NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-5884

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOM ELI ORR, Plaintiff-Appellant, v. TENNESSEE BUREAU OF INVESTIGATION, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

ORDER

Before: ROGERS, WHITE, and STRANCH, Circuit Judges.

Tom Eli Orr, a pro se federal prisoner, appeals the district court's order and judgment denying his motion for summary judgment and dismissing his civil action, filed pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

After his arrest on March 8, 2003, a jury convicted Orr of two counts of distribution of cocaine base, in violation of 21 U.S.C. § 841(a), and of conspiracy with intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(a). *See United States v. Orr*, 136 F. App'x 632, 634 (5th Cir. 2005). On September 4, 2007, Orr filed a motion in Tennessee criminal court for the return of property that was seized at the time of his arrest and later forfeited. The state court denied the motion, holding that the court lacked jurisdiction to determine the disposition of property seized under Tennessee Code Annotated § 53-11-451(d). In 2012, Orr contacted the Tennessee Department of Safety and Homeland Security to inquire about the forfeited property. On April 20,

2012, the Department responded, noting that the State kept files for only seven years and that the file for his forfeiture case had been destroyed. The attorney for the agency explained that "notice of property seizure is sent out of this office by certified mail and if it returns with a signature then the judge will accept that, if it is returned unclaimed after three attempts by the U.S. Postal Service that will also be sufficient as notice." Also in 2012, Orr filed a petition for judicial review in state court, which was dismissed. The Tennessee Court of Appeals affirmed the dismissal, holding that the trial court did not have subject-matter jurisdiction to hear the case because Orr failed to comply with the sixty-day time limit for filing a petition for review under Tennessee Code Annotated § 40-33-203(a). *Orr v. Tenn. Dep't of Safety*, No. M2012-02711-COA-R3-CV, 2014 WL 468230, at *2 (Tenn. Ct. App. Feb. 4, 2014). Regardless, the Court of Appeals noted that over five years passed before Orr alleged that he had not received notice of forfeiture and that due to Orr's inexcusable delay, the agency no longer had the records to "substantiate its claim that it complied with the statutory procedural requirements." *Id.* at *3.

In 2015, Orr filed a civil action against the Tennessee Bureau of Investigation, the Tennessee Department of Safety, and the Tennessee Department of the Treasury, Division of Unclaimed Property, alleging that state law-enforcement officers unlawfully seized his property after his 2003 arrest. Orr alleged that he never received notice regarding the forfeiture of his property, violating his due process rights under the Fifth Amendment, the Fourth Amendment, and the APA. The district court screened Orr's complaint pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A and dismissed it. The district court concluded that Orr had failed to state a claim upon which relief could be granted under the APA because the defendants are not federal agencies.

In his timely appeal, Orr argues that the district court erred in dismissing his complaint and, alternatively, that it should have permitted him to amend his complaint.

We review de novo a district court's decision to dismiss a prisoner's complaint pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *Flanory v. Bonn*, 604 F.3d 249, 252 (6th Cir. 2010). The complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Orr's complaint was properly dismissed for failure to state a claim, as it did not set forth a plausible claim for relief under the APA or the Federal Constitution.

First, the district court did not err in dismissing Orr's APA claims for failure to state a claim. The APA provides for judicial review only for persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Because the term "agency" is defined as "each authority of the Government of the United States," the APA does not apply to state agencies. 5 U.S.C. § 701(b)(1); *Sw. Williamson Cty. Cmty. Ass'n v. Slater*, 173 F.3d 1033, 1035 (6th Cir. 1999). Orr's APA claims against Tennessee state agencies were therefore properly dismissed. *See id.* at 1035-36.

