

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS W. SHELLEY,

Plaintiff,

v.

MICHAEL J. LECHLEITNER, GARY A. SCHNECK,  
CHAD BILLEB, TROY PAULS, JENNY HOLZ  
and JOHN DOES,

Defendants.  
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ORDER

08-cv-647-bbc

This is a proposed civil action for monetary relief, brought by plaintiff Thomas Shelley under 42 U.S.C. § 1983. Plaintiff's claims arise from his January 11, 2008 arrest and subsequent interrogation. In a December 7, 2010 order, I granted plaintiff leave to proceed on a claim that defendants kept him from receiving a probable cause hearing for more than 48 hours, but stayed service of the complaint to give plaintiff an opportunity to provide more detail about his claims that defendants failed to provide him Miranda warnings, failed to provide him counsel and failed to let him use the telephone to call a lawyer. Now plaintiff has submitted a supplement to his complaint providing further detail. I will address his claims in turn.

A. Failure to Provide Miranda Warnings and Failure to Provide Counsel

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that before police officers may interrogate a suspect that is in custody, they must inform the suspect of his right to remain silent and his right to an attorney. In Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that once a suspect expresses his desire to speak with police in the presence of an attorney, officers may not continue to interrogate the suspect until an attorney is present. In Sornberger v. City of Knoxville, Illinois, 434 F.3d 1006, 1024 (7th Cir. 2006), the court recognized that if a suspect's statement were used against him in a "criminal case," a Miranda violation was a violation of a plaintiff's constitutional rights and therefore actionable under § 1983. However, if the statement is not used against the suspect in a criminal case, there is no violation. Id. at 1024-25. Because the right to counsel announced in Edwards is derived from the holding in Miranda, I must conclude that § 1983 liability attaches for an Edwards violation only if statements are used against the suspect in criminal proceedings.

In his amended complaint, plaintiff alleges that defendant Schneck failed to read him his Miranda rights, and that defendants Pauls and Holz violated Edwards by failing to stop interrogating plaintiff after he asked for an attorney. However, as I noted in the December 7, 2010 order, plaintiff does not allege whether statements he made during his interrogation were used against him in his criminal proceedings. Now in his supplement, plaintiff states

that his statements were not used against him at trial. Therefore I will deny plaintiff leave to proceed on these claims.

B. Sixth Amendment Right to Telephone Counsel

Next, plaintiff alleges that defendant Chad Billeb refused to let plaintiff use the telephone to call an attorney. Restrictions on a detainee's telephone privileges that prevent him from trying to call a lawyer may violate the Sixth Amendment right to counsel. Murphy v. Walker, 51 F.3d 714, 718 (7th Cir. 1995); Tucker v. Randall, 948 F.2d 388, 390-91 (7th Cir. 1991). However, the right to counsel does not attach until “at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” Kirby v. Illinois, 406 U.S. 682, 689 (1972); Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194, 199 (7th Cir. 1985) (Sixth Amendment right did not attach until plaintiff was formally charged.).

In his amended complaint, plaintiff states that he was arrested on January 11, 2008 and then not allowed to call a lawyer that same day. He did not explain how long he was prohibited from calling a lawyer or whether he had been formally charged at that time. Now in his supplement, he states that he was denied use of the phone from January 11, 2008 to January 13, 2008, and that the original scheduled date for his initial appearance was January 13, 2010, implying that he had been formally charged by that point. Construing plaintiff's

allegations liberally, I conclude that plaintiff states a claim for a Sixth Amendment violation. However, going forward, plaintiff will have to establish that adversary criminal proceedings had begun before he was allowed to call a lawyer.

## ORDER

IT IS ORDERED that

1. Plaintiff Thomas Shelley is GRANTED leave to proceed on his claim that defendants Gary Schneck, Michael Lechleitner, Chad Billib, Troy Pauls, Jenny Holz and John Does kept him from receiving a probable cause hearing for over 48 hours.

2. Plaintiff Thomas Shelley is GRANTED leave to proceed on his claim that defendant Chad Billeb violated his Sixth Amendment right to counsel by barring him from calling a lawyer.

3. Plaintiff Thomas Shelley is DENIED leave to proceed on his Miranda claim against defendant Schneck and his Edwards claims against defendants Pauls and Holz.

4. Plaintiff is responsible for serving his amended complaint and supplement, dkt. ##20, 22, as well as the December 7, 2010 screening order, dkt. #21, and this screening order upon defendants. A memorandum describing the procedure to be followed in serving a complaint on an individual in a federal lawsuit is attached to this order, along with copies of plaintiff's amended complaint, supplement, December 7, 2010 order, this order and blank

notice and waiver of service of summons forms. As soon as plaintiff receives signed waivers from defendants, he should file a copy of each with the court in compliance with Fed. R. Civ. P. 4(d)(4).

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

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

Entered this 31st day of January, 2011.

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