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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Joe Newman,

10 Plaintiff,

11 v.

12 Show Low Police Department; Steve L.
13 Williams; Jason O. Spears; Shawn T. Roby;
14 Cory L. Fechtelkotter; Kenneth E.
15 Douglass; Jeff McNeil; Torel Nichols,

Defendants.

No. CV-13-08005-PHX-JAT

ORDER

16 Pending before the Court are Defendants Steven L. Williams, Jason O. Spears,
17 Shawn T. Roby, Cory L. Fechtelkotter, Kenneth E. Douglass, and Jeff McNeil's Motion
18 to Dismiss (Doc. 29) as well as Defendant Torel Nichols' Second Motion to Dismiss
19 (Doc. 30).¹ The Court now rules on the motions.

20 **I. Background**

21 Plaintiff initially filed a complaint alleging that City of Show Low police officers
22 used excessive force while falsely arresting Plaintiff, causing Plaintiff to suffer physical
23 injury. (Doc. 1). Defendants moved to dismiss Plaintiff's claims pursuant to Federal Rule
24 of Civil Procedure ("Rule") 12(b)(6). (Doc. 14; Doc. 24). The Court granted Defendants'
25 motion, finding Plaintiff's complaint contained only conclusory allegations and failed to
26 state facts upon which relief could be granted. (Doc. 27 at 6). However, the Court

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28 ¹ For convenience, the Court refers to both motions as simply "Defendants'
motions."

1 permitted Plaintiff to amend his complaint. (Doc. 27 at 9). Plaintiff subsequently filed his
2 First Amended Complaint (the “Amended Complaint”) (Doc. 28).² Defendants now move
3 to dismiss Plaintiff’s Amended Complaint. (Doc. 29; Doc. 30).

4 Plaintiff’s Amended Complaint clarifies that Plaintiff seeks damages based upon
5 alleged violations of his Fourth and Sixth Amendment rights, apparently related to
6 Plaintiff’s criminal conviction on unspecified charges. (Doc. 28 at 1, 5, 9). Plaintiff
7 alleges he was the subject of an unreasonable search and seizure, false arrest, and
8 excessive force in violation of his Fourth Amendment rights. (*Id.* at 1). Plaintiff also
9 alleges he was denied assistance of counsel and “a full discovery of unedited video
10 evidence” pertaining to his original arrest and criminal prosecution in violation of his
11 Sixth Amendment rights. (*Id.*)

12 Plaintiff makes specific allegations toward each of the Defendants. Plaintiff
13 alleges Defendant Williams (1) grabbed Plaintiff while Plaintiff was sitting “in his seat”
14 and compliant with Williams’ instructions, (2) ordered Defendant Fechtelkotter to shoot
15 Plaintiff with a Taser, and (3) interfered with a video recording (apparently of Plaintiff’s
16 arrest). (*Id.*)

17 Plaintiff alleges Defendant Fechtelkotter shot Plaintiff with a Taser while Plaintiff
18 was standing and while other officers were holding Plaintiff’s arms behind his back. (*Id.*
19 at 3). Plaintiff also alleges Fechtelkotter later made false statements concerning the
20 events of Plaintiff’s arrest. (*Id.* at 3-4).

21 Plaintiff alleges Defendants Roby and Spears kned Plaintiff in the back causing
22 physical injury. (*Id.* at 4). Plaintiff alleges Roby and Spears later made false statements in
23 Defendant Douglass’ police report concerning these events. (*Id.*)

24 Plaintiff alleges Defendant McNeil violated Plaintiff’s right to a fair trial and
25 obstructed justice by not providing Plaintiff with an unedited copy of the “car cam”

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27 ² Although Plaintiff captions his Amended Complaint as “Amended supplement to
28 the original,” (Doc. 28 at 1), “it is well-established that an amended complaint supersedes
the original, the latter being treated thereafter as non-existent.” *Valadez-Lopez v.*
Chertoff, 656 F.3d 851, 857 (9th Cir. 2011) (citation and internal quotation marks
omitted).

