IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PIERRE DEPREE HUSBAND,

Petitioner,

v.

DAVID T. FLANAGAN, Judge;
ROBERT KAISER, District Attorney;
ROBERT BURK, Public Defender; and
POLICE DEPARTMENT,

Respondents.

OPINION and ORDER

07-C-119-C

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On March 21, 2007, petitioner filed a pleading in this case that was styled as a civil action brought pursuant to 42 U.S.C. § 1983. However, because it did not include a demand for relief, I entered an order dated March 29, 2007, directing petitioner to submit no later than April 12, 2007, an addendum to his complaint in which he lists the relief he seeks. Now petitioner has filed the requested addendum. In it, he asks for money damages, including $500 a day for his wrongful incarceration from May 13, 2002 until he is released at some future time.

The first question to be addressed is whether this court can consider in the context

of this civil action one or more of the claims petitioner raises in his complaint. I conclude that petitioner cannot challenge in this action any claim requiring a determination whether his current custody is illegal either because he was convicted in an adult court instead of a juvenile court or because his lawyer was ineffective. These are matters that may be addressed only in the context of a habeas corpus action after petitioner exhausts his available state court remedies.

Although petitioner's remaining three *claims* may be raised in a civil action under 42 U.S.C. § 1983, none of the *respondents* he has named may be sued under that statute. Because that leaves no one upon whom to serve petitioner's complaint, the complaint will be dismissed.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See 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.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Pierre Husband is a prisoner at the Sheboygan County Detention Center. In March 2002, when he was 16 years old, petitioner committed a crime of sexual assault. (The Wisconsin Circuit Court Access website shows that petitioner pleaded guilty on November 14, 2002 to a charge of First Degree Sexual Assault of a Child.) After his offense was reported to Madison police, petitioner was interrogated by two officers. On April 3, 2002, while petitioner was attending a class at Memorial High School, two detectives escorted him from the classroom to a small room where they interrogated him. Petitioner was not given Miranda rights and no other adult was present in the room. Petitioner told the detectives that he did not want to speak, but they nagged him for approximately fifteen minutes until he confessed. The detectives then left without arresting petitioner.

Petitioner's seventeenth birthday occurred on April 17, 2002. Approximately one month later, on May 13, 2002, he was arrested in front of his high school and taken directly to the Dane County jail. At the jail, he was detained as an adult in a maximum security block, which frightened him. He asked to be moved to another block and was taken to 701 West, a 4-man maximum security block. Petitioner should have been taken to a juvenile facility following his arrest.

The circuit court website lists May 10, 2002 as the date the complaint of sexual

assault was filed against petitioner and April 6, 2002 as the date of the offense. The offense actually occurred in the beginning of March of 2002 and the victim's complaint was made in March. The date was altered in court records to insure that petitioner could be charged as an adult rather than as a juvenile. Petitioner did not receive a judicial waiver into adult court.

Four days after his arrest, petitioner had an initial appearance. He should have gotten an initial appearance within 48 hours of his arrest.

Petitioner's confession to the two detectives was key evidence leading to petitioner's arrest. Subsequently, it was held to have been obtained unconstitutionally and its use was not permitted. Nevertheless, petitioner's court appointed lawyer convinced him to plead no-contest to the charge. Because petitioner was not properly waived into adult court, the adult court did not have jurisdiction to convict him, but his lawyer did not challenge the prosecution on this ground.

Because petitioner was young and ignorant, his lawyer, the district attorney, police department and judge manipulated and took advantage of him by not giving him due process and equal protection of the law.

DISCUSSION

I understand petitioner to be raising four separate claims: 1) his Fourteenth

Amendment rights to due process and equal protection of the law were violated when he was charged and convicted as an adult for a crime he committed when he was a juvenile; 2) his Fourteenth Amendment right to be free from punishment was infringed when he was detained in an adult facility rather than a juvenile facility; 3) his Fifth Amendment rights were violated when he was interrogated without being advised of his Miranda rights; and 4) his Fourth Amendment rights were violated when his initial appearance was not held within 48 hours of his detention. Petitioner seeks money damages for these alleged wrongs, including $500 a day for every day he has been held in custody as a result of his allegedly illegal conviction.

Before I can consider the substance of petitioner's claims, I must address whether the parties he has named as respondents may be sued under 42 U.S.C. § 1983. In his complaint, petitioner named four respondents: Dane County Circuit Court Judge David Flanagan, Assistant District Attorney Robert Kaiser, Assistant Public Defender Robert Burk and an unspecified police department.

Liability under § 1983 attaches to persons who "under color of any statute, ordinance, regulation, custom, or usage" of state power deprive a citizen of any right under the Constitution or federal law. In order to qualify as a state actor, a "person" must be clothed with the authority of the state. Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 315 (1913).

Because public defenders are required to use their independent professional judgment when representing indigent defendants, the Supreme Court has held that public defenders do not "act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Polk County v. Dodson, 454 U.S. 312, 325 (1981). Petitioner's complaints about respondent Burk appear to relate wholly to Burk's performance as petitioner's lawyer. Consequently, petitioner may not bring suit against Burk in the context of this lawsuit.

Although respondents Flanagan and Kaiser qualify as state actors, petitioner's claims against them are barred by the doctrines of judicial and prosecutorial immunity. There are few doctrines established more solidly than the absolute immunity of judges from liability for their judicial acts, even when they act maliciously or corruptly. Mireles v. Waco, 502 U.S. 9 (1991). It is unquestioned that immunity applies to "the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court." Forrester v. White, 484 U.S. 219 (1988). Because petitioner's claims against respondent Flanagan are based on his apparent dissatisfaction with Flanagan's judicial decisions, there is no arguable basis in law for petitioner's claims against him.

Similarly, respondent Kaiser is protected from suit by the doctrine of absolute prosecutorial immunity. Kalina v. Fletcher, 522 U.S. 118 (1997) ("A state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal

prosecution is not amenable to suit under § 1983."). In deciding to prosecute petitioner as an adult, respondent Kaiser was "performing functions that require the exercise of prosecutorial discretion." Id. at 125; see also Buckley v. Fitzsimmons, 59 U.S. 259 (1993) (stating that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in his role as an advocate for the State, are entitled to the protections of absolute immunity"). Therefore, petitioner may not sue respondent Kaiser either.

That leaves respondent unnamed police department. Under Fed. R. Civ. P. 17(b), state law determines whether a particular entity has the capacity to be sued. As other courts have recognized, Wisconsin municipalities may be sued, Wis. Stat. § 62.25, but individual agencies and departments may not, including police departments. Grow v. City of Milwaukee, 84 F. Supp. 2d 990, 995-96 (E.D. Wis. 2000), criticized on other grounds, Driebel v. City of Milwaukee, 298 F.3d 622 (7th Cir. 2002); Buchanan v. City of Kenosha, 57 F. Supp. 2d 675, 678 (E.D. Wis. 1999). Generally, litigants seeking redress for wrongs committed by the police must sue either the officers who violated their rights or the municipality (usually a city or county) that has authority over the police department.

Even if petitioner had named as respondent the municipality in which the police department was located, only one of his claims relates directly to the police department and that is his claim that the officers violated his Fifth Amendment right against self-

incrimination by failing to give him Miranda warnings before obtaining his confession. Under § 1983, a municipality may not be held liable simply because it employs an individual who may have violated the law; rather, a city is liable only if it had a policy or custom that caused the constitutional violation. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978). Petitioner has not suggested that it was the custom or official policy of the police department not to give Miranda warnings to suspects they questioned. Indeed, it would defy all common sense to invent such a factual scenario and read it into petitioner's complaint. Any police department enforcing a policy of ignoring Miranda's dictates would be rendered effectively impotent. Rather, petitioner's claim is that particular officers failed to give him the warnings to which he was constitutionally entitled. Although petitioner might have a claim against the officers who questioned him wrongfully, he has not stated a claim against the police department as a whole.

Because none of the respondents petitioner has named are proper defendants to a § 1983 action, his motion to proceed in forma pauperis will be denied and his complaint dismissed.

One other matter requires attention. Even if petitioner had named a proper respondent, he cannot raise in the context of a § 1983 action any claim requiring a determination whether his current custody is illegal. The Supreme Court has held on multiple occasions that when a person can obtain relief for a violation of his rights through

a petition for a writ of habeas corpus, he may not bring a claim for money damages in a civil action until he has prevailed on his habeas claim. Preiser v. Rodriguez, 411 U.S. 475 (1973). Even when a person seeks only damages and not release, habeas corpus remains the sole federal remedy when a ruling in the petitioner's favor would call into question the validity of his confinement. Heck v. Humphrey, 512 U.S. 477 (1994). The determination whether petitioner's conviction in an adult court was obtained in the absence of jurisdiction, whether his lawyer was ineffective are determinations that cannot be made without calling into question the validity of petitioner's current custody. (The Wisconsin Circuit Court Access website reveals that petitioner was sentenced to probation on November 14, 2002, in lieu of a sentence to 15 years' imprisonment. It shows also that petitioner's probation was revoked on January 5, 2007. Thus, it appears that petitioner is currently incarcerated for the conviction he claims was obtained unconstitutionally.) Petitioner must raise these claims in a habeas corpus action in state court and appeal any adverse rulings to the state supreme court before he can raise them in a habeas corpus action in this court.

ORDER

IT IS ORDERED that

1. Petitioner Pierre Husband's request for leave to proceed in forma pauperis is DENIED.

2. The unpaid balance of petitioner's filing fee is $349.66; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

3. Because petitioner's potential habeas corpus claim is a part of the action and the court did not dismiss it for one of the reasons enumerated in § 1915(g), a strike will not be recorded against petitioner.

Entered this 21st day of May, 2007.

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