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

KEVIN L. WILKE,

Plaintiff,

v.

ADAM STUBLASKI,

Defendant.

OPINION AND ORDER

14-cv-639-wmc

On November 30, 2016, this court dismissed *pro se* plaintiff Kevin L. Wilke's proposed challenge of two probation revocation proceedings in Wood County. (Dkt. #13.) Wilke's allegations were insufficient to state any claim upon which relief may be granted against any of the named defendants. However, the court gave Wilke the opportunity to file an amended complaint to clarify the basis of his due process claims against his probation officer Adam Stublaski. After receiving three extensions of his deadline, Wilke has filed an amended complaint that is again before the court for screening under 28 U.S.C. § 1915A.[1]

As an initial matter, Wilke asks the court to reconsider the dismissal of two state court judges from his case, but that request will be denied. As this court explained already, judges are entitled to absolute immunity from claims arising out of acts performed in the exercise of their judicial functions. *See Mireles v. Waco*, 502 U.S. 9, 10 (1991); *Dawsom v. Newman*, 419 F.3d 656, 660-61 (7th Cir. 2005). Because all of Wilke's allegations regarding the two judges concern judicial actions undertaken in connection with his underlying cases, the judges are entitled to absolute judicial immunity.

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[1] At the time he filed suit, Wilke was confined in the Waushara County Jail. He has since been released and is living in Green Bay, Wisconsin. Because he was incarcerated at the time he filed suit, his proposed amended complaint must be screened under 28 U.S.C. § 1915A. *See Witzke v. Femal*, 376 F.3d 744, 750 (7th Cir. 2004) (the status of the plaintiff at the time he brings his suit determines whether the plaintiff is a prisoner subject to the PLRA).

With respect to Officer Stublaski, however, Wilke does allege a potentially vialbe due process claim, accepting at this stage (as the court must) allegations that the officer intentionally delayed a revocation hearing in 2013, resulting in Wilke being held in jail for more than 4 additional months. Wilke may not, however, proceed with a claim based on the 2014 attempted revocation.

OPINION

In his original complaint, Wilke claimed that Stublaski violated his due process rights by intentionally delaying revocation proceedings in 2013 and 2014. As the court explained in its earlier decision, due process requires that a revocation hearing be held within a "reasonable time" of a probationer being taken into custody. *See Morrissey v. Brewster*, 408 U.S. 471, 488 (1972). Factors relevant in determining whether the time for a hearing is reasonable include the length of the delay, the reasons for the delay, whether and when petitioner asserted a right to a prompt hearing, and whether petitioner suffered prejudice. *See United States v. Rasmussen*, 881 F.2d 395, 398 (7th Cir. 1989); *Hanahan v. Luther*, 693 F.2d 629, 634 (7th Cir. 1982).

Wilke's original complaint left unclear both: (1) whether he was actually held in jail for an extended period based solely on pending revocation proceedings; and (2) if so, whether any action by Stublaski in particular caused the delay. Rather, his initial pleading and online court records suggested that Wilke may have been held in custody as a result of new charges or because he failed to pay the cash bond for his release. As the court explained, if Wilke's custody stemmed from another charge, and not pending revocation proceedings, the resultant "loss of liberty" protected by due process is not triggered. *Moody v. Daggett*, 429 U.S. 78, 87 (1976) ("[T]he loss of liberty as a parole violator does not occur until the parolee is taken into custody under the warrant."). Additionally, if Wilke's confinement was not *solely* due to a

revocation hold, but also was attributable to pending charges, there would be a strong basis for concluding that Wilke suffered *no* prejudice from any delay in the revocation. *See, e.g.*, *Doyle v. Elsea*, 658 F.2d 512, 516 (7th Cir. 1981) (rejected due process claim where a reasonably prompt parole revocation hearing would in no way have advanced the defendant's interest in pretrial release); *Jackson v. Div. of Hearing & Appeals*, No. 13-CV-751-JPS, 2013 WL 3716614, at *2 (E.D. Wis. July 12, 2013) ("[G]iven that Jackson's confinement is not solely due to the revocation hold, but also is attributable to the pending possession charge, there is a good reason for the delayed revocation hearing and Jackson is not suffering prejudice from the delay.").

As for Wilke's failure to allege a basis under which Stublaski could be held personally liable for any delay in his revocation hearing, the court instructed Wilke to clarify these points in his amended complaint. As discussed below, the allegations in Wilke's amended complaint are sufficient to state a due process violation against Stublaski arising from the 2013 attempted revocation, but not from 2014.

A. 2013 Revocation Proceedings

Wilke alleges that he was arrested on December 1, 2012, for refusing to take a test for intoxication after being stopped for suspicion of driving while intoxicated in Marquette County. This resulted in formal charges in that court, Case No. 12TR3161. On the same day, Officer Stublaski placed Wilke on a probation hold and moved to revoke the probation imposed after his conviction for burglary in Wood County Case No. 01CF359.

At the time of his probation hold, Wilke had about one year of probation, out of an original 12 years, remaining on that conviction. Wilke further alleges that he had money in his possession to pay a cash bond that would have released him from jail, but no cash bond was set solely because of the probation hold.

Wilke also alleges that he told Stublaski sometime during the first week of December 2012 that he had not been intoxicated while driving and that he needed to be released immediately pending his revocation hearing because he had significant responsibilities operating his own business. Instead of recommending release, Stublaski allegedly asked Wilke to agree to an extension of time on the revocation hearing. When Wilke responded that he could not agree to an extension because he needed to get back to work, the hearing was nonetheless extended at Stublaski's request over Wilke's objection. The hearing was finally held sometime in March 2013, at which time the probation office's request for revocation was denied. Officer Stublaski then pursued an appeal, which was also denied. In addition, the charge of refusing to take a test for intoxication was later dismissed. Still, because of Stublaski's actions, Wilke maintains he was released on April 17, 2013, having spent 137 days in jail. Finally, Wilke alleges that as a result of his incarceration, he lost his residence and many customers.

As stated above, due process requires that a parolee receive a revocation hearing within a reasonable time after being taken into custody. *See Morrissey*, 408 U.S. at 487. The Supreme Court has stated that a two month delay is not unreasonable, *id.*, but the Seventh Circuit has suggested that three months may be the outside limit of reasonableness. *See Hanahan v. Luther*, 693 F.2d 629, 634 (7th Cir. 1982); *United States ex rel. Sims v. Sielaff*, 563 F.2d 821, 825 (7th Cir. 1977).

Here, Wilke alleges that Stublaski caused a more than four-month delay in scheduling the revocation hearing, and then further prolonged the time Wilke spent in custody by pursuing a meritless appeal. Wilke also alleges that he repeatedly asked Stublaski to schedule an earlier hearing and that he suffered foreseeable, specific prejudice as a result of the delay.

At this stage, Wilke's allegations are sufficient to plead a procedural due process claim against Stublaski. In order to hold Stublaski personally liable for these alleged due process violations, however, Wilke will have to prove at summary judgment or trial that Stublaski was responsible for causing the delay in scheduling the revocation hearing. Even more unlikely, Wilke will need to show that Stublaski is not entitled to qualified immunity for actions that fell within the parameters of his job, since a court apparently accepted his reasons for a delay in the hearing and did not find his appeal frivolous.[2]

B. 2014 Revocation Proceedings

In contrast, Wilke's amended complaint contains very few allegations concerning his 2014 revocation proceedings. He alleges only that he was arrested, placed in county jail and did not pay the bond for pretrial release. He was subsequently placed on a revocation hold for which a revocation hearing was scheduled but later rescheduled. Eventually, those revocation proceedings were dropped altogether. Finally, Wilke does not allege that he was released after the revocation hold was dropped. Rather, his allegations again suggest that he remained incarcerated on other charges.

For the same reasons previously explained in this court's original screening order, these allegations are insufficient to plead a due process claim. In particular, the court noted that Wilke neither alleged that he was held in custody in 2014 solely as a result of a probation hold, nor because of any action by Stublaski in particular. Rather, his original allegations suggested that he was incarcerated based on other charges and that Stublaski's request for and then later

[2] Indeed, based on the allegations in the complaint, Stublaski was arguably acting in a prosecutorial capacity both in seeking a delay in the revocation hearing and appealing from the court's denial. If so, another layer of immunity may apply here.

abandonment of revocation had little or no effect on the total time Wilke spent in custody during this period. Because Wilke's amended complaint contains no new allegations supporting his due process, his claim regarding the 2014 hearing remains insufficient to state a due process claim against Stublaski. Thus, he will be denied leave to proceed on a claim based on that proceedings.

ORDER

IT IS ORDERED that:

1. Plaintiff Kevin L. Wilke is GRANTED leave to proceed on a due process claim against defendant Adam Stublaski based on 2013 revocation proceedings, but is DENIED leave to proceed on all other claims.

2. For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to the defendant's attorney.

3. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

4. 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 state defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendant.

5. If plaintiff changes his address while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendant or the court is unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 5th day of October, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge