

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**August 17, 2023**

**Christopher M. Wolpert**  
**Clerk of Court**

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KENNETH ALLEN HARDING,

Plaintiff - Appellant,

v.

WILLIAM L. GRISHAM, in his official capacity as Sheriff of Love County, a political subdivision of the State of Oklahoma; LOVE COUNTY BOARD OF COUNTY COMMISSIONERS, sued as Love County, a political subdivision of the State of Oklahoma; JEFF MULLINAX, in his official capacity as a Deputy Sheriff of Love County, State of Oklahoma; JOHN DOE, individually and in his official capacity as Deputy Sheriff and/or Agent of Love County, State of Oklahoma; JANE DOE, individually and in her official capacity as Deputy Sheriff and/or Agent of Love County, State of Oklahoma,

Defendants - Appellees.

No. 22-7059  
(D.C. No. 6:22-CV-00022-JFH)  
(E.D. Okla.)

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**ORDER AND JUDGMENT\***

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Before **HOLMES**, Chief Judge, **PHILLIPS**, and **McHUGH**, Circuit Judges.

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\* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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Plaintiff-Appellant Kenneth Harding appeals pro se from the district court's dismissal of his lawsuit against Love County, Oklahoma, its former Sheriff (Defendant Grisham), a Sheriff's Deputy (Defendant Mullinax), and unnamed other deputies or county agents, all of whom Mr. Harding alleges violated his rights when he was arrested for driving with an expired commercial driver's license ("CDL") and jailed overnight, even though his CDL had been administratively extended because of the Covid-19 pandemic. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

### **I. Background**

Mr. Harding was driving a commercial vehicle on Interstate 35 on June 25, 2020, when he was stopped by Deputy Mullinax.<sup>1</sup> After Mullinax learned his Texas CDL was expired, Mr. Harding advised him "that [his CDL] expiration had been administratively extended due to [the Covid-19] pandemic." Suppl. R. at 4. Deputy Mullinax did not believe Mr. Harding and arrested him for driving without a license.

Mr. Harding was booked into the Love County Jail, where he was given a "delousing." *Id.* at 5 (internal quotation marks omitted). He told jail staff he was

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<sup>1</sup> All facts stated are drawn from Mr. Harding's December 6, 2021, Petition, filed in Oklahoma district court. Suppl. R. at 1–9. We refer to this pleading as the Complaint, consistent with federal practice. We treat Mr. Harding's well-pleaded factual allegations as true and construe them in the light most favorable to him. *Lucas v. Turn Key Health Clinics, LLC*, 58 F.4th 1127, 1136 (10th Cir. 2023).

However, where Mr. Harding's brief on appeal includes additional facts or allegations not found in his Complaint, we do not consider them. *See Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 648 (10th Cir. 2008) ("We generally limit our review on appeal to the record that was before the district court.").

taking a prescription antibiotic, but “was denied access to his medication.” *Id.* He was unsuccessful contacting a bondsman and held overnight. When he was arraigned the next day, the charge for driving without a license was dismissed and he pled not guilty to a charge for improper lane change. After his release, he “was forced to seek additional medical treatment . . . due to Defendant[s’] refusal to provide his . . . medication.” *Id.* He claims to have suffered lost wages and pain and suffering.

Mr. Harding—then represented by an attorney—sued in Oklahoma state court.<sup>2</sup> He pled claims under 42 U.S.C. § 1983, alleging Defendants-Appellees “violated [his] 4th, 5th, 8th and 14th Amendment rights,” *id.* at 7; a claim under the Oklahoma Constitution, *id.* at 8, and the Oklahoma Governmental Tort Claims Act (“OGTCA”), *id.* at 5–7; and a tort claim for intentional infliction of emotional distress, *id.* at 6. Defendants removed the case to federal court under 28 U.S.C. § 1441 and moved to dismiss.

The district court dismissed all of Mr. Harding’s claims with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6), for the following reasons:

- The claims against Grisham and Mullinax in their official capacities were dismissed as subsumed within claims against the County. *See R.*, vol. II at 51–52.
- The claims against Mullinax individually were dismissed because (1) he had probable cause to arrest Mr. Harding; (2) he was acting within the scope of his official duties and therefore immune under the OGTCA; and, (3) Mr. Harding “was also arrested and detained on an improper lane use charge,” providing a separate basis for the arrest. *See id.* at 53–54.

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<sup>2</sup> Mr. Harding’s attorney withdrew, with the district court’s approval, on January 28, 2022, before Defendants moved to dismiss.

- Mr. Harding’s § 1983 claims against the County were dismissed: (1) as to his arrest, “[b]ecause there was no underlying constitutional violation,” *id.* at 59; (2) as to delousing, because he did not allege facts to show the procedure “was unnecessary, unjustified, or outside the standard practice,” *id.* at 60; and (3) as to denial of medication, because his allegations did not show a custom or policy that led to any constitutional violation by “identify[ing] a specific deficiency that was obvious and closely related to his injury,” as required under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), R. vol. II at 61 (internal quotation marks omitted).
- The OGTCA claims against the County based on Mr. Harding’s treatment in custody were dismissed because the OGTCA bars claims based on operation and maintenance of a correctional facility. *See id.* at 56.
- The OGTCA claims against the County for unlawful arrest were dismissed because Mullinax had probable cause to arrest Mr. Harding, *id.* at 56–57, and because he “was lawfully arrested [for] improper lane use,” *id.* at 57.
- The intentional infliction of emotional distress claim was dismissed because “a plaintiff cannot recover under the OGTCA on a tort claim which requires a showing . . . that the employee was not acting in good faith.” *Id.*
- The Oklahoma constitutional claim was dismissed because the OGTCA provides the exclusive means to bring such claims. *See id.* at 62.
- The claims against “John and/or Jane Does” were dismissed for the same reasons as the claims against Grisham and Mullinax. *Id.* at 55.

Mr. Harding now appeals from the district court’s dismissal of his claims.

## II. Standards of Review

“We review de novo the district court’s dismissal of a complaint . . . for failure to state a claim.” *Lucas v. Turn Key Health Clinics, LLC*, 58 F.4th 1127, 1136 (10th Cir. 2023). “To survive a motion to dismiss, the complaint must allege sufficient facts to state a claim for relief plausible on its face.” *Id.*

Because Mr. Harding proceeds pro se, his “pleadings are to be construed liberally and held to a less stringent standard.” *Garrett v. Selby Connor Maddux &*

*Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks omitted).

However, pro se parties must “follow the same rules of procedure that govern other litigants.” *Id.* (internal quotation marks omitted). “[A]lthough we make some allowances for the pro se plaintiff’s failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements, the court cannot . . . serv[e] as the litigant’s attorney.” *Id.* (internal citations, quotation marks and brackets omitted). We “liberally construe” Mr. Harding’s filings, “but we will not act as his advocate.” *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

### **III. Discussion**

Initially, Defendants-Appellees argue that Mr. Harding’s brief was late because it was received on January 3, 2023, after his December 28, 2022, deadline, and they ask us to dismiss his appeal on that basis. But Mr. Harding’s opening brief was postmarked on December 27, 2022, and so appears to have been timely under Fed. R. App. P. 25(a)(2)(A)(ii). In any event, we would not dismiss this pro se appeal on this basis. *See Lee v. Max Int’l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011) (“[O]ur legal system strongly prefers to decide cases on their merits.”).

However, reviewing Mr. Harding’s brief on appeal, he has not made any argument why the district court incorrectly dismissed his claims. In general, we will only consider issues raised by the party who brings an appeal. *See Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) (“Issues not raised in the opening brief are deemed abandoned or waived.” (internal quotation marks omitted)).

“Even in the context of pro se litigants, the first task of an appellant is to explain to us why the district court’s decision was wrong.” *GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1231 (10th Cir. 2022) (brackets and internal quotation marks omitted). More specifically, “[u]nder Rule 28, which applies equally to pro se litigants, a brief must contain more than a generalized assertion of error.” *Garrett*, 425 F.3d at 841 (ellipsis and quotation marks omitted). “When a pro se litigant fails to comply with that rule, we cannot fill the void by crafting arguments and performing the necessary legal research.” *Id.* (internal quotation marks and brackets omitted).

Although Mr. Harding asks us to reverse and to order the district court to permit discovery to allow him to prove his case, he has not made any argument why the district court was wrong to dismiss his claims, or how his Complaint does, in fact, state any claims which can viably proceed. Accordingly, absent any arguments developed by Mr. Harding, and having reviewed the briefing on appeal, the relevant portions of the record, and the applicable law, we see no reversible error and affirm for substantially the same reasons stated by the district court.

Entered for the Court

Gregory A. Phillips  
Circuit Judge