FILED
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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JASON MEGGS, RYAN SALSBURY, et al.,

Plaintiffs,

v.

CITY OF BERKELEY, et al.,

Defendants.

/

Case No. C 02-0693 MHP

AMENDED MEMORANDUM AND ORDER

This action involves consolidated lawsuits against the City of Berkeley, the Berkeley Police Department, Captain William Pittman, Sergeant Cynthia Harris, Sergeant Wesley Hester, and Officers Bernard Allen, Matthew Meredith, Gary Romano, Roderick Roe, Kay Smith, Victoria Crews, and Jitendra Singh ("defendants") for actions taken during three Critical Mass bicycle protests in Berkeley on April 13, 2001, July 13, 2001, and August 10, 2001. The related complaints allege eight causes of action, including several federal civil rights claims under 42 U.S.C. section 1983 and a number of state claims. Defendants filed a motion for summary judgment on December 8, 2003. On December 16, 2003, at the request of plaintiffs' counsel, this court continued the hearing date for defendants' motion until February 23, 2004. On February 11, 2004, again at the request of plaintiffs' counsel, this court continued the hearing date a second time, setting a hearing date on March 15, 2004. According to the order granting this second continuance, plaintiffs were required to file their opposition papers no later than February 17, 2004, and there were to be "absolutely no further continuances."

Despite these explicit instructions, plaintiffs filed their opposition not on February 17, 2004, but instead on February 23, 2004. Moreover, in contravention of Local Rule 7-4(b), plaintiffs filed an opposition brief that totaled 98 pages without seeking prior leave of the court. In light of these circumstances, the court struck plaintiffs' opposition, deeming the matter unopposed and submitted on the papers. After denying the plaintiff's motion for reconsideration, the court now grants defendants' motion in part as unopposed.

Although the court strikes plaintiffs' opposition, which may seem on its face to be a harsh sanction, nevertheless the court reviewed the moving papers and videotape exhibits.[1] These reveal that the defendants' motion would have succeeded even had the court considered plaintiffs' opposition papers. In fact, even construing the facts in the light most favorable to the plaintiffs,[2] the plaintiffs' claims would have failed on all but one count.

REVIEW OF PLAINTIFFS' CLAIMS

Plaintiffs allege that the defendants violated their rights under the First, Fourth, Fifth, and Fourteenth Amendments. Defendants argue that they are entitled to qualified immunity on all counts. When assessing qualified immunity pursuant to a motion for summary judgment, courts first ask whether the facts demonstrate that the defendants violated the plaintiffs' constitutional rights. Valdez v. Rosenbaum, 302 F.3d 1039, 1043 (9th Cir. 2002); see also Saucier v. Katz, 533 U.S. 194, 201 (2001). If the plaintiffs' claims do not establish the violation of a constitutional right, a state public official is entitled to qualified immunity.[3] Nearly all of the plaintiffs' constitutional claims are meritless.

Plaintiffs' excessive force claims arising out of the August 10, 2001, protest are entirely without merit.[4] "[N]ot every push or shove, even if it may later seem unnecessary in [the] peace of a judge's chambers, violates the Fourth Amendment." Saucier, 533 U.S. at 209. The court has reviewed the relevant videotape evidence and observed nothing unreasonable in the officers' behavior; the officer's conduct involves only "pushes and shoves" that would be expected in regulating traffic flow during a bicycle protest, clearing the path for police vehicles and protecting

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fellow officers during citation and arrest procedures.[5] Even resolving all factual disputes in favor of the plaintiff, nothing about the officers' conduct approaches the minimum standard of unreasonableness required for a Fourth Amendment violation.

Plaintiffs' property damage claims are also meritless. Plaintiffs allege that a constitutional violation resulted from the disconnection of speaker wires from a loudspeaker and from the bending of a trailer hitch. Assuming that such damage occurred, plaintiffs fail to demonstrate a Fourteenth Amendment violation. Portman v. County of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993). Plaintiffs were not deprived of their property interest(s) in the wires or the trailer hitch. "A seizure of property . . . occurs when 'there is some meaningful interference with an individual's possessary interests in that property." Soldal v. Cook County, 506 U.S. 56, 72 (1992). Bending a bicycle trailer hitch and fraying the ends of speaker wires does not "meaningfully" interfere with plaintiffs' possessary interests in these items.

Plaintiffs' "false arrest" claims are equally unpersuasive. To prevail on a section 1983 claim for false arrest, plaintiffs must demonstrate that there was no probable cause to arrest them. Cabrera v. City of Huntington Park, 159 F.3d 374, 380 (9th Cir. 1998). The videotaped evidence submitted by the defendants demonstrates that officers had probable cause to arrest both relevant plaintiffs. Plaintiffs' allegations that their constitutional rights were violated by the officers' issuance of traffic citations for various traffic violations likewise do not state a constitutional violation.[6] Officers have authority to issue citations for behavior for which they would have had probable cause to arrest.[7] The videotape exhibits and the plaintiffs' own deposition testimony establish that the plaintiffs engaged in the behavior for which they were cited during the April 13 and July 13 demonstrations.[8]

Plaintiffs' First Amendment claims are likewise unavailing because all allegations are entirely conclusory. To establish a violation of the First Amendment, plaintiffs must show that "by [their] actions [the defendants] deterred or chilled [the plaintiffs'] political speech and such deterrence was a substantial or motivating factor in [the defendants'] conduct." Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999). Plaintiffs allege nothing to create a genuine issue for trial that demonstrates deterrence of their First Amendment activities. Nor can

they demonstrate a genuine issue of material fact that the defendants' motivation for their conduct was to deter exercise of the plaintiffs' First Amendment rights.

Finally, the plaintiffs' equal protection claims regarding supposed selective enforcement are unconvincing. To establish a constitutional claim of selective enforcement, the challenged police action must have "had a discriminatory effect and [been] motivated by a discriminatory purpose." Wayte v. United States, 470 U.S. 598, 608 (1985); United States v. Dumas, 64 F.3d 1427, 1431 (9th Cir. 1995) ("Equal protection is violated when the decision to prosecute is based upon impermissible factors such as race."). The evidence must show that an official chose to prosecute "at least in part 'because of,'not merely 'in spite of,' its adverse effects upon an identifiable group." Wayte, 470 U.S. at 610.[9] The decision to mail citations to plaintiffs was not based on discriminatory purpose, but on the availability of information at the time the officers reviewed their videotapes of the April 13 protest. Plaintiffs' equal protection claim is therefore untenable.

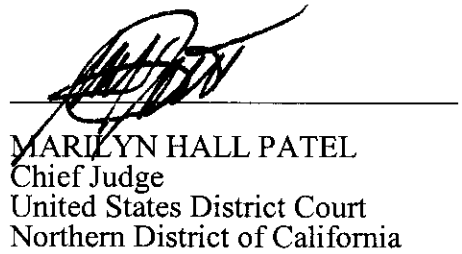
By contrast, one plaintiff states a single colorable claim of constitutional violation. Plaintiff Payne was cited by Officer Meredith during the July 13, 2001, ride for running a stop sign. After pulling Payne over, Meredith handcuffed him and asked for identification. Payne refused to give Meredith his name, so Meredith, instead of arresting Payne for failing to identify himself under California Penal Code section 853.5, removed Payne's wallet from his pocket to obtain the information he needed to issue the citation. See Defs.' Mot. for Summ. J., at 6. While the citation itself was supported by probable cause, the conduct of the officer may give rise to a constitutional claim for which Officer Meredith is not entitled to qualified immunity. By searching Payne's person for his identification in the absence of reasonable suspicion of danger,[10] Meredith may have exceeded the scope of a permissible search. Accordingly, Payne states a cognizable claim that Meredith may have violated Payne's rights under the Fourth Amendment.[11] Although Meredith would be entitled to qualified immunity for a reasonable mistake as to the legality of his actions, the court cannot conclude as a matter of law that this officer's mistake was a reasonable one.[12] Saucier, 533 U.S. at 206.

CONCLUSION

With the exception of Payne's claim for violation of his Fourth Amendment rights under 42 U.S.C. section 1983 against Sergeant Meredith, defendants' motion for summary judgment is GRANTED as to all claims. Payne's Fourth Amendment claim is DISMISSED.[13]

IT IS SO ORDERED.

Date: April 27, 2004



MARILYN HALL PATEL
Chief Judge
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ENDNOTES

1. The court even subjected itself to viewing the amateurish videos filmed by plaintiffs and their "crew". What they demonstrate is a disorganized bunch of roisters engaging in adolescent behavior, baiting and harassing the police. They appear to suffer more from self-inflicted immaturity and imagined injuries than from any mistreatment by the police. In fact, the response of the police is admirable given the repeated provocations.

2. It is well-established that on summary judgment "[f]actual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

3. If the plaintiff's claims do not establish the violation of a constitutional right, a public official is entitled to qualified immunity. Conn v. Gabbert, 526 U.S. 286 (1999). Qualified immunity ensures that when the official acts in an area where clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences. DeBoer v. Pennington, 206 F.3d 857, 864, (9th Cir. 2000), vacated on other grounds, City of Bellingham v. DeBoer, 532 U.S. 992 (2001), remanded, 287 F.3d 748 (9th Cir. 2002).

4. The use of force is excessive and therefore violates the Fourth Amendment when, balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests" with "the countervailing governmental interests at stake," the finder of fact determines the force used was unreasonable. Graham v. Connor, 490 U.S. 386, 396 (1989).

5. In addition to the light weight claims that the officers used excessive force in pushing plaintiffs out of the way, plaintiffs claim that the officers' improper use of sirens to clear intersections blocked by the protesters constituted excessive force. This claim is specious.

6. Payne and Valencia were cited at the scene, while Meggs and Salsbury were mailed citations after the protests.

7. Probable cause for arrest can be established through the collective knowledge of the officers at the scene of the arrest. Dubner v. City & County of San Francisco, 266 F.3d 959, 965-66 (9th Cir. 2001).

8. Under California law, a traffic citation is considered an "arrest," see Cal. Pen. Code § 853.5, for which an officer must have probable cause. Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1498 (9th Cir. 1996). "Probable cause exists when, at the time of arrest, the agents know reasonably trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense." Id. (citing Allen v. City of Portland, 73 F.3d 232, 237 (9th Cir. 1996)).

9. An attempt to make out a selective enforcement claim on the basis of race would also be unavailing. Payne, Valencia, Meggs, and Salsbury are of different ethnic backgrounds and do not constitute a racially identifiable group.

10. Meredith claims he felt that a chain hanging from Payne's belt attached to something in his pocket could have been used as a weapon. Defs.' Mot. for Summ. J., at 6 (emphasis added and noted in context of allegations).

11. California law states: "when a police officer observes a traffic violation and stops the motorist for the purpose of issuing a citation, a pat-down search for weapons as an incident to that arrest must be predicated on specific facts or circumstances giving the officer reasonable grounds to believe that a weapon is secreted on the motorist's person." People v. Superior Court of Los Angeles County, 7 Cal. 3d 186, 206 (1972).

12. Plaintiffs have also stated claims against the officers' supervisors. Under section 1983, a supervisor may be liable only if there exists either: "(1) his or her personal involvement in the constitutional deprivation or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc). In the absence of a constitutional violation, there is no supervisory liability. Because the court fails to find a constitutional violation with respect to the officers on the scenes of the April, July, and August demonstrations, the supervising officers not present at the scene but named as defendants are likewise entitled to summary judgment on plaintiffs' section 1983 claims.

Plaintiffs also set forth a number of state claims including malicious prosecution, assault, battery, negligence, property damage, intentional infliction of emotional distress, violation of California Civil Code section 51.7, and violation of California Business and Professions Code section 17200. California provides public officials and their governmental employers statutory qualified immunity for malicious prosecution, assault, battery, negligence, property damage, and intentional infliction of emotional distress. Cal. Govt. Code. §§ 815.2, 820.2, 820.4, 821.6. Plaintiffs' claim under California Business and Professions Code section 17200 fails because the governmental entity defendants are not businesses for purposes of section 17200 and the plaintiffs have alleged no facts that the individual officers fall into the required definition of "business." Cal. Bus. & Prof. Code § 17200. Nor can the conduct over which the plaintiffs attempt to assert this statute be "properly be called a business practice." Hewlett v. Squaw Valley Ski Corp., 54 Cal. App. 4th 499, 519 (Cal. App. 1997). With respect to the section 51.7 claim, plaintiffs have not presented evidence raising a triable issue of fact that any violence was perpetrated against them due to racial animus or their membership in a protected group set forth in section 51.7.

13. In light of the inattention of plaintiffs' counsel to deadlines and court directives, the court suggests that Payne consider refiling the Fourth Amendment claim with separate counsel who are better able to comply with the local rules and who possess a better sense of ethics. Compare Cove/Mallard Coalition v. U.S. Forest Serv., 67 Fed. Appx. 426, 428 (9th Cir. 2003) (noting the withdrawal of Hildes' *pro hac vice* admission to the District Court of Idaho for willfully attempting to conceal that a court reporter Hildes had hired was the mother of an appellant), with Decl. of Lawrence Hildes in Supp. of Pls.' Mot. for Leave to File Mot. for Reconsideration, ¶ 11 ("I intended no flouting of the rules, nor any disrespect to the court or the process. I have immense respect for both, and proud [sic] of the fact that I have never been sanctioned.").

This court does observe that this claim, though this order allows it to be renewed, appears *de minimis.*