IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD LEONARDI,

OPINION AND ORDER

Plaintiff,

12-cv-133-bbc

v.

UNIVERSITY OF WISCONSIN-MILWAUKEE POLICE DEPARTMENT, RANDALL KWASINSKI, CHRISTOPHER SCHUSTER, DETECTIVE BEAUDRY, YOLANDA ROBERTSON and DEPARTMENT OF COMMUNITY CORRECTIONS,

Defendants.

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Pro se plaintiff Richard Leonardi is suing various public officials under 42 U.S.C. § 1983 for events arising out of the search of his home and his subsequent arrest for drug possession. In particular, he alleges that defendant Yolanda Robertson (his probation and parole agent) and defendants Randall Kwasinski, Detective Beaudry and Christopher Schuster (officers for defendant University of Wisconsin-Milwaukee Police Department) searched his home without a warrant, in violation of the Fourth Amendment and state administrative procedures. In addition, he alleges that defendant Robertson planted heroin in his bedroom.

Plaintiff has made an initial partial payment in accordance with 28 U.S.C. § 1915(b)(1). Because plaintiff is a prisoner I must screen his complaint to determine whether it states a claim upon which relief may be granted. 28 U.S.C. §§ 1915(e)(2) and 1915A.

Having reviewed the complaint, I conclude that plaintiff may proceed on his claim that defendants Robertson, Kwasinski, Schuster and Beaudry searched his home, in violation of the Fourth Amendment. However, I am dismissing plaintiff's claim that defendant Robertson planted drugs in his home and all of his claims against University of Wisconsin-Milwaukee Police Department and the Department of Community Corrections because these claims cannot be brought under § 1983.

OPINION

A. Screening under § 1915

A threshold question for both of plaintiff's claims is whether they may be brought in a lawsuit under 42 U.S.C. § 1983. If a plaintiff is challenging the legality of his confinement under federal law, he first must raise that claim in a petition for a writ of habeas corpus, after exhausting his remedies in state court. Preiser v. Rodriguez, 411 U.S. 475 (1973). Even when a person seeks only damages and not release, habeas corpus remains the sole federal remedy when a ruling in the plaintiff's favor would "necessarily imply" that he is incarcerated in violation of federal law. Heck v. Humphrey, 512 U.S. 477 (1994).

In this case, plaintiff alleges that his extended supervision has been revoked for drug possession. (He says he was criminally charged as well, but the case was later dismissed). If his allegation is true that defendant Robertson planted drugs in his home, this would mean that his parole was revoked using false evidence and would necessarily imply that the revocation was invalid. E.g., Jackson v. Waterberry, 2010 WL 5559326, *1-2 (E.D. Mich. 2010) ("[R]uling in his favor would imply the invalidity of his parole revocation, because he alleges that his parole was revoked solely due to the admission of the falsified evidence. Therefore, Plaintiff's action is prohibited by the Heck Doctrine."); Johnson v. Harris County Probation Dept., 2009 WL 4801422, *1 (S.D. Tex. 2009) (claim that "defendants conspired to revoke his probation based on false evidence" could not be brought under § 1983); Sumter v. Marion, 1999 WL 767426, *5 (S.D.N.Y. 1999) ("Plaintiff's civil rights complaint cannot be sustained under Heck" because "[a] favorable judgment for plaintiff necessitates the finding that defendants . . . falsely altered [documents] and that defendants Martin and Bernstein had used the false document to deprive the defendant of his liberty."). Accordingly, plaintiff's claim regarding planted evidence must be dismissed.

The same conclusion does not apply to plaintiff's Fourth Amendment claim. Even if I assume that plaintiff's supervision would not have been revoked without the evidence found in plaintiff's home, the exclusionary rule does not apply to revocation proceedings. Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 364 (1998). In other

words, even if defendants violated plaintiff's Fourth Amendment rights when they searched his home, it would have no affect on the validity of the revocation decision. Accordingly, I may consider the merits of plaintiff's Fourth Amendment claim.

Generally, an officer's search of a home without a warrant violates the Fourth Amendment. Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) ("[S]earches and seizures inside a home without a warrant are presumptively unreasonable.") (internal quotations omitted). Throughout his complaint, plaintiff says that defendants violated the "warrant requirement" when they searched his home.

Because plaintiff admits that he was on extended supervision at the time of the search, the failure to obtain a warrant is not a Fourth Amendment violation. "Those under supervised release do not enjoy the absolute liberty to which every citizen is entitled, but only conditional liberty properly dependent on observance of special restrictions." United States v. Hook, 471 F.3d 766, 772 (7th Cir. 2006). For this reason, the Supreme Court has held that officers do not always need a warrant when they search the home of a person on probation. Griffin v. Wisconsin, 483 U.S. 868 (1987). In Griffin, 483 U.S. at 876-77, the Court upheld Wisconsin's standard, which requires an officer to have "reasonable grounds to believe that the quarters or property contain contraband or an offender who is deemed to be in violation of supervision." Wis. Admin. Code § DOC 328.21(3)(a). Thus, so long as officers meet this standard when conducting a search, they do not violate the Fourth

Amendment, even if they do not have a warrant. The Court of Appeals for the Seventh Circuit has applied the holding in Griffin to parolees. United States v. Jones, 152 F.3d 680, 685 (7th Cir. 1998).

