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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID JEROME OLIVER, SR.,
Plaintiff,
v.
RICHARD A. CIUMMO, et al.,
Defendants.

No. 2:13-cv-2017 KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff, presently housed in the Placer County Jail, is proceeding without counsel. Plaintiff filed a civil rights action pursuant to 42 U.S.C. § 1983, together with a request for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Plaintiff also seeks injunctive relief, and filed a motion for appointment of counsel. The court addresses these filings below.

Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly

1 payments of twenty percent of the preceding month's income credited to plaintiff's trust account.
2 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time
3 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
4 § 1915(b)(2).

5 Screening Standards

6 The court is required to screen complaints brought by prisoners seeking relief against a
7 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
8 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
9 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
10 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

11 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
12 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
13 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an
14 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
15 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
16 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
17 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.
18 2000) ("a judge may dismiss [in forma pauperis] claims which are based on indisputably
19 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at
20 1227.

21 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain
22 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
23 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
24 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
25 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a
26 formulaic recitation of the elements of a cause of action;" it must contain factual allegations
27 sufficient "to raise a right to relief above the speculative level." Bell Atlantic, 550 U.S. at 555.
28 However, "[s]pecific facts are not necessary; the statement [of facts] need only 'give the

1 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Erickson v.
2 Pardus, 551 U.S. 89, 93 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal
3 quotations marks omitted). In reviewing a complaint under this standard, the court must accept as
4 true the allegations of the complaint in question, Erickson, 551 U.S. at 93, and construe the
5 pleading in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236
6 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984).

7 Analysis

8 Plaintiff's complaint alleges that defendants Richard Ciummo, Jonathan Richter, and Leah
9 Ann Alcazar, attorneys at law, misrepresented plaintiff in a criminal case, resulting in plaintiff's
10 allegedly “wrongful conviction.” (ECF No. 1 at 3.) Plaintiff filed this action on the form
11 complaint used for filing actions under 42 U.S.C. § 1983.

12 In order to state a claim under 42 U.S.C. § 1983, a plaintiff must allege: (1) the violation
13 of a federal constitutional or statutory right; and (2) that the violation was committed by a person
14 acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Jones v.
15 Williams, 297 F.3d 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil
16 rights claim unless the facts establish the defendant's personal involvement in the constitutional
17 deprivation or a causal connection between the defendant's wrongful conduct and the alleged
18 constitutional deprivation. See Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989); Johnson v.
19 Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978).

20 Here, plaintiff, fails to allege that defendants are state actors or that they were otherwise
21 acting under color of law. See Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 835 (9th
22 Cir. 1999) (The party charged with a constitutional deprivation under § 1983 must be a person
23 who may fairly be said to be a governmental actor) (citation and quotations omitted). Section
24 “1983 excludes from its reach merely private conduct, no matter how discriminatory or wrong.”
25 Id. (citing American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999) (citation and internal
26 quotation marks omitted). A public defender is not a state actor within the meaning of § 1983 in
27 representing a client in the traditional adversarial role of a lawyer. Miranda v. Clark County,
28 Nevada, 319 F.3d 465, 468 (9th Cir. 2003). Similarly, attorneys in private practice are not state

1 actors. See Simmons v. Sacramento County Superior Court, 318 F.3d 1156, 1161 (9th Cir.
2 2003); see also Polk County v. Dodson, 454 U.S. 312, 318-19 (1981). Furthermore, plaintiff fails
3 to allege a violation of a federal constitutional or statutory right. Any potential claims for legal
4 malpractice do not come within the jurisdiction of the federal courts. Franklin v. Oregon, 662
5 F.2d 1337, 1344 (9th Cir. 1981).

6 In light of the above, the complaint should be dismissed without leave to amend for failure
7 to state a claim upon which relief may be granted. See Gardner v. Martino, 563 F.3d 981, 990
8 (9th Cir.2009); Silva v. Di Vittorio, 658 F.3d 1090, 1105 (9th Cir. 2011) (“Dismissal of a pro se
9 complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of
10 the complaint could not be cured by amendment.” (internal quotation marks omitted)); Doe v.
11 United States, 58 F.3d 494, 497 (9th Cir. 1995) (“[A] district court should grant leave to amend
12 even if no request to amend the pleading was made, unless it determines that the pleading could
13 not be cured by the allegation of other facts.”).

14 Motion for Injunctive Relief

15 On October 16, 2013, plaintiff filed a motion for preliminary injunction. Plaintiff
16 recounts the history of the proceedings filed against him in the Placer County Superior Court,
17 which plaintiff calls “the family court” (ECF No. 4 at 3), and notes that this case was set for a
18 “violation of probation hearing on October 25, 2013.” (ECF No. 4 at 9.) Plaintiff contends the
19 state court is upholding an allegedly “illegal or void judgment,” and that Judge Frances Kearney
20 “had no authority to grant defendant Wright a 3 year civil protective order.” (ECF No. 4 at 9, 10.)
21 Plaintiff also includes vague allegations concerning prosecutorial misconduct.

22 Injunctive relief is an extraordinary remedy that may only be awarded upon a clear
23 showing that the moving party is entitled to such relief. Winter v. Natural Res. Defense
24 Council, Inc., 555 U.S. 7, 22 (2008). As provided by Federal Rule of Civil Procedure 65, a court
25 may issue a preliminary injunction to preserve the relative position of the parties pending a trial
26 on the merits. University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). The party seeking
27 injunctive relief must show it “is likely to succeed on the merits, . . . is likely to suffer irreparable
28 harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that

1 an injunction is in the public interest.” Winter, 555 U.S. at 20. Accordingly, the temporary
2 relief that plaintiff seeks must be connected to the allegations in the underlying complaint.
3 Because plaintiff’s motion is based on rulings by a state court judge, who is not named as a
4 defendant, and does not pertain to plaintiff’s claims that his attorneys engaged in legal
5 malpractice, the court cannot grant injunctive relief. Plaintiff’s motion should be denied.

6 Motion for Appointment of Counsel

7 Plaintiff requests that the court appoint counsel. District courts lack authority to require
8 counsel to represent indigent prisoners in section 1983 cases. Mallard v. United States Dist.
9 Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney
10 to voluntarily to represent such a plaintiff. See 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935
11 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).
12 When determining whether “exceptional circumstances” exist, the court must consider plaintiff’s
13 likelihood of success on the merits as well as the ability of the plaintiff to articulate his claims pro
14 se in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970
15 (9th Cir. 2009) (district court did not abuse discretion in declining to appoint counsel). The
16 burden of demonstrating exceptional circumstances is on the plaintiff. Id. Circumstances
17 common to most prisoners, such as lack of legal education and limited law library access, do not
18 establish exceptional circumstances that warrant a request for voluntary assistance of counsel.

19 Having considered the factors under Palmer, the court finds that plaintiff has failed to
20 meet his burden of demonstrating exceptional circumstances warranting the appointment of
21 counsel at this time.

22 Conclusion

23 In accordance with the above, IT IS HEREBY ORDERED that:

- 24 1. Plaintiff’s request for leave to proceed in forma pauperis (ECF No. 3) is granted.
- 25 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
26 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
27 § 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order to the
28 Placer County Sheriff filed concurrently herewith.

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- 3. Plaintiff's motion to appoint counsel (ECF No. 5) is denied; and
- 4. The Clerk of the Court is directed to assign a district judge to this case; and

IT IS RECOMMENDED that:


- 1. The complaint be dismissed without leave to amend,
- 2. Plaintiff's motion for preliminary injunction be denied; and
- 3. The Clerk be directed to close this case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, plaintiff may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order.

Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: November 5, 2013

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE