IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

RAYMOND BRESETTE,

Plaintiff,

v.

OFFICER STEVE KREWSON, SHERIFF ROBERT FOLLIS and JAIL ADMINISTRATOR LARRY WEBER,

Defendants.

OPINION AND ORDER

06-C-280-C

- -

In this civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983, plaintiff Raymond Bresette contends that defendants Steve Krewson, Robert Follis and Larry Weber violated his Fourth Amendment rights by subjecting him to false arrest on October 9, 2005 and unlawfully detaining him at the Bayfield County jail between October 9 and October 18, 2005. Plaintiff is incarcerated and is presently housed at the Stanley Correctional Institution in Stanley, Wisconsin. Jurisdiction is present. 28 U.S.C. § 1331, 42 U.S.C. § 1983.

Presently before the court is defendants' motion for summary judgment, in which defendants argue that plaintiff was not subject to false arrest or unlawfully detained in

violation of the Fourth Amendment. Because I find that defendant Krewson had probable cause to arrest plaintiff on October 9, 2005 and that plaintiff received a prompt judicial review regarding whether defendant Krewson had probable cause for his arrest, defendants' motion will be granted.

Before setting forth the facts of this case, there are several preliminary matters that require discussion and resolution. First, throughout the course of this litigation, plaintiff has filed a torrent of motions regarding what he believes to be defendants' noncompliance with his discovery requests. His two most recent motions are titled "Motion for Default," dkt. #67, and "Response by Plaintiff to Defendants' Reply to Plaintiff's Responses to Defendants' Proposed Finding of Fact Supporting Their Summary Judgment," dkt. #68. They are perplexing. First, plaintiff's "Motion for Default" is identical to plaintiff's previous "Motion for Default," dkt. #58, which was construed as a motion for discovery sanctions pursuant to Rule 37(b) and denied by Magistrate Judge Stephen Crocker on January 25, 2007. Dkt. # 65. In the cover letter that accompanies this motion, plaintiff addresses this court and raises objections to the magistrate judge's order. Therefore, although it is not labeled as such, I will construe plaintiff's most recent "Motion for Default," as a motion pursuant to 28 U.S.C. § 636(b)(1)(A) for reconsideration of the magistrate judge's January 25, 2007 order.

A district judge may overturn a magistrate judge's discovery rulings only when they

are "clearly erroneous or contrary to law," 28 U.S.C. § 636(b)(1)(A). In his January 25, 2007 order, the magistrate judge refused to impose severe sanctions on defendants because he concluded that defendants had complied with plaintiff's discovery requests. Fed. R. Civ. P. 37(b) provides for sanctions when a party fails to obey a court order regarding discovery. Sanctions under Rule 37(b) are discretionary and are appropriate when a party fails to comply with a court order. In this case, there was no court order requiring defendants to provide plaintiff with additional discovery. Therefore, the magistrate judge's order was not clearly erroneous or contrary to law and plaintiff's motion for reconsideration will be denied.

Next, I understand plaintiff to argue in his "Response by Plaintiff to Defendants' Reply to Plaintiff's Responses to Defendants' Proposed Finding of Fact Supporting Their Summary Judgment," that he has not received sufficient discovery to respond to defendants' proposed facts numbers 23, 24 and 26. (Plaintiff was given additional time to respond to these proposed facts in an order dated December 7, 2006.) Again, it is difficult to understand what action plaintiff is asking the court to take. However, because plaintiff says that outstanding discovery requests "would have assisted me in the answers of [proposed findings of fact]," I will construe docket number 68 to be a Rule 56(f) motion for a continuance. Fed. R. Civ. P. 56(f) provides a procedure for requesting relief to a party who believes it cannot adequately respond to a motion for summary judgment. However, there

are several problems with plaintiff's motion. First, the rule requires that the party seeking relief file an affidavit stating the reasons that more discovery is necessary. Plaintiff has not filed such an affidavit. Second, and more important, even if the information plaintiff seeks is favorable to him, it would not alter the outcome of this opinion. Therefore, granting a continuance would be futile and plaintiff's motion will be denied.

Finally, a preliminary discussion regarding the proposed facts is necessary. First, plaintiff appears to have disregarded entirely this court's procedure for proposing and supporting facts. He was informed that "[a]ll facts necessary to sustain the parties' positions on summary judgment must be explicitly proposed as findings of fact" and that the court would not search the record for factual evidence. Procedure to be Followed on Motions for Summary Judgment, Introduction, Section I.C.1. Despite this warning, in his submission titled "Proposed Facts," plaintiff submitted only three statements, all unsupported by any evidence, including a statement that "Since the beginning of this alleged violation plaintiff disputed [] all allegations in part!" This is not the kind of fact that the court can rely upon when sorting out the facts of a case. Next, even if I were to set aside the court's longstanding procedure and review the record itself, it is conspicuously lacking in evidence supporting plaintiff's arguments. For example, in his brief and in response to defendants' proposed findings of fact, plaintiff alleges repeatedly that he was not holding a can of beer when defendant Krewson approached him at the Bayfield Apple Festival and that he was not given

a hearing regarding his detention until October 18, 2005. However, there is nothing in the record that supports these allegations. Especially curious is the fact that plaintiff did not submit an affidavit of his own averring to the truth of any of his allegations, yet he seems to understand the evidentiary value of affidavits, having submitted an affidavit signed by his girlfriend, Laura Belanger. Plaintiff has submitted many arguments and no evidence in opposition to defendants' motion; however, arguments, even if repeated often and stated strenuously, cannot replace evidence. As a result, plaintiff's submissions did not properly dispute any of defendants' proposed facts.

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

FACTS

A. Parties

Plaintiff Raymond Bresette is currently incarcerated and housed at the Stanley Correctional Institution in Stanley, Wisconsin.

Defendant Steve Krewson is a police officer with the Bayfield Police Department and a corporal with the Bayfield County Sheriff's Department. Defendant Larry Weber is the jail administrator for the Bayfield County jail. Defendant Robert Follis is the sheriff for Bayfield County.

B. Plaintiff's Arrest and Detention

On October 9, 2005, plaintiff attended the Bayfield Apple Festival in Bayfield, Wisconsin. Defendant Krewson was patrolling the festival for the Bayfield Police Department. Defendant Krewson saw plaintiff holding an open can of Miller Lite beer. Defendant Krewson knew that plaintiff had been issued bonds by Bayfield and Ashland County Circuit Courts for felony Operating While Intoxicated offenses, and that plaintiff had to maintain absolute sobriety as a condition of these bonds. Defendant Krewson contacted the Bayfield Apple Festival command center to confirm that plaintiff was required to maintain absolute sobriety as a condition of his bonds. After confirmation was received, defendant Krewson asked for back-up to assist in arresting plaintiff for violating the conditions of his bonds. Officer Chris Benson of the Bayfield Police Department and Warden Mark Bresette of the Great Lakes Indian Fish and Wildlife Service responded to this request.

Defendant and the other officers approached plaintiff and his brother, Tony Bresette, to question plaintiff. As they approached, defendant Krewson and officer Benson saw plaintiff place the can of Miller Lite that he was holding on the sidewalk and step away from it. Officer Krewson picked up the can of beer and determined that it was approximately two-thirds full. The officers questioned plaintiff about his possession of the beer, which he said he was holding for someone else. The officers smelled the odor of beer on his breath.

(Plaintiff argues, without providing any evidence, that he was holding and drinking a Pepsi and not a Miller Lite. His brother Tony Bresette stated in an unsworn statement that he had purchased a Pepsi for plaintiff, but does not specify whether plaintiff was holding Pepsi when the officers approached. Tony Bresette further stated in this unsworn statement that, if the officers smelled beer when they were talking to plaintiff, it came from him.)

Plaintiff's girlfriend Laura Belanger saw the officers talking to plaintiff and walked across the street to join the group. When she arrived, she did not see a beer in the immediate area around plaintiff. She and Tony Bresette argued to the officers that plaintiff had been drinking a Pepsi.

After smelling beer on plaintiff's breath, defendant Krewson believed that there was probable cause that plaintiff had violated the terms of his bond, and arrested him. After plaintiff was arrested, he was transported to the Bayfield County jail for booking on three charges of bail jumping. At the jail, plaintiff refused to submit to an "Inoximeter" breath test. Defendant Krewson took Bresette to the Memorial Medical Center in Ashland, Wisconsin, where his blood was drawn for an analysis of blood alcohol content. When the test was performed later, it revealed that his blood alcohol level at the time it was drawn was zero.

From the medical center, plaintiff was returned to the Bayfield County jail, where he was booked on three counts of felony bail jumping. On October 10, 2005, Bayfield County

Circuit Judge John P. Anderson determined that defendant Krewson had probable cause to arrest plaintiff. (Plaintiff makes much of an error on the form signed by Judge Anderson, which gives the date as October 9, 2005, rather than October 10, 2005. In his affidavit, defendant Weber avers that Judge Anderson signed the form on October 10, 2005; defendants argue that the date was simply entered incorrectly on the form. Defendants' explanation is sensible, especially given defendant Weber's undisputed testimony that the form was actually signed on October 10, 2005. Therefore, I will accept the fact that Judge Anderson signed the form on October 10, 2005 as undisputed.). On October 11, 2005, plaintiff appeared by videoconference in the Circuit Court for Bayfield County, where his bail was set at $1,000. On October 12, 2005 plaintiff signed the bond form, which informed him that his next court date was October 18, 2005. On October 18, 2005, Belanger posted the $1,000 bond and plaintiff was released.

OPINION

A. False Arrest

The Fourth Amendment to the U.S. Constitution protects individuals against "unreasonable searches and seizures." As a result, a person who believes that he was arrested wrongfully may bring an action for false arrest under 42 U.S.C. § 1983. However, to succeed on a false arrest claim, a plaintiff must prove that the officer arrested him without

probable cause. Morfin v. City of East Chicago, 349 F.3d 989, 997 (7th Cir. 2003) (holding that the existence of probable cause to arrest precludes a successful action for false arrest). Probable cause exists where an officer reasonably believes, in light of the facts known to him at the time, that an individual has committed or is committing a crime. United States v. Reed, 443 F.3d 600, 603 (7th Cir. 2006). "Probable cause is a 'commonsense determination, measured under a reasonableness standard.'" Spiegel v. Cortese, 196 F.3d 717, 723 (7th Cir. 1999) (quoting Tangwall v. Stuckey, 135 F.3d 510, 519 (7th Cir. 1998)). Whether probable cause exists depends on information known to the officers at the moment the arrest is made, not on subsequently received information. Id.

To maintain his claim of false arrest against defendant Krewson in the face of defendants' motion for summary judgment, plaintiff was required to adduce facts from which a reasonable jury could conclude that defendant Krewson arrested plaintiff without probable cause. Wis. Stat. § 946.49(1) provides that "Whoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond is [if the underlying offense is a felony] guilty of a Class H felony." Thus, if defendant Krewson reasonably believed that plaintiff was violating the terms of his bond, he also reasonably believed that plaintiff was committing a crime.

Although probable cause is often a question for a jury to answer because it requires the "the assessment of probabilities in particular factual contexts," a court may properly

make the determination if the "underlying facts supporting the probable cause determination are not in dispute." Maxwell v. City of Indianapolis, 998 F.32 431, 434 (7th Cir. 1993) (citations omitted). Plaintiff argues in his brief that he did not violate the terms of his bonds by drinking a beer at the Bayfield Apple Festival, but there is no evidence in the record to this effect. If plaintiff had placed any of defendants' facts in dispute by submitting an affidavit in which he swore, under penalty of perjury, that he was holding a can of Pepsi and not a can of beer at the Bayfield Apple Festival and that he had consumed no alcohol on October 9, 2005 and that defendant Krewson could not have smelled beer near plaintiff, this might have been sufficient to create a genuine issue of fact for the jury to sort out at trial. He did not. Although plaintiff points to the statements of Laura Belanger and Tony Bresette as evidence supporting plaintiff's contention that defendant Krewson did not see him with a can of beer or smell alcohol on his breath, neither statement provides such evidence because neither contradicts directly the affidavits of officer Benson or defendant Krewson. Specifically, Belanger was not with plaintiff when defendant Krewson approached him and she did not state that she saw plaintiff with a can of Pepsi in his hand as defendant Krewson approached or that plaintiff had had no alcohol to drink. (I have not considered Tony Bresette's statement as evidence, because he did not swear to its veracity. Moreover, Tony Bresette stated only that he had purchased a Pepsi for plaintiff, not that plaintiff was actually holding the soda when defendant Krewson approached them.) Therefore, absent any

legitimate dispute about the facts, the question whether defendant Krewson had probable cause to arrest plaintiff is properly resolved on defendants' summary judgment motion.

The undisputed facts show that on October 9, 2005, plaintiff attended the Bayfield Apple Festival in Bayfield, Wisconsin. At this time, plaintiff was free from custody after posting bonds in three pending cases in Ashland and Bayfield counties. One of the conditions of plaintiff's bonds was that he maintain absolute sobriety. While patrolling the Apple Festival, defendant Krewson saw a can of beer in plaintiff's hand, which plaintiff placed on the ground and attempted to move away from when the law enforcement officers approached. Defendant Krewson smelled alcohol when speaking with plaintiff. He knew that it was a crime for plaintiff to consume *any* alcohol. Under these circumstances, it was reasonable for defendant Krewson to infer from these facts that plaintiff was committing a crime. As a "common sense judgment . . . based upon the totality of the circumstances," Reed, 443 F.3d at 603, it cannot be faulted. Although a blood test taken two hours later revealed that plaintiff's blood alcohol level was zero, this subsequently discovered information does not affect the reasonableness of defendant Krewson's belief at the time he arrested plaintiff. From these undisputed facts, no reasonable jury could conclude that defendant Krewson acted without probable cause when he arrested plaintiff on October 9, 2005. Therefore, defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendant Krewson subjected him to false arrest.

B. Unlawful Detention

Plaintiff's other claim relates to the time he spent at the Bayfield County jail after defendant Krewson arrested him at the Apple Festival. Plaintiff alleges that he was held for ten days without any hearing or review. If true, this would violate the Fourth Amendment, which requires a prompt judicial determination of probable cause for individuals who are arrested without a warrant. Gerstein v. Pugh, 420 U.S. 103, 125 (1975). In the County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991), the United States Supreme Court held that, in most cases, judicial review within 48 hours would meet Gerstein's promptness requirements. Although a judicial review must occur promptly, it need not be extensive; it may be nonadversarial and the arrested person need not be present. Blake v. Katter, 693 F.2d 677, 681 (7th Cir. 1981).

Thus, plaintiff's claim may be disposed of quickly. Plaintiff cannot legitimately dispute that, on October 10, 2005, Judge John P. Anderson determined that defendant Krewson had probable cause for arresting plaintiff on October 9, 2005. The following day, plaintiff had an initial appearance before the court via videoconference. Thus, both the probable cause review and plaintiff's preliminary hearing took place within 48 hours of his arrest. This falls within the period of presumptive promptness outlined in McLaughlin. Plaintiff does not suggest that this represents an excessive delay sufficient to overcome McLaughlin's presumption. Instead, he alleges simply that neither review occurred and now

contends that there is a conspiracy among defendants to hide the fact. Again, plaintiff has not sworn to any of his allegations in an affidavit. As a result, the evidence shows that plaintiff received the judicial review of his arrest required by the Fourth Amendment and no reasonable jury could find otherwise. Therefore, defendants' motion for summary judgment will be granted.

Because I have found that plaintiff's constitutional rights were not violated either by his arrest or his detention, I need not consider whether defendants are entitled to qualified immunity or were involved personally with a constitutional violation.

ORDER

IT IS ORDERED that:

1. Plaintiff Raymond Bresette's motion for reconsideration of United States Magistrate Judge Stephen Crocker's January 25, 2007 order denying Rule 37(b) sanctions, dkt. #67, is DENIED.

2. Plaintiff's Rule 56(f) motion, dkt. #68, is DENIED.

3. The motion of defendants Steve Krewson, Robert Follis and Larry Weber for summary judgment is GRANTED.

The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 20th day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge