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' REPLY IN SUPPORT OF 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 Reply In Support Of 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:

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" (ECF No. 61 at 29).

On December 13, 2017, this Court issued a Magistrate's Recommendation that the third claim for relief (as well as the fourth and sixth claims), be dismissed (ECF No. 60). On January 3, 2018, after the filing of this Motion to Dismiss, the Court adopted the Magistrate's Recommendation, dismissing the third claim for relief against Defendant Shutters (ECF No. 66 at 2).

Despite another opportunity to clarify the allegations of his Complaint, Plaintiff still offers nothing more than conclusory arguments. Furthermore, Plaintiff fails to offer any case law supporting his position. All the remaining claims against Defendant Shutters should therefore be dismissed.

II. ARGUMENT[1]

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 Defendant contends 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.

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

[1] On February 22, 2018, Plaintiff filed a pleading opposing Defendant Shutter's Motion to Dismiss (ECF No. 77). The pleading does not comply with the Court's Practice Standards with respect to addressing a motion to dismiss. Defendant Shutters, nonetheless, provides the following as an attempt to reply while at the same time complying with the Court's applicable practice standards.

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).

In his response, Plaintiff fails to provide the Court with any authority supporting the notion that the means and methods utilized to execute the male sexual assault kit, were somehow violative of his Constitutional rights. Rather, Plaintiff offers conclusory arguments such as "no reasonable-minded law enforcement officer would of (sic) thought it permissible to cause further injuries to an individual subjected to the mercies and whims of their captor, by intentionally executing a Court-Order outside the scope of the warrant itself." (ECF No, 77 at 2) (emphasis in original); "Defendant Shutters conducted the application of the Order unlawfully when he executed, or allowed the execution of this Order, to be performed in the actual, physical presence of an unauthorized member of the General Public" (ECF No. 77 at 3). The arguments are conclusory, as no case law or other support is provided for the statements, respecting how any actions were outside the scope of the valid Court order, including how application of the male sexual assault kit in the presence of a male nurse (ECF No. 61 at 12) was somehow "unauthorized." ***Wilson***, 52 F.3d at 1552. The arguments presented are nothing more than Plaintiff's statement of disfavor towards being arrested, searched, and subsequently convicted of sexual

assault. Plaintiff cannot, therefore, establish either (1) that the defendants' actions violated a constitutional right, or (2) that the right was clearly established at the time of the conduct at issue. ***Mick***, 76 F.3d 1134.

2. Plaintiff's first claim for relief should also be dismissed as any such claim is not pled 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.

The inability of Plaintiff to provide any proper argument or case law to overcome his burden with respect to qualified immunity, also supports the notion that his first claim for relief fails to comply with Federal pleading standards. ***Bell Atl. v. Twombly***, 550 U.S. 544, 555 (2007). Plaintiff offers nothing other than conclusory statements with respect to execution of the male sexual assault kit (*see* Exhibit A, ECF No. 63). No case law is provided supporting his argument that the collection of non-testimonial evidence pursuant to a valid Court Order, was somehow violative of the Fourth Amendment. Furthermore, no support is provided regarding the administration of the male sexual assault kit in the presence of a "homosexual nurse" (ECF No. 61 at 12) as somehow violating the Plaintiff's rights pursuant to the Fourth Amendment ("This analogy is heightened further when considering that the invasive and intrusive examination was performed in the visible sight

and presence of a homosexual." (ECF No. 77 at 5); ("Being exposed to a homosexual, an unauthorized member of the public to be present during a S.A.N.E. examination, physically watching Mr. Anderson be stripped naked, paraded around, and photographed naked, violated Mr. Anderson (sic) to his core belief structure." (ECF No. 61 at 12)). Plaintiff's complaint is not with respect to the collection of the non-testimonial evidence, but rather on *how* the evidence was collected. 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). However, Plaintiff provides only conclusory arguments in support, which are insufficient to overcome Defendant Shutters' Motion to Dismiss. ***Twombly***, 550 U.S. at 555.

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".

To overcome the Motion to Dismiss the Second Claim for Relief, Plaintiff merely refers to the allegations in his Complaint (ECF No. 77 at 9), and states in a conclusory

manner that the handcuffing was "overly aggressive" (ECF NO. 77 at 9). No case law is provided.

Factors to be considered when reviewing a complaint based on handcuffing and excessive force include the manner in which the Plaintiff was handcuffed. ***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). Plaintiff's thirty-four-page Second Amended Complaint recounts in lengthy detail an irrelevant history. However, despite such detail, Plaintiff still does not offer anything other than conclusory statements that Defendant Shutters used "excessive force" in the application of handcuffs. No proper argument or allegations are provided that Defendant Shutters used any 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, and as a result the Plaintiff's claim fails to meet Federal pleading standards.

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). These allegations are not addressed in Plaintiff's Response.

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

1. Intentional Infliction of Emotional Distress[2]

[2] 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

Plaintiff's Fifth Claim for Relief, is entitled "Intentional Infliction of Emotional Distress" (ECF No. 61 at 29). Any tort claim against Defendant Shutters, is barred by application of the Colorado Governmental Immunity Act ("CGIA"), absent an express waiver. Although Plaintiff engages in a recitation of purported "willful and wanton behavior", neither argument nor case law is provided in the response, respecting a waiver of governmental immunity. 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). To the extent the Second Amended Complaint is considered to have incorporated State law claims, any such claims are barred pursuant to the CGIA as Plaintiff has failed to overcome his burden.

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****.*

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

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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 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).

In response to the Motion to Dismiss, Plaintiff provides only rhetorical arguments with respect to a purported due process claim: "Was Mr. Anderson afforded reasonable access to either notice or opportunity for an appropriate hearing prior to the deprivations occurring?" (ECF No. 77 at 13). No indication is given how Plaintiff was purportedly deprived of an opportunity for a hearing, or how any actions by Defendant Shutters purportedly contributed to any such determination. ***Twombly.*** Plaintiff makes the statement that Defendant Shutters' actions were "related to a closed case" and "any reasonable minded detective would have known better…" (ECF No. 77 at 13). However, such allegations are conclusory and fail to address any alleged deprivation of life, liberty or property, the lack of notice or the lack of a hearing. Plaintiff also ignores the Order with respect to collection of non-testimonial evidence, based on a determination of probable cause (ECF No. 63, Exhibit A), as a means of satisfying any due process element.

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 12th day of March 2018.

s/ Mark S. Ratner
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ATTORNEYS FOR DEFENDANT
JASON SHUTTERS

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 12th day of March 2018, I served via email the foregoing **DEFENDANT JASON SHUTTER'S REPLY IN SUPPORT OF 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