

FILED: January 23, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7327
(4:17-cv-01304-RBH)

GREGORY GREEN

Plaintiff - Appellant

v.

HORRY COUNTY; JIMMY A. RICHARDSON, II; SCOTT HIXON

Defendants - Appellees

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

PER CURIAM:

Gregory Green appeals the district court's order accepting the recommendation of the magistrate judge and dismissing without prejudice Green's 42 U.S.C. § 1983 (2012) complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) (2012). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Green v. Horry Cty.*, No. 4:17-cv-01304-RBH (D.S.C. Sept. 29, 2017). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Gregory Green,	)	Civil Action No.: 4:17-cv-01304-RBH
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
Horry County, Jimmy A.	)	
Richardson, II, and Scott Hixon,	)	
	)	
Defendants.	)	

Plaintiff Gregory Green, a state prisoner proceeding pro se, filed this action pursuant to 42 U.S.C. § 1983 against the above-captioned Defendants. *See* ECF No. 1. The matter is before the Court for consideration of Plaintiff's objections to the Report and Recommendation ("R & R") of United States Magistrate Judge Paige J. Gossett, who recommends summarily dismissing Plaintiff's complaint.¹ *See* ECF Nos. 7 & 9.

Standard of Review

The Magistrate Judge makes only a recommendation to the Court. The Magistrate Judge's recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The Court must conduct a de novo review of those portions of the R & R to which specific objections are made, and it may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Court must engage in a de novo review of every portion of the Magistrate Judge's report

¹ The Magistrate Judge issued the R & R in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.).

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to which objections have been filed. *Id.* However, the Court need not conduct a de novo review when a party makes only “general and conclusory objections that do not direct the [C]ourt to a specific error in the [M]agistrate [Judge]’s proposed findings and recommendations.” *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of specific objections to the R & R, the Court reviews only for clear error, *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005), and the Court need not give any explanation for adopting the Magistrate Judge’s recommendation. *Camby v. Davis*, 718 F.2d 198, 199–200 (4th Cir. 1983).

Discussion²

In his § 1983 complaint, Plaintiff alleges that his due process rights were violated when he pled guilty to a drug offense in state court, and that “this unconstitutional conviction was used to Plaintiff’s detriment in a subsequent conviction.” ECF No. 1 at p. 14–15. He sues the assistant solicitor who prosecuted him, as well as the solicitor and the county in which he pleaded guilty. *Id.* at pp. 2–3. Plaintiff seeks monetary damages from Defendants “for the injuries sustained due to the unconstitutional conviction,” namely the “five years of incarceration that he served from July 20, 2006 thru July 1, 2011.” *Id.* at pp. 5–6, 15. The Magistrate Judge recommends summarily dismissing Plaintiff’s complaint because (1) the solicitors are shielded by absolute prosecutorial immunity, and (2) the complaint fails to state a claim upon which relief can be granted. R & R at pp. 3–6.

Although Plaintiff lodges two objections to the R & R,³ *see* ECF No. 9, the Court finds Plaintiff’s claims fail not only for the reasons set forth in the R & R but also for a simple reason not

² The R & R summarizes the factual and procedural background of this case, as well as the applicable legal standards.

³ Plaintiff challenges the Magistrate Judge’s (1) characterization of the manner by which he pleaded guilty to the drug offense and (2) finding of prosecutorial immunity. *See* ECF No. 9 at pp. 1–4.

discussed in the R & R—they are barred by the Supreme Court’s decision in *Heck v. Humphrey*, 512 U.S. 477 (1994). *Heck* bars Plaintiff’s claims because success on them would necessarily imply the invalidity of his drug conviction and five-year prison sentence, which have not been overturned or otherwise called into question. See *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005) (explaining that under *Heck* and related cases, “a state prisoner’s § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner’s suit (state conduct leading to conviction or internal prison proceedings)—if success in that action would necessarily demonstrate the invalidity of confinement or its duration”); *Edwards v. Balisok*, 520 U.S. 641, 646 (1997) (extending *Heck* to civil rights actions that do not directly challenge confinement, but instead contest procedures which necessarily imply unlawful confinement); *Young v. Nickols*, 413 F.3d 416, 417 (4th Cir. 2005) (“*Heck* . . . bars a prisoner’s § 1983 claim if the relief sought necessarily implies the invalidity of his criminal judgment.”). Under *Heck* and its progeny, the Court cannot grant Plaintiff the relief he seeks. See, e.g., *Mayfield v. King*, No. CA 0:10-1487-JFA-PJG, 2010 WL 4929124, at *1 (D.S.C. Nov. 30, 2010) (finding *Heck* barred Plaintiff’s § 1983 action alleging “that the defendants have violated his due process rights and that he has been maliciously and falsely imprisoned”). Accordingly, the Court modifies the R & R to reflect this additional reason for dismissal, and overrules Plaintiff’s objections.⁴

Conclusion

For the foregoing reasons, the Court overrules Plaintiff’s objections, adopts the R & R [ECF No.

⁴ The Court agrees with the Magistrate Judge’s findings that (1) the solicitors are shielded by absolute prosecutorial immunity, and (2) the complaint fails to state a claim upon which relief can be granted. See generally *Safar v. Tingle*, 859 F.3d 241, 248 (4th Cir. 2017) (“It is well settled that prosecutorial activities that are ‘intimately associated with the judicial phase of the criminal process’ are absolutely immune from civil suit.” (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976))).

7] *as modified herein*, and **DISMISSES** this action *without prejudice and without issuance and service of process*.

IT IS SO ORDERED.

Florence, South Carolina
September 29, 2017

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Gregory Green,	)	C/A No. 4:17-1304-RBH-PJG
	)	
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
Horry County; Jimmy A. Richardson, II; Scott	)	
Hixon,	)	
	)	
Defendants.	)	
	)	

The plaintiff, Gregory Green, a self-represented state prisoner, brings this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff files this action *in forma pauperis* under 28 U.S.C. § 1915 and § 1915A. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.). Having reviewed the Complaint in accordance with applicable law, the court concludes that it should be summarily dismissed without prejudice and without issuance and service of process.

I. Procedural Background

Plaintiff was indicted by a Horry County Grand Jury for trafficking crack cocaine, one hundred grams or more, in January of 2005. Plaintiff alleges Defendant Hixon, an assistant solicitor in South Carolina's Fifteenth Judicial Circuit, amended Plaintiff's indictment to include a "totally different charge" during his guilty plea proceeding, which violated his right to due process by failing to provide him notice of the charge. (Compl., ECF No. 1 at 14.) He claims Hixon changed the charge in the indictment from trafficking one hundred grams or more of crack cocaine to trafficking ten to twenty-eight grams of crack cocaine. He claims that based on this conviction, he

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“unconstitutionally served” five years in prison and had a subsequent criminal conviction enhanced.¹ (*Id.* at 15.) Plaintiff further claims Defendants Horry County and Fifteenth Judicial Circuit Solicitor Richardson, Hixon’s employer and supervisor, failed to train Hixon on how to provide constitutionally adequate notice of reducing drug offenses. He seeks monetary damages for the purportedly unconstitutional conviction pursuant to 42 U.S.C. § 1983.

II. Discussion

A. Standard of Review

Under established local procedure in this judicial district, a careful review has been made of the *pro se* Complaint pursuant to the procedural provisions of the Prison Litigation Reform Act (“PLRA”), Pub. L. No. 104-134, 110 Stat. 1321 (1996), including 28 U.S.C. § 1915 and 28 U.S.C. § 1915A. The Complaint has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit, and is also governed by 28 U.S.C. § 1915A, which requires the court to review a complaint filed by a prisoner that seeks redress from a governmental entity or officer or employee of a governmental entity. *See McLean v. United States*, 566 F.3d 391 (4th Cir. 2009). Section 1915A requires, and § 1915 allows, a district court to dismiss the case upon a finding that the action is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); 28 U.S.C. § 1915A(b).

This court is required to liberally construe *pro se* complaints, which are held to a less stringent standard than those drafted by attorneys. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *King*

¹ It appears he is currently serving a term of imprisonment from the subsequent conviction.

v. Rubenstein, 825 F.3d 206, 214 (4th Cir. 2016). Nonetheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990); see also Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (outlining pleading requirements under Rule 8 of the Federal Rules of Civil Procedure for "all civil actions").

B. Analysis

A legal action under 42 U.S.C. § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999). To state a claim under § 1983, a plaintiff must allege: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). In this action, Plaintiff alleges Defendant Hixon violated his Fourteenth Amendment right to due process, and he also alleges Defendants Horry County and Richardson are liable because of their failure to train Hixon. However, as discussed below, the court finds Plaintiff's Complaint should be dismissed because Defendants Hixon and Richardson are immune from suit in this matter and Plaintiff otherwise fails to state a claim upon which relief can be granted.

As to Defendants Hixon and Richardson, solicitors are immune from suit where a plaintiff seeks damages under § 1983 for the solicitors' prosecution of the plaintiff. See Imbler v. Pachtman, 424 U.S. 409, 430 (1976) ("Solicitors are immune from § 1983 claims where their challenged actions are 'intimately associated with the judicial phase of the criminal process.'"); see also Lyles v. Sparks, 79 F.3d 372, 377 (4th Cir. 1996) (explaining "the Imbler Court specified that absolute immunity protects prosecutors' decisions 'whether and when to prosecute'"). Here, Plaintiff alleges Defendants Hixon and Richardson violated Plaintiff's right to due process by amending his

indictment during his guilty plea. This allegation concerns the defendants' prosecution of Plaintiff as solicitors, for which they are entitled to prosecutorial immunity. See Lyles, 79 F.3d at 377; see also Safar v. Tinkler, ___ F.3d ___, No. 16-1420, 2017 WL 2453257, at *5-7 (4th Cir. June 7, 2017) (discussing the parameters of prosecutorial immunity). Accordingly, pursuant to § 1915(e)(2)(iii), Plaintiff's claim arising out of his prosecution against Hixon and Richardson should be dismissed because Plaintiff seeks damages against defendants that are immune from such relief.