Second, to the extent that Orr asserted due process claims under 42 U.S.C. § 1983, those claims were subject to dismissal because Orr's complaint established that they were untimely. *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 839 F.3d 458, 464 (6th Cir. 2016) ("[W]here one can determine from the face of the complaint that the statute of limitations has run, dismissal is appropriate."). Orr became aware that his property had been forfeited, allegedly without notice, no later than September 4, 2007, when he first filed a state-court motion for its return. That motion was denied in March of 2008, but Orr took no further action until 2012, and he did not file his complaint in the federal district court until June 2015. Regardless of any tolling during Orr's state-court proceedings, he filed his federal complaint well outside of the applicable one-year limitations period. *See Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007) (noting that a one-year limitations period applies to § 1983 claims in Tennessee).

Finally, Orr's argument that the district court should have permitted him to amend his complaint is without merit. Orr did not move for leave to amend, and amendment would have been futile for the reasons discussed above.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX-B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

TOM ELI ORR, Plaintiff, v. TENNESSEE BUREAU OF INVESTIGATION, et al., Respondent.	)	No. 2:15-cv-2377-SHM-tmp

ORDER OF DISMISSAL
ORDER DENYING MOTION FOR SUMMARY JUDGMENT AS MOOT
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

On June 2, 2015, Plaintiff Tom Eli Orr, who is confined as an inmate at the Federal Correctional Institution in Memphis, Tennessee, filed a *pro se* complaint pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701. (Complaint ("Compl."), ECF No. 1.) On June 29, 2015, Plaintiff Orr filed an amended complaint. (Amended ("Am.") Compl., ECF No. 5.) On November 13, 2017, Plaintiff filed a motion for summary judgment. (Motion ("Mot."), ECF No. 23.) Plaintiff sues the Tennessee Bureau of Investigation, the Tennessee Department of Safety, and the Tennessee Department of the Treasury, Division of Unclaimed Property. (*Id.* at 1.)

I. THE COMPLAINT

Orr has filed this complaint seeking judicial review of the forfeiture of property seized during his arrest by the Memphis Police Department on March 8, 2003. (*Id.* at 2.) Orr alleges that the police officers seized a 2000 Cadillac DeVille and its contents, tires, rims, clothing, jewelry, and cash. (*Id.*) Orr alleges that the seizing agency did not follow proper statutory

procedures, in particular, the procedures requiring notice to the owner of the seized property. (*Id.*)

II. ANALYSIS

A. Standard of Review

The Court is required to screen prisoner complaints and to dismiss any complaint, or any portion thereof, if the complaint—

> (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
>
> (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A(b); *see also* 28 U.S.C. § 1915(e)(2)(B).

In assessing whether the complaint in this case states a claim on which relief may be granted, the Court applies the standards under Federal Rule of Civil Procedure 12(b)(6), as stated in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009), and in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). *Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010). "Accepting all well-pleaded allegations in the complaint as true, the Court 'consider[s] the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief.'" *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 681) (alteration in original). "[P]leadings that . . . are no more than conclusions . . . are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679; *see also Twombly*, 550 U.S. at 555 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could

satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.").

"A complaint can be frivolous either factually or legally. Any complaint that is legally frivolous would *ipso facto* fail to state a claim upon which relief can be granted." *Hill*, 630 F.3d at 470 (citing *Neitzke v. Williams*, 490 U.S. 319, 325, 328-29 (1989)).

> Whether a complaint is factually frivolous under §§ 1915A(b)(1) and 1915(e)(2)(B)(i) is a separate issue from whether it fails to state a claim for relief. Statutes allowing a complaint to be dismissed as frivolous give "judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Neitzke*, 490 U.S. at 327, 109 S. Ct. 1827 (interpreting 28 U.S.C. § 1915). Unlike a dismissal for failure to state a claim, where a judge must accept all factual allegations as true, *Iqbal*, 129 S. Ct. at 1949-50, a judge does not have to accept "fantastic or delusional" factual allegations as true in prisoner complaints that are reviewed for frivolousness. *Neitzke*, 490 U.S. at 327-28, 109 S. Ct. 1827.

Id. at 471.

"*Pro se* complaints are to be held 'to less stringent standards than formal pleadings drafted by lawyers,' and should therefore be liberally construed." *Williams*, 631 F.3d at 383 (quoting *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004)). *Pro se* litigants and prisoners are not exempt from the requirements of the Federal Rules of Civil Procedure. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989); *see also Brown v. Matauszak*, No. 09-2259, 2011 WL 285251, at *5 (6th Cir. Jan. 31, 2011) (affirming dismissal of pro se complaint for failure to comply with "unique pleading requirements" and stating "a court cannot 'create a claim which [a plaintiff] has not spelled out in his pleading'") (quoting *Clark v. Nat'l Travelers Life Ins. Co.*, 518 F.2d 1167, 1169 (6th Cir. 1975)) (alteration in original); *Payne v. Sec'y of Treas.*, 73 F. App'x 836, 837 (6th Cir. 2003) (affirming *sua sponte* dismissal of complaint pursuant to Fed. R. Civ. P. 8(a)(2) and stating, "[n]either this court nor the district court is required to create Payne's

claim for her"); *cf. Pliler v. Ford*, 542 U.S. 225, 231 (2004) ("District judges have no obligation to act as counsel or paralegal to pro se litigants."); *Young Bok Song v. Gipson*, 423 F. App'x 506, 510 (6th Cir. 2011) ("[W]e decline to affirmatively require courts to ferret out the strongest cause of action on behalf of *pro se* litigants. Not only would that duty be overly burdensome, it would transform the courts from neutral arbiters of disputes into advocates for a particular party. While courts are properly charged with protecting the rights of all who come before it [sic], that responsibility does not encompass advising litigants as to what legal theories they should pursue.").

B. APA Claim

The APA allows judicial review for persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" and defines "agency" as "each authority of the Government of the United States. . . ." 5 U.S.C. §§ 701(b)(1), 702. By its own terms, the APA does not apply to state agencies or authorities. *Southwest Williamson Cnty. Cmty. Ass'n. Inc. v. Slater*, 173 F.3d 1033, 1035 (6th Cir. 1999.) *See also Resident Council of Allen Parkway Village v. HUD*, 980 F.2d 1043, 1055 (5th Cir. 1993); *Gilliam v. Miller*, 973 F.2d 760, 764 (9th Cir. 1992). Because the Tennessee Bureau of Investigation, the Tennessee Department of Safety, and the Tennessee Department of the Treasury, Division of Unclaimed Property, are not agencies as defined by the APA, the complaint is **DISMISSED** as legally frivolous and failing to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915A(b)(1) and 28 U.S.C. § 1915(e)(2)(B)(ii). Plaintiff's motion for summary judgment is **DENIED** as **MOOT** due to the dismissal of the complaint.

III. APPELLATE ISSUES

The Court must also consider whether Plaintiff should be allowed to appeal this decision *in forma pauperis*, should he seek to do so. Twenty-eight U.S.C. § 1915(a)(3) provides that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith."

The good faith standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). The test under 28 U.S.C. § 1915(a) for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any issue that is not frivolous. *Id.* It would be inconsistent for a district court to determine that a complaint should be dismissed prior to service on the defendants, but has sufficient merit to support an appeal *in forma pauperis*. *See Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983).

The same considerations that lead the Court to dismiss this case as legally frivolous and for failure to state a claim also compel the conclusion that an appeal would not be taken in good faith. It is CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by Plaintiff would not be taken in good faith and Plaintiff may not proceed on appeal *in forma pauperis*. Leave to proceed on appeal *in forma pauperis* is **DENIED**.

The final matter to be addressed is the assessment of a filing fee in Plaintiff appeals the dismissal of this case. In *McGore v. Wrigglesworth*, 114 F.3d 601, 610-11 (6th Cir. 1997), the Sixth Circuit set out specific procedures for implementing the PLRA. Plaintiff is instructed that, if he wishes to take advantage of the installment procedures for paying the appellate filing fee, he must comply with the procedures set out in *McGore* and 28 U.S.C. § 1915(b).

IT IS SO ORDERED, this 1st day of August 2018.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE