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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, et al.,

13 Defendants.

No. CV-13-08005-PCT-JAT

ORDER

14 Pending before the Court is Plaintiff's Motion to Appoint Counsel and Motion to
15 Continue (Doc. 36) as well as Plaintiff's Motion for Reconsideration (Doc. 37). The
16 Court now rules on the motions.

17 **I. Background**

18 The Court will recount only the relevant portions of the procedural history. On
19 January 8, 2013, Plaintiff filed a Complaint against Defendants, alleging that Plaintiff
20 was physically injured when Show Low Police officers assaulted him with excessive
21 force on January 27, 2011. (Doc. 1 at 1). Plaintiff's First Amended Complaint stated
22 claims against Defendants for Fourth and Sixth Amendment violations of his rights
23 during Plaintiff's arrest and subsequent criminal conviction. (Doc. 28 at 1, 5, 9). On
24 March 6, 2014, the Court dismissed Plaintiff's Fourth Amendment claims against some
25 defendants, and dismissed Plaintiff's Sixth Amendment claims against all defendants.
26 (Doc. 34 at 7-8).

27 Plaintiff has now filed two documents with the Court asking for relief. Although
28 neither is captioned, the first appears to be a motion to appoint counsel as well as a

1 motion to continue the Rule 16 Scheduling Conference. (Doc. 36). The second appears to
2 be a motion for reconsideration to which Plaintiff attaches new evidence that he asserts
3 supports his now-dismissed claims against Defendants. (Doc. 37).

4 **II. Motion to Appoint Counsel**

5 Plaintiff has filed numerous motions to appoint counsel in this case. Plaintiff first
6 filed a Motion to Appoint Counsel on January 8, 2013, (Doc. 3), which the Court denied,
7 reasoning:

8 There is no constitutional right to appointment of counsel in a
9 civil case. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d
10 266, 269 (9th Cir. 1982). The Court, however, does have the
11 discretion to appoint counsel in “exceptional circumstances.”
12 *See* 28 U.S.C. § 1915; *Wilborn v. Escalderon*, 789 F.2d 1328,
13 1331 (9th Cir. 1986); *Aldabe v. Aldabe*, 616 F.2d 1089 (9th
14 Cir. 1980). In order to determine whether exceptional
15 circumstances exist, the Court evaluates the plaintiff’s
16 “likelihood of success on the merits [and] the ability of the
17 [plaintiff] to articulate his or her claim *pro se* in light of the
18 complexity of the legal issues involved.” *Richard v. Harper*,
19 864 F.2d 85, 87 (9th Cir. 1988) (quoting *Weygant v. Look*,
20 718 F.2d 952,954 (9th Cir. 1983)); *see also Wilborn*, 789
21 F.2d at 1331. Neither factor is determinative, and the Court
22 must consider both factors before reaching a decision on a
23 request for appointment of counsel. *See Wilborn*, 789 F.2d at
24 1331.

25 At this stage of the litigation, the Court is unable to determine
26 whether Plaintiff will succeed on the merits. The Court has
27 read the complaint and finds that Plaintiff is able to articulate
28 his claims *pro se*, and that the issues presented are not
particularly complex.

(Doc. 6 at 1-2).

Plaintiff subsequently filed another Motion to Appoint Counsel, (Doc. 7), which
the Court denied, finding no “reason for the Court to reconsider its prior Order.” (Doc. 8
at 2). Plaintiff then filed a third Motion to Appoint Counsel, which the Court also denied,
finding Plaintiff had not met the standard for appointing counsel. (Doc. 27 at 3).

Plaintiff’s fourth Motion to Appoint Counsel argues that he should be appointed
counsel because he “can not afford one and because the doctor’s order that [he] abstain
from all stressful activities, since this is harmful to my current health condition and will
also delay my recovery.” (Doc. 36 at 1). Plaintiff again does not meet the standard for

1 appointing counsel, for the reasons stated in the Court's prior three Orders. Accordingly,
2 Plaintiff's Motion to Appoint Counsel is denied. The Court is sympathetic to Plaintiff's
3 difficulties, but Plaintiff bears the responsibility for obtaining representation by counsel,
4 if he desires such representation.

5 **III. Motion to Continue**

6 On March 6, 2014, following the resolution of Defendants' Motion to Dismiss, the
7 Court issued an Order setting the Rule 16 Scheduling Conference for April 30, 2014.
8 (Doc. 35). Plaintiff moves to continue this Scheduling Conference, arguing that he has
9 "previous [sic] scheduled surgery at the U of A on [his] injured right kidney to be
10 performed on 04/21/2014" with an "expected recovery of 6 weeks." (Doc. 36 at 1). In
11 support, Plaintiff has attached a doctor's note from James A. Sielski, DO, dated March
12 14, 2014, which states that "pt to have surgery on April 21 2014 please excuse his
13 absence until June 2014 so he can recover from surgery." (*Id.* at 2).

14 Accordingly, the Court will continue the Rule 16 Scheduling Conference to
15 Wednesday, June 4, 2014 at 11 A.M. The Court will not grant Plaintiff another
16 continuance.

