

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 5 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MATTHEW A. NEIDERMEYER,

Plaintiff-Appellant,

v.

MICHAEL CALDWELL, CHP Officer
#20073, individual and official capacity,

Defendant-Appellee.

No. 16-55233

D.C. No.
8:14-cv-01209-JLS-DFM

MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Argued and Submitted October 2, 2017
Pasadena, California

Before: M. SMITH and NGUYEN, Circuit Judges, and SETTLE, District Judge.**

Matthew Neidermeyer appeals the district court's grant of summary judgment in favor of California Highway Patrol Officer Michael Caldwell. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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

** The Honorable Benjamin H. Settle, District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

1. The district court properly granted Officer Caldwell summary judgment on Neidermeyer's investigatory stop claim. "In reviewing the district court's determination of reasonable suspicion, we must look at the 'totality of the circumstances' to see whether the officer had a 'particularized and objective basis' for suspecting criminal activity." *United States v. Colin*, 314 F.3d 439, 442 (9th Cir. 2002) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). Video evidence shows Neidermeyer drifting to the left within the traffic lane and then quickly making an unsafe lane change. These apparent traffic offenses, *see* California Vehicle Code §§ 21658(a), 22107, created reasonable suspicion that justified an investigatory stop of the vehicle.

2. The district court properly granted Officer Caldwell summary judgment on Neidermeyer's unlawful arrest claim. Even assuming that Officer Caldwell lacked probable cause to arrest Neidermeyer for being under the influence of a controlled substance, Neidermeyer "bears the burden to show that the contours of the right were clearly established." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011). Neidermeyer has failed, both here and before the district court, to identify controlling authority or a "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful" in similar circumstances. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). In fact, Neidermeyer cites no cases at all, contending that the California

statute on driving while under the influence of a controlled substance (DUI) alone shows that he was arrested without probable cause. But the operative question is whether it was “clearly established” that an officer could not arrest someone for DUI under the undisputed facts in this case.

Here, construing the facts in the light most favorable to Neidermeyer, Officer Caldwell, who was trained as a Drug Recognition Expert, observed Neidermeyer’s car drifting within its lane and then making an unsafe lane change. After the traffic stop, Officer Caldwell also observed Neidermeyer’s delayed eye response during a nystagmus test.¹ Neidermeyer’s behavior during the stop was unusual, including his atypical and continuous commentary and his flinging himself on the ground. Additionally, Neidermeyer spoke quickly and exhibited signs of paranoia, which Officer Caldwell had been trained to recognize as possible signs of stimulant use. Neidermeyer has not shown that, faced with these facts, a reasonable officer would have known that he lacked probable cause to arrest someone for suspicion of driving under the influence of a controlled substance. Since this is a “dispositive inquiry,” *Saucier v. Katz*, 533 U.S. 194, 202 (2001), the

¹ Neidermeyer argues that Officer Caldwell lied about the nystagmus test results, but offers no evidence to support this allegation. We therefore doubt that Neidermeyer’s allegation is enough to put the fact of the delayed eye response in dispute. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (“A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data.”). But even if this fact *were* disputed, Neidermeyer’s driving and subsequent behavior alone are sufficient to support our holding.

district court properly granted Officer Caldwell qualified immunity on this claim.

Neidermeyer argues that Officer Caldwell must have known he could not punitively arrest him for refusing to answer questions. Even assuming Neidermeyer's refusal to answer questions was a factor in his arrest, Officer Caldwell's "[s]ubjective intentions play no role" in the Fourth Amendment probable cause analysis. *Whren v. United States*, 517 U.S. 806, 813 (1996). Instead, we must look to what a reasonable officer would do in light of the objective facts. *United States v. Magallon-Lopez*, 817 F.3d 671, 675 (9th Cir. 2016). Here, the objective facts do not indicate that Officer Caldwell must have known that he lacked probable cause.

The dissent notes that the police "may not disregard facts tending to dissipate probable cause." **Dissent at 2**, citing *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1023-24 (9th Cir. 2009). But, viewing the evidence in the light most favorable to Neidermeyer, the officers encountered no such facts. On the contrary, Neidermeyer's bizarre behavior intensified throughout the encounter. After being asked to step out of his car—a common measure during a lawful investigatory stop, see *Ramirez*, 560 F.3d at 1021—Neidermeyer demanded that he be allowed to stand "in public"; told the car's passenger that the officers "are not men that can be trusted at this point"; threw himself on the ground in response to a request to take a step; told the officers "take me in, arrest me"; and twice shouted "I'm afraid

for my life.” He also told his companion to put her cell phone “in [her] underwear” to preserve her cell phone recording of the encounter, and later urged her to leave the car and “run to safety.”

The dissent suggests that a jury could have found this to be fearful behavior that was reasonably provoked by Officer Caldwell’s conduct. But, as the district court noted, the video at no point shows Officer Caldwell or his partner “raising his voice or acting in a manner that would prompt these statements and behavior from Neidermeyer.” Neidermeyer may not have been obligated to answer Officer Caldwell’s questions about his intended destination, but the questions themselves assuredly were permissible—indeed, “[a]sking questions is an essential part of police investigations.” *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 185 (2004). In light of the undisputed facts in this case, including Neidermeyer’s increasingly unusual behavior during the lawful investigatory stop, we cannot say that a reasonable officer would have known he lacked probable cause to arrest Neidermeyer for a controlled substance DUI.

3. The district court properly granted summary judgment on the malicious prosecution claim. “[T]here is a rebuttable presumption that a prosecutor exercises independent judgment regarding the existence of probable cause in filing a complaint . . . insulat[ing] the arresting officers from liability.” *Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986); *see also Beck v. City of Upland*, 527 F.3d

853, 862 (9th Cir. 2008). The prosecutor, who had access to video of the arrest, testified in his deposition that he exercised independent judgment in deciding to file charges against Neidermeyer, and in fact also filed an additional charge not recommended in Officer Caldwell's report. Neidermeyer claims that the police reports contain false information. We have the benefit, as did the district court, of the videos documenting the traffic stop. While the police reports certainly characterize the evening's events differently than Neidermeyer does, like the district court, we cannot say that any portion of the reports is demonstrably false.² Neidermeyer "must provide more than an account of the incident in question that conflicts with the account of the officers involved" in order "[t]o rebut the presumption of independent judgment and to survive summary judgment." *Newman v. Cty. of Orange*, 457 F.3d 991, 995 (9th Cir. 2006).

4. The district court did not abuse its discretion in denying Neidermeyer leave to amend the complaint to include a claim for an allegedly unlawful frisk. While leave to amend should be "freely give[n] . . . when justice so requires," F.R.C.P. 15(a)(2), the district court was permitted to deny leave here due to Neidermeyer's "undue delay" in raising the claim and the "prejudice to the

² For example, Neidermeyer argues that he did not refuse to undergo field sobriety tests, as the report indicated. But while in the police vehicle, Neidermeyer explicitly refused to consent to any test other than a Breathalyzer, which was later administered at the police station.

opposing party” that late amendment would cause, *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Though the parties discussed the frisk in Officer Caldwell’s deposition, an unlawful frisk claim was not raised in the second amended complaint that was filed *after* that deposition was taken. Thus, Officer Caldwell was not on notice that Neidermeyer would raise an unlawful frisk claim later in the litigation, and was deprived of the opportunity to conduct appropriate discovery as to possible damages.

Moreover, “when a party seeks to amend a pleading after the pretrial scheduling order’s deadline for amending the pleadings has expired, the moving party must satisfy the ‘good cause’ standard of Federal Rule of Civil Procedure 16(b)(4), which provides that ‘[a] schedule may be modified only for good cause and with the judge’s consent,’ rather than the liberal standard of Federal Rule of Civil Procedure 15(a).” *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir. 2013) (alteration in original). This good cause standard “primarily considers the diligence of the party seeking the amendment.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). If the moving party “was not diligent, the inquiry should end.” *Id.* Neidermeyer, who “has been aware of the facts and theories supporting amendment since the inception of the action,” did not seek leave to amend until opposing Officer Caldwell’s Motion for Reconsideration. *In re W. States*, 715 F.3d at 737 (internal quotation mark

omitted). Indeed, even if we considered the issue pursuant to Federal Rule of Civil Procedure 15(b), as the dissent contends we should, the result would be the same: Neidermeyer has already had two opportunities to amend his complaint and has offered no explanation for his undue delay in seeking a third, the lateness of which would prejudice Officer Caldwell. The district court did not abuse its discretion in concluding that Neidermeyer did not show good cause for his failure to assert any claim related to the frisk in his operative complaint, especially in light of his personal knowledge of the relevant facts.

AFFIRMED.

FILED*Neidermeyer v. Caldwell*, No. 16-55233

DEC 5 2017

SETTLE, District Judge, concurring in part and dissenting in part: MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

While I concur in the majority's analysis of Neidermeyer's investigatory stop claim and malicious prosecution claim, I respectfully dissent in regards to Neidermeyer's unlawful arrest and unlawful frisk claims.

1. I believe the district court improperly granted summary judgment to Officer Caldwell on Neidermeyer's unlawful arrest claim. Like the district court, the majority relies on the following facts that could support probable cause for Neidermeyer's arrest: (a) Neidermeyer momentarily drove along the left line of his lane before making an unsafe lane change in the opposite direction, (b) Officer Caldwell noted approximately two seconds of pupil constriction instead of one when performing a modified nystagmus test, and (c) Neidermeyer acted excessively fearful over the course of the investigatory stop.

In reaching its conclusion, the majority emphasizes Neidermeyer's failure to cite a consensus of cases to support his contention that, under the above-listed facts, a reasonable officer would have known that he lacked probable cause. However, while qualified immunity would certainly be warranted under these facts in isolation, probable cause exists only if a prudent person would have believed that the suspect had committed a crime under the totality of the circumstances.

Hart v. Parks, 450 F.3d 1059, 1065–66 (9th Cir. 2006). “As a corollary of the rule

that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause.” *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1023–24 (9th Cir. 2009).

Interpreting the totality of the circumstances in the light most favorable to Neidermeyer, a jury could conclude that it was clear that Officer Caldwell lacked probable cause to arrest Neidermeyer. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001) (“The relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”). Several facts in this case weigh against a finding of probable cause and negate the facts that Officer Caldwell cites to justify his decision to arrest.

First, apart from the modified nystagmus test—which revealed no nystagmus—Officer Caldwell failed to administer any field sobriety tests. The majority notes that Neidermeyer refused sobriety tests when he was in the back of Officer Caldwell’s vehicle. However, the offer and refusal of sobriety tests occurred only after Neidermeyer had already been unlawfully frisked and then placed under arrest. An officer’s failure to conduct any field sobriety tests weighs against finding that an officer has a reasonable belief or suspicion that a driver is intoxicated. *See United States v. Colin*, 314 F.3d 439, 446 (9th Cir. 2002). Additionally, Officer Caldwell’s improper conduct during the stop and arrest (described below) places his credibility in question, and a jury could reasonably

disbelieve his testimony regarding pupil constriction entirely.

Second, Neidermeyer's fearful behavior can be justified as a reasonable response to Officer Caldwell's conduct during the investigatory stop. For instance, prior to Neidermeyer's fearful behavior, Officer Caldwell ordered Neidermeyer from the vehicle, unlawfully frisked him, and repeatedly stated that Neidermeyer was being detained—and would ultimately be arrested—simply for refusing to answer where he was going. While Officer Caldwell's subjective intent is irrelevant to the existence of probable cause, the fact that he outwardly and repeatedly expressed his unlawful subjective intent to Neidermeyer is an objective fact that should be considered when evaluating the reasonableness of Neidermeyer's fearful behavior. Moreover, "[a] frisk for weapons 'is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.'" *Thomas v. Dillard*, 818 F.3d 864, 876 (9th Cir. 2016), *as amended* (May 5, 2016) (quoting *Terry v. Ohio*, 392 U.S. 1, 28 (1968)). This should be especially true of a patently unlawful frisk, which Officer Caldwell concedes occurred here.¹ Therefore, a jury could conclude that no reasonable officer would view Neidermeyer's fearful behavior as a basis for arrest, since Officer Caldwell's own conduct would likely evoke in a reasonable person some

¹ Officer Caldwell admits he lacked any suspicion that Neidermeyer was armed or dangerous. *See Arizona v. Johnson*, 555 U.S. 323, 327 (2009).

sort of fearful response.

Third, while Neidermeyer's driving was sufficient to support probable cause for a traffic infraction or a reasonable suspicion of intoxicated driving, it was insufficient by itself to support probable cause for an arrest. The video evidence shows Neidermeyer's vehicle drifting towards the left edge of its lane and touching the line briefly before correcting itself and making a potentially unsafe lane change within a car's length of a passing vehicle. Only thirty-four seconds pass from the point when the video evidence first shows the vehicle drifting towards the left to the time that the officers signal to stop. Only fourteen of those seconds pass between when Neidermeyer's vehicle first observably drifted towards the left of his lane and when the subsequent lane change was completed. This was not the type of "swerving all over the road" of which Officer Caldwell accused Neidermeyer when initiating the stop. California courts have held that "pronounced weaving within a lane provides an officer with reasonable cause to stop a vehicle on suspicion of driving under the influence where such weaving continues for a substantial distance." *People v. Perez*, 221 Cal. Rptr. 776, 778 (1985). While Officer Caldwell's observation of a potentially unsafe lane change justified a citation and investigatory stop under California Vehicle Code §§ 21658(a), 22107, it did not, without more, confer probable cause to arrest for intoxicated driving. *See Colin*, 314 F.3d at 446 ("[An] entire observation last[ing] only 35–45 seconds . . .

is not long enough to show that [defendants] were weaving for a ‘substantial’ distance.”).

For these reasons, I would remand on the basis that the district court mistakenly entered summary judgment on Neidermeyer’s unlawful arrest claim when there were genuine factual disputes and a jury could conclude that, under the totality of the circumstances, it would be clear to a reasonable officer that Officer Caldwell lacked probable cause to arrest. *See Borunda v. Richmond*, 885 F.2d 1384, 1391 (9th Cir. 1988) (“Where the facts or circumstances surrounding an individual’s arrest are disputed . . . the existence of probable cause becomes a question of fact for the jury.”).

2. Additionally, I believe that the district court improperly denied Neidermeyer leave to amend his complaint to include his claim asserting an unlawful frisk. The majority concludes that because Neidermeyer sought to amend his complaint after the deadline set forth in a Rule 16 scheduling order, he must satisfy the “good cause” standard set forth in Rule 16(b). *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). In reaching the conclusion that the proposed amendment should be denied, the district court and the majority rely exclusively on Neidermeyer’s lack of diligence in seeking the amendment.²

² While the majority cites “prejudice to the opposing party” as a factor justifying the denial of leave to amend, there does not appear to be any indication or findings of prejudice on the record.

However, Neidermeyer's motion for summary judgment, which raised the issue of the unlawful frisk, should have been construed as a motion to amend under Rule 15(b). *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014). Under that standard, the district court was required to consider "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Id.* We abuse our discretion if we do not apply the correct legal standard, *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1223 (9th Cir. 2000), or if we fail to consider the factors relevant to the exercise of our discretion. *See Bautista v. Los Angeles Cnty.*, 216 F.3d 837, 841–42 (9th Cir. 2000). *See also Desertrain*, 754 F.3d at 1155 ("[T]he district court abused its discretion by not amending the First Amended Complaint to conform to the evidence and argument").

Even if Neidermeyer's request to amend was governed by the Rule 16(b) "good cause" requirement instead of the Rule 15(b) standard, the district court and majority employ too stringent of a standard of "good cause" in this case. Denying leave to amend may be understandable under a harsh interpretation of Rule 16(b) and the Circuit's precedent in *Johnson*. *See* 975 F.2d at 609 ("If [the moving] party was not diligent, the inquiry should end."). However, while "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment," the very use of the term "primarily" in the Circuit's decision in

Johnson leaves open the possibility that circumstances will arise where courts must consider other factors. *Johnson*, 975 F.2d at 609. If this is not the case to require looking beyond just the diligence of the moving party, then I do not believe there can ever be one. The decision in *Johnson* was rendered under highly distinguishable circumstances. In that case, the moving party waited until summary judgment to seek an amendment despite receiving three separate invitations from opposing counsel to correct the inadequacy of the complaint. Additionally, the defendants in *Johnson* predicated their summary judgment motion on the inadequacy of the complaint, so the inadequacy of the complaint was actually before the court during summary judgment proceedings.

In this case, however, the issue of the unlawful frisk was fully briefed without objection in Officer Caldwell's opposition to Neidermeyer's summary judgment motion. Also, the parties openly and plainly discussed whether the frisk was lawfully justified during Officer Caldwell's deposition. Officer Caldwell failed to object to Neidermeyer's efforts to litigate the frisk's unlawfulness until after the district court had already entertained the fully-briefed arguments on the issue and entered summary judgment in favor of Neidermeyer. Denying leave to amend appears to benefit Officer Caldwell for lying in wait with his objection, despite having the issue made clear much earlier in the case. As noted in *Johnson*, a party's gross lack of diligence should end the inquiry into whether a late

amendment will be permitted. In this case however, the district court snatched defeat from the jaws of victory on a constitutional violation that was litigated without objection all the way through summary judgment.

Finally, the district court and the majority's approach of focusing exclusively on the diligence of Neidermeyer's counsel in seeking the proposed amendment appears unworkable when Rule 16 and Rule 15 are viewed in tandem. Rule 15(b) expressly states that, even during trial, "[t]he Court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." Fed. R. Civ. P. 15(b)(1). Since Rule 15(b) allows for the amendment of pleadings freely during trial absent prejudice to the objecting party, basing the Rule 16(b) "good cause" standard exclusively on the diligence of the moving party, without any consideration of prejudice to the objecting party, renders the standard in Rule 15(b)(1) ineffective. Moreover, the text of Rule 16(b) requires that a party show good cause for modifying the scheduling order; it does not require the party to show good cause for their failure to seek modification earlier. If the Rule 16(b) "good cause" standard is to be properly applied in this case, it appears that it must necessarily incorporate a review of some factors beyond mere delay, including a balance of prejudice to Officer Caldwell and the ultimate goal of avoiding an unjust result.

Officer Caldwell's only arguments relating to prejudice deal with a purported lack of opportunity to obtain evidence on damages. If this did constitute prejudice, it could easily be remedied with less than an hour deposition of Neidermeyer sometime before trial, with the costs to be borne by Neidermeyer. Therefore, I would remand with instructions to consider whether the proposed amendment should be permitted under the factors applicable to the Rule 15(b) standard. Even under the Rule 16(b) "good cause" standard, I would remand for consideration of whether the proposed amendment would result in any prejudice to Officer Caldwell or whether avoiding an unjust result in this case constitutes "good cause" for modifying the scheduling order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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DEC 28 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MATTHEW A. NEIDERMEYER,

Plaintiff-Appellant,

v.

MICHAEL CALDWELL, CHP Officer
#20073, individual and official capacity,

Defendant-Appellee.

No. 16-55233

D.C. No.

8:14-cv-01209-JLS-DFM

Central District of California,
Santa Ana

ORDER

Before: M. SMITH and NGUYEN, Circuit Judges, and SETTLE,* District Judge.

Judges M. Smith and Nguyen have voted to deny the petition for panel rehearing, and Judge Settle has voted to grant it. The petition for panel rehearing is DENIED.

* The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MATTHEW A. NEIDERMEYER,

Plaintiff,

vs.

CHP OFFICER MICHAEL CALDWELL
#20073, individually and as a peace officer,

Defendant.

CASE NO. SACV 14-1209-JLS (DFMx)

**ORDER (1) GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT (Doc. 85)
AND (2) GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT (Doc. 78)**

1 Before the Court are cross-motions for summary judgment filed by Plaintiff
2 Matthew A. Neidermeyer and Defendant California Highway Patrol Officer Michael
3 Caldwell. (Pltf's Mot., Doc. 78;¹ Def's Mot., Doc. 85.²) Having considered the briefing
4 and supporting documentation submitted by the parties, held a hearing, and taken the
5 matter under submission, the Court GRANTS in part and DENIES in part Defendant's
6 Motion, and GRANTS in part and DENIES in part Plaintiff's Motion.

7
8 **I. BACKGROUND³**
9

10 This case arises out of Defendant California Highway Patrol ("CHP") Officer
11 Michael Caldwell's traffic stop and subsequent arrest of Plaintiff Matthew A.
12 Neidermeyer. (*See generally* Second Amended Complaint ("SAC"), Doc. 52.)

13 Officer Caldwell became a CHP officer in January 2010. (Defendant's Genuine
14 Issues and Additional Statement of Material Facts, "SGI" ¶ 43, Doc. 93.) During his
15 training from January 2010, to July 2010, Officer Caldwell received approximately 52
16 hours of Driving Under the Influence ("DUI") training. (Plaintiff's Response to
17 Defendant's Additional Statement of Material Facts, "Response" ¶ 1, Doc. 98-1.) In 2011,
18 Officer Caldwell received an additional 16 hours of DUI training, graduating from
19 Advanced Roadside Impaired Driving Enforcement ("ARIDE"). (Id. ¶ 2.) In March 2012,
20 Officer Caldwell became a Drug Recognition Expert ("DRE") after an additional 72 hours
21 of specialized instruction. (Id. ¶ 3.) By December 1, 2012, Officer Caldwell had
22 conducted at least 200 DUI investigations. (Id. ¶ 20.)

23
24
25 ¹ Defendant filed an Opposition to Plaintiff's Motion, and Plaintiff replied. (Def's Opp'n,
Doc. 94; Pltf's Reply, Doc. 98.)

26 ² Plaintiff filed an Opposition to Defendant's Motion, and Defendant replied. (Pltf's Opp'n, Doc.
96; Def's Reply, Doc. 99.)

27 ³ Unless otherwise noted, all facts referred to in this section are undisputed and any objections
28 thereto are overruled.

1 On the night of Saturday, December 1, 2012, Officer Caldwell and his partner,
 2 Officer Taradeo Carter, were driving a patrol car on the Interstate 5 freeway in the vicinity
 3 of Pioneer Boulevard. (SGI ¶¶ 1; Def's Mot. at 5.) While heading southbound on the
 4 four-lane Interstate 5, the officers observed Neidermeyer's car driving in the second lane
 5 from the left. (SGI ¶¶ 1-2.)

6 The in-car video taken from Officer Caldwell's police vehicle ("MVARs Video") is
 7 slightly blurry, but depicts the events leading to Officer Caldwell's traffic stop and
 8 subsequent arrest of Neidermeyer.⁴ (MVARs Video, Docs. 79, 82.) As the officers
 9 approach Neidermeyer's car from behind, the MVARs Video shows Neidermeyer's car
 10 begin to drift from the center to the left side of the lane over a period of about five
 11 seconds.⁵ (Id. at 00:24-00:29.) Neidermeyer's vehicle then jerks to the left, causing the
 12 car's tires to either touch or just barely cross over the dividing lines separating his lane
 13 from the left-most lane of Interstate 5. (Id. at 00:31-00:32.) A few seconds later,
 14 Neidermeyer steers his car back into the center of his lane. (Id. at 0:33-0:34.) He then
 15 begins drifting towards the right side of his lane. (Id. at 00:34-00:39.) As Neidermeyer's
 16 car is drifting towards the right side of his lane, a car begins to pass Neidermeyer's car in
 17 the lane directly to his right. (Id.) Before the car has cleared Neidermeyer's car, and as
 18 Neidermeyer's car continues to drift towards the dividing line separating his lane from the
 19 lane on his right, Neidermeyer puts on his turn signal. (Id. at 00:39-00:40.) With the car
 20

21 ⁴ Both parties have submitted copies of the MVARs Video. (See MVARs Video, Docs. 79, 82.)
 22 Nevertheless, Officer Caldwell objects to Neidermeyer's submission of the MVARs Video.
 23 Because Officer Caldwell has submitted the same copy of the MVARs Video that Neidermeyer
 24 submitted as evidence, the Court finds this evidentiary objection meritless. Thus, the Court finds
 25 both copies of the MVARs Video admissible. The parties also dispute what Officer Caldwell and
 26 his partner observed prior to the events captured on the MVARs Video. (SGI ¶ 31; Response
 27 ¶ 22.) However, for the purposes of this Order, the Court relies only on the behavior captured by
 28 the MVARs Video and Cell Phone Video and other facts that are undisputed by the parties. See
also Scott v. Harris, 550 U.S. 372, 380-81 (2007) (explaining that the Court of Appeals "should
 have viewed the facts in the light depicted by the videotape").

⁵ The first minute of the MVARs Video does not have audio. The rest of the MVARs Video,
 however, has audio.

1 on his right at most a single car length ahead of Neidermeyer's car, and without braking,
2 Neidermeyer changes lanes and pulls directly behind the car that had passed him on his
3 right. (Id. at 00:41-00:45.) Neidermeyer seems to continue to drift from the center to the
4 right side of this lane for a short period of time before the officers pull behind Neidermeyer
5 and turn on the patrol vehicle's flashing lights to stop Neidermeyer. (Id. at 00:46-01:02.)

6 After turning on the patrol vehicle's lights, through the patrol vehicle's speakers,
7 the officers direct Neidermeyer to exit the freeway and pull his vehicle over. (Id. at 01:10-
8 01:16.) At one point, Neidermeyer attempts to stop his car on the off-ramp, but the
9 officers direct him to keep going. (Id. at 02:00-02:10.)

10 Once Neidermeyer has parked his car on the side of the road, Officer Caldwell
11 approaches the driver side window of Neidermeyer's car. (Id. at 02:25.) Officer Caldwell
12 asks Neidermeyer for his license, registration, and insurance information. (Id. at 02:35.)
13 Neidermeyer gives Officer Caldwell his license and registration, but not his proof of
14 insurance because he cannot find it. (SGI ¶ 14; Response ¶ 42.)

15 Officer Caldwell asks Neidermeyer where he is coming from, and Neidermeyer
16 informs Officer Caldwell that he had been at the Magic Castle in Hollywood, California.
17 (MVARs Video at 02:40-02:48.) Officer Caldwell then tells Neidermeyer that he pulled
18 Neidermeyer over because Neidermeyer "was swerving all over the road." (Id. at 02:55.)
19 Officer Caldwell also asks Neidermeyer "how long have you been in California?" (Id. at
20 03:10.) Neidermeyer refuses to answer and states that he does not wish to answer any
21 questions without an attorney. (Id. at 03:15.) Officer Caldwell asks Neidermeyer if he had
22 drank any alcohol that night. (Id. at 04:13.) Neidermeyer responds that he had not. (Id.)

23 Officer Caldwell then asks Neidermeyer to stick his head out of the window. (Id. at
24 04:16.) Officer Caldwell performs a modified nystagmus test on Neidermeyer, which
25 consists of Officer Caldwell holding up his finger and having Neidermeyer follow it with
26 his eyes while Officer Caldwell shines a flashlight in Neidermeyer's direction. (Id. at
27 04:20-04:40.) Although no nystagmus was found, Officer Caldwell claims that
28 Neidermeyer's pupils contracted after two to three seconds instead of the standard one

1 second contraction. (SGI ¶¶ 16-17.) According to Caldwell, slow contraction of pupils is
2 an indicator that someone might be under the influence of drugs or alcohol. (Id. ¶ 16;
3 Response ¶ 53.)

4 Officer Caldwell then returns to the patrol vehicle for a few minutes. (MVARs
5 Video at 04:40-07:50.) When Officer Caldwell returns to Neidermeyer's car, he again
6 asks Neidermeyer where he is going. (Id. at 07:55.) Once again, Neidermeyer refuses to
7 answer the question without an attorney. (Id. at 08:05.)

8 At this point, Officer Caldwell asks Neidermeyer to get out of his car. (Id. at
9 08:05.) As soon as Neidermeyer gets out of his car, he looks across his car towards
10 Officer Carter and says, "All of it, all of it is being recorded." (Id. at 08:12.) Officer
11 Caldwell then orders Neidermeyer to move onto the sidewalk on the right side of the road.
12 (Id. at 08:20.)

13 From this point forward, Neidermeyer and Officer Caldwell cannot be seen on the
14 MVARs Video. However, the MVARs Video continues to capture the audio of their
15 interactions.

16 As soon as Neidermeyer moves out of the sight of the MVARs Video, he demands,
17 "record all this." (Id. at 08:19.) Neidermeyer states that "he wants to be in public" and
18 where other people can see him. (Id. at 08:30.) Officer Caldwell then tells Neidermeyer to
19 face the patrol car, interlace his fingers, and spread his feet. (Id. at 08:40.) Officer
20 Caldwell asks Neidermeyer if he has any weapons or drugs on him, and Neidermeyer
21 quickly answers no. (Id. at 08:55.) Officer Caldwell then proceeds to conduct a pat-down
22 of Neidermeyer. (SGI ¶ 24; MVARs Video at 09:00-09:20.) Officer Caldwell admits that
23 he did not believe Neidermeyer was armed. (SGI ¶ 25.)

24 Officer Caldwell then asks Neidermeyer why he will not tell him where he is going.
25 (MVARs Video at 09:25.) In response, Neidermeyer loudly states, "I will not answer any
26 questions without an attorney." (Id. at 09:27.) Officer Caldwell then asks Neidermeyer if
27 he "wants to make this difficult," and "if [he] wants to go to jail because [he] won't answer
28 a couple of questions." (Id. at 09:42.) Soon thereafter, after Officer Caldwell informs

1 Neidermeyer that he is being recorded, Neidermeyer loudly narrates that his "hands are up
2 in the air and visible." (Id. at 10:36.) Neidermeyer then asks, "Can I stand in front of the
3 car where the camera can see me? I would like to stand in front of the car so that they can
4 see I am not being violent. I am not being violent." (Id. at 10:50.) Neidermeyer continues
5 to narrate his movements out loud. (Id. at 10:50-11:00.)

6 Next, Neidermeyer calls out to his girlfriend, "Megan, get on your phone Send
7 a message of that recording, a condensed version of it, so that when they take your phone
8 and assault you or do anything to you, we have it online. These are not men that can be
9 trusted at this point." (Id. at 11:15-11:30.) Neither the video nor the audio of the MVARs
10 Video show either officer raising his voice or acting in a manner that would prompt these
11 statements and behavior from Neidermeyer. (*See generally* id.)

12 Neidermeyer continues to refuse to answer the officers' questions. (Id. at 12:00-
13 12:15.) Officer Caldwell informs Neidermeyer at this point that he is not under arrest, but
14 that he is being detained. (Id. at 12:20.) Neidermeyer once again narrates his movements
15 and the events aloud. (Id. at 12:35.)

16 When Officer Caldwell directs Neidermeyer to "step right here," Neidermeyer
17 states that he is "just going to get down on the ground." (Id. at 12:58.) Neidermeyer then
18 lies down on the ground with his hands and feet apart, despite not being instructed to do
19 so. (Response ¶ 88.) Officer Caldwell quickly tells Neidermeyer to stand up, turn around,
20 put his hands on his head, and spread his legs. (MVARs Video at 13:12-13:20.)
21 Neidermeyer responds by shouting, "Take me in. . . . Arrest me. I'm afraid for my life.
22 I'm afraid for my life." (Response ¶ 89.) Officer Caldwell directs Neidermeyer to spread
23 his feet. (MVARs Video at 13:42.) Soon thereafter, Neidermeyer yells, "You are hurting
24 my arms, you are hurting my arms," and claims that the officers are hurting his left
25 shoulder. (Id. at 13:50-14:05.) Neidermeyer yells to his girlfriend, directing her not to
26 delete her cell phone recording, to put it in her underwear if she has to, and to start e-
27 mailing little segments. (Id. at 14:45.) Finally, Neidermeyer states, "I have not resisted
28 one bit" and "I have completely cooperated," to which Officer Caldwell responds, "You

1 have not answered any questions. All I wanted to know was where you were going. Now
2 I know where you are going. You're going to jail. Because you didn't want to answer
3 questions." (Id. at 14:48.) Officer Caldwell arrests Neidermeyer.⁶ (Response ¶ 90.)
4 Neidermeyer was arrested for a violation of California Vehicle Code § 23152(a). (Id.
5 ¶ 103.)

6 Portions of the traffic stop and Neidermeyer's arrest also were recorded by
7 Neidermeyer's girlfriend, Megan Barhorst, on her cell phone ("Cell Phone Video") while
8 she was a passenger in Neidermeyer's car. (Response ¶ 71; Cell Phone Video, Ex. B, Doc.
9 79; Ex. I, Doc. 82.) The cell phone recording begins as Neidermeyer is searching for his
10 proof of insurance while still in his car. (Cell Phone Video at 00:00.) The Cell Phone
11 Video then captures the modified nystagmus test conducted by Officer Caldwell. (Id. at
12 01:00.) The Cell Phone Video stops, but then resumes after Officer Caldwell returns to
13 Neidermeyer's car and asks Neidermeyer to step out of the car. (Id. at 01:00 to 01:15.)

14 While the MVARs Video does not include video of the events that occurred once
15 Neidermeyer exits his car, the Cell Phone Video captures Neidermeyer's movements and
16 behavior while he is on the sidewalk. (Id. at 0:200.) However, the Cell Phone Video fails
17 to clearly capture the audio of these events until Neidermeyer begins narrating his
18 movements loudly. (Id. at 02:00-04:00.)

19 The Cell Phone Video recording stops after Neidermeyer says to Barhorst "these
20 men cannot be trusted at this point," but resumes when Neidermeyer lies down on the
21 ground without being prompted to do so. (Id. at 05:20-05:40.) The Cell Phone Video also
22 captures the point when Neidermeyer is handcuffed and arrested and when Neidermeyer
23 complains that Officer Caldwell is hurting his arm and shoulder. (Id. at 06:30-07:00.)

24
25
26 ⁶ The MVARs Video lasts for an additional 35 minutes, but, because the parties agree that
27 Officer Caldwell arrested Neidermeyer when he put Neidermeyer in handcuffs, the Court need not
28 discuss what is captured on the MVARs Video from this point forward.

1 During the events captured on the Cell Phone Video, Neidermeyer keeps his hands
2 raised or visible at all times, and seems to timely comply with the officers' instructions,
3 except for laying down on the ground unprompted and being slow to put his hands behind
4 his head at one point. (Id. at 02:00-07:00.) The Court cannot say one way or another
5 whether Neidermeyer's body movements and posture were abnormal during these
6 interactions. However, at no point does the Cell Phone Video show either officer raising
7 his voice or acting in a manner that would prompt these statements and behavior from
8 Neidermeyer. (*See generally* id.)

9 Following the traffic stop and arrest, Officer Caldwell prepared a DRE Report and
10 an Arrest report, both of which were submitted by CHP to the District Attorney's Office.
11 (Response ¶ 106.) On December 12, 2013, Filing Deputy District Attorney Wakabayashi
12 reviewed Officer Caldwell's Arrest Report and DRE Report and charged Neidermeyer
13 with violating California Vehicle Code § 23152(a) and California Penal Code 148(a). (Id.
14 ¶ 107.) Eventually, the criminal charges against Neidermeyer were dismissed because the
15 District Attorney who was subsequently assigned to the case determined that the case
16 would be too hard to prosecute. (Id. ¶ 115.)

17 In addition, after Neidermeyer refused to submit to a chemical test, a DMV
18 administrative per se hearing was held, where it was determined that Neidermeyer's
19 driving privileges should be suspended for one year. (Id. ¶ 110.) The DMV and
20 Neidermeyer eventually reached a settlement after Neidermeyer filed a Writ in Superior
21 Court, challenging the DMV's decision to suspend his license. (Id. ¶ 113.)

22 As a result of this traffic stop and arrest, Neidermeyer brings a cause of action
23 against Officer Caldwell under 42 U.S.C. § 1983, claiming that Officer Caldwell violated
24 his constitutional rights by detaining Neidermeyer without reasonable suspicion,
25 conducting an illegal pat-down, and arresting Neidermeyer without probable cause. (SAC
26 ¶¶ 8-16.) Neidermeyer also contends that Officer Caldwell is liable for malicious
27 prosecution. (Id.)

28 Both parties now move for summary judgment.

II. LEGAL STANDARD

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is proper "if the [moving party] shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A factual issue is "genuine" when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the non-movant's favor, and an issue is "material" when its resolution might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . , the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Therefore, if the nonmovant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion. See *In re Oracle Corp. Secs. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) ("the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor").

1 **III. DISCUSSION**

2
3 Where, as here, “parties submit cross-motions for summary judgment, ‘[e]ach
4 motion must be considered on its own merits.’” *Fair Hous. Council of Riverside Cty., Inc.*
5 *v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting William W. Schwarzer, et
6 al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 499 (Feb.
7 1992)). However, “the court must consider the appropriate evidentiary material identified
8 and submitted in support of both motions, and in opposition to both motions, before ruling
9 on each of them.” *Id.* at 1134.

10 Plaintiff’s Opposition largely sets forth the same arguments and evidence as set
11 forth in Plaintiff’s Motion and Plaintiff’s Reply. (*Compare* Pltf’s Opp’n with Pltf’s Mot.
12 and Pltf’s Reply.) Similarly, Defendant’s Opposition sets forth almost identical arguments
13 and evidence as set forth in Defendant’s Motion and Defendant’s Reply. (*Compare* Def’s
14 Opp’n with Def’s Mot. and Def’s Reply.) The Court has considered Plaintiff’s Motion and
15 Defendant’s Motion⁷ on their own merits, but for the sake of judicial economy, where the
16 arguments in the parties’ respective motions and responsive pleadings overlap, the Court
17 will discuss those arguments as they are found in Defendant’s Motion, Plaintiff’s
18 Opposition, and Defendant’s Reply. However, because Plaintiff’s Motion addresses the
19 legality of Officer Caldwell’s pat-down, whereas that issue is not raised in Defendant’s
20 Motion or the pleadings filed in response to Defendant’s Motion, the Court will address
21 the pat-down separately.

22
23
24
25 ⁷ Neidermeyer contends that Officer Caldwell failed to file his motion for summary judgment
26 by the July 5, 2015 deadline, and thus Defendant’s Motion should not be considered. (Pltf’s
27 Opp’n at 6-7.) Defendant’s Motion was filed on July 7, 2015, two days after the deadline. (Def’s
28 Mot.) Despite Officer Caldwell’s late filing, the Court, in its discretion, will consider Defendant’s
Motion.

1
2 **A. Defendant's Motion for Summary Judgment**

3
4 For the purposes of Caldwell's Motion, the Court takes the facts in the light most
5 favorable to Neidermeyer.

6 Officer Caldwell argues that he is entitled to summary judgment on Neidermeyer's
7 42 U.S.C. § 1983 claim because he and Officer Carter "had reasonable suspicion to
8 investigate whether [Neidermeyer] was driving impaired" and because "Officer Caldwell,
9 a Drug Recognition Expert, arrested Neidermeyer because there was probable cause to
10 believe that [Neidermeyer] was under the influence of a CNS stimulant." (Def's Mot. at
11 4.) Officer Caldwell also contends that he "is entitled to qualified immunity under section
12 1983 because his decision to stop and arrest [Neidermeyer] did not violate clearly
13 established law." (Id. at 5.)

14 Because the Court finds that Officer Caldwell is entitled to qualified immunity in
15 regards to Neidermeyer's claims related to the traffic stop and arrest of Neidermeyer, the
16 Court need not determine whether Officer Caldwell had reasonable suspicion to detain and
17 probable cause to arrest Neidermeyer.

18
19 **1. Qualified Immunity**

20
21 "Qualified immunity balances two important interests—the need to hold public
22 officials accountable when they exercise power irresponsibly and the need to shield
23 officials from harassment, distraction, and liability when they perform their duties
24 reasonably. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "The doctrine of qualified
25 immunity protects government officials from liability for civil damages insofar as their
26 conduct does not violate clearly established statutory or constitutional rights of which a
27 reasonable person would have known." *Stanton v. Sims*, 134 S. Ct. 3, 4 (2013) (internal
28 quotation marks and citation omitted).

1 “‘Qualified immunity gives government officials breathing room to make
2 reasonable but mistaken judgments,’ and ‘protects all but the plainly incompetent or those
3 who knowingly violate the law.’” *Id.* at 5 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731
4 (2011)). “The principles of qualified immunity shield an officer from personal liability
5 when an officer reasonably believes that his or her conduct complies with the law. Police
6 officers are entitled to rely on existing lower court cases without facing personal liability
7 for their actions. *Pearson*, 555 U.S. at 244-45 (2009). “The protection of qualified
8 immunity applies regardless of whether the government official’s error is ‘a mistake of
9 law, a mistake of fact, or a mistake based on mixed questions of law and fact.’” *Id.* at 231.

10 “[A]n officer will be denied qualified immunity in a § 1983 action only if (1) the
11 facts alleged, taken in the light most favorable to the party asserting injury, show that the
12 officer’s conduct violated a constitutional right, and (2) the right at issue was clearly
13 established at the time of the incident such that a reasonable officer would have understood
14 her conduct to be unlawful in that situation.” *Green v. City & Cty. of S.F.*, 751 F.3d 1039,
15 1051-52 (9th Cir. 2014) (internal quotation marks and citation omitted). “A[n officer]’s
16 conduct violates clearly established law when, at the time of the challenged conduct, the
17 contours of a right are sufficiently clear that every reasonable official would have
18 understood that what he is doing violates that right. *al-Kidd*, 563 U.S. 731, 131 S. Ct. at
19 2083. “This inquiry must be undertaken in light of the case’s specific context, not as a
20 broad general proposition.” *Saucier v. Katz*, 533 U.S. 194, 194 (2001).

21 Courts “‘do not require a case directly on point’ before concluding that the law is
22 clearly established, ‘but existing precedent must have placed the statutory or constitutional
23 question beyond debate.’” *Stanton*, 134 S. Ct. at 5 (quoting *Ashcroft v. al-Kidd*, 563 U.S.
24 731 (2011)). Plaintiffs “bear the burden of demonstrating that the right allegedly violated
25 was clearly established at the time of the incident.” *Greene v. Camreta*, 588 F.3d 1011,
26 1031 (9th Cir. 2009) *vacated in part*, 563 U.S. 692, 131 S. Ct. 2020, 179 L. Ed. 2d 1118
27 (2011) and *vacated in part*, 661 F.3d 1201 (9th Cir. 2011). “In the absence of genuine
28 issues of material fact, this determination is a question of law to be determined by the

1 court.” *Davis v. City of Seattle*, No. C13-0895JLR, 2014 WL 3810574, at *3 (W.D. Wash.
2 Aug. 1, 2014) (citing *Green*, 751 F.3d at 1052).

3
4 **i. Reasonable Suspicion to Stop Neidermeyer’s Vehicle**

5
6 The Supreme Court permits courts “to exercise their sound discretion in deciding
7 which of the two prongs of the qualified immunity analysis should be addressed first in
8 light of the circumstances in the particular case at hand.” *Pearson*, 555 U.S. at 236. Thus,
9 based on the circumstances present in this case, the Court first will address the second step
10 of the qualified immunity inquiry.

11 Caldwell asserts that he pulled Neidermeyer over because he suspected that
12 Neidermeyer was driving under the influence of alcohol and/or drugs. (SGI ¶ 7.) *See* Cal.
13 Veh. Code § 23152 (providing that “[i]t is unlawful for a person who is under the influence
14 of any alcohol beverage . . . [or] for a person who is under the influence of any drug to
15 drive a vehicle”). Officer Caldwell also claims that Neidermeyer violated California
16 Vehicle Code §§ 21658(a) and 22107. (Def’s Mot. at 5.) California Vehicle Code
17 § 21658(a) provides: “Whenever any roadway has been divided into two or more clearly
18 marked lanes for traffic in one direction, the following rules apply: (a) A vehicle shall be
19 driven as nearly as practical entirely within a single lane and shall not be moved from the
20 lane until such movement can be made with reasonable safety.” Cal. Veh. Code § 21658.
21 California Vehicle Code § 22107 provides: “No person shall turn a vehicle from a direct
22 course or move right or left upon a roadway until such movement can be made with
23 reasonable safety and then only after the giving of an appropriate signal in the manner
24 provided in this chapter in the event any other vehicle may be affected by the movement.”
25 Cal. Veh. Code § 22107.

26 “Stops under the Fourth Amendment fall into three categories. First, police may
27 stop a citizen for questioning at any time, so long as that citizen recognizes that he or she is
28 free to leave. . . . Second, the police may ‘seize’ citizens for brief, investigatory stops.

1 This class of stops is not consensual, and such stops must be supported by reasonable
2 suspicion. Finally, police stops may be full-scale arrests. These stops, of course, are
3 seizures, and must be supported by probable cause.” *Morgan v. Woessner*, 997 F.2d 1244,
4 1252 (9th Cir. 1993) (internal quotation marks omitted) (citing *Terry v. Ohio*, 392 U.S. 1,
5 20-22 (1968)).

6 “The Fourth Amendment permits brief investigative stops—such as the traffic stop
7 in this case—when a law enforcement officer has a particularized and objective basis for
8 suspecting the particular person stopped of criminal activity.” *Navarette v. Cal.*, 134 S. Ct.
9 1683, 1687 (2014) (internal quotation marks and citation omitted). “The [reasonable
10 suspicion] standard takes into account the totality of the circumstances—the whole
11 picture.” *Id.* “Determining reasonable suspicion is a ‘commonsense approach’ under
12 which courts can appropriately recognize certain driving behaviors, such as weaving, as
13 ‘sound indicia of drunk driving.’” *Davis*, 2014 WL 3810574, at *4 (quoting *Navarette*,
14 134 S. Ct. at 1690-91).

15 Officer Caldwell argues that, “[e]ven if Officer Caldwell did not have reasonable
16 suspicion to stop [Neidermeyer]’s vehicle, [] he is entitled to qualified immunity.” (Def’s
17 Mot. at 13.) Neidermeyer is correct that, in the Ninth Circuit, merely weaving within a
18 lane does not justify a traffic stop unless the weaving is “pronounced” or occurs for a
19 “substantial distance.” (See Pltff’s Opp’n at 12 (citing *United States v. Colin*, 314 F.3d 439,
20 445 (9th Cir. 2002)). “However, weaving in conjunction with other indicia of intoxication
21 can give rise to a reasonable suspicion that a driver is under the influence.” *Davis*, 2014
22 WL 3810574, at *4 (citing *United States v. Mesa*, 234 F. App’x 680, 682-83 (9th Cir.
23 2007)); *United States v. Fernandez-Castillo*, 234 F.3d 114, 1120 (9th Cir. 2003)).

1 The beginning of the MVARs Video shows Neidermeyer drifting within his lane
2 over a period of about five seconds.⁸ (MVARs Video at 00:24-00:29.) Neidermeyer's
3 vehicle then jerks to the left, which -- if taking the facts in the light most favorable to
4 Neidermeyer -- causes the car's tires to touch the dividing lines separating Neidermeyer's
5 lane from the left-most lane of Interstate 5. (Id. at 00:31-00:32.) After steering his car
6 back into the center of his lane, Neidermeyer begins drifting towards the right side of his
7 lane. (Id. at 00:34-00:39.) As Neidermeyer's car is drifting towards the right side of his
8 lane, a car begins to pass Neidermeyer's car in the lane directly to his right. With the car
9 on his right at most a single car length ahead of Neidermeyer's car, and without braking,
10 Neidermeyer changes lanes and pulls directly behind the car that had passed Neidermeyer
11 on his right. (Id. at 00:41-00:45.) The MVARs Video also shows Neidermeyer drifting
12 from the center to the right side of this lane for a short period of time. (Id. at 00:46-00:57.)

13 As mentioned above, the Court will not address the first prong of the qualified
14 immunity analysis and thus does not express any view regarding whether Officer
15 Caldwell's traffic stop of Neidermeyer was constitutional. In regards to the second prong,
16 the Court finds that, though Officer Caldwell may have been mistaken in believing his
17 actions were justified, he was not "plainly incompetent," and thus is entitled to qualified
18 immunity. *See Stanton*, 134 S. Ct. 3, 7 (2013).

19 Neidermeyer claims that Officer Caldwell is not entitled to qualified immunity
20 because "[t]he right against being unlawfully detained, arrested and booked on accusations
21 of crime in bad faith and without probable cause is long settled in the 9th Circuit." (Pltf's
22 Opp'n at 13.) However, the Supreme Court has directed courts "not to define clearly
23 established law at a high level of generality. The general proposition, for example, that an
24 unreasonable search or seizure violates the Fourth Amendment is of little help in

26 ⁸ Because the Cell Phone Video captures only the events that occurred after Neidermeyer was
27 stopped, the Court relies exclusively on the events and behavior captured on the MVARs Video in
28 this section.

1 determining whether the violative nature of particular conduct is clearly established.” *al-*
2 *Kidd*, 563 U.S. 731, 131 S. Ct. at 2084 (2011) (internal quotation marks and citations
3 omitted). When analyzed at the correct level of generality, the Court finds that
4 Neidermeyer has failed to carry his burden of demonstrating that the right allegedly
5 violated was clearly established at the time of his traffic stop. *See Davis*, 2014 WL
6 3810574, at *5.

7 Neidermeyer primarily relies on the Ninth Circuit’s decision in *U.S. v. Colin*, 314
8 F.3d 439 (9th Cir. 2002) for the proposition that the right allegedly violated in this case
9 was clearly established at the time Neidermeyer was stopped by Officer Caldwell. (Pltf’s
10 Opp’n at 11-12.) In *Colin*, an officer observed a car on Interstate 15 “drift onto the solid
11 white line on the far side of the right lane and watched the car’s wheels travel along the fog
12 line for approximately ten seconds.” *Colin*, 314 F.3d at 441. After the car signaled and
13 moved into the left lane, the officer then “observed the car drift to the left side of the left
14 lane where its left wheels traveled along the solid yellow line for approximately ten
15 seconds.” *Id.* “The car then returned to the center of the left lane, signaled a lane change,
16 and moved into the right lane.” *Id.* At this point, the officer pulled the car over for
17 possible violations of California Vehicle Code §§ 21658(a) and 23152(a). *Id.*

18 The *Colin* court concluded that the officer “did not have reasonable suspicion to
19 stop [the car] based on lane straddling or driving under the influence.” *Id.* at 446. The
20 Court based its decision on the fact that “cases suggest that to violate a lane straddling
21 statute, a driver must do more than simply touch, even for 10 seconds, a painted line on a
22 highway.” *Id.* at 444. Further, the Court found that because there was no “pronounced
23 weaving within a lane” that continued for “a *substantial* distance,” the officer did not have
24 reasonable suspicion to stop the vehicle on suspicion of driving under the influence. *Id.* at
25 445-46.

26 Here, if the MVARs Video merely showed Neidermeyer’s car drifting within his
27 lane and touching the dividing lines for a short period of time, Neidermeyer might be
28 correct that *Colin* established that the right allegedly violated in this case was clearly

1 established in 2002. (Pltf's Opp'n at 12.) However, *Colin* is inapposite because, even if
2 the Court assumes that Neidermeyer's car never crossed the dividing line between lanes,
3 but rather only touched the dividing lines briefly, the MVARs Video also shows
4 Neidermeyer making an unsafe lane change.⁹ (MVARs Video at 00:41-00:45.) *Colin*
5 recognized that California Vehicle Code § 21658(a) imposes "two separate duties on
6 drivers – to stay within a single lane and to make safe lane changes." *Id.* at 444 (citing
7 *People v. Butler*, 146 Cal. Rptr. 856 (1978); *People v. Skinner*, 39 Cal. 3d 765 (1985)). In
8 *Colin*, there was no evidence that the car made any unsafe lane changes prior to being
9 pulled over. However, here, the MVARs Video shows Neidermeyer making an unsafe
10 lane change about 15 seconds before Neidermeyer is pulled over. As a result, the facts
11 before this Court are different from the facts before the *Colin* court, and Neidermeyer's
12 reliance on *Colin* fails to satisfy his burden of showing that the right allegedly violated in
13 this case was clearly established at the time Neidermeyer was stopped by Officer Caldwell.
14 (Pltf's Opp'n at 11-12.)

15 Further, "[t]he Ninth Circuit precedent[s] of *Mesa* and *Fernandez–Castillo* make
16 clear that a combination of minor driving irregularities that do not themselves constitute
17 illegal activity can nonetheless sum to a reasonable suspicion of intoxicated driving."
18 *Davis*, 2014 WL 3810574, at *5 (citing *United States v. Mesa*, 234 F. App'x 680, 682–83
19 (9th Cir. 2007) and *United States v. Fernandez–Castillo*, 324 F.3d 1114, 1117 (9th Cir.
20 2003) ("All relevant factors must be considered in the reasonable suspicion calculus—even
21 those factors that, in a different context, might be entirely innocuous.")). "As a matter of
22

23
24 ⁹ At oral argument, Neidermeyer's counsel contended that Officer Carter's deposition
25 testimony impeaches Officer Caldwell's account of the events at issue in this case. Specifically,
26 Neidermeyer's counsel argued that Officer Carter testified that Neidermeyer's lane change was
27 safe. The Court, however, has reviewed the entirety of Officer Carter's deposition testimony and
28 at no point does Officer Carter classify this lane change as safe. (See generally Carter Depo., Doc.
85-4.) Rather, Officer Carter testified that Neidermeyer's car came close to the vehicle on his
right when Neidermeyer made his lane change, estimating the distance between the cars to be
between five and ten feet when Neidermeyer changed lanes. (*Id.* at 78-79.)

1 public policy, qualified immunity provides ample protection to all but the plainly
2 incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335,
3 335 (1986).

4 Accordingly, based on the events captured in the MVARs Video, the Court cannot
5 say that every reasonable officer in Officer Caldwell’s position would have understood that
6 the traffic stop violated Neidermeyer’s constitutional rights. *See Davis*, 2014 WL
7 3810574, at *5 (citing *al-Kidd*, 131 S. Ct. 2083). As a result, the Court GRANTS
8 Defendant’s Motion and DENIES Plaintiff’s Motion in regards to the traffic stop because
9 Officer Caldwell is entitled to qualified immunity.¹⁰

10
11 **ii. Probable Cause to Arrest Neidermeyer**
12

13 Officer Caldwell asserts that, “[i]n the absence of Neidermeyer’s full cooperation,
14 which included not taking any FSTs or answering questions, . . . [the] decision to arrest
15 Neidermeyer [was based] on the following information: (1) [Neidermeyer]’s erratic
16 driving; (2) objective signs that [Neidermeyer] was under the influence of a CNS
17 stimulant; (3) [Neidermeyer]’s odd, combative, and paranoid demeanor during his contact
18 with the officers; and (4) Officer Caldwell’s training and experience as a traffic officer and
19 as a Drug Recognition Expert/Evaluator.” (Def’s Mot. at 17-18.) According to Officer
20 Caldwell, Neidermeyer “exhibited obvious signs of [Central Nervous System (“CNS”)]
21 stimulant use (paranoia, fast talking, muscle rigidity), refused to cooperate in Officer
22 Caldwell’s investigation without his attorney present, refused to answer questions seeking
23 to determine whether [Neidermeyer] was driving impaired, and refused to perform field
24 sobriety tests (“FSTs”).” (Id. at 4.) Officer Caldwell claims that he “not only had the
25 duty, but also the obligation, to remove [Neidermeyer] from the roadways after he
26

27 ¹⁰ Because the second step of the qualified immunity analysis is dispositive, the Court need not
28 discuss the first step of the qualified immunity analysis.

1 witnessed [Neidermeyer]'s previous erratic and dangerous driving and the obvious signs of
2 CNS stimulant use (paranoia, fast talking, muscle rigidity) exhibited by [Neidermeyer]
3 during their encounter." (Def's Reply at 2.) Officer Caldwell therefore argues that the
4 objective evidence was "more than sufficient to support the conclusion Officer Caldwell
5 had probable cause to arrest [Neidermeyer] for DUI." (Def's Mot. at 18.)

6 As an initial matter, Neidermeyer argues that "[w]hat these films and Plaintiff's
7 other evidence shows[sic] is Caldwell negatively reacted to [P]laintiff's right not to answer
8 his question about where he was going by abusing his arrest powers, a classic 'contempt of
9 cop' arrest without probable cause." (Plt's Opp'n at 16.) Neidermeyer therefore claims
10 that Officer Caldwell did not have probable cause to arrest Neidermeyer and is not entitled
11 to qualified immunity because Officer Caldwell admits that he arrested Neidermeyer for
12 refusing to answer his questions. (Plt's Mot. at 27-28.) However, the Supreme Court has
13 "foreclose[d] the argument that ulterior motives can invalidate police conduct justified on
14 the basis of probable cause. Subjective intentions play no role in ordinary, probable-cause
15 Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 806 (1996) (internal
16 citation omitted). Thus, this argument is without merit.

17 Neidermeyer also claims that, even if the Court were to accept all of Officer
18 Caldwell's claims about Neidermeyer's behavior as true, Officer Caldwell still did "not
19 have probable cause to arrest [Neidermeyer] for [a] violation of California's DUI statute."
20 (Plt's Opp'n at 14.) According to Neidermeyer, the MVARs Video and the Cell Phone
21 Video "prove Neidermeyer was well able to communicate, had clear clean speech, had the
22 physical agility to get down and up balancing on one leg, and otherwise com[ply] with
23 commands." (Id. at 16.)

24 Neidermeyer "bear[s] the burden of demonstrating that the right allegedly violated
25 was clearly established at the time of the incident." *Camreta*, 588 F.3d at 1031. However,
26 specifically in regards to Officer Caldwell's decision to arrest Neidermeyer, nowhere in
27 Plaintiff's Motion, Plaintiff's Opposition, or Plaintiff's Reply does Neidermeyer "cite[]
28 any cases of controlling authority in the[] jurisdiction at the time in question which clearly

1 established the rule on which [he] seek[s] to rely, nor ha[s he] identified a consensus of
2 cases of persuasive authority such that a reasonable officer could not have believed that his
3 actions were lawful.” *Wilson v. Layne*, 526 U.S. 603, 604 (1999). (See Plaintiff’s Motion
4 at 17-23; Plaintiff’s Opp’n at 13-16; Plaintiff’s Reply at 11-12 (arguing based on the facts
5 that Officer Caldwell violated Neidermeyer’s rights and that those rights were clearly
6 established, but failing to cite a single case to support the contention that Officer Caldwell
7 could not have believed that his actions were lawful when arresting Neidermeyer).

8 Further, to the extent that Neidermeyer has cited cases for the general proposition
9 “that an unreasonable search or seizure violates the Fourth Amendment,” the Court finds
10 that Neidermeyer has failed to satisfy his burden because such general propositions are “of
11 little help in determining whether the violative nature of particular conduct is clearly
12 established.” *al-Kidd*, 131 S. Ct. at 2084 (internal quotation marks and citations omitted).
13 The Supreme Court has directed courts “not to define clearly established law at a high
14 level of generality.” *Id.*

15 Accordingly, though the Court recognizes that Officer Caldwell may have been
16 mistaken in believing his arrest of Neidermeyer was justified, the Court finds that Officer
17 Caldwell was not “plainly incompetent,” and thus is entitled to qualified immunity. See
18 *Stanton*, 134 S. Ct. at 7. Neidermeyer has failed to carry his burden of demonstrating that
19 the right allegedly violated was clearly established at the time of Neidermeyer’s arrest. As
20 a result, the Court GRANTS Defendant’s Motion and DENIES Plaintiff’s Motion in
21 regards to the arrest because Officer Caldwell is entitled to qualified immunity.¹¹

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27 ¹¹ Once again, because the second step of the qualified immunity analysis is dispositive, the
28 Court need not discuss the first step of the qualified immunity analysis.

2. Malicious Prosecution¹²

Officer Caldwell claims that he is entitled to summary judgment on Neidermeyer's § 1983 claim for malicious prosecution because "the District Attorney's Office exercised independent judgment in filing charges of, and then criminally prosecuting [Neidermeyer] for, DUI and resisting arrest." (Def's Mot. at 26.) Neidermeyer argues, however, that Officer Caldwell is not entitled to summary judgment on Neidermeyer's malicious prosecution claim because "[t]he truthfulness of [Officer Caldwell]'s reports, which [the District Attorney] testified w[ere] exclusively what he relied upon, [are] materially disputed by [Neidermeyer]." (Pltf's Opp'n at 17.)

"In order to prevail on a § 1983 claim of malicious prosecution, a plaintiff 'must show that the defendants prosecuted [him] with malice and without probable cause, and that they did so for the purpose of denying [him] equal protection or another specific constitutional right.'" *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004) (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995)) (alteration in original). "Malicious prosecution actions are not limited to suits against prosecutors but may be brought, as here, against other persons who have wrongfully caused the charges to be filed." *Id.*

Where, as here, a prosecutor has filed a criminal complaint, a rebuttable presumption arises that "the prosecutor . . . exercised independent judgment in determining that probable cause . . . existed, thereby breaking the chain of causation between an arrest and prosecution and immunizing investigating officers from damages suffered after the complaint was filed." *Beck v. City of Upland*, 527 F.3d 853, 862 (9th Cir. 2008) (citation and internal quotation marks omitted). However, the presumption is rebutted by showing

¹² Plaintiff's Motion does not seek summary judgment on the malicious prosecution claim.

1 that the independence of the prosecutor's judgment has been compromised. *Id.* That may
2 be accomplished by, among other things, showing that the prosecutor was given false
3 information or that the officers otherwise engaged in "wrongful or bad faith conduct that
4 was actively instrumental in causing the initiation of legal proceedings," *id.* at 862-63
5 (citation and internal quotation marks omitted), including the fabrication of police reports.
6 *See Blankenhorn v. City of Orange*, 485 F.3d 463, 482-83 (9th Cir. 2007); *Sloman v.*
7 *Tadlock*, 21 F.3d 1462, 1474 (9th Cir. 1994).

8 The Court finds that Officer Caldwell is entitled to summary judgment on
9 Neidermeyer's malicious prosecution claim because there is no genuine dispute that the
10 prosecutor who filed the criminal complaint against Neidermeyer exercised independent
11 judgment in determining that probable cause existed. Further, Neidermeyer has failed to
12 show that the independence of the prosecutor's judgment was compromised in this case.

13 In support of Plaintiff's Motion, Neidermeyer submitted as evidence Officer
14 Caldwell's DRE Report and Arrest Report concerning Neidermeyer's traffic stop and
15 arrest. (*See* Ex. D, DRE Report, Doc. 78-2; Ex. G, Arrest Report, Doc. 78-2.) Both
16 reports provide a description that largely matches what is depicted on the MVARs Video
17 and Cell Phone Video, and which the Court independently describes above. (*Compare id.*
18 *to* MVARs Video; Cell Phone Video; Section I. *supra.*) It is true that Neidermeyer
19 disputes the truthfulness of these reports based on the events depicted in the MVARs
20 Video and Cell Phone Video, but, even when taking the facts in the light most favorable to
21 Neidermeyer, the Court cannot say that any statements included in these reports are
22 demonstrably false. Neidermeyer may disagree with Officer Caldwell's characterization
23 of Neidermeyer's movements and demeanor in the reports, but Neidermeyer has failed to
24 show that Officer Caldwell fabricated any portion of these reports.

25 Further, it is undisputed that Filing Deputy District Attorney Wakabayashi (the
26 "filing prosecutor") reviewed Officer Caldwell's Arrest Report and DRE report and
27 charged Neidermeyer with violating California Vehicle Code § 23152(a) and California
28 Penal Code 148(a) based on them. (Response ¶ 107.) On the first page of the Arrest

1 Report, in the upper right corner, Officer Caldwell checked the box indicating the
2 existence of the MVARs Video. (Arrest Report at 1.) Thus, Officer Caldwell not only
3 provided a detailed description of the events in his reports, but also informed the
4 prosecutor that this description could be verified by viewing the MVARs Video. Though
5 the filing prosecutor admits that he never saw the MVARs video before filing the criminal
6 complaint against Neidermeyer, (Wakabayashi Depo. at 31:7-32:12, Doc. 85-5), there is no
7 evidence that the filing prosecutor could not have viewed the MVARs Video if he so
8 desired. As a result, the filing prosecutor's decision to file charges against Neidermeyer
9 based solely on Officer Caldwell's reports was an exercise of his independent judgment.

10 Finally, not only did the filing prosecutor independently decide to charge
11 Neidermeyer with a violation of California Vehicle Code § 23152(a), but he also filed a
12 charge against Neidermeyer under California Penal Code § 148(a). (Response ¶ 107.)
13 Nowhere in Officer Caldwell's Arrest Report or DRE report does Officer Caldwell
14 recommend that Neidermeyer be charged under California Penal Code § 148(a). Rather,
15 the Arrest Report and DRE Report recommend that Neidermeyer be charged with
16 violations of California Vehicle Code § 23152(a) and California Health and Safety Code §
17 11550(a) only. (Arrest Report at 6; DRE Report at 4.) Thus, the filing prosecutor once
18 again exercised independent judgment when deciding to charge Neidermeyer with
19 violating California Penal Code § 148(a).

20 While Neidermeyer disputes what Officer Caldwell and his partner witnessed prior
21 to the events captured on the MVARs Video, there is no evidence that Officer Caldwell
22 engaged in "wrongful or bad faith conduct that was actively instrumental in causing the
23 initiation of legal proceedings." *Beck*, 527 F.3d at 862-63 (citation and internal quotation
24 marks omitted). Accordingly, there is no genuine dispute of material fact as to
25 Neidermeyer's malicious prosecution claim. As a result, the Court GRANTS Defendant's
26 Motion to the extent Officer Caldwell seeks summary judgment on Neidermeyer's
27 malicious prosecution claim.
28

B. Plaintiff's Motion for Summary Judgment and the *Terry* Search

As mentioned above, Neidermeyer contends that Officer Caldwell's pat-down during the traffic stop was illegal. Specifically, Neidermeyer argues that "Officer Caldwell's admission that he had no belief [that Neidermeyer] was armed or dangerous to himself or anyone else" establishes that Officer Caldwell's pat-down search violated Neidermeyer's Fourth Amendment right to be free from unreasonable seizures. (Pltf's Mot. at 17; Pltf's Reply at 9-11.) The Court agrees.

"Where an officer reasonably believes that 'the persons with whom he is dealing may be armed and presently dangerous,' the officer may conduct a frisk or 'pat-down' search of that person." *United States v. I.E.V.*, 705 F.3d 430, 432-33 (9th Cir. 2012) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). "The stop and the frisk[] must be analyzed separately; the reasonableness of each must be independently determined." *Id.* at 434-35 (citing *United States v. Thomas*, 863 F.2d 622, 628 (9th Cir. 1988)).

"The sole justification of [a pat-down] is the protection of the police officer and others nearby Thus, the appropriate analysis is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *I.E.V.*, 705 F.3d at 435 (internal quotation marks and citation omitted) (emphasis in original). The Ninth Circuit has joined other circuits in "refus[ing] to allow police officers to justify a *Terry* search based on mere nervous or fidgety conduct and touching of clothing. *Id.* at 430.

Here, prior to conducting the pat-down, Officer Caldwell asked Neidermeyer if he had any weapons or drugs on him, and Neidermeyer quickly answered no. (MVARs Video at 08:55.) In addition, up to the point of the pat-down, there was no objective evidence or behavior on the part of Neidermeyer to suggest that he was armed or dangerous. (See generally *id.* at 0:00 to 08:55.) In fact, at his deposition, Officer Caldwell admitted that, at the time he conducted the pat-down of Neidermeyer, he did not believe that Neidermeyer was armed or dangerous. (See Caldwell Depo. at 310:4-312:1, Ex. C,

1 Doc. 78-2;¹³ SGI ¶ 25 (undisputed that Officer Caldwell did not believe Neidermeyer was
2 armed or dangerous.) Thus, there is no evidence to suggest that “a reasonably prudent
3 man in the circumstances would be warranted in the belief that his safety or that of others
4 was in danger.” *I.E.V.*, 705 F.3d at 435 (internal quotation marks and citation omitted).

5 Officer Caldwell also argues that his pat-down of Neidermeyer was lawful because
6 it was a search incident to Neidermeyer’s arrest. (Def’s Opp’n at 17 (quoting *United*
7 *States v. Robinson*, 414 U.S. 218, 235 (1973).) “The search-incident-to-arrest exception
8 permits law enforcement officers to conduct a warrantless search of a person who is
9 arrested, and of his surrounding area, when the search is incident to the arrest.” *United*
10 *States v. Smith*, 389 F.3d 944, 950-51 (9th Cir. 2004). “[T]he critical inquiry in such cases
11 is whether the search is roughly contemporaneous with the arrest. *Id.* at 951 (internal
12 quotation marks and citation omitted). “The requirement that the search and the arrest be
13 roughly contemporaneous is not strictly temporal in nature. Rather, ‘[t]he relevant
14 distinction turns not upon the moment of arrest versus the moment of the search but upon
15 whether the arrest and search are so separated in time or by intervening acts that the latter
16 cannot be said to have been incident to the former.’” *Id.* (quoting *United States v.*
17 *McLaughlin*, 170 F.3d 889, 892 (9th Cir. 1999)).

18 According to Officer Caldwell, “[i]t is immaterial that Plaintiff’s pat down was
19 done before [Neidermeyer] was formally under arrest” because Officer Caldwell ultimately
20 decided to arrest Neidermeyer. (Def’s Opp’n at 17-18.) However, the cases that Officer
21 Caldwell relies upon in support of this contention involved searches that occurred
22 immediately after the arrest, *United States v. Robinson*, 414 U.S. 218 (1973), without a
23 “significant delay in the series of events from the moment probable cause arose,” *Smith*,
24

25 ¹³ At one point in his deposition, Officer Caldwell testifies that “something led me to believe
26 that I needed to pat [Neidermeyer] down, and I - - in that instance that night, I - - for officer safety
27 reasons, I did a pat-down.” (Caldwell Depo. at 308:20-308:23.) However, in response to follow-
28 up questions, Officer Caldwell admits that he did not believe that Neidermeyer was armed when
he conducted the pat-down. (See *id.* at 310:4-310:7.)

1 389 F.3d at 952-53, under circumstances “[w]here the formal arrest followed quickly on
2 the heels of the challenged search,” *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980), or
3 where officers “had a reasonable basis to believe that there was a threat to officer safety,”
4 *Ross v. Cal.*, No. ED CV 11-1252-DSF SP, 2013 WL 2898066, at *10 (C.D. Cal. June 10,
5 2013). None of those circumstances are present here. Officer Caldwell’s pat-down of
6 Neidermeyer occurred immediately after Officer Caldwell asked Neidermeyer to exit his
7 vehicle and well before Neidermeyer was handcuffed and arrested. Thus, at the time
8 Officer Caldwell conducted his pat-down, very few of the events and observations that
9 Officer Caldwell claims contributed to having probable cause to arrest Neidermeyer had
10 occurred. In addition, as discussed above, there was no objective evidence or behavior on
11 the part of Neidermeyer to suggest that he was armed or dangerous, and Officer Caldwell
12 himself admitted that he did not believe Neidermeyer was armed at the time he conducted
13 the pat-down. Thus, Officer Caldwell’s pat-down of Neidermeyer cannot be classified as a
14 search incident to arrest based on the cases Officer Caldwell cites in his papers.

15 Accordingly, because there is no genuine dispute of material fact as to the illegality
16 of Officer Caldwell’s pat-down of Neidermeyer, the Court GRANTS Plaintiff’s Motion to
17 the extent Neidermeyer seeks summary judgment on this issue.

18 19 **IV. CONCLUSION**

20
21 For the foregoing reasons, Defendant’s Motion is GRANTED in part and DENIED
22 in part, and Plaintiff’s Motion is GRANTED in part and DENIED in part.

23 The Court GRANTS Defendant’s Motion in regards to Defendant’s stop and arrest
24 of Plaintiff and Plaintiff’s claim for malicious prosecution. The Court GRANTS
25 Plaintiff’s Motion in regards to Officer Caldwell’s pat-down of Neidermeyer. However,
26 the Court DENIES the remainder of Plaintiff’s Motion.

27 Accordingly, Neidermeyer has prevailed on his 42 U.S.C. § 1983 claim to the
28 extent it is based on Officer Caldwell’s illegal pat-down, whereas Officer Caldwell has

1 prevailed on all other theories of liability. Thus, the only issue for trial is a determination
2 of the damages arising from Officer Caldwell's illegal pat-down.

3 In light of this Order, the Court ORDERS the parties to file a Joint Status Report no
4 later than **14 days** from the date of this Order, informing the Court which motions in
5 limine the Court still needs to decide. (Docs. 106-115.)

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8 DATED: October 21, 2015



JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE