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

TRAYVON SMITH,

Plaintiff,

v.

OPINION & ORDER

CO HOFF, JOHN DOES 1-4, First Responder Team, MS. PETERSON, MR. JOHNSON, and JOHN DOE 5, Dental,

17-cv-30-jdp

Defendants.

Plaintiff Trayvon Smith, a state of Wisconsin inmate currently confined at the Wisconsin Secure Program Facility, brings this lawsuit alleging that, while he was confined as a juvenile at the Lincoln Hills School, located in Irma, Wisconsin, defendant prison officials beat him, failed to provide him with medical care, and then performed unwanted dental procedures on him to cover up his injuries. Smith has made an initial partial payment of the filing fee, as previously directed by the court.

The next step in this case is to screen the complaint. In doing so, I must dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. Because Smith is a pro se litigant, I must read his allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (per curiam).

After reviewing the complaint with these principles in mind, I conclude that Smith may proceed on several types of claims against defendants.

ALLEGATIONS OF FACT

Plaintiff Trayvon Smith is currently confined at the Wisconsin Secure Program Facility. This case involves events that occurred while Smith as a juvenile confined at the Lincoln Hills School.

One evening in July 2013, Smith and another detainee were in the unit bathroom. Six other detainees entered the bathroom and attacked them. Defendants Correctional Officer Hoff and Ms. Peterson arrived at the scene. Hoff told Smith to get on the ground, and Peterson said, "You're going to pay for this." As four defendant John Doe officers arrived, Hoff stomped on Smith's leg, even though Smith was not moving. The officers shackled Smith. One officer (who I will call John Doe No. 1) said, "What are you looking at?" and then kicked Smith in the mouth several times.

Smith was placed in a van to be taken to segregation. In the van, Doe No. 1 punched Smith in the face, sat on top of him with his knee "in him," put on gloves, and punched him in the back of the head about eight more times. Smith suffered a split lip, swollen face, injured knee, and broken teeth.

After they arrived at the segregation unit, the officer strip-searched Smith and gave him "segregation clothes." Smith, who "had blood everywhere," asked if he could get medical help and take a shower. The officer said, "In your dreams," and laughed. Smith was in a cell for about seven days without a change of clothes, a shower, or medical help. He also was not allowed to file a grievance about the incident.

A "white shirt" officer saw Smith's condition and got him medical attention and moved to a different cell. Smith spoke with the Sheriff's Department about the incident but

he was not allowed to file an internal grievance about it, because there was an "ongoing investigation."

Because Smith was soon going to be released, he did not want to receive dental treatment "so he could show [his injuries to] someone on the street." But defendants Doe No. 1 and Officer Johnson held him down while a John Doe dental staff member (Doe No. 5) fixed his broken teeth against his will.

ANALYSIS

Smith brings claims against defendant prison officials for using excessive force against him. The precise standard for the excessive force claim is unclear, because of Smith's status as a juvenile detainee. An adjudication of juvenile delinquency in Wisconsin "is not a conviction of a crime." *See* § 938.35(1).

For a convicted prisoner to prevail on an Eighth Amendment claim of excessive force against a correctional officer, the plaintiff must prove that the officer applied force "maliciously and sadistically for the very purpose of causing harm," rather than "in a good faith effort to maintain or restore discipline." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The factors relevant to this determination include (1) why force was needed; (2) how much force was used; (3) the extent of the injury inflicted; (4) whether the defendant perceived a threat to the safety of staff and prisoners; and (5) whether efforts were made to temper the severity of the force. *Whitley*, 475 U.S. at 321. But pretrial detainees (who are not convicted prisoners) need not prove the defendant's subjective state of mind to prove an excessive force claim under the Fourteenth

Amendment; they need only show that the force used was "objectively unreasonable." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015).

Smith's allegations here meet either standard because he alleges that he was beaten by defendants Hoff and John Doe No. 1. I will also allow him to proceed on claims against defendant Ms. Peterson, who told Smith that he "was going to pay" right before defendants harmed him, and against three more Doe defendants who were present at the scene but did not intervene to protect Smith. As the case proceeds, the parties should provide input on which legal standard to apply to Smith's excessive force claims. At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Stephen Crocker will explain the process for Smith to use discovery requests to identify the names of the Doe defendants and to amend the complaint to include the proper identities of these defendants.

Smith also alleges that defendant Doe left him in his cell for a week without a change of clothes or shower, refused to arrange for medical care, and did not allow him access to inmate grievances. Smith explicitly includes only a claim about the lack of medical care. Even if he had attempted to bring claims about the lack of grievances or the hygiene and clothing issues, I would not allow him to proceed on those types of claims. The Constitution does not require that a prison provide a grievance procedure or that prison officials respond to grievances. *Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1996). And Smith's allegations about the lack of a shower or change of clothing over such a short time by themselves are not severe enough to state a plausible conditions-of-confinement claim.

But he has stated a claim against Doe for denial of medical care, regardless whether I consider an Eighth Amendment or Fourteenth Amendment standard. Historically, courts have borrowed the Eighth Amendment standard in Fourteenth Amendment cases similar to

this one, stating that "the protection afforded [pretrial detainees] is functionally indistinguishable from the Eighth Amendment's protection for convicted prisoners." *Smego v. Mitchell*, 723 F.3d 752, 756 (7th Cir. 2013).

To establish a claim of deliberate indifference based on the denial of medical care, the plaintiff must show both an objectively serious medical condition and the defendant's deliberate indifference to that condition.[1] Smith's allegations that he had been badly beaten and had sustained injuries are sufficient to show that he had a serious medical need, and defendant Doe No. 1's flippant response to his request for help is sufficient to show deliberate indifference.

Finally, Smith says that defendants Doe No. 1 and Mr. Johnson held him down while Doe No. 5 performed dental work on him against his will. I take him to be saying that defendants did this to cover up the tooth injuries he suffered from the beating. I see two potential theories regarding these allegations. First, under the Due Process Clause, a

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[1] The *Kingsley* decision calls into question whether it is appropriate to adopt wholesale the Eighth Amendment approach in cases not involving convicted prisoners. In *Kingsley*, the Court concluded that in the excessive force context, the defendant's subjective state of mind was irrelevant; rather, the "pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." 135 S. Ct. at 2473. The *Kingsley* Court did not expressly state that this holding should be applied to pretrial detainee cases outside of the excessive force context, and the Court of Appeals for the Seventh Circuit has generally declined to do so. *See Burton v. Downey*, 805 F.3d 776, 784 (7th Cir. 2015) (Fourteenth Amendment prohibits "deliberate indifference to [a pretrial detainee's] serious medical needs," and that "[t]his standard is essentially the same as the Eighth Amendment's prohibition against cruel and unusual punishment, which applies to convicted prisoners."; *see also Riley v. Kolitwenzew*, No. 15-1137, 2016 WL 1077168, at *3 (7th Cir. Mar. 18, 2016) ("Riley was a pretrial detainee, but we evaluate this claimed denial of due process using the same deliberate-indifference standard governing Eighth Amendment claims from convicted prisoners."); *but see Collins v. Al-Shami*, 851 F.3d 727 (7th Cir. 2017) ("but *Kingsley* was an excessive-force case, and we have not yet addressed whether its reasoning extends to claims of allegedly inadequate medical care."). The parties are free to raise this issue as the case proceeds.

competent person has a liberty interest in refusing unwanted medical treatment. *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 262 (1990). I will allow Smith to proceed on a due process claim for being forced to submit to dental care he did not want.

Second, it appears that defendants gave Smith this treatment in response to Smith wanting to file grievances about his treatment and his desire to show people on the outside his injuries, presumably so that he could file a lawsuit about it or otherwise publicize the problems he faced at Lincoln Hills. Smith's allegations could support a retaliation claim under the First Amendment.

To state a First Amendment retaliation claim, a plaintiff must identify: (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by the defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that the plaintiff's protected activity was one of the reasons defendants took the action they did against him. *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009). Smith has the First Amendment right to complain about inadequate prison conditions or to publicize his injuries to people upon his release. Defendants' actions suggest that they forced dental treatment on Smith to cover up his injuries because they knew he wanted to complain about them. I conclude that Smith may proceed on retaliation claims against defendants Doe No. 1, Johnson, and Doe No. 5.

ORDER

IT IS ORDERED that:

1. Plaintiff Trayvon Smith is GRANTED leave to proceed on the following claims:

    a. Excessive force claims against defendants CO Hoff, Ms. Peterson, and John Does Nos. 1-4.

    b. A medical care claim against defendant Doe No. 1.

    c. Due process and retaliation claims against defendants Doe No. 1, Mr. Johnson, and Doe No. 5.

2. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's amended complaint and this order are being sent today to the Attorney General for service on defendants. Plaintiff should not attempt to serve defendants on his own at this time. 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.

3. For the time being, 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 or lawyers 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 his documents.

5. If plaintiff is transferred or released while this case is pending, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and the defendants or the court are unable to locate him, his claims may be dismissed for his failure to prosecute them.

Entered April 17, 2017.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge