

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

WILLIAM GERHARTZ,

Plaintiff,

v.

DAVID RICHERT and BILL
TYSON, in their individual capacity,

Defendants.

OPINION AND ORDER

12-cv-38-slc¹

In this proposed action for monetary relief under 28 U.S.C. § 1983, plaintiff William Gerhartz contends that defendants David Richert and Bill Tyson violated his rights under the Fourth and Fourteenth Amendments by conspiring to obtain a blood sample from him without his consent and without probable cause. Dkt. #5. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made his initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his proposed amended 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

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

damages from a 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). Having reviewed the proposed amended complaint, I conclude that plaintiff may proceed on his claims that defendants violated his rights under the Fourth and Fourteenth Amendments.

Plaintiff has alleged the following facts.

ALLEGATIONS OF FACT

Plaintiff William Gerhartz is an inmate at the Stanley Correctional Institution, located in Stanley, Wisconsin. Defendants David Richert and Bill Tyson are sheriff's deputies employed by Calumet County.

On February 16, 2006, plaintiff was driving on Highway 55. The night was windy and snowy, and both sides of the road were covered with snow banks. Plaintiff noticed an oncoming car traveling toward him at a high rate of speed and swerved to the side of the road to avoid a collision. Unfortunately, plaintiff's car struck the snow bank, causing his car to slide sideways directly into the oncoming car.

Police and paramedics were called to the scene of the collision, and defendants began conducting an investigation into the cause of the accident. Although defendants found no evidence indicating that plaintiff or the other driver was impaired, they "ordered the hospital

personnel” to draw plaintiff’s blood. Plaintiff did not consent to this procedure. Although plaintiff is currently an inmate, the complaint does not state the crime of which he was convicted. It is unclear whether plaintiff was arrested or charged with any crime in connection with the accident or whether the blood was ever used as evidence in a criminal proceeding against him.

OPINION

A. Fourth and Fourteenth Amendment Violations

The Fourth Amendment protects persons from unreasonable searches and seizures. The extraction of blood is a search under the Fourth Amendment, Schmerber v. California, 384 U.S. 757, 767-68 (1966), and the subsequent analysis is a further invasion into a person’s privacy interests. Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 616 (1989). However, “[t]he Fourth Amendment neither forbids nor permits all such intrusions.” Winston v. Lee, 470 U.S. 753, 760 (1985). To determine whether a particular blood draw is unreasonable requires “a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable.” Id.

The Supreme Court has held that a compelled blood test at a hospital did not violate the Fourth Amendment. Schmerber, 384 U.S. at 772. In that case, the officer saw the defendant’s glassy, bloodshot eyes and smelled liquor on his breath, so he had probable cause

to arrest the defendant for driving while intoxicated. He was not required to obtain a warrant before taking defendant's blood, because waiting for the warrant risked "destruction of the evidence" as defendant's liver processed the alcohol. Id. at 771. On the other end of the spectrum, the Court of Appeals for the Seventh Circuit has held that "[f]orcible extraction of blood when there is no reason to think it will yield evidence of crime is an unlawful search, and therefore violates the Fourth Amendment." Herzog v. Village of Winnetka, Ill., 309 F.3d 1041, 1044 (7th Cir. 2002).

At this early stage of the litigation, I must assume the facts as recited by plaintiff are true. If defendants had no reason to believe plaintiff was intoxicated, then they had no reason to think that drawing his blood would yield evidence of a crime. Therefore, plaintiff may proceed on his claim that defendants violated his rights under the Fourth and Fourteenth Amendment by drawing his blood without probable cause or consent.

B. Plaintiff's Criminal Conviction

As noted above, it is unclear whether plaintiff is incarcerated for a crime relating to his traffic accident and his blood was used as evidence against him. If so, plaintiff's claim may be barred under Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), which forbids a plaintiff from bringing claims for damages if a judgment in his favor would "*necessarily* imply the invalidity of his conviction or sentence." (Emphasis added.).

However, many claims similar to plaintiff's do not run afoul of Heck because finding that a plaintiff's Fourth Amendment rights were violated may not necessarily undermine that plaintiff's conviction, given the presence of other evidence and the limitations of the exclusionary rule. Id. at 487 n.7; Dominguez v. Hendley, 545 F.3d 585, 589 (7th Cir. 2008). It is too early to tell whether plaintiff's claims would be barred by Heck. Because it is defendants' burden to show that success by plaintiff in this action would necessarily invalidate his conviction, Sanford v. Motts, 258 F.3d 1117, 1119 (9th Cir. 2001), I will let plaintiff proceed with his claim. As the case proceeds, defendants may file a motion to dismiss the case under to Heck, but they will have to support the motion by producing evidence showing the factual basis for plaintiff's criminal conviction.

ORDER

IT IS ORDERED that

1. Plaintiff William Gerhartz is GRANTED leave to proceed on his claim that defendants David Richert and Bill Tyson violated his rights under the Fourth and Fourteenth Amendments by taking his blood without his consent or reason to believe he was driving while intoxicated.
2. Copies of plaintiff's complaint and this order are being forwarded to the United States Marshal for service on defendants.

3. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyers will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows 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 documents.

5. Plaintiff is obligated to pay the unpaid balance of his filing fee 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 fee has been paid in full.

Entered this 10th day of April, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge