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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONALD G. ROBERTSON, and
COLLEEN F. ROBERTSON, husband
and wife and the marital community
comprised thereof,

Plaintiffs,

v.

FERRY COUNTY, a municipal
corporation; FERRY COUNTY
SHERIFF'S DEPARTMENT; a
municipal corporation; PETE
WARNER, Sheriff; TALON
VENTURO, Deputy; and JOHN
DOES, Deputies,

Defendants.

NO: 2:14-CV-117-RMP

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

Before the Court is Defendants' Motion for Summary Judgment, ECF No.
10. The Court has reviewed the record and is fully informed.

BACKGROUND

Plaintiffs Donald Robertson and Colleen Robertson filed this action in
regard to a search of their home that was conducted by officers of the Ferry County

1 Sheriff's Department. ECF No. 1, Ex. 2. On or about December 9, 2011, A.H., an
2 eleven year-old child, was taken by his father to the Ferry County Sheriff's Office.
3 *See* ECF No. 12, Ex. G. A.H. reported to Deputy Talon Venturo that his mother,
4 Colleen Robertson, was growing marijuana in her bedroom. ECF No. 12, Ex. B at
5 4. A.H. provided details about the plants, including that they "smelled like a
6 skunk[,]” were grown together in a 3 foot by 4 foot area, and were under a grow
7 light. ECF No. 12, Ex. B at 4. Deputy Venturo drew a picture of a marijuana leaf,
8 which A.H. confirmed to be the same type of leaf that was on the plants in his
9 mother's bedroom. ECF No. 12, Ex. B at 4. Deputy Venturo also showed A.H.
10 pictures of marijuana plants on his computer, which A.H. recognized as the same
11 kind of plants that his mother grew. ECF No. 12, Ex. B at 4.

12 Deputy Venturo used A.H.'s statement in support of a search warrant
13 application, which was granted. ECF No. 12, Exs. A, B. Deputy John Lofts, who
14 was wearing a body camera, executed the search warrant with other officers on the
15 evening of December 9, 2011. *See* ECF No. 12, Exs. D at 2; F (copy of video
16 recording).

17 Colleen Robertson opened the door for the officers. ECF No. 12, Ex. C at 1.
18 Deputy Lofts frisked both Donald and Colleen Robertson. ECF No. 12, Ex. D at 2.
19 In a declaration filed in opposition to the motion for summary judgment, Mr.
20 Robertson states that he observed the deputy "lift [his] wife's shirt, and reach
21 underneath each breast, touching both." ECF No. 16 at 3. Colleen Robertson

1 stated at a deposition that during the search the officer smacked her knee three
2 times, knocking her halfway down. ECF No. 12, Ex. C at 14. She further stated
3 that after she told the officer that she had no clothing on beneath her shirt, he lifted
4 her shirt above her head in front of the other officers. ECF No. 12, Ex. C. at 14.
5 The officer allegedly also put his hands in Colleen Robertson's pants. ECF No. 12,
6 Ex. C at 14.

7 Deputy Lofts denies that he lifted Colleen Robertson's shirt, put his hand
8 into her pants, or hit her knee. ECF No. 12, Ex. D at 3. The recording from
9 Deputy Lofts's body camera records Deputy Lofts saying "back of the hand" while
10 searching Colleen Robertson. ECF No. 12, Ex. F. Deputy Lofts explains that he
11 was trained to use the back of his hand to run across and underneath a woman's
12 chest during a weapons frisk because it is non-invasive. ECF No. 12, Ex. D at 2-3.

13 Deputy Venturo's report of the search reflects that officers located marijuana
14 smoking devices, marijuana seeds, and a plastic bag containing marijuana in the
15 Robertson residence, but no marijuana plants. ECF No. 15, Ex. A at 2. Colleen
16 Robertson showed Deputy Venturo her medical marijuana authorization, which
17 had expired. ECF No. 15, Ex. A at 2. Deputy Venturo seized the paraphernalia,
18 seeds, marijuana, and a copy of the expired medical marijuana authorization. ECF
19 No. 15, Ex. A at 2.

20 Criminal proceedings were initiated, but the Ferry County District Court
21 suppressed the evidence found in the search and terminated the prosecution. *See*

1 ECF No. 15, Ex. B. Among other concerns, the judge who suppressed the
2 evidence concluded that “Deputy Venturo’s drawing and the computer image(s)
3 were impermissibly suggestive under the facts and circumstances.” ECF No. 15,
4 Ex. B at 2.

5 A.H. gave his statement, and the Robertsons’ house was searched, one week
6 before the date of a hearing regarding the custody of A.H. ECF No. 12, Ex. C at 2.
7 In January 2012, A.H. apparently recanted his prior statement regarding marijuana
8 plants. *See* ECF No. 12, Ex. G. In the later statement, A.H. explained that his
9 father took him to the police station on December 9, 2011, but that A.H. did not
10 want to go. ECF No. 12, Ex. G. A.H. further stated that Deputy Venturo gave him
11 a piece of paper (presumably the form on which A.H.’s handwritten statement is
12 recorded), which A.H.’s father told A.H. how to fill out. *See* ECF No. 12, Ex. G.

13 Donald Robertson explains in his declaration that the Ferry County Sheriff’s
14 Department and Judge Tom Brown, who signed the search warrant, were familiar
15 with the contentious relationship between Colleen Robertson and A.H.’s father
16 before A.H. reported that his mother grew marijuana. *See* ECF No. 16 at 2. In
17 2010, Donald Robertson told Sheriff Pete Warner that A.H.’s father had been
18 abusing one of Colleen Robertson’s daughters. ECF No. 16 at 2. Sheriff Warner
19 directed Donald Robertson to report the abuse to Tom Brown, who was the
20 prosecuting attorney at the time. ECF No. 16 at 2. Donald Robertson relayed to
21 Tom Brown the allegations against A.H.’s father. *See* ECF No. 16 at 2.

1 judge to resolve the parties' differing versions of the truth at trial.'" *T.W. Elec.*
2 *Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting
3 *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). The
4 nonmoving party "may not rely on denials in the pleadings but must produce
5 specific evidence, through affidavits or admissible discovery material, to show that
6 the dispute exists." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.
7 1991). In deciding a motion for summary judgment, a court must construe the
8 evidence and draw all reasonable inferences in the light most favorable to the
9 nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31.

10 *1. Liability of Sheriff Warner and Municipalities*

11 Defendants claim that there is no evidence to establish that Sheriff Warner
12 was involved in the incident or that the municipality defendants, Ferry County and
13 the Ferry County Sheriff's Department, may be held liable. ECF No. 10 at 7. The
14 Robertsons did not respond directly to this argument, other than providing general
15 statements from Donald Robertson, including that "Sheriff Warner and his deputies
16 knew, or should have known, that any information coming from [Colleen
17 Robertson's] minor children could be flawed" and that he "believe[s] Deputy
18 Venturo and the Ferry County Sheriff's Department used A.H.'s statement in
19 support of their search warrant . . . in order to adversely affect Colleen's custody
20 rights." *See* ECF No. 16 at 2-3.

1 The Robertsons have failed to demonstrate a genuine issue of material fact
2 regarding Sheriff Warner’s liability in this matter. There is no evidence that
3 Sheriff Warner was involved in interviewing A.H., applying for the search warrant,
4 or conducting the search. Moreover, because Sheriff Warner did not question
5 A.H., it is irrelevant that Donald Robertson contends that the sheriff should have
6 suspected the veracity of A.H.’s statements. Sheriff Warner is entitled to summary
7 judgment in his favor.

8 Turning to Ferry County and the Ferry County Sheriff’s Department,
9 municipalities are included as “persons” to whom 42 U.S.C. § 1983 applies and
10 thus they may be held liable for causing a constitutional deprivation. *Monell v.*
11 *Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). However, the doctrine of
12 respondeat superior does not apply to § 1983 claims against municipalities.
13 *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986) (citing *Monell*, 436 U.S.
14 at 691).

15 Instead, a plaintiff may establish municipal liability for a § 1983 claim by
16 satisfying one of three conditions:

17 First, the plaintiff may prove that a city employee committed the
18 alleged constitutional violation pursuant to a formal governmental
19 policy or a longstanding practice or custom which constitutes the
20 standard operating procedure of the local governmental entity. Second, the plaintiff may establish that the individual who committed
21 the constitutional tort was an official with final policy-making
authority and that the challenged action itself thus constituted an act
of official governmental policy. Whether a particular official has final
policy-making authority is a question of state law. Third, the plaintiff

1 may prove that an official with final policy-making authority ratified a
2 subordinate's unconstitutional decision or action and the basis for it.

3 *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992) (citations and internal
4 quotations omitted).

5 The Robertsons have not provided any evidence indicating that the alleged
6 constitutional violations were made pursuant to a longstanding practice, that an
7 official with policy-making authority committed the acts, or that the
8 unconstitutional actions were ratified by someone with policy-making authority.

9 Summary judgment is appropriate in the municipalities' favor.

10 *2. Search of Residence*

11 Defendants argue that the Robertsons' challenge to the search of their
12 residence lacks merit because the officers obtained a lawful warrant to search the
13 home. ECF No. 10 at 4-6.

14 The Robertsons argue that the search violated their rights under the federal
15 constitution because the warrant lacked probable cause. ECF No. 14 at 3-7.

16 Furthermore, the Robertsons claim that the search of the house was improper
17 because of Washington State's regulation of medical marijuana. ECF No. 14 at 7-

18 8. The Robertsons also contend that the search violated the Washington State
19 Constitution. ECF No. 14 at 9-11.

20 *a. Fourth Amendment*

21 Looking first to the claim under the federal constitution, the Robertsons
contend that the search warrant was obtained in violation of the Fourth

1 Amendment's probable cause requirement because the Ferry County Sheriff's
2 Department withheld relevant information from the magistrate who issued the
3 warrant. *See* ECF No. 14 at 3-5. In particular, the Robertsons contend that "the
4 Ferry County Sheriff's Department knew, and should have known, that there was a
5 significant child custody dispute going between Plaintiff Colleen Robertson and
6 [A.H.'s father]." ECF No. 14 at 3. In addition, Deputy Venturo allegedly
7 encouraged A.H. to exaggerate the incriminating information that he provided
8 about his mother. ECF No. 14 at 3.

9 The doctrine of qualified immunity protects government officials, including
10 police officers, from liability when their conduct "does not violate clearly
11 established statutory or constitutional rights of which a reasonable person would
12 have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified
13 immunity is "an immunity from suit rather than a mere defense to liability" and is
14 "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v.*
15 *Forsyth*, 472 U.S. 511, 526 (1985) (emphasis omitted). Thus, courts must resolve
16 questions of qualified immunity "at the earliest possible stage in litigation."
17 *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

18 A police officer is entitled to qualified immunity in a § 1983 action unless
19 (1) the facts, when taken in the light most favorable to the plaintiff, show that the
20 officer's conduct violated a constitutional right; and (2) the right was clearly
21 established at the time of the alleged misconduct. *Saucier v. Katz*, 533 U.S. 194,

1 201 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223
2 (2009).

3 The Fourth Amendment to the United States Constitution provides that “no
4 Warrants shall issue, but upon probable cause, supported by Oath or affirmation,
5 and particularly describing the place to be searched, and the persons or things to be
6 seized.” U.S. Const. amend. IV. When a police officer submits a search warrant
7 affidavit that he knew to be false or should have known to be false, and probable
8 cause would not have existed without the false statements, then the officer “‘cannot
9 be said to have acted in an objectively reasonable manner,’ and the shield of
10 qualified immunity is lost.” *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir.
11 1991) (quoting *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985)), *overruled on*
12 *other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir.
13 2002).

14 To survive summary judgment on a claim of judicial deception, a plaintiff
15 must (1) make “a substantial showing of deliberate falsehood or reckless disregard
16 for the truth, and (2) establish that but for the dishonesty, the challenged action
17 would not have occurred.” *Butler v. Elle*, 281 F.3d 1014, 1024 (9th Cir. 2002) (per
18 curiam) (internal quotations and citations omitted); *see also KRL v. Moore*, 384
19 F.3d 1105, 1117 (9th Cir. 2004) (stating that “a plaintiff must show that the
20 defendant deliberately or recklessly made false statements or omissions that were
21 material to the finding of probable cause”). If the plaintiff satisfies these

1 requirements, then “the matter should go to trial.” *Butler*, 281 F.3d at 1024
2 (quoting *Liston v. Cnty. of Riverside*, 120 F.3d 965, 973 (9th Cir. 1997)).

3 Here, the Court considers whether the Robertsons made a substantial
4 showing that Deputy Venturo’s actions constituted deliberate falsehood or reckless
5 disregard for the truth.

6 The Robertsons contend that the Ferry County Sheriff’s Department knew,
7 or should have known, of the child custody dispute between Colleen Robertson and
8 A.H.’s father, implying that the information was deliberately or recklessly omitted
9 from the warrant application. *See* ECF No. 14 at 3-4. However, the Robertsons
10 provide evidence showing only that Sheriff Warner and Judge Tom Brown knew
11 of the contentious relationship between Colleen Robertson and A.H.’s father. *See*
12 ECF No. 16 at 2. Although Donald Robertson suspects that “[Sheriff Warner’s]
13 deputies knew, or should have known, that any information coming from [Colleen
14 Robertson’s] minor children could be flawed as a result of improper coaching by
15 their father[,]” there is no evidence that Deputy Venturo, who applied for the
16 warrant, had any prior knowledge of Colleen Robertson or A.H.’s father. *See* ECF
17 No. 16 at 3.

18 Moreover, despite the Robertsons’ contention that Deputy Venturo
19 encouraged A.H. to exaggerate his report, the Robertsons have produced no
20 evidence indicating that Deputy Venturo omitted any facts from the warrant
21 affidavit. Counsel for the Robertsons apparently relies on Deputy Venturo’s report

1 to demonstrate that the deputy's "questions to the minor child during the initial
2 interview were leading and clearly produced incorrect information." *See* ECF No.
3 15 at 2. The only activity that could be characterized as "leading" is that Deputy
4 Venturo asked A.H. to compare the appearance of his mother's plants to a picture
5 of a marijuana leaf that the deputy drew and to pictures of marijuana plants on the
6 deputy's computer. *See* ECF No. 15, Ex. A at 2. However, these actions as
7 described in Deputy Venturo's report also are reflected verbatim in the warrant
8 affidavit. *Compare* ECF No. 15, Ex. A at 2 *with* ECF No. 12, Ex. B at 4.

9 Thus, the Robertsons have not made a substantial showing that information
10 was omitted from the warrant affidavit deliberately or with reckless disregard for
11 the truth. Because the Court finds that the Robertsons have not demonstrated that
12 information was omitted, the Court does not consider whether the allegedly
13 missing information would have affected the magistrate's decision to issue the
14 search warrant.

15 To the extent that the Robertsons argue that Defendants are liable under the
16 federal constitution because the warrant, as issued, lacked probable cause, the
17 Court finds that Defendants are protected by qualified immunity. "Where the
18 alleged Fourth Amendment violation involves a search or seizure pursuant to a
19 warrant, the fact that a neutral magistrate has issued a warrant is the clearest
20 indication that the officers acted in an objectively reasonable manner or, as [the
21 Supreme Court has] sometimes put it, in 'objective good faith.'" *Messerschmidt v.*

1 *Millender*, 132 S. Ct. 1235, 1245 (2012) (quoting *United States v. Leon*, 468 U.S.
2 897, 922-923 (1984)). An exception exists, however, “if, on an objective basis, it
3 is obvious that no reasonably competent officer would have concluded that a
4 warrant should issue” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

5 Here, in light of A.H.’s statements about the smell and appearance of his
6 mother’s marijuana plants, the Court cannot conclude that no reasonably
7 competent officer would find that probable cause existed to support a search
8 warrant. Defendants are entitled to summary judgment on this theory as well.

9 *b. Washington’s Regulation of Medical Marijuana*

10 The Robertsons claim that the search of their residence was improper also
11 because they were authorized to have medical marijuana. ECF No. 14 at 7-8. As
12 stated above, Colleen Robertson presented Deputy Venturo an expired medical
13 marijuana authorization. ECF No. 15, Ex. A at 2.

14 Washington law provides that the medical use of marijuana in compliance
15 with the law:

16 does not constitute a crime and a qualifying patient or designated
17 provider in compliance with the terms and conditions of this chapter
18 may not be arrested, prosecuted, or subject to other criminal sanctions
19 or civil consequences, for possession, manufacture, or delivery of, or
20 for possession with intent to manufacture or deliver, cannabis under
21 state law, or have real or personal property seized or forfeited for
possession, manufacture, or delivery of, or for possession with intent
to manufacture or deliver, cannabis under state law, [if specified
conditions are met.]

1 RCW 69.51A.040. Among the conditions to avoid criminal liability is that
2 “[t]he qualifying patient or designated provider presents his or her proof of
3 registration with the department of health, to any peace officer who
4 questions the patient or provider regarding his or her medical use of
5 cannabis” RCW 65.51A.040(2). A qualifying patient who is not
6 registered with the department of health may be entitled to “an affirmative
7 defense to charges of violations of state law relating to cannabis through
8 proof at trial, by a preponderance of the evidence, that he or she otherwise
9 meets the requirements of RCW 69.51A.040.” RCW 69.51A.043(2).

10 In a recent case, the Washington Supreme Court explained that
11 chapter 69.51A RCW provides only an affirmative defense for medical
12 marijuana users and does not decriminalize any conduct. *State v. Reis*, No.
13 90281-0, 2015 WL 2145986, at *8 (Wash. May 7, 2015). The text of RCW
14 69.51A.040 appears to create an exception to criminal liability for patients
15 who, among other conditions, register with the state. However, after the
16 Department of Justice indicated that administering a medical marijuana
17 registry could result in liability under the Controlled Substances Act,
18 Washington’s governor vetoed provisions of the bill that would have created
19 the registry. *Id.* at *4. Thus, no state registry currently exists, and medical
20 marijuana patients have only an affirmative defense to prosecution. *Id.* at
21 *4, 10.

1 Here, because Washington’s medical marijuana law provides only the
2 protection of an affirmative defense, the Robertsons’ reliance on statutory language
3 regarding decriminalization is misplaced. “[T]he possibility of proving the
4 affirmative defense does not undermine probable cause for a search warrant.” *Id.*
5 at *10 (citing *State v. Fry*, 168 Wn.2d 1, 6 (2010)). Thus, the Robertsons have
6 failed to establish that a genuine issue of material fact exists as to Colleen
7 Robertson’s medical marijuana authorization.

8 *c. State Constitutional Claims*

9 The Robertsons also contend that Defendants violated their right to privacy
10 pursuant to the Washington State Constitution. ECF No. 14 at 9-11. Article I, § 7
11 provides: “No person shall be disturbed in his private affairs, or his home invaded,
12 without authority of law.” Wash. Const. art I, § 7. This privacy protection is
13 broader than that of the Fourth Amendment. *State v. Ladson*, 138 Wn. 2d 343,
14 348-49 (1999).

15 However, “Washington courts have consistently rejected invitations to
16 establish a cause of action for damages based upon constitutional violations
17 ‘without the aid of augmentative legislation’” *Blinka v. Washington State Bar*
18 *Ass’n*, 109 Wn. App. 575, 591 (2001) (quoting *Sys. Amusement, Inc. v. State*, 7
19 Wn. App. 516, 517 (1972)). The Court is aware of no legislation authorizing
20 causes of action based on violations of the Washington State Constitution.
21

1 Accordingly, Defendants are entitled to summary judgment on the Robertsons'
2 claims under the state constitution.

3 *3. Sexual Assault*

4 Defendants challenge the alleged sexual assault solely on a factual basis,
5 claiming that the Robertsons fabricated the incident. *See* ECF No. 10 at 8-10.
6 Defendants offer Deputy Lofts's body camera recording of the search, which
7 shows that Deputy Lofts's search of Colleen Robertson lasted approximately 25
8 seconds. *See* ECF No. 12, Ex. F. However, the video is dark, and Colleen
9 Robertson's body rarely is captured in the recording of the search. In response to
10 the motion for summary judgment, Donald Robertson provides some details of his
11 wife's sexual assault that are consistent with Colleen Robertson's deposition
12 statements. *Compare* ECF No. 16 at 3 *with* ECF No. 12, Ex. C at 14. Viewing the
13 evidence in the light most favorable to the Robertsons, the Court cannot conclude
14 whether and to what extent Colleen Robertson was assaulted.

15 However, Deputy Lofts, who allegedly committed the assault according to
16 the evidence submitted by the Robertsons, is not a party to this action. Rather,
17 Deputy Lofts may be among the "John Doe" deputies listed as defendants in the
18 Complaint. *See* ECF No. 1, Ex. 2 at 3.

19 Generally, the use of John Doe defendants is not favored in the Ninth
20 Circuit. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). In situations
21 where a plaintiff does not know the identity of a defendant before filing his or her

1 complaint, “the plaintiff should be given an opportunity through discovery to
2 identify the unknown defendants, unless it is clear that discovery would not
3 uncover the identities, or that the complaint would be dismissed on other grounds.”

4 *Id.*

5 Here, the Robertsons were given ample time to discover Deputy Lofts’s
6 identity but nonetheless failed to amend their Complaint to add him as a defendant.
7 According to the Jury Trial Scheduling Order, entered on July 31, 2014, any
8 motion to add parties was due by September 11, 2014. ECF No. 8 at 3. The
9 Robertsons had a sufficient opportunity to discover the identity of Deputy Lofts,
10 who played a key role in their allegations.

11 Because Deputy Lofts was not added as a party and there is no evidence
12 submitted against any person other than Deputy Lofts, Defendants are entitled to
13 summary judgment on this claim as well.

14 CONCLUSION

15 In sum, there are no genuine issues of material fact regarding the
16 Robertsons’ claims against Sheriff Warner, Ferry County, or the Ferry County
17 Sheriff’s Department. The Robertsons’ constitutional claims regarding the
18 issuance of a search warrant and search of their residence also do not survive
19 summary judgment. Defendants also are entitled to summary judgment on the
20 Robertson’s claim of sexual assault.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendants' Motion for Summary Judgment, **ECF No. 10**, is

3 **GRANTED.**

4 2. The Robertsons' Motion for Extension of Time, **ECF No. 21**, is

5 **DENIED AS MOOT.**

6 The District Court Clerk is directed to enter this Order, provide copies to
7 counsel, enter judgment accordingly, and **close** this case.

8 **DATED** this 8th day of June 2015.

9
10 *s/ Rosanna Malouf Peterson*

11 ROSANNA MALOUF PETERSON
12 Chief United States District Court Judge
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