IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Vondell Wilbourn, individually and for others similarly situated,	)	
Plaintiffs,	)	
-vs-	)	No. 23-cv-1782
Sheriff of Cook County and Cook County, Illinois,	)	*(Judge Shah)*
Defendants.	)	

RESPONSE TO MOTION TO DISMISS

In addition to raising a meritless standing argument (ECF No. 20 at 5-7), defendants seek to reframe this case from a challenge to explicit policies of the Cook County Sheriff into one against the non-party Deputy Sheriffs who applied those policies to plaintiff. The Court should reject this reframing and apply the well settled rule that "the plaintiff is the master of her complaint." *Ambrose v. Backpage.com, LLC*, 17-cv-5081, 2017 WL 11559787, at *2 (N.D. Ill. Nov. 21, 2017). Plaintiff discusses his claims in Part I below and demonstrates in Part II that he has standing to litigate these claims. Plaintiff responds to defendants' other arguments in Part III.

I. Plaintiff's claims

Plaintiff challenges, individually and for a putative class, two policies of defendant Sheriff of Cook County, and raises three constitutional claims about those policies. Each

policy involves persons released from the Cook County Jail on "electronic monitoring" or "EM" who are suspected of having violated a condition of release.[1]

The first policy is applied after an employee of the Sheriff has determined that a defendant on electronic monitoring has violated a condition of the monitoring program. Illinois law sets out a procedure for the Sheriff to follow in this instance: To call the alleged infraction to the attention of the prosecutor, who would then follow 725 ILCS 5/110-6(e) and request the trial judge to issue a warrant.[2] The Sheriff does not follow this procedure but instead directs his employees to seize the defendant without judicial authorization and bring him directly to the Cook County Jail. (ECF No. 19, Amended Complaint, ¶ 14.) Once at the Jail, the defendant is treated as a person whose bond has been revoked.

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[1] Plaintiff does not raise any claim against the officers who executed these policies.

[2] 725 ILCS 5/110-6(e) provides as follows:

> (e) Upon verified application by the State stating facts or circumstances constituting a violation or a threatened violation of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. If the actual court before which the proceeding is pending is absent or otherwise unavailable another court may issue a warrant pursuant to this Section. When the defendant is charged with a felony offense and while free on bail is charged with a subsequent felony offense and is the subject of a proceeding set forth in Section 109-1 or 109-3 of this Code, upon the filing of a verified petition by the State alleging a violation of Section 110-10 (a) (4) of this Code, the court shall without prior notice to the defendant, grant leave to file such application and shall order the transfer of the defendant and the application without unnecessary delay to the court before which the previous felony matter is pending for a hearing as provided in subsection (b) or this subsection of this Section. The defendant shall be held without bond pending transfer to and a hearing before such court. At the conclusion of the hearing based on a violation of the conditions of Section 110-10 of this Code or any special conditions of bail as ordered by the court the court may enter an order increasing the amount of bail or alter the conditions of bail as deemed appropriate.

The second policy authorizes Sheriff's employees to enter without a warrant the residence of a defendant who is being arrested pursuant to the first policy. (ECF No. 19, Amended Complaint, ¶ 17.)

Plaintiff's first claim is that the Due Process Clause of the Fourteenth Amendment requires a hearing before a judicial officer to lawfully revoke release on EM. This right to a pre-seizure hearing is no different than that of a parolee, *Morrissey v. Brewer*, 408 U.S. 471 (1972), or a probationer. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

Plaintiff's second claim arises from the Sheriff's policy that his employees enter a dwelling without a warrant to seize the defendant for an alleged violation of the electronic monitoring rules. This policy contravenes the warrant clause of the Fourth Amendment, which "generally requires the obtaining of a judicial warrant before a law enforcement officer can enter a home without permission." *Lange v. California*, 141 S. Ct. 2011, 2017 (2021) (cleaned up).

Plaintiff's third claim is that the seizure of a person released on EM solely because there is reason to believe that the person has violated a condition of EM is unreasonable under the Fourth Amendment. This claim is a consequence of Illinois law, which does not criminalize a violation of EM unless the defendant "knowingly violates a condition" of release. 730 ILCS 5/5-8A-4.1(a).[3]

[3] Plaintiff relies on the version of the statute that will be in effect until September 18, 2023, when the "Pretrial Fairness Act" takes effect. *Rowe v. Raoul*, 2023 IL 192248, ¶ 52, 2023 WL 4566587 at *10 (2023).

II. Application of the challenged policies to plaintiff

In 2019, plaintiff was charged with felony offenses in the Circuit Court of Cook County.[4] (ECF No. 19, Amended Complaint, ¶ 2.) Plaintiff posted bond on September 27, 2019, and was released that day from the Cook County Jail, subject to the rules of the electronic monitoring program.[5] (*Id.* ¶ 8.) After leaving the Jail, plaintiff returned to living with his wife and their young children. (*Id.* ¶ 9.) Thereafter, the judge presiding over plaintiff's criminal case authorized plaintiff to take his children to and from school. (*Id.* ¶ 10.)

On Friday, February 24, 2023, an employee of defendant Sheriff of Cook County determined that on four occasions between January 31, 2023, and February 23, 2023, plaintiff did not return home by the route he had followed while driving his children to school. (ECF No. 19, Amended Complaint, ¶ 11.) Defendants argue in their motion to dismiss that returning home by a different route is an "escape" under 730 ILCS 5/5-8A-4.1(a). (ECF No. 20 at 4, 9-10.) Plaintiff was never charged with "escape" and there was no evidence of the "intent" element required by the Illinois escape statute.[6] 730 ILCS 5/5-8A-4.1(a).

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[4] Plaintiff was arrested on August 7, 2019. (ECF No. 20 at 3.)

[5] Plaintiff did not incorporate the rules of the electronic monitoring program into his original (ECF No. 1) or amended complaint. (ECF No. 19.)

[6] The Seventh Circuit requires that "a police officer must have 'some evidence' on an intent element to demonstrate probable cause." *Dollard v. Whisenand*, 946 F.3d 342, 355 (7th Cir. 2019), quoting *BeVier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986). *See infra* at 13-14.

Plaintiff appeared at a scheduled hearing in his criminal case on March 1, 2023; no mention was made of any violations of the EM rules and the case was continued for a further hearing on April 10, 2023.[7]

On March 3, 2023, without notice to plaintiff or his counsel, "officers from the Sheriff's Electronic Monitoring 'EM' unit traveled to plaintiff's home and, without a warrant or a court order of any sort, entered the dwelling, handcuffed plaintiff in front of his minor children, and brought plaintiff to the Cook County Jail." (ECF No. 19, Amended Complaint, ¶ 19.) Plaintiff was not processed into the Jail on a new offense, but entered the Jail on March 3, 2023, as a person whose bond had been revoked by the Sheriff.[8] As plaintiff explains more fully below, the crux of this case is whether the Sheriff has the right to terminate electronic monitoring and revoke plaintiff's bond without court approval.

Plaintiff appeared before the judge presiding over his criminal on March 7, 2023—4 calendar days after he returned to the Jail. The prosecutor made the following statement:

> There were four incidents on the report that were violations of the EM program.
>
> On January 31, the defendant deviated in his essential movement from 7:45 to 7:54. On 2-8, he deviated from 7:42 a.m. to 8:04 a.m. On February 15, he deviated from 7:52 to 8:06 a.m. On February 23, he was

[7] Plaintiff did not allege these facts in his amended complaint, but invokes *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012) and *Defender Sec. Co. v. First Mercury Insurance Co.*, 803 F.3d 237, 335 (7th Cir. 2015) to elaborate on the complaint. This Court recognized the right of a plaintiff to hypothesize additional facts in *In re Chicago Bd. Options Exch. Volatility Index Manipulation Antitrust Litig.*, 435 F. Supp. 3d 845, 872 (N.D. Ill. 2020), *aff'd sub nom. Barry v. CBOE Glob. Markets, Inc.*, 42 F.4th 619 (7th Cir. 2022).

[8] Plaintiff is responding to defendants' argument that he entered the jail as a person arrested for the offense of escape by "elaborating on the complaint."

> traced traveling outside of his placement from 7:32 a.m. to 8:00 a.m., Judge.

(Transcript, 3/7/23, 3:9-16, attached as Exhibit 1.)

Without receiving further evidence, or asking for a definition of "essential movement" or what it means to say that plaintiff had "deviated" or had traveled "outside of his placement," the trial judge made the following ruling:

> THE COURT: State granted leave to file petition for violation of bail bond. He will be held no bail right now.

(Exhibit 1, Transcript, 3/7/23, 3:17-19.) Plaintiff's counsel was permitted to make a brief argument (i*d.*, 5:1-9), and instructed by the trial judge to present a written motion for "bond review." The prosecutor filed a "petition for violation of bail bond" after the court hearing. (*Id.*, 6:10-19.)

The trial judge heard arguments on the motion for bond review on March 8, 2023, and denied the motion. Plaintiff attaches a transcript of those proceedings as Exhibit 2.

Plaintiff remained in custody at the Jail for 19 days until the Illinois Appellate Court ordered his release on May 21, 2023. (ECF No. 19, Amended Complaint, ¶ 24.) The Appellate Court acted on plaintiff's motion and did not provide reasons in its order.[9]

Plaintiff pleaded guilty to reduced charges on May 9, 2023, and received a two-year sentence. (*Id.*, ¶ 26.) Plaintiff was entitled to receive credit for the 1,371 days he served before pleading guilty, which includes the time he spent on electronic monitoring. (*Id.*) This amount of sentence credit, under the day-for-day provision of Illinois law, 730

[9] Plaintiff attaches a copy of the order reinstating bail as Exhibit 3.

ILCS 5/3-6-3(a) (2.1), exceeded the two-year sentence that the state court judge imposed on May 9, 2023.

III. Plaintiff has standing to challenge the Sheriff's policies

Defendants argue that *Ewell v. Toney*, 853 F.3d 911 (7th Cir. 2017) bars plaintiff from obtaining damages and therefore requires that the Court dismiss this case for lack of a justiciable controversy. (ECF No. 20 at 5-7.) This argument is without merit.

The plaintiff in *Ewell* claimed that she had been arrested without probable cause and held in custody without a judicial determination of probable cause for slightly more than the 48 hours authorized by *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). A judge found probable cause after Ms. Ewell had been in custody for more than 48 hours; Ms. Ewell remained in custody for another 10 days until the prosecutor declined to file charges. *Ewell*, 853 F.3d at 915.

After Ms. Ewell filed her Section 1983 action, the prosecutor changed course and she was indicted and convicted of the offense for which she had been arrested. All the time she had been in custody, including the 12 days she had been incarcerated before being charged, was credited to her sentence, and the Seventh Circuit held that this meant that she could not "receive damages for time spent in custody, if that time was credited to a valid and lawful sentence." *Ewell*, 853 F.3d at 917.

The 19 days that plaintiff spent at the Jail from March 3, 2023 (when the Sheriff returned defendant the Jail) to March 21, 2023 (when the Illinois Appellate Court reinstated bond) were not "credited to a valid and lawful sentence," as in *Ewell*.

Plaintiff received a two-year sentence on May 9, 2023. Under the day-for-day provision of Illinois law, 730 ILCS 5/3-6-3 (a) (2.1), plaintiff needed 365 days of pretrial detention to satisfy the two-year sentence.[10] Illinois (like all other jurisdictions) does not permit an offender to "bank time" and draw against it for "future transgressions." *United States v. Rhone*, 311 F.3d 893, 895 (8th Cir. 2002). Subtraction of the 365 days plaintiff needed to satisfy his sentence from the 1,371 days he served awaiting trial means that the 19 days plaintiff spent in the Jail because of the Sheriff's policies challenged here were not credited to his sentence.

Defendants assert that plaintiff did not suffer any injury during the 19 days he spent at the Jail This argument is "contrary to fundamental principles of tort law." *McFarlane v. Carothers*, 15-cv-176, 2018 WL 4625660 at *2 (S.D. Ind. Sept. 27, 2018).

During the 19 days he spent in the Cook County Jail, plaintiff was deprived of daily contact with his spouse and children, required to live with dangerous persons, and subjected to much harsher conditions of confinement than if he had remained at home on electronic monitoring. (ECF No. 19, Amended Complaint, ¶ 25.) Plaintiff is entitled to damages for this "discomfort or injury to health, and loss of time and deprivation of society." *Savory v. Cannon*, 947 F.3d 409, 414 (7th Cir. 2020).

Defendants are unable to explain how plaintiff has been compensated for the 19 days he spent at the Jail that he should have spent at home with his family on electronic

[10] Since 2012, under Illinois law has required sentence credit for time on electronic monitoring. See *People v. Donahue*, 2022 IL App (5th) 200274, ¶ 27, 205 N.E.2d 956, 965 (2022) (discussing the various versions of the statute).

monitoring. The Court should therefore reject defendants' standing argument. The Court should also reject defendant's 12(b)(6) motion to dismiss for the reasons explained below.

IV. The Rule 12(b)(6) motion is without merit

A. The Sheriff's policy does not respect plaintiff's 14th Amendment right to a pre-seizure hearing

Defendants argue as a matter of law that the Due Process Clause of the Fourteenth Amendment does not require pre-seizure notice and hearing before law enforcement officers enter a dwelling, seize a person who has been released on bail, and place him in a jail. (ECF 20 at 13) The Court should not resolve this question on a Rule 12(b)(6) motion to dismiss.

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Supreme Court held that release on parole can only be terminated after a hearing because the release "includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Id.* at 482. The Court applied this reasoning to persons released on probation in *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). This rule is now clearly established. *Faheem-El v. Klincar*, 841 F.2d 712, 722 (7th Cir. 1988) (en banc) ("An individual's conditional liberty associated with his or her status as a parolee is a liberty interest protected by the Fourteenth Amendment.")

The rule of *Morrissey* and *Gagnon* is fully applicable to pretrial release on electronic monitoring, which allows the releasee to be "with family and friends and to form the other enduring attachments of normal life." *Morrissey*, 408 U.S. at 482. In *Hohman v. Hogan*, 474 F. Supp. 1290 (D. Vt. 1979), a state trial judge allowed a criminal defendant to be enlarged on bail pending appeal from his conviction. *Id.* at 1291. Thereafter, the

state supreme court revoked bail and the criminal defendant sought habeas relief in federal court. The district court held that a person released on bail pending appeal has a liberty interest that could not be revoked without some due process protections. *Id.* at 1296. The district court reached the same conclusion in *King v. Zimmerman*, 632 F.Supp. 271, 275-75 (E.D. Pa. 1986).

Defendants ask the Court to hold that the proceedings before the criminal court trial judge on March 7, 2023, provided a constitutionally adequate post-arrest hearing: "Plaintiff received due process because he appeared before a judge the very next court day and the judge ordered Plaintiff to be held at the Jail without bail." (ECF No. 20 at 8.) This argument misses the point of plaintiff's claim that a hearing was required *before* the Sheriff revoked his release on electronic monitoring.

Revocation of bail because of an alleged violation of an EM rule requires a hearing "when the deprivation can still be prevented," *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). In this case, there was not a "pressing need," *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993), to return plaintiff to the Jail before a hearing on whether he had violated the conditions of release on electronic monitoring. Even though Sheriff's employees made their determination that plaintiff violated the EM rules on February 24, 2023, the purported violations were not mentioned when plaintiff appeared in criminal court on March 1, 2023, and it was not until March 3, 2023, eight days after the determination, that plaintiff was arrested. There was ample opportunity for a hearing before the officers went to plaintiff's home, removed him from his family, and placed him in the Jail.

The Supreme Court set out a three-factor test to determine when Due Process requires a pre-deprivation hearing in *Mathews v. Eldridge*, 424 U.S. 319 (1976).[11] As in *Simpson v. Brown County*, 860 F.3d 1001 (7th Cir. 2017), plaintiff "has plausibly alleged that he was denied the pre-deprivation process he was due." *Id.* at 1010. Application of the balancing test of *Mathews v. Eldridge* should await summary judgment or trial.

B. The Sheriff's policy authorizing warrantless entry of the home to arrest for a violation of the EM rules is inconsistent with the warrant clause of Fourth Amendment

Since *Payton v. New York*, 445 U.S. 573 (1980), the law has been settled that law enforcement officers require a warrant to enter a dwelling to make an arrest. Defendants are manifestly in error in asserting that "probable cause is an exception to the warrant requirement." (ECF No. 20 at 8-9.)

Defendants are also mistaken in seeking to dismiss based on the affirmative defense of consent. Defendants do not suggest that plaintiff voluntarily permitted the officers to enter his dwelling to arrest him. Nor do defendants ask the Court to extend *Samson v. California*, 547 U.S. 843 (2006), authorizing a search of a parolee's home without reasonable suspicion, to pretrial detainees who have been released on electronic monitoring. Instead, defendants assert that "Plaintiff provided consent for officers to enter his home based on his participation in the electronic monitoring program." (ECF No. 20 at 11.)

[11] "First, the private interest that will be affected by the official action, second, the risk of an erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. at 335.

Waivers of Fourth Amendment rights by a probationer or a parolee are construed as a contract. *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005). For example, in *United States v. Knights*, 534 U.S. 112 (2001), the probation order required the probationer to "[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.* at 114. Similarly, in *Sampson v. California*, 547 U.S. 843 (2006), the parolee had "agree[d] in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." *Id.* at 846. And in *United States v. Beechler*, 68 F.4th 358 (7th Cir. 2023), the Court noted that the "compliance check" was authorized by the terms of the home detention contract. *Id.* at 367.

The record in this case does not include the agreement that plaintiff signed when he was released on electronic monitoring. Defendants instead rely on an Illinois statute which required plaintiff to allow Sheriff's employees to enter his home "for the purpose of verifying the participant's compliance with the conditions of his or her detention." 730 ILCS 5/5-8A-5. Here, the officers did not enter plaintiff's dwelling "to ensure compliance." In this case, the officers entered plaintiff's home to seize plaintiff and remove him to the Cook County Jail. Nothing in the provisions of any EM agreement authorized a warrantless entry to plaintiff's dwelling to place him under arrest.

Defendants also rely on an opinion of the Illinois Appellate Court. *People v. Garcia*, 2021 IL App (1st) 190026, ¶ 41, 2021 WL 6122971 at *7 (2021), quoted at ECF 20 at 11. There, the officers entered the dwelling because they had "received an alarm that the

home monitoring device worn by defendant as a condition of pretrial release had been tampered with." Thus, the officers were entering the dwelling "for the purpose of verifying the participant's compliance with the conditions of his or her detention," as authorized by the statute. The home entry in this case was quite different: The officers were not checking to see if plaintiff was at home. Rather, they were entering plaintiff's home to seize him and take him to the Jail.

Neither the statute nor *Garcia* controls this case. The Court should therefore reject defendant's motion to dismiss the warrantless home entry claim.

C. The Sheriff's policy resulted in an unreasonable seizure

Defendants argue that plaintiff was returned to the Jail because there was probable cause to believe that he had committed the offense of escape. (ECF 20 at 9.) This is incorrect.

The Illinois escape statute requires that the alleged offender "knowingly violates a condition of the electronic monitoring program."[12] Under Seventh Circuit precedent, there must be "some evidence" of this element. *BeVier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986); *Dollard v. Whisenand*, 946 F.3d 342, 355 (7th Cir. 2019). The Sheriff's policy that plaintiff challenges does not require any evidence of a knowing violation of the rules of the EM program.

Here, the trial judge ordered that plaintiff could leave home on each weekday from 7:15 a.m. to 11:00 a.m. to transport his minor children to specified schools (Exhibit 4) and from 2:00 p.m. to 3:30 p.m. to bring the children home. (Exhibit 5.) The Sheriff accused

[12] The statute is set out in ECF No. 20 at 4.

plaintiff of having violated the EM rules when he returned home on four occasions, all within the morning hours when he was permitted to take his children to school and return home. (ECF 19, Amended Complaint ¶ 21.) The precise violation is that "plaintiff did not return home by the route he had followed while driving his children to school." (*Id.*, ¶ 11.) This conduct does not provide probable cause to believe that plaintiff had knowingly violated the rules of the EM program.

In *BeVier*, an officer "saw sunburnt, filthy, and listless children sitting in the sun on a hot day," did not investigate, but simply arrested the parents. *Pasiewicz v. Lake County Forest Preserve Dist.*, 270 F.3d 520, 525 (7th Cir. 2001) (discussing *BeVier*). The Court in *BeVier* applied the rule that the officer had an obligation to pursue "reasonable avenues of investigation" where he had no information about the arrestee's intent. *Bevier*, 806 F.2d at 128. The same is true here: Without any information about plaintiff's intent, it was not reasonable for the Sheriff to order plaintiff's arrest because he returned home on a different route that he had used to take his children to school.

There is no merit in defendant's reliance on *Williams v. Dart*, 967 F.3d 625 (7th Cir. 2020) and "the custodial relationship of the surety to the person bailed, as existed at common law." (ECF No. 20 at 11-12.) The complaint in *Williams* involved the refusal of the Sheriff to grant release on electronic monitoring to persons for whom a judge had ordered release. *Williams*, 967 F,3d at 637. Nothing in that decision speaks to the claims plaintiff raises in this case. On the contrary, *Williams* confirms that the Sheriff may not act unilaterally in revoking electronic monitoring. *Id.* at 636.

Defendants' present claim that plaintiff was arrested because there was probable cause to believe that he had committed an offense is inconsistent with how plaintiff was treated after the officers extracted him from his home. The Felony Review Unit of the State's Attorney of Cook determines whether felony charges will be filed. *Anderson v. Simon*, 217 F.3d 472, 473 (7th Cir. 2000). The Sheriff does not involve Felony Review either before or after revoking electronic monitoring. Instead, the Deputy Sheriffs who implemented the Sheriff's policy brought plaintiff to the Jail, where he was processed as a person whose bond had been revoked. This is strong evidence that the Sheriff's policy is not to arrest for violation of an offense, but to revoke bond because of a perceived violation of electronic monitoring rules.

V. Conclusion

The Court should therefore deny defendants' motion (ECF No. 20).

Respectfully submitted,

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