[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 24-10276

Non-Argument Calendar

ANGEL E. GASTON,

Plaintiff-Appellant,

versus

CITY OF LEESBURG,
In their official capacity,
LAKE COUNTY FLORIDA,
In their official capacity,
JOSEPH IOZZI,
In his individual and official capacity,
NICHOLAS M. ROMANELLI,
In his individual and official capacity,
D. V. PAONESSA,

In his individual and official capacity, et al.,

Defendants-Appellees,

PEYTON C. GRINELL et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:23-cv-00056-PGB-PRL

Before NEWSOM, BRANCH, and ANDERSON Circuit Judges.

PER CURIAM:

Angel E. Gaston appeals the district court's order dismissing his *pro se* second amended complaint, which brought claims under 42 U.S.C. §§ 1983 and 1985, as well as Florida law, arising out of his October 27, 2020, arrest. Gaston asserts that the district court erroneously dismissed his federal claims—for First Amendment retaliation, malicious prosecution, selective enforcement, civil-rights conspiracy, and failure to train—for failure to state a claim. Gaston also contends that the district court erroneously declined to exercise supplemental jurisdiction over his state-law claims. Because

none of his arguments are persuasive, we affirm the decision of the district court.

The facts are known to the parties, and we repeat them here only as necessary to decide the case.

I

We review de novo a district court's sua sponte dismissal for failure to state a claim under 28 U.S.C. § 1915A(b)(1). *Harden v. Pataki*, 320 F.3d 1289, 1292 (11th Cir. 2003).

Section 1983 provides a cause of action for private citizens against persons acting under color of state law for violating their constitutional rights and other federal laws. 42 U.S.C. § 1983; *see also Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 690 (1978) (holding that municipalities are "persons" for purposes of 42 U.S.C. § 1983).

To state a § 1983 First Amendment retaliation claim, a plaintiff must allege facts making it plausible that: (1) his speech was constitutionally protected, (2) the defendant's retaliatory conduct adversely affected the protected speech, and (3) there is a causal connection between the retaliatory conduct and the protected speech. *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1289 (11th Cir. 2019).

In *Nieves v. Bartlett*, the Supreme Court held that the existence of probable cause to arrest bars a retaliatory arrest claim as a matter of law. *See* 587 U.S. 391, 400–04 (2019). But the Court carved out one exception. If a plaintiff can present objective

evidence that he was arrested when otherwise similarly situated individuals would not have been, the plaintiff may still pursue a retaliatory arrest claim as if probable cause did not exist. *Id.* at 406–08. The plaintiff does not need a "virtually identical and identifiable" comparator. *Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024). But the evidence must be objective. *Id.* Evidence that no one had ever been arrested in a certain jurisdiction for a certain kind of conduct can satisfy the *Nieves* exception. *Id.*

"Arguable probable cause exists where reasonable officers in the same circumstances and possessing the same knowledge as the defendant *could* have believed that probable cause existed to arrest." *Gates v. Khokhar*, 884 F.3d 1290, 1298 (11th Cir. 2018) (quotation marks omitted, alteration adopted). Still, an officer may not "unreasonably and knowingly disregard or ignore evidence or refuse to take an obvious investigative step that would readily establish that they lack probable cause to arrest a suspect." *Harris v. Hixon*, 102 F.4th 1120, 1129 (11th Cir. 2024).

Under Florida law, it is illegal for a person to be present on state or county property while "wearing any mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer" if that person intends to "intimidate, threaten, abuse, or harass any other person." Fla. Stat. §§ 876.13, 876.155(3). At the time of Gaston's arrest, it was also illegal to carry a concealed knife without a license. Fla. Stat. § 790.01 (2015); *id.* § 790.001(3)(a) (2016).

Here, the district court did not err in dismissing Gaston's First Amendment retaliation claim because the existence of probable cause to arrest him bars it as a matter of law. *Nieves*, 587 U.S. at 404. And Gaston does not meet the *Nieves* exception because he failed to plead objective examples that showed that he was arrested when otherwise similarly situated individuals would not have been. *Gonzalez*, 602 U.S. at 658; *Nieves*, 587 U.S. at 404.

As to his charge for wearing a mask in public to conceal his identity, Gaston's assertion—that providing his name to the police operator upon his arrival proves that he was not concealing his identity—is unavailing. Even if Gaston's identity was known to Lieutenant Romanelli and the police operator, it was still reasonable for Romanelli to determine that Gaston tried to conceal his identity from others outside the police station. *See Gates*, 884 F.3d at 1298. As Romanelli noted in his probable-cause affidavit, Gaston's attire that day—a "black sparring helmet with a clear to off-white face protector," and underneath that, a camouflage face covering which revealed only his eyes—went far beyond the typical mask that individuals wore during the COVID-19 pandemic. *See id.* Thus, Gaston's open carrying of weapons, combined with his decision to cover nearly his entire head and face, made it reasonable for Romanelli to conclude that Gaston concealed his identity to intimidate or harass others, in violation of Florida law. Fla. Stat. §§ 876.13, 876.155(3); *see Gates*, 884 F.3d at 1298.

As to his charge for carrying a concealed weapon, even granting Gaston's assertion that the steak knife was stored in the

sheath on his hip, it was still reasonable for Romanelli to conclude that the knife was concealed. From Romanelli's vantage point when exiting his vehicle, which was approximately 30 to 40 feet away from Gaston, it is reasonable that he would not have realized that the smaller steak knife was stored alongside the machete in a sheath that was designed specifically for the larger weapon. *See Gates*, 884 F.3d at 1298. Thus, because the knife was not visible to Romanelli when he first observed Gaston—and only became visible after Romanelli told Gaston to drop his weapons—Gaston plausibly violated Florida law. Fla. Stat. § 790.01 (2015); *id.* § 790.001(3)(a) (2016); *id.* § 790.02 (2024).

II

"To establish a federal malicious prosecution claim under § 1983, the plaintiff must prove a violation of his Fourth Amendment right to be free from unreasonable *seizures* in addition to the elements of the common law tort of malicious prosecution." *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003). "The constituent elements of the common law tort of malicious prosecution include: (1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused." *Butler v. Smith*, 85 F.4th 1102, 1111 (11th Cir. 2023) (quotation marks omitted, alterations adopted). A Fourth Amendment claim for malicious prosecution adds two more elements: (5) the legal process justifying the seizure must be constitutionally infirm; and (6) the seizure would be unjustified without legal process. *Id.* at 1111–12. Qualified immunity adds a seventh

element—the law must be "clearly established." *Id.* at 1112 (quotation marks omitted).

Here, Gaston cannot establish his malicious prosecution claim because he cannot show that prosecution occurred both without probable cause and with malice. *Id.* at 1111; *Wood*, 323 F.3d at 881. As already explained, the record supports that the Leesburg Police Department ("LPD") officers acted with arguable probable cause. *Butler*, 85 F.4th at 1111. Gaston also does not point to, and the record does not reveal, any evidence that the officers acted with malice. *Id.*

III

"[T]he Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren v. United States*, 517 U.S. 806, 813 (1996). The proper remedy for selective enforcement is a claim under the Equal Protection Clause, not the Fourth Amendment. *See id.* The Equal Protection Clause directs "that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Equal protection claims are not limited to individuals discriminated against based on their membership in a vulnerable class. *See Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006). The Supreme Court has recognized that equal protection claims may be brought by a "class of one" when the plaintiff alleges that (1) he was intentionally treated differently from others similarly situated; and (2) there was no rational basis for the differential treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)

(quotation marks omitted). "To be similarly situated, the comparators must be *prima facie identical in all relevant respects*." *Grider v. City of Auburn*, 618 F.3d 1240, 1264 (11th Cir. 2010) (quotation marks omitted). "[P]laintiffs are not permitted simply to rely on broad generalities in identifying a comparator." *Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1307 (11th Cir. 2009) (quotation marks omitted). A "class of one" plaintiff could fail to state a claim by leaving out critical facts in alleging that he is similarly situated to another. *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205 (11th Cir. 2007) (quotation marks omitted).

Here, Gaston failed to allege facts showing that he was intentionally treated differently from others similarly situated absent a rational basis. *See Village of Willowbrook*, 528 U.S. at 564. In his second amended complaint, Gaston identified the following situations with potential comparators: (1) protestors in Florida who wore masks during the COVID-19 pandemic; and (2) protestors in Washington D.C. who wore face coverings and tactical military gear on January 6, 2021. Both comparators fail to persuade.

As to the first situation, Gaston failed to allege that other protestors in Florida, who wore masks and carried weapons, were treated differently. *See Grider*, 618 F.3d at 1264; *see also Leib*, 558 F.3d at 1307; *Griffin Indus., Inc.*, 496 F.3d at 1205. Moreover, the district court's finding that the LPD officers acted with arguable probable cause when they arrested Gaston undermines his claim that the officers lacked a rational basis to treat him differently from

other masked protestors in Florida during the pandemic. *See Village of Willowbrook*, 528 U.S. at 564.

As to the second situation, Gaston's comparison to the January 6 protestors in Washington, D.C. also fails because those individuals were not similarly situated as they were not subject to Florida laws. *See Grider*, 618 F.3d at 1264.

IV

Section 1985 covers conspiracies to interfere with civil rights. *See* 42 U.S.C. § 1985(3); *Childree v. UAP/GA AG CHEM, Inc.*, 92 F.3d 1140, 1146–47 (11th Cir. 1996). Subsection (3) of § 1985 provides a cause of action to victims of a conspiracy to deprive any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. 42 U.S.C. § 1985(3). The elements of a § 1985(3) cause of action are:

> (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Childree, 92 F.3d at 1146–47.

To prove the second element, a plaintiff must show that "some racial, or perhaps otherwise class-based, invidiously

discriminatory animus" motivates the conspirators' actions. *Id.* at 1147 (citation and quotation marks omitted).

Here, Gaston failed to state a § 1985(3) claim because he failed to allege that any "racial, or perhaps otherwise class-based, invidiously discriminatory animus" motivated the LPD officers' actions. *See id.* (quotation marks omitted). Instead, Gaston alleged that the officers arrested him because they were irritated that his protest interrupted the officers' attendance at a funeral.

V

To impose 42 U.S.C. § 1983 liability on a local government entity, a plaintiff must show that: (1) his constitutional rights were violated; (2) the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) the policy or custom caused the violation. *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004). A plaintiff must identify either (1) an officially promulgated local policy or (2) an unofficial custom or practice shown through the repeated acts of a final policymaker. *Grech v. Clayton Cnty.*, 335 F.3d 1326, 1329 (11th Cir. 2003) (en banc). The plaintiff must prove the existence of such a custom, not through one incident, but by evidence of a "longstanding and widespread practice . . . deemed authorized by the policymaking officials because they must have known about it but failed to stop it." *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir. 1991).

Here, the district court did not err in dismissing Gaston's failure to train claim because he failed to show that the LPD violated his constitutional rights or that the LPD had a custom or

policy that constituted deliberate indifference to these rights. *McDowell*, 392 F.3d at 1289. As already explained, the officers had arguable probable cause to arrest Gaston, so the arrest did not violate his constitutional rights. *Id.* Gaston also failed to cite to an officially promulgated LPD policy that constituted deliberate indifference to his rights. *Id.*; *Grech*, 335 F.3d at 1329. Gaston further failed to plead facts to support his assertion that the City of Leesburg's policymakers failed to train its officers not to commit *Brady* violations or violate citizens' constitutional rights. *City of Fort Lauderdale*, 923 F.2d at 1481. Although Gaston alleged that the LPD's refusal to provide body cameras to its officers constituted deliberate indifference, he failed to point to any incident where this alleged custom led to the deprivation of someone's rights, which would have put city officials on notice that training was needed. *See McDowell*, 392 F.3d at 1289; *see also City of Fort Lauderdale*, 923 F.2d at 1481.

VI

A district court's decision not to exercise supplemental jurisdiction is reviewed for an abuse of discretion. *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1313 (11th Cir. 2008). A federal district court may have supplemental jurisdiction over all claims that form part of the same case or controversy as claims over which the court has original jurisdiction. 28 U.S.C. § 1367(a). A district court may decline to exercise supplemental jurisdiction over related claims if it has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3).

Here, because the district court properly dismissed Gaston's federal claims for relief, the court did not abuse its discretion in declining to exercise supplemental jurisdiction over his remaining state-law claims. *Id.*; *see Romero*, 552 F.3d at 1313, 1318.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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January 21, 2025

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 24-10276-AA
Case Style: Angel Gaston v. City of Leesburg, et al
District Court Docket No: 5:23-cv-00056-PGB-PRL

Opinion Issued
Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing
The time for filing a petition for panel rehearing or rehearing en banc is governed by 11th Cir. R. 40-2. Please see FRAP 40 and the accompanying circuit rules for information concerning petitions for rehearing. Among other things, **a petition for rehearing must include a Certificate of Interested Persons**. See 11th Cir. R. 40-3.

Costs
No costs are taxed.

Bill of Costs
If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees
The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel
Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

OPIN-1 Ntc of Issuance of Opinion

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10276

ANGEL E. GASTON,

Plaintiff-Appellant,

versus

CITY OF LEESBURG,
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LAKE COUNTY FLORIDA,
In their official capacity,
JOSEPH IOZZI,
In his individual and official capacity,
NICHOLAS M. ROMANELLI,
In his individual and official capacity,
D. V. PAONESSA, I
n his individual and official capacity, et al.,

Appendix "D"

Defendants-Appellees,

PEYTON C. GRINELL et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:23-cv-00056-PGB-PRL

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before NEWSOM, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Panel Rehearing also is DENIED. FRAP 40.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ANGEL E. GASTON,

Plaintiff,

v. **Case No: 5:23-cv-56-PGB-PRL**

CITY OF LEESBURG, *et al.*

Defendants.
_____/

ORDER

Plaintiff Angel E. Gaston, a state prisoner proceeding *pro se*, initiated this action by filing a civil rights complaint. (Doc. 1). Thereafter, he filed an amended complaint. (Doc. 12). Plaintiff is proceeding *in forma pauperis*. (Doc. 5). In an October 20, 2023 Order, the Court dismissed the amended complaint without prejudice and afforded Plaintiff an opportunity to file a second amended complaint. (Doc. 15). Plaintiff filed his second amended complaint on December 19, 2023. (Doc. 21). The case is currently before the Court for screening pursuant to the Prison Litigation Reform Act (PLRA).

LEGAL STANDARD

The PLRA requires the Court to dismiss a case if the Court determines that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such

relief. *See* 28 U.S.C. § 1915A; *see also* 28 U.S.C. § 1915(e)(2)(B) (applying the same standard to *in forma pauperis* proceedings). The Court must liberally construe a *pro se* Plaintiff's allegations. *See Haines v. Kerner*, 404 U.S. 519 (1972); *see also Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981).

PLAINTIFF'S ALLEGATIONS

Plaintiff, an inmate at the Palm Beach County West Detention Center, brings six federal claims and four state tort claims arising out of an incident at the Leesburg Police Station in Lake County, Florida on October 27, 2020. (Doc. 21). Plaintiff states that he went to the police station on the morning of October 27, 2020, to "turn in receipts for confiscated property that LPD officers had previously purposefully discarded." (*Id.* at 11). Due to restrictions related to the COVID-19 pandemic, the police station was not open to the public, and Plaintiff was advised to wait outside for Lieutenant Nicholas M. Romanelli to meet him. While waiting, Plaintiff noticed "two helicopters hovering very low in front of the [police station]" and "decided to use this opportunity to exercise [his] First Amendment right to peacefully protest and/or demonstrate in front of the news camera." (*Id.*) He placed his belongings on the grass and proceeded to execute "color guard marching movements." (*Id.* at 12). He "took all of [his] tools and placed them on a plainly visible part of [his] belt to be clearly seen by anyone who approached [him]." (*Id.*) While marching, blowing his whistle, and displaying his two flags,

members of the Leesburg Police Department surrounded him and instructed him to stop and drop what he had. (*Id.*)

Plaintiff first dropped the two flags that he had in his hands; he then removed a steak knife that was sheathed with a machete on his left hip. (*Id.* at 13). He then removed the one-foot machete, long screwdriver, wooden gardens stakes, and two shovel handles from his belt. (*Id.*) During a pat down, Plaintiff advised the officer that he missed his front pocket and the officer discovered a "pair of small one inch first aid scissors." (*Id.*) Plaintiff was handcuffed and told by the officer that his actions and demonstration were "inappropriate and uncalled for." (*Id.*) Plaintiff asked why he was being arrested but did not receive a response. He informed Lt. Romanelli that he had the receipts for his property, which Lt. Romanelli retrieved from Plaintiff's backpack. (*Id.* at 14). He was escorted into the police station by the arresting officers. (*Id.*)

When Plaintiff was later booked at the Lake County Jail, he was informed that he was charged with (1) carrying a concealed weapon and (2) unlawful wearing of a mask in public. (*Id.* at 15). The arresting officer suggested a mental health evaluation for Plaintiff and an elevated bond until his violation of probation could be addressed. (*Id.* at 16). Plaintiff asserts that the prosecutor at his initial appearance followed the arresting officer's recommendation. (*Id.*)

On February 3, 2021, Plaintiff was deemed incompetent to proceed in his case. (Doc. 12 at 64). The state court records reflect that the two charges against Plaintiff were *nolle prosequi* on October 17, 2022. *See State of Florida v. Gaston*, Case No. 35-2020-MM-005360 (Lake Cnty., Fla.). [1]

Plaintiff's second amended complaint names the following defendants: (1) the City of Leesburg, Florida in its official capacity; (2) Lake County, Florida in its official capacity; (3) unknown police officer #3, the police chief, in his individual capacity; (4) Captain Joseph Iozzi in his individual capacity; (5) Lieutenant Nicholas Romanelli in his individual capacity; (6) Officer D.V. Paonessa in his individual capacity; (7) Officer S.D. Mack in his individual capacity; (8) Officer D.W. Robinson in his individual capacity; (9) Officer J.B. Williams in his individual capacity; (10) unknown police officer #1 in his individual capacity; and (11) unknown police officer #2 in his individual capacity.

Plaintiff's claims are as follows: (1) First Amendment retaliation; (2) false arrest and malicious prosecution, in violation of the Fourth Amendment; (3) selective enforcement, in violation of the Fourteenth Amendment; (4) conspiracy to deprive Plaintiff of his civil rights, in violation of the Fourteenth Amendment;

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[1] Federal Rule of Evidence 201(b) provides that a court "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

(5 & 6) *Monell* claims[2] for failure to train and supervise; (7) negligence; (8) negligent supervision; (9) malicious prosecution and false arrest; and (10) civil conspiracy.

DISCUSSION

Despite being afforded an opportunity to cure the deficiencies of his claims, Plaintiff has failed to do so. Thus, the second amended complaint is due to be dismissed. *See* 28 U.S.C. § 1915A. The Court addresses each of Plaintiff's claims in turn.

I. Probable Cause Supported Plaintiff's Arrest

All of Plaintiff's claims relate to his purported false arrest on October 27, 2020. (Doc. 21). The Court previously determined that the arresting officer acted with arguable probable cause to arrest Plaintiff. (Doc. 15 at 5–9). In his second amended complaint, Plaintiff contends this determination was wrong because the Court did not give credit to material facts related to the probable cause affidavit that Plaintiff disputes. First, Plaintiff asserts that he was not attempting to conceal his identity by wearing a mask, although he does not dispute the officer's statement that Plaintiff was wearing a mask. (Doc. 21 at 35–36). Second, Plaintiff asserts that he was not carrying a concealed weapon in his right pocket, as the knife was "sheithed [sic] with [his] machete and in plain sight of all the officers[.]" (*Id.* at 36).

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[2] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

It is well established that government agents are "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "An arrest without a warrant and lacking probable cause violates the Constitution and can underpin a § 1983 claim . . . ." *See Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 734 (11th Cir. 2010); *see also Von Stein v. Brescher*, 904 F.2d 572, 578 (11th Cir. 1990) ("Under the Fourth Amendment, . . . persons have the right not to be arrested without probable cause."). The existence of actual probable cause, or arguable probable cause, however, "at the time of arrest is an absolute bar to a subsequent constitutional challenge to the arrest." *Gates v. Khokar*, 884 F.3d 1290, 1297–98 (11th Cir. 2018) (quotation omitted). "Whether an officer has probable or arguable probable cause . . . depends on the elements of the alleged crime and the operative fact pattern." *Id.* at 1298 (quotation omitted).

"To determine whether an officer had probable cause for an arrest, [the Court] examine[s] the events leading up to the arrest, and then decide[s] whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *District of Columbia v. Wesby*, 583 U.S. 48, 56–57 (2018) (quotations omitted); *see also Carter v. Butts Cnty., Ga.*, 821 F.3d 1310, 1319 (11th Cir. 2016) ("We assess probable cased based on the totality of the

circumstances." (quotations omitted)). Of course, "[b]ecause probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules." *Gill as Next Friend of K.C.R. v. Judd*, 941 F.3d 504, 516 (11th Cir. 2019) (quotations omitted). Indeed, it "requires only a probability or a substantial chance of criminal activity, not an actual showing of such activity." *Wesby*, 583 U.S. at 57 (quotations omitted). Far from an exacting standard, probable cause is "not a high bar." *Id.*; *see also Paez v. Mulvey*, 915 F.3d 1276, 1286 (11th Cir. 2019) (explaining that probable cause "does not require anything close to conclusive proof or proof beyond a reasonable doubt that a crime was in fact committed, or even a finding made by a preponderance of the evidence").

Arguable probable cause exists when a reasonable officer "in the same circumstances and possessing the same knowledge as the defendant could have believed that probable cause existed to arrest." *Gates*, 884 F.3d at 1298 (alteration adopted) (emphasis in original) (quotation omitted). "The concept of arguable probable cause therefore allows for the possibility that an officer might reasonably but mistakenly conclude that probable cause is present." *Id.* (quotations omitted). "In determining whether arguable probable cause exists, [w]e apply an objective standard, asking whether the officer's actions [were] objectively reasonable . . .

regardless of the officer's underlying intent or motivation." *Lee v. Ferraro*, 284 F.3d 1188, 1195 (11th Cir. 2002).

Here, Plaintiff has attached the arrest affidavit prepared by Lt. Romanelli. (Doc. 21 at 88–89). It states:

> I arrived at the Leesburg Police Department and noticed the defendant carrying a wooden baton and flags. He had a large knife, similar to a machete, in a sheath on his left hip, approximately twelve inches in length. He had two long wooden batons on his waist. He was wearing a brown leather belt that supported the knife in the sheath and wooden batons. I was not able to tell what else he had on his waist as it was hard to see because he was turned away from me. The helmet he was wearing was a black sparring helmet with a clear to off-white face protector. He was wearing a brown and black camouflage face covering underneath, which only showed his eyes. The defendant was simulating marching until he saw me drive into the driveway of the police department. The defendant could be described as appearing intimidating. His attire is not that of a person who casually walks the public areas in Leesburg. Although his face covering underneath his helmet is normally justifiable due to the COVID-19 concerns, covering his face to conceal his identity, wearing a helmet with a shield, carrying multiple weapons to include long objects and his appearance of being intimidating, was deemed inappropriate and concerning. He appeared as he was ready to engage in a confrontation. Therefore, wearing the mask and helmet in public to conceal his identity is in violation of FSS 876.13
>
> I immediately exited by patrol vehicle and addressed him from afar, approximately 30 to 40 feet away. I asked him to slowly remove all weapons on his body and to not make any assertive moves with the weapons. The defendant complied and began to drop the weapons. He reached into his right front pocket and removed a large steak knife with a red handle, approximately six inches in length, not being an ordinary pocket knife. This was not in view at any time I observed him and completely concealed in his pocket, in violation of FSS. 790.01 Carrying a Concealed Weapon. He also removed a long screwdriver

> from his waist band that I could not see either. He removed the wooden batons and the large knife from the sheath.
>
> The defendant was not asked but stated he was practicing for the color guard and was not doing anything wrong. He was explained that his behavior in the public was not appropriate, where other citizens also share and frequent and he was being placed under arrest.
>
> This behavior by the defendant has been a common occurrence and he has been warned numerous times to conduct himself accordingly.

(Doc. 21 at 88–89).

As long as his belief is reasonable, a police officer does not have to ultimately be correct in his belief that he has probable cause to make an arrest. *Rodriguez v. Farrell*, 280 F.3d 1341, 1347 (11th Cir. 2002). Consequently, the facts should not be viewed from the plaintiff's point of view or as known to the plaintiff or to the court later in the case. *Jones v. Cannon*, 174 F.3d 1271, 1283, n.4 (11th Cir. 1999). In addition, "[t]he validity of an arrest does not turn on the offense announced by the officer at the time of the arrest." *Bailey v. Bd. of Cnty. Comm'rs of Alachua Cnty., Fla.*, 956 F.2d 1112, 1119 n.4 (11th Cir. 1992). "When an officer makes an arrest, which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest." *United States v. Saunders*, 476 F.2d 5, 7 (5th Cir. 1973).

Accepting as true Plaintiff's assertions related to disputed facts in the probable cause affidavit, probable cause still existed to arrest Plaintiff, both for

wearing a mask in public to conceal his identity and for carrying a concealed weapon. Plaintiff does not dispute that he was wearing a mask. Instead, he contends that he was not doing so to conceal his identity. (Doc. 21 at 35). However, the determination of probable cause is viewed from whether the arresting officer was objectively reasonable. Here, the arresting officer recognized that wearing a mask was "normally justifiable due to the COVID-19 concerns[,]" (*id.* at 88), but he noted that Plaintiff's wearing of a helmet with a shield as well as a brown and black camouflage face covering underneath with the appearance of being intimidating was inappropriate and concerning. *See* Fla. Stat. §§ 876.13, 876.155. That Plaintiff contends he was not attempting to conceal his identity does not undermine the officer's objective finding that he was wearing the mask so as to conceal his identity. Thus, viewed objectively, the arresting officer was reasonable in determining that Plaintiff was wearing the mask on public property with the intent to intimidate.

As relates to the carrying a concealed weapon offense, Plaintiff states that, "Second I removed the steak knife that I had sheithed [sic] with my machete on my left hip." (Doc. 21 at 13). The Court accepts this as true. However, whether the weapon was sheathed with a machete or in Plaintiff's pocket does not undermine the officer's statement in the probable cause affidavit that the weapon was not visible when he first observed Plaintiff. (Doc. 21 at 88). The officer states that he

observed Plaintiff from 30 to 40 feet away. Whether Plaintiff was carrying the weapon in his right front pocket or within the sheath for his larger machete does not matter—the weapon was still concealed. *See* Fla. Stat. § 790.02 ("The carrying of a concealed weapon is declared a breach of peace, and any officer authorized to make arrests under the laws of this state may make arrests without warrant of persons violating the provisions of s. 790.01 when said officer has reasonable grounds or probable cause to believe that the offense of carrying a concealed weapon is being committed.").

Under these circumstances, based upon the totality of the allegations before the Court, there is no showing that the arresting officer lacked arguable probable cause to make the arrest for wearing a mask on public property or for carrying a concealed weapon. *See Gates*, 884 F.3d at 1302; *see also Paulk v. Benson*, No. 22-11635, 2023 WL 5624537, at *4 (11th Cir. Aug. 31, 2023) (holding that "district court did not err in *sua sponte* dismissing the claim for failure to state a claim on which relief could be granted under § 1915A" when existence of arguable probable cause defeated plaintiff's wrongful arrest claim). This determination—that at least arguable probable cause supported Plaintiff's arrest—is also relevant to Plaintiff's remaining claims.

II. First Amendment Retaliation

To state a First Amendment retaliation claim, a plaintiff must show: (1) "that his speech or act was constitutionally protected"; (2) "that the defendant's retaliatory conduct adversely affected the protected speech"; and (3) "that there is a causal connection between the retaliatory actions and the adverse effect on speech." *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005).

As there was arguable probable cause to arrest Plaintiff for violating the Florida statutes for wearing a mask on public property to conceal the identity with intent to intimidate, Plaintiff cannot establish a causal connection between his arrest and an adverse effect on his speech. Further, the second amended complaint makes only conclusory allegations of a retaliatory motive; it does not allege facts sufficient to raise that conclusion above the speculative level. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (explaining that conclusory allegations are not entitled to a presumption of truth). Consequently, this claim must be dismissed for failure to state a claim upon which relief may be granted.

III. Malicious Prosecution

To maintain a claim of malicious prosecution, Plaintiff must overcome two hurdles. First, he must prove that he suffered a seizure pursuant to legal process that violated the Fourth Amendment. *See Williams v. Aguirre*, 965 F.3d 1147, 1157–59 (11th Cir. 2020). This burden requires him to "establish (1) that the legal process

justifying his seizure was constitutionally infirm and (2) that his seizure would not otherwise be justified without legal process." *Id.* at 1165. Plaintiff must prove that the officials instituted criminal process against him "with malice and without probable cause" and that the broader prosecution against him terminated in his favor. *Id.* (quoting *Paez*, 915 F.3d at 1285).

Because the Court has determined that there was arguable probable cause for Plaintiff's arrest, Plaintiff fails to state a claim for malicious prosecution.

IV. Selective Enforcement

"[T]he Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren v. United States*, 517 U.S. 806, 813 (1996). "[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause." *Id.*

Here, Plaintiff has not alleged any facts to support a racial profiling claim or that he is a member of any other protected group. He does not identify: (1) any similarly situated individual of a different race who was treated differently by any defendants in similar circumstances; or (2) any basis for inferring any defendants' investigation was motivated by a discriminatory purpose, rather than the fact Plaintiff was demonstrating in front of the police station with multiple weapons while wearing a face covering underneath his helmet while appearing intimidating. (Doc. 21 at 22–23). Plaintiff's second amended complaint does not

allege any similarly situated person or group with whom the Court can compare him in determining whether he was treated disparately. Thus, Plaintiff's claim fails because, at bottom, he has not shown that he was arrested, charged, or prosecuted because of his race or national origin.

And to the extent that Plaintiff asserts he was subject to selective enforcement as a "class of one," such claim also falls short. Where a plaintiff does not allege membership in an identifiable group, a plaintiff may state a "class of one" equal protection claim by alleging "that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). This generally requires a plaintiff to identify a comparator to demonstrate discriminatory conduct. *See Eisenberg v. City of Miami Beach*, 1 F. Supp. 3d 1327, 1340 (S.D. Fla. 2014) (citations omitted). The Eleventh Circuit has emphasized that a plaintiff may not merely rely on "broad generalities in identifying a comparator." *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1307 (11th Cir. 2009); *see also Apothecary Dev. Corp. v. City of Marco Island, Fla.*, 517 F. App'x 890, 892 (11th Cir. 2012). Similarly situated "comparators must be 'prima facie identical in all relevant respects.'" *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1264 (11th Cir. 2010) (quoting *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1202 (11th Cir. 2007)). "Different treatment of dissimilarly situated persons does not violate the equal

protection clause." *E&T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987). The rationale behind this requirement is to allow the court to determine whether the plaintiff's treatment was actually the result of discrimination, as opposed to a decision based on facts peculiar to the plaintiff's situation." *Hawkins v. Eslinger*, No. 6:07-cv-1261-Orl-19GJK, 2008 WL 2074409, at *1 (M.D. Fla. May 15, 2008).

Here, Plaintiff alleges that other individuals wearing masks in public were not arrested during the same time period. (Doc. 21 at 22). However, the arresting officer's recognition that wearing masks in public was common at the time and his determination that Plaintiff was acting intimidating while wearing the mask—as well as the Court's determination that the arresting officer acted with arguable probable cause—undermines Plaintiff's claim that the was no rational basis for any disparate treatment. To the extent that Plaintiff names other protestors wearing masks in Florida, he does not also allege that they were carrying weapons, thereby distinguishing those individuals. (Doc. 21 at 60). And Plaintiff's comparison to protestors in Washington, D.C. on January 6, 2021, fails because those individuals were not subject to Florida laws. (*Id.*)

The Court thus finds that under either a selective enforcement or "class of one" theory, Plaintiff has failed to set forth sufficient evidence to support a constitutional violation of § 1983.

V. Conspiracy to Deprive of Civil Rights

To state a claim under § 1985(3), a plaintiff must establish the following six elements:

> (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Childree v. UAP/GA AG CHEM, Inc., 92 F.3d 1140, 1146-47 (11th Cir. 1996). As to the second element, "a plaintiff must allege that some racial or other 'class-based invidiously discriminatory animus lay behind the conspirators' action.'" *Barth v. McNeely*, 603 F. App'x 846, 850 (11th Cir. 2015) (per curiam) (quoting *Childree*, 92 F.3d at 1146-47). Here, Plaintiff includes no allegations in his second amended complaint to satisfy this requirement. Thus, this claim is due to be dismissed.

VI. *Monell* Claims[3]

Because Plaintiff was not deprived of any constitutional rights as his arrest was supported by arguable probable cause, no defendants can be liable for claims of negligence for any insufficient supervision, training, custom or policy under

[3] Section 1983 does not "impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Monell*, 436 U.S. at 692. It is only when the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

§ 1983. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (holding that if a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized a constitutional deprivation is immaterial); *Gish v. Thomas*, 516 F.3d 952, 955 (11th Cir. 2008) (without an underlying violation of Plaintiff's constitutional rights, sheriff could not be liable in his individual or official capacity for a failure to train deputy and county could not be liable on the ground that policy caused a constitutional violation). Accordingly, Plaintiff's *Monell* claims are dismissed for failure to state a claim.

VII. State Law Claims

Plaintiff also raises claims of negligence, negligent supervision, malicious prosecution, false arrest, and civil conspiracy. However, these claims are state law claims, not violations of the United States Constitution or federal law.

As Plaintiff has failed to state a claim of a constitutional violation, these claims cannot proceed because this Court lacks jurisdiction to hear a purely state law claim where there is no diversity between the parties. *See* 28 U.S.C. §§ 1331, 1332. Because Plaintiff has failed to state a federal claim, the Court will not exercise supplemental jurisdiction over these state law claims. 28 U.S.C. § 1367(c)(3).

VIII. Conclusion

Because Plaintiff's arrest was supported by at least arguable probable cause, he has failed to state a claim under § 1983 for any of the federal claims he has brought. And because he has failed to state a claim of constitutional violation, the Court declines to exercise supplemental jurisdiction over his state law claims. 28 U.S.C. § 1367(c)(3).

Accordingly, it is **ORDERED** that:

1. Plaintiff Angel E. Gaston's Second Amended Complaint (Doc. 21) is **DISMISSED** under 28 U.S.C. § 1915A for failure to state a claim.
2. The Clerk is **DIRECTED** to enter judgment, terminate any pending motions and deadlines, and close this file.

DONE AND ORDERED in Orlando, Florida on January 8, 2024.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ANGEL E. GASTON,

Plaintiff,

v. **Case No: 5:23-cv-56-PGB-PRL**

CITY OF LEESBURG, LAKE COUNTY, FLORIDA, JOSEPH IOZZI, NICHOLAS M. ROMANELLI, D. V. PAONESSA, S. D. MACK, D. W. ROBINSON, J. B. WILLIAMS, JOHN DOE, I , JOHN DOE, II and JOHN DOE, III,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff Angel E. Gaston's Second Amended Complaint (Doc. 21) is DISMISSED under 28 U.S.C. § 1915A for failure to state a claim.

Any motions seeking an award of attorney's fees and/or costs must be filed within the time and in the manner prescribed in Local Rule 7.01, United States District Court Middle District of Florida.

Date: January 9, 2024

ELIZABETH M. WARREN,
CLERK

s/AJS, Deputy Clerk

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

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