IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MICHAEL BOUNDS, FOREST OLIVIER, ADAM LUGUNA, WIA DAY, DANIEL BELL, and ZACHARY LORENZ,

Plaintiffs,

vs.

KARL WILLERS, in his official and individual capacities; CITY OF HUTCHINSON; KENNETH WILLERS, in his official and individual capacities; NOBLES COUNTY; NICHOLAS JACOBSON, in his official and individual capacities; OLMSTED COUNTY; BRYCE SCHUENKE, formerly identified as JOHN DOE #1, in his official and individual capacities; DAKOTA COUNTY; JOHN DOE #2, in his official and individual capacities; PINE COUNTY; CHRIS MCCALL, in his official and individual Capacities; ANOKA COUNTY; DANIEL LEWIS; in his official and individual capacities; STEVE SCHULZ, in his official and individual capacities; KANABEC COUNTY; MICHAEL HADLAND, in his official and individual capacities; and FILLMORE COUNTY,

Defendants.

Case No. 13-cv-00266 JRT/FLN

DANIEL LEWIS AND KANABEC COUNTY'S OBJECTION IN PART TO MAGISTRATE'S REPORT AND RECOMMENDATION

INTRODUCTION

Defendants Daniel Lewis and Kanabec County object in part to Magistrate Judge Noel's January 13, 2016 Order [*Doc. 182*] granting in part and denying in part their Motion for Summary Judgment. Specifically, these Defendants object to the denial of the Motion for Summary Judgment regarding Plaintiff Wia Day's Fourteenth Amendment claim against Lewis and the *Monell* claim against Kanabec County. This case arises from Plaintiffs' voluntary participation in a Drug Recognition Evaluators program in which Plaintiffs agreed to allow officers to observe them under the influence of marijuana. Plaintiffs allege officers provided them marijuana, observed the effects, and returned them to their "Occupy Minneapolis" protest. Plaintiffs do not claim they were forced to use marijuana, forced to participate in the program, or threatened with arrest if they did not participate. Plaintiffs' claims do not rise to the level of a constitutional violation; and accordingly, Defendants are entitled to qualified immunity and the dismissal of Plaintiffs' claims. Defendants request a hearing on this matter.

FACTS

Defendants incorporate the facts set forth in their Summary Judgment Memorandum and provide the following in relevant part. *Doc. 150.*

In 2008, the Hennepin County district court issued an Order appointing Wia Day's mother as her legal guardian. *Milstein Declaration, Exhibit F at 3.* Day

"is incapacitated with regard to her person because she is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions concerning her personal needs for medical care, nutrition, clothing, shelter or safety." *Id.* The Order includes the following findings of fact in the Order: Day "can read and write at a 2nd grade level," "is very friendly and trusting toward people she does not know," "needs assistance with making informed medical decisions," and "does not understand contracts." *Id.*

Day left her mother's home in April 2012 to live among her homeless friends at Peavey Plaza. *Depo. Day, 6:23-25, 7:1-16.* She wanted a break from her mother and wanted to understand the struggle of her homeless friends. *Depo. Day, 7:17-25.* She stayed at Peavey Plaza through June 2012. *Id., 8:7-10.*

In late April 2012, Plaintiff Wia Day was curious about her friends returning to Peavey Plaza in Minneapolis high on drugs, so she approached officers training in the DRE Program to learn more. *Aff. Angolkar, Exhibit 1: Deposition of Wia Day, 18:11-15, 19:1-4, 21:1-22.* Day believes she encountered Kanabec County Deputy Dan Lewis. *Depo. Day, 21:20-22, 27:20-22.* The officers she talked to wore different uniforms, with one in brown and one in black. *Depo. Day, 27:3-15.*

Day approached Deputy Lewis, told him she was high, and provided the fake name Selena Lopez. *Depo. Day, 22:7-12, 23:3-4*. She voluntarily accompanied Deputy Lewis, along with her friend "C-Note." *Depo. Day, 22:12-17, 28:1-6, 10-17*. Day claims the officers first drove them to a nearby sand or dirt pile, and provided three bowls each of marijuana to smoke. *Depo. Day, 29:12-25, 30:1-24*. Once at the testing facility, Day was observed by different officers, unknown to Day, for testing. *Depo. Day, 32:12-20*. Day did not tell the officers she suffered from any disabilities or medical issues. *Depo. Day, 34:24-25, 35:1-6*. When the unidentified officers completed their observations, Deputy Lewis drove Day back to Peavey Plaza and gave her a pack of cigarettes and food. *Depo. Day, 35:7-14*.

When Day rejoined her friends, Forest Olivier asked why she was in a squad car. *Depo. Day, 38:1-7, 20-25*. Day told Olivier about the program, and he asked how he could participate. *Depo. Day, 38:22-25*; *Aff. Angolkar, Exhibit 2: Deposition of Forest Olivier, 13:22-25, 15:4-8; Exhibit 12: Clip 0033 at 1:09-1:25*. Day also called her brothers, Zachary Lorenz and Daniel Bell, about getting free marijuana and both told her, "Oh, we're on our way." *Depo. Day, 39:25, 40:1-7; Aff. Angolkar, Exhibit 3: Deposition of Zachary Lorenz, 8:15-17*.

STANDARD OF REVIEW

With regard to this objection, a district court judge shall modify or set aside a magistrate judge's order found to be clearly erroneous or contrary to law. Fed. R. Civ. P. 72; L.R. 72.2.

ARGUMENT

I. DEPUTY LEWIS IS ENTITLED TO QUALIFIED IMMUNITY.

Magistrate Noel denied Defendants' Motion for Summary Judgment on Day's Fourteenth Amendment claim on the question whether she had capacity to voluntarily participate. *Doc. 182 p. 29.* While Magistrate Noel correctly determined voluntary conduct negates a substantive due process claim arising from a liberty interest in bodily integrity, the court erred by concluding Day's voluntariness was a genuine issue of material fact. Applying the standard in *Lee ex rel. Lee v. Borders*, cited by the court, there is no genuine issue of material fact Deputy Lewis was unaware Day had any incapacitated status when she volunteered to participate in the DRE program. 764 F.3d 966, 972 (8th Cir. 2014). Moreover, even if there is genuine issue of material fact regarding Day's admitted voluntariness despite her incapacitation, the alleged conduct was conscience-shocking to rise to the level of a substantive due process violation.

Day asserted a substantive due process claim under the Fourteenth Amendment. *Amended Complaint, ¶ 64.* Substantive due process protects

individuals from certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Rights are protected under the due process clause if they are "so rooted in the tradition and conscience of our people as to be ranked as fundamental" or if such rights reflect "basic values implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). This includes a liberty interest in bodily integrity. *Rogers v. City of Little Rock, Ark.*, 152 F.3d 790, 795 (8th Cir. 1998). The question, however, "is not simply whether a liberty interest has been infringed but **whether the extent or nature of the [infringement] … is such as to violate due process**." *In re Scott County Master Docket*, 672 F.Supp. 1152, 1166 (D. Minn. 1987) (emphasis added). The court is concerned with "violations of personal rights… so severe… so disproportionate to the need presented, and …so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.*

A. Day's voluntary participation negates her Fourteenth Amendment claim.

Magistrate Noel correctly determined if the record established a Plaintiff's participation in the DRE program was voluntary, there was no substantive due process claim. *Doc. 182 p. 13-25, 29.* Voluntary conduct, in the absence of coercion, is fatal to Plaintiffs' substantive due process claim. *See Villanueva v. City*

of Scotsbluff, 779 F.3d 507, 513 (8th Cir. 2015) (distinguishing consensual conduct not the result of coercion); *Rogers*, 152 F.3d at 793-94 (finding violation of right to bodily integrity in rape after traffic stop based on coercion).

The court declined to apply this standard to Day, who presented a 2008 district court Order appointing her adoptive mother as her legal guardian. *Doc. 182 p. 28-29.* The court acknowledged the facts in the record fully illustrated Day's voluntariness in participating in the program. *Id. p. 28.* Day knew she was participating in a program where officers observed her conduct and behavior when she was under the influence of marijuana. Day does not claim she used a substance they were not aware of. She does not claim she did not understand her participation. Rather, Day asserts she was offered marijuana, which she voluntarily used.

B. There is no evidence Deputy Lewis knew Day was incapacitated.

Finding a fact question whether Day could consent, Magistrate Noel cited an Eighth Circuit case upholding a jury instruction regarding "consent" in a substantive due process bodily integrity claim, but the court did not apply the standard to this case. *Lee ex rel. Lee v. Borders*, 764 F.3d 966, 972 (8th Cir. 2014). In *Lee*, a resident at a mental health facility alleged a violation of her substantive due process right to bodily integrity as a result of an alleged sexual assault by a kitchen employee. 764 F.3d at 969-970. Lee had a legal guardian to make

decisions for her but was doing well enough for her family to work to move her to an independent living facility. *Id.* at 969. Borders, the kitchen employee, claimed Lee followed him to a storage area and consented to anal intercourse. *Id.* at 970. He argued she did not "yell rape or none of the other things as we were having sex." *Id.*

Lee did not testify, but presented evidence she did not consent, including testimony from a nurse Lee saw at the hospital immediately following the incident. *Id.* The nurse testified Lee told her, "I said no." *Id.* Lee also reported she was scared. *Id.* Lee also presented evidence she received sexual trauma counseling after the incident. *Id.* A jury found in favor of Lee. *Id.*

Borders appealed the denial of his motion for a new trial. *Id.* at 971. The Eighth Circuit examined the jury instruction regarding the substantive due process claim and consent. *Id.* The instruction required the jury to find by a preponderance of the evidence:

(1) "defendant had anal intercourse with plaintiff without the consent of plaintiff," and

(2) "defendant had anal intercourse with plaintiff **knowing it was without her consent**."

764 F.3d at 972 (emphasis added). The instructions included a definition of consent: "Consent or lack of consent may be expressed or implied. Assent does

not constitute consent if it is given by a person who lacks the mental capacity to authorize the conduct of sexual contact **and such mental incapacity is manifest or known to the actor**." *Id.* (emphasis added). The trial court defined "manifest" to mean "**obvious, or known to the actor**." *Id.* (emphasis added). Ultimately, the Eighth Circuit found the court did not abuse its discretion with the instruction, based on Borders's argument it permitted constitutional liability on a negligence theory, due largely to the court's definition of "manifest." *Id.*

Based on the jury instruction affirmed in *Lee*, to establish lack of consent to prove her substantive due process claim, Day would need to establish by a preponderance of the evidence she lacked mental capacity to agree to use marijuana **and her mental capacity was manifest or known to Deputy Lewis**. Thus, even if there is a genuine issue of material fact whether Day was capable of consenting, the court should have also examined whether there is a genuine issue of material fact whether her mental incapacity was **manifest or known to Deputy Lewis.**

Based on Day's own testimony, it is clear Day's incapacitation was not manifest or known to Deputy Lewis:

> Q: Did you tell any of the officers at any point in time that you suffered from any – any disabilities or medical conditions?
>
> **A: No.**

Q: Why not?

A: It – I thought it better they didn't know. The less they know about me, the better.

Depo. Day, 34:24-25, 35:1-6.

Unlike the plaintiff in *Lee* **who was living in a facility housing incapacitated persons**, there were no outward, objective facts to signal to Lewis she was in fact incapacitated. 764 F.3d at 969. Day approached the officers and told the officers she had just smoked marijuana. She gave a fake name and did not provide information to help identify her. She felt like she could have walked away. She got into the squad car by herself. Day felt she could tell the officers she did not want to use any more marijuana, and indeed, she told them she was done after she smoked three bowls. She did not complain about using the marijuana. In fact, Day smoked marijuana on a daily basis from 2011 until September 2014. Additionally, to a reasonable observer, there is nothing making Day's incapacitation apparent, as depicted in video when she introduced Olivier to officers. *Exhibit 12: Clip 0033 at 1:09-1:25; Depo. Day, 38:22-25.*

Despite numerous opportunities, Day never told Deputy Lewis or anyone else she was incapacitated. There is no evidence her guardian was present at Peavey Plaza nor did Day provide a copy of the Order appointing a guardian to Deputy Lewis. There is nothing in the record to present as evidence, let alone

establish, Day's incapacitation was manifest or known to Deputy Lewis. Accordingly, there is no genuine issue of material fact regarding Day's consent. Therefore, her substantive due process claim must be dismissed.

C. The court can still determine whether the alleged conduct was conscience shocking.

Even if the court correctly determined whether Day's participation could be voluntary due to her legal status, the court nonetheless must determine whether the alleged conduct was conscience shocking to rise to the level of a substantive due process violation.

This Circuit defines this standard as when an executive official's conduct is "conscience shocking **and** … violate[s] one or more fundamental rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Terrell v. Larson*, 396 F.3d 975, 978 n. 1 (8th Cir. 2005) (emphasis in original) (quotations omitted). Courts have applied two standards to determine if conduct reaches the "conscience shocking" threshold: (1) intent-to-harm, and (2) deliberate indifference. *Terrell*, 396 F.3d at 978. Mere negligence is not enough. *Id.*

Proof of intent to harm is required and absent some factual showing of an exception, should be applied. *Id.* There is no evidence Deputy Lewis intended to harm Day by providing her marijuana she voluntarily smoked. Rather, the

purpose of the DRE program was to learn how to detect signs of persons under the influence of drugs.

All of the Plaintiffs – including Day - knew they were participating in a program in which officers observed volunteers under the influence of drugs. Accordingly, Day failed to establish a clearly established substantive due process violation, and Deputy Lewis is entitled to qualified immunity.

II. THE DISTRICT COURT ERRED BY ALLOWING THE *MONELL* CLAIM TO PROCEED ON SINGLE-INCIDENT LIABILITY.

Day also asserts a *Monell* claim against Kanabec County. *Amended Complaint, ¶ 62.* Since Day's claim should be dismissed, her *Monell* claim should not survive. *See, e.g., Hayek v. City of St. Paul*, 488 F.3d 1049, 1055 (8th Cir. 2007) ("Without a constitutional violation by the individual officers, there can be no § 1983 or *Monell* . . . municipal liability.") (quoting *Sanders*, 474 F.2d 523, 527 (8th Cir. 2007)).

While acknowledging Kanabec County had no previous incidents to place it on notice specific training was necessary to avoid the constitutional violation alleged by Day, the court concluded a jury must determine "whether there is a patently obvious need to train an officer to gain proper consent from a participant and refrain from giving that participant illicit drugs before subjecting her to bodily testing." *Doc. 182 p. 40.* The court relied on the very narrow permission of single-incident liability, where "however rare, that the

unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." *Id. p. 38 (quoting Connick v. Thompson*, 563 U.S. 51, 64 (2011)).

The Supreme Court's example of when the "unconstitutional consequences" are deemed "patently obvious" is a city which arms officers and deploys the officers to capture fleeing felons without training officers on the constitutional limitations on the use of deadly force. *Connick*, 131 S. Ct. at 1361 (quoting *Canton v. Harris*, 489 U.S. 378, 390 n. 10 (1989)). Municipal liability in the Court's example does not arise simply because it may be obvious police should not use an unconstitutional level of deadly force. Rather, it arises if, "the **known frequency** with which police attempt to arrest fleeing felons" and the "predictability that an officer lacking specific tools to handle that situation **will violate citizens' rights**," constitutional violations would become "the highly predictable consequence." *Id.* (quoting *Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997)) (emphasis added); *see also Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (elaborating on importance of clarity and notice to city).

The district court relied on a Fifth Circuit case to conclude single-incident liability could be found by a jury. *Brown v. Bryan County, OK*, 219 F.3d 450 (5th Cir. 2000). In *Brown*, a sheriff hired a young, immature relative as a reserve deputy. 219 F.3d at 462. The deputy had no law enforcement training at all, and

he was immediately placed on patrol. *Id.* at 455-56, 458. The deputy made arrests and used force on a regular basis on his first few days of work. *Id.* at 462. The county was sued after the deputy injured the plaintiff while pulling her from the passenger seat of a vehicle after a car chase. *Id.* at 454. The Fifth Circuit confirmed "the evidence in the record allowed the jury reasonably to find that [the Sheriff] made a conscious decision not to train [the deputy], that because the need to train [the deputy] was so obvious, the failure to train him constituted 'deliberate indifference' to the constitutional rights of the citizens of [the County], and that this decision was the 'moving force' behind [the plaintiff's] injuries." *Id.* at 465. The Fifth Circuit referred to this standard as "unmistakable culpability and clearly connected causation." *Id.* at 461.

Since issuing the decision, the Fifth Circuit clarified the very narrow application, explaining there is a difference between a complete lack of any law enforcement training and failure to train in a limited area. *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 288 (5th Cir. 2002).

Here, in contrast to the extreme outlier in *Brown*, there is no evidence Deputy Lewis lacked training and education before and during his employment by Kanabec County. His education and training qualified him to become a licensed police officer in the State of Minnesota, in 2008. *Depo. Lewis, 8:21-25, 9:1-9.* When he attended DRE training, he had been a deputy with Kanabec County

for four years. While Deputy Lewis's continuing education records (beyond the DRE training) are not part of this record, the court can take judicial notice Minnesota law requires continuing education for its officers to maintain a peace officer license. Minnesota Board of Peace Officer Standards and Training, https://dps.mn.gov/entity/post/continuing-education/Pages/default.aspx (accessed Jan. 21, 2016).

This Circuit's decisions rejecting the recognition of "single incident" liability in officer-rape cases is a vivid demonstration of why Day's claim fails. Courts reject municipal liability where a person has been raped, and there was no training "not to rape." *See, e.g. Parrish v. Ball*, 594 F.3d 993, 999 (8th Cir. 2010). There is no patently obvious need to train an officer not to commit rape. *Id.; Andrews*, 98 F.3d at 1077. Here, there can be no liability for providing drugs to a person, even if there was no directive to not give drugs to people, particularly when that deputy attended training **for the purpose of detecting and apprehending individuals under the influence of drugs**.

Day failed to provide evidence of a known frequency Kanabec County deputies would be induced to give drugs to citizens. There is no factual reason to believe a Kanabec County deputy would frequently encounter a situation in which he is induced to give drugs to citizens or to know how to obtain proper consent for accepting such drugs. Indeed, this was the first time a Kanabec

County deputy attended DRE training. *Depo. Schulz, 6:9-13.* There is no evidence Kanabec County knew it would arise, let alone arise frequently. Further, there is no factual basis for a jury to conclude constitutional violations would be a "highly predictable consequence" of Kanabec County failing to provide a deputy with specific tools to handle the training course the first time a deputy attended.

Accordingly, Day's *Monell* claim against Kanabec County fails as a matter of law.

CONCLUSION

For the foregoing reasons, these Defendants request the Court reverse the denial of the Motion for Summary Judgment with regard to Day's Fourteenth Amendment and *Monell* claims.

IVERSON REUVERS CONDON

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