In the United State District Court
Southern District of Florida

Case No. 1:16-cv-20001-FAM

Warren Redlich,
Plaintiff,

v.

Craig Leen, individually and as City Attorney for the City of Coral Gables, 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 County Police Department.

Defendants,
_____/

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

PLAINTIFF WARREN REDLICH, pro se, files this Memorandum in opposition to the motion to dismiss by the Coral Gables defendants.

INTRODUCTION

There are three main issues underlying this case. First and most important on this motion, the checkpoint conducted by the defendants was overbroad, violating clearly established Supreme Court precedent from City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000), and the defendants did not follow other requirements of checkpoints such as proper notice and complying with checkpoint guidelines, violating clearly established precedent dating back to Michigan v. Sitz, 496 US 444 (1990), as well as Florida Supreme Court cases State v. Jones, 483 So.2d 433 (Fla.1986), and Campbell v. State, 679 So.2d 1168 (Fla. 1996).

Second, and perhaps most important for this case overall, Defendants rely upon and attempt to extend Rinaldo v. State, 787 So. 2d 208 (Fla. 4th DCA 2001). In Rinaldo the

Fourth DCA went well beyond any other cases holding that drivers do not have the right to remain silent at all, and that drivers who remain silent or otherwise insist on their rights can be arrested for "resisting without violence", a misdemeanor under Florida law, § 843.02. One of Plaintiff's underlying purposes in bringing this lawsuit, and in testing Florida checkpoints generally, is to get the federal courts to overturn Rinaldo.

The third issue deals with a specific Florida statute, § 322.15, which requires drivers to "exhibit" their licenses upon demand of a police officer in certain contexts such as traffic stops and license checkpoints. Defendants seek to extend the meaning of § 322.15, asserting that the statute requires drivers not merely to exhibit or display their licenses but rather to hand them over to police. Plaintiff contends that the statute clearly requires only display or exhibition of the license without requiring surrender. Any interpretation that requires handing the license over would be void for vagueness.

Within that third issue, § 322.15(4) states that a violation of the statute is a non-criminal, non-moving traffic infraction. Defendants adopted and enforced a policy to arrest anyone who violates § 322.15 under § 843.02 as a misdemeanor. In doing so they went beyond the Berman memo on which they relied.

If the state legislature wanted to make a violation of § 322.15 a misdemeanor, it could have done so. It didn't. If Defendants want to elevate the offense to a misdemeanor, they should run for election to the state legislature. Their unelected positions as city bureaucrats, police officers and police advisors do not give them the authority to elevate non-criminal offenses to misdemeanors.

I. THE CHECKPOINT WAS OVERBROAD

There are many problems with the defense motion, but the biggest is the nature of the checkpoint and defendants' conduct within that checkpoint. In City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000), the Supreme Court ruled:

> The primary purpose of the Indianapolis narcotics checkpoints is in the end to advance "the general interest in crime control," Prouse, 440 U. S., at 659, n. 18. We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and everpresent possibility that interrogation and inspection may reveal that any given motorist has committed some crime. … [W]e decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control."

Where a checkpoint is overboard or conducted improperly, everything that follows is tainted. Bressi v. Ford, 575 F.3d 891 (9th Cir. 2009). Mr. Bressi was stopped at a checkpoint that exceeded the scope permitted by Edmond. The Ninth Circuit reversed the District Court's grant of summary judgment:

> Of course, the Officers were free to set up a roadblock for the purpose of checking the drivers' licenses, vehicle registrations and the sobriety of non-Indian motorists, because the Officers were authorized to enforce state law. … But any such roadblock must meet the constitutional requirements set by the Supreme Court for such suspicionless stops. Bressi alleges that the roadblock did not satisfy those requirements; among other things, his affidavit asserts that the roadblock was not total and that some cars were permitted to drive by, which in his view rendered his suspicionless stop discretionary and unlawful. … There are also questions of fact concerning instructions that may or may not have governed operation of the roadblock. Bressi is entitled to pursue his claim of constitutional deficiencies in the roadblock on remand.

Id. at 897 (citations omitted).

It should be noted that, unlike Bressi, this is not a motion for summary judgment, but rather a motion to dismiss. We have not yet had discovery to fully ascertain the real

purpose(s) of the checkpoint and how operation of the checkpoint was governed. The Complaint alleges that the checkpoint was overbroad and otherwise conducted improperly relating to instructions that may or may not have governed its operation.

Ostensibly a "Sobriety Checkpoint," the officers requested the drivers license of every driver stopped at the initial stop. They had a drug-sniffing dog on hand to check for drugs in cars and used the dog. From that traffic court trial we further learned that defendants used a license plate reader to check every car driving through, regardless of whether they were brought into the chute. We also learned that they conducted a so-called "saturation patrol" and if a car avoided the checkpoint (which Florida law allows) the officers followed the car and looked for an excuse to pull it over to investigate. That saturation patrol protocol was markedly different from what was described in the checkpoint guidelines. Defendant Escobar was equivocal at best in his trial testimony about the purpose of the checkpoint. Directly asked about whether the checkpoint was used for generalized crime control, he did not deny it.

In a half-hearted attempt to follow Florida law defendants provided public notice of the checkpoint. That notice did not indicate anything about it also being used as a license checkpoint, that a plate reader would be used on every car, that cars would be checked for drugs, nor that cars "avoiding" the checkpoint would be followed.

Defendants used this checkpoint for generalized crime control, which is prohibited by Indianapolis v. Edmond, supra. Everything that followed from the moment of Plaintiff's initial encounter with the checkpoint through his arrest and prosecution is, in the words of Bressi, tainted: "If the roadblock were to be determined unconstitutional on remand, the result might taint the subsequent arrest and citations." Bressi, supra 575 F.3d at 899.

Bressi also addressed qualified immunity:

> The district court anticipated this possibility, however. It held that, even if the stop was determined to be unlawful and to taint the probable cause for the arrest, this principle was not clearly established law at the time of the arrest. Thus, the Officers were entitled to qualified immunity; reasonable officers would not have believed that the subsequent arrest violated Bressi's constitutional rights.

Id.

While that might appear to favor the defendants in this case, keep in mind that Bressi was decided in 2009 and concerned actions taken by police in 2002. The checkpoint in this case took place in 2015, 15 years after Edmond and 6 years after Bressi. The principle is now clearly established.

Checking drivers licenses is not a proper part of a sobriety checkpoint

Florida Highway Patrol does not ask for a drivers license unless they are conducting a drivers license checkpoint:

> Unless the driver's license check is a designated part of the safety check procedure, members are not to request to see a driver's license. However, if the driver offers the license to a member it may be reviewed. A driver's license that appears valid on its face will be considered as prima facie proof that the driver is in compliance with the Florida driver licensing laws.

Complaint ¶ 33; FHP Policy Number 17.08.06(G)(1) (rev. 11/23/2015), available online at: http://www.flhsmv.gov/fhp/manuals/1708.pdf

Similarly, the City of Coral Springs does not have the point person check licenses in their sobriety checkpoints.

> Once the point person makes contact with the driver of a vehicle he/she will look for signs of possible impairment (ie: glossy, bloodshot, or watery eyes; slurred speech; odor of an alcoholic beverage; or open container; etc.)

Complaint ¶ 34; The Coral Springs checkpoint policy (see Chapter 9, section VII) is available at:

http://fairdui.org/wp-content/uploads/2016/03/coral-springs-checkpoint.pdf

There is no reason to see a drivers license in the initial phase of a sobriety checkpoint. Even in the US Supreme Court case which allowed sobriety checkpoints, the drivers license was not requested until after the driver was directed into secondary inspection because signs of impairment were detected:

> All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication. In cases where a checkpoint officer detected signs of intoxication, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests.
> Michigan State Police v. Sitz, 496 U.S. 444, 447 (1990).

Forgetting the public notice, the purpose stated in the checkpoint guidelines used by defendants for this checkpoint was: "to detect and apprehend impaired drivers and to identify drivers with vehicle safety violations." It said nothing about licenses. While those guidelines did direct officers to ask to "see" the drivers license, there was nothing about requiring drivers to physically hand the license over. See Complaint ¶ 35-37. Plaintiff has uploaded those guidelines to:

http://fairdui.org/wp-content/uploads/2016/03/CGPD-August-2015-DUI-Sobriety-Checkpoint.pdf

Again, as in Bressi, supra, this relates to improper operation of the checkpoint and precludes dismissal.

Defendants' reliance on Lidster is misplaced. Illinois v. Lidster, 540 US 419 (2004) involved a checkpoint set up after a hit-and-run driver killed a bicyclist. The purpose of that

checkpoint had nothing to do with the drivers doing anything wrong, but rather to attempt to locate witnesses. Id. at 423.

II. RINALDO

The defense relies heavily on Rinaldo v. State, 787 So. 2d 208 (Fla. 4th DCA 2001). The Fourth DCA took an extreme position and police are listening. Multiple sheriffs have said that drivers are required to talk with them in checkpoints and if they don't they will be arrested. In other words, Rinaldo has been taken so far as to deny drivers the right to remain silent.

> Moreover, as the state points out, 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. … Appellant maintains that he was not obligated to interact with the officer or respond to his questions. … Thus, he argues, a citizen is free to ignore the officer's directions and refuse to answer any of his questions. Appellant cites Popple v. State, 626 So.2d 185 (Fla.1993), for the proposition that, during a consensual encounter, a citizen may either voluntarily comply with an officer's request or choose to ignore them. … As we stated above, the guidelines and operational plan used for conducting this DUI checkpoint met the required showing. Accordingly, appellant enjoyed no Popple privilege to ignore the officer's request for documents or to thwart the officer's ability to observe him for signs of impairment.

Id. at 212-213.

Rinaldo is absurd. While recent federal cases focus on whether a defendant's pre-arrest silence can be used against him in a trial, Rinaldo holds that a driver can be arrested and charged with a misdemeanor for remaining silent:

> If 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.

The Fair DUI flyer was designed specifically with recent Supreme Court cases in mind. Both Salinas v. Texas, 133 S. Ct. 2174 (2013) and Berghuis v Tompkins, 560 U.S. 370 (2010) dealt with situations where the defendant remained silent but did not expressly invoke the right to remain silent. At the Coral Gables checkpoint, plaintiff held that flyer up to window expressly invoking his rights, as the top three lines assert:

I REMAIN SILENT

NO SEARCHES

I WANT MY LAWYER

Defense counsel is correct in describing the influence of Rinaldo. That decision's abuse of the right to remain silent has infected Florida checkpoints.

> "They wouldn't be allowed out of that checkpoint until they talk to us," St. Johns County Sheriff David Shoar said. Shoar, president of the Florida Sheriffs Association …."

Peter Holley, Why Florida drivers are making videos of themselves refusing to talk to police at DUI checkpoints, Washington Post, February 10, 2015, online at https://www.washingtonpost.com/news/post-nation/wp/2015/02/10/why-florida-drivers-are-making-videos-of-themselves-refusing-to-talk-to-police-at-dui-checkpoints/

This is why a federal decision is necessary, to reject Rinaldo's overreach.

Distinguishing Rinaldo

With all of that said, Rinaldo can be distinguished from the instant case. It states that drivers in a checkpoint are:

> 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.

Plaintiff did respond to the officer's requests. Under the guidelines the officers were instructed to say to drivers: "May I see your drivers license?" Plaintiff did show his license to the police officers when he was asked to do so. Defendants never asked Plaintiff to roll down his window for any purpose other than to hold the license. Defendant officers told Plaintiff to "just open the window a crack and slide the license out - that's all we need." Despite the facial assertion that this was a sobriety checkpoint, Defendants made no effort to check Plaintiff's sobriety.

The question then becomes how far the officers are allowed to push this and force a driver to open his window and hand over documents. The operational guidelines for the checkpoint say nothing about requiring drivers to hand over their licenses. The stated purpose of the checkpoint had nothing to do with license validity.

At the trial Defendant Escobar stated that he needed to hold the license in his hand to see the hologram:

> THE COURT: I understand. Were you able to read the license?
> THE WITNESS: I could have read it, but I couldn't physically touch it, hold it, check it for a hologram, like you can in any other DUI stop or any other stop.
> THE COURT: Is there any way to tell if it was a legitimate license?
> THE WITNESS: Not until he hands it over to me.
> THE COURT: Okay. And are driver's licenses made specially to avoid impostor licenses?
> THE WITNESS: To have a fraudulent license there are many ways. The only real way, and one that I use, is to grab a driver's license You could shine a flashlight behind it. It illuminates the hologram; hold it at a specific angle. Obviously, the angle is intuitive to my eyes so that I can see the hologram, which it shows another picture.

Trial transcript at 48-49.

At this point I respectfully suggest that the Court test this statement (as I just did while drafting this section). Put your drivers license behind any piece of glass and shine a flashlight on it. I did it with both my toaster oven and the driver's window of my car. The hologram is easily visible with a flashlight. I used an LED maglight similar to what police use. Defendant Escobar admits he didn't even try ("I could have read it").

Whether we are talking about a checkpoint or a traffic stop, there is a question that has yet to be answered thoroughly about where the line for Fourth Amendment searches is drawn. Checkpoint case law generally focuses on the stop, not on the searches that might follow.

Plaintiff respectfully submits that the most sensible place to draw the line is the opening of the driver's window. If the driver refuses to roll down the window and explicitly asserts his or her Fourth Amendment rights (for example by holding up a piece of paper that says "No Searches"), then the officer has no authority to order the window down without probable cause to believe some kind of crime has been committed that opening the window will help resolve. In this case Defendants had no probable cause because Plaintiff's license was facially valid (and a flashlight would have shown the hologram if they bothered).

It is common practice for most drivers to roll down their window before even being asked to do so. Such drivers have effectively waived their Fourth Amendment rights regarding keeping their windows shut. Similarly most drivers speak to police, effectively waiving their Fifth Amendment right to remain silent for that conversation. But for drivers who do assert their rights, such assertion should be respected unless there is probable cause.

Most federal cases regarding checkpoints have focused on whether police can conduct a checkpoint at all, under what circumstances, and what they're permitted to do in them. There is little federal case law on what is required of drivers in checkpoints. This was mentioned in a 2015 case out of the Kentucky Supreme Court:

> Must everyone stop at one of these roadblocks? Can one blow off the officer and speed right past? Can a motorist be cited for not stopping? That question is yet to be decided.

Commonwealth of Kentucky v. Billy Cox, Kentucky Supreme Court, 2013-SC-000618-DG (12/17/2015, Cunningham, J. dissenting).

The federal courts have left this question wide open. It is time for an answer.

III. § 322.15 AND THE ARREST FOR RESISTING

The defense motion is misleading in places regarding the circumstances of the arrest. Defendant Escobar did not arrest the plaintiff for violating § 322.15. He arrested Plaintiff for "resisting without violence," an alleged violation of §843.02.

§ 322.15 provides that any violation is a non-criminal, non-moving traffic infraction with a small fine and no jail time. The statute reads, in pertinent part:

> 322.15 License to be carried and exhibited on demand; fingerprint to be imprinted upon a citation.—
>
> (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 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.
>
> …
>
> (4) A violation of subsection (1) is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.

The statute does not require drivers to hand over their licenses. The title of the statute says licenses are to be carried and exhibited on demand. Subsection 1 says drivers are required to "present or submit" the license without defining those terms. It is unclear whether the two words are intended to have the same meaning or different meanings, and if different when each might apply. Is it the driver's choice to present or submit? Or is that choice up to the officer? The statute doesn't say.

Subsection 2 is important for statutory construction. It refers to the failure to "display" requirement of subsection 1. In other words, subsection 2 indicates that the language in subsection 1 means display. Both the words "display" (from subsection 2) and "exhibit" from the statute's title, have the plain meaning of "show" rather than hand over or surrender. Many states have statutes requiring drivers to surrender their licenses in plain language. Florida does not.

The principles of statutory construction point to a clear answer - the statute does not require handing over the license. At best, and it's a stretch, an interpretation that it requires drivers to hand it over is void for vagueness because of the language in the statute's title (exhibit) and in subsection 2 (display).

The Berman memo (on which Defendants relied in formulating their policy) acknowledges that the meaning of §322.15 "will most certainly only be resolved through litigation." In other words, Guarch, Reyes and Leen knew that their position on § 322.15 was questionable at best. Plaintiff respectfully submits that any lawyer should know the void for vagueness doctrine. E.g. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). Regarding qualified immunity, Plaintiff respectfully submits that the vagueness doctrine has been clearly established for several decades.

IV. OTHER ISSUES

Absolute Prosecutorial Immunity Does Not Apply

The only claim to which absolute immunity might conceivably apply is part of the 13th cause of action for malicious prosecution, where defendants Leen, Guarch, Reyes and the Reyes Law Firm appeared in local traffic court purporting to be prosecutors. Such claim does not apply to their role advising Defendant Escobar to charge Plaintiff (e.g. Burns v. Reed, 500 US 478, 496 (1991)), nor to any other cause of action asserted in the Complaint.

In this case Defendants Leen, Guarch and Reyes are not the type of prosecutor the Supreme Court intended to protect:

> Because the daily function of a public prosecutor is to bring criminal charges, tort claims against public prosecutors "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." Imbler, 424 U. S., at 425. Such "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties," and would result in a severe interference with the administration of an important public office. Id., at 423. Constant vulnerability to vexatious litigation would give rise to the "possibility that [the prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust." Ibid.

Rehberg v. Paulk, 566 US _____ (2012) (at part II(C) of the Opinion).

Defendants Leen, Reyes and Guarch are not public prosecutors as part of their daily function. Leen is the City Attorney and deals with various municipal issues. Reyes and Guarch are private attorneys retained by the city as police advisors.

They interjected themselves into the state proceedings not out of some public duty as prosecutors, but rather to insulate themselves and the city from liability in this very case that they knew was coming. Faced with what had been a favorable termination, these defendants improperly appeared, purporting to be prosecutors in violation of the plain

language of the Florida Constitution. They moved to reopen the case, even describing the city as "Plaintiff" in their moving papers seeking a new hearing.

The concerns raised in Imbler and Rehberg that led to absolute immunity for prosecutors are simply not present here. Prosecution is not part of their ordinary public duties and this litigation does nothing to interfere with the administration of the City Attorney's office nor the Reyes Law Firm in their regular work.

The traffic case was heard in Miami-Dade Traffic Court. These cases are normally heard by a Traffic Hearing Officer with no prosecutor present in the court room. This normal function of the traffic court will not be affected by such litigation. There are no prosecutors in that court who could be intimidated from their work because there are no prosecutors.

Further, Defendants self-assertion as prosecutors here violates Article V, Section 17 of the Florida Constitution:

> Except as otherwise provided in this constitution, the state attorney shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law; provided, however, when authorized by general law, the violations of all municipal ordinances may be prosecuted by municipal prosecutors.

Plaintiff was not charged with violation of any municipal ordinance. He was charged with a violation of a state statute, §322.15.

Defendants rely in part on Lerwill v. Joslin, 712 F.2d 435 (10th Cir. 1983), for the proposition that they would still retain absolute immunity even if they went beyond the scope of their prosecutorial authority. In footnote 5 Lerwill mentions that Beard v. Udall, 648 F.2d 1264 (9th Cir. 1981) reached the opposite result.

Plaintiff respectfully notes a key distinction between Lerwill and Beard. In Lerwill the prosecution was carried out by a part-time city attorney who went beyond the authority of his office, but there was no allegation of a personal interest. By contrast in Beard, County

Attorney Udall pursued the prosecution of Beard because of Udall's personal interest as private attorney for and employer of Beard's ex-wife. The Court in Beard specifically mentioned Udall's "conflict of interest."

> We begin by recognizing that in certain outlying areas it may be necessary for the county attorney to maintain a private practice. In such situations a county attorney's official actions may raise questions regarding conflict of interest. Nevertheless, in most situations, a county attorney will not be deprived of his or her absolute immunity for performing official duties.
>
> Udall's alleged activities, unlike those of the prosecutor in Imbler, were performed to further a private purpose. His conduct, therefore, went beyond merely performing his official duties. Beard alleges that Udall caused the criminal charge to be filed in order to further the civil suit Udall had filed on Crabtree's behalf, and that he filed the criminal charges while knowing the charges were baseless. A prosecutor who faces a conflict of interest is in as poor a position to act impartially as a judge who predetermines a judicial proceeding. Therefore, assuming Beard's allegations against Udall are true, we conclude that Udall was acting beyond the scope of his authority and thus does not enjoy absolute immunity.

Here Plaintiff alleges that Defendants Leen, Guarch, Reyes and The Reyes Law Firm purported to act as prosecutors in this case not out of the public interest, but out of fear of personal liability and civil liability on the part of the city. That makes the case fit more closely with the Beard v. Udall holding that absolute immunity does not apply.

Malicious Prosecution and Favorable Termination

When Plaintiff filed the Complaint there was a credible argument that there had been a favorable termination. Since that date a traffic trial was held and Plaintiff was found guilty. An appeal is pending to the Circuit Court in Miami-Dade County.

Plaintiff respectfully submits that the Court should hold off on dismissing this claim until the appeal is resolved, or in the alternative dismiss the claim without prejudice so that it may be reinstated should the conviction be reversed on appeal.

Excessive Force Claims

Defendants apply the wrong analysis to Plaintiff's excessive force claims. Count 5 of the Complaint expressly relies on the Fourth Amendment rather than the Eighth Amendment. Plaintiff does not contend that the officers conducting the arrest were malicious in their use of force nor that they were gratuitously violent, as would be required for an Eighth Amendment excessive force claim.

A Fourth Amendment excessive force claim turns on whether the force used was reasonable. Graham v. Connor, 490 US 386, 395 (1989). Since the Complaint alleges that both the checkpoint and the arrest were unlawful and unreasonable, the force used by defendants was necessarily unreasonable.

Defendants' reliance on Nolin v. Isbell, 207 F.3d 1253 (11th Cir. 2000) in their "de minimis force" argument is striking when you read the whole decision.

> The Ortega opinion does not address the issue of whether the force used was de minimis. Perhaps the Ortega Court concluded the amount of force used, which included kicking and pointing weapons, rose above a certain level; perhaps the parties, in the early stages of the development of the Graham standard, did not raise the issue; or perhaps, most likely, the Court relied on the notion that the police illegally performed the initial search and arrest such that the use of any force was unlawful.

Id. at 1257 (emphasis added).

In the Eleventh Circuit (and probably the whole country), a Fourth Amendment excessive force claim applies to any use of force in an arrest when the police activity leading up to the arrest and the arrest itself are unlawful. That is the the claim in this case.

The Searches

There are two separate searches in this case. First, with the notion that defendants' arrest of plaintiff was unlawful as asserted in the complaint, any search incident to the arrest was also unlawful. That is straightforward. So the search of plaintiff's person was improper because the checkpoint and the arrest were unlawful.

The other search is different. Even if the arrest was lawful, there was no reason for defendants to search the car. There was nothing about the incident to support any reason to hold the car or search it. Plaintiff was a civil rights activist testing checkpoint procedures. Defendants never suspected nor acted on any other crimes. Plaintiff has an interest in that search because his phone was in the car and was seized by the defendants in the search.

There was no need to detain the vehicle and thus no need for an inventory search. There was a passenger present who was ready, willing and able to drive the car away. The owner of the car, Carlos Miller, was on scene and was ready, willing and able to drive the car away. He was and is known to multiple members of the Coral Gables Police Department including the public relations officer who interacted with him while plaintiff was still in the car. Defendant Rios also indicated on scene that he knew who Mr. Miller is and that he was present. They knew it was Mr. Miller's car. He is the founder and head of PINAC (Photography is Not a Crime) and is known to defendants because of his role in PINAC. The car's license plate reads "PINAC".

Defendant Hudak

The defense motion asserts that the claims against Defendant Hudak (the police chief) must be dismissed because he was merely a supervisor. The assert the following standard:

> 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.

Defendant Hudak was not merely a supervisor. He was on the scene of the checkpoint. Defendant Escobar testified that he consulted with Hudak during the checkpoint about how to deal with Plaintiff during the checkpoint:

> Q. Now, after Mr. Redlich refused to hand you the license what did you do?
> A. After speaking with my chief and determining the best course of action, we came up with a game plan. The game plan …
> Q. … So what did you physically do after that?
> A. We came up with a game plan. The game plan, in essence, was to open the window

Traffic Court trial transcript at 60, lines 11-19 (emphasis added).

I have to mention at this point that counsel for the Defendants was present at the traffic trial and heard this testimony. They have read the transcript. Their assertion in this motion that Hudak was involved only in a supervisory capacity is blatant dishonesty toward this Court.

Hudak was also aware of the issues regarding the custom and policy Defendant Leen had recommended to the department for traffic stops and checkpoints related to § 322.15. Along with Leen he directed the unlawful checkpoint and the policy and practice of wrongly arresting people when they fail to comply with § 322.15.

Monell

Regarding Monell liability, the defense motion asserts the following standard:

> 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." … 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."

Plaintiff has alleged that his constitutional rights were violated, in particular his Fourth Amendment rights but of course various others. The Complaint alleges that the City had adopted checkpoint policies that constituted deliberate indifference to the Fourth Amendment rights of drivers in checkpoints and traffic stops, and further that Plaintiff notified the city that such policies were illegal and the city persisted with such policies in the face of that notice. The Complaint further alleges that the city's checkpoint policies, practices and procedures caused the violations challenged in this action. And finally, the Complaint clearly identifies Defendants Leen and Hudak, who adopted these policies as final policymaking authorities for the city.

Injunctive Relief

Defendants' motion addresses injunctive relief only briefly and Plaintiff respectfully submits dismissal of this cause of action would be premature at this stage. The defendants are well aware that Plaintiff has a history of challenging checkpoints. Defendant Guarch called Plaintiff as a witness in the traffic trial. His first questions on direct were about Plaintiff's activism and history of going to checkpoints, particularly in Miami-Dade County.

They know that Plaintiff is likely to test checkpoints in Coral Gables in the near future, thus creating a real and immediate threat of future injury.

Second, Plaintiff does not seek an injunction that merely orders Defendants to "obey the law." Rather Plaintiff seeks injunctive relief regarding specifics of whether Defendants conduct checkpoints in the future at all and if so how they do so, including how they handle drivers who expressly invoke their rights in a checkpoint, and how they handle drivers who use recording devices to record such encounters.

Third, Plaintiff does not seek any injunction regarding the ongoing state proceedings and is mystified as to why Defendants suggest otherwise.

Punitive Damages

Plaintiff has alleged sufficient facts to state a claim for punitive damages. Defendants rely on Wright v. Sheppard, 919 F.2d 665 (C.A.11 (Fla.), 1990), a case where punitive damages were addressed after trial. We are at the initial pleadings stage.

Conclusion

The motion to dismiss should be denied in its entirety.

Respectfully Submitted,

s/

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Dated: Sunday, March 20, 2016
Boca Raton, Florida