UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Joseph Bailey

Plaintiff,

vs.

City of Ann Arbor,
Christopher Fitzpatrick
William Stanford, and
Michael Dortch,
in their individual and official
capacities.

Defendants.

Case No. 14-cv-12002

Judge Linda J. Parker

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DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED

Defendants, by their attorneys, move the Court pursuant to Fed. R. Civ. P. 12(b)(6) for dismissal in its favor for the Plaintiff's failure to state a claim upon which relief can be granted.

Defendants are entitled to dismissal because Plaintiff's Complaint does not contain any factual allegations sufficient to state a plausible claim under any of the legal theories pleaded. In support of this motion, Defendants rely upon the accompanying brief and arguments of law.

Respectfully submitted,

By: /s/ Stephen K. Postema

Dated: August 7, 2014

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE GRANTED
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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STATEMENT OF ISSUES PRESENTED

I. Should Plaintiff's federal law claim against the individual officers alleging violation of the 4th Amendment/excessive force be dismissed because Plaintiff has failed to state a claim upon which relief can be granted?

Defendants Answer: Yes
This Court Should Answer: Yes

II. Should Plaintiff's state law claims against the individual officers be dismissed because the officers are shielded by governmental immunity pursuant to Michigan law and because Plaintiff has failed to plead in avoidance of governmental immunity?

Defendants Answer: Yes
This Court Should Answer: Yes

III. Should Plaintiff's federal law claim against the individual officers alleging violation of the 4th Amendment/42 USC §1983 unreasonable seizure without probable cause be dismissed because Plaintiff has failed to state a claim upon which relief can be granted?

Defendants Answer: Yes
This Court Should Answer: Yes

IV. Should Plaintiff's federal law claim against the individual officers alleging violation of the 4th Amendment/42 USC §1983 malicious prosecution be dismissed because Plaintiff has failed to state a claim upon which relief can be granted?

Defendants Answer: Yes
This Court Should Answer: Yes

V. Should Plaintiff's federal law claim against the City be dismissed because Plaintiff has failed to state a claim upon which relief can be granted?

Defendants Answer: Yes
This Court Should Answer: Yes

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CONSTITUTIONS

FOURTH AMENDMENT TO US CONSTITUTION 3, 6, 14, 18, 20

INTRODUCTION

This claim against the City of Ann Arbor and three police detectives arose after Plaintiff was arrested in connection with an armed robbery that occurred in Ann Arbor. Plaintiff was arrested several weeks after the robbery occurred and was charged with armed robbery, felony firearm/possession of a short-barreled shotgun, and resisting/obstructing police (which occurred when the police attempted to question him in connection with the armed robbery charge). The armed robbery and felony firearm/possession of a short-barreled shotgun charges were later dismissed on the motion of the prosecutor. However, Plaintiff did plead guilty to the resisting/obstructing police charge and was sentenced to the time he was in jail awaiting trial on all three charges. Plaintiff now brings this §1983 claim along with various state law and common law claims.

Plaintiff's complaint is fatally defective in that he has not pled and cannot plead factual allegations that state any plausible claim under 42 U.S.C. §1983 or under Michigan law. The City and individual defendants are therefore entitled to dismissal of all of Plaintiff's claims.

STATEMENT OF FACTS

On April 9, 2012, just after 10:00 p.m. two men wearing masks robbed the Broadway Liquor Store in Ann Arbor, stealing cash and alcohol. (Complaint at ¶9). One of the suspects was armed with a sawed off shotgun. (Complaint at ¶¶9, 17).

The first suspect was described as a black male, 5 foot 10 inches tall, thin build, wearing a white coat and a white mask. (Complaint at ¶¶10-11, 13). The second suspect is described as a black male 5 feet 4 inches to 5 feet 5 inches tall, wearing a gray mask (Complaint at ¶14). The Plaintiff is 5 feet 6 inches tall and weighs about 140 pounds; he is a black male with a thin build, brown eyes, and a light complexion. (Complaint at ¶15).

On May 25, 2012, Ann Arbor Police Det. William Stanford received an anonymous tip implicating Plaintiff in the robbery. (Complaint at ¶19). Based on that information the detectives went to the Plaintiff's residence, and after obtaining a search warrant, removed evidence linking him to the robbery. (Complaint at ¶¶21, 28). Plaintiff was arrested later in the day on the robbery charge. (Complaint at ¶33).

Plaintiff was charged in a complaint with (1) armed robbery, (2) possession of a short barreled shotgun, and (3) assaulting, resisting, or obstructing a police officer. (Complaint at ¶29). The armed robbery and weapons charges were later dismissed on the motion of the prosecutor. (Complaint at ¶40).

Plaintiff now brings this §1983 action alleging the City and the individually named officers violated his rights under the 4th Amendment, and also alleging various state law claims. In a 102 paragraph Complaint against the City of Ann Arbor and three city police detectives in their individual and official capacities.

Plaintiff alleges eight individual counts: Count I, Violation of the Fourth Amendment, 42 U.S.C. §1983 Excessive Force (Complaint at ¶¶43-49); Count II, Assault and Battery (MCL 750.81), (Complaint at ¶¶50-55.); Count III, Gross Negligence (MCL 691.1407(2)), (Complaint at ¶¶56-64); Count IV, False Arrest/False Imprisonment (Complaint at ¶¶65-71); Count V Malicious Prosecution (MCL 600.2907) (Complaint at ¶¶72-79); Count VI, Violation of the Fourth Amendment 42 USC §1983 Unreasonable Seizure Without Probable Cause (Complaint at ¶¶80-88); Count VII, Violation of the Fourth Amendment 42 USC §1983 Malicious Prosecution (Complaint at ¶¶89-96); and Count VIII City of Ann Arbor's Constitutional Violations (Complaint at ¶¶97-102).

In lieu of filing an answer to the Complaint, Defendants respond with this Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted under FRCP 12 (b)(6).

STANDARD OF REVIEW

I. DEFENDANTS MUST BE GRANTED JUDGMENT ON THE PLEADINGS IF PLAINTIFF'S COMPLAINT DOES NOT STATE A "PLAUSIBLE CLAIM FOR RELIEF."

Federal Rule of Civil Procedure (FRCP) 12(b)(6) allows the Court to determine whether the Plaintiff has stated a claim for which relief can be granted by testing the sufficiency of the Complaint.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544; 127 S.Ct. 1955 (2007) and

Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, (2009), the Supreme Court clarified the pleading requirements of FRCP 8: To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a mere possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570).

The *Iqbal* Court set forth a two-pronged approach to guide the federal district courts in deciding a motion to dismiss under this standard. Noting that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" the Court suggested that district courts "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. Once the district court has eliminated these "legal conclusions couched as factual allegations," it should determine whether the well-pleaded allegations in the complaint state a plausible claim of relief. *Id.*

In evaluating allegations, "bare assertions," which "amount to nothing more than a 'formulaic recitation of the elements'" of a claim must be disregarded. *Id*. at 1951. The Supreme Court has held that Rule 8 notice pleading is generous "but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id* at 1949. The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* Mere "naked assertions devoid of further factual enhancement" are not sufficient to "state a claim to relief that is plausible on its face." *Id.*

"To avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to *all* the material elements of the claim." *Wittstock v. Mark A. Van Sile, Inc*., 330 F.3d 899, 902 (6th Cir. 2003) (emphasis added). To survive a Rule 12(b)(6) motion for dismissal a plaintiff's pleading for relief must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio,* 502 F.3d 545, 548 (6th Cir.2007).

I. PLAINTIFF'S FEDERAL LAW CLAIM AGAINST THE INDIVIDUAL OFFICERS ALLEGING VIOLATION OF THE 4TH AMENDMENT/EXCESSIVE FORCE MUST BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. Plaintiff's Claims

Count I of Plaintiff's Complaint is entitled "Violation of the Fourth Amendment/42 U.S.C. § 1983 Excessive Force", and alleges, in part:

> 45. Defendants violated Plaintiff's right to be free from punishment and deprivation of life and liberty without due process of law under the Fourteenth Amendment to the United States Constitution.
>
> 46. Defendants violated Plaintiff's clearly established and federally protected rights as set forth under the United States Constitution and the Amendments thereto, including, but not limited to, the Fourth Amendment of the United States Constitution to be free from unreasonable searches and seizures, mainly to be free from excessive force which resulted in significant injuries to Plaintiff.
>
> 47. The actions/inactions of Defendants were at all times objectively unreasonable, and in violation of Plaintiff's clearly established rights under the Fourth and Fourteenth Amendments to the United States Constitution which proximately resulted in significant injuries to Plaintiff.
>
> 48. Defendant Stanford is not entitled to qualified immunity because he violated Plaintiff's clearly established Fourth Amendment right to be free from excessive use of force.

However, nowhere in Count I, nor anywhere else in his Complaint, does Plaintiff indicate in what manner, when, or by whom, he was subjected to excessive force. In ¶35 of his Complaint Plaintiff alleges that Det. Stanford intentionally spit on him, which at most might make out a claim for assault and

battery. But he simply pleads no facts to support a claim for excessive force. Instead, Count I is nothing more that "naked assertions devoid of further factual enhancement", and a "formulaic recitation of the elements of a cause of action". Count I falls far short of the pleading standards established by *Ashcroft v. Iqbal* and *Bell Atlantic v. Twombly*, and should be dismissed.

II. PLAINTIFF'S STATE LAW CLAIMS AGAINST THE INDIVIDUAL OFFICERS MUST BE DISMISSED BECAUSE THE OFFICERS ARE SHIELDED BY GOVERNMENTAL IMMUNITY PURSUANT TO MICHIGAN LAW AND BECAUSE PLAINTIFF HAS FAILED TO PLEAD IN AVOIDANCE OF GOVERNMENTAL IMMUNITY.

A. Michigan Governmental Immunity Law

The Michigan legislature enacted the governmental tort liability act (GTLA) in 1964, which codified several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency. *Duffy v. Dep't of Natural Resources,* 490 Mich. 198, 204; 805 N.W.2d 399 (2011). The GTLA, MCL 691.1401 *et seq.,* broadly shields and grants immunity from tort liability to governmental agencies and individual governmental employees when the agency or employee is engaged in the exercise or discharge of a governmental function. *Duffy*, at 204; *Grimes v. Dep't of Transp.,* 475 Mich. 72, 76–77; 715 N.W.2d 275 (2006).

With respect to individual governmental employees, Michigan Compiled Laws (MCL) 691.1407(2) states:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency … is immune from tort liability for an injury to a person or damage to property caused by the officer [or] employee … while in the course of employment … if all of the following are met:
>
> > (a) The officer [or] employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
> >
> > (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
> >
> > (c) The officer's [or] employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Before an individual governmental employee can be liable under a theory of gross negligence, that employee's conduct would have to be *the* proximate cause of the injury, not simply *a* proximate cause. *Robinson v. City of Detroit* 462 Mich. 439; 613 N.W.2d 307 (2000). "We are helped by the fact that this Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." The Legislature has nowhere abrogated this, and thus we conclude that in MCL § 691.1407(2)(c); MSA 3.996(107)(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause." *Id.* at 462.

A plaintiff filing suit against a governmental agency (or, in this case, against individual governmental employees) must initially plead his claims in avoidance of

governmental immunity. *Odom v. Wayne Co.,* 482 Mich. 459, 478; 760 N.W.2d 217, 227 (2008). Here, Plaintiff has alleged several state law claims against the individual officers. Among them are the claims of (Count II) assault and battery (Complaint at ¶¶50-55); (Count III) gross negligence (Complaint ¶¶56-64); (Count IV) false arrest/false imprisonment (Complaint ¶¶65-71); and, (Count V) malicious prosecution (Complaint at ¶¶72-79). However, these allegations are vague, cursory, and lack factual support. Plaintiff thus fails to plead in avoidance of state law governmental immunity, and for that reason his state law claims should be dismissed.

B. Count II, Assault and Battery

Michigan courts define assault as (1) an intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances, which (2) creates a well-founded apprehension of imminent contact, (3) coupled with the apparent present ability to accomplish the contact. *VanVorous v. Burmeister*, 262 Mich. App. 467, 482; 687 N.W.2d 132 (2004). Battery is defined as a "willful and harmful or offensive touching of another person, which results from an act, intended to cause such a contact." *Id.* at 482.

Count II of Plaintiff's Complaint appears to address only Det. Stanford, and alleges, in part:

> 52. At all material times herein, Defendant Stanford threatened and/or caused Plaintiff to be threatened with involuntary, unnecessary, and/or excessive physical contact.
>
> 53. At all material times herein, the physical contact and/or threat of physical contact was without probable cause and/or legal justification.
>
> 54. As the direct and proximate result of the assaults and batteries inflicted upon Plaintiff by Defendant Stanford as described above, Plaintiff sustained injuries and damages.

Nowhere does Plaintiff specify what Det. Stanford supposedly did that constituted "involuntary, unnecessary, and/or excessive physical contact". Without any factual support for this allegation Plaintiff has failed to demonstrate how Det. Stanford's actions were grossly negligent and he has thus failed to plead in avoidance of governmental immunity.

C. Count III, Gross Negligence

Count III presumably applies to all three individual defendants, but contains nothing more than a recitation of the elements of gross negligence as defined in MCL 691.1407(2). Count III of Plaintiff's Complaint alleges, in part:

> 58. The conduct of Defendants amounted to gross negligence that was the proximate cause of Plaintiff's injuries and damages.
>
> 60. Notwithstanding these duties, Defendants breached their duties with deliberate indifference and gross negligence and without regard to Plaintiff's rights and welfare, which caused serious injuries and damages to Plaintiff.

> 62. That according to MCL 691.1407(2), the breach of Defendants' duty to exercise reasonable care was reckless and amounts to gross negligence.

Again, nowhere does Plaintiff specify which defendants or what actions or conduct supposedly were grossly negligent, or how that conduct amounted to *the* proximate cause of any injury he allegedly suffered. Without factual support for this allegation Plaintiff has failed to demonstrate which defendants were grossly negligent and has thus failed to plead in avoidance of governmental immunity.

D. Count IV, False Imprisonment

In Michigan, false imprisonment is a tort defined as an unlawful restraint on a person's liberty or freedom of movement. *Walsh v. Taylor*, 263 Mich. App. 618, 627 (2004); *Clarke v. K-Mart Corp.*, 197 Mich. App. 541, 546 (1993). For an imprisonment to be false, the person who confined the plaintiff must not have had the right or authority to do so. *Moore v. City of Detroit*, 252 Mich. App. 384, 388 (2002). The actual innocence of the person detained or arrested is irrelevant in determining false imprisonment. *Peterson Novelties v. Berkley*, 259 Mich. App. 1, 18 (2003).

Plaintiff's Complaint, under "Facts" and in Count IV, alleges, in part:

> 29. Defendant Fitzpatrick, at a minimum, was responsible for bring the bogus charges against Plaintiff which were as follows: (1) armed robbery; (2) possession of a short barreled shotgun; and (3) assaulting/ resisting/obstructing a police officer.

> 31. Defendants lacked any probable cause at all to charge Plaintiff with the crimes, and the information gathered was stale.

> 66. That Defendants caused the arrest and/or imprisonment of Plaintiff without any legal justification and/or probable cause.

> 67. That Defendants did cause Plaintiff to be held against his will and/or imprisoned without any legal justification and/or probable cause.

However, the Complaint omits critical - and indisputable - information which is part of the state trial court record, namely, that Plaintiff was charged with three crimes (listed in his ¶29 of his Complaint), under a criminal complaint and warrant issued by the Washtenaw County Prosecutor, and, that after a preliminary examination hearing, a state District Court judge determined there was sufficient probable cause to hold Plaintiff for trial on those charges.

Defendants, in their role as police detectives, submitted information to the prosecuting attorney, and it was under the authority of the prosecutor that Plaintiff was charged with armed robbery, a decision which was upheld by the state trial court after a probable cause hearing. Plaintiff's Complaint therefore fails to establish that the individual defendants were responsible for his imprisonment, and fails to establish that their actions were *the* proximate cause, i.e. the one most immediate, efficient, and direct cause of the injury or damage, and he has thus failed to plead in avoidance of governmental immunity.

E. Count V, Malicious Prosecution

To establish a claim of malicious prosecution under Michigan law Plaintiff must show: (1) a defendant initiated a criminal prosecution against him; (2) criminal proceedings were terminated in his favor; (3) there was an absence of probable cause, and; (4) the action was undertaken with malice or a purpose other than bringing the offender to justice. *Matthews v. Blue Cross & Blue Shield of Michigan*, 456 Mich. 365, 378 (1998). Under Michigan law, "the only situation in which an action for malicious prosecution would correctly lie is where a police officer knowingly swears false facts in a complaint, without which there is no probable cause." *Belt v. Ritter*, 18 Mich. App. 495, 503 (1969).

Count V of Plaintiff's Complaint alleges, in part:

> 73. Defendants falsely arrested and caused/instituted criminal proceedings to be brought against Plaintiff in this matter.
>
> 74. Defendants had no probable cause to believe that the proceedings against Plaintiff could succeed.
>
> 75. Defendants instituted and caused charges and proceedings to be brought against Plaintiff by submitting false, misleading, and/or incomplete testimony and/or evidence.
>
> 76. That the charges brought against Plaintiff were dismissed.

Plaintiff has failed to plead sufficient facts to establish a claim for malicious prosecution. His claim that he was falsely arrested and that Defendants submitted

false, misleading and/or incomplete testimony and/or evidence are without substantiation. Nowhere in his Complaint does he offer any support for such claims. Additionally, as pointed out above, the charges of armed robbery, possession of a short barreled shotgun, and assaulting/resisting/obstructing a police officer were authorized by the prosecuting attorney, and after a hearing a state District court judge found probable cause to bind the Plaintiff over on those charges. Moreover, while it is true that the armed robbery and weapons charges were dismissed, Plaintiff omits from his complaint that he pled guilty to the charge of resisting arrest. Plaintiff has failed to plead facts to support any of the elements of a malicious prosecution claim and has thus failed to plead this claim in avoidance of governmental immunity.

III. PLAINTIFF'S FEDERAL LAW CLAIM AGAINST THE INDIVIDUAL OFFICERS ALLEGING VIOLATION OF THE 4TH AMENDMENT/42 USC § 1983 UNREASONABLE SEIZURE WITHOUT PROBABLE CAUSE MUST BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED .

A. Plaintiff's Claims

Count VI of Plaintiff's Complaint is entitled "Violation of the Fourth Amendment 42 U.S.C. § 1983 Unreasonable Seizure Without Probable Cause", and alleges, in part:

> 83. Defendants acted unreasonably and failed in their duty when they falsely arrested/detained/seized Plaintiff without considering the totality of the circumstances.

> 84. Defendants acted unreasonably and failed in his [sic] duty when he [sic] unlawfully seized and detained Plaintiff.
>
> 85. Defendants violated Plaintiff's rights pursuant to the Fourth Amendment when they unlawfully searched Plaintiff's bedroom, unlawfully seized items therein, and authored a constitutionally deficient Affidavit and Search Warrant.

In addition, under the "Facts" section of his Complaint, Plaintiff makes these additional allegations:

> 19. On May 25, 2012, Defendants Stanford and Fitzpatrick investigated the anonymous tip and attempted to make contact with Plaintiff at his home at 2523 Adrienne Drive, which was located in Ann Arbor.
>
> 20. Despite the fact that Plaintiff was not at the residence, Defendants Fitzpatrick and Stanford unlawfully entered Plaintiff's bedroom and conducted an unlawful search of same.
>
> 25. After unlawfully searching Plaintiff's bedroom, on May 25, 2012, Defendant Stanford drafted an Affidavit for a Search Warrant.
>
> 26. The Affidavit was void of specific and/or reliable information which linked Plaintiff to any crime whatsoever.
>
> 27. The Search Warrant was similarly defective on its face and was overbroad.
>
> 31. Defendants lacked any probable cause at all to charge Plaintiff with the crimes, and the information gathered was stale.
>
> 32. All of the individually-named Defendants failed to actively investigate all leads, failed to inquire as to the legitimacy of any leads acquired, and failed to make inquiry into Plaintiff's alibi which put him at a specific address, with a specific individual, at the specific time when the party store robbery occurred.
>
> 33. The individually-named Defendants then falsely arrested Plaintiff.

> 38. Plaintiff was booked and jailed at the Washtenaw County Sheriff Department on or about May 26, 2012 and was not released until approximately November of 2012.
>
> 40. On December 17, 2012, a Motion for nolle prosequi was granted as to Court I (robbery armed) and Count II (weapons possession of a short barreled shotgun) because the charges were not able to be proven and thus no probable cause existed.

Plaintiff appears to allege two separate 4th Amendment violations: (1) that he was detained/arrested without probable cause (¶¶83-84; 31-33); and, (2) that his home was illegally searched and property was illegally seized (¶¶85; 20, 25-27).

B. Detention/Arrest Without Probable Cause.

For a wrongful arrest claim to succeed under § 1983, a plaintiff must prove that police lacked probable cause. *Hartman v. Moore,* 547 U.S. 250, 252, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006) ("want of probable cause must be alleged and proven" to state actionable retaliatory prosecution claim). See also *Brooks v. Rothe,* 577 F.3d 701, 706 (6th Cir.2009); *Gumble v. Waterford Township,* 171 Fed.Appx. 502, 507 (6th Cir.2006) (unpublished) (quoting *Mark v. Furay,* 769 F.2d 1266, 1269 (7th Cir.1985) ("the existence of probable cause for an arrest totally precludes any section 1983 claim for unlawful arrest, false imprisonment, or malicious prosecution, regardless of whether the defendants had malicious motives for arresting the plaintiff.").

"Probable cause exists if the facts and circumstances known to the officer warrant a prudent [person] in believing that the offense has been committed."

Brooks, 577 F.3d at 706 (6th Cir.2009) (quoting *Henry v. United States,* 361 U.S. 98, 102, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959)). "A finding of probable cause does not require evidence that is completely convincing or even evidence that would be admissible at trial; all that is required is that the evidence be sufficient to lead a reasonable officer to conclude that the arrestee has committed or is committing a crime." *Everson v Leis,* 556 F.3d 484, 498–99 (6th Cir. 2009).

Plaintiff has not and cannot make the required preliminary showing that the detectives engaged in "deliberate falsehood or reckless disregard for the truth". *Wolgast v. Richards*, 389 Fed. App. 494, 502 (6th Cir. 2010). ¶¶83 and 84, and 31 and 33, of the Complaint offer no details, and certainly no factual support, for the claim that Plaintiff's detention and arrest were illegal. ¶32 offers no more than speculation that the detectives failed to properly follow up on leads, including a claimed alibi. Plaintiff has not pointed to any evidence, outside of his own naked assertions, to support the claim that there wasn't probable cause to prosecute him. Even assuming the truth of Plaintiff's assertions, he has not pointed to the actual information used by the prosecutor to determine that charges should be brought against him. Ultimately, the fact that a district court judge found that probable cause existed precludes Plaintiff from now asserting probable cause did not exist.

