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.
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REPLY IN SUPPORT OF THE CORAL GABLES DEFENDANTS' MOTION TO DISMISS

The City of Coral Gables Defendants, by and through their undersigned counsel, do hereby submit this reply in support of their motion to dismiss, and respond to the arguments and assertions contained in Plaintiff's Memorandum In Opposition to Motion To Dismiss [DE 34] ("Response"), as follows:

Introduction

Through this litigation, it is Plaintiff's stated intention to compel an answer where Plaintiff believes federal courts have not yet spoken. As framed by Plaintiff, the unanswered

question is whether a police officer operating a DUI checkpoint may require a driver to "open his window and hand over documents." (Response, p. 9). Moreover, this is the quintessential case where qualified immunity applies to the individual defendants because none of them acted in violation of clearly established law. In contrast, they followed clearly established law. Plaintiff admits this question does not remain unanswered in Florida jurisprudence. *Rinaldo v. State*, 787 So. 2d 208 (Fla. 4th DCA 2008) affirmatively decided that officers are well within the bounds of their discretionary authority to require presentation of documentation at a DUI checkpoint. *Id*. at 213. Plaintiff now seeks to impose Constitutional limits on *Rinaldo*'s authority. Plaintiff ignores that *Rinaldo* itself is, in fact, decided based upon a Fourth Amendment reasonableness analysis and concludes that once the driver finds himself within the checkpoint based upon neutral criteria, he does not enjoy the "privilege to ignore the officer's request for documents or to thwart the officer's ability to observe him for signs of impairment." *Id*.

Plaintiff is not the first "activist" to challenge the constitutionality of a DUI checkpoint. (Response, p. 17). *See Devermont v. City of San Diego*, No. 12-CV-1823-BEN KSC, 2014 WL 1877450, at *2 (S.D. Cal. 2014) (granting summary judgment on all federal claims and dismissing remaining State claims brought by owner of business that publicizes the locations of DUI checkpoints, who recorded his encounter at a DUI checkpoint and later posted it on the website). Nor is Plaintiff the first person stopped at a DUI checkpoint to challenge a request to present his driver's license pursuant to the Fourth Amendment. *See Sublett v. State*, 815 N.E. 2d 1031, 1035 (Ind. Ct. App. 2004) (finding police officer's request that driver produce his driver's license and vehicle registration at sobriety checkpoint, did not violate driver's Fourth Amendment rights). At this stage it is clear that Plaintiff has suffered no constitutional deprivation at the City of Coral Gables DUI checkpoint and his Complaint is properly dismissed.

I. Constitutionality of DUI Checkpoint

Plaintiff complains that the DUI checkpoint in Coral Gables was overbroad, and without sufficient notice. The checkpoint at issue: (1) checked the license of every stopped driver at the initial stop (Comp. ¶32); (2) had written guidelines for the checkpoint (Comp. ¶35); and (3), the guidelines instructed contact line officers to determine if the drivers were licensed and to observe if any indications of impairment are visible (Comp. ¶36).[1] The allegations of the Complaint establish that all opportunity for discretion regarding who to screen was removed from the officers conducting the DUI checkpoint. *See Rinaldo*, 787 So. 2d at 211 ("limiting field officer discretion is the main objective underlying *Jones's* requirement that roadblocks be carried out pursuant to a previously established and neutral plan"). Indeed, Plaintiff makes no allegation in the Complaint or in the Response that his stop was anything but random.[2]

The fact that driver's licenses were being checked does not render the checkpoint overbroad or unconstitutional. There is no requirement that sobriety screening be the only motivation when conducting a sobriety checkpoint, only that it be the primary purpose. Plaintiff ignores existing Eleventh Circuit precedent which instructs that a checkpoint may have more

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[1] Plaintiff appears to attempt to establish that the City's sobriety checkpoint guidelines differ materially from FHP's sobriety checkpoint guidelines. However, Plaintiff does not reference any FHP sobriety checkpoint guidelines. FHP Policy Number 17.08 is titled Comprehensive Roadside Safety Checkpoints, and deals with safety checkpoints, not sobriety checkpoints. Further, driver's license checks are allowed under that policy, if so designated in advance so as to apply to all cars that are stopped – as was done by the City of Coral Gables.

[2] It would defy logic for Plaintiff to claim he was harmed by a less than random selection of his vehicle at the checkpoint when his stated intention was to be selected in order "to test the checkpoint." (Comp. ¶42). Plaintiff even secured the services of a photographer on scene "to record the test from the outside." (Comp. ¶43). Also, for the first time in his Response, Plaintiff claims lack of adequate notice for the checkpoint was provided. This is contrary to the allegations of his Complaint where Plaintiff alleges he sought out the checkpoint as a result of receiving prior notice. Plaintiff cannot now claim any harm due to a lack of notice of the checkpoint.

than one purpose. The checkpoint in *United States v. Regan*, 218 F. App'x. 902 (11th Cir. 2007) was "designed to comply with the Constitution" even though it served both the "important state interest of ensuring compliance with the state's driver licensing and vehicle registration laws, and to check for drunk drivers." *Id*. at 905; *see also United States v. William*, 603 F.3d 66, 68 (1st Cir. 2010) ("The threshold requirement under *Sitz* and *Edmond*—that sobriety concerns be the primary purpose of the checkpoint—is met in this case").

The presence of a drug sniffing dog or license plate reader also will not serve to render this checkpoint unconstitutional, especially in this case when Plaintiff was not charged with any offense stemming from the use of the dog or the plate reader. *See William*, 603 F.3d at 68 (presence of drug-sniffing dog at sobriety checkpoint did not render stop at sobriety checkpoint unlawful).

In *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), the Supreme Court found operation of a DUI checkpoint effectively advanced the "State's interest in preventing drunken driving" with minimal intrusion upon individual motorists who are briefly stopped, while consistent with the Fourth Amendment. *Id*. at 455. The "associated preliminary questioning and observation by checkpoint officers" approved in *Sitz* allowed for screening of driver's who may be impaired. *Id*. at 450-51. It is the very act of communicating with the driver through an open window that allows for alcohol impairment screening, such as observing the coordination of the driver to obtain the requested document, observing the speech pattern in response to questions for evidence of slurring, and being able to detect the smell of alcohol or drugs. *See State v. Colbert*, 553 S.E.2d 221, 222 (N.C. Ct. App. 2001) (approving under Fourth Amendment analysis alcohol impairment screening at initial checkpoint stop that: "(1) requested defendant to produce his driver's license, (2) observed the defendant's eyes for signs of impairment, (3)

engaged the defendant in conversation to determine if the defendant had the odor of alcohol on his breath or if his speech pattern indicated impairment, and (4) observed the defendant's clothing").

Plaintiff's reliance on the plurality opinion in *Salinas v. Texas*, 133 S. Ct. 2174 (2013) and the earlier *Berghuis v. Thompkins*, 560 U.S. 370 (2010), are entirely misplaced because the Fifth Amendment privilege against self-incrimination is implicated only where a suspect is compelled to produce evidence of a testimonial or communicative nature. Rolling down the window at a DUI checkpoint provides an opportunity for the line officer to observe smells emanating from the driver and his vehicle. This act is not testimonial and results in no compelled communication by the driver. *See Hearn v. Bd. of Pub. Educ.*, 191 F.3d 1329, 1333 (11th Cir. 2003) (citing *Schmerber v. California*, 384 U.S. 757, 761 (1966)) (production of body fluids is non-testimonial); *United States v. Knight*, No. CR411-347, 2012 WL 1898952, at *2 (S.D. Ga. 2012) (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 602-05 (1990) (under the U.S. constitution the prohibition against self-incrimination applies only when the evidence is testimonial and field sobriety tests which elicit only physical evidence such as slurred speech, imbalance or abnormal eye movement are not testimonial in nature); *see also Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (roadside questioning of a motorist detained pursuant to a routine traffic stop does not amount to "custodial interrogation").

Plaintiff relies on *Bressi v. Ford*, 575 F. 3d 891 (9th Cir. 2009), a case where the court held "that probable cause supported the arrest and citation of Bressi for state law violations in refusing to show his drivers' license and refusal to obey a lawful order of an officer." *Id.* at 898-99. The constitutional questions regarding whether Bressi's stop was random, are not present in this case. *Id.* at 897 (explaining tribal officers are free to set up a roadblock for the purpose of

checking the drivers' licenses, vehicle registrations and the sobriety of non-Indian motorists, but any such roadblock must meet the constitutional requirements set by the Supreme Court for such suspicion less stops).

II. Individuals Entitled To Qualified Immunity

Plaintiff acknowledges in his Response, both expressly or implicitly, that every Individual Defendant acted consistent with *Rinaldo*. Because all of the Individual Defendants acted consistently with clearly established law, the claims against the Individual Defendants fail on the basis of qualified immunity.

Plaintiff admits that the purpose for his law suit is to constrain agencies in Florida from relying on the *Rinaldo* decision. There is no other interpretation of this position than the fact that *Rinaldo* represents the clearly established law. Plaintiff is now seeking to change that law, not in the State courts where *Rinaldo* was decided and where his traffic court case remains pending, but in this federal action. At the very least, it is abundantly clear that the individual defendants did not act in violation of clearly established law, so qualified immunity protects them from suit and entitles them to dismissal. As a result, the claims against Craig Leen, Edward Hudak, Officer Escobar, Officer Diaz, Officer Rios, Israel Reyes and Manuel Guarch, all sued individually, are properly dismissed with prejudice.

Plaintiff's criticism of *Rinaldo* ignores the fact that *Rinaldo* itself was decided based upon a Fourth Amendment reasonableness analysis. The standard for written policies set out in *Campbell v. State*, 679 So. 2d 1168 (Fla. 1996) also acknowledges that the conclusions reached by the Florida Supreme Court were consistent with United States Supreme Court precedent that "'[T]he Fourth Amendment requires that ... the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. ... When such a stop

is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.'" *Id*. at 1170 n. 1 (quoting *Brown v. Texas*, 443 U.S. 47, 51, 52 (1979)).

III. Florida Statute § 322.15

Plaintiff's Response misquotes Fla. Stat. § 322.15. Instead of requiring a driver to "exhibit" their licenses, subsection (1) of the statute directs that the driver "shall present or submit the same upon the demand of a law enforcement officer . . . ." Contrary to Plaintiff's argument, these Defendants in no way seek to extend the scope of this statute, but rather sought compliance with the accepted meaning of its plain terms. The definition of submit, pursuant to Merriam-Webster, is "to present or propose to another for review, consideration, or decision; *also* : to deliver formally." MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/submit (last visited March 28, 2016). The Defendants in this case acted consistently with the plain language of the statute, and as such have committed no violation of clearly established law. *See Migut v. Flynn*, 131 F. App'x. 262, 266-67 (11th Cir. 2005) (officer entitled to qualified immunity based upon existence of at least arguable probable cause to believe plaintiff violated Fla. Stat. § 934.03(1)(a) by recording their conversation without permission even where the Eleventh Circuit was "unable to locate a case in which a Florida court has specifically held that police officers have a reasonable expectation of privacy in their conversations with citizens").

IV. Facts Outside The Complaint

Without attribution, Plaintiff includes a variety of details concerning the DUI Checkpoint which do not appear in his Complaint. Defendant Coral Gables previously provided this Court with Notice of the Pending Action [DE 10] involving the traffic court proceeding. Because the traffic court action is a matter of public record, this court can review the status of that action

without the necessity of converting Defendants' motion to dismiss into a motion for summary judgment. "At the Fed.R.Civ.P. 12(b)(6) stage, we primarily consider the allegations in the complaint, but [t]he court is not [always] limited to the four corners of the complaint. We have held that a district court may take judicial notice of matters of public record without converting a Rule 12(b)(6) motion into a Rule 56 motion." *Halmos v. Bomardier Aerospace Corp.*, 404 F. App'x 376, 377 (11th Cir. 2010) (alterations in original) (internal citation and quotation marks omitted) (quoting *Long v. Slaton*, 508 F.3d 576, 578 n. 3 (11th Cir. 2007)); *see also Byrd v. City of Daphne*, No. CA 11-0468-CG-C, 2012 WL 1036058, at *4 n.5 (S.D. Ala. Mar. 9, 2012) *report and recommendation adopted,* No. CIV.A.11-0468-CG-C, 2012 WL 1021843 (S.D. Ala. Mar. 27, 2012). Accordingly, even if this Court goes outside the Complaint in making its findings of fact, there is no need for conversion of Defendants' motion to dismiss into a summary judgment motion because the matters to be considered fall into the public record category.

Review of the Transcript upon which Plaintiff relies in his Response makes it is clear that (1) Plaintiff was convicted of violating Fla. Stat. § 322.15; (2) Plaintiff raised in the traffic proceeding the constitutionality of this checkpoint, and the court found it to be constitutional; and (3) Plaintiff challenged the vagueness of Fla. Stat. § 322.15 and the court found the statute to be clear on its face. *See* Transcript [DE 10] at pp. 21, 114-115, 123 and 125. Mr. Redlich did not challenge the adequacy of prior notice of the checkpoint in the traffic court. *See* Transcript [DE 10] at pp. 40.

With limited exception, courts has long preserved an interest in securing the finality and consistency of judicial pronouncements issued in courts of competent jurisdiction, and they have also regularly declined the opportunity to invite collateral attacks upon those very pronouncements. *Parke v. Raley*, 506 U.S. 20, 29-30 (1992); *see, e.g.*, *Rooker v. Fidelity Trust*

Co., 263 U.S. 413, 415 (1923) ("Unless and until so reversed or modified" on appeal, an erroneous constitutional decision is "an effective and conclusive adjudication"); *Thompson v. Tolmie*, 27 U.S. 157, 169 (1829) (errors or mistakes of court with competent jurisdiction "cannot be corrected or examined when brought up collaterally"); *Voorhees v. Jackson, ex dem. Bank of U.S.*, 35 U.S. 449, 472 (1836) (observing that "[t]here is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears"). Under a variety of circumstances, various § 1983 claims can serve as collateral attacks upon prior judicial decisions.

These concerns are particularly at work when a plaintiff seeks damages under § 1983. These claims will typically center on the validity of an arrest, the presence or absence of probable cause, or the lawfulness of a search -- all of which can question or invalidate the determination on these issues reached during the original state court proceeding. As a result, the Supreme Court held that the district court "must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). Barring a favorable decision in the state court proceeding, a plaintiff is barred from bringing forth any § 1983 claims that would seek to challenge that decision.

Plaintiff's claims relating to the attendant constitutional violations surrounding his failure to obey a lawful order of the police will be *Heck*-barred because it would undermine the integrity of his conviction for failure to comply with Fla. Stat. § 322.15. *See Heck*, 512 U.S. at 487 (holding that one cannot assert a section 1983 claim that would necessarily invalidate a previous conviction).

V. Remaining Claims

Plaintiff has admitted that his malicious prosecution claim is ripe for dismissal. Plaintiff simply cannot deny that a Florida Statute and Rule of Procedure both contemplated and authorized his prosecution in traffic court by the city attorneys. The city attorneys have absolute immunity, and at the very least, qualified immunity for his prosecution. In fact, all of Plaintiff's claims are properly dismissed, not only because of his failure to demonstrate a violation of any constitutional protection, but also because he has already raised (and lost) in a now pending action the very claims he seeks to pursue in this court. Plaintiff's Response does not address his failure to comply with Fla. Stat. § 768.28's notice provision, a fact fatal to his state law claims against the City. Plaintiff even fails to dismiss his claims against a non-entity, the City of Coral Gables Police Department.

Conclusion

Wherefore, the Coral Gables Defendants, specifically, the City of Coral Gables, the City of Coral Gables Police Department, Craig Leen, Edward Hudak, Alejandro Escobar, Augustin Diaz, Joel Rios, the Reyes Law Firm, PA, Israel Reyes and Manuel Guarch, seek dismissal of Plaintiff's Complaint against them with prejudice, and an award of their costs and fees and such further relief as this court deems just.

Respectfully submitted,

Date: March 31, 2016

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Reply in Support of the Coral Gables Defendants' Motion to Dismiss* was filed via CM/ECF and served by e-mail on March 31, 2016 on all counsel or parties of record on the Service List below.

s/ Elizabeth M. Hernandez

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