APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3406

RaySean D. Barber

Plaintiff - Appellant

Guy Collins

Plaintiff

v.

Scott Frakes; Taggart Boyd; Ted Hill; Miki Hollister; Kristina Milburn; Nate Shwab; Dr. Mark Lukin; Dr. Megan Ford; Betty Gergen; Jacque Gooding; Amy Rezney; Robin Church

Defendants - Appellees

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:18-cv-00410-RGK)

JUDGMENT

Before LOKEN, BENTON, and GRASZ, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

January 20, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RAYSEAN BARBER,

Plaintiff,

vs.

SCOTT FRAKES, TAGGART BOYD, TED HILL, MIKI HOLLISTER, KRISTINA MILBURN, NATE SHWAB, DR. MARK LUKIN, DR. MEGAN FORD, BETTY GERGEN, JACQUE GOODING, AMY REZNEY, and ROBIN CHURCH,

Defendants.

8:18CV410

MEMORANDUM AND ORDER

This matter is before the court upon review of Plaintiff's Amended Complaint. (Filing 25.) The court conducts this review pursuant to 28 U.S.C. §§ 1915(e) and 1915A which require the court to dismiss a prisoner or in forma pauperis complaint or any portion of it that states a frivolous or malicious claim, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. For the reasons explained below, this matter will be dismissed.

I. BACKGROUND

On August 27, 2018, Plaintiff, an inmate currently confined at the Lincoln Correctional Center ("LCC"), and another inmate, Guy Collins ("Collins"), filed the Complaint in this case. Collins was dismissed as a plaintiff in this action after he failed to advise the court in writing whether he wished to "opt out" or continue with the group litigation. (Filing 13.) Plaintiff, proceeding as the sole plaintiff, sought relief pursuant to 42 U.S.C. §§ 1983 and 1985 against Scott Frakes

("Frakes"), Director of the Nebraska Department of Correctional Services ("NDCS"); Taggart Boyd ("Boyd"), the Warden of the LCC; and 10 employees of the LCC for alleged violations of his constitutional rights under the First, Eighth, and Fourteenth Amendments. Liberally construed, Plaintiff also alleged a violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213.

The court conducted an initial review of Plaintiff's Complaint on June 10, 2019. (Filing 14.) Because Plaintiff failed to specify in what capacity Defendants were sued, the court presumed they were sued in their official capacity only. Accordingly, Plaintiff's claims for damages against Defendants in their official capacities were barred by sovereign immunity. The court additionally determined that Plaintiff's claims for prospective injunctive relief were moot and he lacked standing to seek declaratory relief because he was confined at the Tecumseh State Correctional Institution ("TSCI") and was no longer subject to the LCC Mental Health Unit ("MHU") Levels Program that was the subject of his Complaint. However, the court granted Plaintiff leave to file an amended complaint that stated a plausible claim for relief against Defendants in their individual capacities.

On July 23, 2019, the court entered a Memorandum and Order and Judgment dismissing this matter without prejudice because Plaintiff failed to file an amended complaint within the allotted time. (Filings 15 & 16.) On August 6 and August 14, 2019, Plaintiff filed motions for relief from judgment pursuant to Federal Rules of Civil Procedure 59(e) and 60(b) because he never received the court's June 10, 2019 Memorandum and Order directing him to file an amended complaint. (Filings 17 & 20.) On February 11, 2020, the court granted Plaintiff's motions, vacated its order and judgment of dismissal, and gave Plaintiff 30 days to file an amended complaint. (Filing 24.)

Plaintiff filed his Amended Complaint on February 24, 2020. (Filing 25.) Along with his Amended Complaint, Plaintiff also filed a Motion for Relief from Judgment seeking relief from the court's prior determination that his claims for

injunctive and declaratory relief were moot because Plaintiff had been returned to the LCC MHU. (Filing 26.)

II. SUMMARY OF AMENDED COMPLAINT

Plaintiff's Amended Complaint names the same twelve Defendants as his original Complaint: Frakes, Boyd, and the ten LCC employees making up the MHU Multi-Disciplinary Team. (Filing 25 at CM/ECF pp. 2, 4–5, ¶¶ 2, 13–24.) However, Plaintiff now specifies that eleven of those Defendants are sued in their individual capacities.[1] Plaintiff's Amended Complaint essentially restates the allegations of the original Complaint and raises the same claims under the First, Eighth, and Fourteenth Amendments and the ADA. The Amended Complaint also still lists Collins as a co-plaintiff and is signed by Collins. (*See Id.* at CM/ECF p. 12.) However, Collins is no longer a party to this action, and the court will not address those allegations pertaining solely to Collins.[2]

Plaintiff alleges he has been diagnosed with a serious mental illness and is housed in the MHU at the LCC. (*Id.* at CM/ECF p. 1, ¶ 1.) Plaintiff alleges that the Defendants deprive inmates in the MHU of activities and privileges without affording an inmate a hearing or any of the procedures required by Title 68 of the Nebraska Administrative Code, which sets forth the rules for regulating an inmate's behavior. (*Id.* at CM/ECF pp. 1–2, ¶ 2). Plaintiff further alleges that

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[1] Plaintiff did not specify in what capacity Defendant Robin Church is being sued. (Filing 25 at CM/ECF p. 5, ¶ 24.)

[2] As a pro se litigant, Plaintiff may not represent the interests of other parties, like Collins. *Litschewski v. Dooley*, No. 11-4105-RAL, 2012 WL 3023249, at *1 n. 1 (D.S.D. July 24, 2012), *aff'd*, 502 Fed. Appx. 630 (8th Cir. 2013). Moreover, in order for Plaintiff to proceed with his claims, he must have standing. As a general rule, to establish standing a plaintiff must assert his legal rights or interests and not "the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975). Thus, Plaintiff may only assert his own legal rights and interests in this action and not Collins' legal rights and interests.

additional deprivations of privileges are imposed upon admission into the MHU Levels Program "for reasons not directly having to do with the treatment of a particular mental illness." (*Id.* at CM/ECF pp. 2, 7, ¶¶ 3, 32.) Inmates must sign a consent form and a contract agreeing to the terms of the MHU program prior to entering the MHU and are informed that inmates "can be placed on a therap[e]utic restriction." (*Id.* at CM/ECF p. 7, ¶ 31.) The MHU Multi-Disciplinary Team administers the Levels Program which is "allowed by the Director of Corrections [Frakes] and the Warden of LCC [Boyd]." (*Id.* at ¶ 30.)

On June 1, 2018, Plaintiff alleges he was placed on "level D, which is a restriction that is similar to the sanction 'room restriction' set forth in Title 68," for 17 days without being afforded a hearing based on reports that he had engaged in passing and receiving canteen items with other inmates. (*Id.* at CM/ECF p. 8, ¶ 34.) As a result of being placed on level D, Plaintiff lost his job as the lead porter on the MHU. (*Id.* at ¶ 36.) The other inmate with whom Plaintiff allegedly exchanged canteen items did not receive any type of restriction for his alleged misconduct. (*Id.* at CM/ECF p. 9, ¶ 37.)

Plaintiff alleges the MHU Multi-Disciplinary Team's enforcement of the Levels Program violated the First, Eighth, and Fourteenth Amendments, and that "[a]ll Defendants, by agreeing to the enforcement of the levels program, . . . did conspire, for the purpose of depriving, either directly or indirectly, Plaintiffs and others similarly situated of the equal protection of the laws, or of equal privileges or immunities under the laws." (*Id.* at CM/ECF pp. 10–11, ¶¶ 44–45.) For relief, Plaintiff seeks a declaration that the Levels Program is unconstitutional, injunctive relief enjoining the continuation of the MHU Levels Program, and monetary damages. (*Id.* at CM/ECF p. 11.)

III. DISCUSSION

A. Claims for Injunctive and Declaratory Relief

As stated above, Plaintiff's Amended Complaint seeks injunctive and declaratory relief with respect to the MHU Levels Program. Plaintiff also filed a motion pursuant to Fed. R. Civ. P. 60(b) specifically seeking relief from the court's prior determination that his claims for injunctive relief were moot and he lacked standing to seek declaratory relief because he had been returned to the MHU at the LCC. (Filing 26.) Recently, however, Plaintiff filed a motion on August 14, 2020, asking to withdraw his Rule 60(b) motion for the reason that he is "no[] longer on the MHU, and thus cannot obtain the injunctive and declaratory relief requested in his complaint." (Filing 27.)

Upon consideration, Plaintiff's motion to withdraw his Rule 60(b) motion (filing 27) is granted. The court will dismiss Plaintiff's claims for injunctive and declaratory relief pursuant to his motion and the court's reasoning in its previous order on initial review (filing 14 at CM/ECF pp. 5–6).

B. First Amendment

Plaintiff alleges Defendants conspired to deprive him of his "right to freedom of speech" "by depriving him of privileges for disciplinary reasons without adhering to the procedure promulgated in Title 68." (Filing 25 at CM/ECF p. 2, ¶ 4.)

"[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). However, "[a]ny form of involuntary confinement, whether incarceration or involuntary commitment, may necessitate restrictions on the right to free speech."

Beaulieu v. Ludeman, 690 F.3d 1017, 1038–39 (8th Cir. 2012) (internal quotation marks omitted). A prison action is constitutionally valid, even if it restricts a prisoner's constitutional rights, provided it is "'reasonably related to legitimate penological interests.'" *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 982 (8th Cir. 2004) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987). As the Eighth Circuit Court of Appeals has explained:

> "Because the Constitution 'permits greater restriction of [First Amendment] rights in a prison than it would allow elsewhere,' restrictive prison regulations are normally reviewed under the four-factor *Turner* test to determine whether they are 'reasonably related to legitimate penological interests.'" [*Holloway v. Magness*, 666 F.3d 1076, 1080 (8th Cir. 2012)] (citing *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)). . . . We consider four criteria in applying this test:
>
> > (1) whether there is a valid, rational connection between the regulation and legitimate governmental interests put forward to justify it; (2) whether alternative means of exercising their rights remain open to the prisoners; (3) whether accommodation of the asserted rights will trigger a "ripple effect" on fellow inmates and prison officials; and (4) whether a ready alternative to the regulation would fully accommodate the prisoners' rights at de minimis cost to the valid penological interest.

Beaulieu, 690 F.3d at 1039 (quoting *Benzel v. Grammer*, 869 F.2d 1105, 1108 (8th Cir. 1989)).

Here, Plaintiff's bare, conclusory allegation that the MHU Levels Program violates his First Amendment right to free speech is unsupported by sufficient factual allegations to state a plausible claim for relief. For example, Plaintiff does not allege that he engaged in, or attempted to engage in, any protected speech nor does he allege how the imposition of any restriction under the Levels Program impeded his freedom of speech. Plaintiff's allegations fail to meet the pleading

standard set forth in Federal Rule of Civil Procedure 8(a)(2) requiring a "short and plain statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) ("[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007))). Therefore, Plaintiff has failed to state a First Amendment free speech claim upon which relief may be granted.

C. Due Process

Plaintiff alleges his due process rights were violated when Defendants deprived him of privileges for punitive purposes without adhering to the disciplinary procedures set forth in Title 68 of the Nebraska Administrative Code. More specifically, Plaintiff appears to allege that his due process rights were violated when he was placed on a 17-day room restriction without a hearing and lost his lead porter job as a result.

The Supreme Court has held that "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye v. Haymes*, 427 U.S. 236, 242 (1976). In order to prevail on a Fourteenth Amendment due process claim, a plaintiff must allege that he was deprived of life, liberty or property by government action. *Phillips v. Norris, 320 F.3d 844*, 846 (8th Cir. 2003). With respect to actions filed by prison inmates, the court must determine whether the deprivation "impose[d] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *see also Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666, 669 (8th Cir. 1996) (noting that following *Sandin*, courts focus on the deprivation itself and not on whether

mandatory language exists in statutes or prison regulations). "Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law." *Sandin*, 515 U.S. at 485.

Here, Plaintiff's 17-day room restriction plainly does not rise to the level of atypical and significant. *See Orr v. Larkins*, 610 F.3d 1032, 1034 (8th Cir. 2010) (per curiam) (inmate was not deprived of liberty interest during nine months in administrative segregation). The Eighth Circuit has consistently held that "administrative and disciplinary segregation are not atypical and significant hardships[.]" *Portley-El v. Brill*, 288 F.3d 1063, 1065 (8th Cir. 2002); *Phillips*, 320 F.3d at 847 ("We have consistently held that a demotion to segregation, even without cause, is not itself an atypical and significant hardship."); *see also Freitas v. Ault*, 109 F.3d 1335, 1337–38 (8th Cir. 1997) (finding that a prisoner had no constitutionally protected liberty interest in remaining in less restrictive prison environment); *Kennedy v. Blankenship*, 100 F.3d 640, 642–43 n.2 (8th Cir. 1996) (stating that punitive isolation is not an atypical and significant deprivation). Thus, to the extent the plaintiff is claiming the 17-day room restriction violated his due process rights, this claim must be dismissed.

Similarly, to the extent Plaintiff complains that the loss of his lead porter job violated his due process rights, his claim fails. The Eighth Circuit has long held that the loss of a prison job, the compensation derived from that job, or the expectation of keeping a particular prison job does not implicate any property or liberty interest entitled to due process protection. *See Flittie v. Solem*, 827 F.2d 276, 279 (8th Cir. 1987) ("[I]nmates have no constitutional right to be assigned to a particular job."); *Lyon v. Farrier*, 727 F.2d 766, 769 (8th Cir. 1984) (concluding an inmate has no constitutional right to a prison job nor to retain a particular job); *Peck v. Hoff*, 660 F.2d 371, 373 (8th Cir. 1981) (determining inmate had no legal entitlement or right to particular job assignment). *See also Newsom v. Norris*, 888 F.2d 371, 374 (6th Cir.1989); *Garza v. Miller*, 688 F.2d 480, 485 (7th Cir. 1982). Moreover, the loss of a prison job is not an atypical or significant hardship in

relation to the ordinary incidents of prison life. *See Callender*, 88 F.3d at 670 (reversing a judgment in favor of an inmate for denial of procedural and substantive due process because the inmate had no constitutionally protected liberty interest in a work release program, and revocation of his work release status did not impose an atypical and significant hardship upon him in relation to the ordinary incidents of prison life); *see also Bulger v. United States Bureau of Prisons*, 65 F.3d 48, 49–50 (5th Cir. 1995) (holding inmate's termination from his UNICOR job and reassignment to a non-UNICOR job did not impose an atypical and significant hardship on him in relation to the ordinary incidents of prison life).

Accordingly, to the extent Plaintiff is attempting to allege a due process claim arising from the loss of his lead porter job, this claim must be dismissed. Plaintiff's Amended Complaint, therefore, fails to allege any due process claim upon which relief may be granted.

D. Eighth Amendment

Plaintiff also alleges that the deprivation of privileges without proper disciplinary procedures violated the Eighth Amendment prohibition against cruel and unusual punishment. Though unclear from Plaintiff's allegations, Plaintiff may be claiming that the imposition of the 17-day room restriction and the related loss of privileges such as exercise, visiting the library and other inmates, and his lead porter job violated his Eighth Amendment rights.

"The Constitution . . . does not mandate comfortable prisons, and only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (internal citations and quotation marks omitted). Administrative segregation "is not necessarily unconstitutional [under the Eighth Amendment], but it may be, depending on the duration of the confinement and the

conditions thereof." *Hutto v. Finney*, 437 U.S. 678, 685–86 (1978) (internal quotations omitted).

> To establish that a prisoner's conditions of confinement violate the Eighth Amendment, the prisoner must show that (1) the alleged deprivation is, "objectively, sufficiently serious," resulting "in the denial of the minimal civilized measure of life's necessities," and (2) that the prison officials were deliberately indifferent to "an excessive risk to inmate health or safety," meaning that the officials actually knew of and disregarded the risk."

Williams v. Delo, 49 F.3d 442, 445 (8th Cir. 1995) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994)).

Here, Plaintiff's relatively brief time on level D room restriction and the concomitant loss of privileges he sustained fall far short of suggesting the denial of the minimal civilized measure of life's necessities. As Plaintiff admits, the loss of privileges, with the exception of his lead porter job, was only temporary, and he does not allege a denial of "reasonably adequate sanitation, personal hygiene, and laundry privileges, particularly over a lengthy course of time." *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989). Thus, Plaintiff's claim that his 17-day room restriction and loss of privileges violated the Eighth Amendment must be dismissed.

To the extent Plaintiff may be claiming that the deprivation of privileges for purposes unrelated to treatment of his mental illness violated the Eighth Amendment, such claim also fails. "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (internal citation omitted). To prevail on an Eighth Amendment deliberate indifference claim, Plaintiff must demonstrate that (1) he suffered from objectively serious medical needs, and (2) Defendants knew of, but deliberately disregarded,

those needs. *See Gibson v. Weber*, 433 F.3d 642, 646 (8th Cir. 2006) (Eighth Amendment claim based on inadequate medical attention requires proof that officials knew about excessive risks to inmate's health but disregarded them and that their unconstitutional actions in fact caused inmate's injuries); *Jolly v. Knudsen*, 205 F.3d 1094, 1096 (8th Cir. 2000). Here, Plaintiff merely disagrees with Defendants' imposition of therapeutic restrictions for punitive purposes rather than for treatment purposes. Plaintiff does not claim that Defendants delayed or denied him any medical care or treatment for his mental illness and, therefore, has not alleged an Eighth Amendment violation. *See Orr*, 610 F.3d at 1034–35 (affirming dismissal of prisoner's Eighth Amendment claim where prisoner did not claim prison officials delayed or denied medical care).

E. Equal Protection

Plaintiff also alleges Defendants violated his equal protection rights by depriving him of privileges available to general population inmates for the purpose of punishment without adhering to proper disciplinary procedures. Liberally construed, Plaintiff further asserts that the MHU Multi-Disciplinary Team violated equal protection by failing to consistently discipline or place restrictions on each inmate involved in the same alleged misconduct. (Filing 25 at CM/ECF p. 8, ¶ 33.) Specifically, Plaintiff alleges the other inmate with whom Plaintiff allegedly passed and received unauthorized canteen items was not placed on level D like Plaintiff was or any other restriction. (*Id.* at CM/ECF p. 9, ¶ 37.)

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The government is required to treat similarly situated people alike, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985), and this requirement extends to prison inmates. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

To prevail on an equal protection claim, an inmate plaintiff must allege he was treated differently than a similarly situated class of inmates, that the different treatment burdened one of his fundamental rights, and that the different treatment bears no rational relation to any legitimate penal interest. *Murphy v. Missouri Dept. of Corr.*, 372 F.3d 979, 984 (8th Cir. 2004).[3] Taking the allegations of Plaintiff's Amended Complaint as true, Plaintiff has failed to allege that his equal protection rights were violated. Plaintiff does not allege that he was similarly situated to general population inmates, and the fact that inmates in the MHU sign and acknowledge the terms of the MHU program prior to admittance undermines any inference that MHU and general population inmates are similarly situated. *See Muick v. Reno*, 83 F. App'x 851, 853 (8th Cir. 2003) (per curiam) (federal prisoner's placement in a special housing unit and denial of the same privileges as general-population inmates did not support federal prisoner's equal-protection *Bivens* claims, where prisoner was not similarly situated to the general-population inmates and thus could not show he was treated differently from similarly situated class of inmates). Nor does Plaintiff allege that he was similarly situated to the inmate who was also allegedly engaging in the same misconduct as Plaintiff; that is, the other inmate is not alleged to be an inmate within the MHU. Even if it could be reasonably inferred that the other inmate is similarly situated to Plaintiff, Plaintiff has not alleged that the different treatment burdened one of his fundamental rights.

F. 42 U.S.C. § 1985

Citing 42 U.S.C. § 1985, Plaintiff alleges that Defendants conspired to deprive him of his civil rights. (Filing 25 at CM/ECF p. 2, ¶ 4.) However, 42 U.S.C. § 1985(1) and (2) (interference with performance of official duty;

[3] To the extent Plaintiff's allegations could be construed as asserting mentally ill or mentally disabled inmates are a suspect class, such assertion fails. *See More v. Farrier*, 984 F.2d 269, 271 (8th Cir. 1993) (physically disabled inmates not a suspect class (citing *City of Cleburne*, 473 U.S. at 441–43)).

obstruction of justice and intimidation of party, witness or juror) have no application to Plaintiff, and Plaintiff fails to state a claim under 42 U.S.C. § 1985(3). As the Eighth Circuit Court of Appeals has explained:

> In order to prove the existence of a civil rights conspiracy under § 1985(3), the [plaintiff] must prove: (1) that the defendants did "conspire," (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or equal privileges and immunities under the laws," (3) that one or more of the conspirators did, or caused to be done, "any act in furtherance of the object of the conspiracy," and (4) that another person was "injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States." 42 U.S.C. § 1985(3).... "The 'purpose' element of the conspiracy requires that the plaintiff prove a class-based 'invidiously discriminatory animus.'"

Larson ex rel. Larson v. Miller, 76 F.3d 1446, 1454 (8th Cir. 1996) (en banc) (quoting *City of Omaha Employees Betterment Ass'n v. City of Omaha*, 883 F.2d 650, 652 (8th Cir.1989)). In addition, Plaintiff "must allege that an independent federal right has been infringed. Section 1985 is a statute which provides a remedy, but it grants no substantive stand-alone rights. The source of the right or laws violated must be found elsewhere." *Federer v. Gephardt*, 363 F.3d 754, 758 (8th Cir. 2004).

While Plaintiff has alleged a class-based discriminatory animus based on mental illness or disability, Plaintiff's conspiracy claims fail for two reasons. First, as discussed above, the independent federal rights Plaintiff claims were infringed were his rights to free speech under the First Amendment, to be free from cruel and unusual punishment under the Eighth Amendment, and to due process and equal protection under the Fourteenth Amendment. However, Plaintiff has not stated a claim upon which relief may be granted under any of those constitutional provisions. Accordingly, Plaintiff's § 1985(3) claim cannot proceed pursuant to an alleged violation of Plaintiff's rights under the First, Eighth, or Fourteenth

Amendment. Second, Plaintiff's conclusory allegations that a conspiracy existed between Defendants are insufficient to state a claim for relief. *See Kelly v. City of Omaha*, 813 F.3d 1070, 1077–78 (8th Cir. 2016) ("In order to state a claim for conspiracy under § 1985, a plaintiff must allege with particularity and specifically demonstrate with material facts that the defendants reached an agreement. This standard requires that allegations of a conspiracy [be] pleaded with sufficient specificity and factual support to suggest a meeting of the minds directed toward an unconstitutional action." (internal quotation marks and citations omitted)); *Cooper v. Delo*, 997 F.2d 376, 377 (8th Cir. 1993) (per curium) (complaint subject to dismissal if allegations of conspiracy are inadequate; plaintiff must allege facts suggesting mutual understanding between defendants or meeting of minds).

Accordingly, Plaintiff has not alleged any claims on which relief may be granted pursuant to 42 U.S.C. § 1985(3), and such claims will be dismissed.

G. ADA

Liberally construed, Plaintiff's Complaint asserts a claim under the ADA, which is divided into three parts:

> Title I prohibits employment discrimination, 42 U.S.C. § 12112, Title II prohibits discrimination in the services of public entities, 42 U.S.C. § 12132, and Title III prohibits discrimination by public accommodations involved in interstate commerce such as hotels, restaurants, and privately operated transportation services, 42 U.S.C. §§ 12182, 12184.

Gorman v. Bartch, 152 F.3d 907, 911 (8th Cir. 1998).

Title II of the ADA applies to prisons, and it provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of

a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *United States v. Georgia*, 546 U.S. 151, 154 (2006) (a "public entity" under § 12132 includes state prisons); *Mason v. Corr. Med. Servs., Inc.*, 559 F.3d 880, 886 (8th Cir. 2009) ("[R]ecreational activities, medical services, and educational and vocational programs at state prisons are benefits within the meaning of Title II." (internal quotation marks omitted)).

Plaintiff sues eleven of the twelve Defendants in their individual capacities, but Title II ADA claims may only be brought against the Defendant corrections officials and employees in their official capacities. *See Dinkins v. Correctional Med. Svs.*, 743 F.3d 633 (8th Cir. 2014) (correctional officers could not be sued in their individual capacities under the ADA); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) (en banc) (explaining that Title II provides disabled individuals redress for discrimination by a "public entity," which does not include individuals).

To the extent Plaintiff alleges an official capacity claim against Defendant Robin Church, a member of the MHU Multi-Disciplinary Team, Plaintiff's claims for damages under the ADA are barred by sovereign immunity. *See Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc) (holding that Title II of the ADA, governing discrimination by public entities, did not validly abrogate States' Eleventh Amendment immunity from suit by private individuals in federal court). While prospective injunctive relief against state officials in their official capacities is permitted under the ADA, *see Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001) (permitting ADA claims for prospective injunctive relief against state official sued in official capacity), Plaintiff has abandoned his claims for prospective injunctive relief, and such claims would be moot given that Plaintiff is no longer in the MHU. *See* Section III.A. *supra*. Thus, even if Plaintiff

had alleged a plausible claim under the ADA,[4] he does not seek any relief that may be granted under the act.

IV. CONCLUSION

Plaintiff's Amended Complaint fails to state a plausible claim for relief against the Defendants under the First, Eighth, or Fourteenth Amendments. Plaintiff has also failed to state a claim under 42 U.S.C. § 1985 or the ADA. Accordingly, the court will dismiss Plaintiff's Amended Complaint for failure to state a claim upon which relief may be granted without leave to amend as the court concludes that further amendment would be futile.

IT IS THEREFORE ORDERED that:

1. Plaintiff's motion to withdraw his Rule 60(b) motion (filing 27) is granted. The clerk of the court is directed to terminate the motion event for Filing 26.

2. This matter is dismissed for failure to state a claim upon which relief may be granted.

3. The court will enter judgment by a separate document.

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[4] In order to sufficiently allege a Title II ADA claim, Plaintiff must allege "(1) that he is a qualified individual with a disability; (2) that he was excluded from participation in or denied the benefits of the jail's services, programs, or activities, or was otherwise subjected to discrimination by the jail; and (3) that such exclusion, denial of benefits, or other discrimination was by reason of his disability." *Baribeau v. City of Minneapolis*, 596 F.3d 465, 484 (8th Cir. 2010); *see also Folkerts v. City of Waverly*, 707 F.3d 975, 983 (8th Cir. 2013); *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999). Here, Plaintiff fails to satisfy the first element as he alleges absolutely no facts to support a finding that he is a qualified individual with a disability.

Dated this 1st day of October, 2020.

BY THE COURT:

Richard G. Kopf

Richard G. Kopf
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RAYSEAN BARBER,

Plaintiff,

vs.

SCOTT FRAKES, TAGGART BOYD, TED HILL, MIKI HOLLISTER, KRISTINA MILBURN, NATE SHWAB, DR. MARK LUKIN, DR. MEGAN FORD, BETTY GERGEN, JACQUE GOODING, AMY REZNEY, and ROBIN CHURCH,

Defendants.

8:18CV410

MEMORANDUM AND ORDER

Plaintiff filed a Complaint on August 27, 2018. (Filing No. 1.)[1] He has been given leave to proceed in forma pauperis. (Filing No. 9.) The court now conducts an initial review of Plaintiff's Complaint to determine whether summary dismissal is appropriate under 28 U.S.C. §§ 1915(e) and 1915A.

I. SUMMARY OF COMPLAINT

Plaintiff is an inmate in the custody of the Nebraska Department of Correctional Services ("NDCS") and confined at the Tecumseh State Correctional Institution ("TSCI"). Plaintiff brings this action pursuant to 42 U.S.C. §§ 1983 and 1985 against Scott Frakes, Director of the NDCS; Taggart Boyd, the Warden of the Lincoln Correctional Center ("LCC"); and 10 employees of the LCC for alleged violations of his constitutional rights under the First, Eighth, and Fourteenth

[1] The Complaint was signed by Plaintiff and another prisoner, Guy Collins. (Filing No. 1 at CM/ECF p. 13.) Collins was dismissed as a plaintiff in this action after he failed to advise the court in writing whether he wished to "opt out" or continue with the group litigation. (Filing No. 13.)

Amendments. Liberally construed, Plaintiff also alleges a violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213. (Filing No. 1 at CM/ECF pp. 3, 11.)

Plaintiff alleges he has been diagnosed with a serious mental illness and was housed in the Mental Health Unit ("MHU") at the LCC prior to being confined at the TSCI. (*Id.* at CM/ECF p. 1.) Plaintiff alleges that the Defendants deprive inmates in the MHU of activities and privileges without affording an inmate a hearing or any of the procedures required by Title 68 of the Nebraska Administrative Code, which sets forth the rules for regulating an inmate's behavior, and additional deprivations of privileges are imposed upon admission into the MHU "Levels Program" "for reasons not directly having to do with the treatment of a particular mental illness." (*Id.* at CM/ECF pp. 2, 7.) Inmates must sign a consent form and a contract agreeing to the terms of the MHU program prior to entering the MHU and are informed that inmates "can be placed on a therap[e]utic restriction." (*Id.* at CM/ECF p. 7.) The Levels Program is administered by the MHU Multi-Disciplinary Team which is made up of the 10 LCC employees Plaintiff named as Defendants.

On June 1, 2018, Plaintiff alleges he was placed on "level D, which is a restriction that is similar to the sanction 'room restriction' set forth in Title 68," for 17 days without being afforded a hearing based on reports that he had engaged in passing and receiving canteen times with other inmates. (*Id.* at CM/ECF pp. 8–9.) As a result of being placed on level D, Plaintiff lost his job as the lead porter on the MHU. (*Id.* at CM/ECF p. 9.) The other inmate with whom Plaintiff allegedly exchanged canteen items did not receive any type of restriction for his alleged misconduct. (*Id.*)

Plaintiff alleges the MHU Multi-Disciplinary Team's enforcement of the Levels Program violated the First, Eighth, and Fourteenth Amendments, and that "[a]ll Defendants, by agreeing to the enforcement of the levels program, . . . did conspire, for the purpose of depriving . . . Plaintiffs and others similarly situated of

the equal protection of the laws, or of equal privileges or immunities under the laws." (*Id.* at CM/ECF pp. 11–12.) For relief, Plaintiff seeks a declaration that the Levels Program is unconstitutional, injunctive relief enjoining the continuation of the MHU Levels Program, and monetary damages. (*Id.* at CM/ECF p. 12.)

II. APPLICABLE LEGAL STANDARDS ON INITIAL REVIEW

The court is required to review prisoner and in forma pauperis complaints seeking relief against a governmental entity or an officer or employee of a governmental entity to determine whether summary dismissal is appropriate. *See* 28 U.S.C. §§ 1915(e) and 1915A. The court must dismiss a complaint or any portion of it that states a frivolous or malicious claim, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); 28 U.S.C. § 1915A(b).

Pro se plaintiffs must set forth enough factual allegations to "nudge[] their claims across the line from conceivable to plausible," or "their complaint must be dismissed." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

"The essential function of a complaint under the Federal Rules of Civil Procedure is to give the opposing party 'fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved.'" *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 848 (8th Cir. 2014) (quoting *Hopkins v. Saunders*, 199 F.3d 968, 973 (8th Cir. 1999)). However, "[a] pro se complaint must be liberally construed, and pro se litigants are held to a lesser pleading standard than other parties." *Topchian*, 760 F.3d at 849 (internal quotation marks and citations omitted).

Liberally construed, Plaintiff here alleges federal constitutional claims. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege a violation of rights protected by the United States Constitution or created by federal statute and also must show that the alleged deprivation was caused by conduct of a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993).

III. DISCUSSION

A. Sovereign Immunity

Plaintiff has sued Frakes, Boyd, and the 10 LCC employees for monetary damages and declaratory and injunctive relief. Because Plaintiff did not specify the capacity in which these various NDCS officials and employees are sued, the court presumes that they are sued in their official capacities only. *See, e.g., Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999) ("This court has held that, in order to sue a public official in his or her individual capacity, a plaintiff must expressly and unambiguously state so in the pleadings, otherwise, it will be assumed that the defendant is sued only in his or her official capacity."). Sovereign immunity prevents the court from exercising jurisdiction over claims for damages against Defendants in their official capacities.

The Eleventh Amendment bars claims for damages by private parties against a state. *See, e.g., Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 618-19 (8th Cir. 1995); *Dover Elevator Co. v. Arkansas State Univ.*, 64 F.3d 442, 446-47 (8th Cir. 1995). Any award of retroactive monetary relief payable by the state, including for back pay or damages, is proscribed by the Eleventh Amendment absent a waiver of immunity by the state or an override of immunity by Congress. *See, e.g., Dover Elevator Co.*, 64 F.3d at 444; *Nevels v. Hanlon*, 656 F.2d 372, 377-78 (8th Cir. 1981). A state's sovereign immunity extends to public officials sued in their official capacities as "[a] suit against a public employee in his or her official capacity is merely a suit against the public employer." *Johnson*, 172 F.3d at 535.

An exception to this immunity was recognized by the Supreme Court in *Ex Parte Young*, 209 U.S. 123 (1908), which permits prospective injunctive relief against state officials for ongoing federal law violations. This exception does not apply to cases involving requests for purely retroactive relief. *Green v. Mansour*, 474 U.S. 64 (1985).

Plaintiff's claims against Defendants in their official capacities are claims against the State of Nebraska. There is nothing in the record before the court showing that the State of Nebraska waived, or that Congress overrode, sovereign immunity in this matter. Therefore, this court lacks jurisdiction over Plaintiff's damages claims against Defendants in their official capacities.

B. Claims for Declaratory and Injunctive Relief

Sovereign immunity does not bar Plaintiff's claims for declaratory and prospective injunctive relief. However, the fact that Plaintiff is no longer incarcerated at the LCC or subject to the MHU Levels Program moots his claims for declaratory and injunctive relief.

Article III of the Constitution limits federal court jurisdiction to "cases" and "controversies." A case becomes "moot," thus ending jurisdiction, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)) (internal quotation marks omitted). Injunctive relief "'is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again.'" *Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, (1983)). Likewise, to warrant declaratory relief, "the injury still must be clearly impending." *Vorbeck v. Schnicker*, 660 F.2d 1260, 1265 (8th Cir. 1981).

Here, Plaintiff is confined at the TSCI and is no longer subject to the LCC MHU Levels Program. Thus, his claims for injunctive relief are moot, and he lacks standing to seek a declaration as to the constitutionality of the Levels Program. *Martin*, 780 F.2d at 1337 (concluding that claim for injunctive relief against warden was moot and prisoner lacked standing to seek declaratory relief because prisoner was transferred to another prison).

C. ADA Claim

In his Complaint, Plaintiff cites to 42 U.S.C. § 12101 of the ADA as one of the bases for his claims. Plaintiff's purported claim under the ADA appears to be that he is an individual with a disability (a serious mental illness) who is excluded from certain activities or privileges allowed for general population inmates because Defendants impose more restrictive terms on inmates in the MHU. Besides the obvious failure to plausibly allege the elements of an ADA claim,[2] the bar of sovereign immunity applies equally to Plaintiff's claims for damages under the ADA. *See Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir.1999) (en banc) (holding that Title II of the ADA, governing discrimination by public entities, did not validly abrogate States' Eleventh Amendment immunity from suit by private individuals in federal court). While prospective injunctive relief against state officials in their official capacities is permitted under the ADA, *Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001) (permitting ADA claims for prospective injunctive relief against state official sued in official capacity), such claims suffer from the same mootness defect discussed above.

[2] "To state a prima facie claim under the ADA, a plaintiff must show: 1) he is a person with a disability as defined by statute; 2) he is otherwise qualified for the benefit in question; and 3) he was excluded from the benefit due to discrimination based upon disability." *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999). A person is disabled under the ADA if he has "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Here, Plaintiff alleges absolutely no facts to support a finding of disability.

IV. CONCLUSION

Plaintiff's Complaint fails to state a plausible claim for relief against the Defendants in their official capacities because sovereign immunity bars his claims for damages, his claims for injunctive relief are moot, and he lacks standing to seek declaratory relief. On the court's own motion, and out of an abundance of caution, Plaintiff shall have 30 days to file an amended Complaint that states a plausible claim for relief against Defendants in their individual capacities.

IT IS THEREFORE ORDERED that:

1. Plaintiff's claims for injunctive and declaratory relief are dismissed as moot.

2. Plaintiff's claims for damages against Defendants in their official capacities are dismissed as barred by sovereign immunity.

3. Plaintiff shall have until **July 10, 2019**, to file an amended complaint that states a plausible claim for relief against Defendants in their individual capacities. Failure to file an amended complaint within the time specified by the court will result in the court dismissing this case without further notice to Plaintiff.

4. In the event that Plaintiff files an amended complaint, Plaintiff shall restate the allegations of the current Complaint (filing no. 1) and any new allegations. Failure to consolidate all claims into one document may result in the abandonment of claims. **Plaintiff is warned that an amended complaint will supersede, not supplement, his Complaint**.

5. The court reserves the right to conduct further review of Plaintiff's claims pursuant to 28 U.S.C. § 1915(e) in the event he files an amended complaint.

6. The clerk of the court is directed to set a pro se case management deadline using the following text: **July 10, 2019**: check for amended complaint.

Dated this 10th day of June, 2019.

BY THE COURT:

s/ *Richard G. Kopf*
Senior United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3406

RaySean D. Barber

Appellant

Guy Collins

v.

Scott Frakes, et al.

Appellees

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:18-cv-00410-RGK)

ORDER

The petition for rehearing by the panel is denied.

March 17, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

42 U.S.C.A. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE UNITED STATES SUPREME COURT

RAYSEAN BARBER,	)	
Petitioner,	)	MOTION TO PROCEED WITHOUT COMPLAIANCE
v.	)	WITH SUPREME COURT RULE 29
SCOTT FRAKES, et al.,	)	
Respondents.	)	

COMES NOW, Petitioner, pro se, and hereby moves this Honorable Court for an order allowing him to proceed without compliance with Rule 29; Petitioner further argues:

1.) That he is an inmate who proceeded in forma pauperis in the district court;

2.) That, therefore, the U.S. Marshal services would have to provide service of process upon the defendants;

3.) that the district court dismissed this action without serving the defendants; and

4. that, therefore, Petitioner does not have the addresses of the Respondents to properly comply with rule 29.

LEGAL ARGUMENT

Pro se litigants proceeding in forma pauperis are entitled to rely on service by the United States Marshals Service. Wright v. First Student, Inc., 710 F.3d 782, 783 (8th Cir. 2013). Pursuant to 28 U.S.C. §1915(d), in an in

forma pauperis case, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases." See Moore v. Jackson, 123 F.3d 1082, 1085 (8th Cir. 1997) (language in §1915(d) is compulsory); Fed. R. Civ. P. 4(c)(3) (court must order that service be made by United States Marshal if plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915). See, e.g., Beyer v. Pulaski County Jail, 589 Fed. Appx. 798 (8th Cir. 2014) (unpublished) (vacating district court order of dismissal for failure to prosecute and directing district court to order the Marshal to seek defendant's last known contact information where plaintiff contended that the jail would have information for defendant's whereabouts); Graham v. Satkoski, 51 F.3d 710, 713 (7th CCir. 1995) (when court instructs Marshal to serve papers for prisoner, prisoner need furnish no more than information necessary to identify defendant; Marshal should be able to ascertain defendant's current address). With respect to prisoner actions, it is believed that "use of marshals to effect service alleviates two concerns that pervade prisoner litigation, state or federal: 1) the security risks inherent in providing the addresses of prison emplyees to prisoners; and 2) the reality that prisoners often get the 'runaround' when they attempt to obtain information through governmental channels and needless attendant delays in litigating a case result." Id.

Given the above Petitioner can not be expected to be able to comply with Rule 29.

WHEREFORE, Petitioner prays that this Court will allow him to proceed without complying with Rule 29.

Respectively Submitted:

Raysean Barber 7889

RAYSEAN BARBER

P.O. Box 22800

Lincoln, NE 68542

Petitioner, Pro Se.

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MATTHEW DESMOND BROWNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY R. GALLAGHER
Federal Defender for the District of Montana
*JOHN RHODES
Assistant Federal Defender
Federal Defenders of Montana
125 Bank St., Ste. 710
Missoula, Montana 59802-9380
(406) 721-6749
*Counsel of Record

SUBMITTED: August 15, 2018

QUESTION PRESENTED

Is the Fourth Amendment violated when a warrantless seizure is carried out based on an anonymous tip that correctly identifies a vehicle and a driver's first name but incorrectly predicts the location of the vehicle by ninety miles and one to two days?

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APPENDICES

Appendix A: *United States v. Browne*, 717 Fed. Appx. 751 (9th Cir. 2018)

Appendix B: Order of 9th Circuit Court of Appeals denying rehearing

Appendix C: Fourth Amendment of the United States Constitution

Appendix D: *United States v. Browne*, 219 F.Supp.3d 1030 (D. Mont. 2016)

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Federal Statutes

JURISDICTION

The court of appeals issued its opinion denying Mr. Browne's request for appellate relief on April 5, 2018. Appendix A. The court of appeals issued its order denying rehearing on May 17, 2018. Appendix B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. Browne*, 717 Fed. Appx. 751 (9th Cir. 2018). Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States. Appendix C.

STATEMENT OF THE CASE

Mr. Browne was arrested following a traffic stop and search of his vehicle on June 10, 2016. He was indicted on one count of conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846, and two counts of possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A).

Mr. Browne filed a motion in district court to suppress the evidence seized

following the traffic stop. The district court denied the motion, and Mr. Browne ultimately pled guilty to count two of the indictment, charging possession with intent to distribute cocaine. Pursuant to the plea agreement, Mr. Browne reserved the right to appeal the district court's denial of his suppression motion.

The seizure of Mr. Browne and his vehicle was based on an anonymous tip received by law enforcement. While the information in the tip accurately described Mr. Browne's first name and his vehicle, it did not accurately predict his alleged illegal activities. Such a seizure violates this Court's guidance in *Alabama v. White* and *Florida v. J.L.*

Mr. Browne requests this Court grant his petition for certiorari and review his case or vacate the judgment and remand for further proceedings.

PRIOR PROCEEDINGS

On June 8, 2016, Mr. Browne was arrested in Libby, Montana, following a search of his truck which uncovered 58 kilograms of cocaine. On June 10, 2016, Mr. Browne made his initial appearance in the District of Montana. A complaint charged one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). An affidavit by Special Agent Troy Capser of the Department of Homeland Security underwrote the complaint.

On June 21, 2016, the government filed an indictment charging Mr. Browne, Preston Lahmer, and Kristopher Pfeifer. It charged Mr. Browne with one count conspiracy to possess controlled substances with intent to distribute in violation of 21 U.S.C. § 846, and two counts of possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). The government charged the co-defendants with one count conspiracy to possess controlled substances with intent to distribute in violation of 21 U.S.C. § 846, and one count aiding and abetting possession with intent to distribute a Schedule 1 controlled substance pursuant to 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2.

Mr. Browne was arraigned on June 24, 2016.

On October 6, 2016, Mr. Browne filed a motion to suppress all evidence resulting from the stop of his vehicle. A hearing was held on October 28, 2016. On November 8, 2016, the district court denied Mr. Browne's motion to suppress. Mr. Browne filed a motion to change his plea to guilty on November 9, 2016. Per a plea agreement, Mr. Browne agreed to plead guilty to count two of the indictment and reserved his right to appeal the district court's denial of his suppression motion.

On November 14, 2016, the government filed an offer of proof. On November 16, 2016, Mr. Browne pled guilty to the magistrate judge, and the magistrate filed

findings and recommendations recommending the district court accept Mr. Browne's guilty plea, which it did on December 2, 2016.

The court convened a sentencing hearing on March 15, 2017, and imposed a sentence of 24 months imprisonment on count one followed by 2 years of supervised release. The court approved Mr. Browne's right to appeal its order denying the suppression motion, and judgment was entered that same day.

Mr. Browne appealed on March 15, 2017.

The Ninth Circuit Court of Appeals affirmed on April 5, 2018. Appendix A. The Ninth Circuit Court of Appeals denied Mr. Browne's request for rehearing on May 17, 2018.

FACTUAL BACKGROUND

This case begins with an anonymous tip. On Sunday, June 5, 2016, Homeland Security Agent Todd Holton in Kalispell, Montana, received an email from an officer of the Royal Canadian Mounted Police (RCMP). The body of the email is reproduced below, verbatim (including its spacing) and in its entirety:

> Information as follows:
>
> "Matt" white male Canadian with tattoo of lady on his neck entered the US approximately three days ago in Vancouver area where US Customs ripped vehicle with neg results;
>
> Matt is driving a blue Chevrolet Avalanche with BC or California plates and should be in Kalispell about now believed to be overnighting before

Lincoln County Sheriff's Detective Nate Scofield was aware of the tip. Although he was a member of the NWDTF, he did not receive Agent Capser's text message. Instead, he received a phone call from another NWDTF member, Montana Department of Criminal Investigations Agent Steve Spanogle.

Spanogle and Scofield differ on the content of that phone call. Spanogle testified that he told Scofield that a blue Chevy Avalanche with British Columbia license plates was transporting cocaine in the area. Spanogle testified he told Scofield the information originated with Agent Capser.

Scofield, however, testified that Spanogle told him "a blue Chevy Avalanche with BC plates" was "headed towards the Yaak to transport across the U.S./Canada border." The Yaak refers, generally, to the expansive wilderness in northwest Montana around the Yaak River.

Scofield was off-duty on the evening of Wednesday, June 8, 2016. At around 8:00 p.m., he spotted a blue Chevrolet Avalanche with British Columbia license plates at a gas station in Libby, Montana. Libby is approximately ninety miles north and west of Kalispell. The two towns are separated by the 2.4 million acre Flathead National Forest.

Scofield began following the Avalanche, which was headed south on U.S. Highway 2, towards Kalispell. As he did, he called Agent Capser to let him know

he was following a truck that matched the description of the truck in the anonymous tip. Capser instructed Scofield to "keep a loose tail" and follow the truck towards Kalispell.

Scofield also called Lincoln County Sheriff's Sergeant Brandon Holzer. Scofield told Holzer that he was following a vehicle believed to be transporting cocaine, and asked Holzer to follow him if he needed assistance. Scofield did not provide Holzer with any of the details from the tip.

Nine miles outside of Libby, the Avalanche pulled over and turned around to head north, back towards Libby. Scofield followed. The Avalanche approached a hill, known colloquially as "Whiskey Hill." Whiskey Hill is well-known locally as a speed trap. Scofield called Holzer, who had not yet caught up to Scofield or the Avalanche, to tell him that the Avalanche was heading back towards Libby and was about to descend Whiskey Hill. Scofield instructed Holzer to set up at the bottom of Whiskey Hill to attempt to stop the Avalanche for speeding.

Holzer observed the Avalanche traveling 56 mph in a 50 mph zone. At approximately 8:30 p.m., Holzer pulled the Avalanche over for speeding.

Holzer approached the driver of the Avalanche, who was identified as Matthew Browne. He retrieved Mr. Browne's driver's license and vehicle registration. While Holzer was talking to Mr. Browne, Scofield arrived at the scene

and parked behind the Avalanche. Holzer gave the driver's license to Scofield, and told Scofield that Mr. Browne appeared nervous. Scofield took the license with him to his car, and Holzer returned to his patrol vehicle. Holzer called dispatch regarding the Avalanche's registration. Dispatch confirmed the Avalanche was registered to Matthew Browne. Holzer testified, "I was not processing any speeding ticket."

While Holzer checked the vehicle registration in his patrol vehicle, Scofield was in his car calling Capser. It is unclear the length of their conversation; however, Scofield testified that Capser verified the first name of the driver of the Avalanche.

Scofield and Holzer exited their respective vehicles at approximately the same time. Scofield questioned Mr. Browne for about five minutes. After he finished these initial questions, Scofield directed Mr. Browne to turn off the truck. Scofield then began making phone calls to locate an available canine investigation unit. He found one in Dave Grainger, who would have to travel to the area from Bonners Ferry, Idaho.

Scofield informed Mr. Browne that he had requested a canine unit to inspect the Avalanche. Scofield told Mr. Browne that the reason for the inspection was that Mr. Browne's "story just doesn't make any kinda sense." After a wait of approximately forty-five minutes to an hour, Grainger arrived on the scene. He inspected the exterior of the truck with the canine unit, and the canine "alerted" to

the presence of narcotics at the truck's rear bumper. Around this time, Spanogle and Capser also arrived at the scene. Spanogle obtained Mr. Browne's consent to search the vehicle. The officers discovered a secret compartment under the bed of the truck containing one hundred and forty-five pounds of powder cocaine.

REASONS FOR GRANTING THE PETITION

A. The district court ruled the traffic stop ended, and the criminal investigation began, when Holzer exited his patrol car.

In its order denying suppression, the district court held

> First, as a preliminary matter the Court finds that the investigation of the traffic stop ceased, at the earliest, the moment Sergeant Holzer stepped out of his patrol car to assist Detective Scofield in his questioning of Browne.

United States v. Browne, 219 F.Supp.3d 1030, 1036 (D. Mont. 2016). Appendix D.

The Ninth Circuit did not directly address the issue, but it did rule that reasonable suspicion was justified by the details of the tip corroborated by Scofield. *Browne*, 717 Fed.Appx. at 751-52. The Circuit did not consider any of the information Scofield acquired during his questioning of Mr. Browne in its reasonable suspicion analysis.

These decisions narrow the analysis: whether or not Scofield had reasonable suspicion to extend the traffic stop into a drug investigation at the moment Holzer exited his vehicle, ending the traffic stop.

B. The anonymous tip did not provide sufficient reasonable suspicion.

Mr. Browne was stopped for a speeding violation. "A seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation." *Rodriguez v. United States*, 135 S.Ct. 1609, 1612 (2015). In order to exceed the amount of time it took to effect the traffic stop, law enforcement must have reasonable suspicion. *Id.* at 1615. "We have described reasonable suspicion simply as 'a particularized and objective basis' for suspecting the person stopped of criminal activity[.]" *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

Holzer, the officer who initiated the traffic stop, testified he was not processing a traffic ticket, and in fact, never issued a ticket.

1. The tip was anonymous.

The district court and the Ninth Circuit agreed that the tip was anonymous. *Browne*, 219 F.Supp.3d at1036 n.7; *Browne*, 717 Fed.Appx. at 751. The information originated with a foreign law enforcement agency, and that agency did not provide details regarding how it learned the information. Therefore, it was treated as anonymous. "Because the FBI did not provide the sheriff's department with information about the basis of its tip, the tip should be treated as an anonymous tip."

United States v. Morales, 252 F.3d 1070, 1074 (9th Cir. 2001) (applying *United States v. Thomas*, 211 F.3d 1186, 1190 n.3 (9th Cir. 2000)).

2. Anonymous tips demonstrate reliability through predictions.

The only information available to Scofield, who extended the traffic stop into a drug investigation, was the information from the anonymous tip. Some of the information in that tip was identifying information: the description of the truck (a blue Chevy Avalanche with California or British Columbia license plates) and its driver (a Canadian male named "Matt" with a tattoo of a woman on his neck).[1] Some of the information predicted behavior: that the truck carried a substantial amount of powder cocaine, and that the truck and driver were in Kalispell on June 5th and would be meeting, in the "next day or two" (i.e., on June 6th or 7th), with accomplices to prepare the drugs for smuggling into Canada by backpackers.

"[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.'" *Alabama v. White*, 496 U.S. 325, 329 (1990) (quoting *Illinois v. Gates*, 462 U.S. 213, 237 (1983)); *see also*, *Florida v. J.L.*, 529 U.S. 266, 275 (2000)

[1] Mr. Browne does not have a tattoo of a woman on his neck.

of cocaine inside a brown attaché case." *Id.* at 327. Like the tip in Mr. Browne's case, the tip in *White* can be broken down into identifying information (White's name, location, vehicle, and the brown attaché case) and predictive criminal information (exactly where White would be, exactly when she would leave the apartment, exactly where she would go, and that she possessed cocaine).

Officers drove to the Lynwood Terrace Apartments. *Id.* They observed White leave the apartment and get into a brown Plymouth station wagon with a broken right taillight. *Id.* They followed White as she drove towards Dobey's Motel, stopping her just short of the motel itself. *Id.*

Although this Court deemed it a "close case," it ruled that the officers had reasonable suspicion to stop White, because "[w]hen significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop." *Id.* at 332.

That is precisely what did *not* happen here. Law enforcement was provided identifying information (the description of the truck and its driver) and information predicting criminal behavior (the truck carried a substantial amount of powder cocaine, and the truck and driver were in Kalispell on June 5th and would be meeting, on June 6th or 7th, with accomplices prior to smuggling the drugs into

This Court began by noting that police officers can only "stop and frisk," or otherwise detain individuals, when the officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). But in *J.L.*,

> the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, *see Adams v. Williams*, 407 U.S. 143, 146–147 (1972), "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," *Alabama v. White*, 496 U.S., at 329. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." *Id.*, at 327. The question we here confront is whether the tip pointing to J.L. had those indicia of reliability.

J.L., 529 U.S. at 270 (parallel citations omitted).

This Court then reviewed the facts in *White*, explaining that "[o]nly after police observation showed that the informant had accurately predicted the woman's movements, we explained, did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine." *J.L.*, 529 U.S. at 270. Here, the informant did not accurately predict Mr. Browne's movements, and thus it was unreasonable to conclude the informant had inside knowledge of Mr. Browne and therefore to credit his assertion about the cocaine.

Emphasizing the lack of predictive information, this Court explained why officers could not reasonably suspect J.L. of criminal behavior:

> The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L.

Id. at 271.

The tip in this case made specific predictions – that the truck would be in Kalispell on Monday or Tuesday to meet with the targets and distribute the cocaine for smuggling over the border. These predictions are a "means to test the informant's knowledge or credibility." *Id.* The informant failed that test, because the Avalanche was not spotted in Kalispell on Monday or Tuesday, and was found ninety miles away in Libby on Wednesday night. This failure shows that the rest of the information provided was unreliable. Unreliable information cannot serve as the basis for reasonable suspicion. *White*, 496 U.S. at 330 ("Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability.").

Identifying information alone cannot serve as the basis for reasonable suspicion. That is what the Ninth Circuit did when it found "especially compelling the additional corroboration of the name of the driver." *Browne*, 717 Fed.Appx. at 751-52. This Court, however, instructs that "a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *J.L.*, 529 U.S. at 272.

Because Mr. Browne was not where the tip said he would be, when he would be there, law enforcement failed to verify the reliability of the tip, and if anything, verified its unreliability. Because the tip's predictions failed, the tip was shown to be unreliable, and there was no indicia of reliability on which to base reasonable suspicion.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Dated this 15th day of August, 2018.

/s/ John Rhodes
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APPENDIX A

United States v. Matthew Desmond Browne,
717 Fed.Appx. 751 (9th Cir. 2018)

717 Fed.Appx. 751 (Mem)
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Matthew Desmond BROWNE, Defendant-Appellant.

No. 17-30042
|
Argued and Submitted March 7, 2018 Seattle, Washington
|
Filed April 05, 2018

Appeal from the United States District Court for the District of Montana, Dana L. Christensen, Chief Judge, Presiding, D.C. No. 9:16-cr-00027-DLC-1

Attorneys and Law Firms

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John Rhodes, Esquire, Assistant Federal Public Defender, FDMT—Federal Defenders of Montana (Missoula), Missoula, MT, for Defendant-Appellant

Before: RAWLINSON, CLIFTON, and CHRISTEN, Circuit Judges.

MEMORANDUM *

Defendant-Appellant Matthew Browne appeals the district court's order denying his motion to suppress evidence discovered during a warrantless search of his vehicle. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

A district court's denial of a motion to suppress is reviewed *de novo*. *United States v. Gorman*, 859 F.3d 706, 714 (9th Cir. 2017). "We review *de novo* whether the police had reasonable suspicion to make an investigatory stop, a mixed question of law and fact." *United States v. Choudhry*, 461 F.3d 1097, 1100 (9th Cir. 2006). The district court's underlying factual findings are reviewed for clear error. *Id.* We may affirm on any basis supported by the record. *Id.*

1. Holzer had reasonable suspicion to conduct a traffic stop because he witnessed Browne speeding. *See id.* ("A traffic violation alone is sufficient to establish reasonable suspicion.").

2. Scofield was justified in prolonging the traffic stop because he had reasonable suspicion that Browne was trafficking narcotics. The anonymous tip that formed the basis of Scofield's reasonable suspicion

exhibited "sufficient indicia of reliability." *Alabama v. White*, 496 U.S. 325, 332, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). Scofield and Holzer were able to corroborate many of the details of the anonymous tip. The officers corroborated the make, model, color, and country of registration of the vehicle described in the tip. We find especially ***752** compelling the additional corroboration of the name of the driver. "It is true that not every detail mentioned by the tipster was verified." *Id.* at 331, 110 S.Ct. 2412. However, we conclude under the totality of the circumstances that the anonymous tip exhibited sufficient indicia of reliability to justify Scofield's prolongation of the traffic stop. [1]

Further, by calling multiple K-9 units shortly after speaking with Browne, Scofield "diligently pursued a means of investigation that was likely to confirm or dispel [his] suspicions quickly, during which time it was necessary to detain [Browne]." *United States v. Sharpe*, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). Although it took between forty-five minutes and an hour for the K-9 unit to arrive, this delay did not "unreasonably infringe[ ] interests protected by the Constitution." *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); *see also Gallegos v. City of L.A.*, 308 F.3d 987, 992–93 (9th Cir. 2002) (forty-five to sixty minute detention not unreasonable).

3. Browne's reliance on *United States v. Magallon-Lopez*, 817 F.3d 671 (9th Cir. 2016), is misplaced. Browne was in fact told the true basis for why he was stopped and why the stop was prolonged, so we need not address his claim of a due process right "to be informed of the true basis for a stop or arrest." *Magallon-Lopez*, 817 F.3d at 677 (Berzon, J., concurring).

AFFIRMED.

All Citations

717 Fed.Appx. 751 (Mem)

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 We note that there were discrepancies between Detective Scofield's testimony and the bodycam and audio recordings of the traffic stop. Those discrepancies do not alter our determination that other corroboration provided objectively reasonable suspicion to prolong the traffic stop, but we are nonetheless concerned that the record does not support many of the details included in the detective's testimony.

End of Document

APPENDIX B

United States v. Browne, No. 17-30042
Order Denying Petition for Panel Rehearing and Rehearing En Banc

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MATTHEW DESMOND BROWNE, Defendant-Appellant.	No. 17-30042 D.C. No. 9:16-cr-00027-DLC-1 District of Montana, Missoula ORDER

Before: RAWLINSON, CLIFTON, and CHRISTEN, Circuit Judges.

The panel has unanimously voted to deny Defendant-Appellant's petition for panel rehearing. Judges Rawlinson and Christen have voted to deny the petition for rehearing en banc, and Judge Clifton has so recommended.

The full court has been advised of Defendant-Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

U.S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX D

United States v. Browne,
219 F.Supp.3d 1030 (D. Mont. 2016)

219 F.Supp.3d 1030
United States District Court,
D. Montana,
Missoula Division.

UNITED STATES of America, Plaintiff,
v.
Matthew BROWNE, Kristopher Pfeifer, and Preston Lahmer, Defendants.

CR 16–27–M–DLC
|
Signed 11/08/2016

Synopsis

Background: In prosecution for narcotics trafficking, defendant filed motion to suppress evidence seized from search of his vehicle.

Holdings: The District Court, Dana L. Christensen, Chief Judge, held that:

[1] traffic stop was supported by reasonable suspicion that defendant was speeding;

[2] officers had independent reasonable suspicion that defendant was engaged in narcotics trafficking, as basis for prolonging the stop;

[3] prolonging the stop for 45 to 60 minutes, so a canine unit could arrive, was supported by individualized suspicion of narcotics trafficking; and

[4] defendant did not have due process right to be told the true reason for the traffic stop.

Motion denied.

Attorneys and Law Firms

***1032** Jeffrey K. Starnes, Lead Attorney; Attorney to be Noticed, Office of the U.S. Attorney, Great Falls, MT, William Adam Duerk, Attorney to be Noticed, U.S. Attorney's Office, Missoula, MT, for Plaintiff.

John Rhodes, Lead Attorney; Attorney to be Noticed, Federal Defenders of Montana, Eric Ryan Henkel, Lead Attorney; Attorney to be Noticed, Reep Bell Laird Simpson & Jasper, P.C., Bryan C. Tipp, Sarah M. Lockwood, Lead Attorney; Attorney to be Noticed, Tipp & Buley, P.C., Missoula, MT, for Defendants.

ORDER

Dana L. Christensen, Chief District Judge, United States District Court

Defendant Matthew Browne ("Browne") moves the Court to suppress the evidence seized from the search of his vehicle on June 8, 2016, and his related statements to law enforcement. For the reasons explained below, the Court denies Browne's motion.

FACTUAL AND PROCEDURAL BACKGROUND

On approximately June 5, 2016, Troy Capser ("Agent Capser"), a special agent with the Department of Homeland Security Investigations Division ("HSI"), received a tip from Constable Jeff Meyers ("Constable Meyers") of the Royal Canadian Mounted Police, that a large amount of cocaine was going to be smuggled through Montana into Canada. Constable Meyers told Agent Capser that a blue Chevy Avalanche with British Columbia or California license plates would be driving through or near Kalispell, Montana, sometime in the next few days. This truck would be driven by a man named Matt and have a false bed loaded with cocaine. The drugs, according to Constable Meyers, were to be backpacked into Canada through a remote area near Libby, Montana, known as the Yaak. Constable Meyers, however, did not tell Agent Capser the source of the information.

Agent Capser quickly sent out a text message to other law enforcement officers in the region relaying some, but not all of Constable Meyer's information.[1] Agent Capser told the officers to be on the lookout over the next few days for a blue Chevy Avalanche with British Columbia license plates. This vehicle, Agent Capser told the officers, was headed towards the Yaak where the drugs would be taken into Canada. This information was relayed to additional officers, including Detective Nate Scofield ("Detective Scofield") of the Lincoln County Sheriffs' Office.

Detective Scofield received the tip on June 6, 2016. Two days later, on June 8, he located a vehicle matching that description near Libby, Montana, and began to follow it. The vehicle was leaving town and heading east towards Kalispell, Montana. After driving for a few miles, the truck turned around and started driving west, back towards Libby. During this time, Detective Scofield contacted Agent Capser by cell phone and explained that he was following a vehicle matching the description supplied in the tip. Agent Capser told him to find a lawful reason to pull the truck over.

Seeing an opportunity, Detective Scofield quickly called Sergeant Brandon Holzer ("Sergeant Holzer"), a sheriff's deputy with the Lincoln County Sheriffs' Office, and explained he was following a blue ***1033** Chevy Avalanche suspected of carrying drugs. Detective Scofield told Sergeant Holzer to park at the bottom of a hill heading into Libby and see if he could catch the truck speeding. This area, known as Whiskey Hill, was well known for speeding due to its incline and successive reduced speed limits. Sergeant Holzer was told to set up his radar gun and wait for the truck. As predicted, Sergeant Holzer clocked the truck going six miles over the posted speed limit and stopped the vehicle.

Sergeant Holzer approached the truck and spoke with the driver and sole occupant, Defendant Matthew Browne ("Browne"). Sergeant Holzer told Browne that he had stopped him for speeding and asked for his license, registration, and proof of insurance. Browne complied and Sergeant Holzer asked what he was doing in Montana. Browne replied that he was on a road trip. After confirming that Browne owned the vehicle,

Sergeant Holzer asked how much longer he would be in the United States. Browne said another week. Sergeant Holzer told him to "hold tight" and headed back to his patrol car with Browne's driver's license, vehicle registration, and proof of insurance. This initial interaction took roughly 90 seconds.

At this time, Detective Scofield had just arrived on scene and Sergeant Holzer quickly relayed to him that Browne was shaking.[2] Sergeant Holzer also later testified at the suppression hearing that Browne was visibly shaking, in particular his hands, and his throat was pounding on the side of his neck.[3] Detective Scofield took Browne's license from Sergeant Holzer and made a cell phone call to Agent Capser. Sergeant Holzer returned to his patrol car and radioed for a registration check. Agent Capser, who had been driving to Libby from Kalispell, told Detective Scofield that the driver's name would be Matt, and after confirming with Scofield that the driver's name was Matt, Agent Capser told Scofield that they had stopped the suspected smuggler. Detective Scofield finished his phone call with Agent Capser and approached the truck to talk with the Browne.

At the truck, Detective Scofield introduced himself to Browne and confirmed that Browne's name was Matt. Detective Scofield asked if he had a minute to talk and Browne said yes. Detective Scofield began questioning Browne about his travel plans and learned that he was allegedly driving to Washington through Idaho and then returning to Canada. Detective Scofield further learned that Browne had been in the United States for the last couple of weeks, but could not remember the day he entered the country. Nonetheless, Browne told Detective Scofield that he had entered the country through Washington and then drove through Oregon to California.

At this point, Detective Scofield noticed that Browne was wearing "hunting pants"[4] and asked if he had any weapons in the vehicle. Browne said no and they began to discuss hunting. Browne said he was "a big hunter" in Canada and Detective Scofield asked where he hunted. Browne replied that he hunted near Hundred Mile, Seventy Five Mile, and Fifty Mile. After confirming that those were ***1034** town names, Detective Scofield asked Browne if he visited anyone while he was California. Browne said no. After further questioning, Detective Scofield was told that Browne had taken about two or three days to drive to California, where he stayed for around a week. Detective Scofield asked Browne what he did while he was in California and he replied that he attended a Dodgers game and went to San Diego. Detective Scofield then confirmed for a second time that Browne had not visited anyone. Like Sergeant Holzer, Detective Scofield confirmed that the vehicle was registered to Browne in British Columbia. Following this confirmation, Detective Scofield told Browne his story seemed "weird" and asked a series of questions about whether Browne was in possession of narcotics, including cocaine. Browne replied to each question in the negative. With that, Detective Scofield

told Browne to "hang tight for a minute" and to "shut the truck off."

At this point, Detective Scofield began calling various law enforcement officers for a K–9 unit. Within minutes, United States Border Patrol Agent and Canine Handler David Grainger ("Agent Grainger") called back and said he would head over to Libby. Agent Grainger's duty station is in Bonners Ferry, Idaho, roughly 45 to 60 minutes away from Libby. Agent Grainger testified that there are no K–9 units in Libby and he was most likely the nearest unit. He arrived roughly 45 to 60 minutes later and ran his canine around the vehicle. The canine immediately "alerted" to the rear of the vehicle. Detective Scofield asked Browne for his consent to search the truck and verbal consent was given. A search of the vehicle revealed a false bottom under the bed of the truck where roughly 145 pounds of cocaine were found. Browne was taken into custody and Mirandized. He subsequently made incriminating statements.

DISCUSSION

Browne contends that his Fourth Amendment rights were violated when he was stopped and allegedly unlawfully detained. Specifically, Browne contends that: (1) law enforcement lacked reasonable suspicion to stop his vehicle; (2) law enforcement unduly prolonged the traffic stop; (3) law enforcement unlawfully seized him; (4) law enforcement lacked reasonable suspicion to detain him; (5) his due process right's right were violated because law enforcement did not inform him of the true basis for the stop; and (6) all evidence that resulted from the stop must be suppressed.

A. Reasonable Suspicion for the Traffic Stop

[1] **[2]** As discussed, Browne challenges the traffic stop as unreasonable. This threshold inquiry is dispositive to Browne's motion. If law enforcement violated Browne's Fourth Amendment right to be free from "unreasonable searches and seizures" when he was stopped, "then all evidence seized as a result of the stop must be suppressed as the fruit of the poisonous tree." U.S. Const. amend. IV; *United States v. Morales*, 252 F.3d 1070, 1073 (9th Cir. 2001) (citing *Wong Sun v. United States*, 371 U.S. 471, 484–485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). In order to stop, i.e., seize an individual, "law enforcement officers must have at least a reasonable suspicion of criminal activity before stopping a suspect." *Morales*, 252 F.3d at 1073 (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *see also ≠Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (extending *Terry* to car stops). Reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity." ***1035** *United States v. Thomas*, 211 F.3d 1186, 1189 (9th Cir. 2000) (internal quotation marks and citation omitted). "Reasonable suspicion requires specific, articulable facts which, together with 'objective and reasonable' inferences, form a basis for suspecting that a particular person is engaged in criminal conduct." *Id.* (citation omitted).

Holzer stepped out of his patrol car to assist Detective Scofield in his questioning of Browne. The Court bases this finding on Sergeant Holzer's testimony that after he called in Browne's registration and received no "hits" back, he stopped investigating the traffic violation because it was obvious to him that Detective Scofield's investigation into suspected narcotics trafficking had taken over. Thus, the Court must determine if further detainment of Browne by Detective Scofield was justified by independent reasonable suspicion.

The Government argues that the anonymous tip[7] provided by Constable Meyers justified further detainment of Browne because it was corroborated by Detective Scofield. The Goverment contends that this corroboration established independent reasonable suspicion. The Court agrees.

[8] **[9]** "In certain circumstances, an anonymous tip can serve as the basis for reasonable suspicion." *Morales*, 252 F.3d at 1074 (citing *Alabama v. White*, 496 U.S. 325, 327–328, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). However, "an anonymous tip standing alone does not" support a finding of reasonable suspicion. *Morales*, 252 F.3d at 1074–75 (citing *Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000)). Instead, "something more" than just the information is needed. *White*, 496 U.S. at 329, 110 S.Ct. 2412. To determine if an anonymous tip supports a suspicion that criminal activity is taking place, courts look to the totality of the circumstances to establish if the information was supported by an "indicia of reliability." *Id.* at 331, 110 S.Ct. 2412. This is due to the fact that an anonymous tip is inherently unreliable because the source of the information "cannot be held accountable if he or she provides inaccurate information, and the police cannot assess the tipster's reputation." *J.L.*, 529 U.S. at 270, 120 S.Ct. 1375.

[10] Thus, to determine if an anonymous tip has a sufficient "indicia of reliability to serve as the basis for [reasonable ***1037** suspicion], the tip must include a range of details, and it must predict future actions by the suspect that are subsequently corroborated by the police." *Morales*, 252 F.3d at 1074–75 (citing *White*, 496 U.S. at 329, 110 S.Ct. 2412) (quotation marks omitted); *see also ≠Illinois v. Gates*, 462 U.S. 213, 245, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (Court found anonymous letter reliable because it "contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted"). Additionally, corroboration of the facts supplied in the tip enhance the reliability and veracity of the information and thus strengthen the possibility that criminal activity is taking place. *See ≠Gates*, 462 U.S. at 244, 103 S.Ct. 2317 ("Because an informant is right about some things, he is more probably right about other facts.") (citation omitted).

Here, by the time Detective Scofield first spoke with Browne, he had independently corroborated specific factual details supplied in the anonymous tip, including: the name of the driver (Matt), the make,

model, and color of the vehicle (blue Chevy Avalanche), and the vehicle's place of registration and country of origin (British Columbia, Canada). Further, the tip accurately predicted the vehicle's general location (near or heading to the Yaak) and general time frame for when the vehicle was suppose to be heading to this location (a couple of days after June 5, 2016).[8] Finally, Detective Scofield also knew from his brief conversation with Sergeant Holzer that Browne was shaking.[9] The Court finds that these specific and objective facts support a finding of particularized suspicion that Browne may have been involved with criminal activity, specifically narcotics trafficking. Specifically, the Court finds that it was reasonable for Detective Scofield to briefly prolong the traffic stop for further investigation based on the corroborated facts from the anonymous tip and Sergeant Holzer's description of Browne's demeanor.

C. Prolonged Stop for Canine Search

[11] Browne next argues that law enforcement unlawfully prolonged the traffic stop in order to allow for the canine unit to arrive. The Court again disagrees.

[12] **[13]** "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). "[A] dog sniff ... is not an ordinary incident of a traffic stop." *Rodriguez v. United States*, —U.S. —, 135 S.Ct. 1609, 1615, 191 L.Ed.2d 492 (2015). Thus, use of a canine unit to conduct a sniff search which prolongs a stop is only permissible if it is ***1038** independently supported by an officer's individualized suspicion. *Id.* at 1616–1617.

Here, after speaking with Browne, which took roughly four minutes,[10] Detective Scofield told Browne to "hold tight" and immediately called Agent Grainger for use of his canine unit. Agent Grainger arrived between 45 to 60 minutes later and quickly conducted a sniff search. Consequently, Browne was detained an additional 45 to 60 minutes beyond the point the initial traffic stop investigation had ceased. As discussed below, the Court finds that this prolongation was reasonable because it was supported by independent and particularized suspicion.

The Court bases this finding on multiple reasons. First, as discussed, Detective Scofield had already independently corroborated multiple specific factual details alleged in the anonymous tip. Thus, at this point it was extremely likely that Browne was the suspect described in the tip. Second, Sergeant Holzer told Detective Scofield that Browne was acting nervous. Third, Detective Scofield testified that Browne's description of his travels were "very vague." Specifically, Browne told Detective Scofield that he could not remember the day he entered the United States. Browne also stated that he had been traveling for multiple weeks through Washington, Oregon, and California, before driving up to Montana,

but did not provide any details about his trip, apart from attending a Dodgers game and going to San Diego. Detective Scofield further found it odd that Browne could not name any people he had met or visited. This lack of detail was not normal to Detective Scofield and, based upon his training as a law enforcement officer, he concluded that Browne was holding back information about his travels. At this point, Detective Scofield testified that he suspected Browne of trafficking narcotics. [11]

Under these circumstances, the Court concludes that Detective Scofield's suspicions were particularized and based on specific and articulable facts. Detective Scofield's conclusion that Browne was likely involved with drug smuggling was reasonable. Accordingly, further detainment of Browne to allow for a sniff search would have quickly confirmed or dispelled Detective Scofield's suspicions. Prolongation of the stop thus did not violate Browne's Fourth Amendment rights. [12]

Further, the Court finds that the length of time needed to allow for the canine unit to arrive on scene was reasonable. The stop occurred in a rural area of Montana by a town that did not have a resident canine unit. Further, Agent Grainger testified that he was the nearest canine unit and he arrived as quickly as he could. Thus, under these facts it was reasonable to prolong the stop for an additional 45 to 60 minutes to allow for the sniff search. ***1039** *See United States v. $102,836.00 in U.S. Currency*, 9 F.Supp.3d 1152, 1161 (D. Nev. 2014) (Detainment of suspect for twenty to thirty minutes beyond the initial traffic stop to wait for nearest canine unit was reasonable).

Lastly, Browne argues that *United States v. Morales* is controlling to this case. *Morales*, similar to this case, involved an anonymous tip concerning a specific vehicle traveling to an identified location. *Morales*, 252 F.3d at 1071–1072. The officers in *Morales* stopped the vehicle under a good faith but mistaken belief that it was operating in violation of the law. *Id.* at 1072. In spite of this erroneous belief, the Government argued that the stop was still lawful based solely on details provided in the tip that were subsequently corroborated by the officers, including: (1) the make, model, and year of the vehicle; (2) an alternative licence plate number for the vehicle; (3) the number of occupants in the vehicle; and (4) the vehicle's general direction of travel. However, the Ninth Circuit affirmed the district court's suppression order after concluding the tip "did not possess sufficient indicia of reliability to justify an investigative stop of the defendants' car." *Id.* at 1077 (citing *J.L.*, 529 U.S. at 271, 120 S.Ct. 1375) (quotation marks omitted).

Here, unlike *Morales*, Sergeant Holzer had reasonable suspicion to stop Browne because he committed a genuine traffic violation. As discussed, following this initial lawful stop, Detective Scofield developed independent and particularized suspicion that Browne was trafficking narcotics. In addition to the information provided in the tip that was subsequently corroborated by Detective Scofield, he was also told by Sergeant Holzer that Browne was acting nervous.

These facts support Detective Scofield's initial questioning which prolonged the stop by a mere four minutes. Further, after speaking with Browne, Detective Scofield's suspicions were additionally heightened because he found Browne's story to be vague and lacking in detail. Due to this lack of detail, Detective Scofield determined that Browne was hiding something, most likely criminal activity. This case is thus distinguishable from *Morales*. Consequently, the Court rejects Browne's argument that law enforcement lacked reasonable suspicion to detain him and prolong the traffic stop.

D. Browne's Due Process Rights

[14] Browne also argues that his due process rights under the Fifth Amendment were violated because he was never told the true basis for stop. However, the United States Supreme Court has never recognized the right to be told the reason for one's detainment. *See ≠Devenpeck v. Alford*, 543 U.S. 146, 155, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) ("While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required."); *but see ≠United States v. Magallon–Lopez*, 817 F.3d 671, 677 (9th Cir. 2016) (Berzon, J., concurring) ("I would not foreclose, in another case, holding that there is a due process (not Fourth Amendment) based right to be informed of the true basis for a stop or arrest."). The Court declines to hold otherwise.

In conclusion, because the Court has found that Browne's stop and subsequent prolonged detainment were lawful under the Fourth Amendment, the Court will deny his motion to suppress. Accordingly,

IT IS ORDERED that Defendant Matthew Browne's Motion to Suppress (Doc. 71) is DENIED.

All Citations

219 F.Supp.3d 1030

Footnotes

1 At the suppression hearing, it was not clear if Agent Capser initially told Detective Nate Scofield, the law enforcement officer who initiated the stop of Browne's truck, that the driver of the vehicle would be named Matt.

2 Based on a review of Sergeant Holzer's body camera video from the stop, the Court believes that he meant to say "shaking," but it sounds as if he said the word in a slang manner, i.e., "shaken" or "shakin."

3 Browne's hands and most of his body are not visible on the body camera video. However, the Court did not see anything on the video that would contradict Sergeant Holzer's physical description of Browne.

4 At the suppression hearing, Detective Scofield confirmed that Browne was wearing camouflage pants when he was stopped.

5 Browne also points to the fact that Browne never received a speeding ticket as a result from the stop and argues that this cuts against the Goverment's argument that he was speeding. The Court disagrees. First, Sergeant Holzer testified that he generally does not issue speeding tickets for driving six miles over the posted speed limit. Second, Sergeant Holzer further testified that the motivating factor behind the stop was the suspicion that Browne was trafficking narcotics. Because pretextual traffic stops are permissible as long as they are supported by a genuine traffic violation, the Court is not surprised that Browne was not issued a speeding ticket. *See #United States v. Choudhry*, 461 F.3d 1097, 1102 (9th Cir. 2006) ("[A] traffic violation was sufficient to justify an investigatory stop, regardless of whether (i) the violation

was merely pretextual, (ii) the stop departed from the regular practice of a particular precinct, or (iii) the violation was common and insignificant.").

6 The Court also notes that Montana law requires a driver to "operate a vehicle in a careful and prudent manner and at a reduced rate of speed no greater than is reasonable and prudent under the conditions existing at the point of operation, taking into account the amount and character of traffic, visibility, weather, and roadway conditions." Mont. Code. Ann. § 61–8–303(3). Here, it is undisputed that it was heavily raining at the time of the traffic stop. Further, Browne argued in his brief that standing water existed on the highway at the time he was allegedly attempting to pass. The evidence thus suggests that weather and roadway conditions at this time were not conducive to operating a vehicle in excess of the posted speed limit. The Court thus finds that even if Browne was attempting to pass, this was neither reasonable nor prudent under the conditions.

7 At the hearing, Agent Capser testified that he was not aware of Constable Meyer's source for the information supporting the tip. The Court will thus treat this information as an anonymous tip. *See #Morales*, 252 F.3d at 1074 (Ninth Circuit found that tip passed from one law enforcement agency to another was considered anonymous because information about the source of the tip was not provided).

8 The Court recognizes that under *White*, an investigatory stop based solely on Constable Meyer's tip may not have been reasonable. In *White*, prediction and subsequent corroboration of a suspect's specific future movements by an anonymous tip were required to conduct an investigatory stop based on reasonable suspicion. *See #White*, 496 U.S. at 332, 110 S.Ct. 2412. Here, the tip only predicted Browne's future travels in general terms. However, in contrast to *White*, the initial stop was based on a valid traffic violation. Following this valid traffic stop, Detective Scofield established independent reasonable suspicion that illegal activity was taking place which justified prolonging the stop. This case is thus distinguishable from *White*.

9 Detective Scofield testified that he understood Sergeant Holzer's comments to mean that Browne was acting nervous.

10 As discussed above, the Court finds that it was reasonable for Detective Scofield to detain and question Browne for these additional four minutes.

11 Detective Scofield also testified that Browne was wearing camouflage pants the day he was stopped and asked him questions about his hunting activities. Detective Scofield testified that he found Browne's description of his past hunting activities odd. The Court neither agrees nor disagrees with Detective Scofield's determination that Browne's description of his hunting activities was odd. However, the Court notes that it would be a logical inference to connect camouflage clothing with drug smuggling, apparently since the drugs in question were going to be transported by foot across the Canadian border in heavily wooded terrain.

12 The Court bases this finding in large part on the testimony of Detective Scofield. The Court found Detective Scofield to be a credible witness and placed great weight on his testimony.

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