

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

DASON MUSICK,

Plaintiff,

v.

Case No. 2:24-cv-02299-DDC-TJJ

PRAIRIE BAND OF THE POTAWATOMI NATION;  
TANNER LEMERY, in his individual capacity; DEREK  
TUCK, in his individual capacity; TERRY CLARK, in  
his individual capacity; THE BOARD OF COUNTY  
COMMISSIONERS OF JACKSON COUNTY, KANSAS;  
JACKSON COUNTY SHERIFF TIM MORSE, in his  
official capacity,

Defendants.

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**Motion for Judgment on the Pleadings**

Defendants Board of County Commissioners of the County of Jackson, Kansas (Jackson County) and Sheriff Tim Morse move, pursuant to Fed. R. Civ. P. 12(c), to for judgment on the pleadings as to all claims against Jackson County and Sheriff Morse.

**Nature of the Case**

This is an action for damages under 42 U.S.C. § 1983 and Kansas law against Jackson County and Jackson County Sheriff Tim Morse. Additional defendants are the Prairie Band Potawatomie Nation (PBPB), PBPB Police Chief Terry Clark, and PBPB Police Officers Tanner Lemery and Derek Tuck.

**Statement of Facts**

According to the Complaint, Plaintiff Musick was gambling in the Prairie Band Casino on April 16, 2021. Musick was told by PBPB Police Officers Lemery and Tuck to leave the casino. PBPB Officers Lemery and Tuck then stopped Musick while he was driving in the casino parking

lot—which is on the Prairie Band Reservation. PBPB Officers Derek and Tuck administered two preliminary breath tests to Musick which were below the legal limit.

PBPB Officers Derek and Tuck then took Musick to the PBPB police station, located outside the Prairie Band of Potawatomi Reservation, Derek and Tuck they administered two additional breathalyzer tests with the second test showing Musick’s blood alcohol exceeded the legal limits for intoxication. PBPB Officer Lemery later admitted the breathalyzer at the PBPB station was producing false results. PBPB Officers Lemery and Tuck and Police Chief Clark had known for some time that the breathalyzer at the PBPB station was producing false results.

PBPB Officers (presumably Lemery and Tuck) transported Musick to the Jackson County Jail and filed an affidavit charging him with driving under the influence, disorderly conduct, and criminal trespass.

According to the Booking Record, Plaintiff Musick was arrested at 2:18 a.m., booked at 3:40 a.m. and released at 12:20 p.m., all on April 17, 2021.

Tim Morse is the Jackson County Sheriff. The Complaint does not allege Sheriff Morse had knowledge of any alleged false statements in the affidavit. *See Doc. 1*, ¶¶ 29 (“knowingly false affidavit to charge him with driving under the influence”), 70 (“false affidavit based upon the false sobriety test results”), and 77 (“by presenting knowingly false breathalyzer results, a false affidavit”). The Complaint does not allege a lack of probable cause for the offenses of disorderly conduct and/or criminal trespass (*see Doc. ¶¶ 26, 56*)—rather, the complaint alleges a lack of probable cause for a charge for DUI (*id.*).

### **Issues Presented**

1. The Complaint fails to state any claim for relief against Jackson County as Jackson County is not a proper party.
2. Plaintiff’s claims are barred by the statute of limitations:

- A. The § 1983 and negligence claims are barred by the two-year statute limitations, K.S.A. 60-513(a)(4); and
  - B. The state law false imprisonment claim is barred by the one-year statute of limitations, K.S.A. 60-515(b).
- 3. Plaintiff fails to allege a malicious prosecution claim against Jackson County or Sheriff Morse:
  - A. Neither Jackson County nor Sheriff Morse caused the plaintiff's prosecution; and
  - B. Plaintiff's arrest and/or prosecution was not caused by any custom, practice or policy of Jackson County or Sheriff Morse.
- 4. Plaintiff fails to state a negligence claim against Jackson County or Sheriff Morse:
  - A. There was no duty owed Jackson County or Sheriff Morse that was breached; and
  - B. A negligence claim is time-barred by the two-year statute of limitations.
- 5. Plaintiff fails to state a state law false imprisonment claim:
  - A. A false imprisonment claim is time-barred by the one-year statute of limitations; and
  - B. The complaint does not allege that plaintiff's detention was without probable cause.

### **Argument and Authorities**

#### **I. Standard of review**

Courts evaluate a Rule 12(c) motion under the same standard as a Rule 12(b)(6) motion to dismiss. *Turner v. City of Tulsa*, 525 Fed.Appx. 771, 772 (10th Cir.2013). A motion for judgment on the pleadings is granted when the factual allegations in the complaint fail to “state a claim for relief that is plausible on its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), or when an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). Facial plausibility requires that plaintiff plead “factual content that allows the court to draw the reasonable inference that the defendant is liable” to the plaintiff “for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “Under this standard, ‘the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering

factual support for these claims.” *Carter v. United States*, 667 F.Supp.2d 1259, 1262 (D.Kan. 2009) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir.2007)).

A plausible claim requires sufficient factual content to allow a court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. While the Court accepts all well-pleaded allegations as true, it need not accept legal conclusions. *Id.* Conclusory statements are not entitled to the presumption of truth. *Id.* at 678-79. The court need not accept “conclusory allegations without supporting factual averments.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citations omitted).

## **II. The BOCC is not a proper party.**

It is the sheriff (not the Board of County Commissioners) that “shall have the charge and custody of the jail of his county, and all the prisoners in the same.” K.S.A. 19-811. The Board of County Commissioners “are not legally responsible for the hiring or training of personnel or promulgation of policies or procedures within the [Sheriff’s Department], particularly with regard to jail operations.” *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 287, 261 P.3d 943 (2011).

And the “sheriff is not a subordinate of the board of county commissioners and neither are the undersheriff or the sheriff’s deputies and assistants.” [*Bd. of Cnty. Comm’rs of Cnty. of Lincoln v. Nielander*, 275 Kan. 257, 261, 62 P.3d 247 (2003)]. The Board cannot be legally responsible for the policies of SCJ or Sheriff McBryde because it “may not require particular operational practices in a jail.” *Estate of Belden*, 261 P.3d at 970. Without this authority, the Board “cannot be held legally liable for the deleterious consequences of substandard jail policies, procedures, or practices.” *Id.* So, the court grants summary judgment against plaintiff’s claims against the Board of County Commissioners.

*Gardiner v. McBryde*, No. 15-3151-DDC-JPO, 2020 WL 42272, at \*7 (D. Kan. Jan. 3, 2020).

Jackson County is entitled to judgment as it is not a proper party for any of the claims asserted.

### **III. The statute of limitations bars a Fourth Amendment claim for false arrest/false imprisonment against Jackson County and Sheriff Morse.**

The Tenth Circuit held that “‘a plaintiff who claims that the government unconstitutionally imprisoned him has at least two potential constitutional claims.’” *McKnight v. City of Topeka, Kansas*, No. 19-2353-DDC-GEB, 2020 WL 1320724, at \*4 (D. Kan. Mar. 20, 2020) (quoting *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008)). These two potential claims are as follows:

If he has been imprisoned without legal process he has a claim under the Fourth Amendment analogous to a tort claim for false arrest or false imprisonment. If he has been imprisoned pursuant to legal but wrongful process, he has a claim under the procedural component of the Fourteenth Amendment's Due Process Clause analogous to a tort claim for malicious prosecution.

*Mondragon*, 519 F.3d at 1082. It appears Plaintiff Musick asserts both types of claims. *Doc. 1*, ¶¶ 36-37 (alleging “remaining” charges were dismissed in 2023 and also referring to April 2021 arrest). The statute of limitations bars the former—a Fourth Amendment claim for false arrest and/or imprisonment preceding the institution of legal process.

The statute of limitations for a claim under § 1983 is drawn from the personal-injury statute of the state in which the federal district court sits. *Mondragon*, 519 F.3d at 1082. Plaintiff was arrested and held in jail on April 16-17, 2021. Plaintiff does not allege he was detained or jailed after his release shortly after noon on April 17, 2021. Thus, his claim for false arrest/imprisonment accrued on his release on that date. The claim became time barred on April 17, 2023 as § 1983 claims arising in Kansas use a two-year statute of limitations. K.S.A. 60-513(a)(4); *Johnson v. Johnson Cnty. Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991).

Federal law determines when a § 1983 claim accrues, but the statute of limitations comes from the relevant state's personal-injury statute and any tolling also generally comes from state law. *Mondragón*, 519 F.3d at 1082. Section 1983 claims accrue, for the purpose of the statute of

limitations, “when the plaintiff knows or has reason to know of the injury which is the basis of his action.” *Johnson*, 925 F.2d at 1301 (citation omitted).

Musick’s § 1983 claim for false imprisonment accrued on April 17, 2021 and is barred by the statute of limitations. Jackson County and Sheriff Morse are entitled to judgment on the pleadings on the § 1983 claim for false imprisonment.

**IV. The complaint fails to allege a malicious prosecution claim against Jackson County or Sheriff Morse.**

It appears the complaint is intended to allege a § 1983 claim for malicious prosecution. *Doc. 1*, at 9-11 (Count IV, Claim against Lemery, Tuck and Clark for malicious prosecution). It is less clear whether the complaint is intended to allege such a claim against Jackson County and/or Sheriff Morse. *Id.* at 12-13 (Count V, unspecified claims under § 1983).

The Tenth Circuit articulates five elements for a malicious prosecution claim under § 1983:

(1) the defendant caused the plaintiff’s continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages.

*Margheim v. Buljko*, 855 F.3d 1077, 1085 (10th Cir. 2017). The complaint is devoid of any factual allegations that Jackson County or Sheriff Morse caused Musick’s prosecution, or that such prosecutor acted with malice. Also, while the Complaint alleges the DUI charge was premised on false allegations regarding a faulty breathalyzer, the Complaint does not allege a lack of probable cause for the disorderly conduct and/or criminal trespass charges.

Plaintiff seems to allege a more nuanced *Monell* claim against Jackson County and Sheriff Morse. This claim revolves around the alleged deficiencies in the PBPN compliance with K.S.A. 22-2401a. A lack of compliance with that statute (or defects as to compliance whether material or not) do not answer the question.

Kansas law permits a “citizen’s arrest” by a person who is *not* a law enforcement officer. K.S.A. 22-2203.<sup>1</sup> Further, tribal authorities have sovereign authority to maintain public order on a reservation:

Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.

*Duro v. Reina*, 495 U.S. 676, 697 (1990). Kansas cases hold officers may make valid arrests outside of their jurisdiction or without regard to the jurisdictional grant of the power and authority of law enforcement officers under K.S.A. 22-2401a. Kansas law treats an officer making an arrest outside the territorial limits of the officer’s jurisdiction must be treated as a private person.

An officer who makes an arrest without a warrant outside the territorial limits of his or her jurisdiction must be treated as a private person. The officer's actions will be considered lawful if the circumstances attending would authorize a private person to make the arrest.

*State v. Miller*, 257 Kan. 844, Syl. ¶ 1, 896 P.2d 1069 (1995). Even if deemed to have possessed only the authority of private citizen, PBPB Officers can make arrests based on probable cause. K.S.A. 22-2203. In short, the arrest and prosecution of Musick is not made lawful or unlawful by compliance with or non-compliance with K.S.A. 22-2401a.

To state a *Monell* claim against Jackson County or Sheriff Morse in his official capacity plaintiff must allege: “(1) the existence of a municipal policy or custom by which the plaintiff was denied a constitutional right and (2) the policy or custom was the moving force behind the constitutional deprivation.” *Crittenden v. City of Tahlequah*, 786 Fed. Appx. 795, 800 (10th Cir.

