IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PERCY D. BROWN,

ORDER

Petitioner,

05-C-390-C

v.

CITY OF MILWAUKEE POLICE DEPARTMENT,
LIEUTENANT MICHAEL DUBIS,
DETECTIVE MICHAEL KOSCIELAK,
DETECTIVE MICHAEL ZIMMERMAN,
DETECTIVE CARLOS NEGRON,
DETECTIVE GILBERT COLLADO and
CITY OF OAK CREEK POLICE DEPARTMENT,
SERGEANT JAMES OLIVA,
POLICE OFFICER RON PIOJA and
POLICE OFFICER JON SPENCE,

Respondents.

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Milwaukee County Jail in Milwaukee, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial

partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 the prisoner has had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

From the complaint assisted by a review of electronic records maintained on the Wisconsin Circuit Court Access Program (CCAP), I understand petitioner to allege the following.

ALLEGATIONS OF FACT

Petitioner Percy Brown is being detained at the Milwaukee County Jail awaiting trial on one count of forgery and one count of being a fugitive. Respondents Michael Dubis, Michael Koscielak, Michael Zimmerman, Carlos Negron, Gilbert Collado, James Oliva, Ron Pioja and Jon Spence are police officers for either respondent City of Milwaukee Police Department or City of Oak Creek Police Department.

Acting on an erroneous tip from detective Mike Smither of the Louisville, Kentucky police department that petitioner was wanted for a double homicide, respondents Dubis, Koscielak, Zimmerman, Negron, Collado, Oliva, Pioja and Spence entered plaintiff's hotel room and Ford Bronco at 8:00 a.m. on December 27, 2004. Smither had falsely indicated to respondents that he was a Secret Service agent. Respondents did not have probable cause or a warrant to search petitioner's room. They took petitioner's driver's license and identification card from his car and planted them in his hotel room. Respondent Dubis also planted in plaintiff's room the driver's license of Sue Beiersdorf of Sheboygan, Wisconsin. Respondents seized plaintiff's car and arrested him without a warrant. In addition, they searched one other hotel room and seized a Ford Thunderbird that they erroneously believed belonged to a Nina Snow.

At some later time, respondent Negron submitted a police report indicating that respondents had found three checks in petitioner's room, one made out to Latasha Gatlin,

another to Gerald Gatlin and the third to Joshua Gatlin. On a property inventory list, respondent Negron stated that a fourth check had been found in the room.

Petitioner was charged with forgery and being a fugitive from justice. He is currently incarcerated at the Milwaukee County ail, awaiting trial on the forgery and fugitive charges.

DISCUSSION

It appears that all of the respondents are in the Eastern District of Wisconsin and that the allegedly illegal acts occurred there so that venue would be improper in this court. However, improper venue can be waived.

Petitioner's allegations of a wrongful search and arrest implicate his rights under the Fourth Amendment. Before I can allow petitioner leave to proceed on these claims, however, I must find that they are not barred by Heck v. Humphrey, 512 U.S. 477 (1994). Heck bars civil damages suits where a decision in favor of the petitioner would necessarily imply the invalidity of his conviction or sentence unless the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus" under 28 U.S.C. § 2254. Id. at 486-87.

Of course, in this case, petitioner has not yet been convicted, much less sentenced. His criminal case is pending in state court. State v. Brown, 2005-CF-000008, 2005-CF-

000005. Although the Supreme Court did not address this situation explicitly in Heck, the Court of Appeals for the Seventh Circuit has since held that the Heck rule applies equally to "claims, which, if successful, would necessarily imply the invalidity of a *potential* conviction on a pending criminal charge." Washington v. Summerville, 127 F.3d 552, 555-56 (7th Cir. 1997). In reaching this conclusion, the court adopted the reasoning expressed by the Court of Appeals for the Third Circuit in Smith v. Holtz, 87 F.3d 108, 112-13 (3d Cir. 1996):

> [i]f such a claim could proceed while criminal proceedings are ongoing, there would be a potential for inconsistent determinations in the civil and criminal cases and the criminal defendant would be able to collaterally attack the prosecution in a civil suit. In terms of the conflicts which Heck sought to avoid, there is no difference between a conviction which is outstanding at the time the civil rights action is instituted and a potential conviction on a pending charge that may be entered at some point thereafter.

Washington, 127 F.3d at 556 (quoting Smith, 87 F.3d at 113). This approach is consistent with that adopted by other circuits. Harvey v. Waldron, 210 F.3d 1008, 1013-14 (9th Cir. 2000); Beck v. City of Muskogee Police Dept., 195 F.3d 553, 557 (10th Cir.1999); Shamaeizadeh v. Cunigan, 182 F.3d 391, 397-98 (6th Cir.1999); Covington v. City of New York, 171 F.3d 117, 124-25 (2d Cir.1999); Uboh v. Reno, 141 F.3d 1000, 1006-07 (11th Cir.1998).

The next question then is whether plaintiff's claims, if proved, would imply the invalidity of his potential forgery or fugitive conviction. The general rule is that wrongful

arrest and unreasonable search claims are not barred under Heck. Booker v. Ward, 94 F.3d 1052, 1056 (7th Cir. 1996) (wrongful arrest); Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (unreasonable search) (citing Heck, 512 U.S. at 487 n.7). The rationale for this rule is that these types of claims do not necessarily imply the invalidity of a criminal conviction. Booker, 94 F.3d at 1056 ("one can have a successful wrongful arrest claim and still have a perfectly valid conviction"). Whether there are exceptions to these general rules is a trickier issue. In Copus, the Court of Appeals for the Seventh Circuit expressed the opinion that unreasonable search claims are excluded from the Heck rule categorically. The court assumed that this issue had already been decided by the following passage in Antonelli v. Foster, 104 F.3d 899, 901 (7th Cir. 1997):

> [T]o dispel any possible confusion, the difference between a suit premised as here on the invalidity of confinement pursuant to some legal process, whether a warrant, indictment, information, summons, parole revocation . . . , and a suit that complains of official misconduct unrelated to legal process — an unconstitutional arrest without a warrant, the gratuitous beating of the arrested person . . . . In none of the [cited] cases in the second category — official misconduct unrelated to legal process — is the unlawfulness of the plaintiff's being confined pursuant to legal process an implicit or explicit ingredient of his case. The principle of Heck is therefore inapplicable to those cases (as Heck itself makes clear, see 512 U.S. at 486-87 nn. 6, 7, 114 S.Ct. 2004.)

Copus, 151 F.3d at 648 (quoting Antonelli, 104 F.3d at 901).

Since Copus was decided, a split among the circuits has emerged, leaving the categorical approach in the minority. Gibson v. Superintendent of NJ Dept. of Law and Public Safety-Division of State Police, 411 F.3d 427, 448 (3d Cir. 2005) (adopting

categorical approach) (citing Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco, and Firearms, 401 F.3d 419 (6th Cir. 2005) (same); Hughes v. Lott, 350 F.3d 1157, 1161 (11th Cir. 2003) (same); Covington v. City of New York, 171 F.3d 117, 123 (2d Cir. 1999) (same); Martinez v. City of Albuquerque, 184 F.3d 1123, 1125 (10th Cir. 1999) (same); Woods v. Candela, 47 F.3d 545, 546 (2d Cir. 1995) (same); Brooks v. City of Winston-Salem, 85 F.3d 178, 182-83 (4th Cir. 1996) (same)). The debate centers on differing interpretations of Heck's seventh footnote, which provides that:

> a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, which, we hold today, does not encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Heck, 512 U.S. at 487 n.7 (citations omitted).

In cases decided since Copus, both the Court of Appeals for the Seventh Circuit and the United States Supreme Court have applied Heck on a case by case basis. E.g., Muhammad v. Close, 540 U.S. 749, 754 (2004) (rejecting "[c]ircuit precedent that Heck applies categorically to all suits challenging prison disciplinary proceedings"); Wiley v. City of Chicago, 361 F.3d 994, 997 (7th Cir. 2004); Gauger v. Hendle, 349 F.3d 354, 361 (7th Cir. 2003) ("[S]ometimes a successful challenge to a false arrest can indeed impugn the

validity of the plaintiff's conviction"). In Gauger, the court questioned whether the categorical approach had actually been adopted in Copus, noting that in addition to stating that all unlawful search and arrest claims can go forward notwithstanding Heck, the court had said in Copus that ""we cannot say *with certainty* that success on Copus' § 1983 claim '*necessarily*' would impugn the validity of his conviction.'" Gauger, 349 F.3d at 361 (quoting Copus, 151 F.3d at 650) (emphasis added in Gauger).

In light of this apparent split in authority, I must try to ascertain what the court of appeals would do today if confronted with this question. For a variety of reasons, I believe that it would adopt an approach under which courts examine the individual circumstances of each case, not simply identify the type of claim being made. Although the passage from Antonelli that the court cited in Copus was written in unequivocal terms, the thrust of the court's discussion seems to be directed at generalizing the types of claims that typically would or would not be barred under Heck. Notably, Antonelli does not discuss the rationale for approaching Heck questions categorically. Although the court cited Heck's seventh footnote, it later acknowledged in Copus, 151 F.3d at 648, that this footnote was "a bit confusing." Given that the only support for the categorical approach is a passing reference to a footnote later described as confusing, it is not clear that the court intended to adopt a non-specific approach to applying Heck. The court's more recent decisions in Wiley and Gauger suggest that it did not. In both cases, the court found that Heck barred "official

misconduct unrelated to legal process" type claims. Even more telling is the court's rejection in Gauger of "a rule that false arrest and other Fourth Amendment claims are *always* premature while the plaintiff still faces criminal punishment."

Aside from circuit precedent, the fact-specific approach would best serve the policies underlying Heck, namely promoting consistency and limiting collateral attacks on criminal convictions. The categorical approach, if adopted, would from time to time permit claims that if successful would undermine the integrity of the plaintiff's criminal conviction. Moreover, the fact-specific approach is most consistent with the permissive language found in the Heck footnote. Notably, the Court indicated that an unreasonable search claim "*may* lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." Heck, 512 U.S. at 487 n.7. Finally, the Court's recent holding in Muhammad v. Close, 540 U.S. 749 (2004), suggests that Heck is to be applied on a case by case basis; as noted above, the Court rejected the view that Heck "applies categorically to all suits challenging prison disciplinary proceedings." Id. at 754.

Having concluded that there may be instances in which even an unreasonable search or unlawful arrest claim might be barred under Heck, I turn to the question whether this is such a case. In Wiley, 361 F.3d at 997, the court of appeals held that Heck would bar a claim that defendant police officers arrested and prosecuted the plaintiff on the sole ground

of the drugs they had allegedly planted on his person. As the court observed, in that situation, "any civil suit . . . for false arrest would necessarily imply the invalidity of a potential conviction." Id. The present case is analogous. Because evidence seized during an unconstitutional search should be suppressed at trial, Mapp v. Ohio, 367 U.S. 643 (1961), the validity of petitioner's potential conviction for forgery would necessarily be at issue if he were able to prove that respondents planted the evidence supporting that charge in his hotel room while conducting an unlawful search of his hotel room and automobile. Thus, petitioner's claims are barred under Heck and I must deny him leave to proceed. Petitioner's claims will be dismissed without prejudice to his refiling a case raising his Fourth Amendment claims if and when his conviction is "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus" under 28 U.S.C. § 2254. Heck, 512 U.S. at 486-87. (Before filing such a case, plaintiff should determine the district in which venue would be proper.) Because of the lack of clarity in Seventh Circuit law regarding the applicability of Heck to unlawful search and arrest claims, I will not issue a strike against petitioner under 28 U.S.C. § 1915(g). Clemente v. Allen, 120 F.3d 703, 705 n.1 (7th Cir. 1997) (appeal not a strike under 28 U.S.C. § 1915(g) in absence of published Seventh Circuit law regarding applicability of Heck to Bivens actions).

ORDER

IT IS ORDERED that

1. Petitioner Percy Brown's request for leave to proceed in forma pauperis on his Fourth Amendment claims is DENIED and this case is DISMISSED without prejudice;

2. The unpaid balance of petitioner's filing fee is $228.76; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will not be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 9th day of August, 2005.

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