

Appendix A

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-2080

BRIAN L. DAVIS,

Plaintiff - Appellant,

v.

YORK COUNTY BOARD OF SUPERVISORS; J.D. DANNY DIGGS, in his individual capacity; DEPUTY MCCAY, in his individual capacity; DEPUTY FRETWELL, in his individual capacity,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Arenda L. Wright Allen, District Judge. (4:17-cv-00039-AWA-LRL)

Submitted: December 21, 2017

Decided: December 27, 2017

Before WILKINSON and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Brian L. Davis, Appellant Pro Se. Anne Catherine Lahren, Jeff W. Rosen, PENDER & COWARD, PC, Virginia Beach, Virginia; Sherry A. Fox, THOMPSON MCMULLAN PC, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

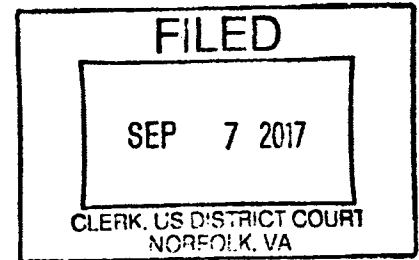
PER CURIAM:

Brian L. Davis appeals the district court's order granting Defendants' motions to dismiss and for summary judgment on his claims brought pursuant to 42 U.S.C. § 1983 (2012). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Davis v. York Cty. Bd. of Supervisors*, No. 4:17-cv-00039-AWA-LRL (E.D. Va. filed Sept. 7, 2017 & entered Sept. 8, 2017). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division



BRIAN L. DAVIS,

Plaintiff,

v.

ACTION NO. 4:17cv39

THE YORK COUNTY BOARD
OF SUPERVISORS, *et al.*,

Defendants.

DISMISSAL ORDER

This matter is before the Court on a number of motions filed by *pro se* Plaintiff Brian L. Davis ("Plaintiff") and Defendants York County Board of Supervisors (the "Board of Supervisors"), J.D. Danny Diggs ("Sheriff Diggs"), Deputy McCay, and Deputy Fretwell, namely:

- (i) Sheriff Diggs' Motion to Dismiss, ECF No. 9;
- (ii) The Board of Supervisors' Motion to Dismiss, ECF No. 20;
- (iii) Deputy McCay and Deputy Fretwell's Motion for Summary Judgment, ECF No. 30;
- (iv) Plaintiff's Motion to Compel ("Plaintiff's First Motion to Compel"), ECF No. 36;
- (v) Plaintiff's Motion to Compel ("Plaintiff's Second Motion to Compel"), ECF No. 37; and
- (vi) Deputy McCay and Deputy Fretwell's Motion to Stay Discovery, ECF No. 39.

The Court concludes that oral argument is unnecessary because the facts and legal arguments are adequately presented in the parties' briefs. For the reasons set forth below, Sheriff Diggs' Motion to Dismiss, ECF No. 9, is **GRANTED**; the Board of Supervisors' Motion

to Dismiss, ECF No. 20, is **GRANTED**; Deputy McCay and Deputy Fretwell's Motion for Summary Judgment, ECF No. 30, is **GRANTED**; Plaintiff's First Motion to Compel, ECF No. 36, is **DENIED**; Plaintiff's Second Motion to Compel, ECF No. 37, is **DENIED**; and Deputy McCay and Deputy Fretwell's Motion to Stay Discovery, ECF No. 39, is **DISMISSED as moot**.

I. Plaintiff's Complaint Allegations

In his Complaint, Plaintiff alleges that he was pulled over for speeding by Deputy Fretwell on September 4, 2016.¹ Comp. at 4, ECF No. 5. During the stop, Deputy Fretwell and Deputy McCay "said there was marijuana in [Plaintiff's] car." *Id.* at 4. Plaintiff denies this assertion. *Id.* Plaintiff claims that Deputy Fretwell asked to conduct a pat-down of Plaintiff, but that Plaintiff said, "I really don't agree with that." *Id.* at 3. Deputy Fretwell proceeded with the pat-down and Plaintiff claims that in doing so, Deputy Fretwell "assaulted" him by "pull[ing] up [his] shirt in [his] back area very hard" and "touch[ing] [his] behind butt area inside [his] pants." *Id.* at 4. Plaintiff also claims that Deputy Fretwell and Deputy McCay "went inside [Plaintiff's] car, and said marijuana was in [his] car . . . yet they did not show [Plaintiff] any type of marijuana." *Id.* Plaintiff believes that Deputy Fretwell and Deputy McCay did not have probable cause to search his vehicle. *Id.* Although Plaintiff was issued a speeding ticket, he was not arrested or charged with any drug-related crimes.

Plaintiff states that this lawsuit is brought "under 42 U.S.C. § 1983 against defendants, York [C]ounty [B]oard of [S]upervisors, [S]heriff J.D. Danny [D]ig[g]s in his individual capacity, [D]eputy Fretwell in his individual capacity, [and] [D]eputy [M]c[C]ay in his

¹ The Court notes that Plaintiff attached three DVDs to his Complaint. The DVDs consist of (i) Deputy McCay's body camera footage taken during the traffic stop, (ii) cell phone video footage taken by Plaintiff during the traffic stop, and (iii) audio footage of a related hearing in state court. Compl., Exs. A, B, and C.

individual capacity, jointly and severally.” *Id.* at 1. Plaintiff claims that the actions described above constituted a violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution.² *Id.* Plaintiff’s Complaint also contains a reference to a state law defamation claim against Deputy Fretwell based on allegedly false statements made by Deputy Fretwell in an internal police document. *Id.* at 5.³

II. Motions to Dismiss

A. Standard of Review

Defendants Sheriff Diggs and the Board of Supervisors moved to dismiss Plaintiff’s action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. A motion to dismiss under Rule 12(b)(6) should be granted if a complaint fails to “allege facts to state a claim to

² Plaintiff’s Complaint contains only non-detailed references to the Fourteenth Amendment. Compl. at 1, 3-5, ECF No. 5. In his opposition to Deputy Fretwell and Deputy McCay’s Motion for Summary Judgment, Plaintiff appears to claim that the September 4, 2016 traffic stop violated his right to equal protection under the Fourteenth Amendment. Opp. Br. at 1-4, ECF No. 35. However, “[i]n order to establish an Equal Protection claim, a plaintiff ‘must first demonstrate that he [or she] has been treated differently from others with whom he [or she] is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination.’” *Corbin v. Woolums*, No. 3:08cv173, 2008 U.S. Dist. LEXIS 95977, at *26 (E.D.Va. Nov. 25, 2008) (quoting *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001)). Here, Plaintiff has not alleged, or pointed to any evidence to suggest, that he was treated differently than other similarly situated individuals or that any such differential treatment was motivated by intentional discrimination. As such, to the extent Plaintiff intended to assert a separate Fourteenth Amendment claim, he has failed to do so.

³ The Court notes that Plaintiff’s Complaint also contains a reference to 42 U.S.C. § 14141. Compl. at 4, ECF No. 5. Section 14141 prohibits “any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority” from engaging in “a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” 42 U.S.C. § 14141. Section 14141(b) specifically authorizes “the Attorney General” to initiate a civil action to “obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.” 42 U.S.C. § 14141(b). Section 14141 “does not create a private cause of action.” *Rutledge v. Town of Chatham*, 4:10cv35, 2010 U.S. Dist. LEXIS 103465, at *5 (W.D. Va. Sept. 30, 2010). Accordingly, to the extent Plaintiff intended to assert a separate claim under 42 U.S.C. § 14141, he cannot do so.

relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also* Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion “tests the sufficiency of a complaint and ‘does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.’” *Johnson v. Portfolio Recovery Assocs., LLC*, 682 F. Supp. 2d 560, 567 (E.D. Va. 2009) (quoting *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)). As such, the Court must accept all factual allegations contained in the Complaint as true and draw all reasonable inferences in favor of Plaintiff. *Johnson*, 682 F. Supp. 2d at 567.

B. Sheriff Diggs’ Motion to Dismiss

Although Sheriff Diggs is listed as a named defendant, Plaintiff’s Complaint does not identify any alleged unlawful conduct on the part of Sheriff Diggs. Recognizing this, Sheriff Diggs argues that Plaintiff has failed to state any claim against him upon which relief may be granted. Mem. in Supp. of Mot. to Dismiss at 1, ECF No. 10. This Court agrees.

To the extent Plaintiff intends to impose liability on Sheriff Diggs under § 1983 based solely on the acts of Deputy McCay and Deputy Fretwell, he has not alleged the elements necessary to do so. It is well established that *respondeat superior* does not provide a basis for liability under § 1983. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Clark v. Md. Dep’t of Pub. Safety & Corr. Servs.*, 316 Fed. App’x 279, 282 (4th Cir. 2009). Supervisory officials can be held liable only for alleged constitutional injuries inflicted by their subordinates in certain limited circumstances. *See Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). To establish supervisory liability under § 1983, a plaintiff must show:

- (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed “a pervasive and unreasonable risk” of constitutional injury to citizens like the plaintiff;
- (2) that the supervisor’s response to that knowledge was so inadequate as to show “deliberate indifference” to or tacit

authorization of the alleged offensive practices;” and (3) that there was an “affirmative causal link between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff.

Id. at 799 (citations omitted); *see also King v. Rubenstein*, 825 F.3d 206, 224 (4th Cir. 2016).

Under the first prong, “the conduct engaged by the supervisor’s subordinates must be ‘pervasive,’ meaning that the ‘conduct is widespread, or at least has been used on several different occasions.’”

Randall v. Prince George’s Cty., 302 F.3d 188, 206 (4th Cir. 2002) (quoting *Shaw*, 13 F.3d at 799).

To show “deliberate indifference” under the second prong, a plaintiff “ordinarily . . . cannot satisfy his burden of proof by pointing to a single incident or isolated incidents . . . for a supervisor cannot be expected . . . to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct.” *Id.* (quoting *Slakan v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984)). Further, because the third prong requires a “causal link” between the supervisor’s inaction and the alleged injury, after-the-fact knowledge will not suffice. *See China v. Coles*, No. 5:15cv3728, 2016 U.S. Dist. LEXIS 185609, at *23-24 (D.S.C. Dec. 13, 2016), *adopted by* 2017 U.S. Dist. LEXIS 48627 (D.S.C. Mar. 31, 2017) (noting that “after-the-fact knowledge does not show the required personal involvement or subjective knowledge” necessary to impose supervisory liability); *Revely v. City of Huntington*, No. 3:07cv648, 2009 U.S. Dist. LEXIS 16051, at *6 (S.D.W.V. Feb. 26, 2009) (noting that “subsequent knowledge is not sufficient to hold [defendants] liable as supervisors”).

Here, Plaintiff does not sufficiently allege any of the required elements necessary to state a § 1983 claim against Sheriff Diggs. In his opposition brief, Plaintiff appears to assert that Sheriff Diggs should be liable under § 1983 because he learned of the actions of Deputy McCay and Deputy Fretwell and did not act to protect Plaintiff. Opp. Br. at 1-3, ECF No. 13. Plaintiff claims that Sheriff Diggs “would have known” that Plaintiff’s rights were violated “by seeing

[Deputy] [F]retwell[']s body camera footage, dashboard camera footage, [Deputy] [M]c[C]ay[']s body camera footage, [and] dashboard camera footage.” *Id.* at 3. However, as noted above, such after-the-fact knowledge is insufficient to state a claim for supervisory liability under § 1983. For these reasons, Sheriff Diggs’ Motion to Dismiss, ECF No. 9, is **GRANTED**.

C. The Board of Supervisors’ Motion to Dismiss

In its Motion to Dismiss, the Board of Supervisors argues that dismissal is warranted because “Plaintiff fails to allege any action taken by the Board of Supervisors or any of its members anywhere in the Complaint.” Mem. in Supp. of Mot. to Dismiss at 4, ECF No. 21. The Board of Supervisors notes that “Plaintiff’s sole references to the Board of Supervisors are contained in paragraphs 4 (simply listing the Board of Supervisors as a party to the Complaint), 13 (style of the case), and 14 (stating that Plaintiff brings a claim under 42 U.S.C. § 1983).” *Id.* The Board of Supervisors argues that “[t]o sustain a claim against the Board of Supervisors, the Plaintiff must at a very minimum allege *some* action taken by the Board of Supervisors or its members.” *Id.* (emphasis in original). In his opposition brief, Plaintiff simply (i) asks the Court to schedule a hearing on this motion; (ii) indicates that he “would like to ask questions” regarding the Board of Supervisors’ dismissal motion; and (iii) states that he would “rather respond in court.” Opp. Br. at 1, ECF No. 29.

It is clear to the Court that Plaintiff’s Complaint does not state any claim against the Board of Supervisors upon which relief may be granted, and there is no indication that an amendment could cure this defect. Accordingly, the Board of Supervisors’ Motion to Dismiss, ECF No. 20, is **GRANTED**.

III. Motion for Summary Judgment

Deputy McCay and Deputy Fretwell ask this Court to grant summary judgment in their favor pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, the Court agrees that summary judgment is warranted.

A. Additional Facts

In support of their Motion for Summary Judgment, Deputy McCay and Deputy Fretwell submitted sworn affidavits that summarize the events of September 4, 2016, as well as video footage from Deputy McCay's body camera. Affidavit of Deputy George Fretwell ("Fretwell Aff."), Affidavit of Deputy Larry McCay ("McCay Aff.") and Video, attached as Exs. 1, 2, and 3 to Mem. in Supp. of Mot. for Summ. J., ECF No. 31. In his affidavit, Deputy Fretwell states that he stopped Plaintiff for speeding after radar indicated that Plaintiff was travelling 54 miles per hour in a 35 miles per hour zone on Route 17. Fretwell Aff. ¶ 4. Plaintiff pulled his vehicle over "and exited his vehicle rapidly." *Id.* ¶ 5. Deputy Fretwell asked Plaintiff to "return to his car and pull over in a safe location." *Id.* ¶ 6. Plaintiff drove to a parking lot "and again exited his car." *Id.* Deputy Fretwell asked Plaintiff "to remain in his car." *Id.* Deputy Fretwell's back up officer, Deputy McCay, told Deputy Fretwell "that he observed some marijuana residue (shake) inside [Plaintiff's] vehicle, which was in plain view." *Id.* ¶¶ 7-8. Deputy Fretwell asked Plaintiff to "step out of his car." *Id.* ¶ 9. Deputy Fretwell states that Plaintiff "appeared nervous and uncomfortable." *Id.* Deputy Fretwell conducted a pat down of Plaintiff "to make sure he had no weapons on him." *Id.* ¶ 11.⁴ During the stop, Plaintiff called his mother, who later arrived on the scene. *Id.* ¶ 13. Deputy Fretwell states that he "performed a search of

⁴ Deputy Fretwell denies that he touched Plaintiff "inside his pants or his butt area." *Id.* ¶ 12.

[Plaintiff's] car based on the following circumstances that he believed amounted to probable cause:

(1) [Plaintiff] immediately exited his car on two separate occasions after being pulled over, which is a behavior I see when someone does not want the police to approach their car; (2) Deputy McCay observed what he believed to be marijuana residue (shake) on the floorboards of [Plaintiff's] car in plain view; (3) when questioned about whether he had a weapon [Plaintiff] began checking his pants pocket; and (4) when I patted down [Plaintiff] his pants were wet.

Id. ¶ 14. Deputy Fretwell states that Plaintiff was only issued a speeding ticket “[b]ecause no measurable amount of marijuana (shake) was recovered inside [Plaintiff's] car.” *Id.* ¶ 15.

Deputy McCay confirms, via his affidavit, that he “observed what [he] believed to be marijuana (shake) in [P]laintiff's vehicle in plain view, and relayed that information to Deputy Fretwell.” McCay Aff. ¶ 5. Deputy McCay also confirms that the video attached as Exhibit 4 to their Motion for Summary Judgment is a true and accurate copy of the video from Deputy McCay's body camera on the day of the incident. *Id.* ¶ 6.⁵

B. Summary Judgment Standard

Summary judgment is appropriate only when the Court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists no genuine dispute “as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* Fed. R. Civ. P. 56(a); *Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 418 (4th Cir. 2004). “A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party . . . [and] [a] fact is

⁵ The video attached as Exhibit 4 to the Motion for Summary Judgment does not contain footage of the initial stop; however, it does support Deputy Fretwell's version of the facts with respect to the pat-down and Deputy McCay's observation of a substance in Plaintiff's vehicle. Video, attached as Ex. 4 to Mem. in Supp. of Mot. for Summ. J., ECF No. 31.

material if it might affect the outcome of the suit under the governing law.” *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015) (citations omitted). The moving party has the initial burden to show the absence of an essential element of the nonmoving party’s case and to demonstrate that the moving party is entitled to judgment as a matter of law. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 185 (4th Cir. 2004); *McLean v. Patten Cmtys., Inc.*, 332 F.3d 714, 718 (4th Cir. 2003); *see Celotex*, 477 U.S. at 322-25.

When the moving party has met its burden to show that the evidence is insufficient to support the nonmoving party’s case, the burden then shifts to the nonmoving party to present specific facts demonstrating that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Honor*, 383 F.3d at 185; *McLean*, 332 F.3d at 718-19. Such facts must be presented in the form of exhibits and sworn affidavits. *Celotex*, 477 U.S. at 324; *see also M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir. 1993). In order to successfully defeat a motion for summary judgment, the nonmoving party must rely on more than conclusory allegations, “mere speculation,” the “building of one inference upon another,” the “mere existence of a scintilla of evidence,” or the appearance of “some metaphysical doubt” concerning a material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002); *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc.*, 330 F. Supp. 2d 668, 671 (E.D. Va. 2004). Rather, there must be sufficient evidence that would enable a reasonable fact-finder to return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 252. Although, at the summary judgment phase, the Court is not “to weigh the evidence and determine the truth of the matter,” the Court is required to “determine whether there is a genuine issue for trial.” *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Anderson*, 477 U.S. at

249); *see also Jacobs*, 780 F.3d at 568-69. Therefore, in determining whether there is a genuine issue for trial, the Court does not weigh the evidence to make a truth determination; rather, “[t]he relevant inquiry is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Stewart v. MTR Gaming Grp., Inc.*, 581 F. App’x 245, 247 (4th Cir. 2014) (quoting *Anderson*, 477 U.S. at 251-52).

C. Qualified Immunity

In their Motion for Summary Judgment, Deputy McCay and Deputy Fretwell primarily argue that (i) they did not violate Plaintiff’s Fourth Amendment rights, and (ii) even if Plaintiff could establish a constitutional violation, the deputies would be entitled to qualified immunity. Mem. in Supp. of Mot. for Summ. J. at 4-8, ECF No. 31. Because the determination of whether the deputies violated Plaintiff’s Fourth Amendment rights is a component of the qualified immunity analysis, the Court will analyze both arguments under the rubric of its qualified immunity analysis.

The doctrine of qualified immunity is “an entitlement not to stand trial or face the other burdens of litigation.” Qualified immunity shields government officials performing discretionary functions from liability for civil damages, insofar as their conduct does not violate clearly established rights of which a reasonable person would have known, in order to “avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.” “Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”

Johnson v. Moore, No. 3:10cv537, 2011 U.S. Dist. LEXIS 47069, at *16-17 (E.D. Va. Apr. 29, 2011) (citations omitted). “In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, ‘[t]aken in the light

most favorable to the party asserting the injury, . . . show the officer's conduct violated a [federal] right[.]” *Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). “The second prong of the qualified-immunity analysis asks whether the right in question was ‘clearly established’ at the time of the violation.” *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). “[T]he salient question . . . is whether the state of the law’ at the time of an incident provided ‘fair warning’ to the defendants ‘that their alleged [conduct] was unconstitutional.’” *Id.* at 1866 (quoting *Hope*, 536 U.S. at 741). In other words, the right that the official is alleged to have violated “must be sufficiently clear that a reasonable official would have understood that what he is doing violates that right.” *Johnson*, 2011 U.S. Dist. LEXIS 47069, at *18.

D. Discussion

As noted above, Plaintiff characterizes his Complaint as one brought pursuant to 42 U.S.C. § 1983. Compl. at 1, ECF No. 5. Section 1983 prohibits any person acting under color of state law from depriving an individual “of any rights, privileges, or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983. Section 1983 does not itself create substantive rights, “but merely provides a method for vindicating federal rights elsewhere conferred.” *Brown v. Mitchell*, 308 F. Supp. 2d 682, 692 (E.D. Va. 2004). Here, Plaintiff’s primary concern appears to be that Deputy Fretwell and Deputy McCay subjected him to an unlawful search and seizure on September 4, 2016, thus violating Plaintiff’s Fourth Amendment rights.

i. Fourth Amendment

Deputy Fretwell and Deputy McCay first argue that Plaintiff’s Fourth Amendment rights were not violated because (i) the traffic stop was lawful, (ii) requiring Plaintiff to exit the vehicle

was lawful, (iii) the pat-down search was lawful, and (iv) the search of the vehicle was lawful. Mem. in Supp. of Mot. for Summ. J. at 4-6, ECF No. 31. The Court agrees.

a. The Traffic Stop

The Fourth Amendment provides that people shall “be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. am. IV. “The primary purpose of the Fourth Amendment is to ‘prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.’” *United States v. Weaver*, 282 F.3d 302, 309 (4th Cir. 2002). The temporary detention of an automobile constitutes a “seizure” under the Fourth Amendment no matter how brief the duration or how limited the purpose. *United States v. Branch*, 537 F.3d 328, 335 (4th Cir. 2008). Accordingly, the traffic stop at issue in this case was a “seizure” and must satisfy the Fourth Amendment’s mandate that it be reasonable under the circumstances. *Whren v. United States*, 517 U.S. 806, 810 (1996). This Court has explained that, “under the principles set forth in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), and its progeny, an automobile stop is reasonable if it is ‘justified by probable cause or a reasonable suspicion, based on specific and articulable facts, of unlawful conduct.’” *Veney v. Ojeda*, 321 F. Supp. 2d 733, 739 (E.D. Va. 2004). A traffic stop “is reasonable and passes muster under the Fourth Amendment ‘if the stop is based on an observed traffic violation.’” *Id.*

In his affidavit, Deputy Fretwell explains that he pulled Plaintiff over “for speeding after measuring [Plaintiff’s] speed by radar at 54MPH in a 35MPH zone.” Fretwell Aff. ¶ 4. As such, the deputies argue that the radar provided Deputy Fretwell with an “objectively reasonable suspicion that [P]laintiff was speeding in violation of Virginia law,” thus making the initial stop of Plaintiff lawful. Mem. in Supp. of Mot. for Summ. J. at 5, ECF No. 31. Plaintiff has not

disputed Deputy Fretwell's assertion regarding Plaintiff's excess speed.⁶ Accordingly, it is clear to the Court that the initial traffic stop satisfied the requirements of the Fourth Amendment.

b. The Request for Plaintiff to Exit his Vehicle

Next, Deputy Fretwell and Deputy McCay argue that the request for Plaintiff to exit his vehicle was lawful. *Id.* The deputies explain that once a vehicle is lawfully stopped, "[o]rdering a suspect from a vehicle 'is a valid precautionary measure designed to afford a degree of protection to the investigating officer.'" *Id.* (quoting *United States v. Taylor*, 857 F.2d 210, 214 (4th Cir. 1988)); *see also United States v. Stewart*, 149 F. Supp. 2d 236, 244 (E.D. Va. 2001) (noting that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures"). Plaintiff has not challenged the deputies' argument regarding the request for Plaintiff to exit the vehicle.⁷ Under these circumstances, it is clear to the Court that the request for Plaintiff to exit the vehicle did not violate Plaintiff's Fourth Amendment rights.

c. The Pat-Down Search

Next, Deputy Fretwell and Deputy McCay argue that the pat-down search of Plaintiff was lawful. It is "well-settled that pat-down searches incident to a reasonable *Terry* stop are

⁶ In his opposition brief, Plaintiff includes a section titled, "(In respon[se] to 1. The traffic stop was lawful.)" Opp. Br. at 2, ECF No. 35. However, in this section, Plaintiff does not challenge Deputy Fretwell's stated reason for the initial traffic stop. Instead, Plaintiff focuses on his belief that there was no marijuana in his vehicle. *Id.* Marijuana, of course, had nothing to do with the initial stop.

⁷ In his opposition brief, Plaintiff includes a section titled, "(In respon[se] to 2. Requiring plaintiff to exit the vehicle was lawful.)" Opp. Br. at 3, ECF No. 35. However, in this section, Plaintiff does not challenge Deputy Fretwell's request for Plaintiff to exit his vehicle. Instead, Plaintiff simply reiterates his belief that the deputies lacked the requisite probable cause to search his vehicle. *Id.*

permissible.” *Veney*, 321 F. Supp. 2d at 741. A pat-down may be justified “to determine whether the person is in fact carrying a weapon.” *United States v. Stewart*, 149 F. Supp. 236, 244-45 (E.D. Va. 2001). A pat-down may also be justified “in connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle.” *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998).

Here, the pat-down of Plaintiff was incident to a lawful traffic stop. Further, in their Motion for Summary Judgment, the deputies state:

[Deputy Fretwell] attests that plaintiff was “nervous” and “uncomfortable,” that he had twice exited the vehicle without being asked, and once Deputy McCay observed what he thought was marijuana and Deputy Fretwell explained the purpose for the pat-down, that plaintiff’s hand went to his pocket each time Deputy Fretwell mentioned “gun” or “weapon.”

Mem. in Supp. of Mot. for Summ. J. at 6, ECF No. 31. In his opposition brief, Plaintiff claims that Deputy Fretwell used “excessive force” on him during the pat-down. Opp. Br. at 3, ECF No. 35. Specifically, Plaintiff claims that Deputy Fretwell “grip[ped] and pull[ed] up very hard inside [Plaintiff’s] pants and touch[ed] [his] behind butt area in [his] pants.” *Id.* The pat-down can be seen in the video footage from Deputy McCay’s body camera, and the video footage refutes Plaintiff’s claim of “excessive force.” Video, attached as Ex. 4 to Mem. in Supp. of Mot. for Summ. J., ECF No. 31.⁸ Under these circumstances, the Court determines that the pat-down did not violate Plaintiff’s Fourth Amendment rights.

⁸ In his opposition, Plaintiff claims that the deputies “did not present the dashboard camera footage, and [F]retwell did not present his body camera footage in which should show what happen[ed], and would show what [F]retwell did towards me.” Opp. Br. at 3, ECF No. 35. However, as noted above, the parties submitted the body camera footage from Deputy McCay, which adequately depicts the pat-down. Video, attached as Ex. 4 to Mem. in Supp. of Mot. for Summ. J., ECF No. 31.

d. The Search of the Vehicle

Next, Deputy Fretwell and Deputy McCay argue that the search of Plaintiff's vehicle was lawful. Mem. in Supp. of Mot. for Summ. J. at 6, ECF No. 31. Under the plain view doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *United States v. Ellington*, 396 F. Supp. 2d 695, 702 (E.D. Va. 2005). On a related note, if an officer observes an illegal substance that is in plain view in a vehicle during a valid traffic stop, such observation provides probable cause to believe that the driver of the vehicle is engaged in illegal activity. *Id.* (finding that an officer who observed "marijuana seed in plain view in the defendant's car . . . had probable cause to believe that [the individual] was committing a narcotics violation"). With probable cause shown, the officer may lawfully conduct a subsequent search of the vehicle. *Id.*

Here, Deputy Fretwell argues that he "had probable cause to search plaintiff's vehicle because of his reasonable belief that the vehicle contained contraband." Mem. in Supp. of Mot. for Summ. J. at 6, ECF No. 31. Deputy Fretwell attests that his probable cause was based on the following circumstances:

(1) plaintiff immediately exited his car on two separate occasions after being pulled over, which is a behavior seen when someone does not want the police to approach their car; (2) Deputy McCay observed what he believed to be marijuana residue (shake) in plaintiff's car in plain view; (3) when questioned about whether he had a weapon plaintiff began checking his pants pocket; and (4) when patted down, plaintiff's pants were wet.

Id.

In his opposition brief, Plaintiff argues that Deputy Fretwell did not have probable cause to search his vehicle "because he did not present [Plaintiff] any type of drugs (marijuana) (shake) nor

did he seize[] any drugs.” Opp. Br. at 3, ECF No. 35. Plaintiff also challenges Deputy Fretwell’s statements that Plaintiff “immediately exited his car on two separate occasions after being pulled over” and that Plaintiff checked his pants pockets when questioned about a weapon because these actions are not “shown on video exhibit 4.”⁹ *Id.* at 4. Even assuming, for the sake of argument, that Plaintiff did not exit his car on two separate occasions or check his pants pockets when questioned about a weapon, such disputed facts are not material for purposes of this Motion for Summary Judgment because the otherwise undisputed facts, as set forth above, indicate that the search of Plaintiff’s vehicle was sufficiently supported by probable cause.¹⁰ Accordingly, the Court determines that Plaintiff’s encounter with Deputy Fretwell and Deputy McCay on September 4, 2016, did not violate Plaintiff’s Fourth Amendment rights.

ii. Clearly Established

Next, Deputy Fretwell and Deputy McCay argue that assuming, for the sake of argument, that Plaintiff could establish a constitutional violation, the deputies would nevertheless be entitled to qualified immunity because they did not violate a clearly established constitutional right. Mem. in Supp. of Mot. for Summ. J. at 7, ECF No. 31. The Court agrees. As noted above, a clearly established right is one that is “sufficiently clear that a reasonable official would have understood that what he is doing violates that right.” *Johnson v. Moore*, No. 3:10cv537,

⁹ Contrary to Plaintiff’s assertion, the video footage from Deputy McCay’s body camera shows Plaintiff checking his pants pocket when questioned by Deputy Fretwell about a weapon. Video, attached as Ex. 4 to Mem. in Supp. of Mot. for Summ. J., ECF No. 31.

¹⁰ Even if Deputy McCay was mistaken and the substance he observed in Plaintiff’s vehicle was not marijuana residue, this would not change the analysis. “An officer’s mistake of fact may provide the objective basis for reasonable suspicion or probable cause under the Fourth Amendment because of the intensely fact-sensitive nature of reasonable suspicion and probable cause determinations.” *United States v. Ellington*, 396 F. Supp. 2d 695, 699 (E.D. Va. 2005). The question is “whether his mistake of fact was reasonable.” *Id.* Here, there is nothing to suggest that Deputy McCay acted unreasonably under the circumstances.

2011 U.S. Dist. LEXIS 47069, at *18 (E.D. Va. Apr. 29, 2011). “[T]he salient question . . . is whether the state of the law’ at the time of an incident provided ‘fair warning’ to the defendants ‘that their alleged [conduct] was unconstitutional.’” *Tolan*, 134 S. Ct. at 1866 (quoting *Hope*, 536 U.S. at 741).

As this Court has explained:

Qualified immunity protects police officers in the performance of their discretionary functions from civil liability under § 1983 so long as their conduct does not violate clearly established rights of which a reasonable officer in the shoes of the defendant would know. The focus, of course, is on what the police officer reasonably perceived at the time that he acted and whether a reasonable officer armed with the same information, would have had the same perception and have acted in like fashion. The doctrine of qualified immunity therefore assures that officers are not held liable for “bad guesses in grey areas;” and, instead, are liable only for transgressing bright lines. Put another way, qualified immunity affords officers additional breathing room for decisions made on the spot.

A fundamental purpose of qualified immunity is the need to avoid deterring police officers from engaging in vigorous law enforcement in difficult situations for fear that they will face civil liability. “The concerns behind the immunity defense are especially salient in the context of street-level police work, which frequently requires quick or decisive action in the face of volatile and changing circumstances.”

Lee v. City of Richmond, 100 F. Supp. 3d 528, 541 (E.D. Va. 2015) (internal citations omitted).

Based on the undisputed facts detailed above, as applied to the current state of the law, the Court concludes that Deputy Fretwell and Deputy McCay’s actions on September 4, 2016, did not violate a clearly established constitutional right. Therefore, as an alternative holding to the

Court's ruling that the deputies did not violate Plaintiff's Fourth Amendment rights, the Court finds that Deputy Fretwell and Deputy McCay are entitled to qualified immunity.¹¹

iii. Defamation

As noted above, Plaintiff's Complaint also contains a reference to a state law defamation claim against Deputy Fretwell based on allegedly false statements made by Deputy Fretwell in an internal police document. Compl. at 5, ECF No. 5 (stating generally that "some of the things that they said" in an internal police document "was false"). "It has been well established that the decision to exercise supplemental jurisdiction [over a state law claim] after a federal claim has been dismissed, rests within the sole discretion of the Court." *Jones v. Tyson Foods*, 378 F. Supp. 2d 705, 710 (E.D. Va. 2004) (citing 28 U.S.C. § 1367(c)(3)); *see also Jordahl v. Democratic Party*, 122 F.3d 192, 203 (4th Cir. 1997). In determining whether to exercise supplemental jurisdiction over a state law claim following the dismissal of all federal claims, the Court should analyze "convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity and considerations of judicial economy." *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995). To the extent Plaintiff intended to assert a separate state law defamation claim against Deputy Fretwell, the Court, based on an analysis of the above-referenced factors, declines to exercise supplemental jurisdiction over such claim.

For these reasons, Deputy McCay and Deputy Fretwell's Motion for Summary Judgment, ECF No. 30, is **GRANTED**.

¹¹ In his Complaint, Plaintiff seeks monetary damages as well as "injunctive relief;" however, Plaintiff does not identify the type of "injunctive relief" sought. Compl. at 2, ECF No. 5. The Court notes that the doctrine of qualified immunity – the alternative basis for granting summary judgment in favor of Deputy Fretwell and Deputy McCay – "does not extend to claims seeking injunctive relief." *Vollette v. Watson*, 937 F. Supp. 2d 706, 720 (E.D. Va. 2013). However, the Court's primary holding – that the deputies did not violate the Fourth Amendment – bars Plaintiff's request for both monetary and injunctive relief.

IV. Other Motions

On July 25, 2017, Plaintiff filed two motions to compel. First Mot. to Compel, ECF No. 36; Second Mot. to Compel, ECF No. 37. In his First Motion to Compel, Plaintiff asks this Court to order Sheriff Diggs to (i) produce Deputy Fretwell's body camera footage and the dashboard camera footage from Deputy Fretwell and Deputy McCay's vehicles, and (ii) respond to a number of interrogatories and requests for admission. First Mot. to Compel at 1-4, ECF No. 36.

Sheriff Diggs filed an opposition brief in which he argues that Plaintiff's First Motion to Compel should be denied because (i) Plaintiff did not properly serve any discovery requests on Sheriff Diggs, (ii) Plaintiff did not properly confer with Sheriff on this issue, and (iii) Sheriff Diggs has a Motion to Dismiss pending before this Court. Opp. Br. at 1-2, ECF No. 38. The Court agrees that Plaintiff's First Motion to Compel is improper.

If a party fails to properly respond to an interrogatory or document request, Rule 37 of the Federal Rules of Civil Procedure authorizes the requesting party to move for an order compelling the party to respond. Fed. R. Civ. P. 37(a). Both the Federal Rules and the Local Rules of the United States District Court for the Eastern District of Virginia require the moving party to certify to the Court that the movant attempted to confer with the non-responding party to resolve the discovery dispute without court action. Fed. R. Civ. P. 37(a)(1); *see also* E.D. Va. Loc. R. 37(E) (stating that "[t]he Court will not consider any motion concerning discovery matters unless the motion is accompanied by a statement of counsel that a good faith effort has been made between counsel to resolve the discovery matters at issue"). Here, Plaintiff has not indicated that (i) he previously served the requested discovery on Sheriff Diggs, or (ii) he attempted to confer with Sheriff Diggs in good faith to resolve the discovery dispute. Further,

upon review of Plaintiff's requested discovery, the Court determines that any responses provided by Sheriff Diggs would not alter the Court's decision, as explained above, that dismissal of Sheriff Diggs pursuant to Federal Rule 12(b)(6) is warranted. For these reasons, Plaintiff's First Motion to Compel, ECF No. 36, is **DENIED**.

In his Second Motion to Compel, Plaintiff asks this Court to order Deputy Fretwell and Deputy McCay to (i) produce the same video footage requested of Sheriff Diggs, and (ii) respond to a number of interrogatories and requests for admission. Second Mot. to Compel at 1-4, ECF No. 37. In response to Plaintiff's Second Motion to Compel, Deputy Fretwell and Deputy McCay filed a Motion to Stay Discovery in which they ask the Court to stay discovery "until the question of qualified immunity has been ruled on by this Court." Mem. in Supp. of Mot. to Stay, ECF No. 40.

As explained above, the Court has determined that (i) Deputy Fretwell and Deputy McCay did not violate Plaintiff's constitutional rights and, (ii) even if they did violate Plaintiff's constitutional rights, Deputy Fretwell and Deputy McCay would be entitled to qualified immunity. Further, upon review of Plaintiff's requested discovery, the Court determines that any responses provided by Deputy Fretwell or Deputy McCay to Plaintiff's requests would not alter the Court's decision that summary judgment in favor of the deputies is warranted pursuant to Federal Rule 56.¹² For these reasons, Plaintiff's Second Motion to Compel, ECF No. 37, is

¹² The Court notes that Deputy Fretwell's affidavit and the video footage from Deputy McCay's body camera provide some of the information sought by Plaintiff. For example, in his Second Motion to Compel, Plaintiff asks, among other things, for the deputies to (i) admit that the pat-down was improper, and (ii) admit that they "said there is marijuana (shake) inside my vehicle." Second Mot. to Compel at 2, ECF No. 37. In his affidavit, Deputy Fretwell denies that he conducted an unlawful pat-down. Fretwell Aff. ¶ 12 (stating that, contrary to Plaintiff's assertion, "[a]t no during the pat down did I touch Mr. Davis inside his pants or his butt area") Fretwell Aff. ¶ 12. Further, the video footage shows the pat-down of Plaintiff, identifies what the

DENIED, and Deputy McCay and Deputy Fretwell's Motion to Stay Discovery, ECF No. 39, is **DISMISSED as moot**.

V. Conclusion

For the reasons set forth above, Sheriff Diggs' Motion to Dismiss, ECF No. 9, is **GRANTED**; the Board of Supervisors' Motion to Dismiss, ECF No. 20, is **GRANTED**; Deputy McCay and Deputy Fretwell's Motion for Summary Judgment, ECF No. 30, is **GRANTED**; Plaintiff's First Motion to Compel, ECF No. 36, is **DENIED**; Plaintiff's Second Motion to Compel, ECF No. 37, is **DENIED**; and Deputy McCay and Deputy Fretwell's Motion to Stay Discovery, ECF No. 39, is **DISMISSED as moot**.

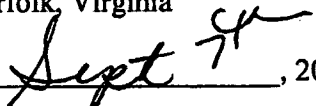
Plaintiff may appeal from this Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, Newport News Division, 2400 West Avenue, Newport News, Virginia, 23607. Said written notice must be received by the Clerk within thirty days from the date of entry of this Dismissal Order.

The Clerk is **DIRECTED** to send a copy of this Dismissal Order to Plaintiff and all counsel of record.

IT IS SO ORDERED.



Arenda L. Wright Allen
United States District Judge

Norfolk, Virginia

_____, 2017

deputies said regarding the presence of marijuana in Plaintiff's vehicle, and speaks for itself. Video, attached as Ex. 4 to Mem. in Supp. of Mot. for Summ. J., ECF No. 31.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division**

BRIAN L. DAVIS,

Plaintiff,

Case No. 4:17cv39

v.

**THE YORK COUNTY BOARD
OF SUPERVISORS, *et al.*,**

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by the Court. This action came for decision before the Court.
The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED GRANTING that Sheriff Diggs' Motion to Dismiss, ECF No. 9, is GRANTED; the Board of Supervisors' Motion to Dismiss, ECF No. 20, is GRANTED; Deputy McCay and Deputy Fretwell's Motion for Summary Judgment, ECF No. 30, is GRANTED; Plaintiffs First Motion to Compel, ECF No. 36, is DENIED; Plaintiffs Second Motion to Compel, ECF No. 37, is DENIED; and Deputy McCay and Deputy Fretwell's Motion to Stay Discovery, ECF No. 39, is DISMISSED as moot.

DATED: September 8, 2017

FERNANDO GALINDO, Clerk

By _____/s/_____
E. Price, Deputy Clerk