he asked defendant Leffler to call the office at the Milwaukee Men's Mission, where he was living, to inform him of the dates for the program but that defendant Leffler never called or otherwise informed him of the program's dates and never gave plaintiff bus tickets to attend meetings. Plaintiff did not know the dates for attending Project Return; as far as he knew, he was still on the waiting list. The only bus tickets defendant Leffler gave plaintiff were two tickets each month so that plaintiff could meet defendant Leffler at his office. Finally, plaintiff asserts that he did not meet with defendant on January 7, 2004.

Despite these divergent accounts, all parties agree that, on December 8, 2003, defendant Leffler arranged for plaintiff to attend treatment at Project Return. It is undisputed that, on January 28, 2004, plaintiff acknowledged to defendant Leffler that he had not been attending Project Return meetings. The evidence indicates that the only information defendant Leffler had on January 28 was plaintiff's admission that he had not been attending Project Return meetings. Because it is undisputed that his failure to attend meetings violated a term of his parole, plaintiff was not entitled to a preliminary hearing. Indeed, so far as defendant Leffler was aware, a hearing would have served no purpose because plaintiff had admitted to conduct that violated a term of his parole. Although

plaintiff contends that he was unaware of the meeting dates and times, he has introduced no evidence to suggest that he told defendant Leffler this when they met on January 28. Regardless, the statement plaintiff gave on February 9 strongly suggests that he was aware of his obligation to attend Project Return meetings because his explanation for his failure to attend was the lack of bus fare and not lack of knowledge of the dates and times of the meetings. It is irrelevant that plaintiff did not sign any document that modified the terms of his parole to include participation in Project Return and that he had completed another drug treatment program before defendant Leffler arranged for his participation in Project Return. What is relevant is what defendant Leffler knew at the time he detained plaintiff. Because the undisputed facts indicate that plaintiff admitted to conduct that violated a term of his parole as early as January 28, 2003, it was not a violation of his due process rights to fail to hold a preliminary hearing after he was detained. Therefore, defendants are entitled to summary judgment with respect to plaintiff's Fourteenth Amendment claim.

B. Fourth Amendment

The "seizure of a parolee requires something less than probable cause to be reasonable under the Fourth Amendment." Knox v. Smith, 342 F.3d 651, 657 (7th Cir. 2003). Because of the parolee's reduced privacy interest and the government's interest in monitoring those who have already demonstrated an inclination to violate the law, the

government need only have reasonable suspicion that a parolee has violated a term of his parole to detain him. Id. Reasonable suspicion is "something less than probable cause but more than a hunch." United States v. Swift, 220 F.3d 502, 506 (7th Cir. 2000). Put another way, it is "'some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.'" Id. (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). Defendants' motion for summary judgment with respect to this claim will be granted because, as with plaintiff's Fourteenth Amendment claim, the undisputed facts indicate that, on January 28, defendant had reasonable suspicion that defendant had violated a term of his parole.

C. False Imprisonment

In the screening order, I granted plaintiff leave to proceed on a claim of false imprisonment. This tort claim arises under Wisconsin law, not § 1983. Defendants argue that they are entitled to summary judgment with respect to this claim because plaintiff did not file a notice of claim with the attorney general pursuant to Wis. Stat. § 893.82, which provides in part:

> Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties, . . . unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding,

> the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employee or agent involved.

"Where the plaintiff has failed to comply with this notice of claim statute, the court lacks jurisdiction to hear the claim." Saldivar v. Cadena, 622 F. Supp. 949, 959 (W.D. Wis. 1985) (noting that Wis. Stat. § 893.82 "imposes a condition precedent to the right to maintain an action").

The facts reveal that plaintiff did not file the required notice of claim. Plaintiff does not contest this point. Instead, he argues that Wis. Stat. § 893.82 is not applicable because plaintiff brought this case under § 1983. In support, plaintiff cites Felder v. Casey, 487 U.S. 131 (1988). In that case, an individual filed suit against the city of Milwaukee and several police officers under § 1983, alleging violations of his Fourth and Fourteenth Amendment rights. The Court ruled that Wisconsin's notice of claim statute was preempted with respect to claims filed under § 1983 in state court.

The holding in Felder is inapplicable to plaintiff's state law claim. Although plaintiff's action was brought under § 1983, his false imprisonment claim arises under Wisconsin law. Section 1983 is a vehicle for redressing violations of federal rights by persons acting under color of state law. Plaintiff's Fourth and Fourteenth Amendment claims are brought under

§ 1983, but his false imprisonment claim is brought under state law. Therefore, the notice of claim requirement is applicable. Felder, 487 U.S. at 151 (federal court exercising supplemental jurisdiction over claim arising under Wisconsin law must apply notice of claim requirement). Because the available evidence indicates that plaintiff failed to file a notice of claim with the attorney general, defendant's motion for summary judgment will be granted with respect to plaintiff's false imprisonment claim.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED in its entirety. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 30th day of November, 2005.

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