

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

BRIAN JAY WILKINSON,

Plaintiff,

v.

CASE NO. 21-3068-SAC

JOE DICKINSON, et al.,

Defendants.

NOTICE AND ORDER TO SHOW CAUSE

This matter is a civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff, a person held at the Harvey County Jail, proceeds pro se and seeks leave to proceed in forma pauperis. The court has reviewed plaintiff's motion to proceed in forma pauperis and directs him to submit a current financial statement.

Nature of the Complaint

Plaintiff sues a state district judge, a district attorney, twelve individual law enforcement officers, and all Harvey County Jail officers employed between October 12 and November 1, 2019, and December 2 through December 8, 2020, and all "techs/employees" of the Larned State Hospital from December 8, 2020, until the date plaintiff was released from that facility.

The complaint states that plaintiff was stopped while traveling between two Kansas communities. Plaintiff states that one of the individual defendants displayed a "lethal weapon" and that he and a dozen armed men criminally damaged plaintiff's vehicle. He claims he was kidnapped and is now held on the order of the defendant state district judge. The complaint also states that plaintiff was assaulted by another jail prisoner, that his car was stolen and sold, and that

he is wrongfully incarcerated. He seeks federal criminal charges against defendants and asks to be "made whole" for the loss of his vehicle and his incarceration.

Screening

A federal court must conduct a preliminary review of any case in which a prisoner seeks relief against a governmental entity or an officer or employee of such an entity. See 28 U.S.C. §1915A(a). Following this review, the court must dismiss any portion of the complaint that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary damages from a defendant who is immune from that relief. See 28 U.S.C. § 1915A(b).

In screening, a court liberally construes pleadings filed by a party proceeding pro se and applies "less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

"To state a claim for relief under Section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citations omitted).

To avoid a dismissal for failure to state a claim, a complaint must set out factual allegations that "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The court accepts the well-pleaded allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Id.* However, "when the allegations in a complaint, however true, could not raise a [plausible] claim of entitlement to relief," the matter should be dismissed. *Id.* at 558. A court need not

accept “[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, “to state a claim in federal court, a complaint must explain what each defendant did to [the pro se plaintiff]; when the defendant did it; how the defendant’s action harmed [the plaintiff]; and what specific legal right the plaintiff believes the defendant violated.” *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007).

The Tenth Circuit has observed that the U.S. Supreme Court’s decisions in *Twombly* and *Erickson* set out a new standard of review for dismissals under 28 U.S.C. § 1915(e)(2)(B)(ii). See *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007) (citations omitted). Following those decisions, courts “look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief.” *Kay*, 500 F.3d at 1218 (quotation marks and internal citations omitted). A plaintiff “must nudge his claims across the line from conceivable to plausible.” *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). In this context, “plausible” refers “to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent,” then the plaintiff has not “nudged [the] claims across the line from conceivable to plausible.” *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Twombly*, 550 U.S. at 1974).

Discussion

The court has examined the complaint and has identified the following deficiencies.

First, to the extent plaintiff challenges his present custody and seeks the intervention of this court in a pending state criminal

action, his claim implicates the abstention doctrine under *Younger v. Harris*, 401 U.S. 37, 45 (1971). The *Younger* abstention doctrine is based on "notions of comity and federalism, which require that federal courts respect state functions and the independent operation of state legal systems." *Phelps v. Hamilton*, 122 F.3d 885, 889 (10th Cir. 1997). Absent narrow exceptions for "bad faith or harassment," prosecution under a statute that is "flagrantly and patently" unconstitutional, or other "extraordinary circumstances" involving irreparable injury, *Younger*, 401 U.S. at 46-55, abstention is appropriate when: (1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court affords an adequate forum to hear the claims raised in the plaintiff's federal complaint, and (3) the state proceedings implicate important state interests. *Weitzel v. Div. of Occupational & Prof'l Licensing*, 240 F.3d 871, 875 (10th Cir. 2001); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). If applicable, the *Younger* abstention doctrine obligates the Court to dismiss an action in favor of an ongoing state proceeding. *Weitzel*, 240 F.3d at 875.

Here, the first condition is met because plaintiff's state criminal proceedings are pending. The second condition is met because Kansas has an important interest in enforcing its criminal laws through criminal proceedings in the state's courts. *In re Troff*, 488 F.3d 1237, 1240 (10th Cir. 2007) ("[S]tate control over criminal justice [is] a lynchpin in the unique balance of interests" described as "Our Federalism.") (citing *Younger*, 401 U.S. at 44). The third condition is met because the Kansas courts provide plaintiff with an adequate forum to litigate his claims by way of pretrial proceedings,

trial, and, if he is convicted, direct appeal, as well as post-conviction remedies. See *Capps v. Sullivan*, 13 F.3d 350, 354 n.2 (10th Cir. 1993) (“[F]ederal courts should abstain from the exercise of ... jurisdiction if the issues raised ... may be resolved either by trial on the merits in state court or by other (available) state procedures.”) (quotation omitted).

Likewise, both the state district judge and the district attorney are immune from suit. A judge acting in his judicial capacity is immune from suit unless he acts in the clear absence of all jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11 (1991). A prosecutor has absolute immunity from claims based on activity that is “intimately associated with the judicial process”. *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)). The commencement and prosecution of criminal charges falls within prosecutorial immunity.

And, to the extent plaintiff seeks the initiation of federal criminal charges as relief in this action, such relief is not available. This court cannot order the filing of criminal charges and cannot order state courts to open or close cases. See *Presley v. Presley*, 102 F. App'x 636, 636-37 (10th Cir. 2004) (holding that any federal court order for “investigation or prosecution of various people for various crimes” would “improperly intrude upon the separation of powers”).

Next, plaintiff's claim concerning damage to and the sale of his vehicle must be addressed with local officials. Neither the negligent nor the unauthorized, intentional deprivation of property by a state employee gives rise to a due process violation if state law

provides an adequate post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (intentional taking of property does not implicate due process clause where an adequate state post-deprivation remedy is available); *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981) (inmate could not present claim against warden under § 1983 for negligent loss of inmate's property where existence of state tort claims process provided due process). When the alleged property loss is not "random and unauthorized" but pursuant to "an affirmatively established or de facto policy, procedure, or custom, the state has the power to control the deprivation" and must generally give the plaintiff a pre-deprivation hearing. *Gillihan v. Shillinger*, 872 F.2d 935, 939 (10th Cir. 1989); *Abbott v. McCotter*, 13 F.3d 1439, 1443 (10th Cir. 1994).

Kansas prisoners have an adequate state post-deprivation remedy. See generally, *Sawyer v. Green*, 316 F. App'x 715, 717, 2008 WL 2470915, at *2 (10th Cir. 2008) (finding Kansas county prisoner could seek relief in state courts to redress alleged deprivation of property). Because an adequate, state post-deprivation remedy exists, plaintiff must show cause why his property claim should not be dismissed for failure to state a claim.

Finally, plaintiff's bare claims that he was assaulted by another prisoner and that he was tased must be supported by facts explaining when and where these events occurred, how the events violated his protected interests, and how any defendant is responsible. Plaintiff will be given the opportunity to file an amended complaint.

Motion to appoint trustee

Plaintiff filed a motion seeking the appointment of the state court judge presiding in his criminal action as his trustee. The motion identifies no basis to appoint a trustee for plaintiff. The court denies the motion.

Order to show cause

For the reasons set forth, the court directs plaintiff to show cause why this matter should not be dismissed. If he chooses to do so, plaintiff may file an amended complaint. An amended complaint must be submitted upon court-approved forms. In order to add claims or significant factual allegations, or to change defendants, plaintiff must submit a complete amended complaint. See Fed. R. Civ. P. 15. An amended complaint is not an addendum or supplement to the original complaint but completely supersedes it. Therefore, any claims or allegations not presented in the amended complaint are no longer before the court. Plaintiff may not simply refer to an earlier pleading; instead, the complaint must contain all allegations and claims that plaintiff intends to present in the action, including those to be retained from the original complaint. Plaintiff must include the case number of this action on the first page of the amended complaint.

Plaintiff must name every defendant in the caption of the amended complaint. See Fed. R. Civ. P. 10(a). He must refer to each defendant in the body of the complaint and must allege specific facts that describe the allegedly unconstitutional acts or omissions by each defendant, including dates, locations, and circumstances.

Plaintiff also must comply with Rules 20 and 18 of the Federal Rules of Civil Procedure in filing an amended complaint. Rule 20 governs permissive joinder of parties and provides, in relevant part:

(2) Defendants. Persons...may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

Fed. R. Civ. P. 20(a)(2).

Rule 18(a) governs joinder of claims and provides, in part: "A party asserting a claim ... may join ... as many claims as it has against an opposing party." Fed. R. Civ. P. 18(a). While joinder is encouraged to promote judicial economy, the "Federal Rules do not contemplate joinder of different actions against different parties which present entirely different factual and legal issues." *Zhu v. Countrywide Realty Co., Inc.*, 160 F.Supp. 2d 1210, 1225 (D.Kan. 2001) (citation omitted). *See also George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (Under Rule 18(a), "multiple claims against a single party are fine, but Claim A against Defendant 1 should not be joined with unrelated Claim B against Defendant 2.").

Requiring adherence to the federal rules on joinder of parties and claims in prisoner suits prevents "the sort of morass [a multiple claim, multiple defendant] suit produce[s].". *Id.* It also prevents a prisoner from avoiding the fee obligations and the three-strike provision of the Prison Litigation Reform Act. *Id.* (Rule 18(a) ensures "that prisoners pay the required filing fees - for the Prison Litigation Reform Act limits to 3 the number of frivolous suits or

appeals that any prisoner may file without prepayment of the required fees.”).

Accordingly, under Rule 18(a), a plaintiff may bring multiple claims against a single defendant. Under Rule 20(a)(2), he may join in one action any other defendants who were involved in the same transaction or occurrence and as to whom there is a common issue of law or fact. He may not bring multiple claims against multiple defendants unless the nexus required in Rule 20(a)(2) is demonstrated with respect to all defendants named in the action.

The Federal Rules authorize the court, on its own initiative at any stage of the litigation, to drop any party and sever any claim. Fed. R. Civ. P. 21; *Nasious v. City & Cnty. Of Denver Sheriff's Dept.*, 415 F. App'x 877, 881 (10th Cir. 2011) (to remedy misjoinder, the court has two options: (1) misjoined parties may be dropped or (2) any claims against misjoined parties may be severed and proceeded with separately).

In any amended complaint, plaintiff must set forth the transactions or occurrences which he intends to pursue in accordance with Rules 18 and 20 and must limit the facts and allegations to properly-joined parties and events. Plaintiff must allege facts in his complaint showing that all counts arise out of the same transaction, occurrence, or series of transactions; and that a question of law or fact common to all named defendants will arise in the action.

In summary, plaintiff must submit an amended complaint that (1)

raises only properly joined claims and defendants; (2) alleges sufficient facts to state a claim of a federal constitutional violation and states a federal cause of action; and (3) alleges sufficient facts to show personal participation by each defendant.

If plaintiff fails to submit an amended complaint consistent with these directions, the court will decide this matter upon the current complaint.

IT IS, THEREFORE, BY THE COURT ORDERED plaintiff is granted to and including **May 5, 2021**, to submit a certified financial statement showing the balance and deposit information for his jail financial account.

IT IS FURTHER ORDERED that on or before **May 5, 2021**, plaintiff shall show cause why this matter should not be dismissed for the reasons discussed herein or shall submit an amended complaint.

IT IS FURTHER ORDERED plaintiff's motion to appoint trustee (Doc. 6) is denied.

IT IS SO ORDERED.

DATED: This 5th day of April, 2021, at Topeka, Kansas.

S/ Sam A. Crow

SAM A. CROW
U.S. Senior District Judge