Plaintiff's claim for the absence of probable cause appears to be based on the fact that the prosecutor moved for a dismissal of the armed robbery and weapons

charges. (Complaint at ¶40). Apparently the prosecutor felt he lacked sufficient evidence to prove those charges beyond a reasonable doubt at trial. But the dismissal of those charges does not equate to the absence of probable cause. As noted above, a district court judge found probable cause existed to hold Plaintiff for trial on all charges. The later dismissal by the prosecutor does not erase that finding of probable cause. ¶¶83-84 and 31-33 of the Complaint are nothing more than "naked assertions devoid of further factual enhancement" which fall far short of federal pleading requirements.

C. Illegal Search and Seizure.

¶¶85, and 19, 20 and 25 of the Complaint actually describe two separate entries into Plaintiff's bedroom, located in a home leased by his mother, in which nothing was seized during the first entry, and in which certain items of clothing were seized pursuant to a search warrant during the second entry.

Plaintiff's bedroom was searched pursuant to a search warrant that was reviewed and approved by a neutral and detached magistrate, who determined there was probable cause to issue that warrant. (Complaint at ¶40). Such decisions generally insulate police officers from liability. *See Hale v. Kart,* 396 F.3d 721, 725 (6th Cir.2005) ("In §1983 actions, an officer ordinarily receives qualified immunity if he or she relies on a judicially secured warrant.").

A §1983 claim does lie against an officer who obtains an invalid search

warrant by making, in his affidavit, material false statements either knowingly or in reckless disregard for the truth. *Donta v. Hooper,* 774 F.2d 716, 718 (6th Cir.1985) (per curiam). However, only if a false statement was made knowingly and intentionally, or with reckless disregard for the truth, and if, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, is there a constitutional violation under the Fourth Amendment. *Franks v. Delaware,* 438 U.S. 154, 155-156; 98 S.Ct. 2674, 57; L.Ed.2d 667 (1978).

In this context, Plaintiff must make a preliminary showing that Det. Stanford engaged in deliberate falsehood or reckless disregard for the truth in omitting information from, or making false statements in, the affidavit. *See Hill v. McIntyre,* 884 F.2d 271, 275 (6th Cir.1989). However, Plaintiff has failed to do so, and instead only makes generalized statements about the validity of the warrant.

¶¶85, 20, and 25-27, offer no details and no factual support for the claim that the search of Plaintiff's bedroom and the seizure of his property were illegal. These paragraphs offer no more than speculation that the searches were illegal and that the search warrant was deficient. Plaintiff has not attached the supposedly defective search warrant to his Complaint, and fails to identify how it is allegedly defective. Nowhere does Plaintiff offer any support for these claims. These are, once again, nothing more than "naked assertions devoid of further factual

enhancement" which fall far short of federal pleading requirements.

IV. PLAINTIFF'S FEDERAL LAW CLAIM AGAINST THE INDIVIDUAL OFFICERS ALLEGING VIOLATION OF THE 4TH AMENDMENT/42 USC § 1983 MALICIOUS PROSECUTION MUST BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED .

A. Plaintiff's Claims

Count VII of Plaintiff's Complaint is entitled "Violation of the Fourth Amendment 42 U.S.C. §1983 Malicious Prosecution", and alleges, in part:

> 90. At all material times herein, Defendants charged Plaintiff with bogus crimes and instituted criminal proceedings against Plaintiff which concluded in his favor.
>
> 91. As stated above, Defendants had no actual knowledge or probable cause to believe that the charges brought against Plaintiff would succeed and acted unreasonably when they initiated a malicious prosecution of Plaintiff in which the charges were dismissed.
>
> 92. Defendants failed to properly and thoroughly investigate, they manufactured probable cause, lied, failed to disclose information exonerating Plaintiff, and wrongfully initiated criminal proceedings against Plaintiff.
>
> 93. Defendants were the initiators of Plaintiff's wrongful prosecution by unlawfully seizing him and charging him with bogus crimes, thereby causing damages.
>
> 94. Defendants knew that they falsely and recklessly built a case against Plaintiff and this exemplified their callous indifference to Plaintiff's life and liberty.

B. Elements of Malicious Prosecution

To succeed on a Fourth Amendment malicious prosecution claim under §1983, Plaintiff must prove: (1) a criminal prosecution was initiated against the plaintiff and that defendants made, influenced, or participated in the decision to prosecute, (2) that there was a lack of probable cause for the criminal prosecution, (3) that as a consequence of a legal proceeding the plaintiff suffered a deprivation of liberty apart from the initial seizure, and (4) the criminal proceeding must have been resolved in Plaintiffs favor. *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010).

As noted above in section III.B., Plaintiff's claim for malicious prosecution fails because he cannot show that there was a lack of probable cause for his arrest. Additionally, he cannot show that the criminal proceedings were resolved in his favor, because he in fact pled guilty to one of the charges against him.

C. Plaintiff's Claim of Malicious Prosecution is Conclusory

While it is true that Detectives Stanford and Dortch participated in the decision to prosecute Plaintiff, the decision to prosecute was ultimately made by the Washtenaw County Prosecutor's Office, which reviewed the information provided by the detectives in arriving at a determination that probable cause existed to authorize criminal charges. Plaintiff has not provided any evidence to show that the prosecutor did not have probable cause to prosecute. ¶¶90-94 of the

Complaint are, once again, nothing more than "naked assertions devoid of further factual enhancement" which fall far short of federal pleading requirements.

V. PLAINTIFF'S FEDERAL LAW CLAIM AGAINST THE CITY MUST BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELEIF CAN BE GRANTED .

A. Plaintiff's Claims

Count VIII of Plaintiff's Complaint is entitled "City of Ann Arbor's Constitutional Violations", and in ¶¶98-102 alleges, in essence, that the City maintained a custom or policy of failure to train/failure to supervise its officers regarding search and seizure, use of force, prosecution of criminal cases, and protection of constitutional rights. However, these paragraphs are devoid of any factual development that would show a custom or practice of failure to train/failure to supervise, and amount to nothing more than a formulaic recitation of the elements of a cause of action.

B. Plaintiff failed to allege even the bare terms of an official policy or custom, as required to state a claim under §1983.

In order to state a §1983 claim on the basis of municipal custom or policy a plaintiff must identify the policy, connect the policy to the city itself, and also show that the particular injury was incurred because of the execution of that policy. *Graham ex rel. Est. of Graham v. County of Washtenaw*, 358 F.3d 377, 383 (6th Cir. 2004); see also *Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658, 694-95, 98 S.Ct. 2018 (1978) ("a local government may not be sued under

§1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983".).

The 6th Circuit has identified four possible ways to prove the necessary link, and Plaintiff has not pled any of the four. "The plaintiff can look to (1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with official decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations." *Thomas v. City of Chattanooga*, 393 F.3d 426, 429 (2005). Plaintiff has not alleged facts sufficient to show that there are any policies or customs in place that provide any link to the injuries suggested here. He has alleged that the city has a policy or custom, but has failed to even establish what that policy is, or to link such a policy to the harm complained of here. ¶¶98-102 of the Complaint are, once again, nothing more than "naked assertions devoid of further factual enhancement" which fall far short of federal pleading requirements.

CONCLUSION

Plaintiff's lengthy complaint has failed to properly plead sufficient facts that could lead any court to determine that a proper claim for relief has been made. He provides nothing more than legal conclusions couched as factual allegations, or

bare assertions which amount to nothing more than a formulaic recitation of the element of a claim. His Complaint does not contain either direct or inferential allegations with respect to *all* the material elements of any of his claims. As to his state law claims Plaintiff has failed to plead in avoidance of governmental immunity. For these reasons his Complaint should not survive this FRCP 12(b)(6) motion to dismiss.

Respectfully submitted,

By: /s/ Stephen K. Postema

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PROOF OF SERVICE

I hereby certify that on August 7, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Plaintiff's Counsel, Christopher Trainor and Associates, and I hereby certify that I have mailed by US Mail the document to the following non-ECF participants: None.

/s/ Jane Allen
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