

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

ALLAN DEAN OWENS

OPINION and ORDER

Plaintiff,

15-cv-00489-bbc

v.

GREGORY BALOW, JOHN ANDREWS
and JOHN SEIFERT

Defendants.

In this civil action, pro se plaintiff Allan Dean Owens, a prisoner at Fox Lake Correctional Institution, has filed a complaint against defendants Gregory Balow, John Andrews and John Seifert. Plaintiff asserts that each of the defendants failed to arrest or bring criminal charges against certain individuals that allegedly broke into his house and stole his property. Plaintiff also asserts that Balow is responsible for the loss of some of plaintiff's photographs and that Balow threatened, abused and degraded him during questioning.

Plaintiff has made an initial partial payment of the filing fee, as required by 28 U.S.C. § 1915(b)(1). After screening the complaint pursuant to 28 U.S.C. § 1915A, I conclude that plaintiff has failed to state a claim upon which relief can be granted. Plaintiff's allegations that defendants should have arrested or pressed charges against the individuals that broke into his house fail to state a claim upon which relief may be granted and will be dismissed

with prejudice. His allegations that defendant Balow is responsible for the theft of his photographs should have been brought in state court as a tort claim. Finally, plaintiff's allegations that Balow was threatening and abusive during questioning are too vague to provide fair notice as required by Federal Rule of Civil Procedure 8. However, I will give plaintiff an opportunity to file an amended complaint to provide more detail regarding Balow's allegedly threatening and abusive behavior. Finally, I will deny plaintiff's motion for assistance of counsel without prejudice; plaintiff may renew his request for counsel if he decides to file an amended complaint.

ALLEGATIONS OF FACT

I have reviewed plaintiff's complaint and the accompanying exhibits, which for screening purposes, I accept as true and read them in the light most favorable to plaintiff. Perez v. Fenoglio, 792 F.3d 768, 774 (7th Cir. 2015). Liberally construed, the complaint and exhibits describe three categories of alleged misconduct: (1) the refusal to arrest, charge and prosecute the people plaintiff claims broke into his house and stole his property; (2) defendant Balow's unauthorized removal of plaintiff's photographs from his cell; and (3) defendant Balow's abusive and threatening conduct while questioning plaintiff. Plaintiff's allegations related to each of these three categories are summarized below.

A. The Theft of Plaintiff's Property and Defendants' Inaction

On June 18, 2012, after plaintiff was arrested by the Pepin County Sheriff's

Department on unspecified charges, defendant Deputy Gregory Balow arrived at plaintiff's house with plaintiff's son's mother, Polly Newman. Upon arrival they discovered that three individuals—Erik Affolter, Casey Affolter and Brian McMahon—had “kicked in” plaintiff's door and were stealing plaintiff's property. The Affolters and McMahon informed Balow that they were taking plaintiff's property for “safe keeping.” Balow apparently accepted this explanation and allowed the trio to continue to remove plaintiff's things. That same day, without plaintiff's permission, Newman moved into plaintiff's house. Balow did not stop Newman from moving in.

Plaintiff filed a grievance about Deputy Balow's inaction and failure to press charges, but it was denied by the Pepin County Sheriff, defendant John Andrews. When plaintiff complained to Sheriff Andrews about the failure to press charges, Andrews said he “stood by [] Balow's decision” and refused to discuss the issue any further. Defendant District Attorney John Seifert, who prosecuted plaintiff, also knew plaintiff wanted to press charges, but Seifert failed to do so.

B. Defendant Balow's Order to Give Plaintiff's Photographs to Newman

In late 2012, while plaintiff was still in custody at the Pepin County jail awaiting trial, he discovered that Newman was moving out of state. Plaintiff asked Deputy Balow if he could give Newman certain photographs before she left. Balow agreed. However, over plaintiff's objection, Balow ordered an officer to take all of plaintiff's photographs and bring them to Newman. When plaintiff's photographs were returned to him 20 minutes later,

several pictures had been removed that plaintiff did not want Newman to have. Plaintiff says Balow “let [Newman] steal any pictures she wanted.”

C. Defendant Balow’s Abusive, Harassing and Threatening Conduct

Defendant Balow also “continually threatened” plaintiff and was “abusive” during questioning on June 6, 2013. Although plaintiff includes few specific allegations, he asserts that Balow was “very abusive and degrading” and “acted as if he was going to punch [plaintiff] in the stomach[h].” As plaintiff puts it, Balow acted like a “bully” and was “pick[ing] on” plaintiff.

OPINION

A. Plaintiff’s Legal Theories

Plaintiff asserts that the allegations in his complaint give rise to claims under state and federal criminal statutes, the Universal Declaration of Human Rights, the Wisconsin State Constitution and various amendments to the United States Constitution. Most of these bodies of law, however, cannot support a claim. None of the criminal statutes plaintiff references support a private cause of action. Chapa v. Adams, 168 F.3d 1036, 1037-38 (7th Cir. 1999)(“Criminal statutes, which express prohibitions rather than personal entitlements and specify a particular remedy other than civil litigation, are accordingly poor candidates for the imputation of private rights of action.”); Mosay v. Wall, No. 13-cv-841, 2015 WL 128076, at *8 (W.D. Wis. Jan. 8, 2015) (no private cause of action under Wis. Stat.

946.12). The same holds true for the Universal Declaration of Human Rights. Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004)(the Universal Declaration of Human Rights “does not of its own force impose obligations as a matter of law.”). With respect to Wisconsin’s constitution, plaintiff refers to it merely in passing and does not identify which of its provisions give rise to his claims. In light of all this, I will limit my review of plaintiff’s complaint to the question whether his allegations support a claim under 42 U.S.C. § 1983 that his civil rights were violated.

