STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Windsor Unit **Docket No. 246-4-13 Wrcv**

DOUGLAS S. MASON,
Plaintiff

v.

STATE OF VERMONT,
Defendant

DECISION
Cross Motions for Summary Judgment (#4, #5)

Plaintiff seeks recovery for alleged civil rights violations based on a period of five years during which he was held in prison. His claim is that the detention was unlawful because it was based on a false parole violation. The State claims that it was pursuant to an agreed-upon plan for how he would serve his original sentence, and that it reduced his overall period of incarceration.

Plaintiff is represented by Attorney Stephen J. Craddock. The State is represented by Attorney Todd J.W. Daloz. The court heard oral argument on both parties' motions for summary judgment on June 9, 2016.

Facts

The historical facts are largely undisputed, as laid out in both parties' motions.

In 1991, the Plaintiff pled guilty to second degree murder and was sentenced by a Vermont state court to a term of 15 to 30 years. His sentence commenced in state prison on April 6, 1992, and he was to receive credit for 1 year and 12 days already served. In 1993, the Plaintiff sent the Vermont sentencing judge threatening letters by mail, which is a federal crime. In 1995 a federal judge sentenced the Plaintiff to a 36-month term, to be served consecutive to his Vermont sentence, followed by 3 years of federal supervised release.

At the time, Department of Corrections' policy would not allow the Plaintiff to receive pre-release programming if the consecutive federal sentence remained pending. Without pre-release programming, the Plaintiff could not be paroled. Effectively, this meant that the Plaintiff would be required to max out his Vermont sentence so long as the federal sentence remained unserved.

In 1999, the Plaintiff proposed to the Parole Board that he be paroled to serve his 36-month federal sentence, after which he would be returned to Vermont. He made this request at a hearing before the Parole Board in 2002, when it was denied, and again in 2004. Although both parties now agree that the Parole Board had no authority to parole the Plaintiff to serve his consecutive

federal sentence as if it were a concurrent sentence, the Parole Board nevertheless did parole the Plaintiff to federal authorities in Pennsylvania in the middle of his sentence. The State has not offered an adequate explanation for why the Board did this, or on what basis the members of the Board believed they had authority to do so. On May 26, 2004, the Plaintiff signed a parole agreement which transferred him to federal custody, conditioned upon him receiving substance abuse counselling and mental health counselling, apparently for the purposes of analogous pre-release programming in Vermont.

While in federal custody in Pennsylvania, the Plaintiff completed substance abuse counselling, but did not complete mental health counselling.

The Plaintiff was scheduled to be released from federal custody, having completed the 36-month sentence, on January 18, 2007. The Vermont Department of Corrections notified the Federal Bureau of Prisons that it was expecting the Plaintiff would be transferred back into Vermont DOC custody. The Bureau of Prisons allegedly told the DOC that it would not transfer the Plaintiff directly to the DOC, but would instead release him to local law enforcement custody in Pennsylvania. Further, local law enforcement in Pennsylvania would not transfer the Plaintiff to DOC without a warrant for his arrest.

Based on this information, despite the fact that the Plaintiff had not violated his parole, the Director of the Parole Board issued a warrant for a violation of parole in order to return the Plaintiff to DOC custody. The Parole Board had no information that there was any parole violation; however, the Director of the Parole Board viewed the arrest warrant as a necessary mechanism to return the Plaintiff to Vermont. The Plaintiff was released to local law enforcement custody in Pennsylvania, waived extradition before a Pennsylvania court, and was transferred back to DOC in Vermont. There is no evidence that the Plaintiff ever received a trial or a hearing in Vermont for any alleged violation of parole.

Upon his return to Vermont, the Plaintiff subsequently remained incarcerated for 5 years. Although he was eligible for parole/probation, his applications were denied at DOC's recommendation. He filed at least one court case while incarcerated with the goal of securing his release. The petition was one for judicial review of governmental action under Rule 75. Now that he has been released, he has filed suit for damages arising from the period of incarceration from 2007 to 2012.

Conclusions

The complaint seeks relief based on two claims: Count 1, "Intentional Infliction of Emotional Distress," and Count 2, "Unlawful Arrest/Detention." The Plaintiff seeks damages related to both counts. The State is the only named defendant.

Both parties seek summary judgment. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a).

Count 1: Intentional Infliction of Emotional Distress

The elements of intentional infliction of emotional distress are: "extreme and outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, that has resulted in the suffering of extreme emotional distress." *Denton v. Chittenden Bank*, 163 Vt. 62, 66 (1994); compare with Restatement (Second) of Torts, § 46 ("severe emotional distress").

The State argues that, even assuming the Plaintiff has adequate evidence of outrageous conduct and the State's intent, he lacks evidence of the element of extreme emotional distress. Although the Plaintiff concedes that his mental health has been put at issue in this case and that there is no affidavit or other supporting evidence of extreme emotional distress, at oral argument he argued that extreme emotional distress can be inferred from the fact of unlawful imprisonment.

As noted in the Restatement,

> The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises.

Restatement (Second) of Torts, § 46(j). Here, there has been no allegation that the Plaintiff suffered emotional distress, much less extreme or severe emotional distress. Thus, the Plaintiff lacks evidence of an essential element of the alleged tort.

This is not to say that some degree of emotional distress cannot be inferred from the Plaintiff's confinement. It can readily be inferred that confinement generally has a negative impact on a person's mental and emotional health, and that when confinement is unlawful it produces an even greater level of emotional distress. However, intentional infliction of emotional distress does require extremity or severity in a plaintiff's emotional response to outrageous conduct, above and beyond 'ordinary' compensable mental anguish. This heightened requirement cannot be inferred from the mere fact of imprisonment.

Plaintiff has failed to produce sufficient evidence of extreme emotional distress sufficient to make a prima facie case. The State is entitled to summary judgment on Count 1.

Count 2: "Unlawful Arrest/Detention"

The Plaintiff's second count alleges "Unlawful Arrest/Detention." In the Plaintiff's complaint he cited 42 U.S.C. § 1983 and Article 10 of the Vermont Constitution as the legal bases of this claim. At the motion hearing, the Plaintiff referred to the claim as one for false imprisonment, which is a common law claim.

Section 1983

At the hearing, the Plaintiff conceded that a Section 1983 action is not available as a matter of law. The State of Vermont is the only named defendant in this case, and a state of the union is

not a proper defendant in a Section 1983 action seeking damages. In *Will v. Michigan Department of State Police*, the U.S. Supreme Court held that the plain meaning of the phrase "every person" in the statute cannot be read to include the States. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The Court has also held that Section 1983 was not intended to abrogate state sovereign immunity, and thus States retain their immunity, unless waived, in both federal and state courts, under both the Eleventh Amendment and the common law. *Id.* at 67. These principles were reaffirmed in *Hafer v. Melo*, 502 U.S. 21, 26 (1991), where the Court made clear that § 1983 actions cannot be maintained either against the States or against state employees being sued in their official capacities, but can be maintained against state employees being sued in their individual capacities. This is well-settled law, and is consistent with Vermont's interpretation of the statute. *Bock v. Gold*, 2008 VT 81, ¶ 9, 184 Vt. 575.

Article 10 of Vermont Constitution

The Plaintiff also conceded at the motion hearing that he does not have a legal basis for a constitutional tort under Article 10 of the Vermont Constitution. The Vermont Supreme Court has never recognized an independent constitutional tort under Article 10. There is a high burden to establish a cause of action based solely on a provision of the Vermont Constitution, particularly where monetary damages are sought. It requires, among other things, a determination that no existing remedies adequately address the alleged harm. *In re Town Highway No. 20*, 2012 VT 17, Para. 36, 191 Vt. 231. As discussed further below, the Plaintiff has adequate remedies such that the court is not required to recognize a new constitutional cause of action to afford the Plaintiff an opportunity for relief.

Common Law False Imprisonment

The Plaintiff did not specifically plead common law false imprisonment in his complaint. However, Vermont is a notice pleading jurisdiction, and the claim for "Unlawful Arrest/Detention" easily applies to the common law tort of false imprisonment.

At common law, the tort of false imprisonment occurs whenever a person intentionally confines another without the privilege to do so, and the other is conscious of his confinement. *State v. May*, 134 Vt. 556, 559 (1976); Restatement (Second) of Torts, § 35. False imprisonment is not a negligent tort, but an intentional one, and a plaintiff must only prove that the tortfeasor intended to confine him without privilege, not that there was a breach of any duty of care. Damages are not an element of false imprisonment; even if a plaintiff suffers no cognizable damages, he or she is nevertheless entitled to at least nominal damages so long as the elements of the claim are proved.

The Plaintiff's evidence, taken in the light most favorable to him, shows that the Vermont Parole Board revoked his parole without an actual parole violation and returned the Plaintiff to prison in Vermont and confined him for five years without a hearing or waiver of hearing. It can be inferred that the State intended to confine him, since it did not release him, and it can also be inferred that he was aware of his confinement of more than five years (even if he did not believe his confinement improper for at least some portion of it). Whether the State had any privilege to confine him is genuinely disputed; however, it can be inferred from the fact that his parole was revoked without a parole revocation hearing that the State lacked the privilege to confine him.

Damages are not an element of false imprisonment, and to the extent the Plaintiff lacks evidence of compensable harm, he can still obtain nominal damages. Thus, the Plaintiff's evidence, taken in the light most favorable to him, is sufficient to make out a prima facie case of false imprisonment.

Immunity

Even if the Plaintiff has sufficient evidence for a prima facie case for false imprisonment, however, the State claims that it is still entitled to summary judgment on the basis of immunity:

State Sovereign Immunity

Sovereign immunity is recognized at common law and reaffirmed as applying to the states under the Eleventh Amendment. As a general matter, sovereign immunity means that a private person cannot sue a state of the union in civil court unless the state consents to suit. Under the Vermont Tort Claims Act, the State has waived its sovereign immunity "for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of employment." 12 V.S.A. § 5601(a). The Vermont Supreme Court has held that the Tort Claims Act did not waive immunity for purely governmental functions, and the statute itself specifically reserves the State's sovereign immunity for

> Any claim based upon an act or omission of an employee of the State exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a State agency or an employee of the State, whether or not the discretion involved is abused.

12 V.S.A. § 5601(e)(1).

The State argues that the Plaintiff's injuries arise from the discretionary decision of the Parole Board to revoke the Plaintiff's parole, and thus the State has not waived its sovereign immunity. The State also argues that the Parole Board's conduct in this case was done in the exercise of a purely governmental function.

In determining whether an act is discretionary or ministerial, Vermont courts apply the two-part test from *United States v. Gaubert*, 499 U.S. 315, 324 (1991). See *Kennery v. State*, 2011 VT 121, ¶ 32, 191 Vt. at 60.

> Under the first prong of the test, a court must determine whether a statute, regulation, or policy mandates certain acts, or whether performance of a duty involves an element of judgment or choice. If a court determines that acts involve an element of judgment or choice, it must then decide whether that judgment is of the kind that the discretionary function exception was designed to shield. The exception protects only governmental actions and decisions based on considerations of public policy. However, when a statute, regulation, or policy vests discretion in the government employee, it is presumed that the employee's acts are grounded in public policy when exercising that discretion. The analysis focuses on

> whether the actions taken by the government employee are "susceptible to policy analysis," not on an employee's "subjective intent in exercising the discretion conferred by regulation."

Id. (quotation marks, alterations, and citations omitted).