1 evidence. (*Id.*)

2 Plaintiff alleges Defendant Douglass, who investigated the circumstances of
3 Plaintiff's arrest, violated Plaintiff's right to a fair trial and obstructed justice when he
4 "purposefully overlook [sic] the officers [sic] conflicting, contradictory sworn
5 statements" to "clear his fellow officers of criminal activity." (*Id.* at 4-5).

6 Finally, Plaintiff alleges Defendant Nichols obstructed justice by knowingly using
7 "criminally altered evidence" to convict Plaintiff of a crime. (*Id.* at 5).

8 Plaintiff purports to provide a legal basis for his allegations by including in his
9 Amended Complaint a number of quotations and citations to case law concerning a
10 governmental entity's liability under 42 U.S.C. § 1983. (*Id.* at 6-7).

11 **II. Legal Standard**

12 **A. Rule 12(b)(6)**

13 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim
14 upon which relief can be granted if it fails to state a cognizable legal theory or fails to
15 allege sufficient facts under a cognizable legal theory. *Balistreri v. Pac. Police Dep't*,
16 901 F.2d 696, 699 (9th Cir. 1990). To survive a motion to dismiss, a complaint need
17 contain only "a short and plain statement of the claim showing that the pleader is entitled
18 to relief" such that the defendant is given "fair notice of what the . . . claim is and the
19 grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
20 (quoting Fed.R.Civ.P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). But
21 although a complaint "does not need detailed factual allegations," a plaintiff must "raise a
22 right to relief above the speculative level." *Id.* This requires more than merely "a
23 formulaic recitation of the elements of a cause of action." *Id.* A complaint must "state a
24 claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
25 (quoting *Twombly*, 550 U.S. at 570). Facial plausibility requires the plaintiff to plead
26 "factual content that allows the court to draw the reasonable inference that the defendant
27 is liable for the misconduct alleged." *Id.* "Where a complaint pleads facts that are 'merely
28 consistent with' a defendant's liability, it stops short of the line between possibility and

1 plausibility of entitlement to relief.” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal
2 quotation marks omitted).

3 In reviewing a complaint for failure to state a claim, the Court must “accept as true
4 all well-pleaded allegations of material fact, and construe them in the light most favorable
5 to the non-moving party.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir.
6 2010). The Court does not have to accept as true “allegations that are merely conclusory,
7 unwarranted deductions of fact, or unreasonable inferences.” *Id.* However, in “civil rights
8 cases where the plaintiff appears pro se, the [C]ourt must construe the pleadings liberally
9 and must afford plaintiff the benefit of any doubt.” *Karim-Panahi v. L.A. Police Dep’t*,
10 839 F.2d 621, 623 (9th Cir. 1988). “[B]efore dismissing a pro se civil rights complaint for
11 failure to state a claim, the district court must give the plaintiff a statement of the
12 complaint’s deficiencies.” *Id.*

13 **B. 42 U.S.C. § 1983**

14 42 U.S.C. § 1983 is “‘not itself a source of substantive rights,’ but merely provides
15 ‘a method for vindicating federal rights elsewhere conferred.’” *Graham v. Connor*, 490
16 U.S. 386, 393-94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). “To
17 make out a cause of action under section 1983, [a] plaintiff[] must plead that (1) the
18 defendants acting under color of state law (2) deprived plaintiffs of rights secured by the
19 Constitution or federal statutes.” *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir.
20 1986). Accordingly, “[t]he first inquiry in any § 1983 suit, therefore, is whether the
21 plaintiff has been deprived of a right ‘secured by the Constitution and laws.’” *Baker*, 443
22 U.S. at 140 (quoting 42 U.S.C. § 1983).

23 **III. Analysis**

24 As stated, Plaintiff’s Amended Complaint alleges both Fourth and Sixth
25 Amendment violations giving rise to section 1983 liability. (Doc. 28 at 1).

26 **A. Fourth Amendment**

27 Plaintiff alleges two bases for a violation of his Fourth Amendment rights: false
28 arrest and excessive force. (*Id.*) “A claim for unlawful arrest is cognizable under § 1983

1 as a violation of the Fourth Amendment, provided the arrest was without probable cause
2 or other justification.” *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 918 (9th Cir. 2012)
3 (quoting *Dubner v. City & Cnty. of S.F.*, 266 F.3d 959, 964 (9th Cir. 2001)). Thus,
4 Plaintiff must plead facts that would show Defendants “ordered or otherwise procured the
5 arrests and the arrests were without probable cause.” *Id.* Plaintiff’s Amended Complaint
6 recites that Plaintiff was subjected to an unreasonable search and seizure, “falsely
7 arrested,” and “searched without a warrant.” (Doc. 28 at 1). But these allegations are
8 legal conclusions, not facts which, if true, would give rise to a violation of Plaintiff’s
9 Fourth Amendment rights. Because Plaintiff pleads no facts showing that Defendants
10 procured his arrest without probable cause, the Amended Complaint fails to state a claim
11 for section 1983 liability based upon Plaintiff’s allegedly unlawful arrest.

12 Plaintiff also alleges several officers used excessive force during his arrest. A
13 claim for excessive force “in the context of an arrest” is analyzed for a Fourth
14 Amendment violation. *Graham*, 490 U.S. at 394. The mere use of force during an arrest
15 does not constitute excessive force. *See Graham*, 490 U.S. at 396 (“ . . . the right to make
16 an arrest . . . necessarily carries with it the right to use some degree of physical coercion. .
17 .”). Whether an arresting officer used excessive force depends upon “the facts and
18 circumstances of each particular case, including the severity of the crime at issue,
19 whether the suspect poses an immediate threat to the safety of the officers or others, and
20 whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.*

21 Although Defendants argue that Plaintiff “provides no facts surrounding the arrest
22 beyond his blanket allegations that he was beaten, tased, searched, and seized,” (Doc. 29
23 at 3), Plaintiff has pleaded sufficient facts such that his claim of excessive force is
24 “plausible on its face,” *see Iqbal*, 556 U.S. at 678, even if the details of his arrest are
25 unclear. Plaintiff alleges that Defendant Fechtelkotter shot him with a Taser while
26 Plaintiff was standing and other officers were holding Plaintiff’s arms behind his back.
27 (Doc. 28 at 3). These facts, if true, state a plausible claim that Fechtelkotter used force in
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1 excess of that necessary to arrest Plaintiff while he stood with his arms restrained.³
2 Furthermore, because Plaintiff alleges Defendant Williams ordered Fechtelkotter to shoot
3 Plaintiff with the Taser, (*id.*), Plaintiff states a cognizable claim against Williams as well.
4 *See Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997).

5 Plaintiff also states a cognizable claim against Defendants Spears and Roby for the
6 use of excessive force. Plaintiff alleges that Spears and Roby drove their knees into
7 Plaintiff's back causing serious, objective physical injuries. (Doc. 28 at 4). Read in
8 context with Plaintiff's assertion that he was not resisting arrest, this is sufficient to state
9 a claim against Spears and Roby.⁴

10 **B. Sixth Amendment**

11 Plaintiff fails to state a cognizable claim under section 1983 for an alleged
12 violation of his Sixth Amendment rights. "[I]n order to recover damages for allegedly
13 unconstitutional conviction or imprisonment . . . a § 1983 plaintiff must prove that the
14 conviction or sentence has been reversed on direct appeal, expunged by executive order,
15 declared invalid by a state tribunal authorized to make such determination, or called into
16 question by a federal court's issuance of a writ of habeas corpus A claim for
17 damages bearing that relationship to a conviction or sentence that has *not* been so
18 invalidated is not cognizable under § 1983." *Heck v. Humphrey*, 512 U.S. 477, 486-87
19 (1994). Although Plaintiff alleges that he was denied effective assistance of counsel as
20 well as video evidence possessed by Defendants that Plaintiff believes would have tended
21 to exonerate him, (Doc. 1 at 1, 3), Plaintiff does not allege that the conviction which he
22 seeks to challenge has been reversed. Accordingly, his section 1983 claims for alleged
23 violations of his Sixth Amendment rights are not cognizable.

