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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Richard Brubaker, et al.,
Plaintiffs,
v.
City of Tucson, et al.,
Defendants.

No. CV-10-00649-TUC-DCB (BPV)
ORDER

This matter was referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1)(B) and the local rules of practice of this Court for a Report and Recommendation (R&R) (Doc. 103) on Cross Motions for Summary Judgment (Docs. 84,86). Before the Court is the Magistrate Judge's Report and Recommendation (Doc. 103). The Magistrate Judge recommends to the Court that relief may be granted, as follows: 1) grant in part and deny in part the City Defendants' Motion for Summary Judgment and (2) grant in full Defendant Pima County's Motion for Summary Judgment. The City Defendants filed Objections (Doc. 106), Supplement Authority (Doc. 109), and the Plaintiffs filed a Response to the Objections (Doc. 110).

1 **FACTUAL AND PROCEDURAL BACKGROUND**

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3 On November 2, 2010, the City Defendants removed this action originally filed in
4 the Superior Court of Arizona for Pima County on September 30, 2010. Because
5 Plaintiffs' Complaint claimed deprivation of constitutional rights as well as state tort
6 claims of negligence, gross negligence, assault, battery, and intentional infliction of
7 emotional distress, this Court had federal question jurisdiction under 28 U.S.C. §1331 of
8 all claims for alleged violations of constitutional rights, 42 U.S.C. §1983, et seq.
9 Plaintiffs are private parties, while the Defendants are the City of Tucson and the Pima
10 County Board of Supervisors. The Complaint is based on police activity in September
11 2009, specifically police allegedly entered a residence by mistake using a search warrant
12 mistakenly specifying that there was probable cause that drugs would be inside the
13 premises and entered the home again the next day without a search warrant.

14 On December 15, 2010, the Court granted a Motion to Stay pending the outcome
15 of criminal charges related to the events at issue in this action. On April 29, 2016, the
16 Stay was lifted and the action again became viable. (The charges in the underlying
17 Tucson City Court Case CR13025792 were resolved on November 17, 2015.) On May
18 16, 2016, Plaintiffs filed an Amended Complaint (Doc. 52). A Rule 16 Scheduling
19 Conference was held and a case management schedule was entered by the Court. During
20 this time there were reports of settlement talks and discussions, including a referral to a
21 Magistrate Judge to preside over a settlement conference. On May 1, 2017, the City
22 Defendants filed a dispositive motion, as did the Pima County Defendants. Without the
23 need for oral argument, the Magistrate Judge issued a Report and Recommendation on
24 January 18, 2018. On February 12, 2018, the City Defendants filed Objections to the
25 Report and Recommendation. On February 22, 2018, the City Defendants filed
26 Supplemental Authority and on February 26, 2018, the Pima County Defendants filed a
27 Response to the Objections.

1 **STANDARD OF REVIEW**

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3 When objection is made to the findings and recommendation of a magistrate
4 judge, the district court must conduct a de novo review. *United States v. Reyna-Tapia*,
5 328 F.3d 1114, 1121 (9th Cir. 2003).

6
7 **DISCUSSION**

8 As pled in the First Amended Complaint¹:

9 ***

10 4. On or about September 30, 2009 Officer Pelton with the
11 assistance of Sgt. Woolridge and other unknown officers
12 obtained a search warrant from Judge Sharon Douglas of the
13 Pima County Superior Court without probable cause through
the means of mis-stating evidence and excluding relevant
information known to them that if disclosed would have
likely resulted in the denial of the requested warrant.

14 5. Sgt. Woolridge was the lead officer at the service of the
15 warrant on September 30, 2009. After entering the home Sgt.
16 Woolridge and the other officers determined that there were
17 no “drugs” present at the premises as specified in the search
18 warrant and were therefore, required to leave the premises.
19 Instead Sgt. Woolridge or other officers invited a City of
Tucson building inspector into the premises. That invitation
to enter and the subsequent entry without a warrant or
permission of Mr. Brubaker violated Sec. 16-42 and Sec. 16-
44 of the Neighborhood preservation Ordinance of the City of
Tucson and the Fourth Amendment of the United States
Constitution.

20 ***

21 7. The Tucson City Police Officers and Animal Control
22 Officers and building inspector returned the next day October
23 1, 2009 and entered once again the Brubaker residence
without permission or a search warrant.

24 8. The Pima County Animal Control Officers knew or should
25 have known that they could not lawfully enter the Brubaker
residence without a search warrant.

26 ¹ Adoption of the R&R will result in a civil jury trial to resolve: 1) whether the Plaintiffs’
27 constitutional rights, 42 U.S.C. §1983, were violated when judicial deception was
28 employed by Officers Pelton and Woolridge of the City of Tucson to obtain a search
warrant; 2) if so, were these false statements and omissions material to the judge’s
probable cause determination; and finally, 3) without the deceptive information would the
search warrant have been issued by the judge at all.

1 9. The Defendant Pima County is responsible for their
2 trespasses pursuant to respondent superior. (Doc. 52 at 2-3.)

3 Plaintiff Brubaker was charged with violations of Tucson City Code relating to
4 animal neglect and disposal of animal waste. After a trial, Brubaker was found guilty of
5 22 counts of neglect of medical care. Brubaker appealed and Pima County Superior
6 Court Judge Howard Fell found in Brubaker's favor, vacating all judgments and
7 sentences, and finding that the search warrant lacked probable cause, as follows:

8 Here, when Officer Pelton applied for the search warrant, he
9 incorrectly stated that Deal was arrested near 'a residence that
10 we have received information from concerned citizens that
11 they were selling narcotic drugs.' There were no such reports
12 for Brubaker's home. After obtaining the address using the
13 Pima County Assessor's map, TPD could have run a record
14 check for that residence to determine whether there were any
15 reports of drug related activity, rather than other houses in the
16 neighborhood or the community itself, but failed to do so. On
17 its own, the failure to a records check does not inherently
18 demonstrate a reckless disregard for the truth. However, when
19 coupled with the improper statements in the search warrant
20 and Officer Pelton's failure to inform Judge Douglas of
21 Deal's credibility, see discussion infra, the failure to perform
22 a records check for 6341 E. Calle Marte demonstrates a
23 reckless disregard for the truth.

24 Furthermore, TPD's desire to convert Deal into an informant
25 (i.e. checking his probation/parole status only)...rather than
26 confirming the credibility of his statements, also demonstrates
27 a reckless disregard for the truth. Sergeant Wakefield's III
28 records check included Tucson City Court, South Tucson, and
Pima County Superior Court filings and "quite often will
show arrests and convictions for jurisdictions nationwide."
The III records check would list "the offense, the jurisdiction
and it would list the disposition." That records check was
available for TPD review before applying for the search
warrant, and would have included at least four convictions for
False Reporting to Law Enforcement from Tucson
Municipal/City Court. Although this information was
available, Sergeant Wakefield did not distribute that
information to Sergeant Woolridge, Officer Pelton, or anyone
else involved with the investigation because that was not his
"specific objective." It is reckless disregard for the truth for
TPD to perform a records check on its sole informant in an
investigation and blatantly disregard the results of that
criminal background check, which directly affect the
credibility of the informant, because it was not the "specific
objective" of TPD at that time.

Accordingly, setting aside those portions of the affidavit, the
Court FINDS that there was not probable cause to support the

1 search warrant. Thus, the Court FURTHER FINDS that the
2 trial court erred when it denied Defendant Brubaker's Motion
3 to Suppress.

4 (Doc. 87-13 at 4-5.)

5 **A. CITY DEFENDANTS' OBJECTIONS²**

6 The R&R found judicial deception based on three findings: 1) That the search
7 warrant affidavit contained the false statement that Deal was arrested "in the area of a
8 residence that we have received information from concerned citizens that they were
9 selling drugs"; 2) The officers omitted from the affidavit that Deal initially lied about
10 why he was in the area; and, 3) The officers failed to review the records check which
11 included at least four convictions for false reporting to law enforcement.

12 City Defendants object to parts of the R&R (Doc. 103) denying City Defendants'
13 motion for summary judgment on the judicial deception and the state law trespass claims.
14 City Defendants maintain that there was no judicial deception. Plaintiffs' claim of
15 judicial deception, which is adopted by the R&R, is that Defendant Pelton's testimony
16 that "Deal was arrested 'in the area of a residence that we have received information from
17 concerned citizens that they were selling drugs'" was false because there were in fact no
18 reports of drugs being sold at Plaintiffs' residence. (Doc. 106 at 3.) This Objection
19 quibbles with the facts, the weight of the facts and the credibility assessed to the
20 witnesses statements and points of view. It parses the facts that the R&R finds as a whole
21 are material and unresolvable in a dispositive motion. The Magistrate Judge did not
22 abuse his discretion when he considered evidence not completely in compliance with
23 LRCiv 56.1(b); in any event, a jury trial will require consideration of the weight and
24 admissibility of all evidence.

25 Defendant Pelton never testified when he requested the warrant that Deal was a
26 man of impeccable honesty who had been completely truthful with him at all times
27 during his arrest. (Doc. 106 at 3-4.) The Magistrate Judge assumed that Deal was a police
28 "informant" for the purpose of executing the search warrant. "Informant" in this context

² No Objections were filed by the Pima County Defendants.

1 is a term of art that is more limited than anyone who provides police with any
2 information. *Id.* It refers to a person who is engaged by police to affirmatively seek out
3 information on criminal conduct. Deal was not such an “informant”. *Id.* Again, the
4 lodged objections repeat material facts that are unreviewable and unresolvable by a
5 dispositive motion. Further, the Court is placed in a position of choosing who and what
6 to believe, when credibility assessment is for the trier of fact.

7 The City Defendants maintain that the Magistrate Judge erred in equating the
8 voluntary proffer of information on drug activity with that of a paid informant. (Doc. 106
9 at 6.) The R&R further erred by extending the legal requirements applicable to
10 “confidential informants” to individuals who provide information to police in the course
11 of their own arrest. *Id.* The R&R established this new legal standard by viewing each
12 sentence in the search warrant “in isolation, rather than as a factor in the totality of the
13 circumstances.” *D.C. v. Wesby*, No. 15-1485, 2018 WL 491521 (U.S. Jan. 22, 2018). *Id.*
14 at 7. The Court does not find *Wesby* helpful in resolving a situation where, as here,
15 allegedly misleading statements were used to obtain a search warrant. The R&R does not
16 make any new standards for measuring police conduct. What, if anything, motivated Deal
17 is for the trier of fact to resolve.

18 Finally, the R&R incorrectly found that Officer Pelton and Sergeant Woolridge
19 “failed to review the records check which included at least four convictions for false
20 reporting to law enforcement” because they chose not to request that information. (Doc.
21 106 at 8-9.) Plaintiffs cannot make a “substantial showing” that Pelton or Woolridge
22 made a “deliberate falsehood” in the affidavit or recklessly disregarded the truth when it
23 is uncontroverted that they did not have Deal’s criminal background information prior to
24 the execution of the search warrant. *Id.* Again, these are all facts and arguments that a
25 jury may consider and resolve.

26 **B. Plaintiffs’ Response to Objections**

27 Plaintiffs respond that the objections are based in misunderstanding and
28 misapplying the English language; too narrowly defining the use of words to describe the

1 events to the search warrant judge. Plaintiffs also argue that the new case law does not
2 relate to the fact pattern involving misleading statements to obtain a search warrant and is
3 therefore not relevant.

4 **RULING**

5 It does appear that the R&R correctly highlights material questions of fact that
6 only a jury may resolve. In addition, after conducting a de novo review of the record, the
7 Court does not find that the R&R makes any new law or improperly interprets any law
8 currently on the books as to law enforcement actions. “In sum, once the false statement
9 is excised from the affidavit, all that remains are uncorroborated, unreliable informant
10 information which cannot support a finding of probable cause. Consequently, a
11 reasonable judge would not have issued the warrant upon being apprised of the accurate
12 version of the evidence. Therefore, Plaintiffs have satisfied the test to proceed on their
13 judicial deception claim.” (R&R at 27, ¶3-7.)

14 Accordingly,

15 **IT IS ORDERED** that the Report and Recommendation (Doc. 103) is
16 **ADOPTED** as the ruling of this Court. The City Defendant’s Motion for Summary
17 Judgment (Doc. 84) is **GRANTED** with regard to Plaintiffs’ claims of violation of Art. 2,
18 Sec. 8 of the Arizona Constitution and the Tucson City Code but denied on all other
19 grounds. The County Defendants’ Motion for Summary Judgment (Doc. 86) is
20 **GRANTED**. Objections are **OVERRULED**. No Final Judgment shall be entered at this
21 juncture. The Court will separately set a Pretrial Conference in preparation for a civil
22 jury trial.

23 Dated this 16th day of April, 2018.

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Honorable David C. Bury
United States District Judge