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United States District Court, N.D. New York.

Elizabeth GONZALEZ, Michael Fyvie and Charles Frisbee, Plaintiffs,
v.
THE CITY OF SCHENECTADY, Richard Barnett, Michael Siler, Thomas Mattice, Michael Glasser, Marisela Mosher, William Lachanski, and Eric Hesch, Individually and as Agents, Servants and/or Employees and Police Officers of the City of Schenectady and the City of Schenectady Police Department, and "John Doe" and "Jane Doe," Individually and being Unnamed Agents, Servants and/or Employees and Police Officers of the City of Schenectady and the City of Schenectady Police Department, Defendants.

No. 00–CV–0824. | Sept. 17, 2001.

Attorneys and Law Firms

Tobin and Dempf, Albany NY, for Plaintiffs, Kevin A. Luibrand, Adrienne Kerwin, of counsel.

Dreyer Boyajian LLP, Albany, NY, for Defendant Barnett, Daniel J. Stewart, of counsel.

Carter Conboy Law Firm, Albany, NY, for Defendant City of Schenectady, Michael Murphy, of counsel.

Opinion

DECISION & ORDER

MCAVOY, J.

I. BACKGROUND

***1** Plaintiffs commenced the instant action pursuant to 42 U.S.C. § 1983 alleging violations of their Fourth and Fourteenth Amendment rights arising out of their alleged arrests, detainments, and strip searches by Defendants. Plaintiffs also assert various pendent state law causes of action.

Previously, the Court granted partial summary judgment in favor of Plaintiff Michael Fyvie as to his claim against the City of Schenectady that he was strip searched in violation of his Fourth Amendment rights pursuant to an unconstitutional strip search policy. The Court denied Plaintiff Gonzales' motion and Defendants City of Schenectady, Thomas Mattice, Michael Glasser, Marisela Mosher, William Lachanski, and Eric Hesch's cross-motion for summary judgment pursuant to Rule 56 on that same issue.

Now before the Court is the motion of the Defendant City of Schenectady seeking partial summary judgment on all claims brought against the City by Plaintiff Charles Frisbee; and the motions of Defendant Richard Barnett seeking dismissal of all claims against Mr. Barnett on the grounds that the Complaint fails to state a cause of action against Mr. Barnett, or, in the alternative, granting him summary judgment on the grounds of qualified immunity. Mr. Barnett also seeks to dismiss the state law claims against him because of the Plaintiff's failure to file a timely Notice of Claim and because the Plaintiff did not interpose the state law claims within the applicable statute of limitations. In addition, Mr. Barnett moves pursuant to Rule 21 of the Federal Rules of Civil Procedure to sever the claims of the three plaintiffs and, further, pursuant to Rule 42(b), to bifurcate Mr. Frisbee's claims against Mr. Barnett from the claims against the City of Schenectady.

A. Plaintiff Frisbee's Version of the April 1, 1998 Arrest

Pursuant to Rule 56, the following facts are taken in the light most favorable to the non-movant, Plaintiff Charles Frisbee. *Cruden v. Bank of New York,* 957 F.2d 961, 975 (2d Cir.1992).

On April 1, 1998, at about 5:55 p.m., Mr. Frisbee was walking on a public street in the City of Schenectady with his then-six year old daughter and her nine year old friend to go to a convenience store to buy ice cream. When they were in front of the store, Frisbee was called over to a City of Schenectady police vehicle by Defendant–Officers Barnett and Siler who were seated in the vehicle. Siler asked Frisbee what he was doing in the area. Frisbee responded that he was going to the store. Frisbee's daughter and her friend entered the store, and Siler and Barnett exited the police vehicle. Siler and Barnett then approached Frisbee on the sidewalk and, according to Frisbee's deposition, Siler said: "Where is the fucking crack, where is the fucking crack?"[1] Plaintiff then responded: "I don't use crack. I don't know nothing about crack." Plaintiff asserts that he said he was with his daughter and her friend, that Siler & Barnett were aware of that fact, that he told the Officers that he just lived one block away. He also asserts that at about that point his daughter came running out of the store yelling: "Don't take my daddy to jail."

***2** Plaintiff asserts that Barnett escorted his daughter away at which time Plaintiff said to Siler: "Why are you

stopping me. Why are you harassing me." Plaintiff claims that Siler responded: "Because you won't fucking tell us where the fucking crackheads are you fucking asshole." Barnett then supposedly asked: "Got anything in your pockets?" to which Plaintiff responded in the negative. Siler then said: "Spread 'em." Plaintiff claims that Siler kicked him in the ankle, threw him up against the car, and started to frisk him. Plaintiff claims that "they was checking through my pockets,—keys, whatever I had in my pockets, looking, looking, looking. And they found a little marijuana." Frisbee Dep. p. 69. Plaintiff asserts Defendants found a small bag of marijuana in the Plaintiff's front pocket which Plaintiff claims was worth approximately $5.00.

Frisbee was then handcuffed, transported to the City of Schenectady Police Station, and stripped searched by Siler and Barnett. He was kept in a holding cell for a couple of hours and then was issued an Appearance Ticket and released without having to post bail. He was charged with the violation of possession of marijuana, contrary to New York Penal Law Section 221.05. He asserts that when he received back his belongings, one hundred ($100.00) dollars in cash was missing. He also asserts that at no time did he consent to be searched.

Mr. Frisbee eventually pled guilty to possession of marijuana and paid the resulting fine.

II DISCUSSION

The Court will first address the motions directed to Mr. Frisbee's arrest. The Court notes that the City's arguments are addressed only to the circumstances surrounding Mr. Frisbee's April 1, 1998 arrest, therefore, the Court treats the motion as limited to that much of those causes of action premised in whole or in part on the April 1, 1998 incident.[2]

In addition, Mr. Barnett's motion, which is similarly directed to the April 1, 1998 events, relies on documents beyond the pleadings. The non-movant responds in kind. Therefore, the Court treats his motion as a Rule 56 motion.

A. Post–Marijuana discovery detention claim

Plaintiff acknowledges that under *Townes v. City of New York,* 176 F.3d 138 (2d Cir.1999), *cert. denied,* 120 S.Ct. 398 (1999), he may not recover for damages arising from any detention suffered as a consequence of the discovery of marijuana on him on April 1, 1998. Therefore, that much of Defendant Barnett and the City of Schenectady's motions seeking to dismiss Plaintiff Frisbee's claims for damages for his detention occurring after the discovery of marijuana on April 1, 1998 is GRANTED and that portion of Mr. Frisbee's claims premised on his detention after the marijuana was discovered on April 1, 1998 are DISMISSED.

B. Pre–Marijuana discovery detention claim

Plaintiff argues, however, that he has a legally viable claim for damages under a false arrest theory based upon the defendants' conduct on April 1, 1998 which occurred before the marijuana was discovered. The threshold issue now before the Court is whether the facts of this case, when viewed in the light most favorable to Mr. Frisbee, could lead a reasonable finder of fact to conclude that the Plaintiff was seized, arrested or searched in violation of his Fourth Amendment rights before the marijuana was discovered.

1. The Fourth Amendment

***3** The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend IV; *Atwater v. City of Lago Vista,* 121 S.Ct. 1536, 1543 (2001). Whenever an individual is physically or constructively detained by a police officer in such a manner that a reasonable person would not feel he is free to leave, that individual has been "seized" or "arrested" within the meaning of the Fourth and Fourteenth Amendment. *See Terry v. Ohio,* 392 U.S. 1 (1968); *Tennessee v. Garner,* 471 U.S. 1 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has seized the person.").

A seizure does not occur every time a police officer approaches a citizen on the street to engage in consensual discourse. *See United States v. Tehrani,* 49 F.3d 54, 58 (2d Cir.1995). A police officer may stop and detain an individual to conduct a reasonable inquiry into whether crime is afoot without violating the Fourth Amendment if the officer possesses a reasonable suspicion that criminal activity has occurred or is about to occur. *Terry v. Ohio,* 329 U.S. at 20. This is known as a Terry Stop. However, when an officer detains an individual for questioning yet lacks this reasonable suspicion, a seizure under the Fourth Amendment occurs. *See United States v. Glover,* 957 F.2d 1004, 1008 (2d Cir.1992).

Further, Terry Stops, because they are investigative in nature, must be brief and "reasonably related in scope to the circumstances which justified the intervention in the first place." *See Terry,* 329 U.S. at 20. If such a stop last "longer than is necessary to effectuate the purposes of the stop" or employs tactics more invasive than necessary under the circumstances, then the stop becomes a *de facto* arrest for which the officer must have probable cause to believe that a crime has occurred. *See Tehrani,* 49 F.3d at

58; *Oliveira v. Mayer,* 23 F.3d 642, 645–46 (2d Cir.1994), *cert. denied,* 513 U.S. 1076 (1995).

Probable cause exists when officers "have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Posr v. Court Officer Shield No. 207,* 180 F.3d 409, 414 (2d Cir.1999). The inquiry into the existence of probable cause is an objective one; the subjective beliefs of the arresting officer are irrelevant. *Martinez v. Simonetti,* 202 F.3d 625, 633 (2d Cir.2000).

During a Terry Stop, officers may conduct a "pat-down frisk" if the officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot *and* that the persons with whom he is dealing may be armed and presently dangerous." *Terry,* 392 U.S. at 30. Further, "where nothing in the initial stages of the encounter serves to dispel his *reasonable fear* for his own or others' safety, he is entitled ... to conduct" this pat down frisk, which is intended be "a carefully limited search of outer clothing of such persons in an attempt to discover weapons...." *Terry,* 392 U.S. at 30.

2. Plaintiff's claims

***4** In order for the Plaintiff to maintain his Fourth Amendment or false arrest claims[3] for April 1, 1998, he must establish:

(1) that the defendants detained him without a reasonable suspicion before they found the marijuana; or

(2) that the defendants used measures more intrusive then necessary to conduct a Terry Stop without probable cause before the marijuana was discovered; or

(3) that the defendants engaged in a *defacto* arrest of the Plaintiff without probable cause before the marijuana was discovered.

To succeed on the first and third theories, Plaintiff must establish that he was seized within the meaning of the Fourth Amendment, to succeed on the second theory he must establish that the level of intrusion used by the officers was unreasonable under the totality of the circumstances. The Courts have held that these determinations are generally questions of fact for a jury to determine. *See Oliveira,* at 645; *Posr v. Doherty,* 944 F.2d 91, 99 (2d Cir.1991) ("The issue of precisely when an arrest takes place is a question of fact."). Further, each theory requires proof that the officers acted without the requisite "reasonable suspicion" or "probable cause."

Here, when viewing the facts in the light most favorable to Mr. Frisbee, a reasonable trier of fact could conclude that the officers detained Mr. Frisbee for questioning without a reasonable suspicion that a crime had occurred or was about to occur; that at least Defendant Siler engaged in procedures more intrusive then necessary under the circumstances; and that the officers seized and search Mr. Frisbee without probable cause.

According to Mr. Frisbee's version of the events, on April 1, 1998 he was engaged in wholly innocuous activity when he was approached by the defendants. A finder of fact could conclude that the police lacked any suspicion that crime was afoot when they approached Mr. Frisbee. Further, a reasonable finder of fact could conclude that during the questioning, a reasonable person would not feel free to leave and that the police gained no further heightened suspicion or probable cause to continue detaining or to search Mr. Frisbee during their questioning. None of the responses given by the Plaintiff to Defendants' questions, at least as he recounts them, would lead a reasonable trier of fact to conclude that the defendants obtained a reasonable suspicion or probable cause to believe that a crime had been committed or that plaintiff was armed.

Still further, based upon Mr. Frisbee's account, a reasonable finder of fact could conclude that the police lacked a reasonable basis to frisk Mr. Frisbee or, if they did have such reasonable suspicion, that the frisk went far beyond a justifiable pat down of his outer clothing. In addition, a reasonable trier of fact could conclude that there existed no reasonable suspicion or probable cause to believe, at that time, that Plaintiff presented a risk of harm to himself or to others. *See Kerman v. City of New York,* 2001 WL 845442, at *6 (2d Cir. July 26, 2001) (A police officer's decision to detain or handcuff a person is not unreasonable if the officer has probable cause to believe that the person presents a risk of harm to himself or to others.). In fact, Defendants have not advanced a position on this motion that either Siler or Barnett believed the Plaintiff was armed at the time, and it is a reasonable inference that the small bag of marijuana discovered by the police would not have been discovered in a simple pat down frisk intended only to discover weapons.

***5** Even assuming, *arguendo,* that the area in which this encounter took place was known by the police as having high drug sales, this fact still does not prevent a reasonable finder of fact from concluding that the police lacked an articulable suspicion or probable cause that Plaintiff committed or was about to commit a crime when they approached and detained him. To hold to the contrary would eviscerate the protections of the Fourth Amendment for every person who lives, works, or travels in an area known for high drug sales.

While Mr. Barnett asserts in his Memorandum of Law

that a reasonable suspicion arose, in part, from the fact that Mr. Frisbee had a prior marijuana possession conviction, Mr. Barnett's affidavit is void of any contention that he possessed this information at the time of the stop. Further, while Frisbee admits that when the police approached, a number of "kids" who had gathered in front of the store ran away, he denies he had any involvement with these individuals. Frisbee Dep., p. 173–174.

Based upon Plaintiff's version of the events, a reasonable finder of fact could conclude that the facts leading up the discovery of marijuana constitute an unjustified intrusion which offends Mr. Frisbee's Fourth Amendment rights and constitutes a legally cognizable false arrest claim.

3. Interplay with *Townes v. City of New York*

Townes v. City of New York does not prevent the Plaintiff from pursuing claims for damages arising from conduct that occurred before the discovery of the marijuana. The holding of *Townes* is specifically limited to the fact that Mr. Townes had not sought damages for conduct occurring before the discovery of the weapons in the taxi-cab in which he was riding. *Townes* does not hold that a Fourth Amendment claim for that period of time is a legally nullity. In fact, the *dicta* in *Townes* supports the contrary conclusion. In this regard, the *Townes* decision states:

> [T]he *only actionable violations* of [the Fourth Amendment] are the stop of the taxicab and the associated seizure and search of Townes's person, which alone might at most support slight or nominal damages. Townes, however, seeks damages not for those injuries, but only for the ultimate harm he suffered by his conviction and incarceration.

Townes, 176 F.3d at 145 (emphasis added).

The *Townes* decision goes on to hold that "because Townes does not seek *the only relief to which he may have been entitled,* his complaint should have been dismissed pursuant to Fed .R.Civ.P. 12(b)(6)." *Townes,* 176 F.3d at 149 (emphasis added). Accordingly, had Mr. Townes properly pled and sought damages for a constitutional violation for the period up to the discovery of weapons and drugs, his claim would have been actionable *albeit* of minimal value.

Here, the threshold issue is whether the Plaintiff's claim is cognizable at law. The Court finds that Plaintiff does assert cognizable false arrest claims for the period of time between initial contact with the police and the point where the marijuana was discovered.

4. Barnett's personal involvement—April 1, 1998

***6** Mr. Barnett argues in his Reply Memorandum of Law that he did not participate in the search of Mr. Frisbee and therefore he cannot be held accountable for this conduct. At first blush, the Amended Complaint appears not to allege any patently unlawful conduct by Mr. Barnett on April 1, 1998 until after the marijuana was discovered. *See* Amend. Compl. ¶¶ 46, 47, & 48. The Amended Complaint asserts that on April 1, 1998, without probable cause, Barnett and Siler approached Plaintiff, Amend. Compl. ¶ 46; that Officer Siler forced Plaintiff against the car and searched Plaintiff, Amend. Compl. ¶ 47; and that Officer Siler unlawfully detained and handcuffed Mr. Frisbee, Amend. Compl. ¶ 48. Officer Barnett is alleged to have participated in the transfer of Frisbee to the station which, according to the Plaintiff's facts, occurred after the discovery of marijuana. Amend. Compl. ¶ 48. The mere allegation that Barnett approached Frisbee without probable cause is legally insufficient to state a claim under the Fourth Amendment or for state law false arrest.

However, one sentence in the Amended Complaint gives the Court pause before dismissing the claim against Mr. Barnett. At paragraph 55, the Amended Complaint uses a plural noun and asserts that:

> The defendant police officers, at the above times and places, ... without cause of legal right, did, under color of Law of the State of New York and/or the City of Schenectady, stop and frisk Charles Frisbee without reasonable suspicion and without consent of Charles Frisbee....

Amend. Compl. ¶ 55.

While the earlier paragraphs of the Amended Complaint assert that Defendant Siler conducted the frisk, Plaintiff testified at his deposition that Mr. Barnett asked Plaintiff if he had anything in his pockets and then claims, using a plural pronoun, that: "they was checking through my pockets,—keys, whatever I had in my pockets, looking, looking, looking. And they found a little marijuana." Frisbee Dep. p. 69.

A reasonable finder of fact could conclude that Barnett participated in both the investigatory detention of Plaintiff and in the search after Siler started the frisk. Further, based upon the totality of circumstances, a reasonable finder of fact could conclude that Barnett's presence and actions when approaching Plaintiff, participating in the

questioning, and ushering his daughter way from the scene contributed to a reasonable belief that Mr. Frisbee felt detained and therefore seized within the meaning of the Fourth Amendment and state common law.

This creates a sufficient question of material fact which requires the Court to DENY summary judgment on this ground.

C. Qualified Immunity

Next, Defendant Barnett moves for summary judgment asserting that under the holding of *Cerrone v. Brown,* 246 F.3d 194 (2d Cir.2001), he is entitled to qualified immunity because the officers had "arguable probable cause" for the Terry Stop and pat down frisk of Plaintiff. Neither party contests that in 1998, it was clearly established that a "Terry Stop and Frisk" required an articulable suspicion, and that an arrest and search required probable cause. Thus, the issue is whether Officer Barnett's conduct was objectively reasonable under the second element of the qualified immunity analysis.

***7** In *Cerrone,* the Second Circuit held that:

> the second element of qualified immunity analysis permits a court to grant summary judgment if a reasonable officer could have believed his or her actions were lawful. A court must evaluate the objective reasonableness of the appellants' conduct in light of clearly established law and the information the officers possessed. Because the test is an objective one, the officer's subjective beliefs about the seizure are irrelevant. A defendant is therefore entitled to summary judgment on qualified immunity grounds if a jury, viewing all facts in the light most favorable to the plaintiff, could conclude that officers of reasonable competence could disagree on the legality of the defendant's actions.

Cerrone, 246 F.3d at 202 (internal citations and quotations omitted). "Arguable probable cause exists when a reasonable police officer in the same circumstances and possessing the same knowledge as the officer in question could have reasonably believed that probable cause existed in the light of well established law." *Cerrone,* 246 F.3d at 202–203.

While the holding of *Cerrone* combined with Mr. Barnett's version of the facts of April 1, 1998[4] *might* entitle him to qualified immunity, one must not lose sight of the fact that this defense is raised in the context of a Rule 56 motion during which the Court must view the facts in the light most favorable to Mr. Frisbee. However, as also instructed by the Second Circuit in *Cerrone:*

> Even on summary judgment, where all facts must be viewed in the light most favorable to the non-moving party, for the purpose of qualified immunity and arguable probable cause, police officers are entitled to draw reasonable inferences from the facts they possess at the time of a seizure based upon their own experiences.
>
> *Cerrone,* 246 F.3d at 203.

Here, when performing the mental exercise of viewing the facts in the light most favorable to Mr. Frisbee while still drawing reasonable inferences from the facts Defendant Barnett possessed at the time of the stop based upon his own experiences, the Court cannot conclude that reasonable officers would disagree on whether Defendants Siler and Barnett had either a reasonable suspicion to detain or frisk Frisbee or probable cause to arrest or search him—at least until they found the marijuana on him. Under Mr. Frisbee's version of events, he was doing nothing suspicious nor involved in any apparent criminal activity. He was simply walking down a City street with his daughter and her young friend. Even drawing the reasonable inference based upon Mr. Barnett's experience that Plaintiff was in a high drug trade zone and that he had previously been convicted of marijuana possession, nothing in Plaintiff's conduct, appearance, or his answers to the Defendants' questions could form the basis for an objectively reasonable suspicion that he was involved in drug activity or any other crime on April 1, 1998.

***8** The 20/20 vision gained through hindsight cannot be used to alter the events which lead up the marijuana discovery, at least as recounted by Mr. Frisbee. The divergent version of the two scenarios creates a material question of fact which prevents the application of qualified immunity at this time. *Kerman,* 2001 WL 845442, at *8 ("However, the parties' versions of the facts differ markedly and '[s]ummary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness." ') (quoting *Thomas v. Roach,* 165 F.3d 137, 143 (2d Cir.1999); *Ying Jing Gan v. City of New York,* 996 F.2d 522, 532 (2d Cir.1993) (summary judgment available on immunity issues only if undisputed facts).

5. April 1, 1998 Strip Search

Next, Plaintiff argues that despite the discovery of

marijuana on his person, the strip search conducted of Mr. Frisbee on April 1, 1998 could still form the basis of a constitutional tort. He argues that the amount of marijuana was so small that he was only charged with a violation level offense, and, therefore, under the circumstances the strip search conducted by Siler and Barnett violated his Constitutional rights. Officer Barnett argues that the initial finding of marijuana supplied reasonable suspicion that the Plaintiff might have been secreting other contraband on his person which therefore justified the strip search.

In the May 31, 2001 Memorandum, Decision & Order issued in this case, the Court held that the blanket policy of the City of Schenectady in strip searching all non-felony detainees was unconstitutional. The Court also held that each asserted constitutional violation must be addressed independently to determine whether or not there existed a reasonable suspicion in each case that the detainee possessed weapons or contraband. Circumstances which are considered in reaching this conclusion are the "the crime charged, the particular circumstances of the arrestee, and/or the circumstances of the arrest." *Weber v. Dell,* 804 F.2d 796 (2d Cir.1986), *cert. denied sub. nom., County of Monroe v. Weber,* 483 U.S. 1020 (1987).

Once it is conceded that the detention was constitutionally justified, the issue then is whether the strip search incident to that detention was justified under the circumstances. Here, even drawing all facts and inferences in Mr. Frisbee's favor, given the discovery of marijuana before the detention a reasonable fact-finder could only conclude that reasonable officers could disagree whether a reasonable suspicion existed that Mr. Frisbee possessed more contraband which the defendants, for obvious institutional reasons, did not want in their holding cells.

There is no allegation the strip-search was punitive in nature or that questions of fact exist as to whether Plaintiff did possess marijuana. There is an allegation that after the strip search, $100.00 in cash was missing from Mr. Frisbee's personal belongings. While the Fourth Amendment's notion of a reasonable and non-excessive intrusion would probably be offended by an otherwise-valid strip search that converted $100.00 of personal belongings, the allegations of the Amended Complaint assert that it was Officer Siler who took the $100.00. Amend. Compl. ¶ 50. There is no similar allegation with regard to Officer Barnett. Nor is there any allegation that Officer Barnett participated in nor was deliberately indifferent to Mr. Siler's alleged conduct in this regard.

***9** Therefore, Mr. Barnett is entitled to qualified immunity on this portion of Plaintiff's claim. *See Saucier v. Katz,* 531 U.S. 991 (2001); *Cerrone,* 246 F.3d 194.

6. Damages

In the Reply papers, Defendant Barnett argues that under *Townes v. City of New York,* any surviving claim under the Fourth Amendment should be limited to nominal damages as a matter of law.

In *Townes,* the Second Circuit stated that in a § 1983 suit, the plaintiff must demonstrate proximate causation between the asserted invasion of privacy and actual damages. *Townes* at 146–48. The discovery of criminality prevents recovery of damages for post-discovery incarceration caused by the criminality, not the pre-discovery false arrest. *Id.* However, Plaintiff concedes this point and instead seeks damages for the asserted invasion of privacy which occurred before the marijuana was discovered.

"Damages in an illegal search suit under § 1983 ... must ordinarily be determined by a jury, not a judge." *Dasher v. Hughes,* 2000 WL 726865, at *8 (S.D.N.Y. June 6, 2000). A plaintiff is entitled to develop his case tending to prove actual injury. Only if, after presenting evidence, he remains "unable to prove" actual damages does a nominal award become appropriate. *See, e.g., Atkins v. New York City,* 143 F.3d 100, 103 (2d Cir.1998) (citing *Carey v. Piphus* 435 U.S. 247, 248 (1978)). "A judge cannot summarily award merely nominal damages, thereby usurping the jury's function, unless plaintiff cannot present any reasonable evidence of injury." *Dasher,* 2000 WL 726865, at *9.

Whether a jury would award compensatory damages for the brief detention suffered by the Plaintiff is, therefore, a question of fact. Because the issue was raised in a Reply Memorandum of Law, Plaintiff has not responded directly to the damage argument. However, Defendant Barnett has not demonstrated the lack of a genuine question of material fact on this issue and, therefore, he has not satisfied his burden under Rule 56. *See* FED. R. CIV. P. 56(e); *Weinstock v. Columbia Univ.,* 224 F.3d 33, 41 (2d Cir.2000) (moving party bears the initial burden of establishing that there are no genuine issues of material fact, and, once such a showing is made, burden shifts to non-movant tp set forth specific facts showing that there is a genuine issue for trial). For this reason, the motion is denied in this respect.

7. Conclusion

Therefore, that much of Fourth Amendment and state law false arrest claims seeking damages for Mr. Frisbee's detention after the point in time that the marijuana was discovered are DISMISSED. These same claims, however, remain viable inasmuch as they seek damages for the detention up to the time of the discovery of

marijuana. Further, Officer Barnett is GRANTED qualified immunity for his role in Mr. Frisbee's strip search on April 1, 1998.

8. State Law Claims—Statute of Limitations

***10** Next, Officer Barnett moves to dismiss the state law claims asserted against him on the grounds that the Plaintiff failed to file a Notice of Claim against Officer Barnett pursuant to General Municipal Law § 50(e), or, in the alternative, to dismiss on the grounds that the state law claims were not interposed within the applicable statute of limitations period. The Plaintiff has not opposed that portion of Defendant Barnett's motion addressed to the statute of limitations issue. Because it does not appear that the state law claims were interposed within one year of the date of accrual, these claims against Mr. Barnett are DISMISSED. *See* N.Y. C.P.L.R. § 215(3); *Greiner v. County of Greene,* 811 F.Supp. 796, 800 (N.D.N.Y.1993).

9. Severance/Bifurcation

Defendant Barnett also moves pursuant to FED. R. CIV. P. 21 seeking to sever Mr. Frisbee's claims from the plaintiffs' claims and, pursuant to FED. R. CIV. P. 42(b), seeking to bifurcate Mr. Frisbee's claims against Mr. Barnett from Mr. Frisbee's claims against the City of Schenectady. The Plaintiff does not oppose the severance of his claims from the other plaintiffs but does oppose the bifurcation of the claim between the City and the individual defendants.

A. Severance/Separate Trial (bifurcation)—Standard

Rule 21 of the Federal Rules of Civil Procedure allows for the severance of "any claims,"[5] and Rule 42(b) provides that a court may order a separate trial of any claim "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy," FED. R. CIV. P. 42(b). The distinction between these two rules is that "[s]eparate trials usually will result in one judgment, but severed claims become entirely independent actions to be tried, and judgment entered thereon, independently." 9 Charles A. Wright & Arthur R. Miller, *FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D* § 2387.

Trial courts have broad discretion to employ either of these rules, which are generally determined using the same standard. *Wausau Bus. Ins. Co. v. Turner Const. Co.,* 2001 WL 460928, at *2 (S.D.N.Y. May 2, 2001) (citing *New York v. Hendrickson Bros ., Inc.,* 840 F.2d 1065 (2d Cir.), *cert. denied,* 488 U.S. 848 (1988)); *see also Smith v. Lightning Bolt Productions, Inc.,* 861 F.2d 363, 370 (2d Cir.1988).

In exercising this discretion, courts must consider "(1) whether the claims arise out of the same transaction or occurrence; (2) whether the claims present some common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims." *Morris v. Northrop Grumman Corp.,* 37 F.Supp.2d 556, 580 (E.D.N.Y.1999).[6] To grant severance or separate trials requires the presence of only one of these conditions. *Lewis v. Triborough Bridge & Tunnel Authority,* 2000 WL 423517, at *2 (S.D.N.Y. April 19, 2000) (severance); *Carson v. City of Syracuse,* 1993 WL 260676, at *2 (N.D.N.Y. July 7, 1993) (bifurcation).

B. Severance

***11** In support of his position to sever the Frisbee claims from the other two plaintiffs' claims, Mr. Barnett argues that each plaintiff has a separate claim involving separate arrests by different officers.[7] He asserts that he stands to suffer substantial prejudice if severance is not granted because of the possibility of a taint by evidence of an impermissible stop or search of another plaintiff by another officer in another circumstance. As indicated, the Plaintiff consents to the severance. The City, Mr. Siler, and the other defendants have not presented a position one way or the other. Based upon the fact that they were served with the pending motions, their silence will be deemed acquiescence in the relief sought.

The Court finds that severance is appropriate in this case. Each individual plaintiff's claims arise from separate occurrences and involve separate individual defendants. The individual claims do not arise from a common nucleus of operative facts nor does it appear that there will be much overlap in witnesses or documentary proof, at least as the individual claims are concerned. There is the potential for some prejudice which can be avoided if severance is granted, and this potential is not outweighed by the judicial economy which will be served by one trial.

Therefore, Defendant Barnett's motion to sever Mr. Frisbee's claims from the main action is GRANTED.

C. Bifurcation (Separate trials)

Bifurcation, or the granting of separate trials, "may be appropriate where, for example, the litigation of the first issue might eliminate the need to litigate the second issue, or where one party will be prejudiced by evidence presented against another party ." *Amato v. City of Saratoga Springs,* 170 F.3d 311, 316 (2d Cir.1999). "The party moving for a separate trial has the burden of

showing that [separate trials are] necessary to prevent prejudice or confusion, and to serve the ends of justice." *Buscemi v. Pepsico, Inc.,* 736 F.Supp. 1267, 1271 (S.D.N.Y.1990).

In support of bifurcation, Defendant Barnett makes two arguments. First, he argues that if the Plaintiff fails on his claims against the individual officers, the "failure to train" and "failure to supervise" claims will not need to be litigated. Thus, Defendants argues, there is the potential for judicial economy by trying the individual claims first. On this point, Defendant asserts that the trial of the individual claims will take merely a few days whereas the trial of the municipal claims will take substantially longer.

Plaintiff responds that if the claims are bifurcated, he would be forced to present the same proof twice unless the second trial is in front of the same jury. Plaintiff's counsel does not specifically address the quantum of proof that will be presented on the municipal claims as compared to the individual claims.

Second, Defendant argues that the potential for prejudice exists because the Plaintiff may attempt to prove his failure to train or failure to supervise theories by evidence of prior misconduct by the officers which would not be admissible on the individual claims under the Federal Rules of Evidence. Plaintiff responds that such a safeguard is not required in this case because specific evidence of past misconduct of the individual defendants involved in this case will not be offered to prove claims against the municipality.

***12** Given Defense counsel's representation that the second set of claims will take considerable time to try in comparison to the individual claims, Plaintiff's counsel's silence on the issue, and the potential that the second trial may not be necessary if Mr. Frisbee does not succeed on his individual claims,[8] judicial economy is best served by bifurcation. However, the ends of justice are also best served by trying both portions of Mr. Frisbee's case "back to back to the same jury." *Carson,* 1993 WL 260676, at * 7. This obviates the need, for all parties, to try the same issues twice.

Therefore, Defendant's motion to bifurcate the claims is GRANTED. The case will be tried back to back to one jury.

III. CONCLUSION

In conclusion the Court determines as follows:

Defendants City of Schenectady and Mr. Barnett's motions for summary judgment are GRANTED IN PART AND DENIED IN PART. That much of Fourth Amendment claims and state law false arrest claims seeking damages from these defendants for Mr. Frisbee's detention after the point in time that the marijuana was discovered are DISMISSED. These same claims, however, remain viable against these defendants inasmuch as they seek damages for the detention up to the time of the discovery of marijuana.

Defendant Barnett's motion for summary judgment on the grounds of qualified immunity is GRANTED IN PART AND DENIED IN PART. Mr. Barnett is granted qualified immunity for his role in the strip search of Mr. Frisbee occurring on April 1, 1998 and this much of Plaintiff's claim is DISMISSED. His motion for summary judgment on the grounds of qualified immunity is denied in all other respects.

Defendant Barnett's motion to dismiss the state law claims against him is GRANTED, and all state law claims brought against Mr. Barnett are DISMISSED.

Defendant Barnett's motion to sever the claims of Mr. Frisbee from the other plaintiffs' claims is GRANTED pursuant to Rule 21 of the Federal Rules of Civil Procedure. The Clerk of the Court is hereby ORDERED to assign the severed action a separate trial date as close in time as possible to the trial date set in the Rule 16 Scheduling Order in the main action, taking into account the Court's schedule and the overlap of counsel in the now-separate actions.

Defendant Barnett's motion to bifurcate the trial of the claim between the individual officers and the municipal claims is GRANTED, however, the claims shall be tried back to back to the same jury.

IT IS SO ORDERED

Footnotes

1 At his deposition, Frisbee was asked who made this statement. He responded: "Siler and Barnett, pretty much Siler though." Plf. Dep. p. 66.

2 The Amended Complaint asserts claims by Mr. Frisbee for false arrest and unlawful search arising from conduct by the City's police officers on April 1, 1998, April 8, 1998, and July 6, 1998. The Notice of Motion seeks dismissal of all claims by Frisbee whereas the attorney affirmation in support of the pending motion explicitly limits the motion to the causes of action arising from

the April 1, 1998 arrest.

3 The elements of a cause of action for state common law false arrest are (1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. *See Kirk v. Metropolitan Transp. Auth.,* 2001 WL 258605,*9 (S.D.N.Y.2001) (citing *Weyant v. Okst,* 101 F.3d 845, 853 (2d Cir.1996); *Broughton v. State,* 37 N.Y.2d 451, 456 (1975)). Because false arrest is a type of false imprisonment, the two claims have identical elements. *See Singer v. Fulton County Sheriff,* 63 F.3d 110, 118 (2d Cir.1995), *cert. denied,* 517 U.S. 1189 (1996).

4 Barnett asserts that on the date in question, he and Siler were on routine patrol in an area of the City "known to [him] to be a popular location for drug dealings." As he approached the corner where the store is located, he observed Frisbee "huddled with several younger black males. Based upon [his] experience, it looked [to him] as if they were engaged in a drug deal. As [the officers] approached, a black gentleman ran into the adjacent store, and Mr. Frisbee began to walk away. Mr. Frisbee's daughter was not present at the time." Barnett Aff. ¶ 3.

At his deposition, Frisbee said that there were "one or two [known drug houses] on every block" in the area in question; that there were "a lot of [drug] users" in the area where the store is located; but denied that it was known to him as an area where drugs were sold. Frisbee Dep., p. 154–155. Frisbee also states in his deposition that when he approached the store with his daughter and her friend, there were four (4) or five (5) kids within a "half block radius" in front of the store who "scurried ... Took off when they seen [the police] pull up." Frisbee Dep., p. 173–174. He asserts further, however, that he had no involvement with these individuals.

Barnett asserts that Siler approached Frisbee and began asking him questions. When Plaintiff was asked about drugs, "he denied that he ha[d] any and said to go ahead and search him." That is when the police found the marijuana inside a cigarette package. Barnett denies taking any money after the strip search. He asserts that the stip search occurred pursuant to the policy of the City.

5 Rule 21 provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

6 Other Courts have held that the test is:

> "(1) whether the issues sought to be tried separately are significantly different from one another; (2) whether the severable issues require the testimony of different witnesses and different documentary proof; (3) whether the party opposing the severance will be prejudiced if it is granted; and (4) whether the party requesting the severance will be prejudiced if it is not granted."

BD ex rel. Jean Doe v. DeBuono, 2000 WL 249115, at *5 (S .D.N.Y. Feb. 28, 2000).

7 He argues that the only basis to join the three in the first place is because they all involved a single issue of whether the City's strip search policy was unconstitutional. Now that the this issue has been decided against the City, Defendant Barnett argues that the only issue left to be tried on the strip search issue is whether each plaintiff has made out a constitutional claim.

8 See *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986) and *Pitchell v. Callan,* 13 F.3d 545, 549 (2d Cir.1994), both standing for the proposition that it is well-settled that a claim of negligent training or supervision under *Monell* lies against a municipality only where there is a finding of a constitutional violation by one of its officers.