IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DERRICK LAMONT MOORE,

Plaintiff,

v.

ROBERT WEIER, ALAN SCHRANK and
MINERAL POINT POLICE DEPARTMENT,

Defendants.

OPINION AND ORDER

11-cv-800-slc[1]

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In this proposed civil action for monetary and injunctive relief under 42 U.S.C. § 1983, plaintiff Derrick Lamont Moore, a prisoner at the Dane County jail, contends that defendants violated his constitutional rights in conjunction with his arrest for domestic battery and his subsequent parole revocation hearing. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a

[1] For purposes of issuing this order, I am assuming jurisdiction over this case.

defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. 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). After reviewing the complaint, I conclude that the allegations in plaintiff's complaint either fail to state a claim or are barred by the doctrines of Heck v. Humphrey, 512 U.S. 477 (1994), and Younger v. Harris, 401 U.S. 37 (1971). Therefore, I will deny his motion for leave to proceed and dismiss his complaint without prejudice.

Plaintiff has alleged the following facts, which I have supplemented by reference to the public records where necessary.

ALLEGATIONS OF FACT

Plaintiff Derrick Lamont Moore is a prisoner at the Dane County jail, located in Madison, Wisconsin. Defendant Robert Weier is the chief of police for the Mineral Point Police Department, and defendant Alan Schrank is a police officer for the Mineral Point Police Department.

After being released from prison on parole on May 31, 2011, plaintiff went to live with Kandace McKenzie. On June 14, 2011, plaintiff and McKenzie had an argument and physical altercation. Plaintiff was verbally abusive and she responded by attacking him, tearing off his shirt and breaking his cell phone. McKenzie's son called 911, and defendants

Schrank and Weier arrived to investigate. McKenzie had a scratch on her neck and plaintiff was bleeding from a scratch above his lip. The police did not find any bruises on McKenzie, so they decided to return later to photograph any bruises that materialized (the next day she had several bruises, which plaintiff asserts she inflicted on herself). Defendants believed McKenzie's story that plaintiff attacked her and arrested plaintiff for battery.

According to plaintiff, defendants disregarded the evidence that McKenzie attacked him, including his bruises and cuts, his torn shirt and the inconsistencies in her story. McKenzie made the fight into a racial issue by telling the officers that plaintiff attacked her after she called him a nigger. Defendant Weier wrote in the police report that plaintiff told him "I don't think you need to know all of my (Biz)." Plaintiff never used the word "biz," which is slang for business. According to plaintiff, defendant Weier assumed plaintiff used this word because of defendant's racial bias. Defendants also reported that McKenzie's son said that he saw plaintiff throw McKenzie against the wall, when in fact her son was outside of the house calling the police during the altercation and the defendants learned this version of the events from McKenzie.

Plaintiff was arraigned on September 8, 2011, at which time he entered a plea of not guilty. The charges against plaintiff were later amended to counts of disorderly conduct, domestic abuse and strangulation. On December 6, 2011, a judgment of "Guilty Due to No Contest Plea" was entered on two counts of disorderly conduct, a class B misdemeanor, and

the strangulation charge was dismissed on the prosecutor's motion. Wisconsin v. Moore, Iowa Co. Case No. 2011CF00085.

On November 30, 2011, in the midst of his ongoing criminal case, plaintiff filed his proposed complaint in this court, dkt. #11, seeking monetary damages and an "immediate release from custody."

Plaintiff's parole revocation hearing was held on December 26, 2011. The administrative law judge considered defendants' police report, testimony by McKenzie, photographs taken the day after the incident showing her bruises and the tape of her son's 911 call. The administrative law judge believed McKenzie's testimony and revoked plaintiff's parole. Plaintiff challenges the sufficiency of the evidence presented at his revocation hearing, asserting that McKenzie lied on the stand; McKenzie fabricated her injuries; defendants' police report adopted McKenzie's false statements without investigating; defendants ignored evidence; and the administrative law judge denied plaintiff's request to call McKenzie's son to testify.

Plaintiff has not filed an appeal of his revocation or his criminal conviction in the state courts. He moved to withdraw his plea on January 2, 2012. The docket sheet contains an entry stating "amended judgment of conviction" on April 4, 2012, but does not indicate how the judgment was amended.

OPINION

Although it is difficult to identify any constitutional violations in plaintiff's complaint, his general allegations are that (1) his parole was revoked with insufficient evidence; (2) defendants lied in their police report by accepting McKenzie's false statements without investigation; and (3) defendants' investigation and criminal prosecution were motivated by racial bias.

Plaintiff's attempts to challenge his parole revocation and his criminal prosecution are barred by either Heck v. Humphrey, 512 U.S. 477 (1994), or Younger v. Harris, 401 U.S. 37 (1971). In Heck, the Supreme Court held that when a prisoner's § 1983 claim would have the effect of challenging the legality of his conviction or confinement, the prisoner must establish that the conviction has been found invalid through a successful appeal in the state courts or through a writ of habeas corpus by a federal court under 28 U.S.C. § 2254. Heck, 512 U.S. at 486-87. If "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction" and the plaintiff has not already established that the conviction was invalid, then his claim under § 1983 is barred. Id. at 487. The rule in Heck applies to parole revocation proceedings as well as convictions. Spencer v. Kemna, 523 U.S. 1, 17-18 (1998); Williams v. Wisconsin, 336 F.3d 576, 579-80 (7th Cir. 2003).

Plaintiff's parole revocation hearing is complete. Plaintiff's accusations that defendants introduced false testimony through their police reports and that he was denied

an opportunity to call McKenzie's son as a witnesses on his behalf are claims that challenge the validity of his parole revocation and his conviction. These claims are barred under Heck. He may not seek relief under § 1983 for the revocation order until it is overturned through a direct appeal or a writ of habeas corpus.

It is not clear from the complaint or the public record whether plaintiff's criminal prosecution is ongoing. Plaintiff entered a plea of no contest and a judgment of guilty was entered on December 6, 2011, but the docket sheet also indicates the judgment was amended on April 4, 2012. If the judgment entered December 6, 2011, is still final, then plaintiff's challenge to the criminal conviction is also barred by Heck. If his criminal conviction is not final, then this court must abstain from enjoining his ongoing criminal prosecution under Younger v. Harris, 401 U.S. 37 (1971). Federal district courts are generally required to abstain from issuing injunctions against ongoing state proceedings, particularly with respect to criminal cases. Id. See also 28 U.S.C. § 2283. If plaintiff believes that his constitutional rights are being violated in the context of those proceedings, then his proper course of action is to raise these claims before the state court judge or on appeal. General Auto Service Station LLC v. City of Chicago, 319 F.3d 902, 904 (7th Cir. 2003). Plaintiff may not do an end run around the state judicial process by filing an action in federal court under § 1983.

However, dismissal of plaintiff's claims under Heck and Younger is without prejudice,

which means that petitioner may refile his suit if he is able to establish the invalidity of the revocation decision or of his conviction through appeal or writ of habeas corpus.

The only remaining question is whether plaintiff has a cause of action that would not be barred by Heck against defendants for instigating a criminal investigation without probable cause because of racial bias. Plaintiff's allegations could be interpreted as asserting a claim for false arrest under the Fourth Amendment, for selective prosecution under the equal protection clause or for malicious prosecution.

To state a claim for false arrest in violation of the Fourth Amendment, plaintiff must allege that the arresting officer lacked probable cause to make the arrest. Mucha v. Village of Oak Brook, 650 F.3d 1053, 1056 (7th Cir. 2011). An officer has probable cause if he has reason to believe, in light of the facts known to him at the time, that there was a substantial chance that the suspect had committed a crime. Wheeler v. Lawson, 539 F.3d 629, 634 (7th Cir.2008); Purtell v. Mason, 527 F.3d 615, 626 (7th Cir. 2008). The court views the facts "as they would have appeared to a reasonable person in the position of the arresting officer." Mustafa v. City of Chicago, 442 F.3d 544, 547 (7th Cir. 2006). False arrest claims are not barred by Heck, because defendants may pursue damages only for injuries suffered from the time of arrest until arraignment and, thus, false arrest claim does not challenge the validity of the conviction. Wallace v. City of Chicago, 440 F.3d 421, 427 (7th Cir. 2006).

Assuming that all of plaintiff's allegations are true, a reasonable officer in defendants'

shoes would have had reason to believe that plaintiff had committed a battery. Defendants were not required to believe plaintiff. Perhaps McKenzie was not telling the truth, but defendants were entitled to make reasonable judgments about her veracity. McKenzie had a scratch on her neck and her son had called 911. These were sufficient reasons for defendants to believe that there was a substantial chance he had committed a battery. Accordingly, plaintiff's allegations fail to state a claim for false arrest.

Next, plaintiff might be alleging that defendants caused him to be prosecuted because of his race. A plaintiff may have a § 1983 cause of action for "selective prosecution" in violation of the equal protection clause if he was singled out for prosecution where others similarly situated were not and the decision to prosecute was motivated by an impermissible classification, such as race or religion. United States v. Armstrong, 517 U.S. 456, 464-66 (1996); United States v. Darif, 446 F.3d 701, 708 (7th Cir. 2006); Kramer v. Village of North Fond du Lac, 384 F.3d 856, 863 (7th Cir. 2004) (assuming that selective prosecution may give rise to § 1983 cause of action). However, a claim for selective prosecution would fail under Heck because it challenges the lawfulness of the conviction.

Last, plaintiff's allegations might be interpreted as a claim that defendants caused him to be prosecuted without probable cause. The Court of Appeals for the Seventh Circuit has interpreted the Supreme Court's opinion in Albright v. Oliver, 510 U.S. 266 (1994), to preclude "constitutional torts of malicious prosecution when state courts are open to such

challenges." Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001). Wisconsin recognizes a cause of action for malicious prosecution. Elmer v. Chicago & N.W. Ry. Co., 257 Wis. 228, 231, 43 N.W.2d 244 (1950). Therefore, plaintiff cannot state a federal cause of action for malicious prosecution, and I decline to exercise jurisdiction over his potential state law claim.

ORDER

IT IS ORDERED that plaintiff Derrick Lamont Moore is DENIED leave to proceed on his claims and his complaint is DISMISSED without prejudice. The clerk of court is directed to close this case.

Entered this 4th day of May, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge