UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

16-CV-20001-FAM

WARREN REDLICH, pro se,

Plaintiff,

vs.

THE CITY OF CORAL GABLES, CRAIG LEEN, individually and as City Attorney for the City of Coral Gables, the CORAL GABLES POLICE DEPARTMENT, EDWARD HUDAK individually and as Police Chief, OFFICERS ALEJANDRO ESCOBAR, AUGUSTIN DIAZ, JOEL RIOS, and JOHN DOE #1-42, THE REYES LAW FIRM, PA, ISRAEL U. REYES and MANUEL A. GUARCH, KATHERINE FERNANDEZ RUNDLE, individually and as State Attorney of the 11th Judicial Circuit, and ASSISTANT STATE ATTORNEYS JAMES ROE #1-4 individually, and OFFICERS ROBERT MOE #1-4, of the MIAMI-DADE GABLES POLICE DEPARTMENT.

Defendants.
_____/

THE CITY OF CORAL GABLES DEFENDANTS' MOTION TO DISMISS

The City of Coral Gables, together with its officers, agents and attorneys who have been named as Defendants in this litigation, do hereby seek dismissal of Plaintiff's Complaint with prejudice on the grounds that Plaintiff has not suffered a violation of any constitutional right. Specifically, Defendants, Craig Leen, the City of Coral Gables, the City of Coral Gables Police Department, Edward Hudak, Alejandro Escobar, Augustin Diaz,[1] Joel Rios, the Reyes Law Firm,

[1] Plaintiff has named Augustin Diaz as a Defendant, and the City of Coral Gables accepted service on behalf of all of its employees, but Augustin Diaz was not present at any of the events described.

PA, Israel Reyes and Manuel Guarch, by and through their undersigned counsel, and pursuant to Federal Rule of Civil Procedure 12(b)(6), do hereby seek dismissal of Plaintiff's claims against them in Counts 1 through 15[2] of Plaintiff's Complaint, for failure to state a claim upon which relief may be granted and because the individual Defendants are entitled to absolute or qualified immunity, and state in support thereof:

Introduction

Brief, suspicionless seizures at highway checkpoints for the purposes of combating drunk driving have been constitutional since the Supreme Court decided *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). Plaintiff's own misguided actions upon encountering a DUI checkpoint operated in the City of Coral Gables, motivated by his desire for commercial promotion, caused his seizure to be more than brief. However, based upon the facts as alleged in Plaintiff's Complaint, at no point was there any violation of Plaintiff's constitutional protections.

Facts Alleged In Complaint

1. *Pro Se* Plaintiff, Warren Redlich, a member of the Florida and New York Bars and self-proclaimed author and promoter of "a new approach to help drivers handle traffic stops and checkpoints," initiated this litigation against the City of Coral Gables, its City Attorney, its Police Chief, its Police Department, its police legal advisors and two individual officers following an encounter with the police at a DUI checkpoint in the City of Coral Gables on August 19, 2015. (Complaint ("Comp.") ¶¶ 13, 14 and 16).

[2] Plaintiff generally fails to specify the Defendant each Count is directed toward, preferring instead to name "Defendants" or "all Defendants" in Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12. Counts 13 and 14 are brought against only Defendants Leen, Guarch, Reyes and the Reyes Law Firm. Count 15 appears to attempt to state a claim against only Defendant City of Coral Gables, but Plaintiff periodically alleges wrongdoing by non-party, the City of Coral Springs, and also all "Defendants."

2. Plaintiff alleges that on that date he drove a car equipped with six cameras into the DUI checkpoint set up on South Dixie Highway in order "to test the checkpoint." (Comp. ¶¶ 42 and 43). Plaintiff approached and was directed into the checkpoint. Plaintiff complied and Officers then approached the vehicle and "asked to see Plaintiff's license." (Comp. ¶ 46).

3. In response to the Officers' request, "Plaintiff displayed the license by pressing it up against the window without rolling the window down." (Comp. ¶ 47). Plaintiff was asked by the Officers to hand the license outside the window and Plaintiff refused. (Comp. ¶¶ 48 and 53). At this point, Plaintiff was advised that holding his license up against the window "was not going to work." (Comp. ¶ 54). Plaintiff was then advised to turn over his driver's license (Complaint ¶ 56), and Plaintiff refused. (Comp. ¶ 57).

4. Plaintiff was placed in custody and his vehicle was searched. (Comp. ¶¶ 71-74, 78). Plaintiff was relieved of his loaded weapon during the search. (Comp. ¶ 73). Plaintiff was issued a traffic ticket under Florida Statute § 322.15. (Comp. ¶ 89). His weapon and ammunition were returned. (Comp. ¶ 90).

5. Plaintiff has appeared in traffic court to contest issuance of the traffic ticket, but the case "remains pending." (Comp. ¶¶ 93 and 104; *see also* Notice of Pending or Related Action [DE 10]).

6. Although Plaintiff has brought suit for state law claims against a municipality, Plaintiff has not complied with, nor alleged compliance with, the pre-suit Notice requirements of Fla. Stat. § 768.28 (6)(a).

The Causes Of Action

7. Based upon this core set of facts, Plaintiff alleges his First, Second, Fourth, Fifth and Sixth Amendment rights were violated, and seeks redress pursuant to 42 USC § 1983, and has also brought state law claims for False Arrest, False Imprisonment, Battery and Malicious Prosecution. Specifically, Plaintiff's Complaint includes claims against 11 named Defendants and 50 unidentified Defendants, for:

a. Count 1 - A claim for Injunctive Relief against Defendants;

b. Count 2 - A claim for False Arrest against Defendants;

c. Count 3 - A claim for False Imprisonment against Defendants;

d. Count 4 - A claim for False Arrest pursuant to 42 USC § 1983 against all Defendants;

e. Count 5 - A claim for Excessive Force pursuant to 42 USC § 1983 against all Defendants;

f. Count 6 - A claim for Battery against Defendants;

g. Count 7 - A claim pursuant to 42 USC § 1983 for violation of the First Amendment against Defendants;

h. Count 8 – A claim pursuant to 42 USC § 1983 for violation of the Second Amendment against Defendants;

i. Count 9 - A claim pursuant to 42 USC § 1983 for conducting an improper checkpoint which resulted in his unconstitutional stop against Defendants;

j. Count 10 - A claim pursuant to 42 USC § 1983 for unlawful search against Defendants;

k. Count 11 - A claim pursuant to 42 USC § 1983 for violation of Fifth Amendment right to remain silent against Defendants;

l. Count 12 - A claim pursuant to 42 USC § 1983 for violation of Sixth Amendment right to counsel against Defendants;

m. Count 13 - A claim for Malicious Prosecution against Defendants Leen, Guarch, Reyes and the Reyes Law Firm;

n. Count 14 - A claim for Punitive Damages against Defendants Leen, Guarch, Reyes and the Reyes Law Firm;

o. Count 15 - A "*Monell* Claim" against Defendant the City of Coral Gables.

8. This motion seeks dismissal of all Counts of Plaintiff's Complaint, including the state claims, the federal claims and the claim for punitive damages because each of those claims fail to state a claim upon which relief may be granted; each federal claim fails to describe a cognizable constitutional violation; each state claim fails as a matter of law; and, because the individual Defendants are entitled to absolute or qualified immunity.

The Florida Statute

9. Plaintiffs' Complaint cites to Fla. Stat. § 322.15,[3] titled *License to be carried and exhibited on demand; fingerprint to be imprinted upon a citation*, which states in full:

> (1) Every licensee shall have his or her driver license, which must be fully legible with no portion of such license faded, altered, mutilated, or defaced, in his or her immediate possession at all times when operating a motor vehicle and **shall present or submit the same upon the demand of a law enforcement officer** or an authorized representative of the department. A licensee may present or submit

[3] The Complaint also references Fla. Stat. § 843.02, which is titled *Resisting officer without violence to his or her person*, which states, in part: "Whoever shall resist, obstruct, or oppose any officer . . . in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree . . . ." Plaintiff was not charged with this offense.

> a digital proof of driver license as provided in s. 322.032 in lieu of a physical driver license.
>
> (2) Upon the failure of any person to display a driver license as required by subsection (1), the law enforcement officer or authorized representative of the department stopping the person shall require the person to imprint his or her fingerprints upon any citation issued by the officer or authorized representative, or the officer or authorized representative shall collect the fingerprints electronically.
>
> (3) In relation to violations of subsection (1) or s. 322.03(5), persons who cannot supply proof of a valid driver license for the reason that the license was suspended for failure to comply with that citation shall be issued a suspension clearance by the clerk of the court for that citation upon payment of the applicable penalty and fee for that citation. If proof of a valid driver license is not provided to the clerk of the court within 30 days, the person's driver license shall again be suspended for failure to comply.
>
> (4) A violation of subsection (1) is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.

Fla. Stat. § 322.15 (emphasis added).

MEMORANDUM OF LAW

Standard On Motions To Dismiss

A pleading in a civil action must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Labels and conclusions, and a formulaic recitation of the elements of a cause of action are not sufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that Rule 8(a)(2)'s pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). Nor can a complaint rest on "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557 (alteration in original)). The Supreme Court has emphasized that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

On a motion to dismiss raising the affirmative defense of qualified immunity, the court in *Lawson v. City of Miami Beach*, 908 F. Supp. 2d 1285 (S.D. Fla. 2012), explained:

> A court may dismiss a complaint under Rule 12(b)(6) "when its allegations, on their face, show that an affirmative defense bars recovery on the claim." *Cottone v. Jenne,* 326 F.3d 1352, 1357 (11th Cir. 2003). The affirmative defense of qualified immunity in particular "is intended to 'allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law.'" *Brown v. City of Huntsville,* 608 F.3d 724, 733 (11th Cir. 2010) (quoting *Lee v. Ferraro,* 284 F.3d 1188, 1194 (11th Cir. 2002)). As a result, "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." *Allen v. Gooden,* No. 11–61804–Civ–COOKE/TURNOFF, 2012 WL 2375330, at *1, 2012 U.S. Dist. LEXIS 86726, at *3–4 (S.D. Fla. June 22, 2012) (quoting *Cottone,* 326 F.3d at 1357).

Id. at 1289.

Further, the pleadings in this action are drafted by an attorney and therefore not subject to the liberal construction conferred upon *pro se* litigants. *See Powell v. Lennon,* 914 F.2d 1459, 1463 (11th Cir. 1990) (*pro se* litigant's pleadings must be construed more liberally than those pleadings drafted by attorneys).

I. NO CONSTITUTIONAL VIOLATION

The DUI Checkpoint

Plaintiff's Complaint challenges the constitutionality of a City of Coral Gables DUI checkpoint -- a checkpoint Plaintiff admits to having previous knowledge of, and purposefully sought out in an attempt to test his commercial endeavor, "Fair DUI." (Comp. ¶ 42). Yet, Plaintiff fails to describe with the specificity required in this Circuit, the failings which rendered a constitutionally approved method of DUI enforcement and awareness, unconstitutional in this instance. Instead, Plaintiff makes the legal conclusion that "Defendants conducted the checkpoint in an unlawful and overbroad manner, violating the principals set forth in

Indianapolis v. Edmond, 531 U.S. 32 (2000)." (Comp. ¶ 166). Plaintiff also concludes that "the checkpoint was conducted improperly, in an overbroad manner, beyond the limits allowed by the US Supreme Court." (Comp. ¶ 31). As to specifics of how the checkpoint in question was being run, Plaintiff admits it was "Defendants' practice in this checkpoint to check the license of every stopped driver at the initial stop," that "Defendants had written guidelines for the checkpoint"; and that "Contact line officers were instructed by the guidelines to 'determine if [the driver's] have a driver's license and to observe if any indications of impairment are visible.'" (Comp. ¶¶ 32, 35 and 36).