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26 ³ The Court notes that Plaintiff may not survive summary judgment absent
27 significant additional factual development of this claim.

28 ⁴ However, Plaintiff does not plead any facts which, if true, would state a section
1983 claim against Defendants Douglass, McNeil, and Nichols for the use of excessive
force.

1 **C. City of Show Low Police Department**

2 The Court previously dismissed Defendant City of Show Low Police Department
3 as a non-jural entity not subject to suit and instructed Plaintiff to “not reassert any legal
4 theories against the Show Low Police Department.” (Doc. 27 at 8). However, Plaintiff’s
5 Amended Complaint devotes nearly two pages to a discussion of cases involving the
6 section 1983 liability of a governmental entity pursuant to *Monell v. Department of*
7 *Social Services of City of New York*, 436 U.S. 658 (1978). To the extent Plaintiff’s
8 Amended Complaint can be liberally construed as alleging a *Monell* claim, it fails to state
9 a cognizable claim for relief because none of the remaining Defendants are a
10 governmental entity.

11 **D. Plaintiff’s Surreply**

12 Plaintiff has filed a surreply to Defendants’ Reply in Support of Defendants’
13 Motion to Dismiss. *See* (Doc. 33). “Neither [Rule 7] nor the local rules of practice for this
14 District provide for the filing of a surreply and surreplies are not authorized by any other
15 rules of procedure absent express prior leave of the Court.” *Millenium 3 Techs. v. ARINC,*
16 *Inc.*, 2008 WL 4737887, at *2 (D. Ariz. Oct. 29, 2008). Regardless, the Court has read
17 Plaintiff’s surreply and finds that consideration of the arguments presented therein would
18 not change its ruling.

19 **IV. Conclusion**

20 The Court’s prior Order instructed Plaintiff to “clearly identify his legal theories in
21 separate causes of action” and to “set forth ‘who is being sued, for what relief, and on
22 what theory, with enough detail to guide discovery.’” (Doc. 27 at 8). Despite the Court’s
23 liberal construction of Plaintiff’s Amended Complaint, Plaintiff fails to state cognizable
24 claims for relief pursuant to section 1983 based on either his false arrest or violations of
25 his Sixth Amendment rights.

26 For the foregoing reasons,

27 **IT IS ORDERED** granting in part and denying in part Defendants’ Motion to
28 Dismiss (Doc. 29).

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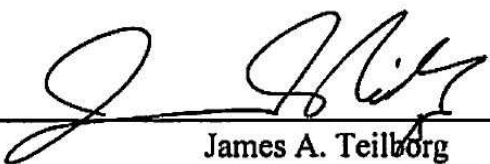
IT IS FURTHER ORDERED granting Defendant Torel Nichols' Second Motion to Dismiss (Doc. 30).

IT IS FURTHER ORDERED dismissing with prejudice all claims against Defendants Douglass, McNeil, and Nichols.

IT IS FURTHER ORDERED dismissing with prejudice all claims against Defendants Williams, Fechtelkotter, Spears, and Roby except excessive force. Thus, Plaintiff's sole remaining claims are the excessive force claims against Defendants Williams, Fechtelkotter, Spears, and Roby.

IT IS FURTHER ORDERED striking Plaintiff's "Reply to Defendants Counsel Motion to Dismiss" [sic] (Doc. 33).

Dated this 6th day of March, 2014.



James A. Teilborg
Senior United States District Judge