IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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COREY C. ISAACSON,

Petitioner,

v.

GOERGE GOTHNER, BRIAN CARON, CHARLES LAGEESE, DOUGLAS COUNTY, CITY OF SUPERIOR POLICE STATION,

Respondents.

OPINION and ORDER

07-121-C

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In this proposed civil action for monetary relief, petitioner Corey Isaacson, a prisoner at the Dodge Correctional Institution in Waupun, Wisconsin, contends that respondents Goerge Gothner, Brian Caron, Charles Lageese, Douglas County, Wisconsin and the City of Superior Police Station violated his rights under the Fourth Amendment by using excessive force against him in the course of his arrest. Petitioner requests leave to proceed in forma pauperis under 28 U.S.C. § 1915 and has made the initial partial payment required under that statute.

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. 28 U.S.C. § 1915(e)(2).

Because petitioner has alleged facts from which it may be inferred that respondents Gothner and Douglas County may have violated petitioner's rights under the Fourth Amendment, I will grant petitioner leave to proceed against them. However, because the facts alleged in the complaint do not permit the inference that respondents Caron and Lageese violated petitioner's constitutional rights, I will deny petitioner leave to proceed against these respondents.

Before addressing petitioner's claims individually, I note that respondent City of Superior Police Station is not a proper defendant in this case. The police station is a building, not a legal entity; it is incapable of accepting service of petitioner's complaint or responding to it. Therefore, the police station will be dismissed from this case.

From petitioner's complaint and from publicly available Wisconsin Circuit Court records, I draw the following factual allegations.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Corey Isaacson is a prisoner at the Dodge Correctional Institution in Waupun, Wisconsin.

Defendants Goerge Gothner and Brian Caron are police officers who work in Superior, Wisconsin. (It is not clear who employs them.)

Defendant Charles Lageese is an "internal affairs officer."

Defendant Douglas County is a Wisconsin municipality.

Defendant City of Superior Police Station is located in Superior, Wisconsin.

B. The Shooting

On the night of April 4, 2004, petitioner was "breaking windows" at his home in the city of Superior, Wisconsin. Respondents Gothner and Caron responded to the scene and proceeded to arrest petitioner. At the time the officers approached him, petitioner was carrying boards. Petitioner took approximately four steps in respondent Caron's direction. As he did so, respondent Gothner fired two shots at petitioner with his nine millimeter pistol, striking petitioner both times. (Petitioner does not say where he was struck or how seriously he was injured.) Respondent Gothner did not warn petitioner before firing his gun.

After the incident, respondent Gothner reported that he shot petitioner because he

thought petitioner was "charging" respondent Caron, even though Gothner admitted he could not see Caron at the time he shot petitioner.

Respondent Gothner has been "rogue" on several occasions in the past. Defendant Douglas County failed to train and supervise their employees, including defendant Gothner, adequately.

After the incident, defendant Lageese investigated the occurrence. He did not assign an "outside officer" to handle the investigation. Respondent Lageese allowed respondent Gothner to return to active duty before July 2004.

On July 14, 2004, petitioner pleaded guilty to one count of criminal damage to property and one count of battery to law officers in Douglas County Case Number 2004-CF-0087. Both convictions arose from the April 4, 2004 incident.

DISCUSSION

Although petitioner hints in his complaint that his April 4, 2004 arrest may have been illegal, I do not understand him to be challenging the validity of his arrest, a wise choice given the fact that any such challenge would be barred by Heck v. Humphrey, 512 U.S. 477 (1994). (Heck bars persons such as petitioner from challenging the legality of their arrests unless they have established the invalidity of the convictions flowing from the arrests.) Rather, I understand petitioner to allege that respondents violated his constitutional rights

by using deadly force against him unnecessarily in the course of that arrest, and by failing to take steps to prevent the use of excessive force. Such claims may be raised in the context of a suit under 42 U.S.C. § 1983. McCann v. Neilsen, 466 F.3d 619, 621 (7th Cir. 2006).

Petitioner's claims arise under the Fourth Amendment because the alleged use of force occurred in the course of an arrest. Graham v. Connor, 490 U.S. 386 (1989); Morfin v. City of East Chicago, 349 F.3d 989, 1004 (7th Cir. 2003). "Whether an officer used excessive force during an arrest is determined under the 'objective reasonableness' standard." Smith v. City of Chicago, 242 F.3d 737, 743 (7th Cir. 2001). Factors to be considered include "'the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether [the suspect was] actively resisting arrest or attempting to evade arrest by flight.'" Id. (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)). Ultimately, a court must "balance the amount of force used in relation to the danger posed to the community or to the arresting officers." Smith, 242 F.3d at 743.

A. Police Officers

Petitioner alleges that respondent Gothner shot him twice with a nine millimeter pistol, placing him at risk of death or serious injury, without provocation and without first warning petitioner that he intended to shoot him. A law enforcement officer may use potentially deadly force when he believes that a suspect's actions place him or others in the

immediate vicinity in imminent danger of death or serious bodily injury. DeLuna v. City of Rockford, Ill., 447 F.3d 1008, 1010 (7th Cir. 2006). However, he may not resort to such force in the absence of imminent danger. Whether respondent Gothner reasonably believed that petitioner posed a serious and imminent threat to himself or to respondent Caron is a matter to be resolved at a later stage of the proceedings. For now, petitioner has done enough to state a claim against respondent Gothner under the Fourth Amendment.

Next, petitioner has named respondent Caron, Gothner's partner, as a defendant in this lawsuit. However, under § 1983, liability cannot attach to Caron unless he "caused or participated in" the constitutional deprivation. Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir. 1994)). Petitioner does not allege that respondent Caron used any force against him, encouraged or goaded respondent Gothner to use force on petitioner or knew Gothner was going to shoot petitioner. Without more, respondent Caron's mere presence at the scene of the shooting fails to suggest that Caron was personally involved in the use of excessive force against petitioner. Because petitioner's allegations fail to implicate respondent Caron in any violation of petitioner's constitutional rights, petitioner's request to proceed against Caron will be denied.

In addition to naming as defendants the officers who responded to the April 4, 2004 incident, petitioner contends that respondent Lageese violated his rights by (1) failing to

assign an "outside officer" to conduct an internal investigation of Gothner's decision to shoot him and (2) returning Gothner to active duty. Although it is clear that petitioner disagrees with respondent Lageese's decision, petitioner has not alleged that respondent Lageese's actions prevented petitioner from bringing suit against respondent Gothner, or even hindered him in doing so. Without allegations of that nature, it is difficult to imagine how Lageese's actions could have violated plaintiff's rights. Cf. Vasquez v. Hernandez, 60 F.3d 325, 328 (7th Cir. 1999) ("when police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged") (citing Bell v. City of Milwaukee, 746 F.2d 1205, 1261 (7th Cir. 1984)). Respondent Lageese conducted his investigation and made his decisions after petitioner had been shot and arrested; petitioner does not suggest that Lageese was involved in the arrest or otherwise took any action that affected petitioner directly. Respondent Lageese's decisions were directed toward respondent Gothner, not petitioner. Because respondent Lageese's actions did not violate plaintiff's constitutional rights, petitioner will be denied leave to proceed against him.

B. Douglas County

Petitioner's final claim is that defendant Douglas County violated his rights by failing to adequately train and supervise its police officers. Although petitioner does not allege

specifically that defendant Douglas County employed respondent Gothner, I will assume for the purpose of this order that he was employed by the county as a sheriff's deputy. (Of course, if respondent Douglas County did not employ respondent Gothner, it would have no responsibility for training him.)

A municipality may not be held liable for the errors of its employees unless it is clear that it caused the alleged deprivation of plaintiff's constitutional rights by maintaining an unconstitutional policy or custom that its employees followed when plaintiff's rights were violated. Monell, 436 U.S. at 694. A municipality, such as respondent Douglas County, may be held liable under § 1983 for failing to train its employees only "where a failure to train reflects a deliberate or conscious choice [or, in other words] a policy." City of Canton v. Harris, 489 U.S. 378, 388 (1989). Although it is unclear at this stage whether respondent Douglas County had an obligation to train its officers and whether a deliberate failure to do so caused petitioner's Fourth Amendment rights to be violated, petitioner has done enough to state a claim against respondent Douglas County. Consequently, he will be granted leave to proceed on his claim that respondent Douglas County failed to adequately train and supervise respondent Gothner in violation of his Fourth Amendment rights.

ORDER

IT IS ORDERED that petitioner Corey Isaacson's request to proceed in forma

pauperis is

1. GRANTED with respect to petitioner's claims that

a. respondent Goerge Gothner used excessive force against him in violation of the Fourth Amendment and

b. respondent Douglas County failed to adequately train and supervise respondent Gothner in violation of plaintiff's Fourth Amendment rights; and

2. DENIED with respect to petitioner's claims that respondents Caron, Lageese and City of Superior Police Station violated his constitutional rights.

FURTHER, IT IS ORDERED that

3. Respondents Brian Caron, Charles Lageese and City of Superior Police Station are DISMISSED from this lawsuit.

4. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

5. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. The unpaid balance of petitioner's filing fee is $344.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

7. A copy of petitioner's complaint and a copy of this order are being forwarded to the United States Marshal for service on respondents.

Entered this 14th day of March, 2007.

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