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

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT BY DAKOTA COUNTY DEFENDANTS

I. INTRODUCTION

Plaintiffs have filed this lawsuit averring a § 1983 claim and a purported state claim against several Minnesota peace officers and the respective law enforcement agencies who employ them related to the officers' alleged actions during their participation in Drug Recognition Expert training conducted by the Minnesota State Patrol in April and May of 2012. One of the training participants was Dakota County Deputy Bryce Schuenke and he, along with the Dakota County Sheriff's Office are named as defendants in this lawsuit. As discussed below, this lawsuit should be dismissed against these two defendants pursuant to Fed.R.Civ.P. 12(b)(6) because Plaintiffs' Complaint fails to state a claim against them for which relief can be granted.

II. STATEMENT OF FACTS

A. Minnesota DRE Program

The Drug Recognition Expert ("DRE") course is a federal program which trains law enforcement officers to identify specific drug impairment in people and the characteristics and behaviors of drug impaired drivers. (Exhibit 1, DC0131-32)[1]. The national program is managed and coordinated by the International Association of Chiefs of Police with support from the National Highway Traffic Safety Administration of the U.S. Department of Transportation. (DC0132). The state coordinator for the Minnesota DRE Program is Sergeant Rick Munoz of the Minnesota State Patrol ("Munoz"). (DC0131). To participate in the Minnesota DRE Program, an officer must have previously completed a two-day standardized field sobriety class and be recommended by at least two other officers who are current drug recognition experts. (DC0132).

In April and May of 2012, a DRE course was conducted by the Minnesota State Patrol. (DC0128-29, DC0131). Twenty-six law enforcement officers from eighteen (18) different Minnesota law enforcement agencies participated in the course including Defendant Bryce Schuenke, a deputy employed by the Dakota County Sheriff's Office. ("Schuenke"). (DC0006, DC0188-89). The course consisted of classroom instruction followed by field certification training. (DC0131-32, DC0188-89). The classroom portion of the training was conducted at the White Bear Lake Police Department from April 2 – 12, 2012; and the field certification training was held from April 13 – May 3,

[1] All references herein to a bate stamp number starting with "DC" are contained in Exhibit 1.

2012, and was conducted out of the Minneapolis Police Department's 5th Precinct for a few days and thereafter out of the Minnesota Department of Transportation Facility in Richfield, Minnesota ("Richfield Facility"). (DC0128-29, DC0188-189).

As part of the field certification training, students were required to perform fifteen (15) evaluations of individuals who were under the influence of drugs and in doing so, were required to observe four different drug categories. (DC0127, DC0132, DC0188, DC0443). Of the fifteen (15) evaluations, six evaluations had to be conducted by the student, six had to be recorded by the student and the student could observe three evaluations performed by other students. (DC0188, DC0443). Students were paired up and were required to go out into the community to recruit volunteers who were under the influence of drugs to participate in the evaluations. (DC0133, DC0188). Instructors identified high drug traffic locations in Minneapolis where students could possibly find individuals under the influence of drugs, such as the lakes area, under bridges, bus stops and outside homeless shelters. (DC0016, DC0081, DC0094, DC0170, DC0238, DC0292, DC0303, DC0307, DC0362, DC0365, DC0401, DC0444, DC0490).

Schuenke was partnered with Deputy Michael Hadland of the Fillmore County Sheriff's Office ("Hadland") during the entire field certification training and they utilized Schuenke's squad car when out seeking volunteers. (DC0188, DC0443-44, DC0448). If they saw someone they believed to be under the influence of drugs, they would approach the individual, identify themselves, and explain that they were in the city to conduct evaluations on individuals under the influence of drugs as part of their DRE training. (DC0188). Any individuals who were under the influence and willing to volunteer were

transported in Schuenke's squad car to the evaluation facility. (DC0189). Volunteers were not handcuffed. (DC0189) To encourage participation, students were instructed to assign fake names to the volunteers so as to allow them to retain their anonymity. (DC0061, DC0134, DC0189, DC0445). Upon completion of an evaluation, Schuenke and Hadland would typically buy a fast food meal for volunteers as compensation for their time and would then drive the volunteers to a location of their choice within Minneapolis. (DC0189).

B. Occupy Minnesota Movement

While the field certification training was being conducted, the Occupy Minnesota Movement was located on Peavey Plaza in downtown Minneapolis. Some of the students sought volunteers at this location. One of the DRE students who sought volunteers at Peavey Plaza was Deputy Michelle Ness of the Olmsted County Sheriff's Office (along with her partner State Trooper Bryan Bearce) who stated the following in that regard:

> You know it wasn't even that we were, we were driving around and there's a um a homeless shelter not too far kinda off ah Currie, 1010 Currie Ave or something like that I remember the name of it up there you know we went up there we were, we found a lot of people up there that would be willing to come you know come with us. A lot of 'em use various kinds of drugs and we found, we found a lot of different stuff going on there. We found Peavey Plaza almost by accident. We were just driving along and we kinda looked over to Peavey and we're like whoa concentration of potential clients. So we actually parked our squad and we walked out on Peavey Plaza and we, we really didn't know what was going on I mean we were truly like not sure so we walked up to this, this group of maybe ten people and we're just you know Brian [sic] and I were both very just like outgoing, friendly we're not mean we're just kinda you know relaxed. We're like hey what's going on, why are you guys down here and just chatty and we talked to these people for probably a good ten minutes just kind of asking 'em what was going on, how ya doin', what are you guys here for. Oh Occupy Minnesota. Oh yeah, yeah you know. You know so we, they were kinda

> looking at us and looking at our patches like where are you from. And then it started the well let me um we'll tell you why we're down here. So we gave the speech of this is why we're here. And ah you know all of 'em were laughing like oh you'd give me a pack of cigarettes if I went with you. We're like look we need people that are high though. Oh yeah I just smoked weed you know half an hour ago. Like alright let's start over, so I remember my partner was like okay, who here smokes marijuana. And literally everyone raised their hands except for one woman. And I looked at her and I kind of laughed and pointed to her I'm like what's up with that she goes well I'm pregnant right now. Oh okay-okay. So then you know at that point we were getting, I'd say bored with people who were just doing marijuana we were looking for other harder drugs. Alright who here uses ah you know cocaine. And a couple raised their hand. Who here used meth I mean it was like a, they were just it was funny really that the, they'd be so honest and so you know here's two cops asking who uses what drugs they were just like ohh me and raising their hands.

(DC0097-98).

Schuenke and Hadland went to Peavey Plaza and sought volunteers on two occasions, once on April 25, 2012, and once on April 27, 2012. (DC0142, DC0447). On the first occasion, two people (one man and one woman) volunteered to be evaluated. (DC0447). During their second visit, Schuenke and Hadland were videotaped by members of the Occupy Minnesota Movement. (DC0448). As discussed later in this memorandum, while being videotaped, Schuenke and Hadland were asked why DRE students were providing drugs to people. (DC0142, DC0448). Schuenke denied the allegation and stated that if other officers were doing that, it was behavior he did not condone. Schuenke and Hadland were unsuccessful in getting any volunteers on the second occasion and returned to the Richfield Facility. (DC0448). Upon returning to the Richfield Facility, they advised Munoz and other students about being videotaped and recommended that other students not seek volunteers from that location. (DC0142).

Video from this encounter was subsequently posted by the Occupy Minnesota Movement on YouTube. (Complaint, ¶40; DC0184; DC0507).[2]

C. BCA Investigation

On May 3, 2012, the last day of field certification training, one of the students, Deputy Andrew Mahowald of the Chisago County Sheriff's Office, ("Mahowald") reported to Munoz that he witnessed his partner give what he believed to be a baggie of marijuana to a volunteer and that the volunteer smoked it. (DC0137-38). Mahowald's partner was Officer Karl Willers of the Hutchinson Police Department. (DC0137-38). As a result, the Hutchinson Police Chief requested that the Minnesota Bureau of Criminal Apprehension ("BCA") conduct an investigation into the allegation, which it agreed to do. (DC0005).

Special agents of the BCA conducted an interview of Mahowald who alleged the following:

- He was a participant in the DRE course held in April-May, 2012. (DC0014-15).
- During the field certification training, he was partnered with Karl Willers of the Hutchinson Police Department. (DC0017).
- In completing the field certification training, participants were instructed to seek volunteers who appeared to be under the influence for purposes of evaluation. (DC0015). It was recommended that participants look for volunteers primarily in downtown Minneapolis due to the high number of people and higher drug activity. (DC0015-16).
- On Friday, April 27, 2012, he and Karl Willers went to Peavey Plaza where they saw two other DRE students talking to a group of people. (DC0021, DC0031). One of the students was a deputy with Olmsted County and the other was a state trooper. (DC0022). He spoke to one of the officers who indicated that there were

[2] In their Notice of Claim to the Defendants, Plaintiffs notified the Defendants that their encounters with the DRE Program were set forth in part in the following video available online: http://www.youtube.com/watch?v=vTgN17FZGKE or that the video would appear by using the search engine of "Minnesota DRE" on YouTube.

a lot of people in the area who were admitted users, but were unwilling to volunteer or were not high at that time. (DC0021). He next observed Karl Willers talking to two individuals. (DC0021). One of the individuals admitted to taking methadone that morning and admitted that he was a heroin user. (DC0022). (It was later determined that the admitted heroin user was Jay Roland ("Roland") and the other individual was Plaintiff Forest Olivier ("Plaintiff Olivier"). (DC0056-58)).

- Karl Willers asked the two individuals "What if you had some marijuana to smoke or I might have some marijuana for you to smoke?" or words to that effect. (DC0022). In response, Roland winked and responded, "Then I might be able to come in and do an evaluation." (DC0022). Roland and Plaintiff Olivier got into Mahowald's squad car and were driven to an area near the Richfield Facility where Karl Willers provided them with marijuana, which they smoked. (DC0022-24, DC0033-34).
- Roland and Plaintiff Olivier were subsequently transported to the Richfield Facility to be evaluated, but were denied entry by Munoz because they were recognized as being two of the individuals who Schuenke and Hadland had encountered during the videotaping incident while at Peavey Plaza earlier that day. (DC0029-30).

Special agents of the BCA also conducted an interview of Plaintiff Michael Bounds ("Plaintiff Bounds") who alleged the following during his interview:

- On the afternoon of April 26, 2012, a deputy from Dakota County and a deputy from Pine County picked him up on Nicollet Avenue across from the Target Center. (DC0042, DC0043).[3]
- He did not know the names of the deputies, but identified the counties they were from by looking at the patch on their respective uniforms. (DC0042).
- The deputies were in a marked State Patrol car.[4] (DC0042, DC0043).
- The deputies told him that they were participating in a drug recognition training program and asked him if he would be willing to participate. (DC0043).
- Plaintiff Bounds agreed to do so after which the deputies drove him to the fifth deck of the 6th Street parking ramp near the Target Center. (DC0043, DC0047).
- In the parking ramp, the deputies provided him with some marijuana which he smoked using his own pipe. (DC0043, DC0046, DC0047).

[3]The only Dakota County deputy that participated in the training was Schuenke and he was partnered with Hadland during the entire field certification training. (DC0006, DC0188, DC0443-44, DC0448). There were no participants from Pine County. (DC0006).

[4] Schuenke used his county squad car during the field certification training. (DC0448).

- He smoked "a couple of bowls" after which the deputies provided him with a quarter sack of weed and told him they would give it to him in exchange for him acting as an informant. (DC0043-DC0044).
- After leaving the parking ramp, the deputies dropped him off at Peavey Plaza. (DC0045).

Subsequently, at the request of the BCA, security staff from the Minneapolis Parking Authority reviewed all the April 26, 2012, video for the parking ramp. In doing so, no squad cars were seen entering the parking ramp or going to any of the level 5 decks within the ramp. (DC0039).

Special agents of the BCA also interviewed Plaintiff Olivier who alleged the following during his interview:

- He was approached and agreed to be evaluated as part of the DRE program on three separate occasions. (DC0054).
- The first occasion was on Friday, April 27, 2012. (DC0054-56). On this occasion, he was at Peavey Plaza and two of his friends who had just returned from being evaluated, were "stoned" and said that the officers had provided them with "free weed." (DC0055-56). Upon learning this, he approached the two officers who were still at Peavey Plaza. (DC0055-56). He agreed to volunteer and got into their car. (DC0055-56). Before getting into the car, the officers described to him what the DRE program was. (DC0061).
- On the first occasion, he "thinks" the officers were a Dakota County deputy and an Anoka County deputy driving a State Patrol car.[5] (DC0054-56). He did not know the names of the deputies. (DC0055).
- The deputies drove him and two others to the Richfield Facility and upon their arrival, the deputies provided him with a baggie of marijuana, which he and the other two volunteers smoked. (DC0056-57). The deputies gave him a bowl to smoke the marijuana and let him keep if afterwards. (DC0056). He smoked eight bowls of marijuana after which the officers evaluated them. (DC0056-57).

[5] The only Dakota County deputy that participated in the training was Schuenke and he was partnered with Hadland during the entire field certification training; and they utilized Schuenke's county squad car. (DC0006, DC0188, DC0443-44, DC0448). There was one Anoka County deputy (i.e., Chris McCall) that participated in the training, but he was partnered with Deputy Kenneth Willers of the Nobles County Sheriff's Office. (DC0271, DC0373-74).

- The second occasion occurred on Saturday, April 28, 2012. (DC0054-55). On this occasion he and Roland were approached by two officers – a Hutchinson police officer named "N. Jacobson" and a Kanabec County deputy, whose name he did not recall.[6] (DC0056-58). On this occasion, he was provided marijuana by N. Jacobson and he and Roland smoked a combined twelve (12) bowls. (DC0059, DC0063).[7]
- The third occasion occurred on May 3, 2012. (#DC0054-55). On this occasion, a deputy from Fillmore County and a deputy from Olmsted County transported him to a location near the Richfield Facility and provided him with marijuana to smoke, which he did.[8] (#DC0059). He did not recall the names of the deputies. (DC0060). The deputies subsequently brought him to the Richfield Facility to be evaluated, but he was denied entry.[9] (DC0059).

During the investigation, BCA special agents identified two members of the Occupy Minnesota Movement that gave statements to the media regarding the allegations of DRE students providing drugs to volunteers. (DC0462). The two individuals were identified as Roland and Donald Turner ("Turner"). (DC0462). The BCA special agents made several attempts to locate Roland and Turner to conduct interviews, but were unsuccessful in locating them. (DC0462). Subsequently, Turner called Special Agent

[6] There was a Nicholas Jacobson that participated in the training, but he was a deputy with the Olmsted County Sheriff's Office and was partnered with Trooper John Schmutzer for the field certification training. (DC0006, DC0106, DC0293).

[7] This is most likely the encounter referenced by Mahowald. The YouTube video posted by the Occupy Minnesota Movement, shows Plaintiff Olivier and Roland entering Mahowald's squad car.

[8] The only Fillmore County deputy that participated in the training was Hadland who was partnered with Schuenke during the entire field certification training. (D0006, DC0188, DC0443-44, DC0448). There were two deputies from Olmsted County that participated, but they were each partnered with a state trooper. (DC0006, DC0095, DC0106, DC0236, DC0293).

[9] It was on April 27, 2012, that Plaintiff Olivier was denied entry to the Richfield Facility after Schuenke and Hadland had returned to the facility and advised Munoz and other students that were present at the time about their videotaping encounter with Movement members and recommended that other students not seek volunteers from that location.

Swanson of the BCA and agreed to be interviewed. (DC0474). The interview was conducted on June 15, 2012, during which Turner provided the following information:

- Turner is deeply involved with the Occupy Minnesota Movement and is affiliated with Occupy Wall Street. (DC0479, DC0482).
- While at Peavey Plaza, he had contact with some DRE students who were looking for people under the influence to evaluate. (DC0476). His friend Jay Roland told him that it was okay and that Turner could use a fake name.[10] (DC0476). He smoked some marijuana with Roland at Peavey Plaza and then was taken to the Richfield Facility by a state trooper and was evaluated. (DC0476). Following the evaluation, he was driven to a gas station where one of the DRE students purchased him a pack of cigarettes after which, they dropped him back off at Peavey Plaza. (DC0476). At no time was he provided any drugs by any of the DRE students. (DC0476, DC0481).
- Turner claimed that he knew that the allegations made regarding DRE students providing drugs to volunteers was false and specifically mentioned Plaintiff Olivier as someone who lied about the allegations. (DC0477-78). Turner stated that Plaintiff Olivier is at Peavey Plaza on a daily basis and "tries to mooch weed and drugs." (DC0477). The marijuana bowl that Plaintiff Olivier claims was provided to him by DRE students was actually given to him by Turner. (DC0477-78). Turner believes that Plaintiff Olivier's motivation to lie was a desire for notoriety. (DC0480).
- Turner said that the DRE students did not seek any information regarding the Occupy Minnesota Movement and were not even aware of what the Movement was until people at Peavey Plaza told them. (DC0479-80). Their primary concern was to find volunteers and they did not care who you were. (DC0479-80). Turner had no knowledge of any officers providing drugs to anyone. (DC0481).

Aside from Mahowald, BCA special agents attempted to interview the other twenty-five (25) DRE students. Of those, four declined to be interviewed, nineteen (19) agreed to be interviewed, and two declined to be interviewed, but provided written statements.[11] Those that were interviewed or provided written statements denied

[10] Turner had warrants out for his arrest at the time. (DC0479).

[11] The students who declined to be interviewed included: Karl Willers of the Hutchinson Police Department (DC0067-71); Mark Hanneman of the Hutchinson Police Department (DC0072-74); Troy Kemp of the Coon Rapids Police Department (DC0146-148); and Peter Zajac of the Farmington Police Department (DC0191-193). The students who

providing any drugs to any volunteers, denied that their partners had provided any drugs to volunteers, denied seeing any other students providing drugs to volunteers and denied having any knowledge of students providing drugs to volunteers. (DC0083, DC0086, DC0098, DC0108, DC0157-58, DC0167-68, DC0179, DC0182, DC0189, DC0201-04, DC0213, DC0218, DC0244, DC0274, DC0276, DC0291, DC0306, DC0308, DC0311, DC0326-31, DC0343, DC0348, DC0354, DC0364, DC0367, DC0390, DC0392, DC0404-05, DC0425, DC0448, DC0491, DC0493).

Following the completion of its investigation, the BCA referred the matter to the Hennepin County Attorney's Office for charging consideration. The Hennepin County Attorney's Office declined to file charges. (DC0500-DC0514).

III. STANDARD FOR RULE 12(B)(6) MOTION TO DISMISS

Under Fed.R.Civ.P. 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The Rule 8 pleading standard does not require "detailed factual allegations," but it demands more than an "unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citation omitted). "A pleading that offers labels and conclusions or formulaic recitation of the elements of a cause of action

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declined to be interviewed, but provided written statements were Schuenke (DC0186-190) and Daniel Lewis of the Kanabec Sheriff's Office (DC0221-225).

will not do." *Iqbal*, 556 U.S. at 678, *quoting Twombly*, 550 U.S. at 555 (internal quotation marks omitted). "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678, *quoting Twombly*, 550 U.S. at 557 (internal quotation marks omitted).

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, *quoting Twombly*, 550 U.S. at 570 (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, citing *Twombly*, 550 U.S. at 556. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678, *quoting Twombly*, 550 U.S. at 557 (internal quotation marks omitted).

As noted by the Supreme Court, two working principles underlie its decision in *Twombly*:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Twombly*, 550 U.S. at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation"). Rule 8 marks a notable and generous departure

> from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Twombly*, 550 U.S. at 556. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

Iqbal, 556 U.S. at 678-79.

In considering a motion to dismiss, a court can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 679. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

When considering a motion to dismiss under Rule 12(b)(6), this Court may rely on the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings and matters of public record. *Miller v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010) citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). Accordingly, this Court may consider the investigative file compiled by the BCA during the course of its investigation into the allegations that Defendant Karl Willers

provided marijuana to volunteers as well as the YouTube video posted by the Occupy Minnesota Movement.

IV. ARGUMENT

A. THE § 1983 CLAIM AGAINST THE DAKOTA COUNTY SHERIFF'S OFFICE SHOULD BE DISMISSED BECAUSE IT IS NOT AN ENTITY SUBJECT TO SUIT.

In their Complaint, Plaintiffs aver a § 1983 claim against the Dakota County Sheriff's Office in its capacity as the employer of Defendant Schuenke. For the reasons discussed below, the § 1983 claim against the Dakota County Sheriff's Office should be dismissed.

Municipal police departments are not legal entities subject to suit under § 1983. *Anderson v. City of Hopkins*, 805 F.Supp.2d 712, 719 (D.Minn. 2011) citing *In re Scott Cty. Master Docket*, 672 F.Supp. 1152, 1163 n.1 (D.Minn. 1987); *Ketchum v. City of West Memphis*, 974 F.2d 81, 82 (8th Cir. 1992) ("The West Memphis Police Department and West Memphis Paramedic Services are not juridical entities suable as such. They are simply department or subdivisions of the City government."); *Franco v. Grant*, 2010 WL 663855, *6 (D.Minn. Feb. 22, 2010) ("A municipal police department is not a cognizable legal entity, or person subject to suit under § 1983, but is simply part of a larger municipality"). This Court has similarly held that a sheriff's department is not subject to suit as it does not have a legal existence separate from the county. *Franco*, 2010 WL 653855 at *6, citing *Polta v. City of St. Paul Police Dep't*, 2006 WL 1174210 at *2 (D.Minn. May 1, 2006).

In *Franco*, the plaintiff commenced suit averring several state claims and a claim under 42 U.S.C. § 1983 arising from events related to plaintiff's arrest, the execution of two search warrants at his home, and the removal from his home of weapons and chemicals as suspected evidence of a methamphetamine laboratory. *Franco*, 2010 WL 653855 at *1. Plaintiff named several defendants including the Dakota County Sheriff's Office, the Dakota County Attorney's Office, and the Lakeville Police Department. These three defendants moved to dismiss plaintiff's claims arguing that the complaint failed to state a claim upon which relief could be granted. Specifically, they argued that they were not legal entities separate from their respective county or city organizations and therefore were not entities which could be sued. *Id*., at *5-6. The Court agreed and held that the three were not legal entities subject to suit. *Id*., at *6.

Here, because the Dakota County Sheriff's Office is a sub-entity of Dakota County, Minnesota, it is not a separate legal entity subject to suit. Accordingly, the § 1983 claim against it must be dismissed.

B. THE § 1983 CLAIM AGAINST DEFENDANT SCHUENKE SHOULD BE DISMISSED.

Plaintiffs sued Defendant Schuenke under 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

42 U.S.C. § 1983. To establish a § 1983 claim, one of the elements Plaintiffs must prove is that Defendant Schuenke deprived them of a right secured by the Constitution or laws

of the United States. The gravamen of Plaintiffs' § 1983 claim is that the individual Defendants who participated in the DRE field certification training allegedly provided marijuana to them, transported them to an evaluation facility where they were evaluated and returned them to "the streets in a high and incoherent state."(*See Complaint*, ¶¶*15-16*). Plaintiffs assert that the foregoing actions violated their First, Fourth, Eighth and Fourteenth Amendment rights. For the reasons discussed below, the § 1983 claim against Defendant Schuenke should be dismissed.

1. No factual allegations in Complaint that Defendant Schuenke violated Plaintiffs' constitutional rights.

To successfully plead a § 1983 claim, Plaintiffs must allege a set of historical facts, which, if proven true, would demonstrate that Defendant Schuenke violated their constitutional rights while acting under color of state law. *Delgado-O'Neil v. City of Minneapolis*, 2010 WL 330322 at *6 (D.Minn Jan. 20, 2010) citing *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). Liability under § 1983 requires a causal link to, and direct responsibility for, the deprivation of rights protected by the Constitution. *Delgado-O'Neil*, 2010 WL 330322 at *6, citing *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990); *Speed v. Ramsey County*, 954 F.Supp. 1392, 1397 (D.Minn. 1997) (quotations omitted). Plaintiffs must plead facts showing Defendant Schuenke's personal involvement in alleged constitutional wrongdoing. *Delgado-O'Neil*, 2010 WL 330322 at *6, citing *Ellis v. Norris*, 179 F.3d 1078, 1079 (8th Cir. 1999); *Beck v. LaFleur*, 257 F.3d 764, 766 (8th Cir. 2001) (upholding summary dismissal of civil-rights claims because plaintiff's complaint "failed to allege sufficient personal

involvement by any of defendants to support such a claim"). In sum, when a plaintiff seeks relief under § 1983, plaintiff's complaint must set forth specific factual allegations showing what each named defendant allegedly did, or failed to do, while acting under color of state law, which purportedly violated plaintiff's federal constitutional rights. *Delgado-O'Neil*, 2010 WL 330322 at *6, citing *Iqbal*, 556 U.S. at 676 (explaining that a plaintiff "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution"). In other words, Plaintiffs must plead facts showing Defendant Schuenke's direct responsibility for the constitutional violation. *Delgado-O'Neil*, 2010 WL 330322 at *6

There are no facts averred in the Complaint that Defendant Schuenke gave marijuana to any of the Plaintiffs, transported any of the Plaintiffs or conducted evaluations of any of the Plaintiffs. To the contrary, Plaintiff Bounds did not identify which Defendants he had contact with (*Complaint,* ¶*28*); Plaintiff Olivier identified Defendants Nicholas Jacobson, Karl Willers and Kenneth Willers (*Complaint,* ¶¶*33-39*); and the remaining Plaintiffs failed to identify any of the Defendants and instead simply averred that they "had similar experiences." (*Complaint,* ¶*42*).

Plaintiffs have failed to plead facts showing Defendant Schuenke's direct responsibility for any constitutional violation. Accordingly, Plaintiffs' § 1983 against Defendant Schuenke must be dismissed.

2. Plaintiffs' Complaint fails to state a cognizable constitutional violation.

Assuming arguendo that Defendant Schuenke did engage in the activity as asserted by Plaintiffs, the § 1983 claim must be dismissed because the alleged activity does not rise to a constitutional violation.

At the outset, conduct in which one voluntarily engages can hardly be said to rise to a constitutional violation. This is most obvious in the case of Plaintiff Olivier who, according to the Complaint and his statement to the BCA, volunteered to be evaluated on three separate occasions. (*Complaint*, ¶*33*; DC0054). Plaintiffs were not forced in any way, shape or form to volunteer to participate in the DRE field certification training evaluations. Even assuming arguendo that any of the Plaintiffs were provided marijuana, their consumption of said marijuana was voluntary as well. There is no evidence or allegation that Plaintiffs' wills were overborne or that they were offered inducements that they did not have the power to resist if they chose. Given that Plaintiffs volunteered and consented to participating in the DRE field certification training evaluations, the Complaint fails to state a cognizable constitutional violation and their § 1983 claim must be dismissed.

Even if this Court examines each constitutional claim alleged by Plaintiffs, as discussed below, their § 1983 claim must still be dismissed.

a. <u>First Amendment</u>.

Plaintiffs assert that the Defendants' alleged actions violated their First Amendment rights to free speech and peaceable assembly averring that:

> Indeed, officers running the Program were instructed to specifically target Occupy Minneapolis protesters exercising their First Amendment right to free speech and peaceable assembly, and in fact targeted such individuals.
>
> (*Complaint*, ¶*13*).
>
> The Defendants' conduct was contrary to (among other things) the Plaintiffs' First Amendment right to free speech and peaceable assembly. . . .
>
> (*Complaint*, ¶*20*).

In considering a motion to dismiss, this Court can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 679. Here, this Court need not accept as true the above averments because they are nothing more than legal conclusions couched as factual allegations.

The Complaint fails to state sufficient facts to support Plaintiffs' assertion that Defendant Schuenke violated their First Amendment rights. First, as discussed earlier, Plaintiffs do not aver any facts that Defendant Schuenke was directly responsible for violating their First Amendment rights. Plaintiffs claim that "officers running the Program" were responsible for "targeting Occupy Minneapolis protesters;" however, they failed to identify who those officers were. Clearly Defendant Schuenke was not an "officer running the Program" – he was a student.

Second, Plaintiffs do not aver how the alleged activity complained of infringed on their First Amendment rights to free speech and peaceable assembly. There are no facts averred that Defendant Schuenke placed restrictions on the content of Plaintiffs' speech. There are no facts averred that Defendant Schuenke placed any time, place or manner

restrictions on Plaintiffs' speech. There are no facts averred that Defendant Schuenke acted against Plaintiffs in retaliation for exercising their First Amendment rights.

Plaintiffs' assertions regarding the alleged First Amendment violation belie what actually occurred in this case. For example, as indicated by Defendant Ness during her BCA interview, she and her partner "found Peavey Plaza almost by accident" and did not know what was going on until a group they approached at Peavey Plaza told them that they were there as part of "Occupy Minnesota." (DC0097-98). This is supported by Donald Turner, who identified himself as being deeply involved in the Occupy Minnesota Movement. According to Turner, the DRE students did not seek any information regarding the Occupy Minnesota Movement and were not even aware of what the Movement was until people at Peavey Plaza told them. (DC0479-80). According to Turner, the students' primary concern was to find volunteers and they did not care who you were. (DC0479-80).

Most telling is the YouTube video that was posted by the Occupy Minnesota Movement. At the 4:33 mark, the video shows Defendants Schuenke and Hadland approach a group of individuals at Peavey Plaza on April 27, 2012. They are being videotaped by an unknown male individual ("videographer") and Defendant Hadland asked the videographer to turn the camera off telling him that they are only there to do evaluations. The videographer continued taping and neither Defendant Schuenke nor Defendant Hadland took any actions to prevent or stop the videographer from taping them.

At the 7:46 mark of the video, Defendant Schuenke can be seen conversing with Plaintiff Olivier and Jay Roland. This conversation takes place on the sidewalk outside of Defendant Schuenke's squad car. Defendant Hadland is standing on the street on the opposite side of the squad car. The videographer approaches the squad car and as he does so is asked by Defendant Schuenke to "stop recording." Defendant Hadland then walks around the car and requests the videographer to "please turn the camera off" because his family has been threatened before and he "would appreciate not being on anything." Defendant Hadland goes on to tell the videographer that:

> We're not here to bug you guys. Okay. We're here to do some other stuff, so if you could turn that off or not face it towards us, I would really appreciate it. Like I said, my family's been threatened and me, my life, so I really don't want to be on anything. Okay? That's the only reason I want it off.

The videographer tells Defendant Hadland that he will make sure that he does not include Defendant Hadland's face on any of the video. Defendant Hadland responds:

> Well, the thing is, like I said, I really don't care what you guys are doing up here. I'm not from up here. So more power to you. Okay? But, we're up here for a class and we don't need to get in trouble for anything. You understand that?"

The videographer responds that he does and continues taping. Again neither Defendant Schuenke nor Defendant Hadland took any actions to prevent or stop the videographer from taping them.

Defendant Schuenke did not deprive Plaintiffs of any rights secured by the First Amendment. Accordingly, their § 1983 claim cannot be maintained on that basis.

b. Fourth Amendment.

Plaintiffs assert in their Complaint that the Defendants' alleged actions violated their Fourth Amendment rights; however, Plaintiffs only make general allegations in that regard and fail to aver what Fourth Amendment right was violated. Based on the allegations set forth in paragraph 15 of the Complaint, it seems that Plaintiffs are asserting that when they were transported in a squad car for purposes of participating in an evaluation, they were in "police custody" and that this constituted a seizure for Fourth Amendment purposes. To the contrary, there was no Fourth Amendment violation because the encounters between the DRE students and the Plaintiffs were consensual and outside the scope of the Fourth Amendment.

The Fourth Amendment protects:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, an no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Fourth Amendment is not implicated in every encounter between a police officer and a citizen. *United States v. Flores-Sandoval*, 474 F.3d 1142 (8th Cir. 2007). There are three categories of police-citizen encounters: (1) consensual communications involving no coercion or restraint, (2) *Terry* stops – minimally intrusive seizures that are significant enough to invoke the Fourth Amendment and must be supported by reasonable suspicion, and (3) full-scale arrests that must be supported by probable cause. *Id*. at 1144-45, citing *United States v. Johnson*, 326 F.3d 1018, 1021 (8th

Cir. 2003); *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (quotations omitted).

"A consensual encounter does not implicate the Fourth Amendment." *Flores-Sandoval*, 474 F.3d at 1145. (citation omitted). Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. *Flores-Sandoval*, 474 F.3d at 1145. (citations and quotations omitted) Mere questioning by a police officer does not constitute a seizure. *Flores-Sandoval*, 474 F.3d at 1145. (citations and quotations omitted).

"A consensual encounter becomes a seizure implicating the Fourth Amendment when, considering the totality of the circumstances, the questioning is so intimidating, threatening, or coercive that a reasonable person would not have believed himself free to leave." *Flores-Sandoval*, 474 F.3d at 1145. (citations omitted). The court is to consider the totality of the circumstances, "not one particular detail," to determine whether a seizure occurred. *Flores-Sandoval*, 474 F.3d at 1145. (citations and quotations omitted). Factors indicating a seizure are: the presence of several officers, a display of a weapon by an officer, physical touching of the person, or the "use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Flores-Sandoval*, 474 F.3d at 1145. (citations and quotations omitted). "A seizure occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a suspect." *Flores-Sandoval*, 474 F.3d at 1145. (citations omitted).

Here, assuming arguendo that Defendant Schuenke transported one or more of the Plaintiffs for the purpose of evaluating them as part of his DRE field certification training, given the totality of the circumstances, the encounter was consensual and did not implicate the Fourth Amendment.

First, the initial contact with Plaintiffs took place at Peavey Plaza in downtown Minneapolis – a wide open, public space.

Second, Defendant Schuenke was not investigating any criminal activity; he was participating in DRE field certification training. The fact that Defendant Schuenke was not engaged in the investigation of any criminal activity is supported by the following facts: (1) he was outside of his territorial jurisdiction (i.e., Dakota County) and was partnered with another student who was also outside his territorial jurisdiction (i.e., Defendant Hadland, a Fillmore County Deputy); and (2) he and Defendant Hadland witnessed three volunteers smoke marijuana in front of them, two of which were a pimp and a prostitute, and none of these volunteers were placed under arrest or threatened with arrest. (DC0446).

Third, as evident in the YouTube video, Defendant Schuenke did not activate any flashing lights or any siren on his squad car while at Peavey Plaza seeking volunteers. See, *Greer v. City of Duluth*, 2007 WL 547737 at *9 (D.Minn. Feb. 19, 2007) citing *United States v. Barry*, 394 F.3d 1070, 1075 (8th Cir. 2005) (no seizure when officer approached defendant without activating lights on squad car); *United States v. Richardson*, 2006 WL 3061053 at *3 (D.Minn. Oct. 26, 2006) (no seizure when officer approached defendant on dark street at 1:40 a.m., shone light on him, and requested to

speak to him); *United States v. Marasco*, 466 F.Supp.2d 1073, 1079-80 (D.Neb. 2006) (reasonable person would feel free to leave when squad car approached without lights or siren); *Dennen v. City of Duluth*, 2002 WL 832593 at *5 (D.Minn. May 1, 2002) (finding "no objective indications that [officer] was asserting his authority," when he approached defendant without turning on patrol vehicles lights or siren).

Fourth, volunteers that agreed to participate in an evaluation were not handcuffed while being transported. (DC0189).

Fifth, volunteers were allowed to remain anonymous to protect their identities. (DC0061, DC0134, DC0189, DC0445).

Sixth, following completion of the evaluations, volunteers were transported to a location of their choice within Minneapolis. (DC0189).

Seventh, although Defendants Schuenke and Hadland were partnered together and jointly sought volunteers, the presence of two officers is not dispositive of the consensual nature of encounter. *Greer*, 2007 WL 547737 at *8 (citations omitted). Defendants Schuenke and Hadland clearly identified themselves as officers and stated that their purpose was to seek volunteers for evaluations. This is evident in the YouTube video posted by the Occupy Minnesota Movement.

At the 4:33 mark, the video shows Defendants Schuenke and Hadland approach a group of individuals at Peavey Plaza on April 27, 2012. Defendant Hadland asked the videographer to turn the camera off telling him that they are only there to do evaluations. The videographer continued taping and captured Defendants Schuenke and Hadland addressing the group during which they stated:

> Defendant Hadland: In this case we're just doing evals. We don't want peoples' names. We don't want to get anybody in trouble. We're here to [inaudible] eval to us. [inaudible] if you smoke weed or something like that, We don't care, we really don't. What we want to do is we'll take you for about 45 minutes of testing, but we gotta go down by the airport, so it takes, you know, 10 minute drive down there, 15 minutes. We do run 45 minutes of testing.
>
> Defendant Schuenke: We bring you right back, drop you right back off.
>
> Defendant Hadland: So, that's what we're doing. And like I said, we're, I'm not even from here. I'm from Fillmore County. So I'm way south of Rochester.

At the 7:46 mark of the video, Defendant Schuenke is seen conversing with Plaintiff Olivier and Jay Roland. This conversation takes place on the sidewalk outside of Defendant Schuenke's squad car. Defendant Hadland is standing on the street on the opposite side of the squad car. The videographer approaches the squad car and as he does so is asked by Defendant Schuenke to "stop recording." Defendant Hadland then walks around the car and requests the videographer to "please turn the camera off" because his family has been threatened before and he "would appreciate not being on anything." A conversation ensues in which Defendant Hadland explains to the videographer that he does not want to be videotaped due to safety concerns. Following his conversation with the videographer, Defendant Hadland returns to the opposite side of the squad door and opens the front passenger side of the squad car preparing to enter the car.

Defendant Schuenke continues talking to Plaintiff Olivier and Roland, but is primarily directing his comments to Roland. The entire conversation cannot be heard,

but the gist of the conversation is that Defendant Schuenke is telling them that he and Defendant Hadland are quitting early that night and that if they want to volunteer, it would need to be within the next hour; otherwise they would not be there again until May 3rd. Defendant Schuenke tells Plaintiff Olivier and Roland that he would give them his work number if they wanted to call him next Thursday (i.e., May 3rd) to volunteer. Defendant Schuenke then tells them they "would appreciate it." During this conversation, in response to something said by the Roland, Defendant Schuenke tells him that they are only picking up people who have already used. Roland tells Defendant Schuenke that other officers are providing volunteers with marijuana to smoke after which the following exchange takes place:

> Defendant Schuenke: Well, that's not true.
>
> Roland: No, it is, because I did it [inaudible]. I'm not a liar. It's true. Sat in back of the state trooper car and he handed me an evidence bag with a red sticky and everything, he handed it to me through the top of the bars and while he was driving, he had me roll up.
>
> Defendant Schuenke: I'm telling you that personally, I don't do that.
>
> Roland: I'm sure you don't.
>
> Defendant Schuenke: Whether or not other officers were doing that type of stuff, I don't condone that.

Defendant Schuenke then hands Roland a business card and tells him:

> So, that's my direct cell phone number down there. So like I said, on Thursday we're going to be here like from 3:00 p.m. to 11:00 p.m. So call me between that time on Thursday and I'll be able to pick you up and I'll bring you over to where

> we're doing the evaluations and bring you back to wherever you need to go. Okay?

Following this conversation, Defendants Schuenke and Hadland left Peavey Plaza without any volunteers.

Eighth, although Defendants Schuenke and Hadland were wearing their uniforms, including holstered firearms, there is no evidence that they brandished their weapons. See, *United States v. Drayton*, 536 U.S. 194, 205, 122 S.Ct. 2105, 2112, 153 L.Ed.2d 242 (2002) (presence of a holstered firearm is unlikely to contribute to the coerciveness of a police encounter absent active brandishing of the weapon); *Greer*, 2007 WL 547737 at *9 (no seizure when officer did not display any weapon) citing *United States v. Johnson*, 2001 WL 1640041 at *3 (D.Minn. Nov. 13, 2001) (no seizure when officer displayed, but did not draw gun); *United States v. Garcia*, 197 F.3d 1223, 1226 (8th Cir. 1999) (no seizure when officers did not touch defendant or block his path, did not have holsters showing, did not speak in harsh tones or raise their voices); *United States v. Robinson*, 984 F.2d 911, 914 (8th Cir. 1993) (where detectives did not display their weapons or threaten to arrest suspect, or use physical force or show of authority against suspect, the District Court property concluded that detectives' "continued questioning was a consensual encounter that did not constitute a *Terry* stop").

Finally, as evident in the YouTube video, Defendants Schuenke and Hadland did not employ any forceful language or tone of voice that a reasonable person would have found to be threatening or intimidating. To the contrary, they were courteous and

indicated that they would appreciate it if people would volunteer to participate in an evaluation.

Assuming arguendo that Defendant Schuenke transported one or more of the Plaintiffs in his squad car to participated in an evaluation, based on the totality of the circumstances of this case, the encounter was consensual and outside the scope of the Fourth Amendment.

Defendant Schuenke did not deprive Plaintiffs of any rights secured by the Fourth Amendment. Accordingly, their § 1983 claim cannot be maintained on that basis.

c. Eighth Amendment.

Plaintiffs assert that the Defendants acted with deliberate indifference to their medical needs in violation of the Eighth Amendment. (*See Complaint, ¶60*). The Eighth Amendment prohibits cruel and unusual punishment and is made applicable to the states by the Due Process Clause of the Eighth Amendment. The Amendment applies only to convicted criminal defendants against whom the state "has secured a formal adjudication of guilt in accordance with due process of law." *Ingraham v. Wright*, 430 U.S. 651, 671 n. 40, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).

In *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Supreme Court extended the Eighth Amendment prohibition on cruel and unusual punishment to protect prisoners against prison officials' "deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 104, 97 S.Ct. at 291. The Supreme Court held that punishment must be consistent with contemporary standards of decency and "conclude[d] that deliberate indifference to serious medical needs of prisoners constitutes

the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Id*. (citation omitted). The Eighth Circuit also applies the Eighth Amendment's deliberate indifference standard to claims brought by pretrial detainees concerning the denial of medical care. See *Hartsfield v. Colburn*, 371 F.3d 454, 456-57 (8th Cir. 2004) citing *Ervin v. Busby*, 992 F.2d 147, 150 (8th Cir. 1993).

Plaintiffs' reliance on the Eighth Amendment is misplaced. At the time of the alleged actions underlying Plaintiffs' § 1983 claim, Plaintiffs were not convicted defendants or pre-trial detainees who were inmates in a correctional facility.

Defendant Schuenke did not deprive Plaintiffs of any rights secured by the Eighth Amendment. Accordingly, their § 1983 claim cannot be maintained on that basis.

d. <u>Fourteenth Amendment</u>

Plaintiffs assert that the Defendants' alleged actions of providing them "with substantial quantities of drugs (principally marijuana)," observing them "while under the influence of drugs, and then releasing them "onto the streets in a high and incoherent state" violated their "Fourteenth Amendment rights to bodily integrity, essential human dignity, and privacy." (*Complaint, ¶¶15 and 20*).

The Due Process Clause of the Fourteenth Amendment provides "[n]or shall any State deprive any person of life, liberty, or property, without due process of law." *U.S. Const. amend. XIV*. The substantive component of the Due Process Clause protects only those rights considered to be "fundamental". *Friedman v. City of Overland*, 935 F.Supp. 1015, 1019 (E.D.Mo. 1996) (citations and quotations omitted). These "fundamental" rights include those clearly enumerated in the Bill of Rights and other rights recognized

by the Supreme Court as requiring constitutional protection." *Id*. Basic to these rights is the understanding that they are created only by the Constitution, not by state law. *Id*. (citations and quotations omitted).

A substantive due process violation only occurs if a government action "shocks the conscience." *Neal v. St. Louis County*, 52 F.Supp.2d 1090, 1093 (E.D.Mis. 1999) citing *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 1718, 140 L.Ed.2d 1043 (1998). In order to "shock the conscience," it is not enough that the government official's behavior meets the "lowest common denominator of customary tort liability." *White v. Smith*, 696 F.3d 740, 757 (8th Cir. 2012) *quoting Lewis*, 523 U.S. at 848-49. Rather, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id*., *quoting Lewis*, 523 U.S. at 849. "Only the most severe violations of individual rights that result from the 'brutal and inhumane abuse of official power' rise to this level." *White*, 696 F.3d at 757, *quoting C.N. v. Willmar Publ. Schs., Indep. School Dist. No. 347*, 591 F.3d 624, 634 (8th Cir. 2012).

The protections accorded by the substantive component of the Due Process Clause have generally been applied to matters concerning marriage, family, procreation and bodily integrity. *Friedman*, 935 F.Supp at 1020, citing *Albright v. Oliver*, 510 U.S. 266, 271-73, 114 S.Ct. 807, 812, 127 L.Ed.2d 114 (1994); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791, 2806-07, 120 L.Ed.2d 674 (1992). Previous decisions regarding a violation of substantive due process rights with regard to a right to bodily integrity have involved the State's affirmative decision or

action to intrude upon the sanctity of one's right to make decisions regarding his or her body or be protected from invasive medical procedures. *Friedman*, 935 F.Supp. at 1020. These decisions have viewed the right to bodily integrity as including abortion, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and *Planned Parenthood of Southeastern Pa v. Casey*, *supra*; stomach pumping, *Rochin v. People of California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); and administration of antipsychotic drugs, *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).[12] These decisions all involved the State's (or state actor's) deliberate overt decision to invade a person's right to maintain his or her body as they desired. *Friedman*, 935 F.Supp. at 1020.

The Complaint fails to state sufficient facts to support Plaintiffs' assertion that Defendant Schuenke violated their Fourteenth Amendment rights. As discussed earlier, Plaintiffs do not aver any facts that Defendant Schuenke was directly responsible for violating their constitutional rights. Plaintiff Bounds did not identify which Defendants he had contact with (*Complaint, ¶28*); Plaintiff Olivier identified Defendants Nicholas Jacobson, Karl Willers and Kenneth Willers (*Complaint, ¶¶33-39*); and the remaining Plaintiffs failed to identify any of the Defendants and instead simply averred that they "had similar experiences." (*Complaint, ¶42*).

[12] A number of circuit courts, including the 8th Circuit, have found Fourteenth Amendment due process violations when state actors have inflicted sexual abuse on individuals. See e.g. *Rogers v. City of Little Rock*, 152 F.3d 780 (1998) (finding that a rape of a woman by on-duty police officer was conscience shocking).

Assuming arguendo that Defendant Schuenke provided marijuana to one or more of the Plaintiffs for the purpose of evaluating them as part of the DRE certification field training, this action does not reach the level of a constitutional violation because it is not behavior that "shocks the conscience." This is especially true in light of the fact that Plaintiffs engaged in voluntary behavior by accepting and smoking any marijuana given to them. Plaintiffs always retained control over what they ingested and Defendant Schuenke took no affirmative action to intrude upon the sanctity of any of the Plaintiff's right to make decisions regarding their bodies.

Defendant Schuenke did not deprive Plaintiffs of any rights secured by the Fourteenth Amendment. Accordingly, their § 1983 claim cannot be maintained on that basis.

3. Defendant Schuenke is immune from liability under the doctrine of qualified immunity.

As an alternative basis, the § 1983 claim against Defendant Schuenke should be dismissed because he is immune from liability under the doctrine of qualified immunity.

Qualified immunity shields government officials from suit for official acts as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Thomsen v. Ross*, 368 F.Supp.2d 961, 968-69 (D.Minn. 2005) (citation and quotations omitted). Qualified immunity is not just immunity from liability, but also immunity from suit, from the burdens of having to defend the litigation. *Delgado-O'Neil*, 2010 WL 330322 at *9, citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Saucier v. Katz*, 533 U.S.

194, 200-01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). The application of qualified immunity is a question of law and should be decided by the court long before trial. *Thomsen*, 368 F.Supp.2d at 969, citing *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991).

Qualified immunity requires a two-part analysis. *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995). (citations omitted). The first inquiry in qualified immunity analysis is "whether the plaintiff's allegations establish a violation of the Constitution." *Sherbrooke v. City of Pelican Rapids*, 513 F.3d 809, 813 (8th Cir. 2008). If there is no constitutional violation, the inquiry is complete. *Hayek v. City of St. Paul*, 488 F.3d 1049, 1054 (8th Cir. 2007). If there is a constitutional violation, the Court inquires whether the constitutional right was clearly established at the time of the violation, such that a reasonable person would have known that his conduct violated a constitutional right. *Sherbrooke*, 513 F.3d at 813.

As discussed above, Plaintiffs have failed to sufficiently plead that Defendant Schuenke took any action that violated their clearly established First, Fourth, Eighth or Fourteenth Amendment rights. The Complaint contains no factual content regarding Defendant Schuenke's personal involvement in any violation of Plaintiffs' clearly established rights. Accordingly, the § 1983 claim against Defendant Schuenke should be dismissed on the basis of qualified immunity.

D. COUNT II OF THE COMPLAINT AVERRING A CLAIM UNDER MINN. STAT. § 3.736 AGAINST THE DAKOTA COUNTY SHERIFF'S OFFICE AND DEFENDANT SCHUENKE SHOULD BE DISMISSED.

In their Complaint, Plaintiffs aver a purported claim under Minn. Stat. § 3.736, the Minnesota Tort Claims Act. Minn. Stat. § 3.736 does not create a cause of action in and of itself. Rather, it defines the conditions under which the State, its agencies and employees may be held liable for damages resulting from the State's negligence. Because Count II does not state a claim for which relief may be granted, it must be dismissed.

V. CONCLUSION

For all the above reasons, Defendants Schuenke and the Dakota County Sheriff's Office's motion to dismiss should be granted and the Complaint against them be dismissed with prejudice.

Dated: April 9, 2013

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