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.

RANDALL KWASINSKI,
CHRISTOPHER SCHUSTER,
STEVEN BEAUDRY and
YOLANDA ROBERTSON,

Defendants.

- -

In this case brought under 42 U.S.C. § 1983, pro se plaintiff Richard Leonardi contends that defendant Yolanda Robertson (his probation officer) and several law enforcement officers violated his rights under the Fourth Amendment by searching his home without a warrant. Because I conclude that defendants did not violate plaintiff's clearly established constitutional rights, I am granting defendants' motion for summary judgment.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed and material.

UNDISPUTED FACTS

In November 2004, Plaintiff Richard Leonardi began serving a sentence of state probation following convictions for obtaining a controlled substance by fraud, felony bail

jumping and possession of narcotic drugs. On August 12, 2008, defendant Yolanda Robertson began serving as plaintiff's probation officer.

In May 2009, defendant Robertson received phone calls from plaintiff's girlfriend, who told Robertson that plaintiff was using drugs, abusing her, leaving their child unattended, stealing money and threatening to harm them. On May 8, 2009, plaintiff was arrested at the home he shared with his girlfriend "because he was high, drunk and refused to leave." Dfts.' PFOF ¶ 19, dkt. #40. Following that arrest, plaintiff signed an alternative to revocation agreement that included mandatory domestic violence counseling and drug treatment.

In the spring of 2010, plaintiff was enrolled as a student at the University of Wisconsin-Milwaukee and living in university housing. On March 16, 2010, the university police arrested plaintiff for stealing ten to fifteen chemistry books from the university book store and reselling them for cash. Upon his release, plaintiff's probation was not revoked. Instead, he agreed again to an alternative to revocation and rules of community supervision. Paragraph 6 of the rules of community supervision states, "You shall make yourself available for searches or tests ordered by your agent including but not limited to urinalysis, breathalyzer, DNA collection and blood samples or search of residence or any property under your control." Dkt. #44-2 at 3.

Over the next month and a half, plaintiff did not report regularly to defendant Robertson. Around June 3, 2010, Robertson received a phone call from a university police officer, defendant Randall Kawsinski. Kwasinski stated that plaintiff was suspected of

stealing a woman's bag in the university computer lab. A security video showed that plaintiff was in the computer lab just before the theft and that the person who stole the bag was using a computer near the victim. Computer identifier records indicated that plaintiff had been using that computer at the time of the theft.

During the phone call, Robertson told Kwasinski that she was also looking for plaintiff and that she would enter a warrant for plaintiff's arrest for violating the terms of his supervision. Robertson also mentioned that she wanted to visit plaintiff's apartment and that Kwasinski could meet her there.

The same day, plaintiff's apartment manager called Robertson and told her that there were problems at plaintiff's apartment. Robertson learned that plaintiff had allowed another student to move in with him even though the student had been kicked out of school because of illegal drug use. She also spoke to that student's father, who told her that plaintiff was holding his son's belongings and refusing to return them. Robertson indicated she would assist the apartment manager.

After this phone call, defendant Robertson issued an apprehension request for plaintiff's arrest. Robertson affid., dkt. #44, exh.#105, ¶ 32. In her chronological log, Robertson noted that she went to plaintiff's apartment "at the request of the apartment manager to assist the police with gaining entry as well as to conduct a home visit and attempt to help the father of the roommate obtain his son's personal property." Dfts.' PFOF, ¶ 52, dkt. #40.

Defendant Kwasinski, defendants Christopher Schuster and Steven Beaudry (also

university police officers) and a university housing staff member met Robertson outside plaintiff's apartment that same day. Robertson knocked and identified herself. After she knocked again, the police officers heard movement within the apartment and the sound of a toilet flushing. After several minutes, plaintiff opened the door and Robertson entered, followed by the three officers. Kwasinski handcuffed plaintiff and sat him down on a futon in the small living area. Plaintiff's small apartment had an open living area with a kitchen and a futon. The bedroom doors were on opposite sides of the living area. From the futon, plaintiff could have entered his bedroom by turning and taking one step. The police officers stayed with plaintiff and did not search the apartment.

Defendant Robertson saw a bag in plaintiff's bedroom that matched the description of the stolen bag and entered plaintiff's bedroom. In another bag, she saw a needle and a spoon. From her training and experience, she knew a needle and spoon were often used to administer heroin. Robertson also knew plaintiff had a history of heroin use and suspected that he used the needle and spoon to take heroin. She picked up the second bag and handed it to defendant Kwasinski.

Both defendants Kwasinski and Schuster had experience and training in illegal drugs and they suspected the residue on the spoon was an illegal drug. Also, Kwasinski knew what the stolen bag looked like because he had viewed video footage of the theft and spoken to the bag's owner. At that point, the officers placed plaintiff under arrest and Robertson stopped her search.

Defendants Kwasinski and Schuster began a search of plaintiff's bedroom while

Robertson stayed with plaintiff in the living area. Plaintiff's room had burn marks on the floor and on his desk. The trash bin held spent cigarettes and empty corner-cut pieces of plastic baggies. In a jewelry holder on plaintiff's desk, Kwasinski found a small corner-cut baggy that contained a white powdery substance. Kwasinski believed the powdery substance to be heroin or an opium derivative. (Subsequent testing identified the substances found on the spoon and in the baggy as heroin.) Plaintiff's probation was subsequently revoked and he was confined to prison.

OPINION

A. Preliminary Issues

In the order screening plaintiff's complaint under 28 U.S.C. § 1915, I noted that the rule of Heck v. Humphrey, 512 U.S. 477 (1994), and Preiser v. Rodriguez, 411 U.S. 475 (1973), prohibited plaintiff from bringing claims that would necessarily imply that a conviction or a decision to place plaintiff in custody is invalid. Relying on that rule, I dismissed plaintiff's claim that defendants had planted drugs in his home because success on that claim would necessarily imply that the decision to revoke his parole was invalid. E.g., 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.").

I allowed plaintiff to proceed on his Fourth Amendment claim because the exclusionary rule does not apply to revocation proceedings. Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 364 (1998); State v. Wheat, 2002 WI App 153, ¶¶ 26-28, 256 Wis. 2d 270, 647 N.W.2d 441. In other words, even if defendants violated plaintiff's Fourth Amendment rights when they searched his home, it would have no effect on the validity of the revocation decision.

Plaintiff acknowledged in his complaint that he had been "criminally charged with possession of narcotics," but I did not see that as a problem under Heck and Preiser because I understood him to allege that all the criminal charges had been dismissed. Dkt. #1 at ¶ 28. Neither side expressly challenges that view in their summary judgment materials, but plaintiff filed a transcript of a hearing on a motion to suppress in State v. Leonardi, No. 10CF2926 (Wis. Cir. Ct. Jan. 27, 2011), that raises questions about the outcome of the criminal case. Dkt. #55-2. According to the Wisconsin Court System Circuit Court Access website, plaintiff was charged in that case with theft and drug possession. http://wcca.wicourts.gov. Both the transcript and the electronic docket sheet show that the circuit court granted plaintiff's motion to suppress as it related to the heroin, but denied the motion as to the bag, needle and spoon. The prosecutor later dismissed the drug possession charges, but plaintiff pleaded guilty to theft and possession of drug paraphernalia.

The events in the circuit court raise two issues. First, because part of plaintiff's claim is that defendants' seizure of the bag, needle and spoon violated his Fourth Amendment rights, there is a question whether success on his claim in this court would necessarily imply that his convictions for theft and possession of drug paraphernalia are invalid. Second, because the state trial court has ruled on the constitutionality of each of the searches plaintiff is challenging in this case, there is a question whether the doctrine of issue preclusion would bar both sides from challenging the rulings made in the criminal case.