As to Defendants Horry County and Richardson, Plaintiff seeks to hold them liable for Defendant Hixon's purported violation of Plaintiff's right to due process under the failure to train theory of liability. See generally City of Canton v. Harris, 489 U.S. 378, 392 (1989). However, in order to find liability for failure to train, Plaintiff must, among other things, show that a subordinate actually violated his constitutional rights. Brown v. Mitchell, 308 F. Supp. 2d 682, 701 (E.D. Va. 2004) (citing City of Canton, 489 U.S. at 388-92). Plaintiff alleges Hixon violated his right to due process by amending his indictment to charge a lesser-included offense during the guilty plea proceeding, thereby depriving Plaintiff of sufficient notice of the new charge.

Due process requires that an accused be given "reasonable notice" of the specific charge against him. Stroud v. Polk, 466 F.3d 291, 296 (4th Cir. 2006) (citing Cole v. Arkansas, 333 U.S. 196, 201 (1948)). Reasonable notice requires the defendant be apprised, with reasonable certainty, of the nature of the accusation against him so that he may prepare a defense. Id. (citing United States v. Simmons, 96 U.S. 360, 362 (1878) (1962)).

In South Carolina, indictments are notice documents, intended to inform defendants of the charges against them. See State v. Smalls, 613 S.E.2d 754, 756 (S.C. 2005) ("The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to appraise him of the elements of the offense and to allow him to decide whether to pled guilty or

stand trial.”) (citing Evans v. State, 611 S.E.2d 510 (S.C. 2005)). In Smalls, the South Carolina Supreme Court held that a defendant had notice of the charge to which he pled guilty, despite the lack of an indictment for the charge. Id. The Court stated,

In a criminal case, a defendant who chooses to plead guilty has ample opportunity to be fully notified of the charges he is pleading guilty to. First, a defendant may check a box on the sentencing sheet to indicate a waiver of presentment of the indictment to the grand jury. Second, a defendant may check a box to indicate that he wishes to plead guilty. In addition, a defendant may sign the sentencing sheet, indicating the defendant is informed of the choices and has selected the box that corresponds to the course of action the defendant wants to take in the case.

Id. The Court went on to state that it is not necessary to prepare another indictment for the charge to which a defendant will plead guilty, stating, rather, “A signed document gives rise to a presumed regularity in the proceedings that the defendant was informed of the charges against him.” Id.

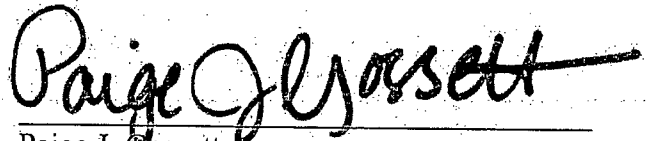
In this case, Plaintiff attached his sentencing sheet to the Complaint. (ECF No. 1-1 at 1.) The sentencing sheet is signed by Plaintiff and his criminal defense attorney, and it indicates Plaintiff pled guilty to trafficking in crack cocaine, ten to twenty-eight grams, second offense, and a negotiated sentence of five years’ imprisonment. See S.C. Code Ann. § 44-53-375(c)(2). Plaintiff’s signed sentencing sheet shows he was informed of the charge against him, despite the alleged amendment to the indictment at his guilty plea proceeding. See Smalls, 364 S.E.2d at 756. Moreover, the only difference between the statutory subsection under which he was originally charged and the subsection to which he pled guilty was the amount of narcotics he was accused of possessing, of which he pled guilty to the lesser. Therefore, Plaintiff’s allegation that he did not have sufficient notice of the charge is frivolous. See id. Accordingly, Plaintiff fails to allege facts that plausibly show he was denied his right to due process by the amendment of his indictment during his guilty plea proceeding. Further, because Plaintiff has failed to properly allege an underlying constitutional violation, his failure to train claim against Defendants Horry County and

Richardson should be dismissed for failure to state a claim upon which relief can be granted pursuant to § 1915(e)(2)(B)(ii). See Brown, 308 F. Supp.2d at 701.

III. Conclusion

For the foregoing reasons, it is recommended that the Complaint be dismissed without prejudice and without issuance and service of process.

June 13, 2017
Columbia, South Carolina


Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

*The parties are directed to note the important information in the attached
"Notice of Right to File Objections to Report and Recommendation."*