no._____

In The

United States Supreme Court

October Term, 2019

Benjamin Oshea Calhoun
Petitioner

Vs.

Tony Villa-officer, G.D. Rogers-officer, Z.J. Mathis-officer, Martha Montalvo-Houston Police Department Chief of Police, City of Houston, J.A. Devereux-OFFICER, S.L. Sievert

Respondents

Petition For Writ of Certiorari To The
United States Court Of Appeals For
The Fifth Circuit

Appendix to Brief of Petitioner

Pro-se Petitioner: Benjamin Oshea Calhoun

8510 N. Main St., Houston, Tx. 77022

Contact no. 832-996-6389

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Appendix a

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-20080

BENJAMIN OSHEA CALHOUN,

Plaintiff–Appellant

v.

TONY VILLA, OFFICER; G.D. ROGERS, OFFICER; Z.J. MATHIS, OFFICER; MARTHA MONTALVO, HOUSTON POLICE DEPARTMENT CHIEF OF POLICE; CITY OF HOUSTON; J.A. DEVEREUX, OFFICER; S.L. SIEVERT,

Defendants–Appellees

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-3001

Before SMITH, DUNCAN, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Benjamin Calhoun, proceeding pro se, alleges that the Houston Police Department violated his constitutional rights by arresting him on two occasions for Class C misdemeanors that were only punishable by a fine. He

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

claims that these arrests violated his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

I.

On May 20, 2016, Calhoun was arrested for jaywalking by Officers Villa and Rodgers. Jaywalking is illegal pursuant to Texas Transportation Code § 552.006. It is a Class C violation and under Texas Penal Code § 12.23 is punishable by a fine not to exceed $500.

On August 28, 2016, Calhoun was arrested by Sergeant Sievert for standing on railroad tracks and refusing to leave after being so directed. Three other police officers arrived and participated. This violation is also a Class C misdemeanor punishable by a fine according to Texas Penal Code § 28.07(b)(2)(A).

Calhoun filed this lawsuit on October 6, 2016. He filed the Amended Complaint on November 21, 2016. He asserts constitutional violations by the City of Houston and six officers individually, under § 1983, as well as corresponding state law claims. The City of Houston, the police chief, and the officers on the scene moved for dismissal under Federal Rule of Civil Procedure 12(b)(6). Upon referral, the magistrate judge recommended dismissal of all of Calhoun's claims. The district court adopted the recommendation in full.

Calhoun appealed asserting that (1) the district court erred by granting the Rule 12(b)(6) motions, (2) the district court abused its discretion by denying Calhoun's successive amendments, and (3) the district court abused its discretion by denying Calhoun's motion to recuse.

II.

This Court reviews the district court's ruling on a Rule 12(b)(6) motion de novo. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 246 (5th Cir. 1997). A Rule 12(b)(6) motion is asserted for failure to "state a claim upon which relief

can be granted." FED. R. CIV. P. 12(b)(6). Motions for failure to state a claim are "disfavored in the law and rarely granted." *See Thompson v. Goetzmann*, 337 F.3d 489, 494-95 (5th Cir. 2003); *Lowrey*, 117 F.3d at 247. To overcome a Rule 12(b)(6) motion, the complaint must contain, "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint is to be "liberally construed in favor of the plaintiff." *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

This Court generally reviews the denial of a motion for leave to amend for abuse of discretion. *Daly v. Sprague*, 675 F.2d 716, 723 (5th Cir. 1982). However, when the court's denial was based "solely on futility" the Fifth Circuit reviews de novo. *Thomas v. Chevron*, 832 F.3d 586, 590 (5th Cir. 2016).

This Court reviews the denial of a motion to recuse for abuse of discretion. *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483 (5th Cir. 2003). "Under 28 U.S.C. § 144, a judge is to recuse himself if a party to the proceeding 'makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party . . . .'" *Id.* The affidavit must be filed within ten days of the beginning of the term at which the case will be considered. *Id.*

III.

The district court granted the Rule 12(b)(6) motion for failure to state a § 1983 claim. In order to state a claim under § 1983, a plaintiff must allege a violation of his federal rights by a person acting "under color of state law." *See Bass v. Parkwood Hosp.*, 180 F.3d 234, 241 (5th Cir. 1999). Warrantless arrests are not per se violations of the Fourth Amendment. *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001). As Calhoun pointed out, in *Atwater*, a state statute explicitly authorized the warrantless arrest. *Id.* This Court has stated,

in applying *Atwater*, that "[a] law enforcement officer can make a warrantless arrest only if a federal or state law imbues him with that authority." *United States v. Sealed Juvenile 1*, 255 F.3d 213, 216 (5th Cir. 2001).

There is an applicable Texas statute that authorizes peace officers to make warrantless arrests in this situation: "[a] peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view." TEX. CRIM. PROC. CODE ANN. § 14.01 (West 2017).[1] Because both misdemeanor violations occurred within view of the officers, they would be justified in making an arrest, even though the violations were only punishable by a fine. The district court was correct in applying relevant state law to the question at hand. Because a state statute authorized the warrantless arrest in this case, the officers' actions were not unconstitutional, and the dismissal was appropriate.[2]

The district court dismissed the state law claims as well. Calhoun appears to assert claims for false arrest, false imprisonment, and malicious prosecution. Texas law protects governmental entities from suit through sovereign immunity, unless the area of liability is specifically waived by the Texas Tort Claims Act, such as injury by an employee's motor vehicle, injury caused by property conditions, and claims arising from defects in premises. TEX. CIV. PRAC. & REM. CODE ANN. § 101 *et seq.* None of Calhoun's claims fall under these categories. Additionally, under Texas law, "[i]f a suit is filed . . .

[1] The defendants do not cite this statute, instead referencing *Atwater* for the constitutionality of warrantless arrests, without noting the requirement for a statute at all. Calhoun, however, points out the requirement for an applicable statute and the defendants' failure to cite one. The magistrate judge did supply the applicable statute in the memorandum and recommendation, as adopted by the district court. Calhoun contends that the magistrate judge cannot supply the statute when the defendants failed to do so. We disagree.

[2] Thus, all of Calhoun's claims relying on the officers' actions being unconstitutional also fail to state a claim upon which relief can be granted.

against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." *Id.* § 101.106(e). Therefore, Calhoun's state law claims against both governmental entities and individual defendants were properly dismissed.[3]

Next, we address Calhoun's attempts to amend the complaint. Although Calhoun was entitled to amend his complaint once, the district court denied his second and third requests for leave to amend. Federal Rule of Civil Procedure 15 allows for one amended complaint "as a matter of course," but other amendments may only be filed "with the opposing party's written consent or the court's leave." FED. R. CIV. P. (15)(a)(1)–(2). Allowing amendments is preferred and "[t]he court should freely give leave when justice so requires." *Id.* There are several reasons that a district court may deny leave to amend without abusing its discretion–one of which is "futility of amendment." *Forman v. Davis*, 371 U.S. 178, 182 (1962) (others listed include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . .").

As noted above, when futility is the sole grounds for denial, this Court reviews de novo. In the memorandum and recommendation adopted by the district court, the magistrate judge appears to rely solely on the futility of the successive amendments: "Consequently, Calhoun's proposed amendment would be futile, and his Motions for Leave to Amend are DENIED." (internal citations omitted). No other grounds for denial are mentioned.

[3] Calhoun also confusingly argues that the officers lacked probable cause to arrest him. In his complaint, however, he concedes that the officers were physically present when the violations occurred, and we have already concluded that the arrest was constitutionally permissible. Calhoun's argument therefore lacks merit.

Calhoun's second and third amended complaints made some formatting changes (which would not affect the plausibility of the complaint) and added substantive claims under 42 U.S.C. §§ 1985(3) and 1986. Section 1985(3) prohibits, *inter alia*, a conspiracy to deprive a person of the equal protection of the law or equal privileges and immunities under the law. Relatedly, § 1986 establishes a cause of action against a person who fails to act when they have knowledge of a § 1985 conspiracy. Neither of these claims is supported by the well-pleaded facts in Calhoun's amended complaints. Therefore, as the magistrate judge stated, his proposed amendments would be futile and would not affect the district court's disposition on the Rule 12(b)(6) motion.[4]

Calhoun argues that the scheduling order set up by the district court led him to believe he was able to amend as many times as he wanted within that time frame. Although we recognize that this could have been unclear to a pro se litigant and it would have been better for the district court to make it explicit that unlimited amendments would not be allowed, this does not change the final evaluation of his proposed amendments. The district court's order was correct.

Finally, we address Calhoun's appeal of the denial of his motion to recuse Judge Bennett. First, Calhoun's motion, filed ten months after he filed the lawsuit, was untimely. A motion to recuse must be filed within ten days of the beginning of the term when the case is to be considered, unless the movant can show good cause for delay. *See Patterson*, 335 F.3d at 483. Calhoun did not argue good cause to explain the delay. Second, the substance of his argument in favor of recusal was based on Judge Bennett's adverse rulings in other cases,

[4] *See Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 806 (10th Cir. 1999) ("Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend.").

which is not sufficient to require recusal. *Liteky v. United States*, 510 U.S. 540, 556 (1994). Therefore, the district court did not abuse its discretion in this determination.

IV.

For the reasons cited above, we **AFFIRM** the district court's granting of the Rule 12(b)(6) motion, the denial of the motions to file successive amendments, and the denial of the motion to recuse.

Appendix b

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20080

BENJAMIN OSHEA CALHOUN,

Plaintiff - Appellant

v.

TONY VILLA, Officer; G. D. ROGERS, Officer; Z. J. MATHIS, Officer; MARTHA MONTALVO, Houston Police Department Chief of Police; CITY OF HOUSTON; J. A. DEVEREUX, Officer; S. L. SIEVERT,

Defendants - Appellees

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 2/14/2019, 5 Cir., _____, _____ F.3d _____)

Before SMITH, DUNCAN, and ENGELHARDT, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

Appendix c

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BENJAMIN OSHEA CALHOUN,	§	
	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO. H-16-3001
	§	
TONY VILLA, ET AL.,	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION GRANTING DEFENDANTS' MOTIONS TO DISMISS

Pending in this case that has been referred by the District Judge to the undersigned Magistrate Judge is Defendant City of Houston's Rule 12(b)(6) and 12(b)(5) Motion to Dismiss (Document No. 4), Defendant Chief Martha Montalvo's Rule 12(b)(6) and 12(b)(5) Motion to Dismiss (Document No. 5), and Defendant Officers T. Villa, G.D. Rogers, Z.J. Mathis, J.A. Devereux, and Sergeant S.L. Sievert's Rule 12(b)(6) and 12(b)(5) Motion to Dismiss (Document No. 6). Also pending and related to those Motions to Dismiss, are two Motions filed by Plaintiff for Leave to Amend (Document No. 34 and 35)[1], Plaintiff's Motion to Compel a Responsive Pleading (Document No. 12), and Plaintiff's Motion for Extension of Time to Serve Defendants (Document No. 13). Based on Defendants' Response to Plaintiff's Motion for Extension of Time (Document No. 26), in which Defendants represent that they are no longer contesting service, Plaintiff's Motion for Extension of Time to Serve Defendants (Document No. 13) is MOOT. Also MOOT are those parts of Defendants'

[1] Document Nos. 34 and 35 were not filed as motions for leave to amend *per se*, but as Motions to Amend "As a Matter of Course." But, because Calhoun had already amended his complaint once, prior to Defendants' filing of their Motions to Dismiss, leave to amend is required, *see* Fed. R. Civ. P. 15(a)(1), (2), and Calhoun's "motions" (Document Nos. 34 & 35) will be construed as requests for such.

Motions to Dismiss, which seek dismissal under Fed. R. Civ. P. 12(b)(5) for for insufficient service. Finally, because a Rule 12(b)(6) Motion to Dismiss is a type of responsive pleading, *Charboneau v. Box*, No. 4:13-CV-678, 2017 WL 1159765, at *13 (E.D. Tex. Mar. 29, 2017) ("Responsive pleadings include answers to the complaint, as well as motions to dismiss pursuant to Rule 12(b)(6)"), and because each Defendant has filed a Rule 12(b)(6) Motion to Dismiss, Plaintiff's Motion to Compel a Responsive Pleading (Document No. 12) is also DENIED as MOOT.

Having considered Defendants' Rule 12(b)(6) Motions to Dismiss for failure to state a claim, Plaintiff's response in opposition, the parties' additional briefing, and Plaintiff's requests for leave to amend, the Magistrate Judge concludes, for the reasons set forth below, that Plaintiff has not, and cannot, state a plausible claim against Defendants under § 1983 or the asserted state law theories of false arrest, false imprisonment or malicious prosecution based on his arrests on May 20, 2016 and August 28, 2016. Accordingly, the Magistrate Judge RECOMMENDS that Defendants' Motions to Dismiss (Document Nos. 4, 5 and 6) be GRANTED, ORDERS that Plaintiff's Motions to Amend (Document Nos. 34 & 35) are DENIED, and RECOMMENDS that this case be DISMISSED WITH PREJUDICE.

I. Background

Plaintiff Benjamin Oshea Calhoun ("Plaintiff") filed his Original Complaint (Document No. 1) on October 6, 2016, and amended it as a matter of course on November 21, 2016. (Document No. 3). In that Amended Complaint (Document No. 3), Calhoun asserts claims against the City of Houston, Chief of the Houston Police Department, Martha Montalvo, and several individual officers (Officers T Villa's, G.D. Rodgers, Z. J. Mathis, J.A. Devereux, and Sergeant S. L. Sievert, referred

to herein as "Individual Defendant Officers") for violations of his civil rights under 42 U.S.C. § 1983 as well as the 4th, 5th, 6th, 8th, and 14th Amendments to the Constitution, and state law claims for false arrest, false imprisonment, and malicious prosecution. In support of all his claims, Calhoun refers to two interactions he had with law enforcement on May 20, 2016 and August, 28, 2016, respectively. On May 20, 2016, Calhoun was arrested and jailed by law enforcement for walking on a street when a sidewalk was available, a violation of Texas Transportation Code § 552.006. On August 28, 2016, Calhoun was arrested and jailed for walking on railroad tracks, a violation of Texas Penal Code § 28.07(b)(2)(A). Calhoun alleges that in both events his arrest and incarceration were illegal as Class C misdemeanors, which are punishable by fine only. As such, he claims that his constitutional rights were violated. Calhoun seeks, at minimum, $250,000 in damages for pain and suffering and further unspecified damages for deprivation of rights, "general damages", "prejudgment and post judgment interest," "court costs", and punitive damages of $2,000,000.

Defendants timely filed Motions to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim. According to Defendants in each of their motions, Calhoun has not alleged a violation of his federal constitutional rights, and Defendants are immune from liability on the state law claims alleged by Calhoun. With respect to Calhoun's civil rights and constitutional claim(s), Defendant City of Houston argues "it is not unconstitutional to arrest an individual for a low level misdemeanor, even one punishable only by a fine." Defendant City of Houston also argues that Calhoun has not alleged any facts that would give rise to municipal liability under § 1983, and that it cannot be held liable under a theory of *respondeat superior* and/or based on his allegations of failure to train or supervise. Defendant Chief Martha Montalvo similarly argues that Calhoun's arrests were constitutional, that suit against her in her official capacity is redundant of Calhoun's

claim against the City, and that there are no facts alleged of her personal involvement in the arrests and no facts that could overcome her defense of qualified immunity. The Individual Defendant Officers also argue that Calhoun's arrests were constitutional and that there are no facts that would overcome their defense of qualified immunity.

Calhoun, in response to the Motions to Dismiss, while recognizing the Supreme Court's holding in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), maintains that his arrests were illegal, that there was no legal or statutory authority that allowed for his arrests on such misdemeanor offenses, and that the Individual Defendant Officers lacked probable cause to support his warrantless arrests. Calhoun also, however, subsequent to filing of his response to the Motions to Dismiss, has asked for leave to amend (Document Nos. 34 & 35), seeking to add to this case claims under 42 U.S.C. §§ 1985 and 1986.

II. Rule 12(b)(6) Standard

Rule 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is said to be plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Plausibility will not be found where the claim alleged in the complaint is based solely on legal conclusions, or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Nor will plausibility be found where the complaint "pleads facts that are

merely consistent with a defendant's liability" or where the complaint is made up of "'naked assertions devoid of further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557)). Plausibility, not sheer possibility or even conceivability, is required to survive a Rule 12(b)(6) motion to dismiss. *Twombly*, 550 U.S. at 556-557; *Iqbal*, 556 at 680.

In considering a Rule 12(b)(6) motion to dismiss, all well pleaded facts are to be taken as true, and viewed in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). But, as it is only *facts* that must be taken as true, the court may "begin by identifying the pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. It is only then that the court can view the well pleaded *facts*, "assume their veracity and [ ] determine whether they plausibly give rise to an entitlement to relief." *Id.*

III. Discussion – Motions to Dismiss

A. § 1983 claims

42 U.S.C. § 1983 provides that any person who, under color of state law, deprives another 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 proceedings for redress...." 42 U.S.C. § 1983. "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1574 (5th Cir. 1989), *cert. denied,* 493 U.S.1019 (1990). To state a claim under § 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States, and (2) demonstrate that the alleged deprivation was committed by a person acting "under color of state law". *See Bass v. Parkwwod Hosp.*, 180 F.3d 234, 241 (5th Cir. 1999); *Gomez v. Toledo*, 446 U.S. 635, 340 (1980)

("By the plain terms of § 1983, two-and only two-allegations are required in order to state a cause of action under that statute. 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.").

Here, as aptly argued by Defendants in each of their Motions to Dismiss, Calhoun has not alleged a plausible violation or deprivation of a right secured by the United States Constitution or laws of the United States. Calhoun complains about his warrantless arrests on misdemeanor offenses, but does not point to any federal Constitutional right that was implicated thereby. While he does make reference to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, he fails to plead any facts that would render his arrests, by officers *who personally witnessed his offending conduct* (walking in the street when there was a navigable sidewalk, in violation of § 552.006 of the TEXAS TRANSP. CODE,[2] and walking on the railroad tracks, in violation of § 28.07 of the TEXAS PENAL CODE[3]), illegal or otherwise violative of any right secured by the Constitution or laws of the United States. *See* TEXAS CODE CRIM. PROC. art. 14.01(b) ("A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."); TEXAS TRANSPORTATION CODE § 543.001 ("Any peace officer may arrest without warrant a person found

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[2] Under § 552.006(a) of the TEXAS TRANSP. CODE, "[a] pedestrian may not walk along and on a roadway if an adjacent sidewalk is provided and is accessible to the pedestrian." Other provisions of the TEXAS TRANSP. CODE define an offense under § 552.006 as a misdemeanor, punishable by a fine of up to $200. TEXAS TRANSP. CODE §§ 542.301, 542.401.

[3] Under § 28.07(b)(2)(A) of the TEXAS PENAL CODE, "[a] person commits an offense if the person: (2) without the effective consent of the owner:(A) enters or remains on railroad property, knowing that it is railroad property." A violation of § 28.07(b)(2)(A) is "a Class C misdemeanor," TEXAS PENAL CODE § 28.07(d), punishable by a fine of up to $500. TEXAS PENAL CODE §§ 12.23 ("An individual adjudged guilty of a Class C misdemeanor shall be punished by a fine not to exceed $500.").

committing a violation of this subtitle."). Calhoun's complaints that he shouldn't have been arrested when he faced, as punishment on the offenses, only fines, misses the point and ignores the Supreme Court's decision in *Atwater*, in which the Supreme Court made it clear that "[t]he Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine." *Atwater* 532 U.S. at 318. As for Calhoun's complaints that the officers who arrested him lacked probable cause to support the arrests, Calhoun's own allegations in his Complaint (Document No. 3 at ¶ 12, 28, 29), that the arresting officers witnessed him – both in the street when there was a nearby sidewalk, and one the railroad tracks – defeat his claim. Probable cause is defined as a "reasonable belief of guilt" that is "particularized with respect to the person to be searched or seized." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Personally witnessing a crime, whether it is a misdemeanor or felony offense, provides an officer with probable cause for a warrantless arrest. *See e.g.; Zimmerman v. Culter*, No. 15-50424, 657 F.App'x 340, 345 (5th Cir. Sept. 20, 2016) (probable cause existed for arrest on charge of evading detention where officer witnessed defendant's attempt to flee); *see also Mangieri v. Clifton*, 29 F.3d 1012, 1016 (5th Cir. 1994) ("For warrantless arrests, the test for whether the "police officer ha[d] probable cause to arrest [is] if, at the time of the arrest, he had knowledge that would warrant a prudent person's belief that the person arrested had already committed or was committing a crime."). Calhoun has not, quite simply, alleged a violation of any federal Constitutional right occasioned by, or attendant to, his arrests on May 20, 2016 and August 28, 2016.[4] He has therefore not stated a claim under § 1983

[4] Calhoun framed part of his § 1983 claim as an "equal protection" claim. He, however, did not allege *any* facts that would support an equal protection claim. *See Gibson v. Texas Department of Insurance - Div. of Workers' Compensation*, 700 F.3d 227, 238 (5th Cir. 2012) ("To state a claim under the Equal Protection Clause, a § 1983 plaintiff must either allege that (a) "a state actor intentionally discriminated against [him] because of membership in a protected class [,]" or

against any of the Defendants.[5]

B. State Law Claims

In addition to claims brought under § 1983, Calhoun appears to assert three state law claims: for false arrest, false imprisonment and malicious prosecution. Under the Texas Tort Claims Act, however, none of the Defendants can be held liable on any of those claims.

In Texas, a governmental unit[6] can only be held liable for the tortious actions of its agents

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(b) he has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.") (citations omitted). In addition, Calhoun's malicious prosecution claim does not fall within the scope of § 1983, and instead is considered a state law claim. *Deville v. Marcantel*, 567 F.3d 156, 169 (5th Cir. 2009) ("The federal Constitution does not include a 'freestanding' right to be free from malicious prosecution. *See Castellano v. Fragozo,* 352 F.3d 939, 945 (5th Cir.2003) (en banc). Instead, it must be shown that the officials violated specific constitutional rights in connection with a 'malicious prosecution.'").

[5] Defendants have each asserted numerous bases for dismissal, but because Calhoun has not met the threshold requirement of alleging a violation of a Constitutional right, none of Defendants' other arguments will be addressed.

[6] A governmental unit is defined as:

> (A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils and courts;
>
> (B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority; and
>
> (C) an emergency service organization; and
>
> (D) any other institution, agency or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the

and employees to the extent that its sovereign immunity is waived by the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101 *et seq*. The three specific areas of liability for which sovereign immunity has been waived include: (1) injury caused by an employee's use of a motor-driven vehicle, TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1); (2) injury caused by a "condition or use of tangible personal or real property," *id.* § 101.021(2); and (3) claims arising from premise defects, *id.* § 101.022.

None of the conduct complained of herein falls within the sovereign immunity waivers provided for in the Texas Tort Claims Act. As such, those state law claims are subject to dismissal as against both the City of Houston (the governmental unit), and the individual Defendants. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(e) ("e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit."); *Alcala v. Texas Webb County*, 620 F.Supp.2d 795, 805 (S.D. Tex. 2009) (concluding, in reliance on *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008), that the election of remedies provision in § 101.106(e) of the Texas Civil Practice and Remedies Code warranted the dismissal of all tort claims asserted against an individual when those same claims were asserted against the employing governmental entity); *see also e.g., Lewis Piccolo v. City of Houston*, No. CV- H-16-2897, 2017 WL 2644211, at *5 (S.D. Tex. June 1, 2017), *report and recommendation adopted*, No. CV- H-16-2897, 2017 WL 2633592 (S.D. Tex. June 19, 2017) (dismissing malicious prosecution and false imprisonment claims against both the City of Houston and the arresting police officer on the basis that sovereign immunity had

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legislature under the constitution.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3).

not been waived for such intentional tort claims under the Texas Tort Claims Act).

IV. Discussion – Amendment

In addition to filing a response to Defendants' Motions to Dismiss, Calhoun has asked for leave to amend, seeking to include new claims under 42 U.S.C. § 1985 and 1986. Defendants maintain that such an amendment would be futile. The undersigned agrees.

Under FED. R. CIV. P. 15(a)(2) leave to amend should be freely given "when justice so requires." When a claim is subject to dismissal under Rule 12(b)(6) for failure to state a claim, "district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies... unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal." *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002).

Here, any claim Calhoun seeks to include under §§ 1985 and 1986 would be subject to dismissal under Rule 12(b)(6) for the same reasons referenced above relative to his claim(s) under § 1983. Sections 1985 ("Conspiracy to interfere with civil rights") and 1986 ("Action for neglect to prevent"), each requires, as a predicate, a violation of a federal Constitutional right and a conspiracy to do so. As set forth above, Calhoun's arrests on May 20, 2016 and August 28, 2016, were legal under state law, and did not run afoul of any federal Constitutional right. In addition, courts have held that City employees, such as those in this case, cannot conspire amongst themselves for purposes of liability under §§ 1985, 1986. *See Swilley v. City of Houston*, No. 11-20374, 457 F. App'x 400, 404 (5th Cir. Jan. 6, 2012) ("The City of Houston is a single legal entity and, as a matter of law, its employees cannot conspire among themselves."). Consequently, Calhoun's

proposed amendment would be futile, and his Motions for Leave to Amend (Document Nos. 34 & 35) are DENIED.

V. Conclusion and Recommendation

Based on the foregoing, and the conclusion that Plaintiff has not, and cannot, state a plausible claim relative to his arrests on May 20, 2016, and August 28, 2016, the Magistrate Judge RECOMMENDS that Defendants' Motions to Dismiss (Document Nos. 4, 5 and 6) all be GRANTED, and Plaintiff's § 1983 claims and state law all be DISMISSED WITH PREJUDICE for failure to state a claim.

The Clerk shall file this instrument and provide a copy to all counsel and unrepresented parties of record. Within fourteen (14) days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C), FED. R. CIV. P. 72(b), and General Order 80-5, S.D. Texas. Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Ware v. King*, 694 F.2d 89 (5th Cir. 1982), *cert. denied*, 461 U.S. 930 (1983); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc). Moreover, absent plain error, failure to file objections within the fourteen day period bars an aggrieved party from attacking conclusions of law on appeal. *Douglass v. United Services Automobile Association,* 79 F.3d 1415, 1429 (5th Cir. 1996). The original of any written objections shall be filed with the United States District Clerk.

Signed at Houston, Texas, this 7th day of August, 2017.

Frances H. Stacy
United States Magistrate Judge

Appendix d

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BENJAMIN OSHEA CALHOUN, Plaintiff, VS. TONY VILLA, *et al*, Defendants.	§ § § § § § § §	CIVIL ACTION NO. 4:16-CV-3001

ORDER

Before the Court is Magistrate Judge Frances H. Stacy's Memorandum and Recommendation filed August 7, 2017 (Doc. #74). The Court also considered Plaintiffs' Objections to Judge Stacy's Memorandum and Recommendation (Doc. #80) filed on August 21, 2017. Given Plaintiff's Objection to the Memorandum and Recommendation, Judge Stacy's findings and conclusions were reviewed de novo. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C); *United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989). Having considered the arguments and the applicable law, the Court adopts Judge Stacy's Memorandum and Recommendation in full.[1] As such, Plaintiff's claims are DISMISSED WITH PREJUDICE. All pending Motions are DENIED as moot.

It is so ORDERED.

AUG 24 2017
Date

The Honorable Alfred H. Bennett
United States District Judge

[1] Plaintiff also filed Objections to this Court's Order Referring Case to Magistrate Judge (Doc. #64), Objections to Order on Motion to Compel and Request for District Judge Review (Doc. #73), Motions for Sanctions (Docs. #75, 76), and a Motion for Recusal (Doc. #78). As all these motions lack merit, each of the above motions is DENIED.

Appendix e

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BENJAMIN OSHEA CALHOUN, §
§
Plaintiff, §
VS. § CIVIL ACTION NO. 4:16-CV-3001
§
TONY VILLA, *et al*, §
§
Defendants. §

ORDER

Before the Court are Plaintiff's Motion to Reconsider and Vacate Judgment (Doc. #82), Plaintiff's Motion for an Entry of Judgment and a Finding of Facts and Conclusions of Law (Doc. #83), and Plaintiff's Request for a More Definite Statement (Doc. #86). As all Motions lack merit, these Motions are DENIED.

It is so ORDERED.

APR 02 2018
Date

The Honorable Alfred H. Bennett
United States District Judge

Additional material from this filing is available in the Clerk's Office.