The parties do not explain why they did not discuss these issues in their summary judgment briefs. Plaintiff should have informed the court immediately after screening that the court was wrong in assuming that all the criminal charges had been dismissed. Both issues could have had a significant effect on the summary judgment decision, but I conclude that it is not necessary to ask the parties to discuss the issues now. Ordinarily, the rule from Heck and Preiser is a threshold issue that is decided before the merits, but the Court of Appeals for the Seventh Circuit has held that the "Heck defense is subject to waiver" and that "district courts may bypass the impediment of the Heck doctrine and address the merits of the case." Polzin v. Gage, 636 F.3d 834, 838 (7th Cir. 2011). Similarly, a party may waive issue preclusion by failing to raise it. Klingman v. Levinson, 114 F.3d 620, 627 (7th Cir. 1997). Accordingly, I will set these issues aside and proceed to the merits.

B. Fourth Amendment

Defendants raise several arguments in their summary judgment motion: (1) plaintiff waived his Fourth Amendment rights by agreeing to searches as a condition of his probation; (2) defendants had reasonable grounds for conducting the searches; and (3) plaintiff consented to the searches. In addition, with respect to the search that uncovered the heroin, defendants argue that it was authorized under the Fourth Amendment as a search incident to arrest. Defendants argue that even if the court were to find any of the searches unconstitutional under the Fourth Amendment, that they are entitled to qualified immunity.

In Griffin v. Wisconsin, 483 U.S. 868, 873 (1987), the Supreme Court acknowledged that a "probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" However, the Court rejected the view that a warrant is needed to search a probationer's home. Rather, it upheld the validity of a Wisconsin regulation that permitted "any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are 'reasonable grounds' to believe the presence of contraband." Id. at 870-71 (quoting Wis. Admin. Code HSS §§ 328.21(4), 328.16(1) (1981)). In addition, the Court upheld the determination of the Wisconsin Supreme Court that "a tip from a police detective that [the probationer] 'had' or 'may have had' an illegal weapon at his home constituted the requisite 'reasonable grounds.'" Id. at 875.

In United States v. Knights, 534 U.S. 112, 114 (2001), one of the conditions of the defendant's probation was to "[s]ubmit his . . . person, property, place of residence, vehicle,

personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." The court of appeals concluded that a warrantless search of the probationer's home violated the Fourth Amendment because "the search was for 'investigatory' rather than 'probationary' purposes." Id. at 116.

The Supreme Court declined to consider the purpose of the search, at least in the absence of any limiting language in the conditions of probation. Id. at 122 ("Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose."). In addition, the Court declined to decide whether the probationer's "acceptance of the search condition constituted consent in the . . . sense of a complete waiver of his Fourth Amendment rights." Id. at 118. Instead, the Court considered the waiver as part of the "totality of circumstances" in assessing the reasonableness of the search. Id. The Court held: "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." Id. at 121. In Knights it was undisputed that the officers had reasonable suspicion that the probationer had set fire to a power transformer because the date of the vandalism coincided with the probationer's court date related to stealing services from the power company. In addition, and a sheriff's deputy had observed the probationer with pipes and gasoline and had seen explosive materials outside the probationer's residence.

In United States v. Barnett, 415 F.3d 690 (7th Cir. 2005), the Court of Appeals for the Seventh Circuit answered a question left open in Knights, holding that a probationer's waiver could justify a search, even if the search was not supported by reasonable suspicion. In Barnett, the probationer had agreed to "submit to searches of [his] person, residence, papers, automobile and/or effects at any time such requests are made by the Probation Officer, and consent to the use of anything seized as evidence in Court proceedings." Id. at 691.

In this case plaintiff acknowledges that he agreed to "make [him]self available for searches . . . ordered by your agent including . . . search of residence or any property under your control." However, he argues that the phrase "make yourself available" is not giving consent to conduct the search; it is only an agreement to be present when a search occurs. Although the language in plaintiff's waiver may not be as clear as in Knights and Barnett, plaintiff's interpretation is not a reasonable one. By agreeing to make himself available for the search, he was agreeing to the search itself.

In addition, it is clear that defendants had reasonable suspicion (or reasonable grounds) to believe that plaintiff was violating the law. A video showed that plaintiff had been in the university computer lab before a laptop was stolen and an investigation determined that plaintiff had been logged into the computer next to the victim. Just months earlier, the university police had arrested plaintiff for stealing chemistry books. In addition, Robertson had received a report that plaintiff had refused to return his roommate's property.