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<sup>1</sup> K.S.A. 22-2403 provides:

**Arrest by private person.** A person who is not a law enforcement officer may arrest another person when:

(1) A felony has been or is being committed and the person making the arrest has probable cause to believe that the arrested person is guilty thereof; or

(2) any crime, other than a traffic infraction or a cigarette or tobacco infraction, has been or is being committed by the arrested person in the view of the person making the arrest.

2019) (citing *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978)).

First, the Complaint does not allege a malicious prosecution claim as it does not allege the disorderly conduct and/or criminal trespass charges against Musick were without probable cause. Second, the Complaint does not allege any basis for imposing *Monell* liability on Jackson County or Sheriff Morse for the conduct of PBPN officers.

In *Monell*, the Supreme Court explained when a municipality may be held liable under § 1983--municipalities may not be held liable under § 1983 for constitutional torts committed by their employees under the doctrine of respondeat superior. *Id.* at 663 n.7, 691–94 (citations omitted). 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” § 1983 holds the government “as an entity [ ] responsible ....” *Id.* at 694. For example, a municipality may be sued under § 1983 if “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers.” *Id.* at 690. In short, if a municipality's own policy or custom causes a violation of plaintiff's constitutional rights, the municipality itself may be held liable. *Id.* at 690–95; *see also Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403 (1997) (explaining the requirement for “a plaintiff seeking to impose liability on a municipality” to locate a policy of the municipality that caused the injury “ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality”).

Here, the alleged wrongdoing was that of PBPN officers, not employees or deputies of Jackson County or Sheriff Morse.



Further, neither Jackson County nor Sheriff Morce prosecuted Musick as they do not charge or prosecute crimes. *See* K.S.A. 22-2104 (“All prosecutions for violations of the criminal laws of this state shall be in the name of the state of Kansas.”) It is the county attorney, not the Board of County Commissioners or the Sheriff, who acts on behalf of the state of Kansas with respect to prosecuting criminal actions. *Wilson v. City of Chanute*, 43 F. Supp. 2d 1202, 1216 (D. Kan. 1999). Thus, a county cannot be liable under § 1983 for any alleged constitutional violations caused by prosecutorial decisions made by the county attorney. *Id.*

There was no custom or policy of the County or Sheriff Morce that caused or was the moving force behind Musick’s arrest and prosecution. Jackson County and Sheriff Morce are entitled to judgment on the pleadings on Musick’s § 1983 malicious prosecution claim.

**V. The Complaint fails to allege a negligence claim against Jackson County or Sheriff Morce. There was no duty owed Jackson County or Sheriff Morce that was breached and any such claim is time-barred by the two-year statute of limitations.**

The Complaint alleges, in conclusory fashion, that Jackson County and the Jackson County Sheriff owed a duty of care to Musick and assumed a duty of care once they detained him in their jail and prosecuted him.

First, as noted above, neither Jackson County nor Sheriff Morce prosecuted Musick as they do not charge or prosecute crimes. *See* K.S.A. 22-2104 (“All prosecutions for violations of the criminal laws of this state shall be in the name of the state of Kansas.”) As further noted above, it is the sheriff, not the Board of County Commissioners that has charge and custody of the jail of his county, and all the prisoners in the same.” K.S.A. 19-811. The Complaint does not allege plaintiff sustained any injury in the few hours Musick was in the Jackson County jail.

Liability for negligence requires plaintiff to establish: (1) the defendant owed a duty to the plaintiff; (2) the duty was breached; (3) the breach was the proximate cause of the plaintiff’s injury; and (4) the plaintiff sustained damages. *Hesler v. Osawatomie State Hospital*, 266 Kan. 616, 623,

971 P.2d 1169 (1999). Whether a duty exists is a question of law. *Adams v. Bd. of Sedgwick Cnty. Comm'rs*, 289 Kan. 577, 585–86, 214 P.3d 1173 (2009). Plaintiff predicates his negligence claim on alleged duties by Jackson County and/or Sheriff Morse with respect to compliance by the PBPB with K.S.A. 22-2401a. That statute imposes no duty on counties or sheriffs. Rather, K.S.A. 22-2401a(b) confers state law enforcement powers and authority on tribal police officers *if* the elements of the statute are met. However, non-compliance with the steps in the statute do not deprive tribal authorities of their sovereign rights to make citizen's arrests or to detain offenders on reservation land and transport them to the proper authorities. *See* K.S.A. 22-2203 and *Duro v. Reina*, 495 U.S. at 697.

Even if there was a duty owed Musick that was by Jackson County or Sheriff Morse, it occurred on April 17, 2021. Such a claim became time-barred on April 17, 2023. K.S.A. 60-513(a)(4). The notice of claim in March 2024 does not toll the already-expired statute of limitations. *Gessner v. Phillips Cnty. Comm'rs*, 270 Kan. 78, 82, 11 P.3d 1131 (2000) (a party who fails to file the statutory statement before expiration of the statute of limitations is not entitled to relief).

Jackson County and Sheriff Morse are entitled to judgment on the pleadings on Musick's state law negligence claim.

**VI. The state law false imprisonment claim fails. It is time-barred and the complaint does not allege that plaintiff's detention was without probable cause.**

[A] cause of action which alleges negligent conduct by law enforcement officers which results in false arrest and consequent damages is a cause of action for false arrest and imprisonment. *Brown v. State*, 261 Kan. 6, Syl. ¶ 2, 927 P.2d 938 (1996). "False arrest" is the restraint of the personal freedom of an individual without legal excuse by any words, acts, threats, or personal violence that under the circumstances the one being restrained fears to disregard. *Mendoza v. Reno County*, 235 Kan. 692, 695, 681 P.2d 676 (1984).

*Soto v. City of Bonner Springs*, 38 Kan. App. 2d 382, 385, 166 P.3d 1056, 1059 (2007), *aff'd*, 291 Kan. 73, 238 P.3d 278 (2010). If the arresting officers had probable cause to arrest plaintiff, he

cannot prevail on a false arrest/imprisonment claim. *Hans v. Bd. of Shawnee Cnty. Commissioners*, 775 Fed.Appx. 953, 957 (10th Cir. 2019) (citing *Mendoza*, 235 Kan. at 694-95). As noted above, the Complaint does not allege a lack of probable cause for the charges of disorderly conduct or criminal trespass.

Further, the jail officials were entitled to rely upon information relayed to them by the PBPN in determining probable cause existed for Musick's to arrest (by the PBPN officers) and Musick's brief detention in the jail. *See Oliver v. Woods*, 209 F.3d 1179, 1190 (10th Cir. 2000). Probable cause for making an arrest is a complete defense to an action for false arrest/imprisonment. *Price v. Cochran*, 205 F. Supp. 2d 1241, 1250 (D. Kan. 2002), *aff'd*, 66 Fed. Appx. 781 (10th Cir. 2003); *Hill v. Day*, 168 Kan. 604, 610, 215 P.2d 219, 224 (1950).

Finally, a state law claim of false imprisonment is governed by a one-year statute of limitations. K.S.A. 60-514(b) ("The following actions shall be brought within one year: ... (b) An action for ... false imprisonment."). Musick was detained for a few hours on April 17, 2021. The limitations period for his false imprisonment claim expired April 17, 2022. Thus, Musick's state law false imprisonment claim is time-barred.

Jackson County and Sheriff Morse are entitled to judgment on the pleadings on Musick's state law false imprisonment claim.

### **Conclusion**

For the foregoing reasons, Jackson County and Sheriff Morse are entitled to judgment on the pleadings.

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### **Certificate of Service**

On \_\_\_\_\_, 2024, the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record:

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