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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK DEMON CALDWELL II, Plaintiff-Appellant, v. ARIZONA DEPARTMENT OF PUBLIC SAFETY, named as Department of Public Safety; B. HOUCHENS, Highway Patrol Officer, Defendants-Appellees.	No. 18-15926 D.C. No. 2:17-cv-02582-DLR-ESW MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Submitted November 27, 2018**

Before: CANBY, TASHIMA, and FRIEDLAND, Circuit Judges.

Patrick Demon Caldwell II appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging various constitutional claims relating to a traffic stop and impoundment of his vehicle. We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under 28 U.S.C. § 1915A. *Hamilton v. Brown*, 630 F.3d 889, 892 (9th Cir. 2011). We affirm.

The district court properly dismissed Caldwell's action for failure to state a claim because Caldwell failed to allege facts sufficient to state any plausible claim. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are liberally construed, a plaintiff must allege facts sufficient to state a plausible claim); *see also Whren v. United States*, 517 U.S. 806, 810 (1996) (no Fourth Amendment violation when officer has probable cause to believe a traffic violation occurred); *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (defining a seizure claim under the Fourth Amendment); *Serrano v. Francis*, 345 F.3d 1071, 1081-82 (9th Cir. 2003) (setting forth elements of an equal protection claim).

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK DEMON CALDWELL II, Plaintiff-Appellant, v. ARIZONA DEPARTMENT OF PUBLIC SAFETY, named as Department of Public Safety; B. HOUCHENS, Highway Patrol Officer, Defendants-Appellees.	No. 18-15926 D.C. No. 2:17-cv-02582-DLR-ESW District of Arizona, Phoenix ORDER

Before: CANBY, TASHIMA, and FRIEDLAND, Circuit Judges.

We treat Caldwell's motions for reconsideration (Docket Entry Nos. 13 & 14) as a petition for panel rehearing and deny the petition.

Caldwell's motion for appointment of counsel (Docket Entry No. 17) is denied.

No further filings will be entertained in this closed case.

ASH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Patrick Demon Caldwell,

Plaintiff,

v.

Arizona Department of Public Safety, et al.,

Defendants.

No. CV 17-02582-PHX-DLR (ESW)

ORDER

On August 3, 2017, Plaintiff Patrick Demon Caldwell, who is not in custody, filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed In Forma Pauperis. In a September 19, 2017 Order, the Court granted the Application to Proceed and dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

On October 3, 2017, Plaintiff filed his First Amended Complaint. In a January 17, 2018 Order, the Court dismissed the First Amended Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file a second amended complaint that cured the deficiencies identified in the Order.

On February 5, 2018, Plaintiff filed a Second Amended Complaint (Doc. 8). The Court will dismiss the Second Amended Complaint and this action.

. . . .

I. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1)–(2).

A pleading must contain a "short and plain statement of the claim *showing* that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not demand detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

"[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "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.* "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Thus, although a plaintiff's specific factual allegations may be consistent with a constitutional claim, a court must assess whether there are other "more likely explanations" for a defendant's conduct. *Id.* at 681.

But as the United States Court of Appeals for the Ninth Circuit has instructed, courts must "continue to construe *pro se* filings liberally." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). A "complaint [filed by a pro se prisoner] 'must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

II. Second Amended Complaint

As with his previous complaints, Plaintiff names the Arizona Department of Public Safety (AZDPS), and AZDPS Highway Patrol Officer B. Houchens as Defendants. Plaintiff seeks "justice" and "pain and suffer[ing]," which the Court will construe as monetary relief.

III. Failure to State a Claim

A. AZDPS

As explained in the Court's previous Orders, the Arizona Department of Public Safety is not a proper Defendant. Under the Eleventh Amendment to the Constitution of the United States, a state or state agency may not be sued in federal court without its consent. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Furthermore, "a state is not a 'person' for purposes of section 1983. Likewise 'arms of the State'" — such as the Arizona Department of Public Safety — "are not 'persons' under section 1983." *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir. 1991) (citation omitted). Plaintiff has also not made any allegations against AZDPS in his Second Amended Complaint. Therefore, the Court will dismiss the Arizona Department of Public Safety.

B. Houchens

1. Count One

In Count One, Plaintiff alleges that Houchens violated his Fourteenth Amendment rights because Houchens "had no proper cause to pull me over" and "discriminated against [Plaintiff] because [of] the color of [Plaintiff's] skin." Plaintiff further alleges that Houchens "accused [Plaintiff] of drug crimes that were untrue."

Plaintiff styles Count One as related to "citizenship[] rights" arising under the Fourteenth Amendment. The Court will construe the allegations as an equal protection claim under the Fourteenth Amendment, as well as a search-and-seizure claim under the Fourth Amendment. Generally, "[t]o state a claim . . . for a violation of the Equal Protection Clause . . . [,] a plaintiff must show that the defendants acted with an intent or

purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Plaintiff has not alleged he is a member of a protected class. Nor has Plaintiff alleged that Houchens acted with any intent to discriminate against him.

The United States Supreme Court has also recognized "successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see also SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002). Even under this standard, Plaintiff has failed to state a claim. Plaintiff has failed to allege that he was treated differently than other similarly situated individuals and that there was no rational basis for treating him differently.

With regard to the Fourth Amendment, the Fourth Amendment protects the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. However, other than alleging that Houchens "had no proper cause to pull [Plaintiff] over," Plaintiff has provided no facts illuminating the context of the stop he appears to refer to, or to support that it was not reasonable. Although pro se pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled. *Id.* Accordingly, Plaintiff has failed to state a claim in Count One, and it will thus be dismissed.

2. Count Two

In Count Two, Plaintiff alleges that Houchens "pulled [Plaintiff] over for the same crime in the same area," which Plaintiff claims constitutes "double jeopardy." Plaintiff also alleges that Houchens "remove[d] property from [Plaintiff]," including his car, which was "impound[ed] . . . for 30 days."

Although Plaintiff styles Count Two as a "Double Jeopardy" claim arising under the Fifth Amendment, the Double Jeopardy clause does not apply here.[1] Rather, the Court will construe the claim as a Fourth Amendment seizure claim. A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (citation and quotation omitted). A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

As with Count One, however, other than alleging that Houchens "remove[d] property from [Plaintiff]" and that his car was impounded for 30 days, Plaintiff has provided no facts illuminating the context of any seizure, or to support that it was unreasonable. Although pro se pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled. *Id.* Accordingly, Plaintiff has failed to state a claim in Count Two, and it will thus be dismissed.

3. Count Three

In Count Three, Plaintiff alleges that he was "accused of crimes [he] didn't commit" and that a highway patrol officer "retaliated" against him "due to a law suit case [Plaintiff is] involved in as a main witness." However, Plaintiff makes no allegations against any named Defendant.[2] Accordingly, Count Three will thus be dismissed.

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[1] "The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *United States v. Chick*, 61 F.3d 682, 686 (9th Cir. 1995) (quoting *United States v. Halper*, 490 U.S. 435, 440 (1989)). Plaintiff makes no allegation that he was prosecuted or punished more than once for the same offense; indeed, Plaintiff does not even allege that he was prosecuted or punished for *any* offense.

[2] To the extent the "Highway Patrol Officer" Plaintiff refers to is Houchens, Plaintiff has failed to allege any facts to support that Houchens was even aware of the "law suit case" that Plaintiff was "involved in as a witness," much less that Houchens

4. Count Four

In Count Four, Plaintiff alleges that Houchens "had no right or warrants to search or remove my property" and had "no probable cause" and "no right to sie[z]e none of [Plaintiff's] property." As with his other Counts, however, Plaintiff has provided no facts illuminating the context of any seizure, or to support that it was unreasonable. Accordingly, Plaintiff has failed to state a claim in Count Four, and it will thus be dismissed.

IV. Dismissal without Leave to Amend

Because Plaintiff has failed to state a claim in his Second Amended Complaint, the Court will dismiss his Second Amended Complaint. "Leave to amend need not be given if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Court's discretion to deny leave to amend is particularly broad where Plaintiff has previously been permitted to amend his complaint. *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Repeated failure to cure deficiencies is one of the factors to be considered in deciding whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538.

Plaintiff has made three efforts at crafting a viable complaint and appears unable to do so despite specific instructions from the Court. The Court finds that further opportunities to amend would be futile. Therefore, the Court, in its discretion, will dismiss Plaintiff's Second Amended Complaint without leave to amend.

IT IS ORDERED:

(1) Plaintiff's Second Amended Complaint (Doc. 8) and this action are **dismissed** for failure to state a claim, and the Clerk of Court must enter judgment accordingly.

(2) The Clerk of Court must make an entry on the docket stating that the dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

"retaliated against Plaintiff because of that lawsuit. Plaintiff has also failed to describe *how* Houchens supposedly retaliated against him.

(3) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3) and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal of this decision would be taken in good faith and finds Plaintiff may appeal in forma pauperis.

Dated this 4th day of May, 2018.

Douglas L. Rayes
United States District Judge

Additional material from this filing is available in the Clerk's Office.