NOT FOR PUBLICATION

FILED

JUL 19 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARY VANDERMEULEN, Plaintiff-Appellant, v. THOMAS L. LECLAIRE, Superior Court Judge (retired) County of Maricopa; et al., Defendants-Appellees.	No. 19-15273 D.C. No. 2:18-cv-02062-JAT-DMF MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Submitted July 15, 2019**

Before: SCHROEDER, SILVERMAN, and CLIFTON, Circuit Judges.

Cary VanDerMeulen appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging a variety of constitutional claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Whitaker v. Garcetti*, 486 F.3d 572, 579 (9th Cir. 2007) (dismissal under *Heck v. Humphrey*,

* 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).

Appendix A

512 U.S. 477 (1994)); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order) (dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii)). We affirm.

The district court properly dismissed VanDerMeulen's claims against officers Walter and Tucker related to VanDerMeulen's arrest and the search and seizure of his property because success on these claims would necessarily imply the invalidity of his conviction, and VanDerMeulen failed to show that his conviction had been invalidated. *See Heck*, 512 U.S. at 486-87 (if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated").

The district court properly dismissed VanDerMeulen's remaining claims against officers Walter and Tucker, as well as his claims against Brinker, Shupe, and Judges LeClaire, McMurdie, Swann, and Orozco, because these defendants are entitled to absolute immunity. *See Paine v. City of Lompoc*, 265 F.3d 975, 980 (9th Cir. 2001) ("Witnesses, including police witnesses, are accorded absolute immunity from liability for their testimony in judicial proceedings."); *Fry v. Melaragno*, 939 F.2d 832, 836-38 (9th Cir. 1991) (explaining that government attorneys are subject to absolute immunity in both civil trials and criminal

proceedings); *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988) (explaining judicial immunity doctrine).

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).

All pending motions are denied.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cary VanDerMeulen,

Plaintiff,

v.

Thomas L LeClaire, et al.,

Defendants.

NO. CV-18-02062-PHX-JAT (DMF)

JUDGMENT OF DISMISSAL IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed January 14, 2019, Plaintiff to take nothing, and the complaint and action are dismissed for failure to state a claim and without leave to amend.

Brian D. Karth
District Court Executive/Clerk of Court

January 14, 2019

By s/ Rebecca Kobza
Deputy Clerk

ASH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cary VanDerMeulen,

Plaintiff,

v.

Thomas L. LeClaire, et al.,

Defendants.

No. CV 18-2062-PHX-JAT (DMF)

ORDER

On June 29, 2018, Plaintiff Cary VanDerMeulen, who is not in custody, filed a pro se "Complaint and Request for Injunction," an Application to Proceed In Forma Pauperis, a Motion to Allow Electronic Filing by a Party Appearing Without an Attorney, and a Motion for Temporary Restraining Order. In a September 12, 2018 Order, the Court granted the Application to Proceed, denied the motions, and dismissed the Complaint because Plaintiff had failed to state a claim for which relief could be granted. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

On October 11, 2018, Plaintiff filed his First Amended Complaint (Doc. 10), as well as a new Motion to Allow Electronic Filing by a Party Appearing Without an Attorney (Doc. 9), and another Motion for Temporary Restraining Order (Doc. 11). The Court will deny the motions, and dismiss the First Amended Complaint and this action.

I. Statutory Screening of Prisoner Complaints

Pursuant to 28 U.S.C. § 1915(e)(2), in a case in which a plaintiff has been granted

in forma pauperis status, the Court

> shall dismiss the case at any time if the court determines that–(A) the allegation of poverty is untrue; or (B) the action or appeal–(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(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 plaintiff] '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. First Amended Complaint

As with his original Complaint, Plaintiff names as Defendants: Arizona Superior

Court Judge Thomas L. LeClaire; Phoenix Assistant City Prosecutor Gary Shupe; Phoenix Police Officers Michael Walter and Dennis Tucker; and Arizona State Court of Appeals Judges Paul J. McMurdie, Peter B. Swann, and Patricia A. Orozco.[1] Plaintiff's allegations are virtually identical to — indeed, they are almost entirely verbatim of — those made in his original Complaint, and appear to relate to his arrest and trial, and to subsequent civil forfeiture proceedings relating to property seized during Plaintiff's criminal proceedings. Plaintiff identifies the Fourth, Fifth, and Fourteenth Amendments as being "at issue in this proceeding." Plaintiff seeks monetary and injunctive relief, as well as punitive damages.

III. Failure to State a Claim

In its September 12, 2018 Order, the Court found that all of the Defendants were absolutely immune from this suit, and that Plaintiff's claims for damages were barred by *Heck v. Humphrey*, 512 U.S. 477, 486 (1994). The Court nevertheless provided Plaintiff an opportunity to amend his Complaint to attempt to provide factual allegations supporting that immunity should not extend to the Defendants, or to demonstrate that the *Heck* bar did not apply. Plaintiff has failed to do so. Although he has added a "List of Defendants and Statement of Facts underlying Claim" page to his First Amended Complaint, Plaintiff makes no allegations against any named Defendant on this page, and, as noted, what allegations he does provide elsewhere in his First Amended Complaint are virtually verbatim, and functionally identical, to those in his original Complaint.[2] Accordingly, for

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[1] As with his original Complaint, although he does not identify him as a Defendant, Plaintiff also makes allegations against Deputy Maricopa County Attorney John Eric Brinker. Even if Brinker was named as a defendant, Plaintiff does not allege facts to support that he would not also be entitled to prosecutorial immunity. Plaintiff also refers to an "Officer Mendoza," although he does not name Mendoza as a Defendant, and describes him only as "the party responsible for the safe keeping of seized property." Because Plaintiff makes no particular allegations against Mendoza,Mendoza will be dismissed to the extent Plaintiff intended to name him as a Defendant to this action.

[2] Plaintiff also now indicates that "most of the facts supporting the contentions of this claim are readily available as a matter of record, as provided by contemporaneous records and those of court record; transcripts which are readily identifiable in electronic form." (Doc. 10 at 14). However, Plaintiff fails to actually provide any of these purported records, to identify which case or cases he is refering to, or to otherwise explain how they are relevant to and support his claims, or, more importantly, how they overcome the Defendants' absolute immunity and the *Heck* bar to his damages claim.

the same reasons as those set forth in the Court's September 12 Order, Plaintiff has failed to state a claim for which relief could be granted in the First Amended Complaint, and it will thus be dismissed. Additionally, and again for the same reasons as those set forth in the Court's September 12 Order, Plaintiff's Motion to Allow Electronic Filing by a Party Appearing Without an Attorney, and Motion for Temporary Restraining Order, will be denied.

IV. Dismissal without Leave to Amend

"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 two 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 First Amended Complaint without leave to amend.

IT IS ORDERED:

(1) The First Amended Complaint (Doc. 10) and this action are **dismissed** for failure to state a claim, and the Clerk of Court must enter judgment accordingly.

(2) Plaintiff's Motion to Allow Electronic Filing by a Party Appearing Without an Attorney (Doc. 9) and Motion for Temporary Restraining Order (Doc. 11) are **denied**.

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(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 14th day of January, 2019.

James A. Teilborg
Senior United States District Judge