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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JASON MALLORY,
Plaintiff,
v.
VACAVILLE POLICE DEPARTMENT,
et al.,
Defendants.

No. 2:14-cv-1203 KJM CKD PS

FINDINGS AND RECOMMENDATIONS

Plaintiff is proceeding in this action pro se and in forma pauperis. The action was referred to this court by Local Rule 302(c)(21).

Plaintiff has filed a second amended complaint. The federal in forma pauperis statute authorizes federal courts to dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327.

1 A complaint must contain more than “naked assertions,” “labels and conclusions” or “a
2 formulaic recitation of the elements of a cause of action.” Bell Atlantic Corp. v. Twombly, 550
3 U.S. 544, 555-557 (2007). In other words, “[t]hreadbare recitals of the elements of a cause of
4 action, supported by mere conclusory statements do not suffice.” Ashcroft v. Iqbal, 129 S. Ct.
5 1937, 1949 (2009). Furthermore, a claim upon which the court can grant relief has facial
6 plausibility. Twombly, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads
7 factual content that allows the court to draw the reasonable inference that the defendant is liable
8 for the misconduct alleged.” Iqbal, 129 S. Ct. at 1949.

9 The Civil Rights Act under which this action was filed provides as follows:

10 Every person who, under color of [state law] . . . subjects, or causes
11 to be subjected, any citizen of the United States . . . to the
12 deprivation of any rights, privileges, or immunities secured by the
13 Constitution . . . shall be liable to the party injured in an action at
14 law, suit in equity, or other proper proceeding for redress.

15 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
16 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
17 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
18 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
19 meaning of § 1983, if he does an affirmative act, participates in another’s affirmative acts or
20 omits to perform an act which he is legally required to do that causes the deprivation of which
21 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

22 In this action, plaintiff alleges claims arising out of his arrest for use of pepper spray
23 during an altercation at a dance club in Vacaville, California. Plaintiff alleges he was wrongfully
24 arrested and imprisoned for three days. Plaintiff further alleges that the felony charge of use of
25 tear gas was reduced to a misdemeanor and ultimately dismissed for lack of evidence. To prevail
26 on a claim for false arrest under section 1983, plaintiff must demonstrate that there was no
27 probable cause to arrest him. See Cabrera v. City of Huntington Park, 159 F.3d 374, 380 (9th Cir.
28 1998) (“To prevail on his § 1983 claim for false arrest . . . , [plaintiff] would have to demonstrate
that there was no probable cause to arrest him.”). The allegations as set forth in plaintiff’s second
amended complaint are insufficient to state a claim under section 1983. “Probable cause to arrest

1 exists when officers have knowledge or reasonably trustworthy information sufficient to lead a
2 person of reasonable caution to believe that an offense has been or is being committed by the
3 person being arrested.” United States v. Lopez, 482 F.3d 1067, 1072 (9th Cir. 2007) (defining
4 probable cause and explaining that it is an objective standard). “Probable cause does not require
5 the same type of specific evidence of each element of the offense as would be needed to support a
6 conviction.” Adams v. Williams, 407 U.S. 143, 149 (1972); see also Henry v. United States, 361
7 U.S. 98, 102 (1959) (evidence required to establish guilt not necessary for probably cause). The
8 exhibits attached to plaintiff’s first amended complaint¹ demonstrate that the arresting officer
9 knew that several people were treated at the scene by paramedics for exposure to oleoresin
10 capsicum spray, that one victim was transported by ambulance for shortness of breath from being
11 sprayed, that plaintiff was observed by at least one witness spraying something at a group of
12 people, and that several people reported to the arresting officer that plaintiff had assaulted them
13 with pepper spray inside the bar. Under these circumstances, the arresting officer had probable
14 cause to arrest plaintiff for felony misuse of tear gas.²

15 Plaintiff also names as defendants the City of Vacaville and the Vacaville Police
16 Department. In order to hold the City liable on a section 1983 claim, plaintiff must show that his
17 rights were violated pursuant to a municipal custom or policy. Monell v. Department of Social
18 Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978). Plaintiff, however, has failed
19 to identify any policy or custom of the City underlying the arrest of plaintiff.

20 In addition, plaintiff seeks expungement of his arrest record under California Penal Code
21 § 851.8 and alleges that his civil rights have been violated in connection with defendants’ failure

22 ¹ Although plaintiff did not attach these exhibits to the second amended complaint, plaintiff
23 cannot make self-serving allegations which contradict the exhibits previously submitted by
24 plaintiff in support of his claims.

25 ² California Penal Code § 22810 provides in pertinent part: “Notwithstanding any other
26 provision of law, any person may purchase, possess, or use tear gas or any tear gas weapon for the
27 projection or release of tear gas if the tear gas or tear gas weapon is used solely for self-defense
28 purposes . . . any person who uses tear gas or any tear gas weapon except in self-defense is guilty
of a public offense and is punishable by imprisonment . . . for 16 months, or two or three years or
in a county jail not to exceed one year or by a fine not to exceed one thousand dollars (\$1,000), or
by both the fine and imprisonment.” Cal. Pen. Code § 22810(g)(1).

1 to remove his arrest record from the criminal database. In this case, an accusatory pleading was
2 filed against plaintiff after his arrest but no conviction occurred. As such, under California Penal
3 Code § 851.8(c), plaintiff may petition the court that dismissed the action for a finding that
4 plaintiff is factually innocent of the charges for which the arrest was made. This court, however,
5 does not have the authority to grant the relief plaintiff seeks.

6 Plaintiff has now filed three complaints. Plaintiff's second amended complaint again
7 suffers from the deficiencies previously noted with regard to the original and first amended
8 complaints. In each complaint, plaintiff has failed to allege in a nonconclusory fashion the proper
9 elements for the causes of action pled in the complaint. Despite repeated opportunities to cure the
10 deficiencies in his complaints, plaintiff has failed to do so. Moreover, it appears that further
11 amendment would be futile.

12 Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed.

13 These findings and recommendations are submitted to the United States District Judge
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
15 after being served with these findings and recommendations, any party may file written
16 objections with the court and serve a copy on all parties. Such a document should be captioned
17 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
18 within the specified time may waive the right to appeal the District Court's order. Martinez v.
19 Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 Dated: November 18, 2014

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CAROLYN K. DELANEY
23 UNITED STATES MAGISTRATE JUDGE

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