

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

KELLEY HOWE,

Plaintiff,

v.

CITY OF MADISON, WISCONSIN
and NOBLE WRAY,

Defendants.

ORDER

11-cv-179-bbc

In this civil action for injunctive and monetary relief, plaintiff Kelley Howe contends that defendants City of Madison and Noble Wray violated his constitutional rights when they stopped him, arrested him, searched his apartment and confiscated his gun. Plaintiff is proceeding in forma pauperis and has made an initial partial payment. On April 5, 2011, I screened plaintiff's complaint under 28 U.S.C. § 1915(e)(2)(B) and concluded that plaintiff had failed to state a claim upon which relief may be granted. In particular, plaintiff had alleged in his complaint that his rights under the Second Amendment were violated when Madison police arrested him and confiscated his rifle. I explained that police officers can confiscate guns in the context of a lawful stop or arrest in order to protect themselves and

others and that the confiscation was not a violation of plaintiff's Second Amendment rights.

Now before the court is plaintiff's motion for reconsideration, dkt. #6. In the motion, he says that his initial complaint did not explain the facts underlying his claim adequately and he provides several pages of facts that change substantially the nature of his claim. Thus, I am considering plaintiff's motion for reconsideration as a motion for leave to file a supplement to his original complaint and to reopen the case. After reviewing the allegations in the supplement, I conclude that plaintiff may proceed on claims that defendants City of Madison and Noble Wray violated his rights under the Fourth Amendment by subjecting him to an unlawful stop, arrest and search. However, plaintiff may not proceed on any claims that his rights under the Second Amendment have been violated.

ALLEGATIONS OF FACT

On September 10, 2010 at approximately 10:00 a.m., plaintiff received a phone call from his brother, Regan Howe. Regan told plaintiff that the Secret Service was in his shop and that they believed plaintiff wanted to assassinate President Obama, who would be in Madison that afternoon. Plaintiff had no idea why the Secret Service thought he wanted to assassinate the president and told his brother that the idea was "preposterous and pure fantasy."

Thirty minutes later, a man claiming to work for the Secret Service in the Chicago

office called plaintiff. The man refused to tell plaintiff his name. He accused plaintiff of wanting to kill the President. Plaintiff told the man that was a ludicrous idea.

Several hours later, plaintiff went for a bike ride and was stopped by a Madison police officer. The officer asked plaintiff to confirm that he was Kelley Howe and then told plaintiff that he had been briefed about him that morning. The officer did not accuse plaintiff of anything, but “detained” plaintiff for about an hour until the Secret Service and other law enforcement officers arrived. During the detention, dozens of law enforcement officers approached plaintiff. Plaintiff was not allowed to leave. (Plaintiff does not explain what happened after the Secret Service and other law enforcement officers arrived, such as whether they asked him questions or searched him. He states only that he was eventually allowed to go home.)

After plaintiff was home, he decided to report the incident to the Madison police department. He called the department’s non-emergency number and the dispatcher told plaintiff that an officer would come visit him. Plaintiff said that was not necessary, but the dispatcher insisted. Plaintiff waited for the officer outside the front entrance of his apartment building. Sometime later, two officers arrived, handcuffed plaintiff and put him in a squad car. The officers did not accuse plaintiff of any wrongdoing and “made it obvious” that they were acting under directions to search plaintiff’s apartment. After plaintiff had been waiting for about an hour, one of the officers escorted plaintiff back into

his apartment and asked him where his rifle was. After plaintiff told them the combination and location of his gun safe, the officers took plaintiff's rifle and ammunition and left. The next day, two Madison police department officers returned plaintiff's gun.

Plaintiff does not know why the Madison police department or anyone else would suspect him of wanting to kill the president.

DISCUSSION

Plaintiff's supplemental allegations do not implicate his right to "keep and bear arms" under the Second Amendment of the United States Constitution. Although plaintiff was deprived of his gun by the police for a brief period of time, the fact that the police recovered a gun after arresting him and searching his apartment, rather than confiscating another type of property, does not bring this claim under the Second Amendment. However, plaintiff's allegations do suggest that officers from the Madison police department subjected him to an unlawful stop, arrest and search in violation of his rights under the Fourth Amendment.

A. The Stop

The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. An officer executes a Fourth Amendment

seizure when “by means of physical force or show of authority [the officer] . . . in some way restrain[s] the liberty of a citizen.” Shell v. United States, 448 F.3d 951, 955 (7th Cir. 2006) (internal quotations omitted) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)). The test for assessing whether a “seizure” has occurred is whether “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (internal quotations and citations omitted). In his supplement allegations, plaintiff alleges that he was riding his bike when a police officer stopped him, “detained” him and would not allow him to leave. A reasonable person in plaintiff’s position would not believe he was free to leave. Thus, plaintiff’s allegations support an inference that a Madison police officer engaged in a Fourth Amendment seizure of plaintiff.

Plaintiff’s allegations also support an inference that the seizure was unlawful. A law enforcement officer can execute “an investigatory stop when the officer has reasonable suspicion that a crime may be afoot.” United States v. Hampton, 585 F.3d 1033, 1038 (7th Cir. 2009). To conduct an investigatory stop, an officer must be “aware of specific and articulable facts giving rise to reasonable suspicion.” United States v. Tilmon, 19 F.3d 1221, 1224 (7th Cir. 1994). Plaintiff alleges that he does not know why he was stopped and there was no legitimate reason for the police to suspect him of committing a crime. Accordingly, plaintiff may proceed on a claim that he was subjected to an unlawful seizure when he was

stopped and detained by a Madison police officer for no apparent reason.

B. The Arrest and Search

Plaintiff has also alleged facts suggesting that he was arrested without probable cause and that his apartment was searched without probable cause. Under the Fourth Amendment, police must have probable cause to believe that the individual committed a crime before the police can arrest the individual. Ray v. City of Chicago, 629 F.3d 660, 663 (7th Cir. 2011). Also, law enforcement officials must have probable cause to believe that “contraband or evidence of a crime will be found” in a particular place before they may search the place. United States v. Aljabari, 626 F.3d 940, 944 (7th Cir. 2010).

Plaintiff alleges that two Madison police officers arrived at his home, arrested and handcuffed him, placed him in a squad car and then proceeded to search his apartment without permission. Plaintiff states that there was no reason for the police to arrest him or search his apartment. If plaintiff’s allegations are true, they support a claim that Madison police violated his rights under the Fourth Amendment. Therefore, plaintiff may proceed on these claims.

C. Proper Defendants

Plaintiff has named the City of Madison and Noble Wray as defendants. (Defendant Noble Wray is the chief of police and is presumably being sued in his official capacity.) Plaintiff has not named the individual police officers who were involved in the incidents and he does not suggest that he wishes to sue these individual officers. In fact, plaintiff says that the officers were not acting on their own accord but under “directions” when they stopped him, arrested him and searched his apartment. Because plaintiff suggests that the officers were acting under the direction of the Madison police department and by implication, Noble Wray, I will not dismiss either defendant at this time. However, as the facts develop, it may be that plaintiff has not named the proper defendants. If it turns out that the individual officers were not acting under the direction of Noble Wray or in accordance with any policy or practice of the City of Madison or the Madison police department, plaintiff’s claims may be dismissed.

ORDER

IT IS ORDERED that

1. Plaintiff Kelley Howe’s motion for reconsideration, to reopen this case and to supplement his complaint, dkt. #6, is GRANTED.
2. Plaintiff is GRANTED leave to proceed on his claims that defendants City of Madison and Noble Wray violated his rights under the Fourth Amendment by subjecting

him to an unlawful stop, arrest and search.

3. Plaintiff is DENIED leave to proceed on his claim that defendants violated his rights under the Second Amendment.

4. 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 learns the name of the lawyer that will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

5. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. I am sending copies of plaintiff's complaint, dkt. #1, his supplement, dkt. #6, the April 5, 2011 order, dkt. #4, and this order to the United States Marshal for service on defendants.

Entered this 26th day of April, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge