

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MICHAEL A. HERNANDEZ,)	4:08CV3099
)	
Plaintiff,)	
)	
v.)	
)	
BRIAN SILVERMAN, KATHREEN)	MEMORANDUM
HUTCHINSON, STEVE)	AND ORDER
ELMSHAEUSER, KEN HART,)	
DAVE EUBANKS, LEN TABOR,)	
and AMY RAGSDALE,)	
)	
Defendants.)	

Plaintiff filed his Complaint in this matter on May 12, 2008. ([Filing No. 1.](#)) Plaintiff has previously been given leave to proceed in forma pauperis. ([Filing No. 13.](#)) Plaintiff has also filed five motions which are pending as of the date of this Memorandum and Order. (Filing Nos. [9](#), [14](#), [15](#), [17](#), [18](#).) The court now conducts an initial review of the Complaint to determine whether summary dismissal is appropriate under [28 U.S.C. §§ 1915\(e\)](#) and [1915A](#).

I. SUMMARY OF COMPLAINT

Plaintiff filed his Complaint on May 12, 2008, against six individual Defendants. ([Filing No. 1](#) at CM/ECF p. 1.) Plaintiff did not specify the capacity in which he sues these Defendants. ([Id.](#) at CM/ECF pp. 1-40.) Plaintiff is currently confined in the Tecumseh State Correctional Institution in Tecumseh, Nebraska. ([Id.](#) at CM/ECF p. 1.)

Condensed and summarized, Plaintiff alleges that Defendants engaged in “criminal acts” and “misconduct” in order to convict him. (*Id.* at CM/ECF pp. 5, 31.) Plaintiff specifically alleges that the police bribed witnesses and tampered with evidence (*id.* at CM/ECF pp. 5-7), that the prosecuting attorneys conspired against, discriminated against, and maliciously prosecuted Plaintiff (*id.* at CM/ECF pp. 7-12), that the judge committed judicial misconduct (*id.* at CM/ECF pp. 12-20), that defense counsel was ineffective (*id.* at CM/ECF pp. 20-26), and that appellate counsel was ineffective (*id.* at CM/ECF pp. 26-27). In sum, Plaintiff’s Complaint details events that led to his arrest and conviction. (*Id.* at CM/ECF pp. 1-40.) Plaintiff seeks \$77,000,000.00 in damages, punitive damages for malicious prosecution, and release from prison. (*Id.* at CM/ECF p. 33.)

II. APPLICABLE LEGAL STANDARDS ON INITIAL REVIEW

The court is required to review prisoner and in forma pauperis complaints seeking relief against a governmental entity or an officer or employee of a governmental entity to determine whether summary dismissal is appropriate. See [28 U.S.C. §§ 1915\(e\)](#) and [1915A](#). The court must dismiss a complaint or any portion thereof that states a frivolous or malicious claim, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. [28 U.S.C. § 1915\(e\)\(2\)\(B\)](#); [28 U.S.C. § 1915A](#).

Therefore, where a pro se plaintiff does not set forth enough factual allegations to “nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed” for failing to state a claim upon which relief can be granted. See generally, [Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 \(2007\)](#) (overruling [Conley v. Gibson, 355 U.S. 41 \(1967\)](#), and setting new standard for failure to state a claim upon which relief may be granted). Regardless of whether a plaintiff is represented or appearing pro se, the plaintiff’s complaint must allege specific facts sufficient to state a claim. See [Martin v. Sargent, 780 F.2d 1334, 1337](#)

[\(8th Cir. 1985\)](#). However, a pro se plaintiff's allegations must be construed liberally. [Burke v. North Dakota Dep't of Corr. & Rehab.](#), 294 F.3d 1043, 1043-1044 (8th Cir. 2002) (citations omitted).

III. DISCUSSION OF CLAIMS

Claims relating to the validity of an individual's incarceration may not be brought in a civil rights case, regardless of the relief sought. As set forth by the Supreme Court in [Preiser v. Rodriguez](#), 411 U.S. 475 (1973) and [Heck v. Humphrey](#), 512 U.S. 477 (1994), if success on the merits of a civil rights claim would necessarily implicate the validity of a conviction or continued confinement of a convicted state prisoner, the civil rights claim must be preceded by a favorable outcome in habeas corpus or similar proceedings in a state or federal forum. Absent such a favorable disposition of the charges or conviction, a plaintiff may not use [42 U.S.C. § 1983](#) to cast doubt on the legality of his conviction or confinement. See [Heck](#), 512 U.S. at [486-87](#).

Here, Plaintiff's claims relate entirely to his arrest and conviction. As stated above, Plaintiff's Complaint details the various "criminal acts" and "misconduct" that Defendants allegedly engaged in to convict him. (*Id.* at CM/ECF pp. 1-40.) In addition, Plaintiff specifically requests that the court release him from prison. (*Id.* at CM/ECF p. 33.) Because Plaintiff's claims necessarily implicate the validity of his conviction and incarceration, the court cannot address them in an action brought pursuant to [42 U.S.C. § 1983](#). However, the court will dismiss Plaintiff's claims without prejudice to reassertion in a habeas corpus or similar proceeding.

IT IS THEREFORE ORDERED that:

1. Plaintiff's Complaint ([filing no. 1](#)) is dismissed without prejudice to reassertion in accordance with this Memorandum and Order.

2. Plaintiff's pending Motions (filing nos. [9](#), [14](#), [15](#), [17](#), [18](#).) are denied as moot.

3. The Clerk of the court is directed to send to Plaintiff the Form AO241 packet, Petition for Relief From a Conviction or Sentence By a Person in State Custody.

4. A separate judgment will be entered in accordance with this Memorandum and Order.

October 1, 2008.

BY THE COURT:

s/Richard G. Kopf
United States District Judge