IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Jason Steven Kokinda,	)	
Plaintiff,		Case No. 3:21-CV-154
V.	)	Hon. Judge Johnston
Elkins Police Dep't., et al.,		(specially appointed)
Defendants,	)	

MEMORANDUM OF LAW IN SUPPORT OF OBJECTIONS TO (ECF DOC. 70) PF&R IN RE: MILLER'S MOTION TO DISMISS

I. Introduction

The defendant's defense is so weak that the Magistrate had to shanghai Mr. Kokinda by brainstorming *sua sponte* surprise defenses for them and using crude analyses to prevent Mr. Kokinda from winning. Then the injustice was compounded by delay in adjudicating the PF&R which thereby erected impossible hurdles to filing clarifying amendments.

The honorable magistrate's crude framing of the issues lacks objective rule-of-law analyses and jumps to conclusions by "weighing evidence" (contradicted by other evidence) and making "credibility determinations" that wholly disregard Mr. Kokinda's pled credibility disputes.

II. Scope and Standard of Review

Fed.R.Civ.P. Rule72 allows a party to file objections to any magistrate recommendation for 'de novo' review of any dispositive matter. The 'clearly erroneous' standard applies to any non-dispositive matter.

"The district court may accept, reject, or modify the recommended disposition, receive further evidence; or return the matter to the magistrate judge with instructions." Fed.R.Civ.P. Rule 72(b)(3); accord. 28 U.S.C. § 636(b)(1).

The "clearly erroneous" standard is met when the magistrate's recommendation "leave[s] a firm conviction that a mistake has been committed" or is not a "plausible" determination. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-4, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985).

See also *Mathews v. Weber*, 423 U.S. 261, 270-71, 96 S.Ct. 549, 554-55, 46 L.Ed.2d 483 (1976) ("The magistrate may do no more than propose a recommendation, and neither § 636(b) nor the General Order gives such recommendation presumptive weight. The district judge is free to follow it or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew. The authority—and the responsibility—to make an informed, final determination, we emphasize, remains with the judge.")

See also *Bell Atlantic Corp. v. Twombly*, ("[A] well-pleaded complaint" may proceed even if it strikes a savvy judge that "actual proof of those facts is improbable," and that "recovery is very remote or unlikely.")

III. Discussion

A. OBJECTION #1: THE MAGISTRATE CONVERTED THE *MOTION TO DISMISS* INTO AN UNLAWFUL *MOTION FOR SUMMARY JUDGMENT* ─ ABSENT *ROSEBORO* NOTICE ─ BY UNLAWFULLY "WEIGHING EVIDENCE," "DETERMINING CREDIBILITY," AND LITIGATING ON THE DEFENDANT'S BEHALF:

1. Defendant Miller's (ECF Doc. 41) "Motion to Dismiss" is about as barebones as you can get. The honorable magistrate shot down their bizarre *Heck* and *Younger* abstention doctrine claims, yet she thereafter developed, *sua sponte*, "failure to state malicious prosecution and excessive bail claims" contained therein with novel theories the defendant never raised.

(a) The Motion to Dismiss memorandum merely claims that Mr. Kokinda did not articulate clearly enough "where and when the probable cause hearing occurred," (whereat Cprl. Miller S.P. admitted that he had no evidence to support the *highly technical* "more than fifteen continuous days in a particular county" ***initial***-duty-to-register WV standard).[1]

(b) By pretending that Miller had *probable cause*, it was thereafter easy for the magistrate to agree that Miller had no control over the Randolph County magistrate setting an additional $75,000 cash-only bail when Mr. Kokinda was about to bail out on recent $25,000 cash-only bail for the misdemeanors subsequently dismissed.

2. The Magistrate is not allowed to *sua sponte* develop claims for represented defendants under the guise of "taking judicial notice of court records."[2]

(a) It may be allowable to take judicial notice of hard evidence that is not contradicted by other evidence for sake of judicial economy. However, when a judge starts to litigate claims on behalf of a represented party and cherry-pick evidence she thinks is controlling

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[1] See (ECF Doc. 42) Memorandum of Law in Support of Motion to Dismiss pgs. 13-14, ("Plaintiff alleges that Defendant Miller caused a seizure of plaintiff without probable cause because Defendant Miller "had no evidence of [Plaintiff] living in West Virginia for 'more than 15 continuous days.'" (ECF No. 16–1 at 9–10). Plaintiff states that this occurred "at a probable cause hearing;" however, Plaintiff does not specify when or where this hearing occurred, nor does he specify which of his several federal and state criminal charges the hearing was conducted in relation to. (See ECF No. 16; ECF No. 16–1). Thus, Plaintiff does not provide a sufficient factual basis to plausibly allege that Defendant Miller lacked probable cause for the three "failure to register as a sex offender" criminal charges under West Virginia law.") – The (ECF No. 46-3) probable cause hearing notes Mr. Kokinda provided in his Response sufficiently support that the hearing occurred in the Randolph County Magistrate Court shortly after his arrest. The actual audio should be discoverable pre-trial to eliminate any confusion. Furthermore, this evidence is known to the Defendant and does not require Mr. Kokinda to provide it for fair notice in pleadings to prevent surprise at trial.

[2] The general ***Tellabs, Inc. v. Makor Issues & Rts., Ltd.***, 551 U.S. 308, 322 (2007) authority that the magistrate relied upon (ECF Doc. 70, pg. 8-9) must be rationally balanced against "waiver doctrine," and the prohibitions against "weighing evidence" or making "credibility determinations" without ***Roseboro*** notice.

despite other contrary evidence, this is far removed from the framework of an insufficiency-in-pleading inquiry and, instead, converts the magistrate into the defendant's attorney, judge, jury, and executioner holding a mini bench trial.

(b) The honorable magistrate had also unlawfully adopted the defendant's version of the facts, as if incontrovertible, simply because *they* alleged various events at the Elkins park, as if their unproven statements carried some sort of *Roman Imperium* weight.

See Cont'l Technical Servs., Inc. v. Rockwell Int'l Corp., 927 F.2d 1198, 1199 (11th Cir. 1991) ("[A]n issue raised perfunctorily without citation to authority constitutes waiver of [the] issue.); Fed.R.App.P. 28(a)(4) ("The argument shall contain the contentions of the [party] with respect to the issues presented, and the ***reasons*** therefor, with citations to the authorities, statutes and parts of the record relied on.") (emphasis added)).

See also Marino v. Indus. Crating, Co., 358 F.3d 241, 247 (3d Cir. 2004) (Even "in considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the *non-moving party's* evidence is to be believed[,] and all justifiable inferences are to be drawn in *his* favor." (emphasis added))

See also Coltex v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) (The defendants must demonstrate that there is not more than a scintilla of evidence in favor of the plaintiff's claims to obtain summary judgment dismissing claims against them.)

See also Paladino v. Newsome, 885 F.3d 203, 209-10 (3d Cir. 2018) (Concluding that inmate's sworn deposition testimony, even though self-serving, created a genuine issue of material fact that could only be resolved by jury at trial.)

See also Boitnott v. Corning, Inc., 669 F.3d 172, 175 (4th Cir. 2012) (In reviewing a motion for summary judgment, the Court views the facts in light most favorable to the non-moving party.)

(c) The Magistrate was supposed to provide *Roseboro* notice if the motion became a question of whether a "scintilla of evidence exists to support claims" as a basis for summary judgment on the pleadings.

(a) Not only did a *scintilla* of evidence exist, as supported by Mr. Kokinda's sworn pleadings, but *affirmative evidence* was Discoverable to prove Cprl. Miller S.P. lacked *probable cause* and that summary judgment should be granted in *Mr. Kokinda's* favor.[3]

See Pledger v. Lynch, 5 F.4th 511 (4th Cir. 2021) at Lexis 33-35 (holding that "the grant of summary judgment on [an] incomplete record deprived [Plaintiff]" of "adequate *Roseboro* notice" and "Rule 56(d)'s protections." *Roseboro* requires the magistrate to provide notice that she is converting the motion to dismiss into a motion for summary judgment.)

(b) The Magistrate styles her conversion as mere "judicial notice," but *judicial notice* has its limitations when the plaintiff is denied rebuttals to the conclusions drawn, and the evidence relied upon is materially false or misleading.

(1) Ms. Bell's statement that she saw Mr. Kokinda in April of 2019 was easily fabricated *ex post facto* and is also misleading in the context of her trial testimony and the Wells Fargo bank statements (relied upon for presuming his location at trial).

[3] *See* Exhibit-A, Wells-Fargo bank transaction records relied upon at trial used to prove Mr. Kokinda's inferable whereabouts; *see also* Exhibit-B, Ms. Bell's trial testimony that she had only observed Mr. Kokinda twice or thrice a week at the Elkins City Park for maybe an hour or two during the August 26-September 29, 2019, timeframe of the federal indictment.

(2) A jury may not find Ms. Bell *credible*, in light of her other capricious testimony that doesn't add up and circumstantial evidence of political favors to her father.[4] And they may believe that the defendants told her what to say, and she agreed because the bank records provide evidence that Mr. Kokinda was momentarily in Elkins at times.

B. OBJECTION #2: BY CHERRY-PICKING TANGENTS OF EVIDENCE, THE MAGISTRATE DREW ERRONEOUS CONCLUSIONS REGARDING *PROBABLE CAUSE* AND IMPROPERLY FRAMED THE ANALYSIS:

1. The Magistrate ***liberally construed*** the elements of the WV registration statute to conclude that Mr. Kokinda's visits to Elkins and various counties for "less than fifteen continuous days" combined with Ms. Bell's misleading statement, read in *isolation* – that she saw him in April of 2019, provided undebatable *probable cause* to charge and arrest him.

(a) The U.S. Supreme Court, however, requires that criminal statutes be ***strictly construed*** to objectively define the line of criminality in order to provide "fair warning" before punishment may ensue.

See *Manning v. Caldwell*, 930 F.3d 264, 278 (4th Cir. 2019) ("Supreme Court precedent requires that statutes be based upon objectively discernable standards." (emphasis added))

See also *United States v. Hilton*, 701 F.3d 959, 966 (4th Cir. 2012) (Criminal statutes "are strictly construed and should not be interpreted to extend criminal liability beyond that which Congress has plainly and unmistakably proscribed.")

[4] *See* 2nd Amended Complaint, describing how her father, David Parker, was suspiciously elected to the city council shortly before her false testimony at trial. Officials have a lot of influence over other governmental departments and plausibly helped Parker obtain key support.

2. The proper analytic framework requires this Court to consider the contours of the law as declared by the West Virginia Supreme Court and whether a reasonably well-trained officer would have believed that the offense was committed under those strict standards.

See Hupp v. Cook, 931 F.3d 307, 317 (4th Cir. 2019) ("Probable cause is determined both by the suspect's conduct as known to the officer, and the [strictly construed] contours of the offense thought to be committed by that conduct.")

See also Toghill v. Clarke, 877 F.3d 547, 558 (5th Cir. 2017) ("[W]e are bound to accept the state supreme court's construction "as if it written into the statutes themselves.""); *see also* Johnson v. Fankell, 520 U.S. 911, 916 (1997), cited more recently in Johnson v. United States, 559 U.S. 133, 138 (2010) (Federal courts do not have "any authority to place a construction on a state statute different from the one rendered by the highest court of the state."); "[s]tate courts are the ultimate expositors of the state law," Mullaney v. Wilbur, 421 U.S. 684, 691 (1975), and "a fixed and received construction of [a] statute [] of a state in its own courts" becomes "a part of the statute[]," Mudock v. City of Memphis, 87 U.S. 590, 611 (1874).

3. Beegle, *infra*, is the Supreme Court of West Virginia's objective construction of the WV registry statute. And it clearly defines the singular, *initial* duty of offenders to register: They must register only after staying in a particular country for "more than fifteen continuous days." Because the statute requires the offender to *deregister* ten business days in advance, the statutory scheme makes registration of travelers/visitors impossible in most cases.

   (a) Pursuant to Beegle, *infra*, there is no additional obligation to register vehicles someone may drive for a few days, unless the offender is already on the WV registry and will drive the particular vehicle for more than ten business days. ─ Miller only alleged that Mr.

Kokinda rented two vehicles and drove them for a few days each and affirms he was *never* on the WV registry. *See* (ECF Doc. 46-14), Miller's Affidavit of Probable Cause.

4. Applying the proper framework, it is clear that Cprl. Miller S.P. lacked *probable cause* because he only alleged that Mr. Kokinda was visiting various spots in West Virginia and knew that Ms. Bell had only seen him on spotty occasions, primarily in the August 26 – September 29, 2019, timeframe supported by the bank transactions. An ordinary person would know the difference between establishing a residence and visiting.

See *United States v. Novak*, 607 F.3d 968, 973 (4th Cir. 2010) (citing *United States v. Venturella*, 391 F.3d 120, 125 (2d Cir. 2004) ("[T]ransients [are] those persons passing through a locality. … Residency means an established abode, for personal or business reasons, permanent for a time. A resident is so determined from the physical fact of that person's living in a particular place. … A person may be a resident of one locality, but be domiciled in another.")

5. Furthermore, Cprl. Miller S.P. had two campground reservation receipts for Pendleton County which constituted *affirmative evidence* that Mr. Kokinda was merely ***traveling*** through West Virginia, not *residing*, and (more likely than not) did not stay more than fifteen continuous days in any county in the Aug. 26- Sept. 29 timeframe as required to charge him.[5]

See *State v. Beegle*, 237 W. Va. 692, 533, 790 S.E.2d 528 (W.Va. 2016) at n.11 ("[T]he initial duty to register as a sex offender in a particular county arises when an offender has been in that county for more than fifteen continuous days. *See* C.S.R. § 14-5.1")

[5] The specific dates of these receipts described in Exhibit-C, alone, would foreclose any theory that Mr. Kokinda spent "more than fifteen continuous days in any particular county" because there was less than two weeks preceding the Sept. 8th-21st Yokum's reservation and only eight days following it ─ as supported by locational presence adduced from bank transaction records. *See also* indictment range of August 26 to September 29, 2019 in (ECF Doc. 46), Dkt. 2:19-CR-33, N.D.W.V., *Pro Se* Motion to Dismiss.

6. Cprl. Miller S.P. had a duty to present a fair and balanced narrative to a neutral and detached magistrate, rather than spinning facts in a sensationalized manner by using unlawful "*puffing*" methods to make it look like a violation in some "unparticularized," *liberal construction* sense.

See United States v. Bosyk, 933 F.3d 319, 366 (4th Cir. 2019) "[T]he government may not seek relief under the good faith exception if "the magistrate or judge [] issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for [her] reckless disregard of the truth." *Id.* (citation omitted). One situation in which this Court has found an affidavit is sufficiently misleading to establish an absence of good faith is when the affidavit includes "puffing"—i.e., irrelevant or inapplicable information—in an apparent "attempt[] to endue the affidavit with the appearance of genuine substance." *United States v. Perez,* 393 F.3d 457, 465 (4th Cir. 2004) (quoting *United States v. Wilhelm,* 80 F.3d 116, 123 (4th Cir. 1996))"); *Id.* at 367 *cf. Coreas,* 419 F.3d at 156 (rejecting the use of "unparticularized allegations" to justify an otherwise inadequate warrant application).

(a) Cprl. Miller S.P. did not even state a colorable claim under the contours of the law as declared by the WV Supreme Court regarding the statute. He only stated an "unparticularized allegation" that Mr. Kokinda was unregistered and *visited* West Virginia in various counties for brief stays, never to return twice to the same county.

(b) Cprl. Miller S.P. also had exculpatory email evidence that is currently being suppressed and held in Mr. Kokinda's red HP laptop that was confiscated before his arrest. These emails demonstrate *modus operandi* evidence of hotel and B&B reservations proving he

only visited each state according to what the clearly established law allowed at great expense to his wallet in constantly moving to comply.

C. OBJECTION #3: THE MAGISTRATE'S PF&R WAS FILED POST-SCHEDULING ORDER, CREATING ADDITIONAL "GOOD CAUSE" TO ALLOW CURATIVE AMENDMENTS REGARDING ADA CLAIMS, INTER ALIA:

1. Mr. Kokinda cured his failure to adequately state an ADA violation, implicating Cprl. Miller S.P. in his official capacity, by filing the 2nd Amended Complaint.

   (a) Because the amendment was not futile and "futility" was never addressed, the PF&R was neither dispositive nor instructive on the question of *futility* and leave to amend.

   (b) Mr. Kokinda did not have access to his case-file to properly amend his Complaint during the small window he had to amend Complaint before a scheduling order was issued.[6]

   (c) He also had difficulty writing the volume of pleadings required with his heavy-handed penmanship and the primitive implements available in the jail.

   (d) The curative amendment is allowable pursuant to "relation-back doctrine."[7]

   (e) An adjudication on the merits is preferred in §1983 litigation over procedural hurdles that insulate rogue officials from liability based on technicalities and formal procedure.[8]

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[6] *See* (ECF Doc.) "Motion to Amend/Supplement § 1983 Complaint"

[7] *See* Wilkerson Fuel, Inc. v. Elliott, 415 BR 214 - Dist. Court, (D. South Carolina 2009) at 220 ("Rule 15(c) of the Federal Rules of Civil Procedure provides that "[a]n amendment to a pleading relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." In *Dominguez,* the debtor argued that the court should strictly enforce the bar date and not allow the amendment to relate back. The court held that "[a]cceptance of this argument in this context would elevate form over substance and defeat the explicit purpose of the relation back doctrine for amendments to complaints." 51 F.3d at 1510. Therefore, the court finds that [Plaintiff] is granted leave to amend its complaint to comply fully with Rules 8(a) and 7008.")

[8] *See* (ECF Doc. 301) (J. Johnston's Order Granting Stay, pgs. 2-3, "Plaintiff will suffer extreme hardship if the Court denies a stay. Plaintiff would have to file his objections without the proper

(f) Therefore, the Court should remand for claim development based on curative amendments in the 2nd Amended Complaint.

2. Considering that the U.S. Court of Appeals for the Fourth Circuit granted oral argument on Mr. Kokinda's direct appeal of the 18 U.S.C. § 2250(a) conviction, this Court would be wise to stay proceedings until the case is decided. This is especially true because the Govt. relies upon some **distorted** *Chevron*-style analysis, and the Supreme Court is likely to overrule *Chevron* in the *Loper Bright Enterprises v. Raimondo* case currently pending on its docket.

D. OBJECTION #4: MR. KOKINDA ADEQUATELY STATED AN *EXCESSIVE BAIL* CLAIM BECAUSE THE *EXCESSIVE BAIL* WAS USED AS A *PLACEHOLDER* AND FLOWED AS A NATURAL CONSEQUENCE OF MILLER FILING THREE MALICIOUS COUNTS RIGHT WHEN MR. KOKINDA WAS ABOUT TO BAIL OUT:

1. It was previously asserted that Crpl. Miller S.P. had no authority to set bail himself and could not be liable for the excessive bail violations absent improper influence over the judge. However, it is well established that government officials are responsible for the natural consequences of their actions in a § 1983 action, and "[i]t is an undoubtedly natural consequence of reporting a person to the police that the person will be arrested." By analog, it is an undoubtedly natural consequence of filing three phony charges that the bail will initially be set in proportion to the magnitude of the facial charges. *See Cf. Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 419 (4th Cir. 2014) *quoting Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013).

materials and resources, which would surely be a futile task. Forcing Plaintiff to fight this losing battle would contravene the strong "public policy of deciding cases on their merits." *Choice Hotels Int'l, Inc. v. Goodwin & Boone*, 11 F.3d 469, 471 (4th Cir. 1993) (quoting *Herbert v. Saffell*, 877 F.2d 267, 269 (4th Cir. 1989)).")

See also Cf. United States v. Black, 918 F.3d 243, 259 (2d Cir. 2019) (The government cannot "use an indictment as a placeholder while contemplating more severe charges based on the same conduct.")

(a) By filing malicious charges to mislead the magistrate, it inherently effectuated Miller's desire to jack up the bail excessively by using the false charges as a placeholder to unlawfully detain Mr. Kokinda in lieu of malicious federal prosecution.

(b) The timing of the charges, dismissal, and ultimate involvement of Cprl. Miller S.P. in finding an unconstitutional avenue to "commandeer state resources to fund his investigations" for the malicious federal prosecution, altogether demonstrate a plan to violate Mr. Kokinda's due process and Eighth Amendment rights in a lawless compounded conspiracy violation.[9]

IV. Conclusion

THEREFORE, for each of the foregoing reasons, the Court is requested to SUSTAIN the objections in full and/or REMAND for further proceedings on the matters.

/s/_____

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[9] It is a violation of the Tenth Amendment for federal officials to commandeer state officials and resources into enforcing a regulatory program such as SORNA. Therefore, creating the color of law that Miller had a legitimate WV state law violation subverted the purpose of this constitutional prohibition. *See* Printz v. United States, 521 U.S. 898, 935, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997).