Miller v. City of East Mountain

United States District Court for the Eastern District of Texas, Marshall Division

March 12, 2019, Decided; March 12, 2019, Filed

No. 2:17-CV-00496-JRG-RSP

Reporter
2019 U.S. Dist. LEXIS 51953 *

KENNETH CRAIG MILLER, Plaintiff, v. CITY OF EAST MOUNTAIN ET AL, Defendant.

Prior History: Miller v. City of East Mountain, 2018 U.S. Dist. LEXIS 157152 (E.D. Tex., Aug. 29, 2018)

Counsel: [*1] For Kenneth Craig Miller, Plaintiff: David Martin Diaz, Andrew Ross Korn, Korn & Diaz, LLP, Dallas, TX.

For City of East Mountain, Defendant: Victoria White Thomas, LEAD ATTORNEY, Nichols Jackson Dillard Hagar and Smith LLP, Dallas, TX Dallas; Christopher A Klement, Dallas, TX, Cantey Hanger LLP - Dallas; Kirk Allen Kennedy, The Kennedy Firm, Dallas, TX.

Judges: ROY S. PAYNE, UNITED STATES MAGISTRATE JUDGE.

Opinion by: ROY S. PAYNE

Opinion

REPORT AND RECOMMENDATION

Before the Court is a Motion for Summary Judgment by Milton Neal Coulter, Betty Charlson (formerly Betty Davis), and Terry Wayne Davis ("Individual Defendants") [Dkt. #108].[1] Plaintiff also filed a Response [Dkt. #124], and the Individual Defendants filed a Reply [Dkt. #126]. The Individual Defendants each argue that qualified immunity applies and contend that Plaintiff's claims must fail on that basis.

After consideration, the Court concludes that the Individual Defendants' Motion should be GRANTED IN PART. The Motion should be DENIED for claims against Defendant Davis relating to unlawful detention, unlawful arrest, unreasonable seizure of property, and violation of the right to medical care. The

[1] Within this Order, all references to "Defendant Charlson" are referring to Betty Charlson, and all references to "Defendant Davis" are referring to Terry Wayne Davis.

Motion should be GRANTED for all other federal claims brought [*2] against the Individual Defendants.

I. BACKGROUND

This lawsuit primarily arises from the traffic stop of Plaintiff conducted on July 31, 2015. Within the relevant timeframe, Defendant Coulter served as the City's Mayor, Defendant Charlson served as Chief of Police and City Administrator, and Defendant Davis served as a peace officer for the Police Department. Defs.' Mot. at 2.

Prior to the traffic stop, Plaintiff previously filed a lawsuit against the City of East Mountain. *Miller et al v. City of East Mountain, et al*, No. 2:14-cv-00087 (E.D. Tex); Defs.' Mot. at 2; Third Am. Compl. [Dkt. #87] at ¶ 21. In that lawsuit, Plaintiff alleged that he applied for a water meter to receive drinking water for RVs that were to be located on Plaintiff's property. Compl. at ¶ 7, *Miller et al v. City of East Mountain, et al*, No. 2:14-cv-00087. Plaintiff alleged that most of the occupants of the RVs were Hispanic workers. *Id.* The City of East Mountain denied Plaintiff's request, and Plaintiff alleges that this was done for discriminatory reasons. *Id.* at ¶ 19. Plaintiff filed a lawsuit against East Mountain asserting several claims, including a claim for a violation of the Fair Housing Act. *Id.* at ¶ 18-19. [*3]

On July 31, 2015, Defendant Davis was monitoring traffic when Plaintiff drove past him. Defendant Davis contends that Plaintiff was speeding, but Plaintiff claims that he was not speeding. *Id.* at ¶ 4; Miller Decl. [Dkt. #124-20] at ¶ 19. While Defendant Davis claims to have been using a Traffic Radar (Arrest Report [Dkt. #108-6] at 2), Defendant Davis has not been able to produce any proof of that reading from the Traffic Radar.

Operating under the belief that Plaintiff was speeding, Defendant Davis turned his police lights on and began pursuing the Plaintiff's vehicle. Defs.' Mot. at 3; Dash-Cam Video [Dkt. #108-5]. Defendant Davis states that he "observed [Plaintiff] look in his driver's side mirror several times," but Plaintiff did not yield. Arrest Rep. at 2. Defendant Davis pursued Plaintiff for over a minute before the Plaintiff parked his vehicle at an intersection. *Id.* While Defendant Davis claims to have used sirens, he stated in his deposition that he "may not have used [his] sirens." Davis Dep. [Dkt. #124-6] at 70:16.

Once Plaintiff stopped, Defendant Davis approached Plaintiff's driver's side window and asked for his license and registration. Arrest Rep. at 4; Dash-Cam Video. Plaintiff refused to provide [*4] the requested information at that time, requesting that a "neutral party" be present. Arrest Rep. at 4; Dash-Cam Video. Within a few minutes after Plaintiff pulled over, Defendant Charlson arrived to the scene. Dash-Cam Video; Charlson Decl. [Dkt. #108-2] at ¶ 11. Plaintiff eventually provided the requested information after Charlson arrived. Davis Decl. [Dkt. #108-4] at 17. Defendant Davis claims that he requested that Plaintiff exit the vehicle, and Plaintiff initially refused. *Id.*

Plaintiff eventually exited the vehicle, and Defendant Davis later stated that he handcuffed Plaintiff once Plaintiff exited his vehicle. *Id.* at ¶ 17. Plaintiff later claimed that the handcuffs were too tight and that they caused bruising on his wrists. Third Am. Compl. at ¶ 60. Defendant Davis claims that he arrested Plaintiff on the grounds of felony evading arrest and failure to identify under § 38.02. Davis Decl. at ¶ 18. After arresting Plaintiff and handcuffing him, Defendant Davis states that he "placed [Plaintiff] in the back of my police vehicle. Then, per normal protocol, I inventoried Plaintiff's truck and found a loaded gun in the console." *Id.* at ¶¶ 17, 19.

In his Declaration, Miller claims that Charlson threatened [*5] to kill him. Miller Decl. at ¶ 3. Miller reaches this conclusion from a text sent by Charlson to another person stating that she sees "KM['s] truck up there" and that it makes her "have thoughts of how to make a justifiable homicide defense." Charlson Text [Dkt. #26-35].

Miller claims that Coulter told him "I'm going to kill your God damn ass" on April 17, 2013. Miller Decl. at ¶ 8. Miller also claims that, before a hearing in an action against East Mountain on June 6, 2017 at the Upshur County Court at Law, Coulter walked up to him and whispered "I have not forgotten that I owe you and I am going to pay you." *Id.* at ¶ 10. Miller also claims that Coulter yelled out at Miller and called him a liar, a loser, a homosexual, and a "big old crack head." *Id.* at ¶ 11. Within his complaint, Miller also alleges that Individual Defendants made several other similar statements. Third Am. Compl. at ¶ 57.

Against Defendant Coulter, Plaintiff alleged: (1) retaliatory conduct under 42 U.S.C. § 3617; and (2) a violation of the Equal Protection Clause brought according to 42 U.S.C. § 1983. *Id.* at ¶¶ 77-78, 136. Plaintiff withdrew all remaining claims against Defendant Coulter at the October 29, 2018 Hearing.

Against Defendant Charlson, Plaintiff alleged: (1) [*6] retaliatory conduct under 42 U.S.C. § 3617[2]; (2) conspiracy to subject Plaintiff to a sham trial brought according to 42 U.S.C. § 1983[3]; and (3) a violation of Constitutional rights brought according to 42 U.S.C. § 1983.[4] Plaintiff alleged several Constitutional rights violations against Defendant Charlson under 42 U.S.C. § 1983: (1) unlawful detention; (2) unlawful arrest; (3) unreasonable seizure; (4) excessive use of force; (6) violation of the right of access to the courts; (7) violation of the right to freedom of speech; and (8) violation of the Equal Protection Clause. *Id.* at ¶¶ 16, 77-78, 136-39. Additionally, Plaintiff alleges that Charlson violated the Driver's Privacy Protection Act of 1994 (18 U.S.C. § 2724). Third Am. Compl. at ¶¶ 128-31.

Against Defendant Davis, Plaintiff alleged: (1) retaliatory conduct under 42 U.S.C.

---

[2] *Id.* at ¶¶ 16, 77.

[3] *Id.* at ¶¶ 132-35.

[4] *Id.* at ¶¶ 16, 81-88.

§3617[5]; (2) conspiracy to subject Plaintiff to a sham trial brought according to 42 U.S.C. § 1983[6]; and (3) a violation of Constitutional rights brought according to 42 U.S.C. § 1983.[7] Plaintiff alleged several Constitutional rights violations against Defendant Davis under 42 U.S.C. § 1983: (1) unlawful detention; (2) unlawful arrest; (3) unreasonable seizure; (4) excessive use of force; (6) violation of the right of access to the courts; (7) violation of the right to freedom of speech; and (8) violation of the Equal Protection Clause. [*7] *Id.* at ¶¶ 16, 77-78, 136-39. Plaintiff also alleges that Defendant Davis violated Plaintiff's right to medical care. Third Am. Compl. at ¶¶ 81-88.

II. APPLICABLE LAW

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a defendant is entitled to summary judgment on the basis of qualified immunity, the Fifth Circuit has provided a two-step analysis. *Freeman v. Gore*, 483 F.3d 404, 410 (5th Cir. 2007). First, while viewing the facts in the light most favorable to the plaintiff, the Court must determine whether the defendant violated the plaintiff's constitutional rights. *Id.* If there has been a violation, then the second step is to determine "whether the defendant's actions were objectively unreasonable in light of clearly established law at the time of the conduct in question." *Id.* at 411. "To make this determination, the court applies an objective standard based on the viewpoint of a reasonable official in light of the information then available to the defendant and the law that was clearly established at the time of the defendant's actions." *Id.* "If officers of reasonable competence could [*8] disagree as to whether the plaintiff's rights were violated, the officer's qualified immunity remains intact." *Tarver v. City of Edna*, 410 F.3d 745, 750 (5th Cir. 2005). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, 'the contours of a right are sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who

[5] *Id.* at ¶¶ 16, 77.

[6] *Id.* at ¶¶ 132-35.

[7] *Id.* at ¶¶ 16, 81-88.

knowingly violate the law." *Davidson v. City of Stafford, Tex.*, 848 F.3d 384, 391 (5th Cir. 2017), as revised (Mar. 31, 2017) (internal quotations omitted).

III. ANALYSIS

The Court will address whether qualified immunity serves as a bar to each of these claims at the summary judgment stage. The Court will address the Individual Defendants together for similar claims where possible, but the Court will address the Individual Defendants separately when necessary.

As an initial matter, the Court addresses Plaintiff's [*9] arguments that Charlson is not entitled to qualified immunity because she violated the prohibition on Dual Emoluments and that Davis is not entitled to qualified immunity because his hiring was void for nepotism. Pl.'s Resp. at 12-13. Even if Plaintiff's assertions are true, Plaintiff has provided no persuasive authority that Charlson or Davis would not be entitled to assert qualified immunity. Consequently, the Court will not deny any of the claims for qualified immunity on that basis.

a. 42 U.S.C. § 3617

Plaintiff claims that Defendants Coulter, Charlson, and Davis each violated 42 U.S.C. § 3617 by retaliating against Plaintiff for his previous water lawsuit. Third Am. Compl. at ¶ 77; Pl.'s Resp. at 22. However, the Court holds that summary judgment is appropriate for each of these claims. Viewing the facts in a light most favorable to Plaintiff, the Court concludes that none of the Defendants committed a violation under § 3617. Accordingly, qualified immunity applies here, and the Motion for Summary Judgment should be GRANTED with respect to this § 3617 claim for each of the defendants.

Section 3617 makes it unlawful to "coerce, intimidate, threaten, or interfere with any person . . . on account of his having exercised or enjoyed . . . [*10] any right granted or protected by section 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. § 3617. The Fifth Circuit has stated that one plaintiff's claims "under §§ 3604 and 3617 of the FHA fail because they go to the habitability of her condominium and not the availability of housing." *Reule v. Sherwood Valley I Council of Co-owners Inc.*, 235 F. App'x 227, 227, 2007 WL 2114289 at *1 (5th Cir. 2007). Based on the decision in *Reule,* other district courts within the 5th Circuit have held that, "to be actionable under § 3617, the defendant's conduct must make housing unavailable, not merely less habitable." *AHF Community Development, LLC v. City of Dallas*, 633 F.Supp.2d 287, 303 (N.D. Tex. 2009); *see also Pelot v. Criterion 3, LLC*, 157 F. Supp. 3d 618, 622, 2016 U.S. Dist. LEXIS 207, *10 (N.D. Miss. 2016) (stating that Plaintiff's claims under §§ 3604 and 3617 relate to habitability rather than availability, that they "fall squarely within the holdings in *Cox* and *AHF*," and that "[h]is complaints would not give rise to a cognizable claim under clear Fifth Circuit authority."); *Lowe v. UHF Magnolia Trace LP*, 2015 U.S. Dist.

LEXIS 72399 (N.D. Tex. 2015); *Terry v. Inocencio*, No. 3:11-CV-0660-K-BK, 2014 U.S. Dist. LEXIS 133457, 2014 WL 4686570, at *9 (N.D. Tex. Sept. 2, 2014), *report and recommendation adopted*, No. 3:11-CV-0660-K-BK, 2014 U.S. Dist. LEXIS 132394, 2014 WL 4704629 (N.D. Tex. Sept. 22, 2014), *aff'd and remanded*, 633 Fed. Appx. 281 (5th Cir. 2016) ("[T]he scope of Section 3617 tracks that of Section 3604—habitability claims are only actionable, and thus considered adverse actions, if they rise to a level severe enough to make a residence unavailable."). These cases show that actions must make housing unavailable to be actionable under § 3617.

Each of Plaintiff's § 3617 claims fail as none of the alleged conduct makes housing unavailable. Plaintiff [*11] alleges that he was treated differently for his requests for public information by Defendants, Third Am. Compl. at ¶ 78, and that Defendants made several offensive statements about him, *id.* at ¶ 57, but none of this conduct rises to the level of making housing unavailable. Accordingly, no violation occurred, so qualified immunity applies. Even if conduct is not required to make housing unavailable for a valid claim under § 3617, the cases cited in the previous paragraph illustrate a lack of clearly established law on this issue that would make qualified immunity apply here at step two of the qualified immunity analysis. Consequently, this Motion for Summary Judgment should be GRANTED on the basis of qualified immunity for Plaintiff's claims under § 3617 against each of the Individual Defendants.

b. Violation of the Driver's Privacy Protection Act of 1994 brought according to 18 U.S.C. § 2724

Plaintiff claims that Defendant Charlson violated the Driver's Privacy Protection Act of 1994. However, the Court concludes that summary judgment is appropriate for these claims.

Plaintiff here alleges that Defendant Charlson violated § 2724 by providing a mugshot of Plaintiff to Defendant Coulter, who immediately began showing it [*12] to private citizens. Third Am. Compl. at ¶ 128. Defendant Charlson states that she "did not send a mugshot of Miller to Mayor Coulter at any time." Charlson Decl. [Dkt. #108-2] at ¶ 17. Defendant Charlson also states that she "did not at any time release any information from the Texas Crime Information Center to the public." *Id.*

Plaintiff also alleges that Defendant Charlson violated § 2724 by disclosing personal information to the Texas Municipal League, which the Individual Defendants refer to as a "self-insuring risk pool." Third Am. Compl. at ¶ 130; Defs.'s Mot. at 24 n.165. Defendant Charlson states that she sent an email to the Texas Municipal League Risk Pool ("TML") regarding a potential claim by Miller related to his arrest and imprisonment following the July 31, 2015 traffic stop and also sent publicly accessible information related to Miller's arrest from Upshur County Judicial Records Website. Charlson Decl. at ¶ 17.

Section 2724 creates liability for a defendant when the defendant "knowingly

obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter. . . ." 18 U.S.C. § 2724(a). However, the statute provides a list of permitted uses of personal [*13] information. 18 U.S.C. § 2721(b). This list includes use of personal information "by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. § 2721(b)(1). The list also includes use of personal information "by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting." 18 U.S.C. § 2721(b)(6).

The Court concludes that summary judgment should be granted for Defendant Charlson as to whether she violated § 2721 by providing a mugshot or personal information to others. A party may not prevail on the bare allegations of his complaint when there is a properly supported summary judgment motion made against him. *Wayne v. Tennessee Valley Auth.*, 730 F.2d 392, 396 (5th Cir. 1984) (citing *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)). Plaintiff has not provided any summary judgment evidence to show that Defendant Charlson provided a mugshot to Mayor Coulter or distributed any personal information inappropriately. *See* Pl.'s Resp. at 27.

Further, the Court concludes that the Texas Municipal League falls within the definition provided in § 2721(b)(6) as an insurer [*14] or insurance support organization. Thus, disclosing information to Texas Municipal League was permitted under § 2721(b)(6), so no violation occurred from such a disclosure. Accordingly, Defendant Charlson did not commit any violation related to this claim, so the Court recommends that the Motion for Summary Judgment be GRANTED for this claim.

c. Violation of Constitutional rights brought according to 42 U.S.C. § 1983.

Section 1983 creates a private cause of action to redress violations of federal law by those acting under the color of the law. *Colson v. Grohman*, 174 F.3d 498, 504 n.2 (5th Cir. 1999). To properly allege a claim under §1983, a Plaintiff must identify an underlying constitutional or statutory violation that serves as a basis for the claim. *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997).

i. Unlawful Detention

Plaintiff brings § 1983 claims against Defendants Charlson and Davis arguing that the officers unlawfully detained him. Third Am. Compl. at ¶ 16. The Court concludes that summary judgment should be DENIED for the claim against Defendant Davis and that summary judgment should be GRANTED for the claim against Defendant Charlson.

To justify a stop, Defendant Davis needed

to articulate sufficient facts to create a reasonable suspicion that criminal activity was afoot. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Davila v. United States*, 713 F.3d 248, 258 (5th Cir. 2013). This Court must assess the reasonableness of the stop [*15] "by conducting a fact-intensive, totality-of-the circumstances inquiry . . . and considering the information available to the officer[s] at the time of the decision to stop a person." *Davila*, 713 F.3d at 258 (quoting *United States v. Rodriguez*, 564 F.3d 735, 741 (5th Cir. 2009); *United States v. Silva*, 957 F.2d 157, 160 (5th Cir. 1992)).

To show that a reasonable suspicion was present, Defendants rely on two grounds: (1) that Plaintiff was speeding, and (2) that Plaintiff failed to pull over for an extended period of time. Davis Decl. at ¶¶ 4-6. The primary issue is whether, when viewing the facts in a light most favorable to Plaintiff, Defendant Davis presented sufficient facts to support a reasonable suspicion that criminal activity was afoot. The Court concludes that he did not.

Defendant Davis contends that Plaintiff was speeding, but Plaintiff claims that he was not speeding. *Id.* at ¶ 4; Miller Decl. at ¶ 19. While Defendant Davis claims to have been using a Traffic Radar, Arrest Report 2 [Dkt. #108-6], Defendant Davis has not been able to produce the Traffic Radar or a readout from the Radar to prove this. In determining whether a constitutional violation occurred under the first prong of the qualified immunity analysis, the Court must view the evidence in a light most favorable to the Plaintiff. *Freeman*, 483 F.3d at 410. In the absence of [*16] evidence that corroborates Defendant Davis's assertion that Plaintiff was speeding, the Court must conclude that Plaintiff was not speeding for the purposes of this Motion.

Further, Defendant Davis contends that he possessed a reasonable suspicion based on Plaintiff's failure to pull over, but the Court disagrees. "[F]light from a law enforcement officer cannot support alone a determination of probable cause. . . ." *United States v. Agostino*, 608 F.2d 1035, 1038 (5th Cir. 1979) (quoting *United States v. Vasquez*, 534 F.2d 1142, 1145 (5th Cir. 1976)). Thus, even if Plaintiff's conduct can be considered to be flight, it cannot by itself be enough to create a reasonable suspicion. While Plaintiff failed to pull over for around a minute, this could have been because Plaintiff did not initially see the officer or because Plaintiff was looking for a safe place to stop. The dash-cam video shows that Plaintiff generally maintained his same speed and did not attempt to accelerate or act evasively in any other way. Thus, viewing the facts in a light most favorable to Plaintiff, Defendant Davis did not have enough facts to create a reasonable suspicion, so a constitutional violation is properly stated in the form of an unlawful stop.

Under the second step of the qualified immunity analysis, the *Agostino* case constitutes [*17] clearly established law that existed at the time of the stop. *Agostino*, 608 F.2d at 1038. Thus, the unlawful stop was objectively unreasonable in light of clearly established law at the time of the conduct in question. Consequently,

qualified immunity should not apply, and summary judgment for Plaintiff's unlawful detention claim against Defendant Davis should therefore be DENIED.

The Court concludes that Summary Judgment is appropriate for Plaintiff's Unlawful Detention claim against Defendant Charlson. Defendant Charlson was not present when the stop was initiated, so she cannot be liable under the bystander liability theory. An officer may be liable under § 1983 under a theory of bystander liability where the officer "(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." *Whitley v. Hanna*, 726 F.3d 631, 646 (5th Cir. 2013). However, "[bystander] liability will not attach where an officer is not present at the scene of the constitutional violation." *Id.* The Fifth Circuit has affirmed the dismissal of a bystander liability claim when an officer arrived at the scene after an arrest, concluding that the first prong requiring knowledge had not been met. *Westfall v. Luna*, 903 F.3d 534, 547 (5th Cir. 2018).

[*18] Here, Defendant Charlson cannot be liable for this claim as she was not present at the scene until after the stop. This prevented her from being aware of all of the facts to be able to pass judgment as to whether the stop was lawful, and Plaintiff has not presented any other summary judgment evidence to show that she possessed the requisite knowledge. Summary Judgment for Plaintiff's Unlawful Detention against Defendant Charlson should therefore be GRANTED.

ii. Unlawful Arrest

This Motion should be DENIED with respect to the unlawful arrest claim against Defendant Davis. As stated above, the Court must deny the motion with respect to the unlawful detention claim as factual questions preclude the Court from concluding that Davis possessed a reasonable suspicion. If Davis did not have a reasonable suspicion, then he would not be able to develop probable cause based on information obtained as a result of that unlawful detention under the "fruit of the poisonous tree" doctrine. *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Wong Sun is a United States Supreme Court case, and it constitutes clearly established law. Accordingly, Summary Judgment on Plaintiff's unlawful arrest claim against Defendant Davis should be DENIED.

Defendant Charlson [*19] was not present at the scene until after the stop. This prevented her from being aware of all of the facts to be able to pass judgment as to whether the sufficient facts were present to justify an arrest. Plaintiff has not presented any other facts to show that she possessed the requisite knowledge. Consequently, the Court concludes that Charlson did not commit any constitutional violation. Summary Judgment for Plaintiff's unlawful arrest claim against Defendant Charlson should therefore be GRANTED.

iii. Unreasonable Seizure of Property

Plaintiff alleges that Defendants Charlson and Davis unreasonably seized a pistol and ammunition from his vehicle. Third Am. Compl. at ¶ 102. Defendant Davis argues that Plaintiff's vehicle was searched after his arrest as a search incident to an arrest ("SITA"), making a warrant unnecessary. Defs.' Mot. at 20-21. However, the SITA exception does not apply here, and no other exception to the warrant requirement is applicable here.

Defendant Davis stated that he handcuffed Plaintiff once Plaintiff exited his vehicle and that "[a]fter arresting Plaintiff, I placed him in the back of my police vehicle. Then, per normal protocol, I inventoried Plaintiff's [*20] truck and found a loaded gun in the console." Davis Decl. at ¶¶ 17, 19 [Dkt. #108-4].

Arizona v. Gant involved similar facts where a suspect was handcuffed and then placed in the back of a patrol car. 556 U.S. 332, 335, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). The suspect in that case had been arrested for driving with a suspended license. *Id.* The Court held that the search was unreasonable because "police could not reasonably have believed either that [the suspect] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein." *Id.* at 344.

Similarly here, Defendant Davis could not have reasonably believed that Plaintiff could have accessed his car at the time of the search. Just like the suspect in *Arizona v. Gant*, Plaintiff here was handcuffed and sitting in the police vehicle at the time his vehicle was searched. Davis Decl. at ¶¶ 17, 19. Neither could Defendant Davis find additional evidence of the offenses for which Plaintiff was arrested in the vehicle—fleeing from an officer and failure to identify.[8] Accordingly, a constitutional violation may have occurred when the facts are viewed in a light most favorable to the Plaintiff. Thus, it is necessary to proceed to the [*21] second step of the qualified immunity process.

The Court concludes that Defendant Davis's actions were objectively unreasonable in light of clearly established law at the time of the conduct in question. *Arizona v. Gant* is a United States Supreme Court case from 2008, and it remains good law today. *See generally* 556 U.S. 332, 336, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Accordingly, this case provides clearly established law at the time of the stop on July 31, 2015. Summary Judgment for Plaintiff's Unreasonable Seizure of Property claim against Defendant Davis should therefore be DENIED.

The Court concludes that Summary Judgment is appropriate for Plaintiff's unreasonable seizure of property claim against Defendant Charlson. Defendant Charlson was not the officer conducting the search, and she cannot be liable under the bystander liability theory. An officer may be liable under § 1983 under a theory of

[8] Defendants merely argue that the SITA exception applies, but other exceptions to the warrant requirement are also inapplicable. The Court notes that while Defendant Davis and Charlson may have possessed probable cause to arrest Plaintiff for the charges reference above, they have not provided sufficient facts to establish probable cause that the vehicle contains contraband or evidence of a crime. Accordingly, the Automobile Exception does not apply.

bystander liability where the officer "(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." *Whitley*, 726 F.3d at 646. However, "[bystander] liability will not attach where an officer is not present at the scene of the constitutional violation." *Id.* The Fifth [*22] Circuit has affirmed the dismissal of a bystander liability claim when an officer arrived at the scene after an arrest, concluding that the first prong requiring knowledge had not been met. *Westfall*, 903 F.3d at 547. Similarly here, Defendant Charlson arrived to the scene after the initial stop, and Plaintiff has not otherwise asserted that she was aware of all of the facts to be able to pass judgment as to whether the search of the vehicle was lawful. Accordingly, Defendant Charlson did not have sufficient knowledge of a constitutional violation under the first prong and cannot be liable under a bystander liability theory. Summary Judgment for Plaintiff's Unreasonable Seizure of Property claim against Defendant Charlson should therefore be GRANTED as no constitutional violation occurred.

iv. Excessive Use of Force

Plaintiff brings § 1983 claims against Defendants Charlson and Davis arguing that the officers used excessive force against him. Third Am. Compl. at ¶ 16. Summary Judgment should be GRANTED for Plaintiff's Excessive Use of Force Claim against Defendants Charlson and Davis.

To be successful on an excessive use of force claim, a plaintiff must establish "(1) injury (2) which resulted directly and only from [*23] a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Freeman*, 483 F.3d at 416 (quoting *Tarver*, 410 F.3d at 751). Plaintiff's injury must be more than a *de minimis* injury. *Id.*

In *Freeman*, the Fifth Circuit held that a district court erred in denying a motion for summary judgment on the Plaintiff's excessive force claim where the "most substantial injury claimed by [Plaintiff was] that she suffered bruising on her wrists and arms because the handcuffs were applied too tightly when she was arrested." *Id.* at 417. In reaching this conclusion, the Fifth Circuit pointed to several previous cases where the court had previously suggested that "minor, incidental injuries that occur in connection with the use of handcuffs to effectuate an arrest do not give rise to a constitutional claim for excessive force." *Id.* (citing *Glenn*, 242 F.3d at 314; *Tarver*, 410 F.3d at 751-52).

Plaintiff claims that recent Fifth Circuit cases render qualified immunity inapplicable here. Pl.'s Response at 21 n.34. Relevant case law provides "as long as a plaintiff has suffered 'some injury,' even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force." *Brown v. Lynch*, 524 F. App'x 69, 79 (5th Cir. 2013) (citing *Freeman*, 483 F.3d at 416). While *Brown [*24]* cites to and distinguishes *Freeman*, *Brown* does not overrule *Freeman*. *Brown* contrasts *Freeman*, where

injuries resulting from tight handcuffing did not give rise to a constitutional claim for excessive force, with *Schmidt v. Gray*, another Fifth Circuit case were a Plaintiff had a legally cognizable injury after an officer slammed his trunk lid on the suspect's finger and caused pain, soreness, and bruising. *Id.* at 79 n.39; *Schmidt v. Gray*, 399 F. App'x 925, 928 (5th Cir. 2010).

Viewing the facts in a light most favorable to the Plaintiff, the Court concludes that Defendant Davis did not violate Plaintiff's right to be free from excessive force. Any injuries alleged here from the handcuffing do not appear to be any worse than the injuries that resulted from the handcuffing in *Freeman*. And even if the Plaintiff could meet the first prong of the qualified immunity test, the Court cannot conclude that Defendant was objectively unreasonable in light of clearly established law at the time of the conduct in question. Further, no clearly established law existed as of July 31, 2015 to suggest that injuries resulting from handcuffing such as these could be legally cognizable injuries. The Court therefore recommends Summary Judgment be GRANTED for the excessive [*25] use of force claim against Defendant Davis.

Summary Judgment is also appropriate for the excessive use of force claim against Defendant Charlson. Defendant Davis was the one who placed handcuffs on the Plaintiff, not Defendant Charlson. Davis Decl. at ¶ 17; Miller Decl. at ¶ 22. Further, because the Court concludes that Defendant Davis did not violate Plaintiff's right to be free from excessive force, Defendant Charlson cannot be liable under a bystander liability theory. *See Whitley*, 726 F.3d at 646 (stating that bystander liability requires the bystander officer to have knowledge "that a fellow officer is violating an individual's constitutional rights. . . ."). The Court therefore recommends Summary Judgment be GRANTED for the excessive use of force claim against Defendant Charlson as she did not commit any constitutional violation.

v. Violation of the Right to Medical Care

Plaintiff brings a §1983 claim for a violation of Plaintiff's right to medical care against Defendant Davis. Summary judgment should be DENIED for Plaintiff's claim against Defendant Davis as a factual dispute exists.

Plaintiff points to his declaration to provide support for his claim against Terry Davis:

> Terry Davis was present when Upshur [*26] County Sheriff's Deputies booked me into the Jail, and I told the Deputies — while in close proximity to Davis — that I was actively suffering from my TMJD and needed my prescription medicine. Immediately after I identified that medicine as Voltaren, I turned to Terry Davis and said: "it's in my console." In response, Terry Davis — while looking me directly in the eye — said nothing, and did nothing but shrug.

Miller Decl. at ¶ 23. Davis has stated that he experienced extreme pain in his jaw. Third

Am. Compl. at ¶ 84.

An official violates the right to medical care when she acts (1) with deliberate indifference (2) in response to a detainee's serious medical needs. *Fortune v. McGee*, 606 F. App'x 741, 743 (5th Cir. 2015). "Deliberate indifference is shown where an official refuses to treat a detainee, ignores his complaints, intentionally treats him incorrectly, or engages in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *See Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006) (quoting *Sama v. Hannigan*, 669 F.3d 585, 590 (5th Cir. 2012)). The officer must possess a subjective knowledge of the risk of harm and a subjective intent to cause harm. *Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003) (citing *Wagner v. Bay City*, 227 F.3d 316, 324 (5th Cir. 2000)). Mere negligence or a failure to act are insufficient. *Id.* (citing *Wagner*, 227 F.3d at 324). Under the second prong, "[a] serious medical need is one for which treatment [*27] has been recommended or for which the need is so apparent that even laymen would recognize that care is required." *Lewis v. Evans*, 440 F. App'x 263, 264 (5th Cir. 2011) (citing *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006)).

When the evidence is viewed in a light most favorable to the Plaintiff, Defendant Davis's actions are sufficient to show deliberate indifference. Plaintiff states that Defendant Davis was in close proximity to Plaintiff when he stated that he was suffering from TMJD and needed his prescription medicine. Miller Decl. at ¶ 23. From this, it may be inferred that Davis heard Plaintiff's statement for the purposes of resolving this motion. When Plaintiff told Defendant Davis that the medicine was in the console of Plaintiff's vehicle, Davis merely shrugged. *Id.* From this, the conclusion can be reached that Defendant Davis was ignoring complaints and a subjective intent to cause harm can be inferred. Further, Plaintiff had a medication for his TMJD disorder, so he presumably was treated for that disorder. Because of this and because the severity of that disorder is still unclear, the Court concludes that Plaintiff's need for the medication was a serious medical need at this stage.

At the second step of the qualified immunity process, Defendant's actions were "objectively [*28] unreasonable in light of clearly established law at the time of the conduct in question." *Freeman*, 483 F.3d at 411. Here, clearly established law existed at the time of Defendant Davis' actions. The *Fortune v. McGee* case cited above is a Fifth Circuit case that was decided in April of 2015. Thus, the case occurred before the relevant events occurred for this right to medical care claim. Further, this case remains good law. Assuming that TMJD is a severe condition and that Defendant Davis in fact heard Plaintiff's requests for his prescription, Defendant Davis's inaction was objectively unreasonable. Accordingly, this Motion for Summary Judgment should be DENIED with respect to Plaintiff's claim for a violation of the right to medical care against Defendant Davis.

vi. Right of Access to the Courts

Summary Judgment should be GRANTED for Plaintiff's Right of Access to the Courts claim against Defendants Charlson and Davis. The right of access to the courts is implicated "where the ability to file suit was delayed, or blocked altogether." *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994). Here, Plaintiff merely alleges that he was treated differently with respect to public information requests. Pl.'s Resp. at 25-26. Based on this, Plaintiff contends that his [*29] ability to bring suit was blocked. *Id.* at 26. The Court disagrees. Defendants' actions have not blocked Plaintiff's ability to file suit, and Plaintiff has not provided any evidence to show that Defendants' actions have caused a delay in filing suit. Accordingly, summary judgment should be GRANTED with respect to Plaintiff's Right of Access to the Courts claims against both Defendants Charlson and Davis.

vii. Freedom of Speech

Summary Judgment should be GRANTED for Plaintiff's Freedom of Speech claim against Defendants Charlson and Davis. Plaintiff alleges that he was treated differently with respect to public information requests. Third Am. Compl. at ¶ 78; Pl.'s Resp. at 25-26. However, Plaintiff does not clearly articulate how his freedom of speech has been violated.

Defendants submit that Plaintiff appears to assert a First Amendment Retaliation claim, and Defendants contend that claim must fail. Defs.' Mot. at 16. To establish a First Amendment retaliation claim against an ordinary citizen, Plaintiff must show that (1) he was engaged in constitutionally protected activity, (2) Defendants' actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and [*30] (3) Defendants' adverse actions were substantially motivated against Plaintiff's exercise of constitutionally protected conduct. *Westfall*, 903 F.3d at 550 (citing *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002)).

Defendant Charlson's handling of public information requests is the only conduct that the Court is aware of that is relevant to a violation for a claim of freedom of speech. Plaintiff does not articulate how any other actions create a violation of Plaintiff's right to freedom of speech. For the handling of public information requests, any actions taken by Defendants could not have caused an injury that would chill a person of ordinary firmness. If Defendants truly withheld information, Plaintiff could take action with the Court to obtain this information.

Further, Defendants' Counsel asserts that Defendant Davis was not involved in handling public information requests. Defs.' Resp. at 17. Even if Defendant Davis was involved in handling public information requests, he did not violate Plaintiff's right to freedom of speech for the reasons stated above. Plaintiff has not articulated any additional facts to support a claim against Defendant Davis on this ground. Accordingly, the Court recommends that Summary Judgment be GRANTED for Plaintiff's freedom [*31] of speech claim against Defendants Charlson and Davis.

d. Conspiracy brought according to 42 U.S.C. § 1983

Plaintiff claims that Defendants Charlson and Davis "conspired to force Miller: to 1) stand trial on false "trumped-up" criminal charges; 2) secure, sponsor and use perjured testimony and fabricated testimony and evidence; and 3) make the proceedings costly to convince Miller to plead guilty to an offense of which they knew he was innocent. Third Am. Compl. at ¶ 132. However, Plaintiff does not provide evidence that would be admissible at trial to support these claims. Accordingly, the Court concludes that summary judgment should be GRANTED for Plaintiff's conspiracy claims.

IV. CONCLUSION

The Court concludes that Defendants' Motion for Summary Judgment on the Basis of Qualified Immunity should be GRANTED IN PART. Summary Judgment should be GRANTED for all claims against Defendants Coulter and Charlson. Summary Judgment should be DENIED for claims of unlawful detention, unlawful arrest, unreasonable seizure of property, and denial of the right to medical care claims under § 1983 against Defendant Davis, but Summary Judgment should be GRANTED for all other federal claims against Defendant Davis.

Parties [*32] must file any objections to this Report and Recommendation **BY NO LATER THAN MARCH 25, 2019**. A party's failure to file written objections to the findings, conclusions, and recommendations contained in this report by that date bars that party from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Fed. R. Civ. P. 72(b)(2); *see Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

SIGNED this 12th day of March, 2019.

/s/ Roy S. Payne

ROY S. PAYNE

UNITED STATES MAGISTRATE JUDGE

End of Document