COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-12

SEAN MURPHY

vs.

LORRAINE ROUSSEAU & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This is an appeal from a judgment dismissing a civil action brought by the plaintiff against Lorraine Rousseau, a staff attorney for the Bristol County Sheriff's Office (BCSO), State Trooper Daniel Thom, and BCSO Sergeant Clinton Silveirio. The case arises out of events that took place while the plaintiff was a pretrial detainee at the Bristol County house of correction. Ultimately, various claims against each of the defendants were dismissed on the grounds of qualified immunity on the basis that the plaintiff's rights were not violated.[2]

At the time of the dismissal, counts one and five of the complaint together alleged an illegal search of two USB flash

[1] Daniel Thom and Clinton Silveirio.

[2] The other claims against each of the defendants were previously dismissed with the plaintiff's agreement.

drives and legal documents seized from the plaintiff's cell, and count four alleged that defendant Rousseau intentionally omitted or misrepresented material facts that were used by the defendants to obtain improperly a search warrant from the New Bedford District Court.

Ordinarily, in reviewing a motion to dismiss, we would simply take the facts alleged in the complaint as true. See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). In this instance, however, during the pendency of this case, the plaintiff also moved to dismiss a criminal case then pending in the Bristol County Superior Court on the ground of the alleged misconduct that forms the basis for the present action. In the course of denying that motion, the judge in the criminal case made some findings of fact on which his denial of the motion ultimately rested. Because those factual questions were actually litigated in that matter, with the burden there, as here, on the plaintiff, and because the resolution of those factual questions was necessary to the decision of the judge in that matter, we agree with the motion judge in the instant matter that the plaintiff is precluded from relitigating those facts. See Larson v. Larson, 30 Mass. App. Ct. 418, 427 (1991) ("The central requirements [of issue preclusion] are that the issue sought to be foreclosed was actually litigated and was essential to the decision in the prior action"). Therefore, we

must take those facts as found by the judge in the criminal case as true in deciding whether the judgment of dismissal was proper in this case. Our review of the questions of law at issue, however, is de novo. See Curtis, supra at 676.

Because the plaintiff was representing himself pro se in his criminal case, and pursuant to a settlement agreement, the BCSO provided him, unlike other inmates, with access to a word processor function on a computer. In order to provide him with this function, the BSCO allowed him to use a law computer that was otherwise only available to ICE detainees. (Apparently, ICE detainees are permitted the use of this word processor function, and it was on the computer available to them.) The function required the use of a USB flash drive in order to save word processed documents. The plaintiff was allowed to purchase a flash drive from the BCSO pursuant to a signed agreement in which he agreed that he could not retain the flash drive in his possession when not using it at the computer workstation and that it had to be stored in a designated location in the housing unit, such as the control desk or with a caseworker. He agreed that if a flash drive was found in his possession when not using it at the computer workstation, it would be treated as contraband and confiscated.

On February 12, 2013, the defendant reported that his flash drive was missing. He alleged that the BCSO staff had lost it,

and he requested a replacement. A week later, however, he was seen by the BCSO librarian using a flash drive at the computer workstation that looked like the allegedly lost one; when confronted, the plaintiff denied it was the same flash drive and quickly pocketed it.

The librarian reported this to Rousseau and two other BCSO officials. When the two other BCSO officials asked the plaintiff for his flash drive, he produced two flash drives that were in his possession in his cell. They were confiscated as contraband.

The plaintiff argues that the search of these flash drives by staff attorney Rousseau was unlawful because there was neither probable cause for the search nor any recognized exception to the warrant requirement. But he is mistaken about the law. Even if we assume that examining flash drives confiscated as contraband from an inmate at a detention facility was a constitutionally protected search,[3] such a search is lawful

[3] See, e.g., Bell v. Wolfish, 441 U.S. 520, 556 (1979) ("It may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell"); Commonwealth v. Silva, 471 Mass. 610, 620 (2015) (pretrial detainee had no constitutionally protected privacy interest in his sneakers where he had notice of jail facility's legitimate policy treating detainees' personal clothing as contraband); Matter of a Grand Jury Subpoena, 454 Mass. 685, 688 (2009) ("where the sheriff's policy of monitoring and recording detainees' and inmates' telephone calls is preceded by notice to all parties, and further, where the recording and monitoring is

if it is reasonable under the circumstances. See Bell v. Wolfish, 441 U.S. 520, 558-559 (1979). Reasonableness requires balancing the need for the search with the invasion of personal rights, taking into consideration "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Id. at 559. Inmates, even pretrial detainees, have "diminished" Fourth Amendment rights while detention facilities have "significant and legitimate security interests." Id. at 557, 560. See Langton v. Commissioner of Correction, 404 Mass. 165, 168 (1989).

The facts known to Rousseau at the time of her initial search of the flash drives rendered a search reasonable. The plaintiff, despite having agreed that he would not keep his flash drive in his possession when not using it at the computer workstation and that it would be treated as contraband and confiscated if found in his possession when not at the workstation, nonetheless was seen using what reasonably appeared to be the flash drive that he had reported missing and had two flash drives in his possession in his cell. It was not

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justified by legitimate penological interests, no privacy interest exists in the recorded conversations").

unreasonable to believe that he might have been using them for illicit purposes.[4]

To the extent that the plaintiff alleged that attorney-client privileged material was searched, this implicates his Sixth Amendment right to the assistance of counsel. See Commonwealth v. Fontaine, 402 Mass. 491, 496 (1988) ("The monitoring of privileged communications between a defendant and his attorney touches the core of the right to counsel"). In this case, Rousseau did not open two folders on the drive, one called "Civil" and one called "Criminal," but did open two folders, one called "MURPHY, S." and one called "Miscellaneous."

Subsequent to the search in this case, the Supreme Judicial Court decided Preventive Med. Assocs. v. Commonwealth, 465 Mass. 810 (2013). In that decision, the court articulated guidelines for undertaking a search of electronic files belonging to a criminal defendant that are likely to contain some attorney-client privileged material. See id. at 828. We caution that in the future, sheriff's offices and Department of Correction

[4] In his complaint, the plaintiff alleged that the second flash drive was sent to him by counsel in his Federal case, that it had been seen by a mail officer arriving by legal mail at the house of correction, and that the mail officer gave it to two correctional officers to place with the plaintiff's other flash drive. Accepting that as true, and assuming without deciding that that rendered the search of the second flash drive impermissible, that search was harmless beyond a reasonable doubt since the two flash drives had identical contents.

officials examining electronic files of an incarcerated individual that may contain such material must be attentive to any applicable protocols necessary to ensure the privilege is protected. Although we need not and do not hold that all the requirements set out in Preventive Med. Assocs. will be applicable in all circumstances in the case of an incarcerated individual, neither do we hold that the procedure utilized by Rousseau was adequate. We need not do so because, in the end, no privileged material was revealed during this initial search. As the judge in the criminal case found, Rousseau examined "non-privileged documents" that included correspondence between the plaintiff and various individuals. These related to "submitting fraudulent claims in class action settlements," "instructing a witness in potential testimony," "enlisting a corrections officer to smuggle contraband into the [h]ouse of [c]orrection," and "attempting to manipulate the criminal justice system by attempting to force the recusal of the judge presiding over his case." Although we note that attempting to obtain information about a judge in order to determine whether a motion seeking recusal is warranted would not necessarily be a manipulation of the criminal justice system, we need look no further at the contents of the plaintiff's correspondence concerning the judge as there is no indication that it was between the plaintiff and an attorney, or otherwise subject to attorney-client privilege.

The plaintiff also argues that his Sixth Amendment right was violated by the inspection of the flash drives and documents contained in plastic tubs located in his cell that were undertaken pursuant to the search warrant. Here, he relies again on Preventive Med. Assocs. But, again, without opining on whether the procedures utilized by those executing the search warrant were adequate under that decision, his claim flounders on the finding of fact made by the judge in his criminal case that no attorney-client privileged documents were in fact examined during the search.

The search warrant was not tainted by any unlawfulness in obtaining the information in the affidavit that was submitted in support of the application. Likewise, the alleged failure by Rousseau to provide Trooper Thom with information about the Federal attorney providing the plaintiff with a flash drive, see supra note 4, and the allegedly false statement by Rousseau that the plaintiff received two $400 checks from a settlement with AstraZeneca rather than one, something that we must assume to be true, were immaterial. Even had the search warrant application affidavit included a statement that the plaintiff received a flash drive from his lawyer, and even had it stated that the plaintiff received a single check from AstraZeneca, the facts

alleged in the affidavit would have provided probable cause for the warrant to issue.[5]

Because there was no unlawful conduct here that caused any

[5] Contrary to the plaintiff's argument in his brief that the "general" and "conclusory" statements Trooper Thom made in the search warrant affidavit failed to satisfy the probable cause standard, the affidavit contained verbatim quotes from letters the plaintiff sent to a named friend asking him to file claims in various class action settlements on the plaintiff's behalf and instructing the friend to send office supplies to a named corrections officer so he could provide them to the plaintiff. We also reject the plaintiff's argument, apparently distinct from his argument about searching privileged material, that the search warrant was overbroad because it did not specify the areas of the flash drives that could be searched. Based on the facts in the affidavit, which alleged finding evidence of potential crimes on the drives, we conclude that the search was not authorized "beyond a foundation of probable cause." Commonwealth v. McDermott, 448 Mass. 750, 770 (2007).

injury to the plaintiff, the dismissal of the complaint was not in error.[6]

Judgment affirmed.[7]

By the Court (Rubin, Blake & Lemire, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: May 3, 2021.

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[6] Although we appreciate the plaintiff's frustration with the number of continuances granted the Commonwealth, the submission of multiple motions to dismiss, and the fact that the final motion to dismiss was heard by a different judge than the one who had denied the defendants' previous motions to dismiss and motions for reconsideration, ultimately, we see no abuse of discretion in the judge allowing those continuances or in hearing and ruling on the last-filed motion to dismiss. Additionally, although the plaintiff argues that the defendants' motion to dismiss was untimely, we find that contention to be without merit. See Mass. R. Civ. P. 12 (d), as amended, 451 Mass. 1401 (2008). Lastly, having found that none of the defendants violated the plaintiff's rights, we need not and do not reach the arguments raised about qualified immunity.

[7] The plaintiff's notice of appeal was filed timely from the final judgment entered in this matter. Although the notice mentions only the memorandum and decision dismissing the complaint against Rousseau and Sergeant Silveirio, it was filed pro se and we think it can be fairly read to encompass the separate order dismissing the complaint against Trooper Thom entered that same date.

[8] The panelists are listed in order of seniority.