

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

JERED EDWARD FRANKE,

Petitioner,

v.

ALLISON K TYDRICH-FRANKE;
WM. ANDREW SHARP, District Attorney;
EDWARD TYDRICH;
DIANE TYDRICH and
Corporation Counsel of Richland County Attorney,
BEN SOUTHWICK,

Respondents.

ORDER

09-cv-102-slc¹

In an order dated March 3, 2009, this court stayed a decision on petitioner's request for leave to proceed without prepayment of fees and costs and asked him to file a supplemental statement in which he was to advise the court whether he owns a home and

¹While this court has a judicial vacancy, it is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. However, the magistrate judge cannot decide dispositive issues in an action unless the parties give their consent for the magistrate judge to preside over all aspects of their case. At this early date, consents to the magistrate judge's jurisdiction have not been filed by all the parties to this action. Therefore, for the purpose of issuing this order, I am assuming jurisdiction over the case.

the amount of equity he has in the property. Petitioner has submitted a response to the March 3 order, in which he says that he no longer has an interest in the property because his divorce is final. With this additional information, I am satisfied that petitioner is financially eligible to proceed in forma pauperis.

The next step is determining whether petitioner's proposed action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a respondent who is immune from such relief. 28 U.S.C. § 1915(e)(2). 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).

Petitioner seems to be contending that he was wrongfully prosecuted for domestic violence and asking this court to review the lower court decision. As an initial matter, I note that petitioner does not allege any actions in this complaint by respondents Southwick, Diane Tydich or Edward Tydich. Further, he does not name the officers who he alleges investigated the alleged bomb incident. Having reviewed petitioner's complaint, I conclude that he may not proceed on his claims against any respondent.

ALLEGATIONS OF FACT

Petitioner Jered E. Franke is an adult resident of Hillsboro, Wisconsin. Respondents Allison K. Tydrich-Franke, Edward Tydrich and Diane Tydrich are residents of Wisconsin.

Respondent Andrew Sharp is employed as District Attorney for Richland Center, Wisconsin.

Respondent Ben Southwick is employed as Richland County Center Corporation Counsel.

Petitioner alleges that on September 29, 2005, his wife called the police to make an accusation of domestic violence against him. Petitioner was arrested around 10:00 a.m. Later that day, his wife called the police and made a statement that plaintiff had made a home explosive device prior to 10:00 a.m. that day. However, petitioner's wife testified later under oath that the item in question had been in the same cupboard for years. Officers did not follow standard protocol when dealing with the alleged bomb and were selective on gathering information.

Respondent William Sharp used the statements of petitioner's wife to keep petitioner confined on the domestic violent charges and to coerce a guilty plea from him.

DISCUSSION

To state a claim under 42 U.S.C. § 1983, petitioner must allege that he has been deprived a right secured by the Constitution or laws of the United States and that the deprivation was committed by a person acting under color of state law. Donald v. Polk County, 836 F. 2nd 376, 379 (7th Cir. 1988). Petitioner has not alleged that his wife violated his constitutional rights while acting under color of state law.

However, I can infer that petitioner is alleging that respondent Sharp was acting

under color of state law when he allegedly violated petitioner's constitutional rights. I note that defendant Sharp is a prosecutor. In Buckley v. Fitzsimmons, 509 U.S. 259 (1993), and Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court held that prosecutors are entitled to absolute immunity when they act as advocates for the state in preparing for and initiating a prosecution. (They are protected only by qualified immunity when engaged in investigatory conduct such as evidence gathering). Buckley, 509 U.S. at 272-73; see also Newsome v. McCabe, 256 F.3d 747, 749 (7th Cir. 2001) (absolute immunity forecloses action against prosecutor in case in which prosecutor declined to put plaintiff on trial a second time after court vacated his conviction). Petitioner alleges that respondent Sharp used the statements of petitioner's wife to prosecute him for domestic violence charges. Because that allegation concerns the prosecution of petitioner, respondent Sharp is entitled to absolute immunity in this case.

It may be that petitioner is attempting to state a claim for false arrest. However, he has not named the individuals who arrested him.

ORDER

IT IS ORDERED that petitioner Jered Franke's request for leave to proceed in forma pauperis is DENIED and this case is DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction. The clerk of court is directed to close this file.

Entered this 5th day of April, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge