The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GUSTAVO VARGAS RAMIREZ,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. C13-2325-JLR

UNITED STATES' REPLY

I. USBP Had Reasonable Articulable Suspicion to Believe Plaintiff was Illegally in the United States at the Time it Requested Plaintiff be Detained for Further Investigation.

All of the factors known to U.S. Border Patrol ("USBP") at the time they requested that Plaintiff be detained for further investigation have been flushed out in discovery. The parties have submitted numerous briefs discussing whether these factors support a finding of reasonable suspicion. The key difference in the parties' arguments is *how* the Court should weigh these factors. The United States maintains that the Court must undertake a totality of the circumstances analysis and consider whether all of the factors known to USBP, when aggregated together and considered from the perspective of trained and experienced agents, constitute reasonable suspicion. Plaintiff, on the other hand, urges the Court to undertake a divide and conquer analysis and consider whether each individual factor, in isolation and in and of itself, is sufficient to establish reasonable suspicion. Plaintiff's approach has been repeatedly rejected by the United States Supreme Court and the Ninth Circuit and should be rejected by this Court.

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The Supreme Court has clearly cautioned that courts must look at the totality of the circumstances of each case to see whether there is a particularized and objective basis for suspecting wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). And the Ninth Circuit has held that the focus on the totality of the circumstances, rather than each individual circumstance, underscores that "a court may not engage in a 'sort of divide-and-conquer analysis' by evaluating and rejecting each factor in isolation." *United States v. Cheromiah*, 455 F.3d 1216, 1221 (9th Cir. 2006). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *Arvizu*, 534 U.S. at 273. "Individual factors that may appear innocent in isolation may constitute suspicious behavior when aggregated together." *See United States v. Diaz-Juarez*, 299 F.3d 1138, 1141 (9th Cir. 2002); *United States v. Fernández-Castillo*, 324 F.3d 1114, 1117 (9th Cir. 2003) ("All relevant factors must be considered in the reasonable suspicion calculus-even those factors that, in a different context, might be entirely innocuous.").

Thus, this Court should undertake a totality of the circumstances analysis. All of the factors known to USBP at the time they requested that Plaintiff be detained, considered together in the aggregate and through the eyes of trained USBP agents, are sufficient to establish reasonable suspicion to believe Plaintiff was an illegal alien. The quantum of proof needed for reasonable suspicion is less than a preponderance of evidence and less than probable cause. *U.S. v. Tiong*, 224 F.3d 1136, 1140 (9th Cir. 2000) (*citing Illinois v. Wardlow*, 120 S.Ct. 673, 675 (2000)). It is merely " 'a particularized and objective basis' for suspecting the person stopped of criminal activity." *Id.* (*citing Orneleas v. United States*, 517 U.S. 690, 695 (1996)).

Here, the factors known to USBP at the time – that the USBP's background checks revealed that the name and information Plaintiff provided were not in any of USBP's databases; Officer Leetz's suspicion that Plaintiff was possibly an illegal alien and the information he conveyed to USBP agents; the location and area Plaintiff was stopped in; and the fact that there was no Social Security Number associated with the name Plaintiff - provided a particularized and objective basis for ***suspecting*** that Plaintiff was an illegal alien. These factors, considered together in the aggregate through USBP agents' eyes, constitute the quantum of proof needed for reasonable suspicion, which is less than a preponderance of the evidence. Thus, USBP's request that Officer Leetz detain Plaintiff for further investigation was lawful.

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II. USBP Had Probable Cause to Believe Plaintiff was Illegally in the United States at the Time Plaintiff Admitted That [redacted]

This Court has already recognized that whether or not Plaintiff admitted [redacted] is critical to the determination of probable cause. *See* Dkt. No. 26, pg. 18. At oral argument counsel for Plaintiff represented that Plaintiff denies that he made this admission to Agent Orr. *Id.* But Plaintiff conceded in his deposition that he did admit to Agent Orr that [redacted] And Plaintiff's counsel now concedes that Plaintiff made these admissions. *See* Dkt. No. 39, pg. 16. Now Plaintiff argues that the Court cannot consider these admissions in determining whether USBP had probable cause to continue Plaintiff's detention because they were the "direct product of unlawful seizure." *Id.* Plaintiff's new argument must fail because the exclusionary rule does not apply in civil rights actions brought by arrestees. *Smith v. Kelly*, 2013 WL 5770337, *9 (W.D.Wash., Oct. 24, 2013).

In *Smith*, a police officer unlawfully arrested the plaintiff for the non-crime of jaywalking. *Id.* at *4. During the subsequent search the officer located a handgun and computer search revealed that the plaintiff was a felon. *Id.* In the plaintiff's § 1983 case, plaintiff sought to exclude the discovery of the gun as evidence and argued that the police lacked probable cause to continue his arrest. *Id.* But the Honorable Richard A. Jones conducted a thorough analysis of Ninth Circuit jurisprudence and concluded that the exclusionary rule and the closely-related "fruit of the poisonous tree" doctrine are fixtures of *criminal* law, but they do not apply in civil cases. *Smith*, 2013 WL 5770337, *9-10. As such, the Court found that the exclusionary rule does not apply in § 1983 cases. *Id.* at *8.

Therefore, Judge Jones found that once the officer seized the firearm and discovered the plaintiff's felony record, "he had probable cause to lawfully continue his initially unlawful arrest" of the plaintiff. *Id.* As such, the plaintiff could not establish a false arrest claim because he could not prove that the continuation of his arrest after the officer discovered the handgun and his felony record was without probable cause. *Id.* In making his findings in *Smith*, Judge Jones also cited numerous district court cases where evidence that was obtained after the initial arrest, stop, or search was introduced to establish probable cause, even if the initial arrest, stop, or search was unlawful. *Id.* (*citing Lindsey v. Wyatt*, 2013 WL 2319324 (D.Ore. May 27, 2013)

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("[A]ll of the evidence seized from Plaintiffs' residence is admissible to determine whether Defendants had probable cause to arrest even if the seizure of that evidence was caused by an illegal search."); *Bernardi v. Klein*, 682 F.Supp.2d 894, 901-02 (W.D.Wis. 2010) (declining to exclude evidence obtained from sobriety tests after unlawful traffic stop); *Radwan v. County of Orange*, 2010 WL 3293354 (C.D.Cal. Aug. 18, 2010) (rejecting argument that fruit of unlawful search of plaintiff could not be used to justify later search of plaintiff's car); *Davis v. United States*, 2010 U.S. Dist. LEXIS 7036, at *63 n. 26 (C.D.Cal. Jan. 28, 2010) (noting, in *Bivens* action, that "[e]ven if the shotgun was the fruit of an unlawful seizure, though, in a civil proceeding like this one, there is no exclusionary rule which would bar the Government from introducing it as evidence in a malicious prosecution lawsuit to establish probable cause"); *Whitwell v. Hoyt*, 2006 WL 469634 (W.D.Wis. Feb. 27, 2006) ("[I]t would be unreasonable to permit [plaintiff] to recover damages for his 'wrongful' arrest when the undisputed facts conclusively demonstrate that defendant ... had probable cause in fact to arrest him."); *Ferrell v. Bieker*, 2006 WL 287173 (N.D.Ind. Feb. 3, 2006) ("[T]he determination of whether the Defendants had probable cause to arrest the Plaintiff can take account of evidence that may have been found as a result of a constitutional violation."); *Padilla v. Miller*, 143 F.Supp.2d 479, 490-91 (M.D.Pa. 2001) (ruling that illegally seized evidence gave police probable cause to arrest plaintiff); *Reich v. Minnicus*, 886 F.Supp. 674, 681-83 (S.D.Ind. 1993) (declining to suppress evidence of plaintiff's consent to search obtained after unlawful entry).

Therefore, Plaintiff's new argument that the Court must exclude his admissions to Agent Orr must be denied. It is undisputed Plaintiff made these admissions at the time he was interviewed by Agent Orr, just 45 minutes after Officer Leetz took him to the Anacortes Police Department. These admissions, coupled with the other information already known to USBP, constituted probable cause to believe Plaintiff was an illegal alien.

Notably, Plaintiff never argues that USBP did not have probable cause to believe he was an illegal alien once he admitted to Agent Orr that [redacted] *See* Dkt. No. 39, pg. 16. It is beyond doubt that these admissions, coupled with the fact that there was no record in USBP's systems of records that Plaintiff had ever been lawfully admitted to the United States, and the fact that Plaintiff did not possess any valid immigration documents to show that he was legally in the United States, there was probable cause to believe he was an illegal alien. Plaintiff's only attempt to avoid

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this inevitable conclusion - arguing that the statements must be excluded - must fail because the exclusionary rule does not apply in this civil rights action. Therefore, USBP's continued detention of Plaintiff after he made the admissions was supported by probable cause and was lawful.

III. An Abuse of Process Claim Cannot Be Based on USBP Actions Taken Before Removal Proceedings Have Been Instituted by ICE.

Plaintiff brings an abuse of process claim, but he does not challenge his actual removal proceedings in any way. It is undisputed that Plaintiff's removal proceedings were lawfully instituted and conducted by U.S. Immigration and Customs Enforcement ("ICE"). Indeed, Plaintiff's removal proceedings were concluded in Plaintiff's favor with the Government joining Plaintiff's request for administrative closure, which was granted by an immigration judge effectively terminating the removal proceedings. Plaintiff does not challenge those legal proceedings. Rather, Plaintiff's abuse of process claim hinges on an act taken well before the removal proceedings were ever instituted; the completion of the I-213. But completion of the I-213 cannot form the basis of an abuse of process claim because it was not an act done after a legal process was instituted to misuse or abuse the legal process.

Plaintiff argues that act of completing the I-213 is part of a "legal process" because the I-213 plays a key role in removal proceedings in immigration court. *See* Dkt. No. 39, pg. 18. It is true that immigration courts may rely on the I-213 in the course of removal proceedings. But the I-213 is not completed during the removal proceedings or as part of the removal proceedings. Rather, the completion of the I-213 in this case, was done by USBP when it was processing Plaintiff, before Plaintiff was ever transferred to the custody of ICE and well before ICE instituted removal proceedings.

The I-213 was completed by Agent Reyes on June 23, 2011, and the Notice to Appear ("NTA") was filed with the immigration court eight days later on July 1, 2011. Removal proceedings do not begin until ICE files the NTA with the immigration court. 8 C.F.R. § 1003.14; *see also Lazaro v. Mukasey*, 527 F.3d 977, 980 (9th Cir. 2008). The completion of the I-213 Record of Deportable/Inadmissible Alien does not institute any legal proceedings. Rather it is one of several administrative forms a detaining officer completes to document a person's personal information, immigration record, and history of apprehension and detention prior to being placed in removal proceedings. "The Form I-213 is essentially a recorded

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recollection of a[n INS agent's] conversation with the alien . . . ." *Espinoza v. INS*, 45 F.3d 308, 309 n.1 (9th Cir. 1995) (*quoting Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990)).

Washington law is clear: the tort of abuse of process is disfavored. *Batten v. Abrams*, 28 Wash.App. 737, 745 (1981). Washington courts have limited abuse of process claims to acts that occur "after filing suit." *Id.* at 748. And have declined to extend the claim to acts occurring *before* filing a lawsuit, including acts that *initiated* a legal proceeding. *Ressy v. State, Dept. of Corrections*, 2013 WL 5430516 (Div. 1, 2013) (unpublished). Similarly, Washington courts have declined to extend the claim of abuse of process to the act of *instituting* a lawsuit. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wash.App. 665, 699 (Div. 2, 2004); *Saldivar v. Momah*, 145 Wash.App. 365, 389 (Div. 2, 2008). Rather, Washington courts have insisted that the abuse of process claim can only cover acts taken *after* a lawsuit is filed. Furthermore, Washington courts have also declined to extend the abuse of process claim to processes that are non-judicial including the process of the National Labor Relations Board or the Washington State Bar Association because no legal process was issued by Washington courts. *See Sea-Pac Co. v. United Food and Commercial Workers Union 44*, 103 Wn.2d 800 (1985); *Oreskovich v. Eymann*, 2005 WL 2271885, *3 n.2 (Div. 1, 2005) (unpublished).

Therefore, Plaintiff's attempt to extend an abuse of process claim to an act taken by a USBP agent during USBP's detention of Plaintiff eight days prior to ICE's initiation of removal proceedings must fail under Washington law. This case is most analogous to *Ressy*, where the Washington Court of Appeals refused to extend an abuse of process claim to the alleged falsification of a probation violation report finding that the act of filing a false declaration and probation violation report were acts that *initiated* the violation process. *Ressy*, 2013 WL 5430516 at *5. Even if Plaintiff could prove that Agent Reyes intentionally falsified the I-213, that act was not taken as part of any legal process and was taken eight days before removal proceedings were instituted by ICE.[1] The only legal process that occurred here, Plaintiff's removal proceedings, were properly instituted and concluded in his favor. Not surprisingly, Plaintiff has claimed no error with respect to those proceedings. Plaintiff's

[1] As discussed more thoroughly below, there is absolutely no evidence to support Plaintiff's allegation that the inconsistencies in the I-213 were intentional.

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attempt to extend the abuse of process claim to USBP's action taken well before the removal proceedings were ever initiated must fail.

IV. A Negligent Infliction of Emotional Distress Claim Cannot be Based on Alleged Intentional Acts of False Arrest or False Imprisonment.

Despite several cases holding that negligent infliction of emotional distress claims cannot be based on intentional acts, Plaintiff maintains that there is no such rule. Dkt. No. 39, pg. 21-22. The cases are directly on point holding that there can be no claim for negligent infliction of emotional distress based on alleged intentional acts, including false arrest and false imprisonment claims. This is exactly what Plaintiff is trying to do here. Plaintiff is trying to assert a negligent infliction of emotional distress claim based solely on the alleged intentional acts that USBP requested that he be detained without reasonable suspicion and arrested him without probable cause. Dkt. No. 1, pg. 17-19, ¶99-107. His claim must fail.

This Court has previously denied a negligent infliction of emotional distress claim in the same context Plaintiff is seeking to assert it here. In *Dominguez v. City of Seattle*, the plaintiff filed numerous claims based on his arrest and imprisonment. *Dominguez*, 2006 WL 2527626, *1 (W.D.Wash. Aug. 30, 2006). The defendants argued that the plaintiff's claim for negligent infliction of emotional distress should be dismissed because the acts on which the claim was based were intentional. *Id.* at *7 (*citing St. Michelle v. Robinson*, 52 Wash.App. 309, 316 (1988)). This Court agreed with the defendants and dismissed the negligent infliction of emotional distress claims. *Id.*

Similarly, in *Lawson v. City of Seattle*, the plaintiffs filed a § 1983 claim for Fourth Amendment violations, unlawful arrest, excessive force, and false imprisonment based on their arrest by four Seattle Police officers. *Lawson*, 2014 WL 1593350, *1-2 (W.D.Wash. April 24, 2014). The plaintiffs also filed claims for negligent infliction of emotional distress and negligence. *Id.* at *12-13. The Honorable Chief Magistrate Judge Mary Alice Theiler found that the "plaintiffs may not base claims of negligence on alleged intentional actions, such as excessive force or unlawful arrest." *Id.* at *13.

Finally, in *Alcazar v. Corporation of Catholic Archbishop of Seattle*, the plaintiffs filed numerous claims based on an alleged sexual harassment at the workplace. *Alcazar*, 2006 WL 3791370, *1 (W.D.Wash. Dec. 21, 2006). The Honorable Ricardo S. Martinez denied the plaintiff's negligent infliction of emotional distress claim and found that, under Washington

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law, an intentional act gives rise to the tort of intentional infliction of emotional distress, not negligent or reckless infliction of emotional distress. *Id.* at *7 (*citing St. Michelle*, 52 Wash.App. at 316). Judge Martinez held, "[i]f the alleged tort that created the emotional distress was done intentionally, then the plaintiff must plead that the emotional distress was inflicted intentionally." *Id.*

Therefore, the cases refusing to allow a negligent infliction of emotional distress claim based on an alleged intentional act are not "limited to their context" as Plaintiff argues. They are cases nearly identical to Plaintiff's where the basis of the claim is a false arrest or false imprisonment claim. The Court should decline Plaintiff's invitation to simply ignore Washington law prohibiting a negligent infliction of emotional distress claim based on an alleged intentional act. Because the alleged tort that created the emotional distress is an intentional tort of false arrest and false imprisonment, Plaintiff must plead that the emotional distress was done intentionally. His claim for negligent infliction of emotional distress must fail.

V. The United States is Entitled to Summary Judgment on Plaintiff's Intentional Infliction of Emotional Distress Claims.

Plaintiff has limited his intentional infliction of emotional distress claim to two discrete acts: (1) USBP allegedly unlawfully seized Plaintiff; and (2) USBP allegedly falsified the I-213 to "cover up" the unlawful seizure. *See* Dkt. No. 36, pg. 22. Any claim of outrage must be predicated on behavior so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Kloepfel v. Bokor*, 149 Wash.2d 192, 196 (2003) (*citing Reid v. Pierce County*, 136 Wash.2d 195, 202 (1998)).

First, Plaintiff cannot establish, as a matter of law, that USBP Agents engaged in "extreme and outrageous conduct" because their request that Plaintiff be detained for further investigation was supported by reasonable suspicion and their continued detention of him was supported by probable cause. Second, there is no evidence whatsoever, that the inconsistencies in the I-213 were intentional, let alone done for the purpose of covering anything up. Rather, the uncontradicted testimony is that the factual inconsistencies in the I-213 were a mistake due to miscommunication between the USBP agents during a shift change.

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Agent Reyes unequivocally testified that he believed that the facts he put in the I-213 were true at the time he wrote them and he never intentionally misrepresented the facts. *See* Dkt. No. 38, Ex. A. Agent Reyes testified that the inconsistencies in the I-213 were "basically just more mistake than anything else, and confusion between the shift change." *Id.* at pg. 20. There is absolutely no record evidence, nor has Plaintiff produced any evidence to this Court, to rebut Agent Reyes' testimony. The only thing Plaintiff has put before this Court to establish that the I-213 was purposefully falsified to cover up an alleged improper detention is his argument that, if the Court finds that the detention was unlawful, *and that the facts were intentionally misrepresented*, it can infer that the inconsistencies in the I-213 were intentionally done to cover it up. *See* Dkt. No. 35, pg. 24. But there is no evidence that the facts were ever intentionally misrepresented. The only evidence is Agent Reyes testimony that he never misrepresented the facts and he believed them to be true at the time he wrote them. Thus, Plaintiff's theory behind his claim for intentional infliction of emotional distress is simply not supported by any evidence and must fail.

WHEREFORE, for the foregoing reasons, as well as those set forth in the United States' Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment, the United States respectfully requests the Court grant summary judgment in favor of the United States and dismiss Plaintiff's claims.

DATED this 6th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

That on the below date she electronically filed the foregoing document(s) with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record as follows:

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DATED this 6th day of February, 2015.

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