

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dave Willett,

Plaintiff,

vs.

Arizona Department of Safety Officer
Curtis Plumb, #PS5899, et al.,

Defendants.

No. CV-15-08103-PCT-PGR

ORDER

Pending before the Court is defendants' Motion to Dismiss (Doc.7)¹, wherein the defendants seek the dismissal of the federal claims against them on the basis of qualified immunity and the state law claim against them on the basis that the plaintiff failed to file the required notice of claim. Having reviewed the parties' memoranda, the Court finds that the motion should be granted.

Background

According to the complaint, the plaintiff was driving a rental car on business on I-40 in Arizona on July 27, 2014 when he was pulled over for speeding by

1

The plaintiff left off two exhibits to his motion when it was filed. Instead of filing a notice of errata, the plaintiff re-filed the motion to dismiss with the inclusion of the two exhibits (Doc. 8). The docket lists the original motion (Doc. 7) as the pending motion, so the Court refers to it by that docket number.

1 defendant Curtis Plumb, an Arizona Department of Public Safety officer. Plumb,
2 after informing the plaintiff that many drug smugglers drive rental cars, asked the
3 plaintiff for consent to search his car, which the plaintiff denied. Plumb then forced
4 the plaintiff to get out of the car and remain at the scene while waiting for a drug
5 sniffing dog to arrive. The canine unit took seventeen minutes to arrive. The dog
6 circled the car twice before alerting on something. Plumb and co-defendant Gunnar
7 Hancock, another Arizona Department of Public Safety officer, then searched the
8 plaintiff's car and found nothing illegal in it. Only then did Plumb and Hancock allow
9 the plaintiff to leave the scene of the traffic stop. Although it is not absolutely clear
10 from the complaint, the plaintiff was apparently issued a citation for speeding,
11 presumably by Plumb, but no facts are alleged in the complaint establishing at what
12 point during the plaintiff's detention the citation was issued, or what Plumb was doing
13 during the wait for the arrival of the dog, or how long the entire stop took. While the
14 complaint also fails to allege when Hancock appeared at the scene of the traffic stop,
15 the Court presumes for purposes of the motion to dismiss that he was the officer
16 who brought the drug dog to the scene.

17 The complaint alleges three claims against both defendants: a federal claim
18 pursuant to 42 U.S.C. § 1983 for violating the plaintiff's civil rights under color of
19 state law and subjecting him to unreasonable searches and seizures (Count One);
20 a federal claim alleging a violation of the plaintiff's right under the Fourth and
21 Fourteenth Amendments to be free from searches and seizures without a warrant
22 (Count Two); and a state law claim for false imprisonment (Count Three).² The

23 2

24 The Court notes that Counts One and Two appear in effect to be the
25 same claim. It also notes, as to Count Two, that the plaintiff cannot bring a claim
26 directly under the Constitution since all federal claims alleging a violation of a
constitutional right must be brought pursuant to § 1983. Azul-Pacifico, Inc. v. City

1 complaint seeks general and punitive damages for the plaintiff's mental injury,
2 mental anguish and emotional losses.

3 Discussion

4 A. Count Three

5 The defendants have moved to dismiss Count Three, the state law false
6 imprisonment claim, on the ground that the plaintiff failed to comply with the notice
7 of claim requirement of A.R.S. § 12-821.01(A). See Salerno v. Espinoza, 115 P.3d
8 626, 628 (Ariz.App.2005) ("Compliance with the notice provision of § 12-821.01(A)
9 is a 'mandatory' and 'essential' prerequisite to such an action, . . . and a plaintiff's
10 failure to comply 'bars *any* claim.'" (emphasis in original). The Court concludes that
11 Count Three must be dismissed because the complaint fails to allege that the
12 plaintiff filed and served a notice of claim as to either defendant, and because the
13 plaintiff is deemed to have consented to the dismissal of this claim inasmuch as his
14 response to the motion to dismiss totally ignores this issue.³

15 B. Counts One and Two

16 The defendants have moved to dismiss Counts One and Two, the federal
17 claims, on the ground that both defendants are entitled to qualified immunity. Public
18 officials, such as the defendants, who are sued pursuant to 42 U.S.C. § 1983 are
19 entitled to qualified immunity unless it is shown that they have "violated a statutory
20 or constitutional right that was clearly established at the time of the challenged

21 _____
22 of Los Angeles, 973 F.2d 704, 705 (9th Cir.1992) ("Plaintiff has no cause of action
23 under the United States Constitution. We have previously held that a litigant
24 complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983.")

24 3

25 For this reason, the Court has not considered the two declarations from
26 the defendants regarding the non-service of a notice of claim that were attached as
exhibits to the motion to dismiss.

1 conduct.” Reichle v. Howards, ___ U.S. ___, 132 S.Ct. 2088, 2094 (2012). The purpose
2 of qualified immunity is to give “government officials breathing room to make
3 reasonable but mistaken judgments about open legal questions. When properly
4 applied, it protects all but the plainly incompetent or those who knowingly violated the
5 law.” Ashcroft v. al-Kidd, ___ U.S. ___, 131 S.Ct. 2074, 2085 (2011). A two-part test
6 is used to determine whether a public official is entitled to qualified immunity: first, do
7 the facts alleged by the plaintiff show a violation of a constitutional right, and second,
8 was the right clearly established at the time of the alleged misconduct. Carillo v.
9 County of Los Angeles, 798 F.3d 1210, 1218 (9th Cir.2015).

10 1. Violation of a constitutional right

11 The first prong of the qualified immunity test is met if the facts alleged in the
12 complaint, taken in the light most favorable to the plaintiff, show that the official’s
13 conduct violated a constitutional right. Brosseau v. Haugen, 543 U.S. 194, 197
14 (2004). The Court concludes that the plaintiff has sufficiently met this first prong as
15 to Plumb, albeit fairly marginally so given the relatively spare factual allegations in the
16 complaint, and the defendants do not appear to seriously argue otherwise. While the
17 defendants argue that the complaint’s allegations that the continued detention of the
18 plaintiff while waiting for the drug dog to arrive violated internal regulations of the
19 Arizona Department of Public Safety are irrelevant to the qualified immunity analysis,
20 the relevant issue is whether the plaintiff has sufficiently pleaded that his continued
21 detention to facilitate a dog sniff violated the Fourth Amendment, and the Court
22 believes that he has as to Plumb. See Rodriguez v. United States, ___ U.S. ___, 135
23 S.Ct 1609 (2015) (Court held that prolonging a police stop exceeding the time
24 needed to handle the matter for which the traffic stop was made in order to conduct
25 a dog sniff violates the Constitution’s shield against unreasonable seizures unless the
26

1 additional time is supported by independent reasonable suspicion of wrongdoing.)

2 The Court cannot reach the same conclusion as to Hancock because the
3 plaintiff's response in effect focuses solely on his argument that Plumb is not entitled
4 to qualified immunity; Hancock is never so much as mentioned by name in the
5 response, nor do the factual allegations of the complaint sufficiently show that
6 Hancock, who presumably brought the dog to the scene after the alleged 17 minute
7 delay following Plumb's traffic stop of the plaintiff, violated any of the plaintiff's
8 constitutional rights. All the complaint cursorily alleges as to Hancock is that he and
9 Plumb searched the plaintiff's car after the dog alerted on something and, after
10 finding nothing illegal, sent the plaintiff on his way. The complaint alleges no facts
11 showing any involvement by Hancock in the decision to stop the plaintiff or to detain
12 him pending the arrival of the dog, nor any facts showing how long Hancock detained
13 the plaintiff after he arrived on the scene. The Court concludes that the Hancock is
14 entitled to qualified immunity because the first prong of the test, the showing of a
15 violation of a constitutional right, has not been met as to him.

16 2. Clearly established law

17 Because the plaintiff has pleaded a constitutional violation as to Plumb,
18 whether Plumb is entitled to qualified immunity depends on whether the constitutional
19 right that the plaintiff asserts was violated by Plumb was "clearly established" at the
20 time of the alleged misconduct. Garcia v. County of Riverside, __ F.3d __,
21 2016WL1392326, at *7 (9th Cir. April 8, 2016). The plaintiff bears the burden of proof
22 that the right allegedly violated was clearly established as of July 27, 2014, the date
23 of the traffic stop. Tarabochia v. Adkins, 766 F.3d 1115, 1125 (9th Cir. 2014). In order
24 for a right to be clearly established, its contours must be sufficiently clear that a
25 reasonable official would understand that his actions violated that right. *Id.*

1 The gist of the plaintiff's argument is that "[i]t was clearly established at the
2 time of the stop that a traffic stop becomes an unreasonable seizure if the stop is
3 prolonged for a purpose unrelated to the purpose of the stop, or longer than
4 necessary to complete the traffic stop." While this contention is correct as a broad
5 general proposition, that is not sufficient for qualified immunity purposes inasmuch
6 as the Supreme Court has often emphasized that the inquiry into whether the
7 unlawfulness of the official's conduct was clearly established at that time "must be
8 undertaken in light of the specific context of the case, not as a general proposition."
9 Brosseau v. Haugen, 543 U.S. at 198; see *also*, Plumhoff v. Rickard, ___ U.S. ___, 134
10 S.Ct 2012, 2023 (2014) (Supreme Court stated that it has "repeatedly told courts ...
11 not to define clearly established law at a high level of generality since doing so avoids
12 the crucial question whether the official acted reasonably in the particular
13 circumstances that he or she faced.") (internal citation omitted). The Court's inquiry
14 must be whether at the time of the traffic stop the law clearly established that Plumb's
15 conduct violated the plaintiff's Fourth Amendment right in the particularized sense of
16 continuing the plaintiff's traffic stop for the length of time it took for the drug dog to
17 arrive, for the dog to conduct a sniff of his car, and for defendants to then search his
18 car. Although existing precedent as to this issue need not be a case directly on point,
19 especially in this Fourth Amendment context, that precedent "must have placed the
20 statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 131 S.Ct. at
21 2083; see *also*, Hope v. Pelzer, 536 U.S. 730, 739 (2002) ("This is not to say that an
22 official action is protected by qualified immunity unless the very action in question has
23 previously been held unlawful, ... but it is to say that in light of pre-existing law the
24 unlawfulness must be apparent.") The Court's inquiry is ended if the decisional
25 authority of the Supreme Court or the Ninth Circuit then clearly established the right
26

1 at issue, but in the absence of such authority, the Court may look to whatever
2 decisional law is available, including decisions of other circuits. Tarabochia v. Adkins,
3 766 F.3d at 1125.

4 Notwithstanding the many cases giving shape to the contours of when a Terry
5 stop becomes an unlawful seizure in violation of the Fourth Amendment, given the
6 Supreme Court's "demanding standard" for disallowing qualified immunity, Thomas
7 v. Dillard, ___ F.3d ___, 2016WL1319765, at *15 (9th Cir. April 5, 2016), the Court
8 cannot conclude that the plaintiff has met his burden of showing that the
9 constitutional issue here was "beyond debate" at the time of the traffic stop. Although
10 the Supreme Court, pursuant to Rodriguez v. United States, has now clearly
11 established that a traffic stop cannot be extended in order to conduct a dog sniff
12 absent reasonable suspicion, the Supreme Court did not issue that decision until
13 some nine months after the traffic stop of the plaintiff. As the Supreme Court noted
14 in Rodriguez, it granted certiorari in that case "to resolve a division among lower
15 courts on the question whether police routinely may extend an otherwise-completed
16 traffic stop, absent reasonable suspicion, in order to conduct a dog sniff." 135 S.Ct.
17 at 1614.

18 The plaintiff cites to some pre-Rodriguez Supreme Court cases related to Terry
19 stops such as Illinois v. Caballes, 543 U.S. 405 (2005), to support his position, but the
20 Court does not believe that any of them, singularly or collectively, are sufficient to
21 definitely establish that Plumb reasonably should have understood that his extension
22 of the traffic stop under the circumstances here was then unconstitutional. For
23 example, in Caballes, the Supreme Court, while noting that a traffic stop can become
24 unlawful if it is prolonged beyond the time reasonably required to complete the
25 mission of the stop, held that a dog sniff conducted during the pendency of a lawful
26

1 traffic stop that lasted less than ten minutes was constitutional.⁴

2 The plaintiff's argument is not further supported by citation to any Ninth Circuit
3 precedent related to traffic stops, or to any supporting decisions from other circuits.
4 While it may be a close question, the Court concludes that the relevant law was not
5 clearly established because there are decisions prior to July 2014 from other circuits
6 that lend support to the defendants' position that existing case law did not then make
7 the particular right at issue here beyond debate given that there was no established
8 *per se* rule as to how long a traffic stop could be constitutionally continued for
9 purposes of a dog sniff. By way of brief example, the Eighth Circuit, in its decision
10 in January 2014 in United States v. Rodriguez, 741 F.3d 905 (8th Cir. 2014), which
11 is the decision that the Supreme Court vacated and remanded after the traffic stop
12 at issue here, concluded that an officer who prolonged a traffic stop, that lasted a
13 total of some 29 minutes overall, for seven or eight minutes after its completion in
14 order to conduct a dog sniff did not violate the Fourth Amendment, and the Eighth
15 Circuit, in United States v. Gregory, 302 F.3d 805 (8th Cir.2002), had previously
16 concluded that a short detention for a dog sniff after the completion of a traffic stop
17 did not violate the Fourth Amendment when just over twenty minutes elapsed from
18 the beginning of the traffic stop to the completion of the dog sniff. Similarly, the
19 Eleventh Circuit, in United States v. Moore, 570 Fed.Appx. 848 (11th Cir. 2014), had

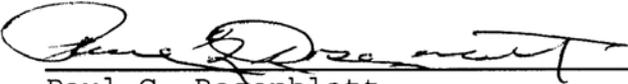
21 4

22 The Court notes that the resolution of the "clearly established" issue in
23 Terry-stop situations often depends very much on the facts of the case. Here, the
24 Court's resolution of the issue has been complicated by the plaintiff's failure to allege
25 pertinent facts in his complaint. For example, although the plaintiff asserts in his
26 response that "[t]raffic stops for speeding do not take 17 minutes," the complaint
does not allege facts pertaining to when the traffic stop was completed in relation to
the dog sniff and vehicle search or how long the plaintiff was detained after the
completion of the mission of the traffic stop.

1 concluded prior to the stop here that a traffic stop was reasonable in duration for
2 Fourth Amendment purposes when the dog sniff occurred some twenty-four minutes
3 after the traffic stop began. Therefore,

4 IT IS ORDERED that the defendants' Motion to Dismiss (Doc. 7) is granted and
5 that this action is dismissed in its entirety. The Clerk of the Court shall enter
6 judgment accordingly.

7 DATED this 25th day of April, 2016.

8
9 
10 Paul G. Rosenblatt
11 United States District Judge

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26