

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
LEWIS T. BABCOCK, JUDGE**

Civil Case No. 08-cv-00498-LTB-BNB

ANTONIO DELMONICO,

Plaintiff,

v.

JEFF CAPITO (Pueblo Police Officer), in his individual and professional capacities,  
NATHAN PRUCE (Pueblo Police Officer), in his individual and professional capacities,  
CITY OF PUEBLO, COLORADO, and  
JAMES BILLINGS, JR. (Chief of Pueblo Police Dept) in his individual and professional  
capacities,

Defendants.

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**ORDER**

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This case is before me on the Recommendation of the Magistrate Judge that Plaintiff's Motion for Summary Judgment (Doc 16) be denied and Defendants' Motion for Summary Judgment (Doc 54) be granted. The Magistrate Judge further recommends that summary judgment enter in favor of the Defendants on all of Plaintiff's constitutional claims and that his state law tort claims be dismissed without prejudice.

The Plaintiff has filed timely written objections to the Magistrate Judge's recommendations. In addition, Plaintiff has filed his Motion to Correct the Record. Because the Motion to Correct the Record and the objections to the Magistrate Judge's recommendation are inter-related, I will consider them together. Specifically, the Plaintiff contends that before hearing on the motions held January 20, 2009, his review of the record on Pacer showed that approximately one-third of his responses to the Defendants'

Motion for Summary Judgment had not been scanned in completely. He contends that he brought this matter to the attention of the Magistrate Judge at the hearing and that the Magistrate Judge responded that if needed to complete the pleadings, he would request them but did not. More specifically, Plaintiff contends that the Magistrate Judge did not have the benefit of review of an affidavit of Patricia Ricker (Exhibit 1-A to Objections), Declaration of Patricia Ricker (Exhibit 1-B to Objections), Declaration of Caitlin Allen (Exhibit 2-A to Objections), Declaration of Caitlin Allen (Exhibit 2-B to Objections), Affidavit of Caitlin Allen (Exhibit 2-C to Objections), and criminal history of Frank Allen Marksberry (Exhibit 3 to Objections). Thus, Plaintiff contends that the Magistrate Judge erred in issuing his recommendations without a complete record.

The Defendants have filed their response to the objections and to the Motion to Correct the Record. I have accordingly reviewed the recommendations *de novo* in light of the file and complete record in this case.

The recommendation was issued and served on March 16, 2009. Contrary to Defendants' assertions, review of Document 85 filed January 14, 2009 and before the issuance of the Magistrate Judge's recommendation, reflects that all of the documents referenced in the Plaintiff's objections and Motion to Correct the Record, were included with the filing of "Plaintiff's Response to Defendants' Motion for Leave to Supplement Defendants' Motion for Summary Judgment" (see Doc 85, Exhibit 6-B, Doc 85, Exhibit 6-A, Doc 85, Exhibit 10, and Doc 85, Exhibit 10-A). As to the criminal record of Frank Allen Marksberry, Doc 85 reflects a substantially more complete and comprehensive inclusion of that record.

I will not presume that the Magistrate Judge failed to consider the filings at issue. In any event, my review is *de novo*. Upon *de novo* review, I conclude that the Magistrate Judge's recommendations are correct. I further conclude that the record is correct. Accordingly

IT IS ORDERED as follows:

1. Plaintiff's Motion to Correct the Record (Doc 102) is DENIED.
2. Plaintiff's Motion for Summary Judgment (Doc 16) is DENIED.
3. Defendants' Motion for Summary Judgment (Doc 54) is GRANTED and judgment shall enter in favor of Defendants on all of Plaintiff's constitutional claims.
4. Plaintiff's state law tort claims are DISMISSED WITHOUT PREJUDICE.

BY THE COURT:

s/Lewis T. Babcock  
Lewis T. Babcock, Judge

DATED: April 16, 2009