There is little doubt that in most situations, the decision to grant, deny, or revoke parole is a discretionary act. The core function of the Parole Board is judging, based on the evidence presented to it, whether a prisoner should be paroled, and such decisions call for the exercise of discretion. By statute, the Parole Board "may issue a warrant for the arrest of a parolee . . . if the board has reason to believe that a violation of parole has occurred." 28 V.S.A. § 551. The State argues that the discretionary nature of parole decisions shields all actions undertaken by the Parole Board.

The trouble with that argument in this particular case is that the Parole Board acted outside its sphere of discretion. It admittedly had absolutely "no reason to believe that a violation of parole has occurred," and thus should not even have considered whether or not to issue an arrest warrant. It is not the case that its members exercised their judgment in evaluating evidence and merely came to the wrong conclusion about whether there was reason to believe that a violation of parole had occurred. Instead, they had absolutely no basis to believe that a parole violation had occurred, yet the Board issued an arrest warrant which they also admittedly had no authority to issue. It was outside the scope of the Board's authority to use the arrest warrant procedure in this way. Thus, whatever protection the discretionary nature of the statutes may grant the Parole Board, such protection cannot extend to a wholly unlawful act for which there was no legitimate discretion to be exercised at all. Thus, the decision to revoke the Plaintiff's parole in this case was not discretionary, and the State is not immunized by 12 V.S.A. § 6501(e)(1).

The State has also argued that it is immunized because parole is a "purely governmental function," and thus sovereign immunity has not been waived as a matter of law. *Denis Bail Bonds, Inc. v. State*, 159 Vt. 481, 486 (1993). The so-called "purely governmental function" exception does not simply immunize acts that only the government undertakes, however. See *Kennery*, 2011 VT 121, ¶ 23. Rather, it calls on the court to analyze whether the government's alleged wrongdoing is analogous to the kind of tort that can be brought against a private person. *Id.*; see also *Denis Bail Bonds*, 159 Vt. at 488.

The cases in Vermont dealing with the governmental function exception seem inapposite to the case at bar, since the bulk of case law deals with whether a governmental duty of care is analogous to a common law duty of care. As noted above, the intentional tort of false imprisonment does not contain duty of care as an element, since it is not a negligence tort.

In any case, the governmental function exception does not apply here because there is a clear private analog to the alleged wrong: the law of false imprisonment simply requires any private person or entity not to confine another without the privilege to do so. The State's attempts to characterize the Plaintiff's claim as one for abuse of process ignores the fact that it was pleaded as "unlawful arrest/detention," which is false imprisonment. False imprisonment is, itself, a valid private cause of action. This cause of action has been recognized as existing against private persons

and public officers since essentially the establishment of this state, and there appears to be no reason why it cannot be a valid claim against the State.

Prosecutorial/Judicial Immunity

The State's second claimed basis for immunity is prosecutorial immunity. Traditionally, prosecutorial immunity as it exists in common law derives from judicial immunity; that is, the discretionary acts of prosecutors are shielded as if they were acting as judges. *Polidor v. Mahady*, 130 Vt. 173, 174 (1972) ("So long as such an officer is performing an act that may be categorized as judicial, and its performance is within his general authority, his motive for acting is not subject to inquiry in a private suit."). In short, prosecutorial immunity is an extension of judicial immunity, which itself is an extension of official immunity. *O'Connor v. Donovan*, 2012 VT 27, ¶ 6, 191 Vt. 412. Absolute prosecutorial immunity extends to 'high executive' officials such as the Attorney General," while qualified immunity extends to all lower officers.

Following *O'Connor v. Donovan*, it appears that state's attorneys and prosecutors in the office of the Attorney General enjoy absolute immunity for alleged torts committed with the scope of their authority, regardless of whether they are acting in a judicial or quasi-judicial capacity. *Id.* at ¶ 21. That is, state's attorneys and the Attorney General's office enjoy absolute immunity even for administrative acts undertaken with the scope of their authority. *Id.* This absolute immunity is premised on the broad powers afforded to state's attorneys and the Attorney General, who are, respectively, the chief law enforcement officials in each county and in the State. *Id.* Conversely, however, although *O'Connor* is silent on this particular issue, it would appear by implication that absolute immunity does not extend to officials not vested with the broad powers of state's attorneys or the Attorney General. These officials would retain qualified immunity as recognized at common law.

Setting aside that it is altogether unclear whether the State can assert an immunity that normally shields individual defendants, to the extent that the Plaintiff's claim is against the Parole Board as a whole, the Board would only be entitled to qualified immunity. First, it is clear that the Parole Board does not stand in the same shoes as state's attorneys or the Attorney General and thus does not qualify for the same type of absolute prosecutorial immunity afforded to high officials. The Parole Board's role is narrowly defined by statute and it is not vested with the broad authority inherent to those elected officers who qualify for prosecutorial immunity. Thus, even if board members exercise a quasi-judicial role from time to time, public policy does not call for giving them absolute immunity in all exercises of their power. *Id.* Thus, the Parole Board is entitled to, at most, qualified immunity.

Second, even if qualified immunity could be invoked by the State as a Defendant on behalf of the Parole Board, it is not available in this case. "The general rule for qualified immunity" is that such individuals are immune from tort liability only where they are: '1) acting during the course of their employment and acting, or reasonably believe they are acting, within the scope of their authority; 2) acting in good faith; and 3) performing discretionary, as opposed to ministerial acts.'" *Libercent v. Aldrich*, 149 Vt. 76, 81 (1987). As noted above, the alleged tortious acts in this case were not discretionary, and thus one element is already unmet. Additionally, even if the acts alleged were discretionary, they could not have been undertaken in good faith. Acts performed in

good faith are defined as those that "did not violate clearly established rights of which a reasonable person would have known." *Levinsky v. Diamond*, 151 Vt. 178, 190 (1989). Here, the issuance of an arrest warrant for a parole violation when there was no information that any violation had occurred would violate the Plaintiff's clearly established rights.

The State reads *O'Connor* as extending absolute immunity to all acts in the nature of prosecutorial acts, regardless of the actor. The argument is overbroad, but even if this were so, the Parole Board's act in this case was not a discretionary act. Prosecutorial immunity is grounded in the rationale that prosecutors must be afforded some degree of discretion in choosing who to prosecute, and public policy demands that they not be second-guessed in the exercise of their discretion. *O'Connor*, 2012 VT 27 at ¶ 14. Considering that the State has essentially admitted that the Parole Board was using the warrant mechanism as a procedural means of returning the Plaintiff to Vermont rather than for the purpose of addressing a parole violation, the Parole Board's actions were not prosecutorial. Even if they could be considered functionally prosecutorial at some level, they were outside the Board's scope of discretion, because it was not within the Parole Board's discretion to use the arrest warrant procedure for a purpose other than possible parole violations.

Accordingly, the court concludes that prosecutorial immunity does not apply to the Plaintiff's claim of false imprisonment.

Affirmative Defenses

Res judicata

The State argues that this action is barred by res judicata. Res judicata "bars the litigation of a claim or defense if there exists a final judgment in former litigation in which the 'parties, subject matter and causes of action are identical or substantially identical.'" *Lamb v. Geovjian*, 165 Vt. 375, 379 (1996). It applies not only to claims that were actually litigated in a prior case, but also to claims that could have been litigated, but were not. *Id.*

In this case, the State claims that the Plaintiff's earlier Rule 75 proceeding bars the current tort case.

With respect to whether the current claim could have been brought at the prior proceeding, a Rule 75 action is a limited form of action essentially in the nature of a request for a writ of mandamus. *Ahern v. Mackey*, 2007 VT 27, ¶ 8, 181 Vt. 599. It is intended to be a simple review procedure for decisions of administrative bodies. V.R.C.P. 75, Reporter's Notes. Relief is prospective: relief sought is different action on the part of a governmental body, as opposed to money damages. The claims have different substantive and procedural requirements and cases proceed on different case management tracks. The court cannot conclude that Plaintiff was required to bring an intentional tort claim simultaneously with a Rule 75 request for review of governmental action.

With respect to the identity of the parties, the State claims that the prior suit against the Department of Corrections was essentially a suit against the State. In a Rule 75 proceeding, the

real party in interest is the specific agency or entity that allegedly either took improper action or failed to take proper action, not the state as a whole. V.R.C.P. 75(a), (b). Thus, the Department of Corrections was the only interested Respondent and the only one named in the Rule 75 action. Plaintiff does not claim that it is the Department of Corrections that was responsible for false imprisonment. In order for the Plaintiff to have pursued a false imprisonment claim at the time of his Rule 75 proceeding, he would have had to join the State as a separate defendant in addition to the Department of Corrections, the Rule 75 Respondent. Under Rule 75 (a) and (b), a Rule 75 proceeding is only available against an agency or political subdivision of the state. The State as a whole is not a real party in interest in a Rule 75 review of governmental action case. The Department of Corrections as a Rule 75 Respondent and the State has a tort claim Defendant are different parties.

Because both the claims and the parties are different, res judicata does not apply to bar the false imprisonment claim.

Contract/Waiver

The State also argues that the Plaintiff himself proposed the plan whereby he would serve his federal sentence before completing his state sentence, and the State agreed to his plan, which benefited him overall. Thus, argues the State, it was merely fulfilling an agreement made by him, or an understanding the Parole Board had with him, about which he did not complain at the time. In a related argument, the State seems to claim a waiver by the Plaintiff of the fact that parole was revoked without a basis for a violation and without a hearing. Plaintiff, however, claims that while he did not object to being returned to Vermont, he believed that the return was for the purpose of being processed out, not to be imprisoned for five more years.

The State's argument is based largely on inferences and interpretations of fact, rather than facts not in dispute. It asserts a defense about which there are disputed facts: whether there was any agreement and/or any waiver, and if so, for what. Summary judgment is therefore not warranted on Count 2.

Summary

The State's Motion for Summary Judgment is granted as to the claim of Intentional Infliction of Emotional Distress, as the Plaintiff has not set forth facts in support of the essential element of extreme emotional distress.

As to Count 2, Plaintiff's sole cause of action is for common law false imprisonment. Plaintiff's Motion for Summary Judgment is denied, as there are disputed facts related to the State's defense of contract or waiver. With respect to the State's Motion for Summary Judgment, the State argued that it was not clearly on notice that Count 2 was based on common law false imprisonment and did not have the opportunity to fully address that issue. The State is correct that in Count 2 of the complaint, the only specifically identified bases were Section 1983 and Article 10 of the Vermont Constitution, which Plaintiff now concedes do not provide grounds for his claim. It is reasonable that the State was not fully on notice that Plaintiff would be pursuing his claim on grounds of common law false imprisonment. While the facts are

sufficient for a prima facie case for such a claim, it was not until oral argument that it became clear that Count 2 would be based on that theory.

Thus, the State has until August 15 to submit a supplement to its Motion for Summary Judgment as to common law false imprisonment. The Plaintiff will have 30 days thereafter to respond, and the State will have a 10-day reply period.

Order

Based on the foregoing,

1. The State's Motion for Summary Judgment is granted as to Count 1, and Count 1, the claim for intentional infliction of emotional distress, is dismissed.

2. The Plaintiff's Motion for Summary Judgment is denied as to both Counts 1 and 2.

3. The State shall file any supplement to its Motion for Summary Judgment as to Count 2, common law false imprisonment, by August 15, 2016. Response and reply times are as set forth above.

Dated in Woodstock, Vermont this 11th day of July, 2016.

Mary Miles Teachout
Superior Court Judge