17 **IV. Motion for Reconsideration**

18 In Plaintiff's second filing, he reargues the facts surrounding his claims for false
19 arrest dismissed in the Court's March 6, 2014 Order. (Doc. 37 at 1). Accordingly, the
20 Court treats Plaintiff's filing as a motion for reconsideration of that Order. Generally,
21 motions for reconsideration are appropriate only if: (1) the movant presents newly
22 discovered evidence, (2) the Court committed clear error or the initial decision was
23 manifestly unjust, or (3) there has been an intervening change in controlling law. *Sch.*
24 *Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.* 5 F.3d 1255, 1263 (9th Cir. 1993).
25 "The Court will ordinarily deny a motion for reconsideration of an Order absent a
26 showing of manifest error or a showing of new facts or legal authority that could not have
27 been brought to its attention earlier with reasonable diligence." L.R.Civ.P. 7.2(g)(1).

28 Plaintiff first contends that:

1 A false arrest by Steve Williams traffic violation claim, a
2 cracked windshield, which I showed prior to him arresting me
3 my claim reply from the State of Arizona who reimbursed me
4 for the damage caused to the windshield [sic] by road
5 construction debre [sic] constituted a false arrest. See copy
6 enclosed.

7 (Doc. 37 at 1). Plaintiff attaches a copy of a form for “Notice of Claim Against the State
8 of Arizona” in which he claims \$253 against the State for damage to his windshield. (*Id.*
9 at 3). Although Plaintiff’s argument is somewhat unclear, he appears to be alleging that
10 Defendant Williams arrested Plaintiff for having a cracked windshield and this arrest
11 constituted a false arrest because Plaintiff had previously filed a claim against the State
12 for allegedly causing the cracked windshield. *See (id.* at 1).

13 To have a viable claim for false arrest, Plaintiff must plead facts that would show
14 Defendants “ordered or otherwise procured the arrests and the arrests were without
15 probable cause.” *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 918 (9th Cir. 2012). Plaintiff
16 fails to plead facts showing he was arrested for having a cracked windshield and that any
17 such arrest was without probable cause.¹ Plaintiff’s allegation that Defendant Williams
18 committed a false arrest is a conclusory allegation that the Court disregards in reviewing
19 a complaint for failure to state a claim. *See Daniels-Halls v. Nat’l Educ. Ass’n*, 629 F.3d
20 992, 998 (9th Cir. 2010).

21 Plaintiff next contends that his conviction was “reversed and set aside or
22 expunged” as required to allege a cognizable claim under 42 U.S.C. § 1983 for a
23 violation of his Sixth Amendment rights. (Doc. 37 at 1). He attaches evidence that his
24 judgment of guilt was set aside on September 11, 2013. (*Id.* at 2). But a cognizable claim
25 under section 1983 for a conviction in violation of Sixth Amendment rights requires a
26 plaintiff to “prove that the conviction or sentence has been reversed on direct appeal,
27 expunged by executive order, declared invalid by a state tribunal authorized to make such
28 determination, or called into question by a federal court’s issuance of a writ of habeas

¹ Even if Plaintiff adequately pleaded facts showing he was arrested for having a cracked windshield, he has not pleaded facts showing any such arrest lacked probable cause.

1 corpus.” *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) (citation omitted).

2 Plaintiff’s conviction, although set aside upon Plaintiff’s completion of a
3 “cognitive awareness course,” (Doc. 37 at 2), was not reversed on direct appeal,
4 expunged by executive order, declared invalid, or called into question by a writ of habeas
5 corpus. *Heck* requires that a conviction have been *invalidated*, see 512 U.S. at 487, which
6 requires a successful attack on its legality. Arizona law, however, permits “every person
7 convicted of a criminal offense” to apply “to have the judgment of guilt set aside” if that
8 person has fulfilled “the conditions of probation or sentence and discharge by the court.”²
9 A.R.S. § 13-907(A) (emphasis added). A successful application does not invalidate the
10 original conviction; it merely grants relief from the *effect* of the conviction. *See id.* § 13-
11 907(C) (“ . . . shall set aside the judgment of guilt, dismiss the accusations or information
12 and order that the person be released from all penalties and disabilities resulting from the
13 conviction . . .”). Therefore, Plaintiff’s successful application under Arizona law to have
14 his judgment of guilt set aside did not invalidate the legality of his conviction.

15 Consequently, Plaintiff cannot state a cognizable claim for section 1983 relief
16 stemming from a Sixth Amendment violation. The Court will deny Plaintiff’s motion for
17 reconsideration.

18 **V. Conclusion**

19 For the foregoing reasons,

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22 **IT IS ORDERED** that Plaintiff’s Motion to Appoint Counsel (Doc. 36) is denied.

23 **IT IS FURTHER ORDERED** that Plaintiff’s Motion to Continue Court
24 Appointed Dates (Doc. 36) is granted.

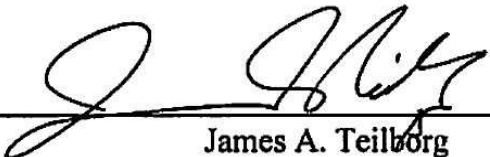
25 **IT IS FURTHER ORDERED** continuing the Rule 16 Scheduling Conference set
26 for Wednesday, April 30, 2014 at 1:00 P.M to Wednesday June 4, 2014 at 11:00 A.M.

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28 ² Although the statute has some exceptions, for example for those convicted of “a
dangerous offense,” they are not relevant to this case. *See* A.R.S. § 13-907(D).

1 **IT IS FURTHER ORDERED** denying Plaintiff's Motion for Reconsideration
2 (Doc. 37) (currently docketed as "Supplement re: Motion to Continue Court Appointed
3 Dates and Motion to Appoint Counsel").

4 Dated this 25th day of March, 2014.

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10 James A. Teilborg
11 Senior United States District Judge
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