

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

TERRENCE BUCHANAN,

Plaintiff,

OPINION AND ORDER

v.

OFFICER JONATHAN WEAVER, JOHN DOE 1,
JOHN DOE 2, JOHN DOE 3, and JOHN DOE 4,

12-cv-408-wmc

Defendants.

Plaintiff Terrence Buchanan brings this action against City of Madison Police Officer Jonathan Weaver and the officers who supervised and trained Weaver, seeking damages for his unlawful arrest and subsequent prosecution following a traffic stop. Buchanan asserts claims for violation of his Fourth and Fourteenth Amendment rights, violation of 42 U.S.C. § 1981, and state law tort claims for malicious prosecution, false imprisonment, and conversion.

Buchanan is an inmate at Green Bay Correctional Institution, and asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit he provided, the court concluded that he is unable to prepay the full fee for filing this lawsuit. Since Buchanan has made the required initial, partial payment of \$4.83 required of him under § 1915(b)(1). The court must now determine whether his proposed action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). After examining the complaint, the court concludes that

Buchanan may proceed on his Fourth Amendment, false imprisonment and conversion claims.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations generously, and hold the complaint "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Buchanan alleges, and the court assumes for purposes of this screening order, the following facts.

- Plaintiff Terrence Buchanan is currently confined at Green Bay Correctional Institution, but at the time of the events in question was a resident of Madison, Wisconsin. Buchanan is an African American (black) male.
- Defendant Officer Jonathan Weaver is a police officer employed by the City of Madison. Defendant Officers "John Doe" 1-4 are the police officers responsible for Weaver's training and supervision.
- On February 19, 2011, Officer Weaver drove his marked police car into the parking lot at the Saddle Ridge Apartment Complex. Weaver observed a parked Chevy Avalanche missing a front license plate. Weaver parked his police car nearby and waited for the Avalanche to leave.
- The Avalanche belonged to Buchanan's mother. With her permission, Buchanan drove the Avalanche out of the parking lot shortly after Officer Weaver parked his police car nearby. On his way out of the lot, Buchanan noticed the presence of the police car, and Officer Weaver was able to see a black male behind the wheel.
- As Weaver began to follow the Avalanche, he requested a vehicle registration check from his dispatcher. Shortly thereafter, Weaver signaled for the Avalanche to pull over. Buchanan promptly did so.
- Weaver approached the Avalanche and began asking Buchanan questions unrelated to his driving and the condition of the vehicle. After a few minutes of probing conversation, Weaver requested backup from a drug sniffing dog unit. Only after making this request did Weaver turn the conversation to the reason for his traffic stop. He asked for a driver's license, which Buchanan produced. Weaver deliberately delayed checking Buchanan's license until the drug-sniffing dog arrived.

- In justifying his delay during the traffic stop, Weaver indicated that Buchanan was acting extremely nervous throughout the duration of the stop, and that his behavior indicated that he had something to hide. However, Buchanan did not display any body language or engage in any act that would raise the suspicion of a reasonable officer. He was perfectly cooperative with Officer Weaver, gave satisfactory answers to every question posed to him, and repeatedly asked why he was being held. Weaver lacked probable cause to believe Buchanan had committed any crime.
- When the drug sniffing dog arrived, Officer Weaver went back to his car and ran a background check on Buchanan. This check revealed Buchanan's criminal history. A search (of Buchanan's person and/or the vehicle -- it is unclear) revealed marijuana and a concealed weapon. Buchanan was arrested and the Chevy Avalanche was seized.
- Buchanan was eventually prosecuted for intent to deliver of marijuana and for illegal possession of a concealed weapon. Officer Weaver gave false information to the prosecutor in the case to help cover up his unlawful actions in the course of seizing and searching Buchanan.
- The criminal case against Buchanan was voluntarily dismissed because the evidence that was found during Officer Weaver's traffic stop was deemed to be inadmissible as the product of an illegal search and/or seizure.
- Buchanan's parole was subsequently revoked or he was threatened with parole revocation.
- Officer Weaver is a Caucasian American (white) male. Weaver is alleged to have pulled Buchanan over and detained him without cause because he is black and because he assumed that as a black man Buchanan was engaged in criminal activity.
- National statistics show that black drivers suffer from discrimination and racial profiling at the hands of police officers generally.
- Buchanan alleges that Officer Weaver would neither have followed a similarly situated white male nor treated him as he did Buchanan. Weaver was motivated, at least in part, by racial prejudice and malicious intent.
- John Does 1-4 are police officers who have supervised and trained Officer Weaver.

OPINION

I. Fourteen Amendment equal protection claim

Buchanan asserts that Officer Weaver decided to stop his vehicle and call in a drug sniffing dog because Buchanan is black and assumed to be a criminal. To state a claim for a Fourteenth Amendment equal protection violation, he must allege (1) that Officer Weaver's actions had a discriminatory effect and (2) that Weaver was motivated by a discriminatory purpose. *Chavez v. Illinois State Police*, 251 F.3d 612, 635-36 (7th Cir. 2001). This entails more than merely reciting the elements of the claim; Buchanan must assert facts that "plausibly suggest an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 663.

To allege discriminatory effect, a plaintiff must plead facts showing that he is a member of a protected class and that he was treated differently from similarly situated members outside the protected class. *Chavez*, 251 F.3d at 636. This can be done by either (1) specifically naming one or more similarly situated individuals from outside the protected class who were treated differently; or (2) through the use of statistics. *Id.* Buchanan has failed to name any non-black individual who was similarly-situated yet treated differently. And while he discusses the general phenomenon of racial profiling at length in his complaint -- the existence of which this court is also prepared to take judicial notice -- he does not offer or claim to have statistics showing that Officer Weaver enforces the law selectively against black drivers.

To allege discriminatory intent, a plaintiff must plead facts that tend to show that “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of’ . . . its adverse effects upon an identifiable group.” *Id.* at 645 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987)). Buchanan offers nothing more than the conclusory allegation that Officer Weaver targeted him because he is black. None of the facts in the complaint present even circumstantial evidence of race-based motivation; even if the court assumes that the traffic stop was both malicious and a flagrant violation of the Fourth Amendment, this does not bring race into the equation. Therefore, although the pleading standard is quite low at the screening stage, Buchanan’s equal protection claim fails because he has not alleged any facts that would create even an inference of discriminatory effect or discriminatory purpose.

II. Selective prosecution and enforcement claim

Buchanan also asserts a claim for “selective prosecution and enforcement.” However, “selective prosecution and enforcement” is merely a synonym for an ordinary equal protection challenge. *United States v. Armstrong*, 517 U.S. 456, 463 (1996) (“A selective-prosecution claim is . . . an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.”). *See also Wayte v. United States*, 470 U.S. 598, 608 (1985)) (“In particular, the decision to prosecute may not be ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’” (citation omitted)).

To the extent Buchanan seeks to articulate a separate claim against Officer Weaver above and beyond of his equal protection claim (discussed above), he has failed to do so. Similarly, to the extent Buchanan means to articulate an equal protection claim against the state prosecutor who brought the now-abandoned drug and gun charges against him, his complaint falls well short of the minimum allegations needed to state a legally cognizable cause of action. The prosecutor is not listed as a defendant in this action and Buchanan alleges no facts that would begin to support such a claim.

III. Claim for violation of 42 U.S.C. § 1981

Section 1981 prohibits acts of racial discrimination that deny a person the equal right to (1) “make and enforce contracts,” (2) “sue, be parties, [and] give evidence,” (3) enjoy the “full and equal benefit of all laws and proceedings for the security of persons and property,” and (4) be subject “to like punishments, pains, penalties, taxes, licenses and exactions of every kind.” Courts have looked to the final two clauses of § 1981 -- the “equal benefit” and “like punishment” clauses -- and concluded that racially-motivated police misconduct is actionable under § 1981. *Mahone v. Waddle*, 564 F.2d 1018, 1028 (3rd Cir. 1977) (“Warrantless, racially-motivated arrests and searches, when made in the absence of probable cause, also fall within the literal reach of the “equal benefit” clause.”); *Bouquett v. Clemmer*, 626 F. Supp. 46, 50 (S.D. Ohio 1985) (malicious prosecution); *Spriggs v. City of Chicago*, 523 F. Supp. 138 (N.D. Ill. 1981) (illegal beating, arrest, search and seizure).

For the reasons discussed in the court’s analysis of Buchanan’s equal protection claim, above, the complaint fails to articulate any facts that suggest either that Officer Weaver acted upon a race-based discriminatory motive, or that his actions had a discriminatory impact. Accordingly, Buchanan has not stated a valid § 1981 claim.

IV. Fourth Amendment illegal search and seizure

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Buchanan does not seem to be challenging the legality of the traffic stop, because he admits driving a car with a missing front license plate, which is a violation of Wis. Stat. § 341.15(1).¹ Instead, he appears to assert that the traffic stop was unduly prolonged, and that Officer Weaver could not constitutionally detain him in his vehicle for longer than the time it took to either issue him a ticket or execute a full custodial arrest for the license plate violation. Here, Buchanan has at least arguably articulated a Fourth Amendment violation. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (“A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”).

The complaint also indicates that police eventually found drugs and a concealed weapon in Buchanan’s possession (either on his person or in the vehicle), but that these

¹ On page 10 of his complaint, Buchanan asserts that Officer Weaver knew there were no grounds to believe that *any* crime had been committed at *any time*. However, this allegation facially conflicts with Buchanan’s specific admission that the Chevy Avalanche was missing its front license plate, and that the missing plate was the reason (even if pretextual) that Officer Weaver articulated for pulling him over.

were found inadmissible in criminal court. It is impossible to tell from the facts alleged whether the search that produced these items was a separate constitutional violation or simply the fruit of the arguably illegal seizure. However, because the court will allow Buchanan's illegal seizure claim to go forward, it will also allow what it presumes to be his related illegal search claim to proceed.²

V. Malicious Prosecution

Malicious prosecution is a constitutional tort cognizable under § 1983 only if state law provides no such remedy. *Newsome v. McCabe*, 256 F.3d 747, 750 (7th Cir. 2001) ("[T]he existence of a tort claim under state law knocks out any constitutional theory of malicious prosecution"). Wisconsin provides just such a tort remedy, so Buchanan's malicious prosecution claim sounds in state common law of torts, rather than constitutional law. *See Whispering Springs Corp. v. Town of Empire*, 183 Wis. 2d 396, 515 N.W.2d 469 (Wis. App. Ct. 1994) (recognizing a tort for malicious prosecution).

The essential elements of a claim for malicious prosecution are: (1) the initiation or continuation of judicial proceedings by, or at the instance of, the current defendant; (2) malice on the part of the current defendant; (3) want of probable cause; (4) termination of the proceedings in favor of the current plaintiff; and (5) injury or damage to the current plaintiff. *Strid v. Converse*, 111 Wis.2d 418, 423, 331 N.W.2d 350, 353-54 (Wis. 1983). Buchanan's allegations fail to satisfy the third element of this test, for

² Since Buchanan alleges revocation of his parole as an adverse consequence, there may be a potential argument that it is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), although cases like *Spencer v. Kemna*, 523 U.S. 1 (1998), may suggest to the contrary. In any event should a *Heck* issue arise later in the case, the court will address it at that time.

there was no lack of probable cause to bring the criminal charges filed against him. “[I]n the context of a malicious prosecution suit, ‘probable cause’ . . . mean[s] that quantum of evidence which would lead a reasonable layman . . . to honestly suspect that another person had committed a crime.” *Pollock v. Vilter Mfg. Corp.*, 23 Wis.2d 29, 42, 126 N.W.2d 602, 609 (Wis. 1964). Buchanan does not deny that he committed a crime, nor does he claim that the prosecutor lacked evidence to bring the abortive drug and weapons charges against him. In fact, Buchanan admits that the charges were dismissed only on the “technicality” that the evidence was obtained in violation of the Fourth Amendment. Initiating a prosecution on potentially excludable evidence is hardly the same thing as initiating a prosecution on the basis of no evidence at all. Only the latter is an act of malicious prosecution. Thus, Buchanan has failed to articulate a cognizable malicious prosecution claim.

VI. False imprisonment

False imprisonment is the unlawful and intentional restraint by one person of the physical liberty of another. *Strong v. City of Milwaukee*, 38 Wis.2d 564, 568, 157 N.W.2d 619, 622 (Wis. 1968). As there is no hint in the complaint that Officer Weaver violated any state or federal laws other than the federal constitution, Buchanan’s false imprisonment claim hinges entirely upon whether the seizure violated the Fourth Amendment. As that question remains to be answered, Buchanan’s false imprisonment claim may proceed.

VII. Conversion

Buchanan alleges that he was unlawfully deprived of possession of the Chevy Avalanche when he was arrested and the vehicle was taken from him. Conversion is committed by a person who, without consent of the owner (or lawful possessor), intentionally controls or takes property of another in such a way that it seriously interferes with the right of the owner (or lawful possessor) to control the property permanently or for an indefinite period of time. *Bruner v. Heritage Co.'s*, 225 Wis.2d 728, 736, 593 N.W.2d 814, 818 (Wis. App. Ct. 1999). As with Buchanan's claim for false imprisonment, if Buchanan's arrest was unconstitutional he has a claim for conversion. This claim may proceed as well.

VIII. Claims Against Supervising Officers

Finally, Buchanan seeks damages from the "John Doe" defendants who supervised and trained Officer Weaver, but nothing in the complaint suggests that these defendant officers participated directly in, approved of, or even knew about Officer Weaver's actions. Accordingly, these unnamed officers cannot be held liable for Weaver's alleged intentional torts and Fourth Amendment violations.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Terrence Buchanan's motion for leave to proceed (dkt. #2) is **GRANTED** as to his § 1983 claim for deprivation of Fourth Amendment rights

