IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Tarahawk Von Brinken, Plaintiff, v. City of Tucson, et al., Defendants.	No. CV-14-02148-TUC-JAS **ORDER**

Pending before the Court are the parties' cross-motions for partial summary judgment.[1] For the reasons stated below, the motions are granted in part and denied in part.

STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).[2] A fact is "material" if, under the

[1] Because the briefing is adequate and oral argument will not help in resolving this matter, oral argument is denied. *See Mahon v. Credit Bureau of Placer County, Inc.*, 171 F.3d 1197, 1200-1201 (9th Cir. 1999).

[2] Unless otherwise noted by the Court, internal quotes and citations have been omitted when quoting and citing cases throughout this Order.

applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* Thus, the "mere scintilla of evidence" in support of the nonmoving party's claim is insufficient to defeat summary judgment. *Id.* at 252. However, in evaluating a motion for summary judgment, "the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

BACKGROUND

At approximately 10:00 p.m. on 6/14/13, Plaintiff met his friend Aaron Graves ("Graves") after work, and they began driving westbound down Speedway Boulevard ("Speedway"). The friends were driving in separate cars down Speedway; Graves was driving his car followed by Plaintiff in his own car.

Unbeknownst to Plaintiff, Graves did not have his headlights on as he proceeded on Speedway. A Tucson Police Department ("TPD") Officer (James Michael Voss "Voss") spotted both Plaintiff and Graves as they were driving on Speedway. Voss noticed that Graves did not have his headlights on, and that Plaintiff had "non-DOT"[3] lights on his car. As Graves's unlit headlights at 10:00 p.m. obviously presented a greater risk than Plaintiff's non-DOT lights, Voss decided to perform a traffic stop on Graves, but did not make any attempt to stop Plaintiff.

Voss did not make any signal whatsoever (audible, visual, or otherwise) to Plaintiff to pull over and stop his car. However, Voss signaled to Graves to pull over and stop his car. As such, Graves pulled into the parking lot of the Lucky Strike Bowl ("Bowl") on Speedway followed by Voss. Seeing that his friend was stopped by the TPD, Plaintiff also pulled into the parking lot of the Bowl to wait for his friend. At some point while Voss was dealing with Graves, Plaintiff walked over to Graves's car to see what was going on. However, Voss told Plaintiff to go back to his car as he was not

[3] Voss's reference to "non-DOT" lights appears to pertain to lights on Plaintiff's car that he thought did not comply with Department of Transportation regulations.

finished with Graves, and Plaintiff then proceeded back to his car to wait for his friend. Shortly thereafter, Voss walked over to Plaintiff who was still standing next to his own car in the Bowl parking lot. Voss asked to see Plaintiff's driver's license ("License"). Plaintiff asked why as he did nothing wrong, he simply voluntarily pulled into the Bowl parking lot to wait for his friend. Voss explained that he had non-DOT lights on his car, that he was required to show his License to him, and that if he failed to show his License to him, he would be arrested. Plaintiff disagreed with Voss, and refused to show Voss his License.

As Voss was about to arrest Plaintiff for his refusal to display his License, TPD Officer Richard A. Legarra ("Legarra")[4] pulled into the Bowl parking lot. Legarra assisted Voss in his arrest of Plaintiff. Voss cited and relied upon A.R.S. § 28-1595(B) as his authority to arrest Plaintiff. Plaintiff was placed in handcuffs, searched, and his wallet was removed which contained his License. A search of Plaintiff did not find any weapons or illegal contraband, and upon running a criminal check after obtaining Plaintiff's License, it was revealed that Plaintiff had no outstanding criminal charges or related issues. While Plaintiff continued to be under arrest and held before the officers, Legarra learned of the pertinent facts and authority Voss relied upon for the arrest of Plaintiff. Both Voss and Legarra discussed the arrest of Plaintiff that night, and Legarra "distinctly remember[s] that we both came to the conclusion that the arrest was 100 percent lawful." *See* Doc. 79-3 at p. 2. Plaintiff was placed in Voss's patrol car, transported to jail that night, and was released the next morning.

Thereafter, Plaintiff pled guilty to violating A.R.S. § 28-1595(B), but the guilty plea was vacated and the case was dismissed after Plaintiff successfully completed a diversion program.[5]

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[4] Shortly before he arrived on the scene, Legarra had received a request for back up from Voss.

[5] Both parties mention this vacated plea and dismissal, but do not argue that this has any legal bearing on the issues currently before the Court.

DISCUSSION

The Merits of Counts One and Seven as they Pertain to Voss and Legarra

Currently before the Court are the parties' cross-motions for partial summary judgment only as to Count One ("42 U.S.C. § 1983 Unlawful Arrest and Detention in Violation of the . . . [U.S.] Constitution") and Count Seven ("Common Law False Imprisonment") of the First Amended Complaint ("Complaint"). As the record reflects, the crux of evaluating the merits of these two interwoven claims is whether there was probable cause to arrest Plaintiff. Defendants argue that as there was probable cause to arrest Plaintiff on the night in question, Counts One and Seven must be dismissed. In contrast, Plaintiff argues that as probable cause did not exist for Plaintiff's arrest, summary judgment must be granted in his favor as to Voss and Legarra. As the Court finds that there was no probable cause for Plaintiff's arrest, summary judgment shall be granted in favor of Plaintiff as to Voss and Legarra.

Title 42 U.S.C. § 1983 states that "[e]very person who, under color of [state law] . . . subjects . . . any citizen of the United States . . . 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 . . . " The "Fourth Amendment, applicable to the states through the Fourteenth Amendment, prohibits an officer from making an arrest without probable cause . . . Probable cause exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime." *Mackinney v. Nielsen*, 69 F.3d 1002, 1005 (9th Cir. 1995). "To prevail on [a] § 1983 claim for false arrest and imprisonment, [plaintiff must] demonstrate that there was no probable cause to arrest him." *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998); *see also Slade v. City of Phoenix*, 112 Ariz. 298, 300 (1975) ("False imprisonment . . . [is] the detention of a person without his consent and without lawful authority . . . The essential element necessary to constitute . . . false imprisonment is unlawful detention. A detention

which occurs pursuant to legal authority . . . is not an unlawful detention.").

As referenced above, Voss noticed that Plaintiff had non-DOT lights while Plaintiff was driving down Speedway. However, Voss only took action to pull over Graves. Nevertheless, after Plaintiff had voluntarily pulled into the Bowl parking lot, Voss approached Plaintiff to investigate regarding the non-DOT lights as he believed they violated A.R.S. § 28-921(A)(1),[6] and requested to see Plaintiff's License which he was required to display to Voss as mandated by A.R.S. § 28-3169.[7] Voss's actions in approaching and investigating the non-DOT lights and requesting Plaintiff's License were reasonable and legally proper. When Plaintiff refused to show Voss his License, Plaintiff violated A.R.S. § 28-3169 (A). However, a violation of § 28-3169(A) (as well as § 28-921(A)(1)) is only a civil traffic violation, and does not subject one to arrest for criminal conduct. *See* A.R.S. § 28-121(A) and (B).[8]

Voss relied on A.R.S. § 28-1595(B) as his authority to arrest Plaintiff for failing to display his license. Subsection 1595(B) states in relevant part: "After stopping as

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[6] § 28-921(A)(1) states in part: "A person shall not: 1. Drive or move and the owner shall not knowingly cause or permit to be driven or moved on a highway a vehicle or combination of vehicles that: (a) Is in an unsafe condition that endangers a person. (b) Does not contain those parts or is not at all times equipped with lamps and other equipment in proper condition and adjustment as required in this article. (c) Is equipped in any manner in violation of this article. 2. Do an act forbidden or fail to perform an act required under this article."

[7] § 28-3169 states in part: "A. A licensee shall have a legible driver license in the licensee's immediate possession at all times when operating a motor vehicle. On demand of . . . a police officer . . . a licensee shall display the license. B. A person who is served a complaint for violating this section is not responsible if the person produces in court or the office of the police officer or field deputy or inspector of the department a legible driver license or an authorized duplicate of the license issued to the person that was valid at the time of the alleged violation of this section."

[8] § 28-121 states in part: "A. A person who violates a provision of this title or who fails or refuses to do or perform an act or thing required by this title is guilty of a class 2 misdemeanor, unless the statute defining the offense provides for a different classification. This subsection does not apply to any provision or requirement of chapter 3 . . . or 8 . . . of this title. B. A violation of or failure or refusal to do or perform an act or thing required by chapter 3 . . . or 8 . . . of this title is a civil traffic violation unless the statute defining the violation provides for a different classification." A review of Title 28 reflects that § 28-3169(A) falls under Chapter 8 of Title 28, and § 28-921(A)(1) falls under Chapter 3 of Title 28, and these statutory provisions do not provide for a different classification.

required by subsection A of this section, the operator of a motor vehicle who fails or refuses to exhibit the operator's driver license as required by § 28-3169 . . . is guilty of a class 2 misdemeanor." Subsection 1595(A) states in relevant part: "The operator of a motor vehicle who knowingly fails or refuses to bring the operator's motor vehicle to a stop after being given a visual or audible signal or instruction by a peace officer . . . is guilty of a class 2 misdemeanor." The undisputed facts show that Plaintiff was never given a "visual or audible signal" by Voss to stop his car. The undisputed facts also show that Plaintiff never "knowingly fail[ed] or refus[ed]" to bring his vehicle to a stop at the direction of Voss. Plaintiff voluntarily pulled into the parking lot of the Bowl, and Voss approached him and requested to see his License while Plaintiff was standing next to his own car in the parking lot. While Plaintiff knowingly refused to show his License to Voss, this was only a violation of § 28-3169(A) which is a civil traffic violation. Plaintiff's conduct did not constitute a violation of § 28-1595(B), which, unlike § 28-3169(A), is a "class 2 misdemeanor" that subjects one to arrest. *See* A.R.S. § 13-3883 (allowing warrantless arrests where there is probable cause to believe a felony, misdemeanor, or petty offense has been committed in the presence of a police officer).

As the undisputed facts show that Plaintiff never "knowingly fail[ed] or refus[ed]" to stop his car after being given a "visual or audible signal" by Voss, there was no probable cause to arrest Plaintiff for a violation of § 28-1595(B). Furthermore, as noted above, while Plaintiff continued to be under arrest and held before the officers, Legarra learned of these undisputed facts and authority Voss relied upon for the arrest of Plaintiff. Both Voss and Legarra "both came to the conclusion [that night] that the arrest was 100 percent lawful." That same night, Plaintiff was arrested, handcuffed, placed in Voss's patrol car, and transported to jail. In light of the foregoing, summary judgment is granted in favor of Plaintiff as to Counts One and Seven as they pertain to both Voss and Legarra.

In addition, given the undisputed material facts and clear language of the authority discussed above, the law was clearly established such that no reasonable officer could believe there was probable cause to arrest Plaintiff on the night in question; thus, Voss

and Legarra are not entitled to qualified immunity as to Counts 1 and 7. *See Demuth v. County of Los Angeles*, _ F.3d _, 2015 WL 4773429 (9th Cir. 2015) ("[Qualified immunity] protects government officials from suits for damages unless their actions violated clearly established statutory or constitutional rights of which a reasonable person would have known . . . [An officer] can only be liable if every reasonable official would have understood that arresting [plaintiff] violated her Fourth Amendment rights . . .While the law must be unambiguous to overcome qualified immunity, that doesn't mean that every official action is protected . . . unless the very action in question has previously been held unlawful . . . [O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances . . . This is especially true in the Fourth Amendment context, where the constitutional standard—reasonableness—is always a very fact-specific inquiry . . . Having no reasonable basis for believing he was authorized to arrest [plaintiff], [Officer] Li is not entitled to qualified immunity.").

Municipal Liability

Plaintiff argues that the City of Tucson ("City") is liable for the false arrest and imprisonment of Plaintiff in this case as it failed to properly train and supervise officers, and improperly hired unfit officers that led to the violations in this case. Defendants argue that Plaintiff has failed to introduce any evidence creating a material issue of fact showing that the City of Tucson is liable for false arrest and imprisonment, and therefore Counts 1 and 7 must be dismissed as to the City of Tucson. The Court agrees.

There is no *respondeat superior* liability under § 1983. To establish municipal liability, Plaintiff must show that the alleged constitutional violation was attributable to some official policy or custom of the government entity. *See Larez v. City of Los Angeles*, 946 F.2d 630, 645 (9th Cir. 1991). In *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), the Court held that local governmental entities could be held liable under §1983 for deprivations of federal rights. However, municipalities can not be held liable pursuant to the doctrine of *respondeat superior*. *See id.* at 691. Municipal liability therefore can not be imposed "vicariously on government bodies

solely on the basis of an employer-employee relationship with a tortfeasor." *Id.* at 692. A municipality may be held liable only if the constitutional violation was caused pursuant to an "official policy" of the municipality. This requirement is "intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinatti*, 475 U.S. 469, 480 (1986).

A Plaintiff suing under §1983 may establish municipal liability in the following ways:

> First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity . . . Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy . . . Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it.

See Gillette v. Delmore, 979 F.2d 1342, 1346-1347 (9th Cir. 1992); *see also Trevino v. Gates*, 99 F.3d 911 (9th Cir. 1996); *Christie v. Iopa*, 176 F.3d 1231 (9th Cir. 1999).

A municipality can also be held liable based on inadequate training and supervision of its officers reflecting deliberate indifference to constitutional violations. *See City of Canton v. Harris*, 489 U.S. 378, 387 (1989). However, "[n]either state officials nor municipalities are vicariously liable for the deprivation of constitutional rights by employees [based on a failure to train or supervise] . . . Rather, as to a municipality, the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Flores v. County of Los Angeles*, 758 F.3d 1154, 1158 (9th Cir. 2014). "This means that [a plaintiff] must demonstrate a 'conscious' or 'deliberate' choice on the part of a municipality in order to prevail on a failure to train claim . . . As to an official in his individual capacity, the same standard applies—[a plaintiff] must show that [a supervisory officer] was deliberately indifferent to the need to

train subordinates, and the lack of training actually caused the constitutional harm or deprivation of rights." *Id.* at 1158-1159. Thus, "[u]nder this standard, [a plaintiff] must [introduce] facts to show that the [municipality or pertinent supervisory officers] disregarded the known or obvious consequence that a particular omission in their training program would cause [municipal] employees to violate citizens' constitutional rights." *Id.* at 1159.

In addition, "[n]egligent hiring or supervision is proscribed under *Monell* but such negligence, as in all *Monell* actions, must be the proximate cause of the injuries suffered. Pointing to a municipal policy action or inaction as a 'but-for' cause is not enough to prove a causal connection under *Monell*. Rather, the policy must be the proximate cause of the section 1983 injury." *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996). "Traditional tort law defines intervening causes that break the chain of proximate causation . . . This analysis applies in section 1983 actions . . . An unforeseen and abnormal intervention . . . breaks the chain of causality, thus shielding the defendant from [section 1983] liability . . . A policy [is] a proximate cause . . . if intervening actions were within the scope of the original risk and therefore foreseeable." *Id.*

In support of his claim that the City is liable due to inadequate training and supervision, Plaintiff cites to the fact that the City stopped doing yearly performance reviews of its police officers back in 2009 due to budget restrictions. Plaintiff argues that national police organizations recognize that yearly performance reviews are a useful tool in identifying problems with individual officers, and taking appropriate actions such as additional training or discipline. As to Voss, Plaintiff cites to a 2007 annual performance review ("Evaluation") and a sustained 2007 Internal Affairs Investigation Report ("Report") where Voss received a "below standards" rating as to "General Orders" covering the period from 12/13/06 to 12/12/07. *See* Doc. 78 at p. 9. As to the Report referenced in the Evaluation, the Report pertains to a 4/4/07 incident where Voss was involved in a "high risk traffic" stop of an individual who stole a 2000 Ducati Supersport motorcycle, and notes that "Voss did not deescalate his behavior and behave in a

professional manner consistent with guidelines of the [TPD]." *Id.* at p. 16. As a result, Voss was suspended for a period of 10 hours without pay. *Id.* The Evaluation notes that these performance issues were brought to Voss's attention, and addressed inasmuch as Voss was disciplined and also temporarily transferred to another assignment; it also notes that "[s]ince his [new] assignment . . . Officer Voss has been found to be in compliance with General Orders and has not had any further issues involving non-compliance." *Id.* at p. 10. In addition, the Evaluation as a whole is good as it concludes that "Voss . . . overall meets standards [of a police officer], and that [w]ithout a doubt . . . [Voss would] definitely have been rated an overall exceeds [police officer] standards [but for the one below standards rating] . . . Voss has a strong commitment to do what is right . . . It is my opinion that Officer Voss is a person of strong character and a person of integrity. I have found that he treats people with empathy and compassion. He understands that people's problems are important and they deserve excellent police service. Officer Voss demonstrates service orientation through his dedicated service to the agency and to people." *See* Doc. 78 at pp. 12-13. Plaintiff has failed to create a material issue of fact showing that the cessation of annual reviews in 2009, combined with performance issues Voss had many years ago, reflect inadequate training and supervision amounting to deliberate indifference to citizens' constitutional rights. *See Flores*, 758 F.3d at 1158-59.

Plaintiff also argues that the City is liable for false arrest and imprisonment as it was negligent in the hiring of Voss. Plaintiff cites to portions of Voss's deposition testimony where he states that he was in combat situations while he was deployed in Iraq from March of 2003 to March of 2004, that he was told by a counselor that he had Post-Traumatic Stress Disorder ("PTSD"), and that the City never inquired or learned about the PTSD when Voss was hired. However, Voss's deposition also reflects that: the City hired Voss as a police officer in 2000 (prior to his combat in Iraq from 2003 to 2004); the PTSD pre-dated his combat experience; and the counseling treatment and PTSD issues stemmed from the death of Voss's son in 1992. Based on the foregoing, Plaintiff has failed to create a material issue of fact that the City negligently hired and supervised Voss

such that it proximately caused the false arrest and imprisonment of Plaintiff. Thus, summary judgment is granted in favor of the City as to the false arrest and imprisonment claims.

Lastly, the Court notes that Plaintiff named TPD Officers Murphy and O'Hara in the Complaint, and that Defendants moved for summary judgment as to the false arrest and imprisonment claims as to these Defendants. Plaintiff did not introduce any specific facts as to Murphy and O'Hara showing that they had any connection whatsoever to the false arrest and imprisonment claims in this case, and Plaintiff appears to concede that they are properly subject to dismissal. Summary judgment is granted in favor of Murphy and O'Hara as to the false arrest and imprisonment claims.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED as follows:

(1) Plaintiff's and Defendants' cross-motions (Docs. 51, 61) for partial summary judgment are granted in part and denied in part as discussed in the body of this Order.

Dated this 9th day of September, 2015.

Honorable James A. Soto
United States District Judge