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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

REGINA KELLY, ***et al.,***	*	
Plaintiffs,	*	
	*	
VS.	*	**CIVIL NO. W-03-CA-179**
	*	
JOHN PASCHALL, ***et al.,***	*	
Defendants.	*	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

This Report and Recommendation is respectfully submitted to the Court pursuant to 28 U.S.C. § 636 (b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, local Rules for the Assignment of Duties to United States Magistrates.

I. Background and Statement of the Case

Came for consideration Defendant Philip Crowell's Motion for Summary Judgment ("Defendant's Motion"). In prior Orders and Reports and Recommendations, the Court has recounted the procedural history and the factual background of the instant case in detail. This being the case, further detailed recitation is unwarranted. In sum, Plaintiffs filed suit pursuant to 42 U.S.C. §1983 and §1981 alleging

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violations of the Fourth and Fourteenth Amendments, as well as violations of Texas law, all arising out of actions of the South Central Texas Regional Narcotics Task Force ("the Task Force"). Plaintiffs allege that Defendants conspired to target African Americans in Hearne, Texas, for searches, seizures, arrest and prosecution. Plaintiffs claim that after the American Civil Liberties Union Foundation brought attention to the Task Force's actions, Defendant Paschall dismissed the charges against the substantial majority of the arrestees.

Philip Crowell ("Defendant") brings the instant Motion for Summary Judgment, contending that (1) Plaintiffs' depositions offer no evidence against him, (2) Plaintiffs offer no competent summary judgment evidence against him, (3) Defendant is entitled to qualified and official immunity, (4) the grand jury indictments break the chain of causation for false arrest, (5) Plaintiffs offer no competent evidence of a conspiracy, and (6) Plaintiffs allege mere negligence.

II. <u>Summary Judgment</u>

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to as a matter of law." FED. R. CIV. P. 56c). A material fact is one that is likely to reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is not genuine if the trier of fact could not, after an examination of the record, rationally find for the non-moving party. *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As such, the burden of demonstrating that no genuine issue of material fact exists lies with the party moving for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once presented, the Court must view the movant's evidence and all factual inferences from such evidence in a light most favorable to the party opposing summary judgment. *Impossible Electronics Techniques v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir.1982). Accordingly, the simple fact that the Court believes that the non-moving party will be unsuccessful at trial is insufficient reason to grant summary judgment in favor of the moving party. *Jones v. Geophysical Co.*, 669 F.2d 280, 283 (5th Cir.1982).

Once the Court determines that the movant has presented sufficient evidence that no genuine issue of material fact exists the burden of production shifts to the party opposing summary judgment. *Matsushita*, 475 U.S. at 586. The non-moving party cannot overcome its burden by way of a simple general denial, but must respond "by affidavit or as otherwise provided in th[e] rule, [and] must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). This does not mean that "the non-moving party must produce evidence that would be admissible at trial," *Celotex*, 477 U.S. at 324, but it does force the non-moving party "to [go] beyond the pleadings and by her own interrogatories . . . designate 'specific facts showing there is a genuine issue for trial.'" FED. R. CIV. P. 56(e); *Id.* Under such a standard the burden on the non-moving party to defeat summary judgment is not an especially difficult one to fulfill.

III. Discussion

A. Title 42 United States Code, Section 1983

Title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of law, causes another to be deprived of a federally protected constitutional right. Section 1983 provides, in

pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . . .

Section 1983 was promulgated to prevent ". . .[a government official's] [m]isuse of power, possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law." *Johnston v. Lucas,* 786 F.2d 1254, 1257 (5th Cir. 1986); *Whitley v. Albers,* 475 U.S. 312 (1986) (8th Amendment); *Davidson v. Cannon,* 474 U.S. 344 (1986) (14th Amendment); *Daniels v. Williams,* 474 U.S. 327 (1986) (14th Amendment). Section 1983, however, does not grant a cause of action for every action taken by a state official. *Whitley,* 475 U.S. at 319.

Only two allegations are required in order to state a cause of action under 42 U.S.C. § 1983. "First, the Plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo,* 446 U.S. 635, 640 (1980); *Manax v. McNamara,* 842 F.2d 808, 812 (5th Cir. 1988).

B. Plaintiffs' depositions

Defendant argues that Plaintiffs' claims are speculative because Plaintiffs have offered no direct testimony that Defendant Crowell violated their constitutional rights. Defendant Philip Crowell's Motion for Summary Judgment ("Defendant's Motion") at 2. In support of this argument, Crowell cites Plaintiffs' depositions, in which they all readily admit that they have no personal knowledge that Crowell violated their rights. *Id.* However, personal knowledge is not an element of any of Plaintiffs' claims, nor does Defendant

cite any authority for his assertion. The mere fact that the Plaintiffs do not have personal knowledge of the alleged wrongdoing by Defendant Crowell in no way mandates a conclusion that he is not liable, nor does it negate their causes of action.

C. Unsupported allegations

Crowell asserts that the Plaintiffs have offered no competent summary judgment evidence to support their claims against him. Defendant Motion at 2-5. Defendant also argues that Plaintiffs' allegations are conclusory and without evidentiary support. *Id* at 4-5. Defendant Crowell, a Task Force officer during the relevant time period, worked with informant Derrick Megress on a number of controlled purchases of drugs. Megress Aff. ¶ 11. Megress alleges that Task Force members wanted to arrest people for dealing in at least four grams of cocaine, preferably powder. *Id* at ¶ 12. Defendant Crowell taught him how to add baking soda, white flour, or some other white powder to crack cocaine to make it appear to be powder cocaine. *Id.* Megress also states that Crowell threatened him many times during the investigation. *Id* at ¶ 16. Megress recounts one occasion on which Crowell slapped him in the face and yelled obscenities at him because he had purchased bogus drugs. *Id.* Megress also claims that Crowell pointed a pistol at his head in an effort to intimidate him. *Id.* On another occasion, Crowell and Defendant Hendrix are alleged to have brandished a rifle before Megress and discussed how the bullets would explode inside him if they were to shoot him. *Id.* After the investigation ended, Megress met with Hendrix and Crowell. *Id* at ¶ 20. They reviewed the surveillance tapes and told him what to say about each tapes' events, "even though nothing was on the tape and they knew the deals had not actually happened." *Id.* These statements constitute direct evidence of Crowell's participation in the alleged conspiracy, and indicate that Crowell knew Megress was an unreliable informant.

Plaintiffs also offer competent summary judgment evidence of disproportionate arrests of African Americans by the Task Force that Garney commanded. *See* Dwight Steward, Expert Report (Sept. 10, 2004)(Plaintiff's Opposition at Exhibit 27); Dwight Steward, Expert Report (Jan. 10, 2005)(Plaintiff's Opposition at Exhibit 29); Katherine Beckett, *Race and Drug Law Enforcement in Robertson/Limestone Counties* (Jan. 10, 2005)(Plaintiff's Opposition at Exhibit 28). These statistical analyses are also probative of Defendant Crowell's alleged discriminatory intent. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997).

D. Megress's affidavit

Defendant argues that the Megress's Affidavit counters the testimony he offered at the Corvian Workman trial, and is offered solely to defeat summary judgment. Defendant's Motion at 4-5. In the Fifth Circuit, such contradictory sworn testimony is not competent summary judgment evidence when offered without explanation. *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 233, 228 (5th Cir. 1984); *S.W.S. Erectors, Inc. v. Interfax, Inc.*, 72 F.3d 489, 495-96 (5th Cir. 1996); *Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 482 (5th Cir. 2002).

In his deposition in the instant case, Megress explained the contradictions between his testimony at the Corvian Workman trial and his affidavit:

Q: Have you always testified truthfully under oath?
A: No.
Q: When did you not testify truthfully under oath?
A: When I was working with Paschall.
Q: When you were a confidential informant?
A: Yes.
Q: The best I know you only testified under oath one time in connection with that, is that correct?
A: Yes, at the Corvian Workman trial.
Q: That's the Corvian Workman trial?

A: Yes.
Q: And you lied under oath at that trial?
A: Well, I really wouldn't say I was just lying, but I had to tell what they wanted me to say, because I was scared. I just did what I felt they wanted me to do. I said what I thought they wanted me to say, yes.
Q: Well, did you say things when you testified that you knew were not the truth?
A: Yes.
. . . .
Q: Yeah, but do you remember whether that involved one or two lies, or do you think there was more than that?
A: I really can't remember that. That was a few years ago.
Q: You can't remember?
A: I mean, I can't tell you, because I would have to just know the whole story. I know that I did lie for them. If you was to bring it, I could tell you what was true and what was not true.

Megress Dep. at 26-28 (Feb. 13, 2004).

While Defendant argues that the affidavit was prepared solely to defeat the Defendants' Motions for Summary Judgment, the Court notes that the Megress deposition (February 13, 2004) and affidavit (January 7, 2004) in the instant case actually *predate* the filing of the Defendants' Motions for Summary Judgment. As required by applicable case law, Megress does offer a plausible explanation for the discrepancy: that he lied out of fear of the Defendants. *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 233, 228 (5th Cir. 1984); *S.W.S. Erectors, Inc. v. Interfax, Inc.*, 72 F.3d 489, 495-96 (5th Cir. 1996); *Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 482 (5th Cir. 2002). Additionally, Megress is not a party to this lawsuit, and does not stand to benefit from its outcome. *Lane v. Celotex Corp.*, 782 F.2d 1526, 1531 (11th Cir. 1986). These circumstances distinguish the instant case from those in support of Defendant's argument.

Plaintiffs candidly admit that Megress's inconsistent testimony can be attributed, in part, to his "lack of credibility, reliability, or mental capacity." Plaintiff's Sur-Reply in Opposition to Murray Agnew's Motion for Summary Judgment at 5-6. The Court has previously commented on the apparent lack of

veracity of Megress's statements, and need not comment further. It is not the place of this Court to substitute its assessment for that of the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The Plaintiffs have presented important issues of material fact requiring resolution by a jury.

E. Qualified immunity and official immunity

Qualified immunity is not merely a defense to liability, but a shield from suit. *Mitchell v. Forsyth*, 475 U.S. 511, 526 (1985). The determination of whether qualified immunity is applicable to any defendant is initially determined by the Court as a matter of law. The issue goes to the jury only if disputed fact issues must be resolved. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

A public official is entitled to qualified immunity "unless it is shown by specific allegations that he violated clearly established constitutional law." *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992). In making this determination, the Court undertakes a two-step analysis. *Duckett v. City of Cedar Park*, 950 F.2d 272, 278 (5th Cir. 1992). First, the Court determines whether the plaintiff has "stated a violation of rights secured by the Constitution." *Salas*, 980 F.2d at 305; *see also Siegert v. Gilley*, 501 U.S. 65 (1991). Only if the plaintiff has crossed this threshold, does the Court move to the second stage of the analysis: whether the defendant's conduct was objectively reasonable. *Salas v. Carpenter*, 980 F.2d 299, 305-06 (5th Cir. 1992). In making this determination, "the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to immunity." *White v. Taylor*, 959 F.2d 539, 544 (5th Cir. 1992). The qualified immunity standard is broad enough to encompass mistakes in judgment by protecting "all but the plainly

incompetent or those who knowingly violate the law." *Hunter*, 502 U.S. at 229, *quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986).

To support a federal civil rights conspiracy claim, a plaintiff must allege facts that suggest: 1) an agreement between a private party and state actors to commit an illegal act, and 2) an actual deprivation of constitutional rights. *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994.), *cert. denied*, 513 U.S. 868 (1994) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

As discussed in the Court's Order of October 30, 2003, the Defendants are alleged to have conspired and been involved in the development and execution of the policy of purposely and selectively targeting innocent African American residents in Hearne for arrest and prosecution, and of using an unreliable informant to support the prosecutions. The Defendants are also accused of threatening and coercing the informant, Derrick Megress, into concocting cases against the Plaintiffs despite their knowledge of Megress's drug use and mental problems. Plaintiffs allege that the Defendants concealed Megress's drug use from the grand jury.

Crowell asserts that Plaintiffs have failed to offer competent summary judgment evidence that overcomes his qualified immunity. The Megress affidavit alone reveals the existence of genuine issues of material fact as to the applicability of qualified immunity to the Defendant. As such, Defendant's qualified immunity defense must be decided by a jury.

Defendant also argues that he is entitled to the Texas equivalent of qualified immunity–official immunity. Official immunity is available to state actors who perform their duties in good faith. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Good faith is an objective test of reasonableness. *Id* at 656. Because, as discussed *infra*, vital issues of material fact exist as to Defendant's

actions, the Court is unable to determine if his behavior was reasonable. The jury must decide the validity of Defendant's immunity defenses.

F. Grand jury intermediary

Defendant argues that the intermediate decision of the grand jury breaks the causal chain for false arrest, and insulates the Defendant from suit. The Court has addressed this issue in prior Reports and Recommendations, and the analysis as to Defendant Crowell reaches the same result. The parties contest the nature of evidence presented to the grand jury, and important questions of fact remain for the jury as to the veracity of information presented. If a grand jury is deliberately presented with false information to obtain an indictment, an independent intermediary defense will fail. *See Miller v. Riser*, 84 Fed. Appx. 417, 418 (5th Cir. 2003); *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988).

G. Negligence

Plaintiff argues that "The majority of Plaintiffs' allegations are essentially allegations of purported negligence (i.e., something could have been done a different way, [D]efendants should have used different equipment, etc.)." Defendant's Motion at 8-9 (parenthetical in original). While Defendant does not specify which allegations to which he refers, Plaintiff's specific allegations and summary judgment evidence concerning Defendant's conduct with the Task Force raise material factual disputes as to conduct that, if proven, would far surpass the bounds of negligence. Such decisions are the province of the jury.

F. Intracorporate conspiracy

Defendant Crowell also argues that Plaintiff's conspiracy allegations are meritless because a governmental agency cannot conspire with its own officers. *See Hilliard v. Ferguson*, 30 F.3d 649 653 (5th Cir. 1994). Therefore, Defendant asserts, he could not have conspired with other Robertson County

officials as a matter of law. However, the alleged conspiracy was not the product of a single entity. The Court has previously held that the South Central Texas Narcotics Task Force ("the Task Force") is a creation of Limestone and Robertson Counties. Order of October 30, 2003 at 32-33. The Task Force officers acted as representatives of both counties; thus, any conspiracy amongst the officers cannot be said to be the product of a single governmental agency. *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994); *Crawford v. Commonwealth of Pennsylvania*, 2003 WL 22169372, *11 (M.D. Pa. 2003).

IV. Recommendation

After thoroughly reviewing the record, the undersigned recommends that Defendant Crowell's Motion for Summary Judgment be **DENIED.**

The Defendant may wish to file objections to this Report and Recommendation. Failure to file written objections to these findings and recommendations within ten (10) days from the date of its receipt shall bar an aggrieved party from receiving a *de novo* review by the District Court of the findings and recommendations contained herein, *see* 28 U.S.C. Section 636(b)(1)(C), and shall bar an aggrieved party except upon grounds of plain error from attacking on appeal the unchallenged proposed factual findings and legal conclusions accepted by the District Court. *See Douglas v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

SIGNED this 14th day of April, 2005.

JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE