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 SECOND AMENDED COMPLAINT (ECF No.61) PURSUANT TO FED. R. CIV. P. 12(b)(1) and 12(b)(6)

Defendant Jason Shutters, through his Attorneys Hall & Evans, LLC, submits the following as his Motion to Dismiss Plaintiff's Second Amended Complaint (ECF No. 61), pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) as follows:

CONFERRAL

> Plaintiff is an incarcerated prisoner, and therefore no ability to properly confer respecting the relief requested in this Motion exists. Nonetheless, pursuant to CMA Civ. Practice Standard 7.1D, undersigned Counsel believes the deficiencies in Plaintiff's Second Amended Complaint, are not "correctable."

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 allegations against Defendant Shutters purport to be for claims of "unreasonable search and seizure" (ECF No. 61 at 21-22 ("Claim One")), "excessive force" (ECF No. 61 at 23-

24 ("Claim Two")), "Violation of the Uniform Youthful Offender Act" (ECF No. 61 at 25-27 ("Claim Three")), and "Intentional Infliction of Emotional Distress" (ECF No. 61 at 29 ("Claim Five")). The Second Amended Complaint also appears to set forth a claim involving "Due Process", although no specifics are provided in the Amended Complaint (ECF No. 61 at 29).

On December 13, 2017, this Court issued a Magistrate's Recommendation that claims Three, Four, and Six of Plaintiff's Second Amended Complaint, be dismissed (ECF No. 60). Generally, the Magistrate's recommendation is based on the Court's previous rulings dismissing the claims set forth in a previous iteration of Plaintiff's Complaint.

Defendant Shutters seeks dismissal of the claims against him[1]. In particular, the claim for unreasonable search and seizure should be dismissed as the procurement of non-testimonial evidence was conducted pursuant to a Court Order, including a finding of probable cause. In addition, the claim for excessive force should be dismissed as Plaintiff provides only conclusory allegations which fail to comply with Federal pleading standards and the standard enunciated in ***Bell Atl. v. Twombly***, 550 U.S. 544, 545 (2007). Furthermore, Defendant Shutters is entitled to qualified immunity.

Additionally, any claim for intentional infliction of emotional distress should be dismissed pursuant to the Colorado Governmental Immunity Act ("CGIA"). §§24-10-102, 24-10-105, 24-10-106(1), and 24-10-108, C.R.S. (2011); ***City of Colorado Springs v. Conners***, 993 P.2d 1167, 1171-72 (Colo.2000).

[1] The filing of this Motion to Dismiss is not intended as an "objection" or response to the Magistrate's Recommendation. Rather, this Motion is filed given the timing respecting the filing of a response to Plaintiff's Second Amended Complaint.

II. ARGUMENT

A. First Claim for Relief: Unreasonable Search and Seizure

1. Defendant Shutters is entitled to qualified immunity in respect to Plaintiff's First Claim for Relief, as any search incident to the Plaintiff's arrest, was conducted pursuant to a Court Order and a valid probable cause determination.

- **Elements**: The application of qualified immunity does not lend itself to a recitation of elements, as required by CMA Civ. Practice Standard 7.1D(1) & (2). Nonetheless, Defendant contends the Plaintiff has not overcome his burden of establishing that (1) 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), thereby entitling Defendant Shutters to qualified immunity.

The first 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. 61 at 21). Plaintiff describes the collection of evidence as a "M.S.A.K. examination" which apparently included being "stripped naked, searched naked, photographed naked for 4 (sic) separate 360 degrees (sic) photographs…and had his penis swabbed by Detective Neil, while a sit-in E.R. homosexual nurse physically watched" (ECF No. 61 at 21). 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, also termed a "male sexual assault kit."

On August 28, 2015, Judge C. Michelle Brinegar of the County Court for Larimer County, Colorado, issued an Order for Non-Testimonial Identification (*see* Court Order,

attached hereto as ***Exhibit A*** (the "Order")[2]; *see also* Affidavit for Court Order For Non-Testimonial Identification, attached hereto as ***Exhibit B***, and; Return of Court Order for Non-Testimonial Identification, attached hereto as ***Exhibit C***). The Order sets forth that 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, and that based on the finding of probable cause, the Court was authorizing the collection of non-testimonial evidence through various procedures, including execution of a male sexual assault kit (***Exhibit A*** at 2). As alleged in Plaintiff's Second Amended Complaint, the male sexual assault kit was administered on or about September 2, 2015 (ECF No. 61 at 21-22; ***Exhibit C*** at 1).

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 from performing discretionary functions from civil liability as long as their conduct

[2] 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***, as well as the Affidavit for Court Order for Non-Testimonial Identification, attached as ***Exhibit B***, and the Return of Court Order for Non-Testimonial Identification, attached as ***Exhibit C***).

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 stage 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, the Court issued an Order expressly authorizing the collection of non-testimonial evidence from Plaintiff Anderson, including execution of a "male sexual assault kit." Furthermore, the Court Order is explicitly based on a probable cause determination that Plaintiff Anderson committed the crime of sexual assault (***Exhibit A*** at 1). Plaintiff cannot establish that any actions taken pursuant to the Order, including the means and methods of executing the male sexual assault kit, were somehow unreasonable and in violation of any Constitutional right. Defendant Shutters is there entitled to qualified immunity for his actions.

2. Plaintiff's First Claim for Relief should also be dismissed as any such claim is not plead in anything other than a conclusory fashion.

- **Elements:** To state a claim, 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).

- **Elements Not Met:** Plaintiff does not allege in anything other than in a conclusory fashion, that the search incident to the Court's Order for Non-Testimonial Evidence, was somehow unreasonable.

"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)." ***Twombly,*** 550

U.S. at 555. At the pleading stage, it is not the defendant's or the Court's responsibility to guess at plaintiff's claims. ***Twombly, 550 U.S. at 555***. 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).

As argued above, the Plaintiff does not allege a Constitutional violation, as any search or seizure was conducted pursuant to a Court Order and a determination of probable cause. Merely arguing that Defendant Shutters violation the scope of the Court Order is conclusory, and therefore insufficient to overcome a Motion to Dismiss.

B. Plaintiff's Second Claim for Relief pertaining to excessive force, fails to set forth any allegations in anything other than a conclusory fashion.

- **Elements:** 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).

- **Elements Not Met:** Plaintiff's excessive force claim expresses in nothing but a conclusory fashion, that Defendant Shutters used "excessive force".

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 thirty-four-page Second 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 expresses in nothing but 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 (*see* ECF No. 61 at 23). 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.

The same argument applies as to Plaintiff's allegations respecting inhibiting "proper photographing of wounds for multiple hours", inhibiting "proper medical care by denying originally (sic) access to E.M.T.'s into police station", and "inhibited proper medical attention in the E.R., and convinced the doctor to deny subsequent medical attention." (ECF No. 61 at 24). All such allegations are conclusory, and there is no basis to discern any Constitutional violation or "credence to the claim of excessive force." (ECF No. 61 at 24).

C. Plaintiff's Third Claim for Relief should be dismissed, as per the Court's previous ruling.

Plaintiff's Third Claim for Relief, purports to set forth a claim for violation of the "Uniform Youthful Offender Act," and "Violation of Juvenile Rights" (ECF No. 61 at 25). These claims were previously dismissed by the Court as being "legally frivolous" (*see* ECF No. 60 at 7, citing ECF No. 17 at 9, and; ***Andrews v. Heaton***, 483 F.3d 1070, 1076 (10th Cir. 2007)) ("Judge Babcock previously dismissed this claim as legally frivolous because the statute cited by Plaintiff, 18 U.S.C. § 5038, did not provide a private right of action))[3]. Plaintiff admits as much in his Complaint, by generally stating: "There is no appropriate cure or remedy to these deprivations other than a Federal Civil Rights Lawsuit (sic)." No citation is provided in the Second Amended Complaint to any statute setting for a "Youthful Offender Act", "Violation of Juvenile Rights", or how any allegations set forth in the Third Claim for Relief, constitute an actionable violation of Plaintiff's Federal Civil or Constitutional Rights. The claim should be dismissed.

D. Plaintiff's Fifth Claim for Relief fails as a matter of law

1. Intentional Infliction of Emotional Distress[4]

Plaintiff's Fifth Claim for Relief, is entitled "Intentional Infliction of Emotional Distress" (ECF No. 61 at 29). To any extent Plaintiff intends on alleging a tort claim, any such claim is barred by application of the Colorado Governmental Immunity Act ("CGIA").

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[3] This Court is recommending this claim as set forth in the Second Amended Complaint, be dismissed. (*see* ECF No. 60 at 7 and ECF No. 62).

[4] Defendant Shutters seeks dismissal of any purported State law tort claim, pursuant to Fed.R.Civ.P. 12(b)(1). Pursuant to CMA Civ. Practice Standard 7.1D(c), Defendant Shutters seeks dismissal of any State law tort claim, pursuant to the Colorado Governmental Immunity Act, "CGIA", as there is no specific statutory waiver for any such claim. §§24-10-102, 24-10-105, 24-10-106(1), and 24-10-108, C.R.S. (2011); ***Conners***, 993 P.2d 1171-72 (Colo.2000). It is Plaintiff's burden to establish such a waiver.

The CGIA provides a grant of governmental immunity unless there is a specific statutory waiver. §§24-10-102, 24-10-105, 24-10-106(1), and 24-10-108, C.R.S. (2011); ***Conners***, 993 P.2d 1171-72 (Colo.2000). The issue of whether the CGIA waived governmental immunity as to a claim for relief is one of subject matter jurisdiction to be decided pursuant to C.R.C.P. 12(b)(1). ***Medina v. State***, 35 P.3d 443, 451-52 (Colo.2001). C.R.S. §24-10-108 of the CGIA requires the trial court to resolve all issues of governmental immunity before trial. ***Finne v. Jefferson Cnty. Sch. Dist. R-1***, 79 P.3d 1253, 1259 (Colo.2003). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff must demonstrate that governmental immunity was waived. ***Tidwell v. City and Cnty. of Denver***, 83 P.3d 75, 85 (Colo.2003). When jurisdictional facts concerning governmental immunity are in dispute, the trial court is required to hold an evidentiary hearing and enter findings of fact. *see* ***Trinity Broadcasting of Denver, Inc. v. City of Westminster***, 848 P.2d 916, 924 (Colo.1993). Where no evidence is disputed no hearing is needed. ***Tidwell***, 83 P.3d at 85-86.

To the extent the Second Amended Complaint is considered to have incorporated State law claims, any such claims are barred pursuant to the CGIA. In addition, Plaintiff makes insufficient allegations against Defendant Shutters to ever meet his obligation regarding any attempt to assert a claim grounded in willful and wanton behavior, enough to overcome the protections of the CGIA. *see* ***City of Lakewood v. Brace***, 919 P.2d 231, 236 (Colo.1996); C.R.S. §24-10-106(1); C.R.S. §24-10-110(5)(a) and (b); ***Moody v. Ungerer*****,** 885 P.2d 200, 205 (Colo.1994).

2. Due Process

- **Elements:** An essential principle of a due process claim is that a deprivation of life, liberty or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." ***Riggins v. Goodman***, 572 F.3d 1101 citing ***Cleveland Bd. of Educ. v. Loudermill***, 470 U.S. 532, 542 (1985**).**

- **Elements Not Met:** To any extent Plaintiff intends to allege a violation of his due process rights, any such claim should be dismissed as it fails to comply with Federal pleading standards pursuant to ***Twombly.***

Plaintiff's Fifth Claim for Relief references treatment that was "unconstitutional" and a violation of "due process", in addition to the purported claim of intentional infliction of emotional distress (ECF No. 61 at 29). To any extent Plaintiff intends to allege a violation of his due process rights, any such claim should be dismissed as it fails to comply with Federal pleading standards pursuant to ***Twombly***. An essential principle of a due process claim is that a deprivation of life, liberty or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." ***Riggins v. Goodman***, 572 F.3d 1101 citing ***Cleveland Bd. of Educ. v. Loudermill***, 470 U.S. 532, 542 (1985). "The Supreme Court has described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" ***Riggins***, 572 F.3d at 1108 citing ***Cleveland Bd. of Educ***., 470 U.S. at 542 and ***Boddie v. Connecticut***, 401 U.S. 371, 379 (1971).

Plaintiff provides no indication how he was purportedly deprived of an opportunity for a hearing, or how any actions by Defendant Shutters purportedly contributed to any such determination. ***Twombly.*** Additionally, Plaintiff provides no indication respecting

personally participation of any such actions. Since personal participation is a prerequisite to establishing a Constitutional violation, Plaintiff's attempts fail. ***Bennett v. Passic,*** 545 F.2d 1260, 1262 (10th Cir. 1976).

III. CONCLUSION

WHEREFORE, Detective Shutters, for the foregoing reasons, respectfully requests that the Court dismiss Plaintiff's Second Amended Complaint in its entirety, and for entry of any other relief deemed just and appropriate by this Court.

Dated this 28th day of December 2017.

s/ Mark S. Ratner
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ATTORNEYS FOR DEFENDANT JASON SHUTTERS

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 28th day of December 2017, I served via email the foregoing **DEFENDANT JASON SHUTTER'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO FED.R.CIV. P.12(b)(6)** to the following:

Plaintiff:

Chayce Aaron Anderson, #175290
Arkansas Valley Correctional Facility
12750 Hwy. 96 at Lane 13
Ordway, CO. 81034