United States Court of Appeals for the Fifth Circuit

No. 20-50403
Summary Calendar

MAURO C. PALACIO,

Plaintiff—Appellant,

versus

JUSTIN CARAWAY; DEPUTY SHERIFF RAY MILLER; DEPUTY SHERIFF CARI DAVIS; U.S. MARSHAL RODERICK TISDALE,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:18-CV-111

Before JOLLY, WILLETT, and ENGELHARDT, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 21, 2021
Lyle W. Cayce
Clerk

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Before JOLLY, WILLETT, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:*

Mauro C. Palacio, Texas prisoner # 2271249, appeals the dismissal, on motions for summary judgment and judgment on the pleadings, of his 42 U.S.C. § 1983 claims of illegal search and seizure, excessive force, and failure

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

to train against the defendants. He also seeks remand based on the defendants' alleged failure to serve him with their summary judgment exhibits.

Review of Palacio's failure-to-serve argument is precluded by his failure to object in the district court. *See Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 508 (5th Cir. 1999);[1] *McCloud River R. Co. v. Sabine River Forest Prods., Inc.*, 735 F.2d 879, 882 (5th Cir. 1984). Palacio has also abandoned, through failure to brief, a separate claim that he was subject to an illegal arrest. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). Finally, we do not consider Palacio's claim that the defendants violated his Fifth Amendment rights to counsel and silence, as Palacio raises it for the first time on appeal. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999).

We review the grant of summary judgment de novo, *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012), and we "may affirm the district court's judgment on any basis supported by the record," *United States v. Clay*, 408 F.3d 214, 218 n. 7 (5th Cir. 2005) (citation omitted).

The district court properly granted summary judgment on Palacio's substantive claims for relief. *McFaul*, 684 F.3d at 571. Regarding municipal liability, Palacio has identified no "policy statement, ordinance, regulation, or decision officially adopted and promulgated by [Hamilton County]" concerning illegal search, seizure, or arrest. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1978). Likewise, on his claim of supervisor liability against Caraway, Palacio has failed to allege Caraway's personal involvement in any unlawful search or arrest and has identified no constitutionally

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[1] *Rushing* was superseded by rule amendment on other grounds as noted in *Mathis v. Exxon Corp.*, 302 F.3d 448, 459 n.16 (5th Cir. 2002).

deficient policy implemented by Caraway that led to an illegal search or arrest. *See Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987).

The district court also correctly found that the defendants are entitled to qualified immunity because Palacio failed to allege facts showing that the challenged searches were constitutionally unreasonable. *See Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017). He offered no refutation of or competent evidence disputing Caraway's affidavit asserting that the challenged searches were conducted pursuant to validly obtained consent. *See generally Fernandez v. California*, 571 U.S. 292, 306 (2014).

Lastly, the district court properly entered judgment on the pleadings for Tisdale against Palacio's claims of illegal search and excessive force. *See Ruiz v. Brennan*, 851 F.3d 464, 468 (5th Cir. 2017); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); FED. R. CIV. P. 12(b)(6). As noted above, Palacio failed to show a violation of his Fourth Amendment rights by any defendant. And his wholly conclusory allegation of excessive force does not suffice to state a claim for relief. *See Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002).

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MAURO C. PALACIO #2271249	**§**	
	§	
V.	**§**	**W-18-CA-111-ADA**
	§	
JUSTIN CARAWAY, et al.	**§**	

FINAL JUDGMENT

Before the Court is the above-entitled cause. Upon review of the entire case file and this Court's Order which granted Defendants' Motion for Summary Judgment and Defendant Tisdale's Motion to Dismiss, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

It is hereby **ORDERED** that Plaintiff's claims against Defendants are **DISMISSED WITH PREJUDICE.**

IT IS FINALLY ORDERED that the above entitled cause of action is hereby **CLOSED**.

SIGNED on April 24, 2020

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MAURO C. PALACIO #2271249	§	
	§	
V.	§	**W-18-CA-111-ADA**
	§	
JUSTIN CARAWAY, et al.	§	

ORDER

Before the Court are Plaintiff's Complaint (#1), Defendants Caraway, Davis, and Miller's Motion for Summary Judgment (#47), Defendant Tisdale's Motion to Dismiss (#51), and Plaintiff's responses (#53, 56).[1] Plaintiff, proceeding pro se, has been granted leave to proceed in forma pauperis.

STATEMENT OF THE CASE

At the time he filed his complaint pursuant to 42 U.S.C. § 1983, Plaintiff was confined in the Federal Medical Center. Plaintiff has since been convicted in state court and is now confined in the Texas Department of Criminal Justice - Correctional Institutions Division. Plaintiff asserts that Defendants subjected him to a false arrest, illegal search and seizure, and excessive force. Plaintiff contends that the arrest and illegal search caused him mental anguish and led to his loss of income. Plaintiff sues

[1] Plaintiff has also filed a motion for leave to supplement his response and a motion to amend complaint (#60, 61). The Court has considered both of these filings in its analysis of the motions to dismiss and for summary judgment, though the additional filings do not alter the Court's ultimate decision. Therefore, Plaintiff's motion to file a supplement is granted and his motion to amend is also granted.

Hamilton County, Hamilton County Sheriff Justin Caraway, Cari Davis, Ray Miller, and Roderick Tisdale. Plaintiff seeks damages and declaratory relief.

DISCUSSION AND ANALYSIS

A. Factual Background

On the evening of July 17, 2017, Plaintiff pulled into the parking lot of a motel. Plaintiff contends that an unmarked red car parked nearby and Defendants Ray Miller and Cari Davis exited the red car and approached Plaintiff. Defendant Miller allegedly asked Plaintiff his name and then identified himself as a deputy sheriff. Miller told Plaintiff that he had a warrant for his arrest. Plaintiff contends that he invoked his right to an attorney and to remain silent. Plaintiff was handcuffed and he claims that Defendant Davis then searched Plaintiff's vehicle. Shortly thereafter, Defendant Tisdale arrived on the scene as well.

Defendants then allegedly escorted Plaintiff to his motel room and began questioning Plaintiff about the items in the room. Plaintiff claims that he answered all of their questions willingly. Plaintiff claims that the officers inquired about Plaintiff's keys, and Plaintiff informed them that the keys accessed Plaintiff's father's apartment complex and that Plaintiff owned a vehicle that was at his father's apartment complex. Plaintiff alleges that he was then taken to the Bell County Detention Center and that Defendants Davis and Miller proceeded to Plaintiff's father's apartment complex where they conducted a search of Plaintiff's vehicle located there.

Plaintiff was eventually charged with Online Solicitation of a Minor. He was subsequently indicted by a grand jury on December 13, 2017 on two counts of Online Solicitation of a Minor. On June 5, 2019, Plaintiff was convicted on both counts.

B. Summary Judgment Standard

A court will, on a motion for summary judgment, render judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *Int'l Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992). When a motion for summary judgment is made and supported, an adverse party may not rest upon mere allegations or denials but must set forth specific facts showing there is a genuine issue for trial. *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 433 (5th Cir. 1995); Fed. R. Civ. P. 56.

Both movants and non-movants bear burdens of proof in the summary judgment process. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The movant with the burden of proof at trial must establish every essential element of its claim or affirmative defense. *Id.* at 322. In so doing, the moving party without the burden of proof need only point to the absence of evidence on an essential element of the non-movant's claims or affirmative defenses. *Id.* at 323-24. At that point, the burden shifts to the non-moving party to "produce evidence in support of its claims or affirmative defenses . . . designating specific facts showing that there is a genuine issue for trial." *Id.* at 324. The non-moving party must produce "specific facts" showing a genuine issue for trial, not mere general allegations. *Tubacex v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995).

In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. The Fifth Circuit has concluded "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

C. *Heck v. Humphrey*

Defendants argue that Plaintiff's claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). Plaintiff alleges his constitutional rights were violated when officers searched his vehicles and motel room. Plaintiff relatedly contends that officers subjected him to arrest without probable cause. Plaintiff also appears to be attempting to assert his father's rights by arguing that his father failed to consent to a search. Defendants explain that a finding that either the search of Plaintiff's vehicles or the search of his motel room were unreasonable would attack the validity of Plaintiff's conviction. In *Heck*, the Supreme Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . . Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint

> must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 486–87.

However, the Supreme Court further explained:

> [A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, . . . and especially harmless error, . . . such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

Id. at 487 n.7 (internal citations omitted).

In short, a successful § 1983 illegal search and seizure action does not necessarily imply the invalidity of an underlying conviction. *See Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (stating that "[i]t is well established that a claim of unlawful arrest, standing alone, does not necessarily implicate the validity of a criminal prosecution following the arrest."); *see also Simpson v. Rowan*, 73 F.3d 134, 136 (7th Cir. 1995) ("Because an illegal search or arrest may be followed by a valid conviction, a conviction generally need not be set aside in order for a plaintiff to pursue a § 1983 claim under the Fourth Amendment."). Under *Heck*, the district court must consider "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Jackson v. Vannoy*, 49 F.3d 175, 177 (5th Cir. 1995) (citation omitted).

Here, whether the arresting officers had probable cause to search Plaintiff's vehicles and motel room bears on the validity of his conviction. If the Court were to find the search or arrest were unconstitutional, then the evidence discovered as a result of the subsequent search would have to be excluded. In addition, the Court finds it improbable that doctrines such as independent source, inevitable discovery, and harmless error would have permitted the introduction of the evidence in the case. Accordingly, To the extent that the evidence obtained in the searches would not have been otherwise obtained, and was used to convict Plaintiff, his claims are barred by *Heck*.

D. No County Liability

To the extent Plaintiff's claims are not barred by *Heck*, his claims fail because they fail to state a claim for county liability and because he fails to overcome the evidence in the record of Defendants' qualified immunity.

To the extent Plaintiff brings claims against Defendants in their official capacities, those claims are the same as if Plaintiff brought his claims against Hamilton County. A political subdivision cannot be held responsible for a deprivation of a constitutional right merely because it employs a tortfeasor; in other words a local government unit cannot be held responsible for civil rights violations under the theory of respondeat superior. *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). The standard for holding a local government unit responsible under § 1983 requires that there be a custom or policy that caused the plaintiff to be subjected to the deprivation of a constitutional right. *Id.* *Collins v. City of Harker Heights, Tex.*, 916 F.2d 284, 286 (5th Cir. 1990). Thus,

Hamilton County would violate an individual's rights only through implementation of a formally declared policy, such as direct orders or promulgations, or through informal acceptance of a course of action by its employees based upon custom or usage. *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984).

Plaintiff's complaint includes only conclusory allegations of any county policies and an alleged failure to train officers and fails to provide any details of any alleged policy that caused him injury. Furthermore, as explained further below, Plaintiff fails to plead any facts supporting an allegation that he was deprived of any constitutional right whatsoever, much less any custom or policy of Hamilton County that deprived him of a constitutional right. Accordingly, the claims against Defendants in their official capacities are dismissed.

E. Supervisory Liability

Plaintiff fails to allege any personal involvement by Defendant Caraway. To the extent Plaintiff is asserting Defendant Caraway is liable as the officer responsible for supervising and training the other Defendants those claims are dismissed. Supervisory officials cannot be held vicariously liable in § 1983 cases solely on the basis of their employer-employee relationship. *Monell v. Department of Social Services*, 436 U.S. 658, 693 (1978); *Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983). If a supervisor is not personally involved in the alleged constitutional deprivation, he may be held liable only if there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violations. *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987). In order to demonstrate a causal connection, the supervisor would have to "implement

a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Id.* at 304. Plaintiff identifies no such policies and makes no allegations that Defendant Caraway was personally involved.

F. Qualified Immunity

A government official performing a discretionary function is entitled to qualified immunity unless his actions violate a clearly established right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Where, as here, a defendant invokes qualified immunity in a motion for summary judgment, it is the plaintiff's burden to show that the defendant is not entitled to qualified immunity. *See Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). That is, the plaintiff must present evidence sufficient to create a genuine dispute of material fact as to whether (1) the official's conduct violated a constitutional right of the plaintiff, and (2) the constitutional right was clearly established so that a reasonable official in the defendant's situation would have understood that his conduct violated that right. *See id.*; *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

G. False Arrest and Illegal Search

Construed liberally, Plaintiff's complaint alleges that Defendants conspired to have him falsely arrested. To prevail in a § 1983 claim for false arrest, a plaintiff must show that he was arrested without probable cause in violation of the Fourth Amendment. *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2009). The uncontested summary judgment evidence shows that there was a warrant issued for Plaintiff's arrest and that Plaintiff was subsequently indicted and convicted. When the facts supporting

an arrest "are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010). Thus, considering he was arrested pursuant to a warrant, and then indicted by a grand jury, Plaintiff has no cause of action for his alleged false arrest.

Plaintiff's claim of unlawful search and seizure must also be denied. Warrantless searches are not unreasonable under the Fourth Amendment if consent is given to conduct them. *See U.S. v. Jenkins*, 46 F.3d 447, 451 (5th Cir. 1995). A consensual search is one of the established and well-delineated exceptions to both the warrant and probable cause requirements. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citing *Davis v. United States*, 328 U.S. 582, 593-94 (1946)). Consent to a warrantless search must be voluntary and may be express or implied. *U.S. v. Jaras*, 86 F.3d 383, 390-91 (5th Cir. 1996). Consent will be found voluntary if after considering all the circumstances it may be established that it was "the product of an essentially free and unconstrained choice by its maker." *Schneckloth*, 412 U.S. at 224. There are several factors to be considered relating to voluntariness: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *See U.S. v. Kelley*, 981 F.2d 1467,1470 (5th Cir. 1993).

The problem for Plaintiff is that the only evidence in the record shows that the searches conducted of Plaintiff's vehicles and motel room were done with his consent. Therefore, there is not a Fourth Amendment violation. Plaintiff indicates that he claimed "Fifth Amendment" protection and demanded a lawyer, but also acknowledges that he continued to engage with officers and answered their questions. At no point does Plaintiff present any evidence or make any claim that he did not consent to the searches. Plaintiff claim that Defendants questioned him regarding items located inside his motel room and that Plaintiff answered all questions. Plaintiff also indicates that he told Defendants that they had failed to produce warrants. Further, Plaintiff indicates that officers "questioned Plaintiff [about] diverse matter[s], e.g. when Plaintiff was laid off from work." Furthermore, Plaintiff admits he understood his right to refuse the search. However, at no point does Plaintiff present any evidence to contradict Defendants' summary judgment affidavits which show that Plaintiff did consent to the searches.[2] Plaintiff also does not contend that Defendants were coercive in any way.

Furthermore, as Plaintiff correctly notes, he would have to show some damages based on the searches alone, which he cannot do. All of Plaintiff's alleged damages (e.g. relating to his lost wages, loss of social security payments, etc.) are due to his indictment and conviction. The alleged search of Plaintiff's vehicles and motel room were not the cause of his damages. Consequently, because the summary judgment

[2] Plaintiff appears to also be attempting to assert a claim on behalf of his father regarding the search of a vehicle at the father's apartment complex. Plaintiff does not have standing to assert such a claim on behalf of his father. In any event, the undisputed summary judgment evidence shows that his father did consent to the search.

evidence is undisputed that Plaintiff consented to the searches, Plaintiff's Fourth Amendment claim of illegal search is dismissed.

H. Claims against Defendant Tisdale

Plaintiff contends that Defendant Tisdale was present at his arrest and the alleged illegal searches. Plaintiff's attempts to serve Defendant Tisdale were unsuccessful, and Tisdale seeks to quash the attempted service, or alternatively order Plaintiff to achieve effective service before the case proceeds further. Plaintiff believes that part of the issue is confusion over whether Defendant Tisdale was acting as a federal agent at the time of Plaintiff's arrest or as a Bell County law enforcement agent. Defendant Tisdale apparently assists the United States Marshals on occasion. To the extent Tisdale was acting as a federal agent, Plaintiff's claims against him would rely on *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971).

Unfortunately for Plaintiff, the service issues notwithstanding, there is no valid claim against Defendant Tisdale regardless whether he was acting as a federal agent or a Bell County law enforcement officer. For the same reasons explained above, the undisputed summary judgment evidence shows that Plaintiff's arrest and subsequent searches were constitutional.

I. Excessive Force

A claim of excessive force arising from an arrest must be analyzed under the "reasonableness" standard of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Ikerd v. Blair*, 101 F.3d 430, 433 (5th Cir. 1996). The Fifth Circuit has adopted a three-part test in such cases. The plaintiff must show: (1) he or she suffered

some injury; (2) resulting from force that was clearly excessive to the need for force; and (3) the force used was objectively unreasonable. *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005); *Heitschmidt v. City of Houston*, 161 F.3d 834, 838 (5th Cir. 1998). The Court must view the totality of circumstances from the standpoint of a reasonable officer on the scene, paying particular attention to "whether the suspect pose[d] an immediate threat to the safety of the officers or others." *Stroik v. Ponseti*, 35 F.3d 155, 157-58 (5th Cir. 1994). *See also Gutierrez v. City of San Antonio*, 139 F.3d 441, 447 (5th Cir. 1998) (court must consider severity of crime at issue, whether suspect posed immediate threat to officer or others, and whether suspect was actively resisting arrest or attempting to evade arrest by flight).

Plaintiff asserts a claim of excessive force in his complaint, but Plaintiff fails to provide any information supporting any excessive force whatsoever. In fact, aside from a single mention of the violation of his right "to be free from the use of excessive force," Plaintiff identifies no use of force and no injury whatsoever. Consequently, his excessive force claim must be dismissed.

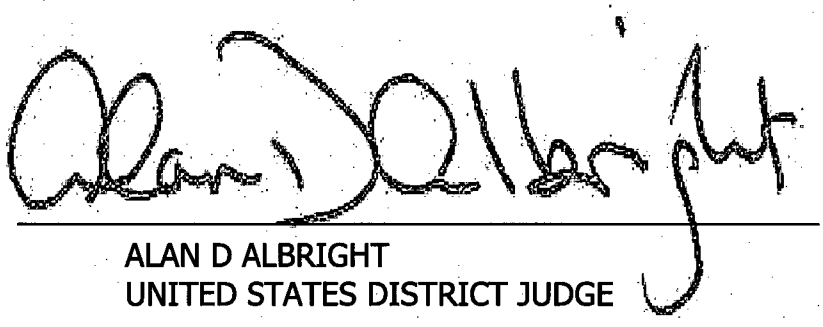
CONCLUSION

It is therefore **ORDERED** that Plaintiff's Motion for Leave to Supplement and Motion to Amend Complaint (#60, 61) are **GRANTED**.

It is further **ORDERED** that Defendants Caraway, Davis, and Miller's Motion for Summary Judgment (#47) and Defendant Tisdale's Motion to Dismiss (#51) are **GRANTED**.

It is finally **ORDERED** that all other pending motions are **DISMISSED**.

SIGNED on April 24, 2020



ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE