NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3439

CRAIG MOSS,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA; SECRETARY PENNSYLVANIA BOARD OF PROBATION AND PAROLE; JOHN/JAN DOE 1 REGIONAL DIRECTOR OF PAROLE; DAVID WOODRING, Field Officer of PA Parole Board; TOM WOLF, Governor of Pennsylvania; JOSH SHAPIRO, Attorney General of Pennsylvania; JOHN TALABOR, Secretary, Board of Probation and Parole; S. KERWIN, Staff Tech, PA Board of Probation and Parole; KIOYONA DUNCAN, Supervisor, York Field Office, PA Board of Probation and Parole

---

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 1:18-cv-02197)
District Judge: Honorable John E. Jones III

Submitted Pursuant to Third Circuit LAR 34.1(a)
November 12, 2020
Before: MCKEE, SHWARTZ and RESTREPO, Circuit Judges

(Opinion filed: December 9, 2020)

OPINION*

---

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Craig Moss, proceeding pro se, appeals an order of the United States District Court for the Middle District of Pennsylvania granting the defendants' motion to dismiss his amended complaint. For the reasons that follow, we will affirm the judgment of the District Court.

I.

While on parole, Moss was charged in the York County Court of Common Pleas with simple assault, 18 Pa. C.S.A. § 2701(a)(1), and harassment, 18 Pa. C.S.A. § 2709(a)(1). As a result of those charges, Moss was taken into custody on May 31, 2016, and incarcerated at SCI Camp Hill pursuant to a parole violator warrant. Moss was acquitted on the assault and harassment charges, and the parole violator warrant was cancelled. He was released from custody on July 14, 2016. The Court of Common Pleas later granted Moss's petition for expungement of the May 2016 charges.

Moss filed a complaint in the York County Court of Common Pleas alleging that his civil rights were violated in connection with his arrest and six-week detention. The defendants removed the action to federal court. See 28 U.S.C. §§ 1331 and 1441. Moss filed an amended complaint, naming as defendants the Pennsylvania General Assembly, the Governor and Attorney General of Pennsylvania, the Secretary of the Pennsylvania Board of Probation and Parole, and several Board employees. He raised claims under 42 U.S.C. § 1983, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Pennsylvania constitution, and Pennsylvania's Criminal History Record Information Act

("CHRIA"). The defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The matter was referred to a Magistrate Judge, who recommended that the motion to dismiss be granted, concluding that Moss's claims were either meritless, untimely, or barred by Eleventh Amendment immunity or the doctrine of respondeat superior. Over Moss's objections, the District Court adopted the Magistrate Judge's Report and Recommendation and granted the motion to dismiss. Moss timely appealed.[1]

II.

We have appellate jurisdiction under 28 U.S.C. § 1291, and exercise do novo review over the order granting the defendants' motions to dismiss. Davis v. Samuels, 962 F.3d 105, 111 n.2 (3d Cir. 2020). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is

[1] Moss raises several threshold procedural challenges to the District Court's dismissal of the complaint. These challenges lack merit. First, he complains that a complaint that survives screening by the District Court under 28 U.S.C. § 1915 cannot later be dismissed pursuant to Rule 12(b)(6). But the District Court did not screen Moss's complaint under § 1915 and, even if it had, nothing prevented the District Court from later granting the defendants' Rule 12(b)(6) motion. Moss also complains that the District Court dismissed claims that the defendants did not challenge in their motion to dismiss. Contrary to Moss's assertion, the defendants did broadly contest all of Moss's claims. Notably, in his objections to the Magistrate Judge's Report and Recommendation, Moss did not allege that the defendants had waived any challenges to his claims. Furthermore, Moss's reliance on Federal Rule of Civil Procedure12(h)(1) is misplaced, as that rule expressly exempts Rule 12(b)(6) motions from its waiver rule. See Frietsch v. Refco, Inc., 56 F.3d 825, 830 (7th Cir. 1995) (observing that if the motion to dismiss were based on 12(b)(6), defendant "would escape the clutches of Rule 12(h)(1)"). Finally, contrary to Moss's suggestion, the defendants' removal of the case to federal court did not constitute a tacit concession that Moss had stated viable claims for relief.

plausible on its face." Santiago v. Warminster Twp., 629 F.3d 121, 128 (3d Cir. 2010) (citations and internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). We may affirm on any basis supported by the record.[2] See Fairview Twp. v. EPA, 773 F.2d 517, 525 n.15 (3d Cir. 1985).

III.

