IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES R. WHITWELL,

Plaintiff,

OPINION AND ORDER

v.

04-C-0981-C

BRAD HOYT (Deputy Sheriff), DOUGLAS COUNTY SHERIFF, and COUNTY OF DOUGLAS,

Defendants.

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This is a civil action for monetary relief in which plaintiff James Whitwell contends that defendants violated his rights under the Fourth and Fourteenth Amendments when they stopped and arrested him without probable cause, maliciously prosecuted him and denied him medical care while he was in custody in the Douglas County jail.

The case is before the court on defendants' motion for summary judgment. In an order dated January 5, 2006, I granted plaintiff's motion to stay proceedings in this case, extending the deadline for filing a response to defendants' motion to February 17, 2006. At the same time, I granted defendants' motion to supplement their summary judgment motion with proposed findings of fact, as required by this court's summary judgment procedures. Although the extended deadline for responding to defendants' motion has now passed,

plaintiff has not filed a response.

Even though defendants' motion is unopposed, it is necessary to examine the facts proposed by defendants to determine whether they are entitled to summary judgment on each of plaintiff's claims. Because there is no evidence to suggest that defendants were deliberately indifferent to plaintiff's serious medical needs, defendants are entitled to judgment in their favor with respect to plaintiff's claim that defendants violated his rights under the Fourteenth Amendment by depriving him of adequate medical care while he was in custody as a pre-trial detainee. Furthermore, because malicious prosecution is not a constitutional tort when a state remedy is available to plaintiff, as it is under Wisconsin law, defendants' motion will be granted with respect to that claim as well. Defendants' motion will be denied with respect to plaintiff's claim that he was stopped in violation of the Fourth Amendment because they have failed to sustain their burden of showing that they are entitled to judgment as a matter of law on that claim; however, because the undisputed facts show that defendant Hoyt had probable cause to arrest plaintiff, defendants' motion will be granted with respect to plaintiff's claim that he was wrongfully arrested.

As a preliminary matter, I note that defendants' proposed findings of fact and brief in support of their motion for summary judgment contain arguments relevant to plaintiff's claims against former defendants Douglas County Jail and Douglas County Sheriff's Department. Both of these parties were dismissed by the court in an order dated January 4, 2005; consequently, facts and arguments relating to them have been disregarded.

Because defendants' motion is unopposed, the following facts are drawn solely from defendants' proposed findings of fact.

UNDISPUTED FACTS

A. Parties

Plaintiff James R. Whitwell is an adult resident of Superior, Wisconsin.

Defendant Douglas County, Wisconsin is a municipal unit of government with a business address in Superior, Wisconsin.

Defendant Brad Hoyt is a law enforcement officer who, at all times relevant to this lawsuit, was employed by defendant Douglas County Sheriff's Department.

B. Events of September 1, 2002

On August 31, 2002, plaintiff went fishing on his boat. While on the boat, plaintiff drank two beers. At some point, he fell into the hold of the boat, injuring his shoulder. When plaintiff returned to shore, he drank four more beers before driving his vehicle along U.S. Highway 2.

Shortly after 2:00 a.m. on September 1, 2002, plaintiff was stopped by defendant Hoyt. After defendant Hoyt initiated the traffic stop, he noticed the odor of intoxicants coming from plaintiff's car. Defendant Hoyt also noted that plaintiff's eyes were glassy and

bloodshot and his speech was slurred. Defendant Hoyt asked for plaintiff's driver's license and confirmed that plaintiff owned the vehicle he had been driving.

After plaintiff admitted to the officer that he had been drinking, defendant Hoyt administered field sobriety tests. Plaintiff's performance on the tests indicated that he was intoxicated. Plaintiff was given a preliminary breath test, which indicated that plaintiff's blood alcohol content was .151 percent. ("1.15," the number proposed by defendants, is likely a typographical error; in defendants' proposed fact #27, they state that plainitff's second breath test yielded a result of .140 percent.) Because plaintiff had prior alcohol-related convictions, it was illegal for him to drive with a blood alcohol level greater than .02 percent. Defendant Hoyt relied on his training, experience and observation of plaintiff and the results of plaintiff's preliminary breath test to conclude that plaintiff was under the influence of alcohol. Defendant Hoyt arrested plaintiff and transported him to the Douglas County Sheriff's Department.

At 3:28 a.m. on September 1, 2002, plaintiff was booked into the Douglas County jail. As part of the booking process, plaintiff had an intake interview with a jail correctional officer. During that interview, plaintiff informed the officer of his injured shoulder and asked to see a doctor.

On Monday, September 2, 2002, a jail staff nurse examined plaintiff's shoulder and concluded that plaintiff had no broken bones and was not bleeding internally.

Because September 2, 2002 was a holiday, plaintiff did not make an initial

appearance until the afternoon of September 3, 2002. He was released that day.

Following his release, plaintiff made an appointment to see a doctor on September 4, 2002. The doctor X-rayed plaintiff's shoulder and confirmed that no bones were broken.

Plaintiff was later charged with a sixth offense of operating a motor vehicle while intoxicated. His preliminary hearing was held in September 2002. At the close of the preliminary hearing, plaintiff was bound over for trial.

OPINION

A. Stop & Arrest

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The temporary detention of individuals during a traffic stop constitutes a seizure within the meaning of the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809-810 (1996). In evaluating the "reasonableness" of traffic stops, courts sometimes apply the "probable cause" standard required for arrest and other times apply the less stringent "reasonable suspicion" standard used to evaluate investigatory stops. Compare Alabama v. White, 496 U.S. 325, 330 (1990) and United States v. Johnson, 383 F.3d 538, 542 (7th Cir. 2004) (applying reasonable suspicion standard) with Whren, 517 U.S. at 810 and United States v. Muriel, 418 F.3d 720, 724 (7th Cir. 2005) (applying probable cause standard). The reason for the stop determines the standard that applies.

If defendant Hoyt witnessed plaintiff committing a traffic violation and stopped plaintiff's vehicle because of that observation, the stop was an "arrest" supported by probable cause. Tennessee v. Garner, 471 U.S. 1, 7 (1985) (arrest occurs "whenever an officer restrains the freedom of a person to walk away"); Lawrence v. Kenosha County, 391 F.3d 837, 842 (7th Cir. 2004) (arrest requiring probable cause occurs when "reasonable person would feel that he is not free to leave"). If instead, the vehicle was stopped in response to a tip or other suspicious circumstance that led defendant Hoyt to believe (1) that "crime was afoot" and plaintiff had a hand in the crime, then the stop would be investigative, requiring only reasonable suspicion. Terry v. Ohio, 392 U.S. 1, 21 (1968); United States v. Askew, 403 F.3d 496, 507 (7th Cir. 2005).

In this case, although defendants have proposed facts relating to events that occurred *after* plaintiff's vehicle was stopped, they have not proposed any individualized, articulable facts known to defendant Hoyt that justified his decision to stop plaintiff's vehicle. Without these facts, it is impossible to determine whether the stop was "reasonable" under the Fourth Amendment; therefore, defendants' motion will be denied with respect to this claim.

"Probable cause" requires only a probability or a substantial chance of criminal activity, not an actual showing of such activity. United States v Roth, 201 F.3d 888, 893 (7th Cir. 2000) (quoting Illinois v. Gates, 462 U.S. 213, 244 (1983)); see also United States v. Ramirez, 112 F.3d 849, 851- 52 (7th Cir. 1997)("All that is required for a lawful search is probable cause to believe that the search will turn up evidence or fruits of crime, not

certainty that it will."). There is no question that if the stop of plaintiff's vehicle was properly made, defendant Hoyt had more than enough evidence to arrest plaintiff for driving while intoxicated.

The undisputed facts show that at the time defendant Hoyt took plaintiff into custody, he had substantial grounds to believe plaintiff was intoxicated. Plaintiff performed deficiently on field sobriety tests administered by defendant Hoyt, his eyes were bloodshot and glassy, his speech was slurred and his car smelled of intoxicants. If that were not enough, the preliminary breath test revealed that plaintiff's blood alcohol level was more than seven times above the legal limit that applied to plaintiff. Because the existence of probable cause is an absolute bar to liability under § 1983 for claims of illegal arrest, Morfin v. City of East Chicago, 349 F.3d 989, 997 (7th Cir. 2003), plaintiff's claim for wrongful arrest will inevitably fail if the stop itself was valid under the Fourth Amendment.

But what if the stop was illegal? If it were and criminal charges were brought against plaintiff, the Fourth Amendment's exclusionary rule would normally bar from trial all testimony relating to matters observed during the stop. United States v. Green, 111 F.3d 515, 523 (7th Cir. 1997) (exclusionary rule applies generally to evidence obtained following illegal traffic stop). The operative question, then, is whether the exclusionary rule applies to civil suits as well. If it does, the court must ignore the observations made by defendant Hoyt following the allegedly illegal stop of plaintiff's vehicle. Doing so would lead to the inevitable conclusion that the arrest occurred without probable cause, in violation of

plaintiff's Fourth Amendment rights. However, if the exclusionary rule does not apply to claims brought under § 1983, then defendant Hoyt's undisputed observations can be considered and would support a finding that he had probable cause to arrest plaintiff for driving while intoxicated.

Neither the United States Supreme Court nor the Court of Appeals for the Seventh Circuit has addressed this question. However, other courts have done so and have concluded consistently that the exclusionary rule does *not* apply to lawsuits brought under § 1983. See, e.g., 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."); Padilla v. Miller, 143 F. Supp. 2d 479 (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.") (collecting cases); Wren v. Towe, 130 F.3d 1154, 1158 (5th Cir. 1997); 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 agree.

The exclusionary rule is not constitutionally required; rather, it is a "judicially created remedy designed to safeguard Fourth Amendment rights." United States v. Leon, 468 U.S. 897, 906 (1984). The 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. See Jonas v. City of Atlanta, 647 F.2d 580, 588 (5th

Cir. 1981). If plaintiff was stopped in violation of the Fourth Amendment, he may recover for that wrong; however, it would be unreasonable to permit him also to recover damages for his "wrongful" arrest when the undisputed facts conclusively demonstrate that defendant Hoyt had probable cause in fact to arrest him. Therefore, defendants' motion will be granted with respect to plaintiff's claim that he was arrested without probable cause in violation of the Fourth Amendment.

B. Malicious Prosecution

In his complaint, plaintiff alleged that defendant Hoyt's "incident report" contained lies and misrepresentations and that defendant Hoyt testified falsely against him in court. In the complaint, plaintiff alleged also that the charges against him were ultimately dismissed when the court determined that defendant Hoyt had illegally stopped plaintiff's vehicle. However, in response to defendants' motion for summary judgment, plaintiff has offered no evidence to substantiate these claims. That alone is sufficient reason to grant defendants' motion with respect to plaintiff's malicious prosecution claim. Moreover, even if plaintiff proved the truth of his allegations, he would not have stated a claim under federal law. The Court of Appeals for the Seventh Circuit has made it clear that malicious prosecution is not a constitutional tort unless a state does not provide any remedy for malicious prosecution. Newsome v. McCabe, 256 F.3d 747, 750 (7th Cir. 2001) ("the existence of a tort claim under state law knocks out any constitutional theory of malicious prosecution"). The state

of Wisconsin recognizes the tort of malicious prosecution. See, e.g., Strid v. Converse, 111 Wis. 2d 418, 331 N.W.2d 350 (1983); Maniaci v. Marquette University, 50 Wis.2d 287, 184 N.W.2d 168 (1971); Whispering Springs Corp. v. Town of Empire, 183 Wis. 2d 396, 515 N.W.2d 469 (Ct. App. 1994). Therefore, defendants' motion will be granted with respect to plaintiff's claim that he was maliciously prosecuted by defendant Hoyt.

B. Deliberate Indifference to Medical Needs

When a pre-trial detainee alleges denial of medical care, he states a due process claim under the Fourteenth Amendment. Chavez v. Cady, 207 F.3d 901, 904 (7th Cir. 2000)(citing Bell v. Wolfish, 441 U.S. 520 (1979). The standards governing denial of medical care claims by pre-trial detainees are analyzed under the same standards used to evaluate claims brought by convicted detainees under the Eighth Amendment. To state a claim for failure to provide adequate medical treatment, a pre-trial detainee must demonstrate that: (1) his condition was "objectively serious"; and that (2) the defendants were deliberately indifferent to that condition. Board v. Farnham, 394 F.3d 469, 479-480 (7th Cir. 2005); Wynn v. Southward, 251 F.3d 588, 593 (7th Cir. 2001).

The undisputed facts show that plaintiff injured his shoulder while fishing. He was examined by a nurse at the Douglas County jail, who determined that plaintiff had not broken any bones. Because plaintiff has not provided the court with any additional information relating to his injury, it is impossible to conclude that his shoulder was seriously

injured or that defendants were deliberately indifferent to his medical needs. Therefore, defendants' motion will be granted with respect to this claim.

C. Trial

As discussed above, plaintiff has not opposed defendants' motion for summary judgment. Plaintiff's last communication with the court was a letter dated December 30, 2005, dkt. # 26, in which he stated that his ability to pursue this case was being hampered by his physical disability. His failure to respond to defendant's motion, in combination with his letter, raises questions regarding plaintiff's ability to pursue his one remaining claim to trial.

It is an inefficient and expensive use of jurors to request that they assemble to hear plaintiff's case if plaintiff is not prepared to put in enough evidence to defeat a motion for a judgment as a matter of law following the close of his case. Therefore, in an effort to insure that plaintiff is prepared for trial, I will require him to submit a letter to the court and to defendant's counsel by March 7, 2006, that 1) lists the names of any witnesses he intends to call at trial; 2) briefly describes the testimony he expects each witness will give; and 3) describes the other forms of evidence he plans to introduce with respect to his claim that on the morning of September 1, 2002, defendant Hoyt stopped his car in violation of the Fourth Amendment. (As he prepares this letter, plaintiff should consider carefully how each witness and each piece of evidence relates to each part of this claim.) If plaintiff fails to

submit a response or is unable to convince me that he possesses the necessary evidence to meet his burden of proof, I will dismiss the case on the court's own motion. If plaintiff does convince me that he possesses the necessary proof, the case will proceed to trial.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is

1. DENIED with respect to plaintiff's claim that his rights were violated when defendant Hoyt stopped his vehicle in violation of the Fourth Amendment; and

2. GRANTED with respect to his claims that defendants wrongfully arrested him in violation of the Fourth Amendment and maliciously prosecuted him and were deliberately indifferent to his serious medical needs in violation of the Fourteenth Amendment.

FURTHER, IT IS ORDERED that defendants Douglas County Sheriff and Douglas County are DISMISSED from this lawsuit.

FURTHER IT IS ORDERED that plaintiff may have until March 10, 2006, in which to serve and file a letter containing the information described above. If, by March 10, 2006, plaintiff has not submitted evidence, his final claim will be dismissed for his failure to

prosecute.

Entered this 27th day of February, 2006.

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