Once defendant Robertson viewed the needle and spoon, justification existed for the search that uncovered the heroin.

Plaintiff argues that neither the waiver nor the lower standard for searching probationers applies to this case because of the involvement of law enforcement officers; the search was not "ordered" by defendant Robertson as required by the waiver; the police officers used Robertson so that they could circumvent the warrant requirement; and the search was improper because Robertson was not present in the room when the officers found the heroin. He cites United States v. Richardson, 849 F.2d 439 (9th Cir. 1988), in which the court stated that "a parole search may not be used as a subterfuge for a criminal investigation."

Plaintiff's arguments are not persuasive. With respect to the waiver, defendant Robertson *did* "order" the search in the sense that it was she who issued a warrant for plaintiff's arrest. In any event, the Court of Appeals for the Seventh Circuit has concluded that police involvement does not invalidate a probation search. United States v. Emmett, 321 F.3d 669, 672 (7th Cir. 2003). As for the holding in Richardson, the Court of Appeals for the Ninth Circuit has recognized that it was overruled by Knights. United States v. Fernandez, 388 F.3d 1199, 1236 (9th Cir. 2004). Under Knights, 534 U.S. at 118-21, the lower standard of review in a search involving a probationer has nothing to do with the motivation for the search or which public official is conducting it because a probationer is not entitled to the same expectation of privacy as those not on probation. Thus, Knights

counsels against drawing a distinction between probation agents and law enforcement officers for the purpose of determining the validity of a search under the Fourth Amendment.

It may be that plaintiff is relying on the distinction because the circuit court did in plaintiff's criminal case. According to the transcript plaintiff filed, the circuit court suppressed the bags of heroin because defendant Robertson was not present when the other defendants conducted that aspect of the search. The circuit court relied on State v. Hajicek, 2001 WI 3, ¶ 23, 240 Wis. 2d 349, 620 N.W.2d 781, in which the state supreme court considered the validity of the search of a probationer's home that involved both probation agents and law enforcement officers. The supreme court framed the threshold question as whether the search was a "probation search" or a "police search." Id. at ¶ 27. The court concluded that it was a "probation search" because "the probation officers conducted the search while the law enforcement officers were present at the search only for protective purposes." Id. at ¶ 34.

At the suppression hearing in plaintiff's criminal case, the circuit court read Hajicek as concluding that a "probation search" is involved only if the search is "done by a probation agent." Dkt. #55-2 at 47. Thus, the seizure of the bag, syringe and spoon was permissible because "these items . . . were seen and discovered by the probation agent," id., but the seizure of the heroin was not because it was "seized and found by officers" who were not acting as "guardians and protectors of the agent" at that time. Id. at 49.

Although the circuit court's interpretation of Hajicek is reasonable, it cannot carry the day for plaintiff. The Wisconsin Supreme Court decided Hajicek in January 2001, *before*

the United States Supreme Court decided Knights. Because the Supreme Court rejected a view that it should apply different standards for "probationary" versus "investigatory" searches, the distinction in Hajicek is questionable. Further, even if I assume that Knights did not close the door on claims that "police" searches of probationers require a warrant, at the least the decision casts doubts on those claims, which is enough to support a qualified immunity defense. Hernandez v. Cook County Sheriff's Office, 634 F.3d 906, 914 (7th Cir. 2011) (to overcome qualified immunity defense, plaintiff must show that defendants violated plaintiff's clearly established constitutional rights). Plaintiff does not cite any case in which the Court of Appeals for the Seventh Circuit has interpreted Knights narrowly or has even hinted that plaintiff's claim could prevail. Although qualified immunity does not apply to requests for injunctive relief, plaintiff did not respond to defendants' argument that plaintiff is not entitled to an injunction, so that issue is waived.

Because I conclude that defendants are entitled to summary judgment on the ground that they had adequate justification for the search, I need not decide whether plaintiff consented to the search or whether defendants discovered the heroin as part of a search incident to arrest.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Yolanda Robertson, Randall Kwasinski, Christopher Schuster and Steven Beaudry, dkt. #38, is

GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 20th day of May, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge