UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael Bounds, et al.,

Plaintiffs,

v.

State of Minnesota, *et al*.,

Defendants.

Civil File No. 13-cv-266 JRT/FLN

DAKOTA COUNTY AND BRYCE SCHUENKE'S RESPONSE TO PLAINTIFFS' OBJECTIONS TO JUDGE NOEL'S REPORT AND RECOMMENDATION

INTRODUCTION

On January 13, 2016, Judge Noel entered his Report and Recommendation on the defendants' respective summary judgment motions in this civil rights case (the "R&R"; ECF No. 182). He recommended granting the Dakota County Defendants'[1] summary judgment motion (ECF No. 161) in its entirety. Specifically, Judge Noel concluded that Plaintiffs failed to proffer any evidence – beyond sheer conjecture – that the Dakota County Defendants violated their constitutional rights.

Plaintiffs now object to the R&R. (ECF No. 184.) Rather than engaging in separate analyses of the evidence against each defendant, as required at the

[1] Dakota County and Bryce Schuenke ("Schuenke") are hereinafter referred to collectively as the "Dakota County Defendants" where appropriate.

summary judgment stage, their objection is premised on the same arguments that Judge Noel rejected.[2] They have provided no basis for overturning the R&R.

None exists. The R&R is well-supported and reaches the appropriate legal conclusions. Judge Noel's recommendation to grant summary judgment in favor of Bryce Schuenke and Dakota County must be adopted.

DISCUSSION

I. Plaintiffs' Substantive Due Process Rights Were Not Violated.

As set out in the Dakota County Defendants' principal brief (ECF No. 163), only two plaintiffs have raised allegations against Schuenke: Forest Olivier ("Olivier") and Adam Luguna ("Luguna"). Neither Olivier nor Luguna has established that Schuenke engaged in conscience-shocking behavior; as such their Fourteenth Amendment substantive due process claim fails out of hand. *See Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002) (*en banc*).

A. Olivier

Olivier has altogether failed to substantiate his allegations against Schuenke with facts (as opposed to speculation). (ECF No. 182, pp. 21-23.)[3] Still, despite undisputed evidence to the contrary, Olivier continues to contend that he involuntarily participated in the Minnesota Drug Recognition Evaluator ("DRE")

---

[2] *Smith v. City of Minneapolis*, 754 F.3d 541, 574 (2014) *citing Heartland Acad. Cmty Church v. Waddle*, 595 F.3d 798, 805-806 (8th Cir. 2010).

[3] ECF. No. 182 p. 21-23.

program, in hopes of aligning his Fourteenth Amendment substantive due process claim with case law in the human experimentation context. (ECF No. 184, p. 4.)

The cases on which Olivier relies are inapposite. They involved patients who were misled into participating in human experiments through false representations that the experiments would somehow benefit them.[4]

In contrast, as Judge Noel rightly concluded, the video evidence submitted at summary judgment, coupled with Olivier's deposition testimony, "demonstrate[ ] that [he] voluntarily participated as a subject in the DRE program." (ECF No. 182, pp. 21-23.) Olivier does not dispute this conclusion. Indeed, he was well aware of the DRE program's purpose. (ECF No. 149, Ex. 2 at pp. 21-22.)

Because it is undisputed that Olivier voluntarily participated in the DRE program, his Fourteenth Amendment substantive due process claim against Schuenke fails as a matter of law.

B. Luguna

As to Luguna, he admits that Schuenke: (1) did not transport him to the DRE facility; (2) did not coerce him into participating in the DRE program;

[4] *See Heinrich ex re. Heinrich v. Sweet*, 62 F.Supp. 2d 282 (D. Mass. 1999); *Cincinnati Radiation Litigation*, 874 F. Supp 796 (S.D. Ohio 1995); *Wright v. Fred Hutchinson Cancer Research Center*, 269 F.Supp. 2d 1286 (D.Wash. 2002).

(3) did not offer or provide him marijuana; and (4) was not present at any time when he received marijuana from a law enforcement officer. (ECF No. 182 p. 33; citing ECF No. 156 Ex. 59.)

In light of these admissions, Luguna does not have a viable substantive due process claim against Schuenke or, in turn, against Dakota County under a *Monell*[5] theory of municipal liability. *See, e.g., Veatch v. Bartels Lutheran Home,* 627 F.3d 1254, 1257 (8th Cir. 2010) ("To establish municipal liability, a plaintiff must first show that one of the municipality's officers violated her federal right.").

II. Plaintiffs' First Amendment Retaliation Claim is Specious.

Summary judgment on Plaintiffs' First Amendment retaliation claim against the Dakota County Defendants is likewise appropriate. As Judge Noel correctly concluded, "plaintiffs have failed to put forth any evidence that any Defendant's decision to approach an individual at Peavey Plaza was motivated by the individual's participation in the Occupy Minneapolis protests." (ECF No. 182, p. 8.)

Plaintiffs object to this conclusion and blithely assert that "officers indisputably targeted assembled protesters with significant medical problems and limited educations." (ECF No. 184, p. 14.) The assertion is belied by a dearth of any facts to support it. Having failed to establish a genuine issue of material

[5] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

fact regarding their First Amendment retaliation claim, that claim must be dismissed.

III. Plaintiffs' Claims Against Dakota County Independently Fail.

Plaintiffs' *Monell* claim against Dakota County fails for several independently sufficient reasons. First, and foremost, Plaintiffs have failed to demonstrate that Schuenke (or any other Dakota County employee) violated their constitutional rights. Again, this failure alone forecloses their *Monell* claim against Dakota County. *Veatch,* 627 F.3d at 1257.

Even if a fact question did exist regarding Schuenke's personal liability under 42 U.S.C. § 1983 (none does), Judge Noel nevertheless correctly concluded that Dakota County is entitled to summary judgment. Plaintiffs' *Monell* claim against Dakota County is premised entirely on a statement of Karl Willers – who is not (and has never been) a Dakota County employee – that "30-40 percent of his [DRE] training class distributed narcotics in order to perform observations[.]" (ECF No. 184, p. 2.) As Plaintiffs' logic goes, the fact that they were provided marijuana by a non-Dakota County DRE-participating law enforcement officer "demonstrates multiple cities and counties' deliberate indifference to training on basic, bedrock issues of policing, which a jury could find caused numerous officers to violate the Plaintiffs' constitutional rights." (ECF No. 166, p. 33.)

The fault in this logic is self-evident. The actions of other, non-Dakota County officers cannot be attributed or imputed to Dakota County. There is no evidence suggesting that Dakota County failed to properly train *its* DRE-participating officer (Schuenke).

Beyond these endemic failures, Plaintiffs fail to establish the *known frequency* with which Dakota County's deputies would be induced to give drugs to citizens exercising their rights of free expression and the *highly predictable* consequence of Dakota County failing to provide a deputy with specific tools to handle the situation or Dakota County's need to train officers not to give drugs to members of Occupy Minneapolis was patently obvious.[6]

Plaintiffs have made no factual or legal argument that supports a municipal liability claim against Dakota County. Summary judgment on the Plaintiffs' claims against Dakota County is therefore proper.

[6] *Connick v. Thompson,* 563 U.S. 51, 63, 131 S.Ct. 1350, 1361, 179 L.Ed.2d 417 (2011), (other citations omitted) (emphasis added); *Cf. Paris v. Ball*, 594 F.3d 993, 999 (8th Cir. 2010) (no patently obvious need to train an officer not to sexually assault women).

CONCLUSION

Plaintiffs' allegations concerning the Dakota County Defendants survived the notice-pleading stage. But when those allegations were tested in discovery, they were proven to be flat-out wrong. The disconnect here between what was pleaded, and what the evidence actually shows, is stark.

Recognizing the tenuity of their claims, Plaintiffs focus the Court again and again on the DRE program itself. They press the Court to find that their civil rights were somehow violated simply because they participated, however voluntarily, in the DRE program.

Plaintiff's participation in the DRE program does not establish *ipso facto* that every officer whom they encountered (however casually), and every government entity that employs those officers, violated their constitutional rights. The law says that the Plaintiffs must prove who violated their civil rights, and how. This they have not done.

In the end, Plaintiffs' claims against the Dakota County Defendants are, as the saying goes, all talk and no substance. Plaintiffs' objections to the R&R must be overruled entirely.

Dated: February 10, 2016

JAMES C. BACKSTROM
DAKOTA COUNTY ATTORNEY

By: s/Helen R. Brosnahan

Helen R. Brosnahan, #0266887
Assistant County Attorney
Jeffrey A. Timmerman, #0352561
Assistant County Attorney
Dakota County Judicial Center
1560 Highway 55
Hastings, MN 55033
Telephone: (651) 438-4438
Facsimile: (651) 438-4479
helen.brosnahan@co.dakota.mn.us
jeff.timmerman@co.dakota.mn.us
ATTORNEYS FOR THE DAKOTA COUNTY DEFENDANTS

O:\CIVIL\LIT\2012\LT12-31 Bounds, et al\LT12-31 Bounds Objection response.docx