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

CHRISTOPHER LACOURCIERE,

Plaintiff,

OPINION AND ORDER

v.

13-cv-616-wmc

TODD BENISCH, *et al.*,

Defendants.

Plaintiff Christopher LaCourciere is currently incarcerated by the Wisconsin Department of Corrections at the Wisconsin Secure Program Facility in Boscobel. LaCourciere filed this proposed civil action against multiple officers and officials employed by Dane County, the Dane County Sheriff's Office, and the Dane County District Attorney's Office. He also purports to sue several insurance companies. LaCourciere has been found eligible to proceed *in forma pauperis* and he has made an initial payment of toward the filing fee as required by the Prison Litigation Reform Act, 28 U.S.C. § 1915(b).

Because plaintiff is incarcerated, the court is also required by the PLRA, 28 U.S.C. § 1915A, to screen the proposed complaint and dismiss any portion that is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks money damages from a defendant who is immune from such relief. In addressing any *pro se* litigant's complaint, the court must read the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S.

519, 521 (1972). Even under this lenient standard, the court must deny LaCourciere leave to proceed further and will dismiss this case for the reasons set forth below.

ALLEGATIONS OF FACT

For purposes of this order, the court accepts all well-pled allegations as true and assumes the following probative facts.[1]

A. Background

LaCourciere purports to sue several officers employed by the Dane County Sheriff's Department, including: Deputy Todd Benisch; Sheriff David Mahoney; Deputy Marci Enloe; Deputy Mark Sweeney; Deputy Brian Mrochek; Deputy R.L. Finch; Lieutenant Chuck Immel; Deputy Tom Stolarczyk; Detective Steven Towne; and Sergeant Kris Boldt. In addition, LaCourciere would sue: an individual, Kip Kalscheur; Mount Horeb Police Officer Tim Milas; Dane County District Attorney Ismael Ozanne; Dane County Assistant District Attorney Brian Asmus; Dane County Clerk of Circuit Courts Carlo Esqueda; Dane County; the Dane County Sheriff's Department; the Dane County District Attorney's Office; and several unidentified insurance companies.

[1] The court has supplemented the facts with dates and procedural information about plaintiff's underlying criminal proceedings from public records available at Wisconsin Circuit Court Access, http://wcca.wicourts.gov (last visited December 10, 2013). The court draws all other facts from the complaint and the attached exhibits, which are deemed part of that pleading. *See* FED. R. CIV. P. 10(c); *see also Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) (explaining that documents attached to the complaint become part of the pleading, meaning that a court may consider those documents to determine whether plaintiff has stated a valid claim).

LaCourciere has a lengthy criminal record, including: convictions for burglary in 2001; third-degree sexual assault in 2002; four counts of burglary in 2007; and escape in 2007. While serving a sentence of imprisonment in 2011, LaCourciere escaped from the Fox Lake Correctional Institution. As a result, a warrant issued for LaCourciere's arrest for the offense of escape.

B. Arrest

On November 24, 2011, defendant Mrochek encountered LaCourciere riding a bicycle near Cross Plains, Wisconsin. When asked for his identification, LaCourciere gave the name "John Brown." Defendant Mrochek detained LaCourciere after noticing that he bore a "strong resemblance" to a picture he had seen of an inmate who was reported missing or escaped from state prison in Fox Lake. With assistance from defendant Finch, Mrochek placed LaCourciere under arrest "because he was believed to be an escaped inmate and was suspected of the crime of escape."

At the time of this encounter, LaCourciere was in possession of a large "frame-style backpack" and a small black "nylon bag." According to LaCourciere, both bags were "closed to public view or inspection." LaCourciere contends that defendant Finch searched both bags without his consent, recovering $7,157.00 in currency and a "multipurpose tool" of the sort that is commonly used for breaking into buildings and safes. Among other things, officers recovered a utility knife, two knit hats, gloves, a pair of pliers, a flashlight, three books ("How to Disappear," "How to be Invisible," and another on wilderness survival) and two cellphones. As defendants Mrochek and Finch were counting the currency found in LaCourciere's possession, they received a call from

defendant Sweeney that a nearby business (owned by defendant Kalscheur) had just been burglarized. Due to his close proximity to the reported burglary, LaCourciere was taken into custody. All of LaCourciere's personal property was also seized at the time he was booked into the Dane County Jail.

Soon after he arrived at the Dane County Jail, LaCourciere contends that defendants Benisch and Towne made two attempts to interview him. Noting that he had already invoked his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), LaCourciere maintains that these defendants harassed him in retaliation for invoking his right to remain silent by speaking to him with a "contemptuous tone."

C. Prosecution and Conviction

Subsequently, LaCourciere was charged in Dane County Case No. 2011CF2255 with burglarizing a business owned by defendant Kalscheur (K&K Manufacturing) located in Cross Plains. In that same case, LaCourciere was also charged with possession of "burglarious tools," theft of movable property, criminal damage to property and resisting or obstructing an officer. LaCourciere was charged separately with the offense of escape in Dodge County Case No. 2012CF216.

On May 3, 2012, LaCourciere pled guilty in Dane County Case No. 2011CF2255 to the charges of burglarizing a dwelling and possessing "burglarious tools." *See* Wis. Stat. §§ 943.10, 943.12.[2] The remaining charges were dismissed, but were "read in" for purposes of consideration at sentencing. Pursuant to the parties' negotiated plea

[2] LaCourciere later pled guilty to the charges of escape in Dodge County Case No. 2012CF216.

agreement, the circuit court sentenced LaCourciere to a total of nine years in the prison system ("five in, four out"), consecutive to all other sentences that LaCourciere was already serving at that time. On May 11, 2012, following LaCourciere's sentencing proceeding, the $7,157.00 in currency seized from LaCourciere during the course of his arrest was released to Kalscheur.

D. Claim for Seized Property

On October 17, 2012, LaCourciere filed a petition pursuant to Wis. Stat. § 968.20 with the Dane County Circuit Court in an effort to recover the property seized during the course of his arrest, including the currency. Noting that the State of Wisconsin neither moved for forfeiture of these funds, nor was he ordered to make restitution to K&K Manufacturing at the time of sentencing, LaCourciere argued that the currency was his personal property to keep. LaCourciere maintains that after contacting the Dane County Sheriff's Department, Esqueda, as Dane County Clerk of Court, refused to file his petition.

In his proposed complaint before this court, LaCourciere contends that he was unlawfully arrested on November 24, 2011, and his property was illegally seized in violation of the Fourth Amendment. LaCourciere contends further that defendants Benisch and Towne verbally harassed him after he invoked his *Miranda* rights; that defendants Benisch and Asmus conspired with Kalscheur to convert the currency found in LaCourciere's possession; and that defendant Esqueda denied him access to the courts in violation of his right to due process and equal protection by refusing to file his petition for the return of property pursuant to Wis. Stat. § 968.20. LaCourciere also asserts

various state law claims for malfeasance, retaliation, intentional infliction of emotional distress, trespass to chattels, conversion and breach of fiduciary duty, as well as negligent failure to hire, train and supervise deputies on the part of Sheriff Mahoney. He seeks actual damages in the amount of $7,157.00, nominal damages in the amount of $100, and punitive damages in an amount determined by the court.

OPINION

A complaint may be dismissed for failure to state a claim where the plaintiff alleges too little, failing to meet the minimal federal pleading requirements found in Fed. R. Civ. P. 8. In that respect, Rule 8(a) requires a "'short and plain statement of the claim' sufficient to notify the defendants of the allegations against them and enable them to file an answer." *Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006). While it is not necessary for a plaintiff to plead specific facts, he must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). There is no heightened pleading requirement for *pro se* prisoner civil rights complaints. *Thomson v. Washington*, 362 F.3d 969, 970-71 (7th Cir. 2004). If a complaint pleads facts showing that the plaintiff does not have a claim, however, the complaint should be dismissed "without further ado." *Id*. at 970. In other words, a plaintiff may "plead himself out of court" by including allegations which show that he has no valid claim. *Lekas v. Briley*, 405 F.3d 602, 613-14 (7th Cir. 2005) (citations omitted).

Here, LaCourciere invokes 42 U.S.C. § 1983 as the basis for federal jurisdiction. Section 1983 authorizes an action for damages from civil rights violations committed by any person acting under the color of state law. To state a claim under § 1983, a plaintiff must allege — at a minimum — the violation of a right protected by the Constitution and laws of the United States. *See Baker v. McCollan*, 443 U.S. 137, 140 (1979); *see also Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009) (reciting the elements required to make a claim under § 1983). For reasons discussed briefly below, none of LaCourciere's allegations rise to that level.

As an initial matter, LaCourciere does not allege specific facts demonstrating that defendants Enloe, Sweeney, Immel, Stolarczyk, Milas, Boldt or Ozanne were personally involved in his arrest and subsequent proceedings that form the basis of the complaint. Liability under 42 U.S.C. § 1983 must be based on a defendant's personal involvement in the asserted constitutional violation. *See Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). To the extent that some of these defendants are supervisory officials, there is also no vicarious or *respondeat superior* liability under § 1983. *See Monell v. Dep't of Social Servs., City of New York*, 436 U.S. 658, 690-91 (1978). Thus, it is not sufficient to simply allege that an official is liable on the basis of his supervisory status alone. *See Palmer*, 327 F.3d at 594.

A plaintiff may establish supervisory liability by proving an official knew about the violation and facilitated it, approved it, condoned it or turned a blind eye. *See Morfin v. City of Chicago*, 349 F.3d 989, 1001 (7th Cir. 2003). However, LaCourciere's claims consist of little more than "[t]hreadbare recitals of the elements of a cause of action,

supported by mere conclusory statements" and are wholly insufficient to establish a plausible claim against any of the above-named defendants. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2007) (citing *Twombly*, 550 U.S. at 555). Therefore, LaCourciere's claims against those defendants must be dismissed.

As a prosecutor employed by the Dane County District Attorney's Office, Asmus is entitled to absolute immunity from civil rights claims for actions taken within the scope of their duties in initiating and pursuing a criminal prosecution. *See Kalina v. Fletcher*, 522 U.S. 118, 123-24 (1997); *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976). Because LaCourciere does not allege facts showing that Asmus exceeded the scope of his official duties, his claims against this defendant must also be dismissed.

LaCourciere has further failed to allege facts showing that the Dane County Sheriff's Department or the Dane County District Attorney's Office is liable on a separate basis from Dane County itself. Similarly, claims against a county sheriff in his official capacity are treated as claims against the county. *Grieveson v. Anderson*, 538 F.3d 763, 771 (7th Cir. 2008) (citing *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 765 (7th Cir. 2006)). Counties and other municipal entities cannot be held liable for the acts of their employees unless those acts were carried out pursuant to an official custom or policy. *Monell v. Dep't of Soc. Svcs.*, 436 U.S. 658, 694 (1978). There is no allegation that LaCourciere was harmed as the result of an unconstitutional policy for purposes of establishing municipal liability.

Likewise, although LaCourciere attempts to name several companies who provide insurance for Dane County, he asserts no facts showing that they were acting under color

of state law for purposes of a claim under 42 U.S.C. § 1983. Absent a plausible inference of a conspiracy, LaCourciere cannot demonstrate that a private insurer is liable in this instance. *See Maniscalco v. Simon*, 712 F.3d 1139, 1145 (7th Cir. 2013). The same holds true for LaCourciere's claims against Kalscheur, whose only involvement in the case appears to have been reporting the burglary and accepting receipt of the currency that was stolen. These claims must be dismissed for failure to state a claim under § 1983.

Moreover, to the extent that LaCourciere claims that his arrest was false, his allegations do not show that the charges against him lacked probable cause. To the contrary, LaCourciere provides a detailed report of the investigation that led to his arrest for escape and the subsequent burglary charges. Based on the report, which details his arrest pursuant to the escape warrant and the subsequent search of his possessions that revealed items taken in a burglary, LaCourciere makes a strong showing of probable cause to arrest. *See Thayer v. Chiczewski*, 705 F.3d 237, 246 (7th Cir. 2012). Since "[p]robable cause to arrest is an absolute defense to any claim under Section 1983 against police officers for wrongful arrest," *id.* (quoting *Mustafa v. City of Chicago*, 442 F.3d 544, 547 (7th Cir. 2006)), LaCourciere cannot show that officers violated the Fourth Amendment by searching his belongings. Accordingly, LaCourciere's Fourth Amendment claims must be dismissed.

Also subject to dismissal is LaCourciere's claim that officers verbally harassed him for invoking his *Miranda* rights. In particular, LaCourciere alleges that defendant Benisch (1) remarked in a contemptuous tone, "You don't wanna talk to me, [then] I'm not gonna talk to you"; (2) then proceeded to slam the door in a petulant manner. A

plaintiff must allege something more than an expression of hostility to state a claim under the Constitution. *See Sherwin Manor Nursing Center, Inc. v. McAuliffe*, 37 F.3d 1216, 1221 (7th Cir. 1994). In other words, verbal abuse, standing alone, does not amount to a constitutional violation. *See DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000) (citations omitted). Since nothing more is alleged to have occurred here, LaCourciere's claim of retaliation based on verbal harassment must also be dismissed. *See Morris v. Powell*, 449 F.3d 682, 685-86 (5th Cir. 2006) (collecting cases from the Second, Sixth, Seventh, and D.C. Circuits and holding that "an inmate must allege more than *de minimis* retaliation to proceed with such a claim").

LaCourciere's claim that he had any interest in the currency found in his possession is also baseless. As LaCourciere himself concedes, he was convicted of taking that money during the course of burglarizing an establishment owned by Kalscheur. To the extent that he challenges the validity of his burglary conviction, his claims are barred by the rule in *Heck v. Humphrey*, 512 U.S. 477 (1994), which precludes a suit for damages under these circumstances. In that respect, LaCourciere does not allege or show that his burglary conviction has been vacated or set aside. *See id*. at 486-87. Finally, it strains credulity for LaCourciere to claim now that he is entitled to that currency simply because the state did not initiate formal forfeiture proceedings.

Because LaCourciere does not demonstrate that he had a valid claim to the currency, he also cannot show that he was denied access to the courts when Esqueda declined to file his petition for the return of this property pursuant to Wis. Stat. § 968.20. Indeed, to state a claim for an infringement of the right of access, a prisoner

must allege an actual injury. *In re Maxy*, 674 F.3d 658, 660-61 (7th Cir. 2012) (citing *Lewis v. Casey*, 518 U.S. 343, 353 (1996)); *Ortiz v. Downey*, 561 F.3d 664, 671 (7th Cir. 2009) ("That right [to access courts] is violated when a prisoner is deprived of such access and suffers actual injury as a result."). That is, plaintiff must allege that some action by a defendant has frustrated or is impeding an attempt to bring a nonfrivolous legal claim. *Maxy*, 674 F.3d at 661 (citing *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) ("[E]ven in forward-looking prisoner class actions to remove roadblocks to future litigation, the named plaintiff must identify a 'nonfrivolous,' 'arguable' underlying claim.")). Because LaCourciere alleges *no* non-frivolous claim to the stolen currency, his allegation that he was denied access to the courts is also legally frivolous.

LaCourciere's remaining claims of malfeasance and other state law theories do not bear mention. Unsupported by specific facts, the various elements and causes of action recited in his complaint do not meet the low threshold established by Rule 8 of the Federal Rules of Civil Procedure. While that pleading standard set forth in Rule 8 "does not require 'detailed factual allegations,' . . . it [does] demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (2009) (quoting *Twombly*, 550 U.S. at 555). More facts are not likely to cure the deficiency in plaintiff's pleading because it is plain that the proposed state law violations stem from LaCourciere's allegations of false arrest and conversion of the burglary's proceeds, none of which have any indicia of legitimacy. Therefore, the court will deny his motion for leave to proceed and dismiss the complaint as legally frivolous.

ORDER

IT IS ORDERED that:

1. Plaintiff Christopher W. LaCourciere's request for leave to proceed is DENIED and his complaint is DISMISSED with prejudice as legally frivolous.
2. The dismissal will count as a STRIKE for purposes of 28 U.S.C. § 1915(g). (barring a prisoner with three or more "strikes" or dismissals for a filing a civil action or appeal that is frivolous, malicious, or fails to state a claim from bringing any more actions or appeals *in forma pauperis* unless he is in imminent danger of serious physical injury).
3. Although he has been found indigent, plaintiff is obligated to pay the remainder of the filing fee in monthly installments as set forth in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the prison facility where plaintiff is in custody, advising the warden of his obligation to deduct payments from plaintiff's inmate trust fund account until the $350 filing fee has been paid in full.

Entered this 17th day of December, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge