IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Devin Washington, Plaintiff, v. Aiken County Sheriffs Office; Inv. Brad Wertz; Philism Newman; Marcus Washington; Carol Thomas, Defendants.	Civil Action No.:1:16-cv-001673-JMC **ORDER AND OPINION**

This matter is before the court on review of Magistrate Judge Paige Gossett's Report and Recommendation ("Report") filed June 15, 2016. (ECF No. 9), recommending that Plaintiff's claim be summarily dismissed *without prejudice* and without issuance of service of process. Plaintiff timely objects. (ECF No. 11.)

For the following reasons the court **ADOPTS** the Magistrate Judge's Report (ECF No. 9), **DISMISSES** Plaintiff's § 1983 Complaint *without prejudice* and without issuance and service of process (ECF No. 1), and **DENIES AS MOOT** Plaintiff's second motion to proceed *in forma pauperis*. (ECF No. 15.)

I. PROCEDURAL BACKGROUND

On May 23, 2016, Plaintiff filed his Complaint against Defendants and motioned for leave to proceed *in forma pauperis*. (ECF Nos. 1, 2.) On June 15, 2016, Plaintiff's motion to proceed *in forma pauperis* was granted. (ECF No. 8.) Also on June 15, 2016, the Magistrate Judge filed her Report and Recommendation. (ECF No. 9.) The parties were advised of their

right to file objections to the Report. (*Id.*) Plaintiff has filed timely objections. (ECF No. 11.) On October 6, 2016, Plaintiff filed a second motion to proceed *in forma pauperis*. (ECF No. 15.)

II. FACTUAL BACKGROUND

Plaintiff alleges that shortly after a shooting that allegedly took place on July 1, 2012, Defendant Aiken County Sheriff's Office was contacted by Co-Defendants Marcus Washington, Carol Thomas, and Philisty (captioned as Philism) Newman. (ECF No. 1 at 2, ECF No. 11-2.) Plaintiff alleges that Wertz and fellow officers initially found no evidence beyond bullet holes, but that on July 23, 2012, Defendant Newman approached Defendant Wertz with what she claimed to be a bullet she had found in her tub. (ECF No. 1.) Plaintiff indicates that on the following day, Defendant Wertz obtained an arrest warrant for five counts of attempted murder despite contradictory evidence from Newman, Thomas, and Marcus Washington, both in reference to contradicting their own statements and those of their respective Co-Defendants. (ECF No. 1 at 3, ECF No. 11-3.)

Plaintiff was later indicted in Georgia on October 9, 2012, along with Marcus Washington for a second shooting that occurred in Richmond County on July 5, 2012. (ECF No. 1 at 2.) Plaintiff claims that during his trial in Georgia the trial judge allowed Defendants Newman, Thomas, and Marcus Washington to make statements in connection with the shooting occurring in South Carolina. Furthermore, in connection with an alleged shooting in Richmond County, Georgia, that eventually resulted in Plaintiff's initial conviction (ECF No. 1), Plaintiff alleges that Defendants Marcus Washington, Carol Thomas, and Philisty (captioned as Philism) Newman, all South Carolina residents, made false and conflicting statements to the Aiken County Sheriff's Department and Investigator Brad Wertz of said Department. (ECF No. 1 at 2.) Plaintiff alleges that this evidence was "extremely harmful" and that the district attorney

attempted to use this information to secure a guilty verdict. (ECF No. 1.) Plaintiff indicates that on July 16, 2015, a Georgia appellate court issued a decision agreeing that Plaintiff's right to due process was violated, and remanded the case for clarification as to why certain evidence was admitted. (ECF No. 1 at 3.) Upon review of the relevant Georgia state cases referenced by Plaintiff in his objections (ECF No. 11-1 at 2), a Georgia appellate court on the date above specified did rule in Plaintiff's favor that the trial court had abused its discretion in the manner in which it declared a mistrial, but specifically chose not to rule on Plaintiff's contention that the trial court had improperly allowed evidence of bad acts into the trial. *Washington v. State (Washington I)*, 775 S.E. 2d. 719, 731 (Ga. Ct. App. 2015). Since this holding and the Magistrate Judge's initial recommendation, a Georgia trial court's initial determination that Plaintiff's felony murder charge should be declared a mistrial without review of the jury verdict has been ruled as an abuse of discretion and his indictment for felony murder in Georgia has been waived for double-jeopardy concerns. *Washington v. State (Washington II)*, 792 S.E. 2d. 479 (Ga. Ct. App. 2016). In *Washington II*, the court, despite ruling in Plaintiff's favor on his double jeopardy claim against his retrial for murder, ruled against Plaintiff on his claim of improper admittance of evidence of prior bad acts, stating that "[Plaintiff] has failed to identify precisely which evidence he now challenges." *Washington II*, 792 S.E. 2d. at 487 (quoting to *Washington I*, 775 S.E. 2d. at 734 (McFadden, J., dissenting)).

Plaintiff also alleges that, at some point prior to his Georgia indictment, the Aiken County Sheriff's Office repeatedly targeted him with frivolous charges (that were subsequently dropped), and racially motivated traffic stops. (ECF No. 1.)

III. LEGAL STANDARD AND ANALYSIS

The Magistrate Judge's Report is made in accordance with 28 U.S.C. § 636(b)(1) and

Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge makes only a recommendation to this court, which has no presumptive weight. The responsibility to make a final determination remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a *de novo* determination of those portions of the Report to which specific objections are made. *Diamond v. Colonial Life & Acc. Ins. Co.*, 46 F.3d 310, 315 (4th Cir. 2005).

Plaintiff requests relief under a civil rights claim pursuant to 42 U.S.C. § 1983 for defamation, false arrest, violation of his constitutional and civil rights and for deliberate indifference amounting to a violation of the Eighth Amendment. (ECF No. 1 at 4.) Plaintiff cites as evidence contradictory and "extremely harmful" witness statements as well as a recent Georgia appellate court decision which recognized Plaintiff was deprived of due process rights and was not given a fair trial. (ECF No. 1 at 4.) Plaintiff requests relief in the form of monetary damages, attorney's fees and court costs, a restraining order against Aiken County, and an arrest warrant against Defendants. (ECF No. 1 at 4.)

Plaintiff is a *pro se* litigant filing a Complaint pursuant to 28 U.S.C. §§ 1915, 1915A, and the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996). *Pro se* complaints such as this one must be liberally construed. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). These complaints must be held to a lower standard than "formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

1. Claims Against Investigator Wertz

To succeed on a § 1983 false arrest claim, Plaintiff must demonstrate that Defendant Wertz could not have reasonably believed that he had probable cause to arrest. *Smith v. Reddy*, 101 F.3d 351, 356 (4th Cir. 1996). Probable cause is formed when there is a "fair probability"

under the totality of the circumstances that criminal activity has occurred. *Illinois v. Gates*, 462 U.S. 213, 246 (1983). When applying for an arrest warrant, an officer's actions are measured against how a reasonable person, provided with the same information of the officer at that time, would act. *Smith v. Munday*, 848 F.3d 248, 253 (4th Cir. 2017). A failure to obtain sufficient information prior to pursuing a warrant is enough to find against an officer for false arrest. *Id.* However, according to the Magistrate Judge, Plaintiff has failed to sufficiently plead facts indicating that Investigator Wertz lacked probable cause in seeking the arrest warrant. (ECF No. 9.)

Plaintiff objects to dismissal of this claim on the grounds police had previously been told there was no physical evidence initially beyond bullet holes, that it was not until 22 days later that Investigator Wertz was given a bullet by Co-Defendant Philisty Newman, and that Wertz' request for a warrant (ECF No. 11-3) was based solely on Philisty's account of the events generally and failed to consider contradictory evidence. (ECF No. 11.) The court agrees with the Magistrate Judge that mere awareness of contradictory evidence is insufficient to show that Wertz lacked probable cause at the time of his request for a warrant. (ECF No. 9, p. 6.) This objection is insufficient to warrant *de novo* review of this issue by the trial court pursuant to Rule 72(b)(3) of the Federal Rules of Civil Procedure, as Plaintiff has failed to make specific objections to the Report (ECF No. 9) and instead merely restates his initial complaint.

Therefore, the court must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond*, 46 F.3d at 315 (quoting an advisory committee note in Fed. R. Civ. P. 72). Upon review of the record, no clear error was found, the Magistrate Judge's Report as to the claims against Investigator Wertz is **ADOPTED** and Plaintiff's claims against Investigator Wertz are **DISMISSED** *without prejudice*.

2. Claims Against Aiken County Sheriff's Office

Plaintiff's initial Complaint requesting a restraining order against the Aiken County Sheriff's Office "failed to plead any facts." (ECF No. 9, p. 7.) Furthermore, to the extent that Plaintiff is attempting to make a claim under *respondeat superior* for the alleged claimable actions of Inv. Wertz, the Sheriff's Office is not amenable through *respondeat superior* to suit under § 1983, but only amenable to suit as a "person" in its own right for constitutional violations where said violations are the "official policy" of the municipal government or governmental unit. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

This claim may also be evaluated as Plaintiff's "deliberate indifference" claim (*see* ECF No. 9, p. 8-9) for the violation of the Eighth Amendment under § 1983 for failure to care for a pretrial detainee or inmate's health and safety. *See Estelle*, 429 U.S. at 104-05 (deliberate indifference to an inmate's illness or injury constitutes a cause of action); *see also Helling v. McKinney*, 509 U.S. 25, 35–36 (1993) (deliberate indifference to activity of fellow inmates endangering health and safety also constitutes a cause of action). Here again, the Magistrate Judge recommends dismissal on the grounds that Plaintiff's claim is "devoid of any facts relating to a deprivation of Plaintiff's health or safety." (ECF No. 9, p. 9.)

Plaintiff has timely objected and has provided alleged facts. (ECF No. 11, p. 2.) Allegations against the Aiken County Sheriff's Office include a history of "discrimination and harassment" following the false arrest, as well as the bringing of numerous charges, which Plaintiff alleges are frivolous, and none of which has resulted in conviction, and a DUI stop that Plaintiff believes was motivated due to stereotypes about his race and age contrasting with the make of his car. (ECF No. 11, p. 2.) He alleges that the Department has been aided by local media and used the jail report news book to damage his reputation, making it more difficult to

pursue employment or education. (ECF No. 11, p. 2.) He further alleges that the Department's "pursuit of false statements" (*see* defamation claim below) directly led to his detainment.

While Plaintiff has alleged facts in this case, Plaintiff has failed to sufficiently answer the Magistrate Judge's recommendation of dismissal on the grounds that the Aiken County Sheriff's Office did not commit these actions in their official capacity rather than as individual officers and civilians. For these reasons, Plaintiff has failed to sufficiently object pursuant to Rule 72(b)(3) of the Federal Rules of Civil Procedure, and is therefore not entitled to *de novo* review of this issue.

Under the appropriate "clear error" review, *Diamond*, 46 F.3d at 315, no clear error was found, the Magistrate Judge's Report is **ADOPTED**, and Plaintiff's claims against the Aiken County Sheriff's Office are **DISMISSED** *without prejudice*.

To the extent Plaintiff is attempting to clarify that his initial intent was to bring § 1983 claims for Eighth Amendment violations against Newman, Washington, and Thomas, such claims are **DISMISSED** *without prejudice* since Plaintiff does not allege that Newman, Washington, or Thomas are acting "under the color" of state law. 42 U.S.C. § 1983; (ECF No. 11).

3. Claims Against Newman, Washington, and Thomas

Plaintiff alleges Defendants Philisty Newman, Marcus Washington, and Carol Thomas gave contradictory statements to law enforcement informally, in formal police reports, and on the witness stand. He claims these contradictory statements and alleged perjuries contributed to his arrest and initial conviction. The court construes this allegation as an attempt to state a claim for defamation under state law. The Magistrate Judge reports that Plaintiff's Complaint is insufficiently pled and recommends dismissal; Plaintiff timely objects. (ECF Nos. 9 & 11.)

South Carolina's defamation law[1] requires a showing of (1) a false defamatory statement; (2) unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) special harm or the actionability of the statement irrespective of special harm. (ECF No. 9, p. 8.) While Plaintiff's objections partially answer the Magistrate Judge's initial recommendation that his claim be dismissed under South Carolina law by asserting facts and providing evidence, Plaintiff has not alleged sufficiently specific facts to overcome the Magistrate Judge's reasoning for dismissing his claim. (ECF Nos. 9 & 11.)

In his objections, Plaintiff alleges general damages of injury to reputation and mental suffering, and asserts that he has shown, through a number of court transcripts and other documents, that witnesses' statements contradicted both their own previous statements and the statements of their fellow witnesses. (ECF Nos. 11-2, 11-3, 11-11 through 11-17.) However, he has failed to allege which statements were false and defamatory and the unprivileged manner in which they were allegedly published or communicated, their only known "publication" being read or spoken in court or to a police officer for the purpose of producing a police report, both of which are, for this purpose, privileged. He is therefore not entitled to *de novo* review pursuant to Rule 72(b)(3) of the Federal Rules of Civil Procedure.

Here the Magistrate Judge has not committed clear error, *see Diamond*, 43 F.3d at 315. The Magistrate Judge's Report is **ADOPTED**, and Plaintiff's defamation claims against Philisty Newman, Marcus Washington, and Carol Thomas are **DISMISSED** *without prejudice*.

4. Plaintiff's Second Motion to Proceed *in forma pauperis*

Plaintiff's second motion to proceed *in forma pauperis* (ECF No. 15) is moot as the Magistrate Judge has already granted Plaintiff's motion of the same nature on June 15, 2016.

[1] The defamation laws of South Carolina and Georgia are nearly identical; where there is no conflict of law, there is no need for a conflict of law analysis. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 838 (1985) (Stevens, J., concurring in part and dissenting in part)

(ECF No. 8.)

IV. CONCLUSION

For the above reasons, the court **ADOPTS** the Magistrate Judge's Report and Recommendation (ECF No. 9), **DISMISSES** all of Plaintiff's claims *without prejudice* and without issuance and service of process, and **DENIES AS MOOT** Plaintiff's second motion to proceed *in forma pauperis*. (ECF No. 15.)

IT IS SO ORDERED.

United States District Judge

July 18, 2017
Columbia, South Carolina