IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DAMIEON B. RASPBERRY,	(,)	
Plaintiff,	(,)	
vs.	(,)	No. 1:12-cv-01209
KENNETH THOMPSON, and HENDERSON COUNTY SHERIFF'S DEPARTMENT.	(,)	
Defendants.	(,)	

REPORT AND RECOMMENDATION

On December 12, 2012, Plaintiff filed this Amended Complaint pursuant to 42 U.S.C. § 1983. (Docket Entry ("D.E.") 6) Plaintiff Raspberry filed a motion seeking leave to proceed *in forma pauperis*. (D.E. 2.) In an order issued on September 19, 2012, the Court granted Plaintiff leave to proceed *in forma pauperis*. The Clerk shall record the defendants as Kenneth Thompson and Henderson County Sheriff's Department. This Complaint was referred to the Magistrate Judge for a Report and Recommendation for an initial screening pursuant to 28 U.S.C. § 1915. For the reasons set forth below, the Magistrate Judge recommends that the Complaint be dismissed in part and that service of process issue for the remaining claims.

RELEVANT BACKGROUND

The Complaint alleges that in August 2011, Plaintiff resided with a Ms. Overman in Lexington, Henderson County, Tennessee. During that time medicines and other items, including jewelry, were stolen. Ms. Overman reported her loss and identified the culprits as Hollie Joe Graves and Danny Kelly in the report she filed with the Henderson County Sheriff's Department. Plaintiff asserts that on September 6, 2011, Investigator Kenneth Thompson swore as the affiant in the affidavit portion of an arrest warrant on Plaintiff for this theft. On September 14, 2011, Plaintiff appeared in court for an unrelated traffic offense and was called to the Henderson County Sheriff's office where he was arrested by Investigator Thompson for the theft of the jewelry belonging to Ms. Overman. Plaintiff states that Investigator Thompson had prior knowledge and evidence that Plaintiff was completely innocent and was not associated with the charged offense, that he was a victim of the theft as well, and that the other victim, Ms. Overman, provided immediate information that Plaintiff was not involved. Plaintiff states that the charges against him were dismissed by the court. He alleges further that the Henderson County Sheriff's Department failed to investigate complaints of the theft and overrule conclusions within the department in spite of the overwhelming evidence otherwise.

ANALYSIS

The Court is required to screen *in forma pauperis* complaints and to dismiss any complaint, or any portion thereof, if the action –

> (i) is frivolous or malicious;
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> (ii) fails to state a claim on which relief may be granted; or
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> (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2).

In assessing whether the Complaint in this case states a claim on which relief may be granted, the Court applies the standards under Federal Rule of Civil Procedure 12(b)(6), as stated in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009), and in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). *Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010). "Accepting all well-pleaded allegations in the complaint as true, the Court 'consider[s] the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief.'" *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 681) (alteration in original). "[P]leadings that . . . are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679; *see also Twombly*, 550 U.S. at 555 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a

claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.").

"A complaint can be frivolous either factually or legally. Any complaint that is legally frivolous would *ipso facto* fail to state a claim upon which relief can be granted." *Hill*, 630 F.3d at 470 (citing *Neitzke v. Williams*, 490 U.S. 319, 325, 328-29 (1989)).

> Whether a complaint is factually frivolous under §§ 1915A(b)(1) and 1915(e)(2)(B)(i) is a separate issue from whether it fails to state a claim for relief. Statutes allowing a complaint to be dismissed as frivolous give "judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Neitzke*, 490 U.S. at 327, 109 S. Ct. 1827 (interpreting 28 U.S.C. § 1915). Unlike a dismissal for failure to state a claim, where a judge must accept all factual allegations as true, *Iqbal*, 129 S. Ct. at 1949-50, a judge does not have to accept "fantastic or delusional" factual allegations as true in prisoner complaints that are reviewed for frivolousness. *Neitzke*, 490 U.S. at 327-28, 109 S. Ct. 1827.

Id. at 471.

"*Pro se* complaints are to be held to less stringent standards than formal pleadings drafted by lawyers, and should therefore be liberally construed." *Williams*, 631 F.3d at 383 (internal quotation marks omitted). *Pro se* litigants, however, are not exempt from the requirements of the Federal Rules of Civil Procedure. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989); *see also Brown v. Matauszak*, 415 F. App'x 608, 613 (6th

Cir. 2011) ("[A] court cannot create a claim which [a plaintiff] has not spelled out in his pleading") (internal quotation marks omitted); *Payne v. Secretary of Treas.*, 73 F. App'x 836, 837 (6th Cir. 2003) (affirming *sua sponte* dismissal of complaint pursuant to Fed. R. Civ. P. 8(a)(2) and stating, "[n]either this court nor the district court is required to create Payne's claim for her"); *cf. Pliler v. Ford*, 542 U.S. 225, 231 (2004) ("District judges have no obligation to act as counsel or paralegal to *pro se* litigants."); *Young Bok Song v. Gipson*, 423 F. App'x 506, 510 (6th Cir. 2011) ("[W]e decline to affirmatively require courts to ferret out the strongest cause of action on behalf of *pro se* litigants. Not only would that duty be overly burdensome, it would transform the courts from neutral arbiters of disputes into advocates for a particular party. While courts are properly charged with protecting the rights of all who come before it, that responsibility does not encompass advising litigants as to what legal theories they should pursue."), *cert. denied*, ___ U.S. ___, 132 S. Ct. 461 (2011).

1. COUNT I

To state a claim under 42 U.S.C. § 1983,[1] a plaintiff must allege two elements: (1) a deprivation of rights secured by the

[1] Section 1983 provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the

"Constitution and laws" of the United States (2) committed by a defendant acting under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). In analyzing a claim under § 1983, the first step is to identify the specific constitutional rights allegedly infringed. In his Complaint, Plaintiff accuses Defendant Thompson of violating his Fourth Amendment right against unlawful seizure of person without probable cause and his Fourteenth Amendment right of freedom from deprivation of liberty and property without due process of the law. The Fourth Amendment applies to "seized" individuals. *Graham v. Connor*, 490 U.S. 386, 388 (1989). A Fourth Amendment claim for wrongful arrest requires an arrest without probable cause. *See, e.g.*, *Parsons v. City of Pontiac*, 533 F.3d 492, 500 (6th Cir. 2008); *Crockett v. Cumberland Coll.*, 316 F.3d 571, 580 (6th Cir. 2003) ("Today it is well established that an arrest without probable cause violates the Fourth Amendment."). Probable cause exists where "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown,

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United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer=s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia

that the suspect has committed, is committing or is about to commit an offense." *Crockett*, 316 F.3d at 580 (quoting *Mich. v. DeFillippo*, 443 U.S. 31, 37 (1979)); *see also Wolfe v. Perry*, 412 F.3d 707, 717 (6th Cir. 2005) ("probable cause necessary to justify an arrest is defined as 'whether at that moment [of the arrest] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense'") (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)) (alterations in original); *Gardenhire v. Schubert*, 205 F.3d 303, 315 (6th Cir. 2000). That an arrest does not result in a conviction does not necessarily mean that the arrest itself was unlawful. Because the relevant inquiry concerns the information available to the officer at the time of the arrest, "[a] valid arrest based upon then-existing probable cause is not vitiated if the suspect is later found innocent." *Criss v. City of Kent*, 867 F.2d 259, 262 (6th Cir. 1988); *see also Baker*, 443 U.S. at 145 ("The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted – indeed, for every suspect released."). If the facts in Plaintiff's Complaint are taken as true, then Defendant Thompson did not have probable cause to arrest Plaintiff.

Under element two of the § 1983 test, Plaintiff must show that Defendant Thompson acted under the color of state law when he allegedly violated Plaintiff's constitutional rights. Thompson, an investigator with the Henderson County Sheriff's Department, acted under the color of state law when he swore as the affiant in the affidavit portion of the arrest warrant for Plaintiff. Accordingly, Plaintiff has minimally asserted a claim under § 1983 for violation of his Fourth Amendment right against arrest without probable cause. According to Plaintiff's Complaint, Defendant Investigator Thompson was told specifically by witnesses that individuals other than Plaintiff had stolen the items from Ms. Overman and nothing connects Plaintiff to the crime except being a victim himself of the crime.

The due process clause of the Fourteenth Amendment provides that "no . . . State . . . shall deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Plaintiff's claim that Defendant Thompson violated his constitutional rights by conducting an unlawful seizure of his person is properly analyzed under the Fourth Amendment. Plaintiff has no claim under the Fourteenth Amendment because "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of

substantive due process." *See United States v. Lanier*, 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 1228 n.7, 137 L. Ed. 2d 432 (1997) (citing *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 1870-71, 104 L. Ed. 2d 443 (1989)). As a consequence, the Magistrate Judge recommends that Plaintiff's Fourteenth Amendment substantive due process claim be DISMISSED.

However, the Henderson County Sheriff's Department is not a suable entity, and any claims against it should be dismissed. Henderson County would have been the proper party to address the claims asserted by this Plaintiff. *See Mathes v. Metro. Gov't of Nashville and Davidson Cnty.*, No. 3:10-cv-0496, 2010 WL 3341889, at *2 (M.D. Tenn. Aug. 25, 2010): *CP v. Alcoa Police Dep't*, No.: 3:10-CV-197, 2010 WL 3341889, at *2 (M.D.Tenn. Aug. 25, 2010);("[I]t is clear that defendant Alcoa Police Department is not an entity capable of being sued under 42 U.S.C. §1983"); *Pruitt v. Lewis*, No. 06-2861, 2007 WL 4293037, at *2 (W.D.Tenn. Dec. 6, 2007)("It is well established that a '[county sheriff's] department is not a legal entity separate from its parent [county].'"). Also, because of the official capacity claim against Investigator Thompson, the Magistrate Judge recommends the claims for punitive damages in Counts I, IV, and V be DISMISSED as they are not recoverable. "A suit against an individual in his official capacity is the equivalent of a suit against the government entity." *Myers v. Potter*, 422 F.3d

347,357 (6th Cir. 2005) (quoting *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). A local government unit is immune from punitive damages under §1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S.247, 271 (1981). Thus, the Magistrate Judge recommends that Henderson County Sheriff's Department be DISMISSED as a defendant.

2. COUNT II

Tennessee does not recognize private causes of action for violations of the Tennessee Constitution. *Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1995); *see also Lee v. Ladd*, 834 S.W.2d. 323, 325 (Tenn. 1992) ("[W]e know of no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer.") Therefore, the Magistrate Judge recommends that Count II of Plaintiff's claims be DISMISSED.

3. COUNT III

Here, the liability of Defendant Thompson in his official capacity for assault and intentional infliction of emotional distress is governed by the Tennessee Governmental Tort Liability Act (GTLA). Tennessee's GTLA states "immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of

any employee within the scope of his employment *except* if the injury arises out of false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights." Tenn. Code Ann. § 29-20-205 (2). The GTLA does not allow plaintiffs to hold governmental entities vicariously liable for false imprisonment and other intentional torts not exempted under section 29-20-205(2). *Pendleton v. Metro. Gov't of Nashville & Davidson County,* No. M2004-01910-COA-R3-CV, 2005 WL 2138240 (Tenn. App. Sept. 1, 2005). Assault and intentional infliction of emotional distress are intentional torts. "A suit against an individual in his official capacity is the equivalent of a suit against the government entity." *Myers v. Potter*, 422 F.3d 347,357 (6th Cir. 2005) (quoting *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). Thus, Defendant Thompson in his official capacity is also immune from liability under the GTLA. Therefore, the Magistrate Judge recommends that Plaintiff's GTLA claims of assault and intentional infliction of emotional distress against Defendant Thompson in his official capacity be DISMISSED.

4. CONCLUSION

In sum, the Magistrate Judge respectfully recommends that the Henderson County Sheriff's Department be dismissed as a defendant, that Count II be dismissed, that all claims for violation of the Fourteenth Amendment be dismissed, that Count III against Defendant Thompson in his official capacity be dismissed, and that the punitive damage claims for Defendant Thompson in his official capacity in Count I, IV, and V be dismissed.

Respectfully submitted this 12th day of July, 2013.

s/Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT AND RECOMMENDATION MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT AND RECOMMENDATIONS. 28 U.S.C. § 636(b)(1). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.