A. Respondeat Superior

To state a claim under § 1983, a plaintiff "must establish that she was deprived of a federal constitutional or statutory right by a state actor." Kach v. Hose, 589 F.3d 626, 646 (3d Cir. 2009). It is well settled, however, that liability under § 1983 may not be based on the doctrine of respondeat superior. See Durmer v. O'Carroll, 991 F.2d 64, 69 n.14 (3d Cir. 1993). Instead, the plaintiff must show that the official's conduct caused the deprivation of a federally protected right. See Kentucky v. Graham, 473 U.S. 159, 166 (1985). More particularly, the plaintiff must allege that the defendant was personally involved in the deprivation. See Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir.

[2] In addition, an appellant's failure to identify or argue an issue in his opening brief forfeits that issue on appeal. See M.S. by & through Hall v. Susquehanna Twp. Sch. Dist., 969 F.3d 120, 124 (3d Cir. 2020). Here, as the appellees argue, Moss has not challenged the District Court's dismissal of several of his claims. Appellees' Br., 15. Most notably, Moss's opening brief did not challenge the dismissal of the Pennsylvania General Assembly on immunity grounds. Accordingly, we will not review the claims against the General Assembly.

1988). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." Id. As the District Court correctly explained, Moss alleged that only one of the named individual defendants, Parole Officer Woodring, had any direct role in his arrest and detention. Moss nowhere alleged that the remaining individual defendants directly participated in, or had knowledge of, the actions described in his complaint.[3] Nor did Moss allege that those defendants acquiesced in the alleged unconstitutional misconduct or failed to properly train subordinate employees. See Gilles v. Davis, 427 F.3d 197, 207 n.7 (3d Cir. 2005). Accordingly, the District Court properly concluded that, with the exception of Parole Officer Woodring, Moss failed to allege that the individual defendants had any personal involvement in the alleged denials of his constitutional rights.

B. Sixth and Eighth Amendment Claims

There is also no merit to Moss's claims under the Sixth Amendment. Relying on Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), Moss asserted that his incarceration at SCI Camp Hill, rather than the York County Prison, interfered with his Sixth Amendment right to effective assistance of counsel. Cobb is inapposite, however, because, among

[3] Although Moss referred to a conspiracy, his conclusory allegations were insufficient to suggest that a conspiratorial agreement existed between the defendants. See Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 178-79 (3d Cir. 2010) (holding that conclusory allegations of an agreement do not meet the pleading standards; instead, specific facts addressing the time the agreement was made, the period of the conspiracy, the exact parties to the agreement, and the object of the conspiracy are required).

other things, it involved plaintiffs who were transferred to prisons that were between 90 and 300 miles from the county where their criminal cases originated. Id. at 950. By contrast, Moss was incarcerated a state prison that is 26 miles from the York County Prison. We further note that Moss's Sixth Amendment claim is undermined by the fact that he waived his right to counsel shortly after his arrest on the parole violator warrant. (ECF 10-3.)

Moss also asserted that his detention on the parole violator warrant violated his rights under the Eighth Amendment. The District Court properly explained, though, that a parolee has no constitutional right to release on bail before a parole revocation hearing. See Luther v. Molina, 627 F.2d 71, 76 n.10 (7th Cir. 1980). In addition, the loss of Moss's job and the foreclosure on his home – which were purely incidental consequences of his incarceration, not the direct result of the government's extraction of any payment – did not constitute a violation of the Constitution's Excessive Fines Clause. See Austin v. United States, 509 U.S. 602, 609-10 (1993) (stating that the Excessive Fines Clause "limits the government's power to extract payments, whether in case or in kind, as punishment for some offense") (internal citation and emphasis omitted); cf. United States v. Kearns, 61 F.3d 1422, 1428 (9th Cir. 1995) (rejecting excessive fines claim where there was no evidence that loss of properties in foreclosure sales was caused by the government's seizure of the properties). Furthermore, Moss did not allege that the conditions he experienced while confined on the parole violator warrant constituted cruel and unusual punishment so as to warrant relief under the Eighth Amendment. See

Thomas v. Tice, 948 F.3d 133, 138 (3d Cir. 2020); Hamilton v. Lyons, 74 F.3d 99, 106 n.8 (5th Cir. 1996) (stating that the "constitutional rights of parolees are at least as extensive as those of convicted prisoners").

C. False Arrest, False Imprisonment, Abuse of Process, and Malicious Prosecution

As the defendants conceded in the District Court, (ECF 10, 2 n.4), a state waives its immunity from suit when it removes a case to federal court. See Lombardo v. Pennsylvania, Dep't of Pub. Welfare, 540 F.3d 190, 197 (3d Cir. 2008). But because the state "retains all defenses it would have enjoyed had the matter been litigated in state court, including immunity from liability," id. at 198, a state may waive its immunity from suit without "waiv[ing] any defenses provided by its own sovereign immunity law." Id. at 200. Here, the defendants asserted they were entitled to immunity from liability pursuant to 1 Pa. Cons. Stat. § 2310. Under that provision, the Commonwealth and its officials and employees acting within the scope of their duties are immune from lawsuits except in specified situations, see 42 Pa. C.S.A. § 8522, none of which applies here. Officer Woodring's alleged actions – arresting and detaining Moss pursuant to parole violator warrant – were necessarily within the scope of his employment as a parole officer. See 61 Pa. C.S.A. §§ 6152 (authorizing parole officers to arrest without a warrant a parolee for violating parole conditions); 6138(b)(1) (providing that the "formal filing of a charge after parole against a parolee within for any violation of the laws of this Commonwealth shall constitute an automatic detainer and permit the parolee to be taken into and held in custody"). Moss did not allege that Officer Woodring acted in such a

way as to bring his conduct outside the scope of his employment. Accordingly, we conclude that Officer Woodring, a Commonwealth party, is immune from liability on Moss's claims for false arrest, false imprisonment, abuse of process, and malicious prosecution.[4]

D. U.S. Const., art. I, § 10, cl. 1

Moss attempted to raise a claim under Article I, Section 10, Clause 1 of the United States Constitution, which provides that "[n]o State shall … pass any Bill of Attainder … [or] Law impairing the Obligation of Contracts …."[5] A bill of attainder is "a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial." United States v. O'Brien, 391 U.S. 367, 384 n.30 (1968). But the parole statute does not constitute a bill of attainder because it did not inflict punishment on Moss or any group to which he belongs. Cf. Story v. Rives, 97 F.2d 182, 188 (D.C. Cir. 1938) (holding that statute requiring service of remainder of original sentence for parole violators was not a bill of attainder). Instead, it required automatic detention on his original sentence because he was charged with a new criminal

[4] In light of this determination, we will not address the District Court's conclusion that Moss's false arrest, false imprisonment, abuse of process claims were time-barred. Likewise, we will not consider the District Court's determination that the malicious prosecution claim failed because a parole proceeding is not tantamount to a criminal prosecution.

[5] Moss also cited Article I, Section 9, Clause 3, of the United States Constitution. That provision, however, applies only to the federal government's passage of a bill of attainder. Moss, of course, challenged Pennsylvania's parole statute.

offense. See 61 Pa. C.S.A. § 6138(b). In addition, Moss failed to state a claim under the Contract Clause. Moss claimed that his detention caused him to lose his job and fail to pay his mortgage. Those allegations, however, did not demonstrate that a "change in state law has 'operated as a substantial impairment of a contractual relationship.'" General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992) (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978)); see also Transport Workers Union, Local 290 v. SEPTA, 145 F.3d 619, 621 (3d Cir. 1998).

E. Civil RICO Claims, State Constitutional Claims, and Claims under the CHRIA

The District Court also properly dismissed Moss's civil RICO claims, his state constitutional claims, and his claims under the CHRIA. In particular, his conclusory assertion that the defendants' actions constituted civil racketeering activity is insufficient to state a claim for relief under 18 U.S.C. § 1962. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989) (holding that allegations supporting a conspiracy claim under civil RICO must be sufficiently specific). Moreover, to the extent that Moss alleged violations of the Pennsylvania Constitution, he failed to state a claim, as Pennsylvania does not recognize a private right of action for damages in a lawsuit alleging a violation of the Pennsylvania Constitution. See Jones v. City of Phila., 890 A.2d 1188, 1208 (Pa. Commw. Ct. 2006) ("[N]either Pennsylvania statutory authority nor appellate case law has authorized the award of money damages for violation of the Pennsylvania Constitution."). Moss also cited a provision of CHRIA providing that "[a] person found by the court to have been aggrieved by a violation of this

chapter or the rules or regulations promulgated under this chapter" can receive certain forms of relief. 18 Pa. C.S.A. § 9183. But Moss's conclusory proclamation that the defendants "refuse[d] to adhere to a[n] expungement order" is insufficient to state a claim under that law. See Taha v. Cty. of Bucks, 862 F.3d 292, 302 (3d Cir. 2017) (stating that "the Pennsylvania Supreme Court has held that '[a] party is aggrieved if he can demonstrate that he has a substantial, direct, and immediate interest in the outcome of the litigation'") (citing Pa. Gaming Control Bd. v. City Council of Phila., 928 A.2d 1255, 1265-66 (Pa. 2007)).

IV.

For the foregoing reasons, we will affirm the District Court's judgment.