

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**DALE E. MCCORMICK,**

**Plaintiff,**

**v.**

**Case No. 02-2135-JWL**

**CITY OF LAWRENCE, KANSAS,  
et al.,**

**Defendant.**

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**MEMORANDUM AND ORDER**

Pro se plaintiff Dale E. McCormick is a self-described civil rights activist who brings this lawsuit against various government officials alleging that they violated his constitutional rights on a number of occasions. The matter is presently before the court on the motion of defendant Bradley R. Burke, Assistant District Attorney for Douglas County, Kansas, for judgment on the pleadings (doc. 221). By way of this motion, defendant Burke asks the court to dismiss plaintiff's three remaining claims against him on the grounds that he is entitled to immunity for his alleged actions. For the reasons explained below, the court agrees that he is entitled to absolute prosecutorial immunity and, accordingly, the court will grant the motion to dismiss.

## **I. Facts**

The following facts are taken from the allegations in plaintiff's first amended complaint (hereinafter referred to as simply the complaint). The complaint asserts a litany of claims against numerous defendants based on numerous incidents. These allegations are described in detail in a prior memorandum and order in which the court resolved the various defendants' motions to dismiss. *See generally McCormick v. City of Lawrence*, 253 F. Supp. 2d 1172 (D. Kan. 2003). For purposes of resolving defendant Burke's current motion for judgment on the pleadings, the court will limit its discussion to the allegations in the complaint relating to plaintiff's claims against defendant Burke.

Plaintiff alleges that on January 10, 2002, he was exercising his First Amendment rights while protesting police activity conducted by defendants James White and Leo Souders, both of the Lawrence Police Department. Officer White threatened to arrest plaintiff for disorderly conduct. Plaintiff pulled a micro-cassette recorder from his coat pocket, extended the device toward Officer White, and asked Officer White to repeat his unlawful threat. Officer White then grabbed plaintiff's hand and physically and forcefully took the recorder from plaintiff and shut off the device. Officer Souders and another police officer, Scott Chamberlain, grabbed plaintiff, forcefully took him into physical custody, and placed wrist shackles on him. Officer White placed plaintiff in a patrol car and transported him to the Douglas County jail. Once there, Officer White had plaintiff booked into jail on charges of disorderly conduct and interference with police duties. Plaintiff demanded that Officer White return his recording

device, but Officer White refused and kept the device. The charges were dismissed at plaintiff's first appearance on January 30, 2002.

In or about March of 2002, defendants Christine E. Kenney,<sup>1</sup> Burke, and White agreed to retaliate against plaintiff for the exercise of his First Amendment rights (e.g., the January 10, 2002, incident); to harass plaintiff and try to deter him from exercising his constitutional rights in the future; and, more specifically, to deny and deprive him of his liberty "by using a falsified affidavit to initiate a 'criminal' charge (see Exhibit B) against plaintiff, to wit: 'disorderly conduct,' in case no. 02-cr-0527 in the District Court of Douglas County. Specifically, said [Kenney], Burke and White . . . agreed to use, and did use . . . an affidavit (Ex. A) which arguably fails on its face to establish probable cause to initiate said 'charge' (under clearly established First Amendment law)." Exhibits A and B are not in fact attached to plaintiff's complaint, but defendant Burke attached those documents to his motion for judgment on the pleadings. Consistent with the standards for evaluating a motion for judgment on the pleadings, the court will consider these documents in resolving defendant Burke's motion because plaintiff refers to the documents in his complaint, they are central to his claims, and plaintiff does not dispute that the documents submitted by defendant Burke are in fact authentic copies of the documents referenced in his complaint.

The criminal charge that plaintiff references as Exhibit B to his complaint states as follows:

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<sup>1</sup> Ms. Kenney was formerly known as Christine Tonkovich, and plaintiff's complaint refers to her as Ms. Tonkovich.

## COMPLAINT

Bradley R. Burke, of lawful age, being first duly sworn on oath, for complaint against the above shown defendant, alleges and states:

### COUNT 1

THAT ON or about the 10th day of January, 2002, in the County of Douglas, State of Kansas, one DALE E. MCCORMICK, did then and there unlawfully with knowledge or probable cause to believe that such acts would alarm, anger or disturb others or provoke an assault or other breach of the peace, use offensive, obscene, or abusive language or engage in noisy conduct tending reasonably to arouse alarm, anger or resentment in others, all in violation of K.S.A. 21-4101(c). Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Kansas. (Disorderly Conduct, Class C Misdemeanor)

Sections violated and class: K.S.A. 21-4101(c), C Mis.

Penalty section: K.S.A. 21-4502 and K.S.A. 21-4503

**Witnesses:**

CANTON, JOHN  
EVIDENCE OFFICER  
MEAGHER, THOMAS  
SOUDERS, LEO  
WHITE, JAMES

The complaint is signed by defendant Burke as the “complainant,” and his signature is notarized.

The affidavit that plaintiff refers to as Exhibit A in his complaint is a sworn, notarized affidavit by Officer White. This affidavit recounts the factual details of the event according to Officer White. The affidavit states that plaintiff approached Officers White and Souders while they were investigating two males who were pushing a moped from a parking stall. At that time, plaintiff began to yell “you fucking pigs, leave them alone” and “you fucking pig’s [sic].” Officer White observed two females walking north on the sidewalk who were looking

at plaintiff and appeared fearful and visibly upset. The two males were later identified as John Canton and Thomas Meagher. Officer White's affidavit states that while plaintiff continued to yell, Messrs. Canton and Meagher told Officers White and Souders that if they would just turn their heads they would "kick the shit out of him." Messrs. Canton and Meagher became visibly upset by plaintiff's yelling and told plaintiff to "get the fuck out of here and leave the Officers alone and let them do their job." Plaintiff was yelling so loudly that it caused the officers to divert their attention from Messrs. Canton and Meagher, which caused a safety issue. Also, plaintiff appeared to be upset and a threat to Officers White and Souders. Officer White told plaintiff to be quiet and leave the area or be arrested for interference with duties and disorderly conduct. Plaintiff did not leave and instead continued to yell, and was then arrested.

Plaintiff's complaint alleges that defendants Kenney, Burke, and White "agreed to use, and did use . . . an affidavit (Ex. A) . . . which further utilizes the following false facts in order to try to falsely create 'probable cause' for such charge": that plaintiff did not use the words "F\*\*k" or "F\*\*king" at any time during the incident; that the few people who were within earshot and were paying attention to the incident, other than the two boys who were pushing their broken down moped, were laughing at what they were observing; that plaintiff's volume was consistent with the noise level in the area; that the affidavit erroneously implied that Messrs. Canton and Meagher were reasonable people within the meaning of the Kansas disorderly conduct law; and that Messrs. Canton and Meagher did not utter the words ascribed to them in the affidavit. Plaintiff's complaint also alleges that these three defendants connived

and conspired to omit the following material facts from their affidavit: that plaintiff made a micro-cassette recording of the incident which proves that the affidavit is false; that Officer White took the micro-cassette and the recorder during the incident and refused to return them to plaintiff; and that Officer White and others in complicity with him destroyed, altered, or adulterated the recordings in order to deprive plaintiff of that evidence. Plaintiff's complaint then alleges that "[a]fter so conspiring and so creating said false affidavit the conspirators caused the said White to swear such affidavit under oath, and the said Burke swore a complaint under oath, thereby instigating said false and falsely premised 'disorderly conduct' charge against plaintiff, and the same then used such falsely premised charge to force plaintiff to appear in court to defend himself against such charge in said court case."

Plaintiff originally asserted five counts against defendants Kenney, Burke, and White arising out of these facts: (1) Count XXII, a conspiracy claim; (2) Count XXIII, an unreasonable seizure claim; (3) Count XXIV, a deprivation of liberty by fabricated evidence claim; (4) Count XXV, a retaliatory, vindictive, or harassing prosecution claim; and (5) Count XXVI, an access to courts claim. The court previously dismissed the conspiracy claim and the access to courts claim. The three remaining claims against defendant Burke, then, are Claims XXIII, XXIV, and XXV. The unreasonable seizure and the deprivation of liberty by fabricated evidence claims allege that defendants Kenney, Burke, and White caused plaintiff to be seized without probable cause through the use of a materially false affidavit and sworn complaint. The retaliatory, vindictive, or harassing prosecution claim alleges that defendants Kenney, Burke, and White retaliated against plaintiff for the exercise of his First Amendment rights "to harass

plaintiff for such exercise, to deter, or try to deter, plaintiff from so exercising in the future, and to interfere with plaintiff's right to access the courts through the use of harassing and vindictive prosecutions, doing so under color of law, without probable cause, under circumstances which give rise to a presumption of vindictiveness, with a charge that bears no reasonable prospect of success, and through the use of a materially false affidavit and sworn complaint, thereby invading plaintiff's right to be free from retaliatory, vindictive or harassing prosecutions."

Of particular importance to the court's evaluation of defendant Burke's motion is the fact that the court previously dismissed plaintiff's conspiracy claim, Count XXII. The court did so on the basis that plaintiff "failed to allege specific facts from which it could be inferred that there was an agreement and concerted action amongst the three defendants" and instead made only insufficient "conclusory allegations regarding the conspiracy." *McCormick*, 253 F. Supp. 2d at 1203-04. Because the court dismissed this claim, then, the court will disregard the allegations in the complaint insofar as plaintiff lumped together conclusory allegations that defendants Kenney, Burke, and White agreed, connived, and conspired against him. Consequently, the court will not impute the alleged conduct of each of these defendants to each of the others, as plaintiff has attempted to do. Instead, the court will focus its inquiry on plaintiff's factual allegations concerning defendant Burke's alleged role in the incident.

The court also wishes to point out that it previously denied defendant Burke's motion to dismiss these three claims on the grounds of absolute prosecutorial immunity. *See id.* at 1204-07. At that time, the court denied defendant Burke's claim of absolute immunity because

plaintiff's complaint alleged that defendant Burke signed a criminal complaint under penalty of perjury and thus he potentially played a role apart from acting as an advocate, and defendant Burke had not argued to the contrary. *Id.* at 1205. The court subsequently denied defendant Burke's motion to reconsider, and the court pointed out that it had been constrained in deciding this issue because defendant Burke had not attached a copy of the criminal complaint to his motion to dismiss. *See* Memorandum and Order (doc. 193), at 3-6, *aff'd*, *City of Lawrence*, Nos. 03-3127 & 03-3184, 2004 WL 882146, at \*5-\*6 (10th Cir. Apr. 26, 2004) (affirming and noting that defendant Burke could have submitted a copy of the criminal complaint with his motion to dismiss). As discussed previously, defendant Burke has now submitted a copy of the criminal complaint as well as defendant White's affidavit in conjunction with his current motion for judgment on the pleadings. Thus, the court's resolution of defendant Burke's judgment on the pleadings differs from the court's prior resolution of his motion to dismiss insofar as the allegations in plaintiff's complaint are now illuminated by copies of the relevant documents.

## **II. Legal Standard for Judgment on the Pleadings**

A motion for judgment on the pleadings under Rule 12(c) is treated as a motion to dismiss under Rule 12(b)(6). *Atlantic Richfield Co. v. Farm Credit Bank*, 226 F.3d 1138, 1160 (10th Cir. 2000). The court will dismiss a cause of action for failure to state a claim only when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief," *Poole v. County of Otero*, 271 F.3d 955, 957

(10th Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), or when an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). The issue in resolving a motion such as this is “not whether [the] plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (quotation omitted).

When, as here, a plaintiff is proceeding pro se, the court construes his or her pleadings liberally and holds the pleadings to a less stringent standard than formal pleadings drafted by lawyers. *McBride v. Deer*, 240 F.3d 1287, 1290 (10th Cir. 2001); accord *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998). In other words, “[n]ot every fact must be described in specific detail, . . . and the plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him [or her] should be allowed to amend his [or her] complaint.” *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). The liberal construction of the plaintiff’s complaint, however, “does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based.” *Id.* (quoting *Hall*, 935 F.2d at 1110). Nonetheless, “conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based.” *Id.* (quoting *Hall*, 935 F.2d at 1110).

It is generally unacceptable for a court to look beyond the four corners of the complaint when deciding a Rule 12(b)(6) motion to dismiss. *Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 961 (10th Cir. 2001), *rev'd on other grounds*, 537 U.S. 79 (2002). If the court on a Rule 12(b)(6) motion looks to matters outside the complaint, the court generally must convert the Rule 12(b)(6) motion into a Rule 56 motion for summary judgment. *Id.* However, it is “accepted practice that, ‘if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff’s claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.’” *Id.* (quoting *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1384 (10th Cir. 1997)). “If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied.” *Id.* (quoting *GFF*, 130 F.3d at 1385).

### **III. Analysis**

State prosecutors are entitled to absolute immunity from suits under 42 U.S.C. § 1983 for activities within the scope of their prosecutorial duties. *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976). This immunity extends to prosecutorial activities that are “intimately associated with the judicial phase of the criminal process.” *Id.* at 430; *accord Burns v. Reed*, 500 U.S. 478, 491-92 (1991). This immunity does not arise purely from esteem for prosecutors, but rather arises from the concern that protecting the prosecutor’s role as an advocate is necessary to protect the judicial process itself. *Kalina v. Fletcher*, 522 U.S. 118,

127 (1997). Thus, in evaluating whether a prosecutor is entitled to immunity for a particular activity, the court must examine “the nature of the function performed, not the identity of the actor who performed it.” *Id.* (quotation omitted). A prosecutor is entitled to absolute immunity to the extent that he or she functions as an advocate for the State in preparing for the initiation of judicial proceedings or for trial, *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993), but this immunity does not extend to administrative or investigatory functions that are unrelated to preparing for initiating a prosecution or judicial proceedings, *id.*; *Burns*, 500 U.S. at 494-96.

It is well established that a prosecutor is entitled to absolute immunity for preparing and filing criminal charges. *Imbler*, 424 U.S. at 431 (holding a prosecutor is immune for “initiating a prosecution and presenting the State’s case”); *Kalina*, 522 U.S. at 129 (holding a prosecutor was entitled to absolute immunity for preparing and filing an information and a motion for an arrest warrant); *Snell v. Tunnell*, 920 F.2d 673, 693 (10th Cir. 1990) (stating that filing charges is an act “within the continuum of initiating and presenting a criminal case”). In doing so, however, a prosecutor is not entitled to absolute immunity to the extent that he or she acts as a complaining witness. *Kalina*, 522 U.S. at 129-31 (holding a prosecutor was not entitled to absolute immunity for signing a certification for determination of probable cause under penalty of perjury which contained two inaccurate factual statements). This is so because “[t]estifying about facts is the function of the witness, not of the lawyer.” *Id.* at 130.

In this case, then, defendant Burke is entitled to absolute prosecutorial immunity for filing the criminal charges against plaintiff except insofar as it is alleged that defendant Burke

may have functioned as a complaining witness. The allegations in the complaint, however, do not give rise to any reasonable inference that defendant Burke stepped out of his prosecutorial role and into that of a complaining witness. Defendant Burke's involvement in the incident was limited to signing the criminal complaint and initiating the case in which plaintiff was charged with disorderly conduct for the January 10, 2003, incident. The complaint that he signed does not allege any specific facts but instead essentially parrots the language of K.S.A. § 21-4101(c), which is the disorderly conduct statute that plaintiff was charged with violating. Further, the complaint reveals that defendant Burke filed the complaint based on evidence collected from the witnesses listed in the complaint, namely Officers White and Souders, Messrs. Canton and Meagher, and an unnamed evidence officer. Thus, defendant Burke was not functioning as a complaining fact witness, but rather he simply signed the complaint, which was necessary to initiate the criminal proceedings. As such, defendant Burke was functioning in his role as an advocate of the State, and his actions were intimately associated with the judicial process. Accordingly, he is entitled to absolute prosecutorial immunity for his actions in signing and filing this criminal complaint. *See, e.g., McCormick v. City of Lawrence*, No. 03-2195-GTV, 2003 WL 22466188, at \*6 (D. Kan. Aug. 14, 2003) (holding the defendant prosecutor was entitled to absolute immunity for signing a similar complaint); *see also, e.g., McCormick v. Bd. of County Comm'rs*, 28 Kan. App. 2d 744, 748, 24 P.3d 739, 744 (holding the defendant prosecutor was entitled to absolute immunity for filing a criminal complaint), *aff'd in part, rev'd in part on other grounds*, 272 Kan. 627, 35 P.3d 815 (2001), *cert. denied*, 537 U.S. 841 (2002).

In so holding, the court finds plaintiff's reliance on *Kalina* and *Roberts v. Kling*, 104 F.3d 316 (10th Cir.), *cert. granted and judgment vacated*, 522 U.S. 1025 (1997), *on remand*, 144 F.3d 710 (10th Cir. 1998), to be misplaced. In *Kalina*, the Supreme Court held that a prosecutor who had signed a certificate for determination of probable cause that summarized the evidence supporting a motion for an arrest warrant was not entitled to absolute prosecutorial immunity because the prosecutor had personally vouched for the truth of the facts set forth in the certification under penalty of perjury. 522 U.S. at 121, 129-31; *see also McCormick*, 28 Kan. App. 2d at 748, 24 P.3d at 744 (applying *Kalina* and holding a prosecutor was not entitled to absolute immunity insofar as the prosecutor swore to and filed an affidavit which resulted in a determination of probable cause). In contrast, here, Officer White's affidavit was the analogous written source that contained evidence of the facts necessary to support the charges in the complaint. Defendant Burke did not vouch for the accuracy of those facts, but rather confined his involvement to the traditional prosecutorial role of filing the criminal complaint on behalf of and as an advocate for the State. *Roberts* is likewise unhelpful to plaintiff in this case. *Roberts* came to the Tenth Circuit on remand from the Supreme Court in light of *Kalina*. The Tenth Circuit stated that it was "[a]ssuming without deciding that [the defendant] acted as a complaining witness in testifying to the truth of the statements contained within the criminal complaint." 144 F.3d at 711. Thus, in *Roberts*, the Tenth Circuit did not decide the issue presented in this case, which is *whether* the defendant was acting as a complaining witness in signing the document at issue. Further, it appears that the criminal complaint at issue in *Roberts* actually contained factual allegations because the plaintiff in

*Roberts* had contended that the criminal complaint itself “contained misrepresentations and omissions of material fact.” *Id.* In contrast, in this case it is Officer White’s affidavit, not the criminal complaint signed by defendant Burke, that plaintiff contends contains misrepresentations and omissions of material facts.

Plaintiff also argues that defendant Burke is not entitled to absolute prosecutorial immunity because he fabricated evidence during the investigative phase of the criminal case, *see Buckley*, 509 U.S. at 273-78 (holding a prosecutor was not entitled to absolute immunity for fabricating evidence concerning an unsolved crime), and he gave Officer White advice about which evidence to fabricate and about the existence of probable cause, *see Burns*, 500 U.S. at 492-96 (same, for providing legal advice to the police during their pretrial investigation of the facts). This argument, however, does not comport with the allegations in plaintiff’s complaint. The court’s dismissal of plaintiff’s conclusory allegations of conspiracy forecloses plaintiff from lumping together the defendants’ conduct and, hence, from imputing Officer White’s conduct to defendant Burke and vice versa. Absent these conspiracy allegations, no reasonable inference can be drawn from the specific facts alleged in plaintiff’s complaint that defendant Burke was involved in any preliminary investigation of the alleged misdemeanor, that he helped Officer White or any other witness manufacture probable cause, or that he fabricated evidence to support the charge. Rather, plaintiff’s complaint contains nothing more than an allegation that defendant Burke signed and filed the criminal complaint in reliance upon the evidence that he obtained from the five witnesses listed in the complaint and, in particular, Officer White’s factual affidavit. The greatest level of involvement by

defendant Burke that reasonably can be inferred from these allegations is that the witnesses listed in the complaint told defendant Burke about the facts surrounding the incident, then defendant Burke prepared the affidavit for Officer White to sign, prepared a criminal complaint matching those allegations to the relevant statutory language, and filed the complaint with the court. He is nonetheless entitled to absolute prosecutorial immunity for these actions because he did not step outside of his prosecutorial role as an advocate for the state and attest to the truth of any factual allegations, which were instead set forth in Officer White's affidavit. *See Scott v. Hern*, 216 F.3d 897, 909-10 (10th Cir. 2000) (holding a prosecutor who drafted an affidavit containing a witness's allegations without augmentation or further investigation, prepared a petition matching those allegations to the relevant statutory language, and submitted the petition to the court was entitled to absolute prosecutorial immunity because the prosecutor did not attest to the truth of the allegations in the affidavit).

Accordingly, defendant Burke is entitled to judgment on the pleadings because even if the court construes all reasonable inferences from the allegations in plaintiff's complaint in plaintiff's favor, it nevertheless appears beyond a doubt that plaintiff can prove no set of facts in support of his claims that would entitle him to relief.

**IT IS THEREFORE ORDERED BY THE COURT** that defendant Bradley R. Burke's motion for judgment on the pleadings (doc. 221) is granted. Accordingly, defendant Burke is dismissed from this action.

**IT IS SO ORDERED** this 5th day of October, 2004.

s/ John W. Lungstrum

John W. Lungstrum

United States District Judge