To the extent plaintiff believes that defendants violated his rights under the Fourth Amendment by failing to obtain a warrant before the search, Griffin and Jones foreclose that claim. However, if defendants did not have reasonable grounds to believe that plaintiff was violating the terms of his supervision, he might still be able to maintain a Fourth Amendment claim. Because plaintiff does not include any allegations in his complaint as to why defendants decided to search his home, I cannot determine at this stage whether they had "reasonable grounds" to do so. Accordingly, I will allow plaintiff to proceed on this claim against defendants Robertson, Kwasinski, Schuster and Beaudry.

However, plaintiff cannot proceed against defendants University of Wisconsin-Milwaukee Police Department and the Department of Community Corrections. First, state agencies are not "persons" within the meaning of § 1983, so they cannot be sued under that statute. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65-66 (1989). Second, even if the departments could be sued under § 1983, they could not be held liable simply because their employees violated the law. Rather, plaintiff would have to show that the departments had a policy, custom or practice that caused the constitutional violation. McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir. 2011). In this case, plaintiff includes no allegations

in his complaint regarding the departments' involvement in the alleged violations.

In closing, I give plaintiff a few words of caution that he should consider before deciding to pursue further his Fourth Amendment claim against the individual defendants. First, the "reasonable grounds" standard under § DOC 328.21 is not a high one. E.g., State v. Griffin, 131 Wis. 2d 41, 388 N.W.2d 535, 544 (tip from police officer that probationer "had" or "may have had" illegal firearm at his home was sufficient). Thus, if defendants had any particular reason to believe that plaintiff had illegal drugs at his house, this claim likely will fail.

Second, defendants will not be required to meet even the reasonable grounds standard if it turns out that plaintiff signed an agreement as a condition of supervision that allowed defendants to search his home at any time. In that case, the search is lawful unless defendants exceeded the scope of the agreement. United States v. Hagenow, 423 F.3d 638, 643 (7th Cir. 2005) ("[A] blanket waiver of Fourth Amendment rights as a condition of probation [is] enforceable, and . . . the existence of such a waiver alone justifie[s] the search of the probationer's home."). See also United States v. Barnett, 415 F.3d 690 (7th Cir. 2005). Plaintiff does not include any allegations of his conditions of supervision in his complaint, so I cannot determine at this stage whether or to what extent plaintiff has waived his Fourth Amendment rights. However, if plaintiff did sign such an agreement, this is another reason that his claim will be vulnerable to dismissal.

Because plaintiff has alleged enough facts to satisfy federal pleading standards, I am allowing him to proceed on his Fourth Amendment claim. However, it is pointless for plaintiff to proceed if he knows that his claim is doomed to fail once more facts are revealed. Thus, if plaintiff knows that defendants had reasonable grounds to search his home *or* that he waived his Fourth Amendment rights as a condition of supervision, plaintiff should dismiss his complaint voluntarily.

B. Motion for Appointment of Counsel

Accompanying plaintiff's complaint is a motion for appointment of counsel. Before a district court can consider such motions, it must first find that the plaintiff made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers who he asked to represent him in this case and who turned him down. Although plaintiff says he "has made repeated attempts to obtain a lawyer," he did not attach copies of the letters he sent them or their responses, which is what this court requires of most plaintiffs seeking appointment of counsel.

Even if I assume that plaintiff's submissions satisfy Jackson, he has not shown that appointment of counsel is necessary in this case. Ideally, every deserving litigant would be

represented by counsel, but, unfortunately, the pro se litigants who file lawsuits in this district vastly outnumber the lawyers who are willing and able to provide representation. For this reason, appointment of counsel is appropriate only when the plaintiff demonstrates that his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). In this case, it is too early to make that determination.

Thus far, plaintiff has not demonstrated any reason to believe that he cannot represent himself competently in this case. His complaint is relatively clear, well organized and shows his familiarity with the legal concepts that are relevant to his case. Further, plaintiff's claim is a relatively simple one and the law relevant to his claim is well-established. Plaintiff's primary task will be to gather the facts necessary to prove his claim, many of which he should know personally. Plaintiff lists several reasons for his belief that counsel is necessary, such as the limitations imposed by his imprisonment and the existence of disputed facts but these apply to the majority of pro se litigants.

Shortly after defendants file their answer, the court will hold a preliminary pretrial conference at which plaintiff will be provided with information about how to use discovery techniques to gather the evidence he needs to prove his claims as well as copies of this court's procedures for filing or opposing dispositive motions and for calling witnesses. If later developments in the case show that plaintiff is unable to represent himself, he is free to renew

his motion for appointment of counsel at that time.

ORDER

IT IS ORDERED that

1. Plaintiff Richard Leonardi is GRANTED leave to proceed on his claim that defendants Yolanda Robertson, Randall Kwasinski, Christopher Schuster and Detective Beaudry searched his home, in violation of the Fourth Amendment.

2. Plaintiff is DENIED leave to proceed on his claim that defendant Robertson planted evidence in his home and on all claims against defendants University of Wisconsin-Milwaukee Police Department and the Department of Community Corrections. The complaint is DISMISSED as to these departments.

3. 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 who 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.

4. 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 their documents.

5. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

6. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fees have been paid in full.

Entered this 18th day of April, 2012.

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