

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

AARON MILLER,)	
)	
Plaintiff)	
)	
v.)	Civil No. 95-0108-B
)	
MAINE PUBLIC SAFETY)	
DEPARTMENT, et al.,)	
)	
Defendants)	

MEMORANDUM OF DECISION¹

This action arises out of a search of Plaintiff's residence on May 30, 1989. Defendants are Maine State Police Officers and Game Wardens ["STATE DEFENDANTS"], and officers of the Augusta Police Department ["AUGUSTA DEFENDANTS"]. Defendants have filed Motions for Summary Judgment which will be considered together. Plaintiff has filed a response to the State Defendants' Motion. Defendants' counsel have orally indicated they will not be filing reply memoranda.

In this District, a party's failure to timely respond to a motion is generally construed to waive objection to the motion. D. Me. R. 19(c). However, the Federal Rules of Civil Procedure require us to examine the merits of a motion for summary judgment regardless of the opposing party's failure to object. *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991). Accordingly, we will examine the merits of the Augusta Defendants' Motion for Summary Judgment as well.

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter. Jury selection is scheduled to begin on May 13, 1996.

The Standard for Summary Judgment

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

Statement of Facts²

1. On May 28, 1989, Mark Golden gave a statement to August Police Officers, Defendant Wayne McCamish and Robert Wagner.
2. Golden told McCamish and Wagner that Plaintiff had given Golden free drugs, including cocaine and marijuana, almost every day during the preceding winter.
3. Golden said that, as of May 28, 1989, Miller had "two cokes on the books . . . [and] a half a pound of marijuana."
4. Golden provided a detailed description of a string of burglaries he had committed with Plaintiff.

² The statement of facts is taken verbatim from the Defendants' Statements of Material Fact, to the extent those facts are uncontroverted.

5. Describing Plaintiff, Golden said that “if you’re going to get him, you’re going to take some coke off the streets, you’re going to take pot off the streets, you’re going to take all that stuff off the streets.”

6. Golden further identified some of Plaintiff’s customers.

7. Golden further stated that “I know [Plaintiff] used to come up with some pretty heavy drugs, heavy drugs, and I didn’t want to be seen in there.”

8. Golden described Plaintiff as having a “wicked amount of drugs,” and stated that Plaintiff usually stocked up for Thursday, Friday and Saturday nights.

9. Golden also stated:

[Plaintiff] knows an incredible, incredible amount of contacts, far more than you would ever believe he had, he deals exclusively to a hundred customers, some big, some not, okay, so, just say this guy comes and says I want a quarter pound of dope or I want a half a pound of dope, he cleans [Plaintiff] out, now [Plaintiff] has to go get some more so he would probably right then go get more and then sometimes he’d wait around, and sometimes he’d hold onto it for . . . for an extra day because nobody has come around but he has an incredible, incredible listing of people that go there.

10. Golden further stated that Plaintiff sold diet pills, speed, Valium, and acid.

11. According to Golden, Miller had “been in this exclusively for ten years approximately, he doesn’t have a job, that’s all he does, he deals drugs.

12. Golden also described Plaintiff “running coke up from the south.”

13. Two days later, on May 30, 1989, Golden again made a statement, this time to Sergeant Wagner, Defendant William Hayward, and District Attorney David Crook.

14. Sergeant Wagner explained Golden’s rights, as did Mr. Crook. Golden again waived those rights, and affirmed that his statement would be voluntary.

15. Golden again recounted the information he had previously given about Plaintiff's drug activity and the burglaries Golden had committed with Plaintiff.

16. That same day, Defendant Hayward taped his conversation with Golden, as he, Golden and Sergeant Wagner drove around the City of August to the various burglary sites described by Golden.

17. Golden described the method of entry for each building, and also described some of the items taken from the various locations.

18. Golden's statements matched the extensive information gathered by Defendant Hayward in his independent investigations of each burglary.

19. On May 30, 1989, McCamish and Hayward told Defendant Dale York of the Maine State Police of the statements made by Golden during the two police interviews. McCamish further told Defendant York that Golden had provided reliable information in the past.

20. Defendant York had been following the string of burglaries in Augusta and was familiar with the nature of many items stolen.

21. Defendant York had received copies of many of the investigative reports for the burglaries.

22. Defendant York was familiar with two of the persons alleged by Golden to be Plaintiff's customers, and had purchased drugs from these persons during an undercover drug operation in the spring of 1988.

23. Defendant York spoke with confidential informants who supported the information provided by Golden.

24. Defendant York prepared an affidavit in support of a request for a search warrant. The affidavit included information provided by Hayward and McCamish.

25. Justice of the Peace Matt Dyer issued a search warrant on May 30, 1989. The warrant allowed the dwelling house, buildings or vehicles owned or occupied by Plaintiff to be searched for drugs and drug paraphernalia.

26. Defendants York, James, Rackliff, Ervin, Chapin and Cunningham, all Maine State Police Troopers, along with Defendant Blagdon and Barry Woodard, both Game Wardens, were present during the search pursuant to the warrant on the night of May 30, 1989.

27. The residence is owned by Plaintiff's father.

28. When the officers commenced the search, they secured the area and the occupants of the residence. Plaintiff was arrested and transferred within 20 minutes of the commencement of the search.

29. In plain view in the living room were two metal safes, one with the door torn off and the other with a hold punched in the bottom. In the open safes in plain view, the officers saw receipts from, among other places, Berry & Berry florists. Defendant York knew Berry & Berry Florists had been burglarized recently. Defendant York seized the safes and their contents.

30. In light of the fact that the search was for drugs, which could be concealed in closed and small spaces, Defendants looked in a variety of places.

31. A gun was found between a waterbed mattress and its frame. Defendant York knew an identical gun had been stolen from the Bureau of Probation and Parole. The gun was later confirmed stolen. In addition, the officers seized a radio they believed was stolen from the Bureau

of Probation and Parole. This fact was also confirmed, and the gun and radio were returned to the Bureau with Plaintiff's consent.

32. Numerous items were located during the search which Defendant York believed were stolen. These items were seized.

33. Drugs and drug paraphernalia were seized.

34. The vast majority of the items seized were transferred from the State Police to the Augusta Police Department on June 1, 1989.

35. Following his conviction, Plaintiff filed a motion for the return of various items seized during the search, and obtained an order for the return of his property. In addition, Plaintiff sought the return of \$3,112.44 that had been seized during another search of his property, and the court ordered the money be used as restitution to some of Plaintiff's victims.

36. Defendants did not seize any property from Plaintiff's home that was not listed on the inventory, except \$900, which has been returned to Plaintiff's designee.

37. The sum of \$1065 was also returned to Plaintiff's designee.

38. There is no policy or custom of the Augusta Police Department or City of Augusta to deprive citizens of their constitutional rights with respect to the acquisition or execution of search warrants.

39. Prior to filing this lawsuit in June, 1995, Plaintiff did not notify any of the Augusta Defendants of his intent to file suit against them.

Plaintiff, in addition to characterizing much of the information allegedly received from Mark Golden as false, disputes the following facts:

1. Much of the property seized during the search was not stolen or otherwise contraband. This property has never been returned to Plaintiff.

2. Plaintiff was not involved in drug dealing in May, 1989, nor were drugs found at his home during the search.

3. Plaintiff was in lawful possession of two safes on May 30, 1989, and neither of them had the door pried off or a hole in the bottom.

4. Only \$2650 was ordered applied to restitution, and Defendant York has yet to comply with the Order.

Otherwise, Plaintiff's statement of facts contains only conclusions of law, such as 'Defendant York did not act in good faith,' or 'the affidavit has insufficient facts from which probable cause could be found.' Despite the liberal reading accorded *pro se* pleadings, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), Plaintiff is nevertheless required to comply with Federal Rule 56 in opposing a Motion for Summary Judgment. *United States v. Heller*, 957 F.2d 26, 31 (1st Cir. 1992).

Discussion

Defendants move for dismissal of several of Plaintiff's claims. The Court will address these arguments first.

I. Count I -- Equal Protection.

Defendants seek dismissal of Count I of Plaintiff's Complaint for the reason that he does not allege discrimination on the basis of his membership in a protected class of persons. Without belaboring the analysis, the Court agrees that Plaintiff has not stated an equal protection violation in this Complaint.

II. Claims against the Maine Public Safety Department.

Defendant Maine Public Safety Department seeks dismissal of so much of Plaintiff's Complaint as seeks to hold it liable under 42 U.S.C. § 1983. The Court agrees that dismissal as to this Defendant is appropriate. The State of Maine, and its agencies, are not "persons" within the meaning of section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

III. Claims regarding the loss of Plaintiff's property.

Plaintiff's Complaint, to the extent he seeks relief for the loss of certain of his personal property allegedly seized during the search of his home on May 30, 1989, should be dismissed. There is no deprivation of property without due process under the Fifth and Fourteenth Amendments where the state provides an adequate remedy. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Loftin v. Thomas*, 681 F.2d 364 (5th Cir. 1982). Plaintiff has not alleged, nor could he, that there is no available state court action for the recovery of his property. Accordingly, he has asserted no due process claim.³

IV. Claims regarding the admission of certain evidence.

The Court agrees that Plaintiff's claims regarding the admission of certain of the seized property into evidence at his criminal trial are not cognizable in this action. These Defendants are police officers, and have no responsibility for offering or admitting materials into evidence in a trial.

³ The State Defendants seek sanctions against Plaintiff on the grounds that his previous complaint alleging property loss was dismissed by this Court, and the dismissal was affirmed on appeal prior to Plaintiff's filing this Complaint. The Motion for Sanctions is hereby DENIED, inasmuch as the lost property claim is but one aspect of Plaintiff's Complaint.

Remaining for resolution are Defendants' requests for judgment on Plaintiff's claims regarding the application for the search warrant, as well as its execution.

V. Claims against the Augusta Police Department.

Defendant Augusta Police Department seeks judgment as a matter of law on all of Plaintiff's federal claims for the reason that there is no evidence of a policy or custom with respect to the acquisition or execution of search warrants sufficient to render it liable on Plaintiff's claims. The Court agrees. *See Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

VI. Claims against the individual Defendants.

I. The Augusta Defendants.

The individual Augusta Defendants assert that they are entitled to qualified immunity on Plaintiff's claims with respect to the acquisition and execution of the search warrant on May 30, 1989. Specifically, they note that Defendant York's affidavit in support of the warrant is a truthful and accurate rendition of the information provided to the Augusta Defendants by Mark Golden.

Defendants are entitled to qualified immunity "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). This doctrine provides for the "inevitable reality that 'law enforcement officials will in some cases reasonably but mistakenly conclude that [their conduct] is [constitutional], and . . . that . . . those officials -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.'" *Id.* (quoting *Anderson*, 483 U.S. at 641). The inquiry regarding qualified immunity "takes place prior to trial, on motion for summary judgment

. . . and requires no fact finding, only a ruling of law strictly for resolution by the court." *Id.* at 1373-74.

The qualified immunity inquiry has two prongs. First we must determine whether the right asserted by Plaintiffs was clearly established at the time of the contested events. *Id.* at 1373. Here there is no dispute that the Fourth Amendment to the U.S. Constitution protects against unreasonable searches and searches. This constitutes a clearly established right. However, we must go one step further and determine whether the specific contours of the right were sufficiently established such that the officer could understand how the law would be applied to his or her actions *in this case*. *Anderson*, 483 U.S. at 640.

Defendants concede, for purposes of this Motion for Summary Judgment, that Plaintiff had a "clearly established right not to be prosecuted, arrested or subjected to a search pursuant to a warrant without probable cause." Augusta Def. Memo. at 12 (citing *Rodriguez v. Comas*, 875 F.2d 979, 981 (1st Cir. 1989)). They correctly argue, however, that where the information contained in Defendant York's affidavit was truthful, they cannot be charged with knowing that providing Defendant York with that information violated Plaintiff's rights. The Augusta Defendants are entitled to qualified immunity on Plaintiff's claims regarding acquisition of the search warrant.

Further, there is no evidence that the Augusta Defendants participated in any way in the search of Plaintiff's home on May 30, 1989. Accordingly, they are entitled to judgment as a matter of law on Plaintiff's claim to the extent it alleges the execution of the search violated Plaintiff's constitutional rights.

II. Defendant York.

Defendant York seeks summary judgment on the basis of qualified immunity on Plaintiff's claims regarding the warrant and the search. The Court agrees that Defendant York is entitled to qualified immunity relative to the 1989 search. To the extent Plaintiff complains that the seizures were outside the scope of the warrant, we do so on the grounds that Plaintiff had no clearly established right to be free from "plain view" seizures of contraband which the police anticipated finding, but which was not included in the search warrant.

In 1971, the Supreme Court addressed the question whether police could seize an automobile incident to an arrest, found in plain view, that they had reason to believe was involved in the crime at issue, where there were no exigent circumstances justifying a warrantless search. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In an opinion in which four of the justices joined, Justice Stewart opined that the "plain view" doctrine was only applicable where the discovery of incriminating evidence was inadvertent. Although Justice Harlan concurred in the judgment, he declined to join that portion of Justice Stewart's opinion, and the four dissenting justices expressly disagreed with the "inadvertent" requirement.

By 1989, however, there were many state and federal courts that had adopted Justice Stewart's inadvertent requirement for plain view seizures. See *Horton v. California*, 496 U.S. 128, 149 app. (1990). The State of Maine appeared to adopt the requirement, in *dicta*, in 1988. *State v. Cloutier*, 544 A.2d 1277, 1281 n.4 (Me. 1988). However, the First Circuit Court of Appeals did not do so until 1990. *United States v. Caggiano*, 899 F.2d 99, 103 (1st Cir. 1990).

Accordingly, the Court does not find that the contours of Plaintiff's right to be free from unreasonable seizures were sufficiently established in 1989 such that Defendant York can be charged with knowing that seizing burglary evidence pursuant to a warrant authorizing a search for

drugs would violate Plaintiff's rights. Indeed, the Supreme Court has now affirmed that a seizure is valid as long as the search was authorized by a warrant, the items were in plain view, and the unlawfulness of the items were immediately apparent, *regardless* of whether the police anticipated finding the items. *Horton*, 496 U.S. at 142.

To the extent Plaintiff challenges the sufficiency of the affidavit to establish probable cause, Defendant York is again entitled to qualified immunity. There is no evidence that Defendant York had reason to believe the information provided by a named informant, which had been independently corroborated in several respects by he and other law enforcement officers, was untrue. The information was clearly sufficient to establish probable cause to believe Plaintiff's home would contain drugs or drug paraphernalia. There is thus no reason to expect Defendant York should have known that his actions in obtaining the warrant violated Plaintiff's rights.

III. The remaining individual State Defendants.

In light of our conclusion with respect to Defendant York, the remaining individual State Defendants are also entitled to judgment as a matter of law. There is no evidence that these Defendants were involved to the same extent as Defendant York; indeed, they appear to be named in this Complaint for their mere presence at the scene of the search in May, 1989.

VII. State law claims.

Defendants move for judgment as a matter of law on Plaintiff's state law claims. We need not address these arguments. In view of our conclusion on Defendants' Motions for Summary Judgment as they relate to Plaintiff's federal law claims, Plaintiff's state law claims are properly dismissed for lack of subject matter jurisdiction. *Astrowsky v. First Portland Mort. Corp.*, 887 F. Supp. 332, 337 (D. Me. 1995).

Conclusion

Accordingly, Defendants' Motions for Summary Judgment are hereby GRANTED in their entirety as to Plaintiff's federal claims. Plaintiff's state law claims are hereby DISMISSED for lack of subject matter jurisdiction.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on May 7, 1996.