In *Sitz*, the Supreme Court addressed the Fourth Amendment implications of sobriety checkpoints, finding the "initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers" to be "consistent with the Fourth Amendment." *Sitz*, 496 U.S. at 450-451, 455. While the stop at a DUI checkpoint constituted a seizure under the Fourth Amendment, the balance of the State's interest in preventing drunken driving, weighed against the degree of intrusion upon individual motorists who are briefly stopped, resulted in the seizures held to be reasonable. *Id.*

The Supreme Court has held that a checkpoint set up for generalized crime control purposes would violate the Fourth Amendment, absent special circumstances. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). *Edmond*, the case cited by Plaintiff in his Complaint (Comp. ¶129), did not involve a DUI checkpoint, but rather a checkpoint where police stopped vehicles to look for evidence of drug crimes committed by occupants of the vehicles. *Id.* at 41, 44. Here, Plaintiff's Complaint clearly describes a DUI checkpoint, a fact Plaintiff admits to knowing before he went to Coral Gables. (Comp. ¶¶ 42, 44). The allegation that police at this checkpoint were asking all drivers for their license does nothing to transform a

brief interaction into an unreasonable seizure. (Comp. ¶32). *See Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (while random stops were disallowed, roadblock-type stops to question all oncoming traffic may be constitutionally implemented).

Plaintiff's allegations relating to policies or procedures used in other departments are irrelevant to the question of the constitutionality of requesting a driver's license at a DUI checkpoint. (Comp. ¶¶ 33, 34). Instead, the question before the court is whether the facts relating to this Plaintiff's interaction with these Defendants resulted in a violation of his constitutional rights. Based on the allegations of the Complaint, it is clear no constitutional protections were infringed upon. Starting with the seizure, in judging reasonableness under the Fourth Amendment, the Supreme Court looks to the "gravity of the public concerns secured by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (internal quotation marks omitted) (citing *Sitz*, 496 U.S. at 450-55).

The Eleventh Circuit has previously found that a DUI checkpoint where "every vehicle was stopped and every motorist was asked for documentation" reasonable under the Fourth Amendment. *United States v. Regan*, 218 F. App'x. 902, 905 (11th Cir. 2007) (the government's interest in preventing accidents caused by motorists, some of whom were intoxicated, and the level of intrusion on an individual's privacy weighed in favor of the checkpoint on a motion to suppress evidence used on his conviction for unlawful possession of a firearm). The Complaint plainly sets forth a constitutionally permissible practice to "check the license of every stopped driver at the initial stop." (Comp. ¶32); *see Regan*, at 905 (checkpoint executed for the important government interest of ensuring compliance with state's driver licensing and vehicle registration laws "and to check for drunk drivers"). Only the Plaintiff's refusal to provide the requested

driver's license caused his stop at the DUI checkpoint to be more than brief. (Comp. ¶ 48). *See Wos v. Shehan*, 57 F. App'x. 694, 696 (7th Cir. 2002) (when Mr. Wos failed to produce a valid license upon request at a roadside checkpoint, deputies had probable cause to believe he had violated the law and to arrest him). Accordingly, Plaintiff's Complaint fails to describe any Fourth Amendment violation in Counts 4 or 9 based on his stop at the checkpoint.

In Counts 7 and 11, Plaintiff attempts to allege that his First and Fifth Amendment rights were also violated "[d]uring the checkpoint" encounter. (Comp. ¶¶ 156, 181). Plaintiff's Fifth Amendment claim ignores the reality that "associated preliminary questioning" by officers have been allowed in DUI checkpoints since *Sitz* was first decided in 1990. *Id.*, 450-51 ("We address only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers."). Questioning of drivers was also approved in the checkpoint stop to obtain information from motorists about a hit and run accident in *Lidster* in 2004. *Id.*, at 428 ("Police contact consisted simply of a request for information and the distribution of a flyer."). While *Sitz* and *Lidster* did not analyze the checkpoint questioning under the Fifth Amendment, the only reason is that the Fifth Amendment does not apply to non-custodial questioning which occurs during the initial checkpoint encounter. *Wos*, 57 F. App'x at 696 (rejecting plaintiff's Fifth Amendment claim because there was no custodial interrogation).

Defendants acknowledge that the Eleventh Circuit has determined that citizens "have a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). However, Plaintiff has not demonstrated these Defendants violated that right or that any actions taken by the officers in the context of a DUI checkpoint were unreasonable.

Plaintiff's claim as to a Sixth Amendment right to counsel (Count 12) based upon his "use of the Fair DUI flyer" during "the checkpoint encounter" is even more tenuous as the Supreme Court has repeatedly held that the sixth amendment right to counsel attaches only after the initiation of formal charges (Comp. ¶¶ 187, 189). *See Moran v. Burbine,* 475 U.S. 412, 431 (1986).

As to Count 1, Plaintiff's request for injunctive relief, in that Plaintiff can prove no constitutional violation occurred in the past, he is not entitled to enjoin behavior that has caused no harm. Plaintiff's specific request that this court enter an "order strictly limiting the scope of any checkpoints conducted by Defendants and limiting the manner in which such checkpoints are conducted," is problematic in at least two ways. First, to obtain an injunction against future conduct, a party must demonstrate a "real and immediate threat" of future injury accompanied by "continuing, present adverse effects." *Elend v. Basham*, 471 F.3d 1199, 1207–08 (11th Cir. 2006) (internal quotation marks omitted); *Koziara v. City of Casselberry,* 392 F.3d 1302, 1305 (11th Cir. 2004) (quoting *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1241 (11th Cir. 2003)). Second, the request for an injunction that commands a party to "obey the law," in this case to not infringe upon constitutional protections, is improper and unnecessary. *See Elend,* 471 F.3d at 1209; *Burton v. City of Belle Glade,* 178 F.3d 1175, 1200–01 (11th Cir. 1999) (the district court correctly refused to issue requested injunction ordering defendant city not to discriminate as such injunction would amount to an order to "obey the law").

Plaintiff admits the traffic court proceeding against him "remains pending." (Comp. ¶ 104). As a result, to the extent Plaintiff is seeking to enjoin ongoing state criminal proceedings, his injunctive claims are subject to abstention under the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971). Also, Plaintiff fails to establish the requisite showing of "bad faith prosecution,

harassment, or extraordinary instances of irreparable harm." *Cate v. Oldham*, 707 F.2d 1176, 1183 (11th Cir. 1983); *see Watson v. Florida Judicial Qualifications Com'n*, 618 F. App'x 487, 491 (11th Cir. 2015) ("*Younger* abstention applies to claims for injunctive relief, as well as claims for declaratory judgment that would effectively enjoin state proceedings."). The ongoing nature of the underlying proceeding, and specifically Plaintiff's failure to allege his conviction has been favorably terminated, also serve to bar Plaintiff's related § 1983 claims. *Domotor v. Wennet*, 630 F. Supp. 2d 1368, 1380-81 (S.D. Fla. 2009) (analyzing application of *Heck v. Humphrey*, 512 U.S. 477 (1994)).

Probable Cause Or Arguable Probable Cause

The controlling decision in Florida, regarding a request for documentation as part of a DUI checkpoint is *Rinaldo v. State*, 787 So. 2d 208 (Fla. 4th DCA 2001). (Comp. ¶ 118). *Rinaldo* involves an appeal from a DUI conviction following the driver's arrest at a DUI checkpoint. The driver sought to suppress evidence found during the stop and the appellate court explained "a driver who is lawfully stopped for a DUI checkpoint is under a legal obligation to respond to an officer's requests for certain information and documents, and the driver's refusal to respond to these requests may constitute the misdemeanor offense of obstructing or opposing an officer." *Id.* at 212 (citing Fla. Stat. § 843.02).

Florida intermediate appellate decisions are binding under Florida law. *See Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) ("Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts."); *see also McMahon v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002) (citing *Pardo v. State* for proposition that it is "particularly appropriate" to look to intermediate appellate decisions to establish the law in Florida unless overruled by the Florida Supreme Court); *accord Bravo v. United States*, 577 F.3d 1324, 1326 (11th Cir. 2009).

Under Florida law, the elements of the crime of obstruction of justice, or resisting officer without violence are: (1) the officer is engaged in the lawful execution of a legal duty; and (2), the arrestee's actions constitute obstruction or resistance of that lawful duty. *Crapps v. State*, 155 So. 3d 1242, 1246-47 (Fla. 4th DCA 2015); *S.L. v. State*, 96 So. 3d 1080, 1084-85 (Fla. 3d DCA 2012). Plaintiff's actions, as described in the Complaint, establish probable cause or arguable probable cause that he committed the crime of obstruction of justice. As the court in *Rinaldo* explained, "[i]f a driver engages in obstructive conduct, in violation of section 843.02, then standard police detention and arrest procedures, rather than checkpoint guidelines, would govern the officer's handling of the situation." *Id*. at 212.

For purposes of this motion, the Court must take as true Plaintiff's allegations that at all times material, Plaintiff was "never ordered . . . to hand over the license." (Comp. ¶ 65). Rather, Defendant Escobar and the other police defendants always "asked" Plaintiff to "hand over the license" rather than ordering him to do so. (Comp ¶ 64). Plaintiff's attempt to distinguish between a request and an order, in this scenario, makes no difference. *See Rinaldo*, 787 So. 2d at 212 ("a driver who is lawfully stopped for a DUI checkpoint is under a legal obligation to respond to an officer's requests for certain information and documents"). Plaintiff's own allegations clearly demonstrate that he was on notice that his failure to comply with Defendants' request would be tantamount to failure to obey a lawful order.

Defendant Escobar told Plaintiff that "§ 322.15(1) requires drivers to "hand over their licenses." (Comp ¶ 58). Escobar told Plaintiff he would be arrested if he refused to hand over his license. (Comp. ¶ 60). Instead of complying with the lawful order, Plaintiff willfully refused. At this point, Defendant Escobar had probable cause or arguable probable cause to arrest Plaintiff for violation of Fla. Stat. § 843.02. Plaintiff complains that "[§ 322.15] calls for

police to issue a non-criminal non-moving traffic infraction for violation of the statute." (Comp. ¶ 131). "[S]ubjective reliance on an offense for which no probable cause exists" does not make an arrest out of order where there is probable cause to arrest for a different offense. *Lee v. Ferraro,* 284 F.3d 1188, 1196 (11th Cir. 2002) (internal quotation marks omitted). *See Devenpeck v. Alford,* 543 U.S. 146, 155 (2004). Probable cause may be found where the officer reasonably believes that the suspect "had committed or was committing an offense," *Gerstein v. Pugh,* 420 U.S. 103, 111 (1975), or where an individual had not actually violated the law but the officer was objectively reasonable in believing that he or she had. *See Arrington v. Kinsey,* 512 F. Appx. 956, 958 (11th Cir. 2013) (citing *Kingsland,* 382 F.3d at 1226) (noting that the reasonableness of the officer's belief "is objective and based on the totality of the circumstances.").

The Detention and Force Used

Plaintiff alleges that he "was held in custody, in handcuffs, against his will by the defendants for approximately three hours." (Comp. ¶¶ 71, 78). Plaintiff was forced "into various uncomfortable positions", and made to "sit in an uncomfortable chair with his hands, cuffed behind his back […]." (Comp. ¶¶ 80, 81). Plaintiff was also made to wait in a "paddy wagon" and the back of a police car, locations respectively described as "unpleasant" and "uncomfortable." (Comp. ¶¶ 82, 83). Plaintiff's allegations describe that he was forced, as in made to do something. Without question, during the entirety of Plaintiff's detention, it was the police that were maintaining control of the process, including the method of Plaintiff's custody. However, as is clear from Plaintiff's Complaint, that control was never exercised through physical means or violence.

The Complaint is completely devoid of any allegation relating to the application of force, such as physical touching of Plaintiff. Plaintiff does not even allege any touching was involved during the placement of handcuffs, although we know that it must of happened. The Eleventh Circuit "has established the principle that application of this type of *de minimis* force, without more, will not support a claim for excessive force in violation of the Fourth Amendment." *Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000); *see also Durruthy v. Pastor*, 351 F.3d 1080, 1094-95 (11th Cir. 2003); *Jones v. City of Dothan, Ala.*, 121 F.3d 1456, 1460-61 (11th Cir. 1997); *Sullivan v. City of Pembroke Pines*, 161 F. App'x. 906, 910 (11th Cir. 2006). In *Nolin*, the Eleventh Circuit dismissed an excessive force claim against an individual officer where Appellee claimed that the officer "grabbed Appellee and shoved him a few feet against a vehicle, pushed Appellant's knee into Appellee's back and Appellee's head against the van, searched Appellee's groin area in an uncomfortable manner, and placed Appellee in handcuffs." *Id.* at 1258 n.4. Indeed, the Eleventh Circuit stated that "the facts sound little different from the minimal amount of force and injury involved in a typical arrest." *Id.* Here, Plaintiff fails to describe the application of any force against his person that could conceivably form the basis of a Fourth Amendment violation. Plaintiff unquestionably experienced less force than what was used in *Nolin*. Indeed, Plaintiff's own Complaint alleges no more than the *de minimis* force involved in the act of placing handcuffs on Plaintiff. (Comp. ¶ 70).

As is made clear in the Complaint, Plaintiff was not arrested, booked or charged with the crime of obstruction of justice. Nonetheless, Plaintiff was detained based on the officer's probable cause determination that Plaintiff had in fact committed the misdemeanor offense. Defendants do not dispute that such detention implicates the Fourth Amendment. To the extent it is Plaintiff's position that his violation of Fla. Stat. §322.15 can never result in an arrest, he is

incorrect. The Supreme Court has held that a custodial arrest does not violate the Fourth Amendment even if the crime for which the person is arrested is not an arrestable offense under state law. *Virginia v. Moore*, 553 U.S. 164, 176-77 (2008).

In *Cruz v. Davidson*, 552 F. App'x. 865, 868 (11th Cir. 2013), the court considered a Fourth Amendment claim based on the arrest and overnight incarceration of a woman ticketed for violating the seatbelt ordinance. The court noted that, "[t]o the extent that Cruz argues that the seatbelt violation *could not* form the basis for her continued detention, this argument is without merit. Cruz notes that she was held overnight for a crime that carried no jail time and a maximum of a $15.00 fine." *Id*. at 868. There was probable cause to believe that she had committed a crime and "that alone was sufficient to justify her detention for purposes of the Fourth Amendment." *Id*.; *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 323–24, (2001); *United States v. Goings*, 573 F.3d 1141 (11th Cir. 2009).

If it is Plaintiff's position that his Sixth Amendment right to counsel attached at some point "during the entire three hours of the checkpoint encounter, arrest, detention and questioning," Plaintiff again assumes a constitutional protection not otherwise recognized in law. (Comp. ¶ 189); *see Jerricks v. Bresnahan*, 880 F. Supp. 521, 525 (N.D. Ill. 1995) (plaintiff's claim under § 1983 for alleged violation of Sixth Amendment based on pre-indictment station house detention failed because the conduct alleged did not even trigger a suspect's sixth amendment right to counsel).

Accordingly, Plaintiff has failed to demonstrate any violation of the Fourth Amendment in Counts 4 and 5 of the Complaint alleging Plaintiff was subjected to false arrest and excessive force.

The Search

In *Moreno v. Turner*, 572 F. App'x. 852, 857 (11th Cir. 2014), the court determined the constitutionality of a search incident to an arrest where only arguable probable cause was present. The Court found the officer was entitled to search plaintiff incident to his arrest based on arguable probable cause and seize his keys, cash, wallet and driver's license. *Id*. at 853, 857, (citing *Holmes v. Kucynda,* 321 F.3d 1069, 1082 (11th Cir. 2003) (stating that, while warrantless searches generally are unreasonable, officers may search a person incident to an arrest without a warrant)); *see also Wos*, 57 F. App'x. at 696 (deputies allowed to conduct inventory search of car to guard against danger and claims of vandalism). Accordingly, the search and inventory of Plaintiff's car incident to his detention based on a probable cause does not state a claim for violation of the Fourth Amendment in Count 10.

Similarly, Plaintiff fails to allege facts that demonstrate his Second Amendment right to bear arms was violated. The police took possession of the firearm Plaintiff carried on his person into the DUI checkpoint as part of their search incident to Plaintiff's detention. (Comp. ¶¶ 72, 73). *See Wos*, at 696. The weapon was returned to him upon his release from detention. (Comp. ¶ 90). No additional allegation demonstrating a violation of Plaintiff's Second Amendment protections is included in Count 8.

II. NO CLAIM MADE OUT AGAINST THE INDIVIDUAL DEFENDANTS

Plaintiff has named City of Coral Gables Defendants in their individual and official capacities. The Supreme Court has held that official capacity claims are the same as claims against the government entity itself. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1989) (holding that a § 1983 claim against government officers in their official capacity constitutes a claim against the government entity of which the officer is an agent); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n. 55 (1978) (recognizing that official capacity suits

"generally represent only another way of pleading an action against an entity of which an officer is an agent"). Further, the Eleventh Circuit has held that the official capacity claims should be dismissed as redundant and confusing:

> Because suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent, there no longer exists a need to bring official-capacity actions against local government officials, because local government units can be sued directly (provided, of course, that the public entity receives notice and an opportunity to respond) . . . To keep both the City and the officers sued in their official capacity as defendants in this case would have been redundant and possibly confusing to the jury.

Busby v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991); *accord De Armas v. Ross*, 680 So. 2d 1130, 1131-32 (Fla. 3d DCA 1996) (agreeing with the holding and reasoning of *Busby* and dismissing complaint against the officer named in his official capacity when the municipality was also named as defendant).

A. Absolute Immunity

Plaintiff has brought claims against Defendants Leen, Guarch, Reyes and The Reyes Law Firm, PA, based upon their appearance in Traffic Court on behalf of the City of Coral Gables (Counts 13 and 14). Plaintiff ignores the fact that the City Attorney and his appointees pursued the prosecution based upon authority conferred by Fla. Stat. § 316.008(2), Coral Gables City Code and the Traffic Court Rules promulgated by the Florida Supreme Court to prosecute matters in Traffic Court. Section 316.008(2) provides that the City has "nonexclusive jurisdiction" to prosecute traffic violations through its "duly authorized officers," which are the City Attorney and special counsel.[4] *See* Rule 6.040(h), Florida Rules of Traffic Court (defining "Prosecutor" as "any attorney who represents a state, county, city, town, or village in the

[4] The City Attorney is granted express authorization to prosecute in section 2-201(e)(3) of the City Code, and special counsel may exercise the City Attorney's delegated authority under section 2-201(d) of the City Code.

prosecution of a defendant for the violation of a statute or ordinance"). In *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976), the Supreme Court concluded that traditional common-law immunities for prosecutors applied to civil cases brought under 42 U.S.C. § 1983. These Defendants are absolutely immune from suit for their actions in initiating the prosecution against Plaintiff and for all acts taken in presentation of the case against Plaintiff. *Hart v. Hodges*, 587 F.3d 1288, 1295 (2009). Further, a "prosecutor is immune for malicious prosecution." *Id.* (citing *Malley v. Briggs*, 475 U.S. 335, 342-43 (1986)).

The immunities afforded prosecutors in *Imbler* have also been found to bar a § 1983 action against a city attorney, who by initiating a prosecution for violation of state laws "acted beyond his authority [and] cited statutes of a unit of government he was not empowered to represent." *Lerwill v. Joslin*, 712 F.2d 435, 440 (10th Cir. 1983). In so holding, the court expressly recognized that the application of absolute immunity in this situation will act to bar a 1983 claim even if the prosecutor "intentionally or even maliciously" rather than mistakenly cited the wrong statute in prosecuting plaintiffs. *Id.* at 441; *see also Edison v. Florida*, No. 2:04CV157 FTM99SPC, 2007 WL 80831, at *5 (M.D. Fla. 2007) ("Conspiring to unlawfully arrest a person while knowing there was no probable cause, and conspiring to unlawfully detain and confine plaintiff are within the protection of absolute immunity") (citing *Fullman v. Graddick*, 739 F.2d 553, 558-59 (11th Cir. 1984)).

B. Individual Defendants Are Entitled To Qualified Immunity

"Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (internal quotation marks and citation omitted). The doctrine

protects from suit "all but the plainly incompetent or one who is knowingly violating the federal law." *Id.* (internal quotation marks and citation omitted).

Plaintiff's claims against the individual Defendants are barred unless Plaintiff pleads and then proves that the individuals acted in violation of clearly established law. *See Pearson v. Callahan*, 555 U.S. 223 (2009); *Scott v. Harris*, 550 U.S. 372 (2007). In this case, the law is clearly established that DUI checkpoints are constitutional, and that police officers may issue orders at checkpoints including to lower the window, through the binding court decisions of *Sitz* (holding DUI checkpoints to be constitutional) and *Rinaldo* (holding that driver must comply with orders at checkpoint, including order to open window).

The protection of qualified immunity is available to "government officials acting within their discretionary authority." *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010) (citations omitted). Arrests by police officers fall within the discretionary authority function. *See, e.g., Lee v. Ferraro,* 284 F.3d 1188, 1194 (11th Cir. 2002) ("there can be no doubt that [the officer] was acting in his discretionary capacity when he arrested [the plaintiff]"). Government attorneys performing extra-judicial activities are entitled to "the qualified immunity to which executive officials are normally entitled." *Auriemma v. Montgomery*, 860 F.2d 273, 290 (7th Cir. 1988).

To claim qualified immunity a public official must first establish that he was engaged in a "discretionary duty." *Mercado v. City of Orlando*, 407 F.3d 1152, 1156 (11th Cir. 2005). If the public official establishes he was acting in a discretionary capacity, the burden shifts to the plaintiff "to show that qualified immunity is not appropriate by satisfying a two-part inquiry": (1) that the official "violated a constitutional right"; and (2) that the "right was clearly established at the time of the incident." *Id.* The law requires that the right is "clearly established" to ensure that

the public official is on notice that her conduct is unlawful before she is subjected to a suit. *Lewis v. City of W. Palm Beach, Fla.*, 561 F.3d 1288, 1291 (11th Cir. 2009). When a defendant moves for qualified immunity through a motion to dismiss, a court must accept "the factual allegations in the complaint as true and [draw] all reasonable inferences in the plaintiff's favor." *Gonzalez v. Reno*, 325 F.3d 1228, 1233 (11th Cir. 2003).

Plaintiff is apparently attempting to establish new federal law that is different than *Sitz* or *Rinaldo*. Plaintiff cannot sue the individual defendants in doing so, however, as they did not act in violation of clearly established law. In fact, the individual Defendants acted entirely consistent with the well-established law on the subject. The law is so well established, Plaintiff himself cites it within his Complaint. (Comp. ¶ 118) Accordingly, the individual Defendants are indisputably entitled to qualified immunity, and the claims brought against them in their individual capacities should be dismissed with prejudice.

C. Supervisory Officials Are Not Liable Under § 1983

It is well settled in the Eleventh Circuit that "'[s]upervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates on the basis of *respondeat superior* or vicarious liability.'" *Barr v. Gee*, 437 F. App'x 865, 875 (11th Cir. 2011) (quoting *West v. Tillman*, 496 F.3d 1321, 1328 (11th Cir. 2007)); *see also Iqbal*, 556 U.S. at 677 (holding supervisory officials cannot be sued merely for having knowledge that a subordinate officer is allegedly acting in an unconstitutional manner). To maintain a claim against a supervisory defendant, the plaintiff must allege (1) the personal involvement of the supervisor in the violation of the plaintiff's constitutional rights, (2) the existence of either a custom or policy that resulted in deliberate indifference to the plaintiff's constitutional rights, (3) facts that support an inference that the supervisor directed the unlawful action or knowingly failed to prevent it, or (4)

a history of widespread abuse that put the supervisor on notice of an alleged constitutional deprivation that he then failed to correct. *See West*, 496 F.3d at 1328–29.

"Absent vicarious liability, each Government official, his or her title notwithstanding, *is only liable for his or her own misconduct*." *Iqbal*, 566 U.S. at 677 (emphasis added). This language is unequivocal and demonstrates that the Supervisory Officers cannot commit a constitutional violation or violation of clearly established law for simply being the supervisors of other Coral Gables police officers who allegedly committed misconduct. Accordingly, Chief Hudak is entitled to dismissal of all claims against him based on qualified immunity and because they fail to state a claim for relief.

III. NO CLAIM AS TO THE CITY DEFENDANT

"[A]n inquiry into a governmental entity's custom or policy is relevant only when a constitutional deprivation has occurred." *Rooney v. Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996). As described above, Plaintiff's Complaint fails to describe any cognizable constitutional deprivation and Plaintiff's claims against the City of Coral Gables fails on this basis alone.

For § 1983 liability to attach to a municipality, "a plaintiff must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown,* 392 F.3d 1283, 1289 (11th Cir. 2004). Plaintiff makes no attempt to satisfy this requirement beyond alleging that the "actions of all the defendant police officers were pursuant to policies, practices and procedures directed by the defendant municipalities." (Comp. ¶ 87).

In addition, a plaintiff "must identify those officials who speak with final policymaking authority for that local governmental entity concerning the act alleged to have caused the

particular constitutional violation in issue." *Grech v. Clayton County, Ga.*, 335 F.3d 1326, 1329 (11th Cir. 2003). Counts 4, 5, 7, 8, 9, 10, 11 and 12 all attempt to allege violations of Plaintiff's rights pursuant to 42 U.S.C. § 1983 against the City as well as its employees and agents. In Count 15, Plaintiff attempts to set out a "Monell Claim," but alleges liability attaches based upon the actions of the "City Attorney and Police Department" without describing either as the final policymaker. (Comp. ¶ 208).

Local governments may not be found liable under § 1983 merely because its agents or employees have caused a constitutional injury. *Monell*, 436 U.S. at 691 ("we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory") (emphasis in original); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) ("*Respondeat superior* or vicarious liability will not attach under § 1983"). To the contrary, a municipality "may only be held liable under 42 USC § 1983 when the injury caused was a result of municipal policy or custom." *Lewis v. City of West Palm Beach*, 561 F.3d at 1293. Plaintiff utterly fails to identify a pattern of specific and similar incidents to Plaintiff's case which would implicate an unofficial policy regarding false arrest (Count 4), excessive use of force (Count 5), interferences with recording police activity (Count 7), violating the Second Amendment (Count 8), conducting illegal searches (Count 10), or violating arrestees Fifth and Sixth Amendment rights while in custody (Counts 11 and 12).

Plaintiff has named the City of Coral Gables Police Department as a Defendant in all Counts of his Complaint except 13 and 14. However, the Police Department is simply a department within the City of Coral Gables and not a separate legal entity capable of being sued pursuant to Federal Rule of Civil Procedure 17(b). Therefore, the Police Department is an

improper party and must be dismissed. *Ball v. City of Coral Gables*, 548 F. Supp.2d 1364, 1369-70 (S.D. Fla. 2008) (granting summary judgment because the City of Coral Gables Police Department is not a separate legal entity); *Eddy v. City of Miami*, 715 F. Supp. 1553, 1556 (S.D. Fla. 1989) (dismissing the Miami Police Department, a department within the City of Miami, from a section 1983 action as an improper party); *Dean v. Barber*, 951 F.2d 1210, 1214 (11th Cir. 1992).

IV. STATE LAW CLAIMS

The City of Coral Gables as a municipality and political subdivision of the State of Florida, enjoys sovereign immunity except for those instances where sovereign immunity has been waived pursuant to Fla. Stat. § 768.68. Florida's waiver of sovereign immunity statute requires notice to the municipality as a condition precedent to suit. In this case, Plaintiff has failed to provide the required notice, and failed to allege that this condition precedent to suit has been established. On this ground alone, dismissal of the state law claims is appropriate.

Further, the Eleventh Circuit and the Florida Supreme Court have each held that the standard for determining whether probable cause exists is the same under both federal and Florida law. *See Rankin v. Evans*, 133 F.3d 1425, 1433 (11th Cir. 1998); *accord Holland v. State*, 696 So. 2d 757, 759 (Fla. 1997) (holding that Article 1 Section 12 of the Florida Constitution binds Florida courts to follow the U.S. Supreme Court's interpretation of the Fourth Amendment). Accordingly, all of the previous arguments explaining why Plaintiff's detention and search incident to detention were objectively reasonable under federal law apply to the remaining state claims of false arrest and false imprisonment, and bar these claims as well. (Counts 2 and 3).

Plaintiff also fails to state a claim for battery against any individual defendant in Count 6. The Complaint alleges that "Defendants engaged in a course of conduct that they intended to touch or make contact with Plaintiff's body, and did touch Plaintiff's body, in a manner that was harmful and offensive…" (Comp. ¶ 153). Plaintiff has sued 62 individuals, 11 of whom are named in the Complaint, and seven of whom are agents or employees of the City of Coral Gables. Yet, the only touching described in Plaintiff's Complaint is the touching incident to his detention. (Comp. ¶¶ 70 and 72). Under Florida law, when a police officer is on duty, the officer can use force in good faith and is "liable for damages only where the force used is clearly excessive." *City of Miami v. Sanders*, 672 So. 2d 46, 47 (Fla. 3d DCA 1996) ("a presumption of good faith attaches to an officer's use of force in making a lawful arrest"). No such clearly excessive force has been alleged by Plaintiff.

Because the Complaint on its face demonstrates Plaintiff's violation of § 843.02, and probable cause for his arrest pursuant to *Rinaldo*, the subjective intent of any individual Defendant is irrelevant. The detention and search are objectively reasonable on the face of the Complaint. *See Cruz*, 552 F. App'x. at 868; *see also P.C.B. P'ship v. City of Largo*, 549 So. 2d 738, 740-41 (Fla. 2d DCA 1989) (affirming dismissal of claims against officials where plaintiff failed to allege facts suggesting malice, and only alleged malice in a conclusory fashion); *Nelson v. Prison Health Services, Inc.*, 991 F. Supp. 1452, 1466 (M.D. Fla. 1997) (interpreting section 768.28(9)(a) and determining that Sheriff could not be sued in his individual capacity because plaintiff failed to allege actions sufficiently "extreme").

Under Florida law there are six elements to a common law malicious prosecution claim, including the termination of the original proceeding in Plaintiff's favor. *See Eloy v. Guillot*, 289 F. App'x. 339, 345 n.11 (11th Cir. 2008). Yet, Plaintiff admits his proceeding in traffic court

"remains pending." (Comp. ¶ 104). Count 13 for malicious prosecution is properly dismissed. The claim is also properly dismissed with prejudice because prosecutorial immunity acts to bar a claim for malicious prosecution under Florida law. *Hansen v. State*, 503 So. 2d 1324, 1326 (Fla. 1st DCA 1987).

V. PUNITIVE DAMAGES

Count 14 attempts to recover punitive damages against three attorneys and the law firm retained by the City to act as its agent in traffic court. Obviously, punitive damages are a remedy, not a separate claim. Plaintiff does not specify the claim to which to which he believes punitive damages are warranted. As an initial point, to the extent Plaintiff fails to state a claim for relief against these Defendants, then his attempt to recover punitive damages against them also fails. Punitive damages are available under § 1983 only when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves callous or reckless indifference to the federally protected rights of others. *Wright v. Sheppard*, 919 F. 2d 665, 670 (11th Cir. 1990). As described above, Plaintiff includes no facts to support his legal conclusion regarding these attorneys' "evil intent."

In addition to failing to make out the underlying claim, Plaintiff fails to make the required showing to warrant imposition of punitive damages other than the bold allegation that "evil intent" was present. (Comp. ¶¶ 121, 204). Accordingly, Plaintiff's attempt to recover punitive damages is properly dismissed.

CONCLUSION

By his Complaint, Plaintiff has failed to state any claim for relief against these Defendants. Plaintiff fails to describe an unconstitutional checkpoint. Instead, Plaintiff describes a stop, search and detention, all within appropriate and acceptable constitutional borders and in response to Plaintiff's self-described conduct. Because Plaintiff fails to set out

any constitutional violation in his Complaint, his claim for injunctive relief in Count 1 also must fail.

Plaintiff does not allege any direct involvement by supervisors in the arrest, detention or search about which he complains. The individual Defendants, the police officers and attorneys, are entitled to absolute or qualified immunity for the acts as alleged by Plaintiff because each was acting well within clearly established law.

Accordingly, based upon the points and authorities cited herein, all City of Coral Gables Defendants are entitled to entry of an order of dismissal with prejudice of the claims made against them in Plaintiffs' Complaint. These Defendants request an award of attorney's fees and costs pursuant to 42 USC §1988.

Respectfully submitted,

Date: March 7, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion to Dismiss* was filed via CM/ECF and served by e-mail on March 7, 2016 on all counsel or parties of record on the Service List below.

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