B. Defendant’s Refusal to File or Allow Plaintiff to File Criminal Charges

Plaintiff’s allegations that defendants failed to arrest, charge and prosecute the Affolters, McMahon and Newman for their allegedly criminal conduct do not support a valid claim. First, with respect to Balow’s alleged failure to arrest the Affolters, McMahon or Newman, the Constitution does not support a cause of action for failing to make an arrest. “[T]he framers of the Fourteenth Amendment and the Civil Rights Act . . . did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented[.]” Town of Castle Rock, Colorado v. Gonzalez, 545 U.S. 748, 768-69 (2005). Accordingly, plaintiff’s allegations that Deputy Balow failed to arrest the Affolters, McMahon, or Newman fail to state a claim.

The Constitution also does not afford plaintiff the right to have anyone charged with a crime. Although the Affolters, McMahon, and Newman may have committed criminal acts, and plaintiff may be the victim of their crimes, plaintiff does not have the right to sue the

defendants for not charging and prosecuting these alleged wrongdoers. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (“[I]n American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”). Therefore, plaintiff’s allegations related to defendants’ failure to file charges against and prosecute the Affolters, McMahon or Newman for their alleged crimes also fail to state a claim.

C. Allowing the Theft of Plaintiff’s Pictures

Plaintiff’s allegations that Deputy Balow is responsible for facilitating Newman’s theft of his pictures are also insufficient to state a claim. The “unauthorized intentional deprivation of property by a state employee,” which is all that plaintiff alleges, states a claim only if the plaintiff does not have a “meaningful postdeprivation remedy.” Hudson v. Palmer, 468 U.S. 517, 533 (1984). I have found in similar cases that Wisconsin tort law provides prisoners an adequate remedy for the loss, theft, or destruction of their property by prison personnel. Theus v. Dept. of Corrections, No. 14-cv-224-bbc, 2014 WL 3556291, at *2 (W.D. Wis. July 17, 2014) (“The state of Wisconsin . . . provides for tort actions to recover damages for wrongfully taken personal property and for the recovery of the property itself. Because [these] procedures were available . . . plaintiff cannot contend that the state deprived him of due process by taking or interfering with his property.”). Plaintiff has not alleged facts that might suggest that the deprivation of his property in this case is any different. Accordingly, his allegations related to the loss of his photographs fail to state a claim that his constitutional rights were violated. However, the inability to state such a

claim does not prevent plaintiff from pursuing available state law remedies.

D. Balow's Harassing and Threatening Behavior

Although it is now well recognized that mental torture, threats, and even “verbal harassment,” may violate the Eighth Amendment, Beal v. Foster, No. 14-2489, — F.3d —, 2015 WL 5853694, at *2 (7th Cir. Oct. 2, 2015)(“The proposition that verbal harassment cannot amount to cruel and unusual punishment is incorrect.”), plaintiff’s allegations related to Deputy Balow’s threatening behavior during plaintiffs’ questioning are too vague to state a claim. For example, plaintiff alleges that Deputy Balow “continually threatened” him, but he does not identify the threats or explain what effect they had on him. Similarly, plaintiff alleges that Deputy Balow, “acted as if he was going to punch plaintiff in the stomach[h],” but he does not explain what actions gave him that impression. Federal Rule of Civil Procedure 8 requires “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Plaintiff’s allegations that Deputy Balow was “very abusive” and “very degrading” are not facts; they are plaintiff’s characterizations of Balow’s conduct. Simply put, plaintiff’s allegations do not provide fair notice to Deputy Balow of his claim.

I will give plaintiff leave to file an amended complaint against Deputy Balow related to his alleged misconduct during the June 6, 2013 interrogation. However, the amended complaint must include more detail about how Deputy Balow acted improperly. For example, plaintiff should explain what he means when he says Deputy Balow acted like a

“bully” and “pick[ed] on” plaintiff. Plaintiff should identify what Balow did that was “abusive” or “degrading.” If Deputy Balow “threatened” plaintiff, plaintiff should identify what Balow said or did that was threatening. Finally, plaintiff should identify the injury, pain or harm he suffered as a result of Deputy Balow’s misconduct.

ORDER

IT IS ORDERED that

1. Plaintiff Allan Dean Owens’s claim that defendants Gregory Balow, John Andrews, and John Seifert failed to arrest, charge and prosecute the Affolters, McMahon and Newman is DISMISSED WITH PREJUDICE for failure to state a claim upon which relief may be granted.

2. Defendants Andrews and Seifert are DISMISSED as defendants in this action.

3. Plaintiff’s claim that defendant Balow violated plaintiff’s civil rights by taking his photographs and giving them to Polly Newman without his consent is DISMISSED WITH PREJUDICE for failure to state a claim upon which relief may be granted. However, this order does not prohibit plaintiff from pursuing his state court remedies for the loss of his pictures.

4. Plaintiff’s claim that defendant Balow threatened, abused or degraded him in violation of plaintiff’s constitutional rights is DISMISSED WITHOUT PREJUDICE for failure to allege sufficient facts to support this claim. Plaintiff may file an amended complaint against defendant Balow that includes the additional information described above.

If plaintiff does not file the amended complaint by November 18, 2015, I will dismiss this action with prejudice and close the case. I will also direct the clerk of court to record a “strike” against plaintiff pursuant to 28 U.S.C. § 1915(g).

5. Plaintiff’s motion for assistance with recruiting counsel, dkt. #4, is DISMISSED WITHOUT PREJUDICE. Plaintiff may renew this motion if he decides to file the amended complaint against defendant Balow described above.

Entered this 27th day of October, 2015.

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