

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

RICHARD HOEFT and
JOSEPH HOEFT,

Plaintiffs,

OPINION AND ORDER

v.

11-cv-390-wmc

MATT SCHERREL and
DAVE SCHULTZ,

Defendants.

In this proposed civil action for monetary relief, plaintiffs Richard and Joseph Hoeft contend that defendants Matt Scherrel and Dave Schultz searched their vehicles on three different occasions and used excessive force against Richard Hoeft in violation of their Fourth Amendment rights.¹ Plaintiffs ask for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavits they have provided, the court concludes they may proceed without any prepayment of fees or costs.

In addressing any pro se litigant's complaint, however, the court has an additional obligation to read the allegations of the complaint generously to determine whether plaintiffs' proposed action (1) is frivolous or malicious, (2) fails to state a claim on which relief may be granted or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After

¹ Plaintiffs are suing defendant Scherrel, a United States Forest Service employee, under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) and defendant Schultz, a state park ranger, under 42 U.S.C. § 1983. A *Bivens* action is analogous to a civil rights action under § 1983; the only difference being that § 1983 applies to constitutional violations by state rather than federal officials. See *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66 (2001); *Izen v. Catalina*, 382 F.3d 566, 570 n.3 (5th Cir. 2004).

reviewing plaintiffs' complaint, the court concludes that both may proceed on claims that defendants violated their Fourth Amendment rights by conducting unreasonable searches of their vehicles, but that Richard Hoeft may not proceed on his claim that defendants used excessive force against him.

ALLEGATIONS OF FACT

In their complaint plaintiffs allege, and the court assumes for purposes of this screening order, the following facts:

- Plaintiffs Richard Hoeft and Joseph Hoeft are adult residents of Park Falls, Wisconsin. Defendant Matt Scherrel is employed by the United States Forest Service in Park Falls, Wisconsin. Defendant Dave Schultz is a park ranger at the Flambeau River State Forest in Winter, Wisconsin.
- In October or November 2010, Richard Hoeft was approached by Scherrel, who was acting in his law enforcement capacity. Scherrel looked at Richard's firewood permit, leaving after the two had a lengthy discussion. As Richard started to walk to a nearby shop, he looked back and saw Scherrel inside his truck. Richard yelled "hey, get out of my truck!" After Scherrel looked up, he jumped into his own truck and drove away.
- In February or March 2011, Scherrel and another law enforcement officer stopped Richard and Joseph Hoeft in the parking lot of the Dollar Store in Park Falls. Following another lengthy discussion, Scherrel opened the door of Richard's truck and began to search it. After Richard yelled to get out of his truck, Scherrel went over to Joseph's truck. He then opened the passenger door and began "ripping stuff apart." When both Richard and Joseph yelled at Scherrel, he went back to his own truck and drove away.
- While driving Richard's truck on May 29, 2011, Joseph Hoeft was stopped by Trooper Shilts and Scherrel in eastern Sawyer County. Richard, who was following Joseph in another vehicle, also pulled over. Soon after, Park Ranger Schultz arrived. After harassing Richard and Joseph for "two to three hours," Scherrel and Schultz allegedly searched the truck that Joseph was driving. Scherrel was also taking

pictures. Richard told them to get out of the truck, at one point screaming at Scherrel and Schultz that “You can’t be in their, I’ll call the law.”

In response, Scherrel and Schultz allegedly both laughed and Scherrel said “we are the law.” Richard met Scherrel and Schultz at the rear of the truck, and Scherrel allegedly said “what are you going to do about it anyway?” and shoved Richard, which caused him to fall and bruise his leg. As Richard was getting up, Schultz said “you keep it up and you’ll go to Sawyer County Jail.” Schultz had his hand on his gun. At that time, Trooper Shilts walked out from behind his SUV and asked Scherrel if he wanted to call Richard’s probation officer. Scherrel said yes. While they were talking, Richard and Joseph left.

OPINION

I. Searches

Plaintiffs Richard and Joseph Hoeft claim that defendants Scherrel and Schultz violated their Fourth Amendment right by searching their trucks without consent. As applied to the states through the Fourteenth Amendment, the Fourth Amendment protects individuals against unreasonable searches and seizures of their persons, homes and effects by state actors absent a warrant supported by probable cause. U.S. Const. Amend. IV. To state a claim for violation of their Fourth Amendment right to protection from unreasonable searches, plaintiffs must allege facts from which it can be inferred that defendants’ conduct constituted a “search” within the meaning of the Fourth Amendment and that the search was unreasonable. *Christensen v. County of Boone*, 483 F.3d 454, 459 (7th Cir. 2007). A search takes place when the state intrudes upon an individual’s legitimate interest in privacy. *Id.* (citations omitted).

“Reasonableness” is determined by balancing the intrusiveness of the search on the individual against the legitimate interest of the government in conducting the search.

Delaware v. Prouse, 440 U.S. 648, 654 (1979). The Fourth Amendment creates a presumption of unreasonableness as to any search not made pursuant to a warrant. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

Here, the Hoefts allege that defendants searched their trucks on three different occasions without their permission, probable cause or a warrant. At this stage in the proceedings, the court must accept plaintiffs' allegations, which are enough to support an inference that the searches of their private property were unreasonable under the Fourth Amendment. Plaintiffs, therefore, will be allowed to proceed on these claims.

II. Excessive Force

Richard Hoeft also claims that Scherrel used excessive force against him during a traffic stop of his brother, Joseph Hoeft, on May 29, 2011. Claims that law enforcement officers used excessive force in the course of an arrest or other seizure are analyzed under the Fourth Amendment's protection against unreasonable seizures. *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Graham v. Connor*, 490 U.S. 386, 395 (1989). The analysis involves a two-step inquiry: (1) whether a seizure actually occurred; and (2) whether it was reasonable under the totality of circumstances. *Carlson v. Bukovic*, 621 F.3d 610, 618 (7th Cir. 2010); *Abdullahi v. City of Madison*, 423 F.3d 763 (7th Cir. 2005).

With respect to the first inquiry, the traditional approach is whether the person believed he was "free to leave." *McCoy v. Harrison*, 341 F.3d 600, 605-06 (7th Cir. 2003). This standard is an objective one and "is made on the basis of the 'totality of the circumstances' surrounding the encounter." *Carlson*, 621 F.3d at 618 (internal citations

omitted). “Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” *U.S. v. Mendenhall*, 446 U.S. 544, 554–55 (1980). The Court of Appeals for the Seventh Circuit has noted some other factors that might influence a reasonable individual to believe that he was not free to leave, including whether the encounter occurred in a public or private place, whether the suspect was informed that he was free to leave and whether the suspect eventually departed the area without hindrance. *Leaf v. Shelnutt*, 400 F.3d 1070, 1089 (7th Cir. 2005) (citing *United States v. Scheets*, 188 F.3d 829, 836–37 (7th Cir. 1999)).

Here, Richard Hoeft alleges that he voluntarily pulled his truck over after law enforcement officers stopped Joseph’s truck. After a lengthy discussion with defendants, Richard also acknowledges leaving of his own accord. Although Richard alleges that defendant Schultz demonstrated a show of authority by shoving Richard, threatening to take him to jail and placing a hand on his gun, Richard never claims to have submitted to that authority, nor does he claim that his freedom to leave was ever restrained. Instead, Richard got up and left without anyone preventing him from doing so, much less arresting him. *See Mendenhall*, 544 U.S. at 544 (“As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective

justification.”); *Acevedo v. Canterbury*, 457 F.3d 721, 725 (7th Cir. 2006) (“Certain types of non-restraining physical contact, without a concomitant showing of authority, are just too minor to constitute a ‘seizure’ for Fourth Amendment purposes without doing violence to that word.”); *Leaf*, 400 F.3d at 1090–91 (determining that no seizure occurred where officers pointed guns and shined lights towards a sleeping man, even if they nudged him). Because Richard was never seized, he cannot state a Fourth Amendment excessive force claim.

ORDER

IT IS ORDERED that:

- (1) Plaintiffs Richard and Joseph Hoeft’s request for leave to proceed on claims that defendants Matt Scherrel and Dave Schultz violated their rights under the Fourth Amendment when they searched their trucks in 2010 and 2011 is GRANTED.
- (2) Plaintiff Richard Hoeft’s request to proceed on a Fourth Amendment excessive force claim against defendants is DENIED.
- (3) For the time being, plaintiffs must send defendants a copy of every paper or document they file with the court. Once plaintiffs have learned what lawyer will be representing defendants, they should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiffs unless plaintiffs show on the court’s copy that they have sent a copy to defendants or to defendants’ attorney.
- (4) Plaintiffs should keep a copy of all documents for their own files. If plaintiffs do not have access to a photocopy machine, they may send out identical handwritten or typed copies of their documents.
- (5) A copy of plaintiffs’ complaint, this order, summons for defendants and United States Marshal Service forms will be forwarded to the United States Marshal for service on the defendants.

Entered this 6th day of November, 2012.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge