IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00884-CMA

CHAYCE AARON ANDERSON,

Plaintiff,

v.

JASON SHUTTERS (In their (sic) Individual Capacity only),

Defendants.

DEFENDANT JASON SHUTTERS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT (ECF No. 9) PURSUANT TO FED.R.CIV.P. 12(b)(6)

Defendant, Jason Shutters, through his Attorneys, Hall & Evans, LLC, submits the following as his Motion to Dismiss Plaintiff's Complaint (ECF No. 9) pursuant to Fed.R.Civ.P. 12(b)(6), and in support states as follows:

I. INTRODUCTION

Plaintiff filed the present matter generally alleging a violation of his Constitutional rights when he was arrested, tried, and subsequently convicted for sexual assault. The Court identified and dismissed most of Plaintiff's claims. The remaining allegations purport to set forth claims against Defendant Shutters for claims of "excessive force"[1] and "unreasonable search and seizure"[2]. The excessive force claim pertains to the

[1] Identified as Claim 2(a)(iii).
[2] Identified as Claim 2(b).

handcuffing of Plaintiff, while the unreasonable search and seizure claim is related to the collection of evidence by what Plaintiff terms a "rape kit."

Defendant Shutters seeks dismissal of the remaining claims against him. In particular, the claim for excessive force should be dismissed as Plaintiff provides only conclusory allegations which fail to comply with Federal pleadings standards and the standard enunciated pursuant to ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544, 545 (2007). Furthermore, the claim for unreasonable search and seizure should be dismissed as the procurement of non-testimonial evidence was conducted pursuant to a validly issued Court Order containing a determination of probable cause. Plaintiff therefore fails to properly set forth any proper Constitutional violation, or comply with Federal pleading standards pursuant to ***Twombly***. Furthermore, Defendant Shutters is entitled to qualified immunity based on the Court's probable cause determination.

II. STANDARD OF REVIEW

A motion to dismiss under Fed R. Civ. P. 12(b)(6) is properly granted when a complaint provides no "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action . . . . Factual allegations must be enough to raise a right to relief above the speculative level." ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544, 545 (2007).

III. ARGUMENT

A. Claim 2(a)(iii)-"excessive force": Plaintiff has not pled in anything other than a conclusory fashion, allegations of excessive force related to his being handcuffed.

To state a claim for relief, a Federal complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" "that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." ***Conley v. Gibson***, 355 U.S. 41, 47 (1957). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." ***Twombly***, 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." ***Id.***

At the pleading stage, it is not the defendant's or the Court's responsibility to guess at plaintiff's claims. ***Id***. The court may not assume that a plaintiff can prove facts that the plaintiff has not alleged or that the defendants have violated the laws in ways that the plaintiff has not alleged. Plaintiff must explain what each defendant did to him, when the defendant did it, how the defendant's action harmed him, and what specific legal right the defendant violated. ***Nasious v. Two Unknown B.I.C.E. Agents,*** 492 F.3d 1158, 1163 (10th Cir. 2007).

To recover on an excessive force claim involving handcuffing, "a plaintiff must show that the officers used greater force than would have been reasonably necessary to affect a lawful seizure, and some actual injury caused by the unreasonable seizure that is not de minimis, be it physical or emotional'" ***Jones v. Lehmkuhl***, 2013 U.S. Dist. LEXIS 139229 at *33-34 (D. Colo. 11 cv 02384 WYD CBS, April 26, 2013) citing ***Fisher v. City***

of Las Cruces, 584 F.3d 888, 894 (10th Cir. 2009). Factors to be considered when reviewing a complaint based on handcuffing and excessive force include the manner in which the Plaintiff was handcuffed. ***Jones***, 2013 U.S. Dist. LEXIS at *35 referring to ***Rhoden v. City of Lakewood, Colorado***, 2013 U.S. Dist. LEXIS 32293 at *3 (D. Colo. 11 cv 01734 PAB BNB, Mar. 8, 2013).

In the present matter, Plaintiff presents a 41-page mostly single-spaced Amended Complaint, which recounts in detail a lengthy history involving juvenile arrests, purported suppression of juvenile convictions, a psychological history including sexual abuse, adult arrests, and the facts surrounding the criminal matter for which Plaintiff was ultimately convicted of. Despite such detail, Plaintiff's excessive force claim sets aside three conclusory sentences respecting his arrest (ECF No. 9 at p. 16, ¶¶4-6). The paragraphs provide no detail, but rather express in a conclusory fashion that Defendant Shutters used "excessive force". Although purported injuries are identified, Plaintiff fails to allege any indication respecting the basis for concluding Defendant Shutters used greater force than would have been reasonably necessary to affect a lawful seizure. Defendant Shutters is left to guess as to the purported "unreasonableness" of his actions were in handcuffing the Plaintiff. As a result, there are no specific factual allegations respecting any actions from which Defendant can discern the existence of a Constitutional violation. Plaintiff's claim fails to meet Federal pleading standards for a Constitutional claim and should be dismissed.

B. Claim 2(b) unreasonable search and seizure: Defendant is entitled to qualified immunity as any search incident to the Plaintiff's arrest, was conducted pursuant to a Court Order and probable cause determination.

The second claim against Defendant Shutters appears to involve a violation of Plaintiff's Fourth Amendment rights, when Defendant Shutters "authorized" the collection of evidence from Plaintiff (ECF No. 9 at p. 27). Plaintiff describes the collection of evidence as a "rape kit", and which included being "searched naked, photographed naked for 4 (sic) separate 360 degrees (sic) photographs…and had his penis swabbed while a sit-in E.R. nurse (homosexual) watched" (ECF No. 9 at p. 27). Based on Plaintiff's description, it is assumed Plaintiff is referring to a search for non-testimonial identification pursuant to Colo.R.Crim.P. 41.1.

On August 28, 2015, Judge C. Michelle Brinegar of the District Court for Larimer County, Colorado, issued an Order for Non-Testimonial Identification (*See* Order, attached hereto as ***Exhibit A***) (the "Order")[3]. Pursuant to the terms of the Order, the Court found probable cause to believe the crime of sexual assault pursuant to C.R.S. §18-3-402(1)(h), a Class 3 Felony, had been committed by Plaintiff Anderson. Pursuant to the finding of probable cause, the Court authorized non-testimonial procedures, namely

[3] Generally, a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b), must be determined on the four-corners of the Complaint. ***SEC v. Goldstone***, 952 F.Supp.2d 1060, 1191 (N.M.Dist.2013) referring to ***Casanova v. Ulibarri***, 595 F.3d 1120, 1125 (10th Cir.2010). Exceptions to this requirement include documents referred to in the complaint if the documents are central to the plaintiff's claim…and matters of which a court may take judicial notice. ***Goldstone***, 952 F.Supp.2d at 1191, referring to ***Tellabs, Inc. v. Makor Issues & Rights, Ltd.***, 551 U.S. 308, 322 (2007). Materials outside the complaint can be considered under these exceptions, without converting the Motion to Dismiss to a Motion for Summary Judgment. The Defendants request this Court take judicial notice of the Order for Non-Testimonial Identification, attached as ***Exhibit A***.

digital images of tattoos on forearms, DNA Sample (Buccal Swab) and a male sexual assault kit, (***Exhibit A*** at p. 2).

Defendant Shutters is entitled to qualified immunity as to Plaintiff's claim for unreasonable search and seizure. Qualified immunity affords public officials immunity from suit and exists to "protect them from undue interference with their duties, and from potentially disabling threats of liability." ***Elder v. Holloway***, 510 U.S. 510, 514 (1994) citing ***Harlow v. Fitzgerald*** 457 U.S. 800, 806 (1982). It protects all governmental officials performing discretionary functions from civil liability as long as their conduct does not violate clearly established Constitutional rights of which a reasonable person would have known. ***Harlow,*** 457 U.S. at 818.

Qualified immunity is not only a defense to liability, it provides immunity from suit. ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985). "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." ***Siegert v. Gilley***, 500 U.S. 226, 232 (1991); *see* ***Ashcroft v. Iqbal***, 556 U.S. 662, 684 (2009). "These burdens include distraction of officials from their governmental responsibilities, the inhibition of discretionary decision making, the deterrence of able people from public service, and the disruptive effects of discovery on governmental operations." ***Hannula v. City of Lakewood***, 907 F.2d 129, 130 (10th Cir.1990). Courts should, therefore, resolve the purely legal question raised by a qualified immunity defense at the earliest possible state in the litigation. ***Medina v. Cram***, 252 F.3d 1124, 1127-28 (10th Cir. 2001); ***Albright v. Rodriguez***, 51 F.3d 1531, 1534 (10th Cir. 1995).

When a defendant pleads the defense of qualified immunity, a plaintiff bears a heavy two-part burden of proving (1) that the defendants' actions violated a constitutional right, and (2) that the right was clearly established at the time of the conduct at issue. ***Mick v. Brewer***, 76 F.3d 1127, 1134 (10th Cir.1996). To survive dismissal, the plaintiff must show that the right was "clearly established" in a "particularized" sense. ***Wilson v. Meeks***, 52 F.3d 1547,1552 (10th Cir. 1995) citing ***Anderson v. Creighton***, 483 U.S. 635, 640 (1987). "[F]or a right to be 'particularized,' there must ordinarily be a Supreme Court or Tenth Circuit decision on point, or 'clearly established weight of authority' from other courts." ***Wilson***, 52 F.3d at 1552 citing ***Medina v. City & County of Denver***, 960 F.2d 1493, 1498 (10th Cir.1992).

Here, Defendant Shutters obtained a Court Order respecting the collection of non-testimonial evidence from Plaintiff Anderson. The Court Order is explicitly based on the finding of probable cause that Plaintiff Anderson committed the crime of sexual assault (***Exhibit A*** at p.1). Plaintiff cannot establish that a right respecting a search and seizure pursuant to a Court Order, constitutes a clearly established Constitutional violation.

Likewise, because Plaintiff cannot establish a Constitutional violation, he fails to comply with Federal pleading standards pursuant to ***Twombly***. No entitlement to relief is identified in the Amended Complaint.

IV. CONCLUSION

WHEREFORE, Defendant Shutters respectfully requests (1) the Court grant his Motion and Dismiss Plaintiff's Amended Complaint with prejudice; (2) the Court find that he is entitled to qualified immunity, and; (3) the Court enter any other relief deemed just.

Dated: September 13, 2017

Respectfully Submitted

Duly Signed original in the file located at Hall & Evans, LLC

/s/ Mark S. Ratner

Mark S. Ratner, #38517
Hall & Evans, LLC
1001 Seventeenth Street, Suite 300
Denver, Colorado 80202-
Attorneys for Defendant Jason Shutters

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 13th day of September, 2017, I electronically filed the foregoing **DEFENDANT JASON SHUTTERS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT (ECF No. 9) PURSUANT TO FED.R.CIV.P. 12(b)(6)**, with the Clerk of Court using the CM/ECF system to the following:

Plaintiff:

Chayce Aaron Anderson, #175290
Arkansas Valley Correctional Facility
12790 Hwy. 96 at Lane 13
Ordway, CO. 81034

s/*Rochelle Gurule, Legal Assistant to*
Mark Ratner, Esq.
of Hall & Evans, L.L.C.