

FILED _____

AT _____ O'clock ____ M
CLERK, DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

JASON MILLER,

Plaintiff,

vs.

**IDAHO STATE PATROL [POLICE],
TROOPER CHRISTOPHER YOUNT, and
JANE DOE YOUNT, et al.,**

Defendants.

Case No. **S CV 2008 628**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANTS'
MOTION FOR RECONSIDERATION OF
DECISION DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

I. BACKGROUND AND PROCEDURAL HISTORY.

The facts were set forth in this Court's Memorandum Decision and Order on Cross Motions for Summary Judgment.

On May 5, 2007, Plaintiff Jason Miller (Miller) was observed by Deputy Slinger of the Bonner County Sheriff's Department stumbling near the driver's door of a vehicle parked at the Shell gas station in Priest River, Idaho. Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 1, report of Deputy Slinger. Deputy Slinger contacted Idaho State Police¹ Trooper Yount (Yount) and Yount made contact with Miller. It is unknown why Slinger did not make the initial contact with Miller, and instead, apparently intended to let Miller, a person Slinger suspected of being under

¹Miller errantly named the Idaho State Patrol instead of the Idaho State Police.

the influence of drugs or alcohol, get behind the wheel and drive. Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 1, report of Deputy Slinger and Attachment No. 2, Report of Trooper Yount, p. 1, ¶ 1: “SLINGER said that he was going to wait for the vehicle to enter the highway.”

At the time of Yount’s contact, Miller was sitting in the driver’s seat of the vehicle with the motor running. Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 1, report of Deputy Slinger and Attachment No. 2, Report of Trooper Yount, p. 2, ¶ 2. Yount noted dilated pupils, indicative of methamphetamine use, and noted rebound dilation, indicative of marijuana use. Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 2, Report of Trooper Yount, p. 2, ¶ ¶ 4, 6. Yount had Miller perform additional field sobriety tests, which Miller failed. Memorandum of Authorities in Support of Motion to Dismiss as to All State Claims, Attachment No. 2, Report of Trooper Yount, p. 2, ¶ ¶ 6-13. Unable to complete the sobriety tests, Miller was arrested by Yount for driving under the influence. *Id.*, p. 3, ¶ 16.

Yount requested a urine sample from Miller, which Miller refused. *Id.*, ¶ 21. Miller said he would take a BAC test at the jail. *Id.* After Miller told Yount that he smoked marijuana every day and smoked marijuana the day he got out of prison, Yount told Miller “he [Yount] was going to take him [Miller] to the hospital and a urine sample would be taken from him.” *Id.*, ¶ 23. Then, Yount’s report reads:

I [Yount] asked MILLER again if he would provide a urine sample. He said, “No”. I asked if he was going to continue to refuse. He said, “Yep”.

Id., ¶ 25. About forty minutes later, at Bonner General Hospital, Yount asked a registered nurse, Shirin Lamp, to withdraw a urine sample from Miller. Lamp said “she administers catheters all the time and would be happy to.” *Id.*, p. 3, ¶ 30. Yount’s report then reads:

Both LAMP and I talked to MILLER and tried to convince him to provide a

urine sample voluntarily. He said, “I will not fight you, but I will not give you a sample voluntarily.”

Id. According to Yount’s report, a urine sample was taken by catheter from Miller about a half-hour later. *Id.*, ¶ 31. Yount wrote in his Idaho State Police Incident Report that he recognized Miller and knew him to be a methamphetamine user. *Id.*, p. 1, ¶¶ 3, 4.

After the urine sample was taken by catheter, Yount walked Miller back out to Yount’s patrol car. Miller asked for a cigarette, indicated he might have some cigarettes in his shirt pocket, and Yount reached into Miller’s shirt pocket. *Id.*, p. 3, ¶ 32. Yount found a pack of cigarettes and a glass methamphetamine pipe which had been used and which field tested positive for methamphetamine. *Id.*, p. 3, ¶ 32.

On September 24, 2007, Miller entered guilty pleas to felony possession methamphetamine, possession of paraphernalia and driving under the influence. Miller conceded that no material facts remain in dispute as to liability: “Trooper Yount was justified in arresting Jason Miller and ...Trooper Yount had a reasonable suspicion that Jason Miller was committing the misdemeanor offense of driving while under the influence of a controlled substance.” Memorandum in Support of Plaintiff’s Motion for Partial Summary Judgment, p. 1.

On April 18, 2008, Miller filed this lawsuit against Idaho State Patrol [Police], Trooper Christopher Yount, Jane Doe Yount, Bonner County, Bonner County Sheriffs Department, Deputy Jason Slinger and Jane Doe Slinger. In his unverified complaint, Miller claims these parties were: negligent; disregarded Miller’s constitutional rights; committed a violation of 42 U.S.C. § 1983; committed assault and battery; and were guilty of negligent supervision, hiring and training. Complaint, pp. 1-7.

On July 31, 2008, defendants Idaho State Patrol, Trooper Christopher Yount and “Jane Doe” Yount, filed their Answer. On August 8, 2008, the remaining defendants were

dismissed by court Order, based upon Miller's stipulation.

On January 16, 2009, defendants Idaho State Patrol (ISP), Trooper Christopher Yount and "Jane Doe" Yount filed their "Motion for Summary Judgment as to All State Law Claims", a "Memorandum of Authorities in Support of Motion for Summary Judgment as to All State Law Claims", a "Motion to Dismiss All 42 U.S.C. § 1983 Claims Against Defendants Idaho State Police and Trooper Yount" and a "Memorandum of Authorities in Support of Motion to Dismiss All 42 U.S.C. § 1983 Claims Against Defendants Idaho State Police and Trooper Yount." On February 2, 2009, Miller filed a "Motion for Partial Summary Judgment", and a "Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment." Even though it is captioned as a Motion for Partial Summary Judgment, Miller asks for "...summary judgment in his favor as to the liability for any damages on all counts listed in the complaint." On February 22, 2009, Miller filed a "Memorandum in Partial Opposition to Defendant's Motion to Dismiss Claims Under 42 U.S.C. § 1983". On March 9, 2009, defendants Idaho State Patrol, Trooper Christopher Yount and "Jane Doe" Yount, filed their "Memorandum of Authorities: 1) In Reply to Plaintiff's Motion for Summary Judgment; 2) In Response to Plaintiff's Reply to Motion to Dismiss All 42 U.S.C. § 1983 Claims; and 3) In Response to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment."

On March 24, 2009, oral argument was held on: Miller's Motion for Partial Summary Judgment; defendants' Motion to Dismiss Miller's 42 U.S.C. § 1983 claims pursuant to I.R.C.P.12(b)(6); and defendants' Motion for Summary Judgment on all Miller's State claims. On April 27, 2009, this Court issued its "Memorandum Decision and Order on Cross Motions for Summary Judgment." This Court concluded:

Because Miller has presented no evidence, the only fact before the Court is that Yount ordered a medical professional to use a catheter to obtain a urine sample from Miller, because Miller refused to issue a urine sample voluntarily. If it were not for all reasonable inferences being given to Miller on that singular fact, all of his claims would be dismissed. Because Miller has put in no evidence, there is no indication that Miller suffered from a “shy bladder” on the night in question. Yount's report indicates this is nothing less than an outright refusal by Miller to voluntarily provide a urine sample. There is every indication that: 1) Miller was perfectly capable of giving a urine sample; 2) Yount specifically wanted a urine sample due to reasonable suspicion of marijuana and/or methamphetamine; yet 3) Miller specifically and defiantly tells the officer he will not provide a urine sample. There is no evidence in the record that Miller in any way resisted the catheter, or that the catheter caused him any pain, injury or damage. However, a reasonable inference is that a catheterization *could* produce pain, injury or damage.

IT IS HERBY ORDERED THAT Miller's 42 U.S.C. § 1982 claims against ISP and the State of Idaho are dismissed. To that extent only, ISP and Yount's “Motion to Dismiss all 42 U.S.C. § 1983 Claims Against Defendants Idaho State Police and Trooper Yount” is GRANTED; as to all other grounds set forth in ISP and Yount's “Motion to Dismiss all 42 U.S.C. § 1983 Claims Against Defendants Idaho State Police and Trooper Yount” are DENIED.

IT IS FURTHER ORDERED that ISP and Yount's Motion for Summary Judgment as to all State Law Claims is DENIED.

IT IS FURTHER ORDERED that Miller's Motion for Partial Summary Judgment is DENIED.

Memorandum Decision and Order on Cross Motions for Summary Judgment, pp. 19-20.

On May 11, 2009, Defendants Yount and ISP filed “Defendants' Motion for Reconsideration and Request for Oral Argument.” On May 28, 2009, plaintiff filed his “Memorandum in Response to Defendant's Motion to Reconsider.” On June 5, 2009, defendants Yount and ISP filed their “Reply Memorandum in Support of Defendants' Motion for Reconsideration.” Oral argument on the Motion for Reconsideration was held on September 2, 2009. At the beginning of oral argument, this Court signed the “Stipulated Partial Order of Dismissal of Plaintiff's Federal Claims Against Defendants Yount and Idaho State Police Except Individual Capacity Claim Against Trooper Yount,” an issue inadvertently not discussed in this Court's Memorandum Decision and Order on Cross Motions for Summary Judgment.

This matter is set for a 4-day jury trial in Bonner County on October 19, 2009.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration under I.R.C.P. 11(a)(2)(B) is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A motion for reconsideration of an interlocutory order of the trial court may be made at any time before entry of the final judgment, but not later than fourteen days after entry of the final judgment. I.R.C.P. 11(A)(2)(B). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

III. ANALYSIS.

Defendants first argue Miller has failed to meet his burden to defeat summary judgment. Defendants' Motion for Reconsideration, p. 5. Defendants argue Miller failed to demonstrate the existence of a genuine issue of material fact as he "failed to produce a single fact in the record which created any genuine issue of material fact as to any of his claims." *Id.* Defendants go on to argue that Yount is entitled to qualified immunity on all claims, in part because the Court "failed to apply the proper standard" for qualified immunity, and Yount never "ordered a catheterization." *Id.*, pp. 7-11. Defendants did not submit any additional evidence. In support of their motion, defendants point the Court to *Saucier v. Katz*, 533 U.S. 194 (2001) and argue that, as in *Saucier*, Miller cannot point to a clearly established rule which would prohibit Trooper Yount from acting as he did and that his actions entitled him to qualified immunity even if a jury could find a constitutional violation based on Miller's allegations. *Id.* at pp. 6-7. Defendants argue Miller failed to identify any case law which would establish Yount's actions violated a clearly established right. *Id.*

Miller frames the issue as “whether or not, when presented with an exception to the warrant requirement for searches of urine, it is reasonable to order that a person be catheterized.” Memorandum in Response to Defendants’ Motion to Reconsider, p. 2. Miller argues the only facts necessary to the case are those in Yount’s own report and, as such, Miller has met his burden to overcome summary judgment. *Id.*

The proper analysis, as set forth in this Court’s Memorandum Decision and Order on Summary Judgment is: (1) whether in the light most favorable to the plaintiff, the facts alleged show that the officer’s conduct violated a constitutional right (here, to be free from an unreasonable testing method) and (2) whether, if the violation of a constitutional right can be made out on a favorable view of a plaintiff’s submissions, the right at issue is clearly established. Memorandum Decision and Order on Summary Judgment, pp. 16-17, citing *Saucier*, 533 U.S. 194, 201. Again, as cited in this Court’s Memorandum Decision and Order, “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.” Citing *Schmerber v. California*, 382 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966). Here, Yount’s stop and arrest are not being challenged. The only issue is whether a reasonable officer in Yount’s position would have understood it to be unreasonable to order a catheter be placed in Miller in order to secure a urine sample. It is without question that the right to be free from intrusions into the body which are not justified or which are made in an improper manner is a clearly established right. *Schmerber*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834. This right is established such that it would be patently clear to any reasonable officer that his conduct in violating that right would be unreasonable. See *Saucier*, 533 U.S.194, 202.

Contrary to defendants’ arguments, the issue before the Court is not whether, pursuant to the second prong of a *Saucier* analysis, Miller can point this Court to specific

case law which establishes that an officer is entitled to qualified immunity where it cannot be shown that using catheterization for evidentiary testing purposes is an established right. Rather, the issue here is a factual one, whether Yount acted reasonably in exercising his discretion as to testing method under I.C. § 18-8002. Therefore, the *Saucier* analysis here involves broad Fourth Amendment reasonableness considerations, not the more specific issue pointed to by defendants as to whether Miller has presented case or statutory authority that catheterization is not analogous to blood withdrawal by a needle under *Schmerber*, or whether Miller set forth evidence that such a procedure is constitutionally prohibited. Defendants' Motion for Reconsideration, p. 7.

The parties disagree as to applicable case law regarding urine tests. Defendants cite *Sparks v. Stutler*, 71 F.3d 259 (7th Cir. 1996), which Miller argues is contrary to Ninth Circuit case law. *Sparks* involved a prison inmate suspected of drug use, who was catheterized by the prison's physician after guards asked for a urine sample and Sparks did not provide one. 71 F.3d 259, 260. The Seventh Circuit reversed the District Court and held the defendants entitled to qualified immunity without concluding whether a Fourth Amendment violation had occurred. 71 F.3d 259, 261. The Seventh Circuit stated:

Sparks may have been lying when he said that he could not urinate, and although the prison may have been entitled to equate failure to provide a prompt sample with a confession of drug use, it did not have to do so; quick identification of the drug and its level in the body may serve vital purposes beyond setting the stage for punishment

71 F.3d 259, 262. Miller cites *Ellis v. City of San Diego*, 176 F.3d 1183 (9th Cir. 1999). *Ellis* involved a parolee who was physically restrained, tied to a table, tranquilized, and had blood and urine forcibly extracted. 176 F.3d 1183, 1191. In reversing the lower Court's determination that the doctor who catheterized Ellis was entitled to qualified immunity, the Court reasoned that warrantless, compulsory tests are unreasonable unless supported by

probable cause and exigent circumstances and “[i]t was furthermore clearly established at the time that even if the search meets these criteria, it is still unreasonable if the degree of force employed to carry it out is excessive.” 176 F.3d 1183, 11921, citing *United States v. Cameron*, 538 F.2d 254, 257 (9th Cir. 1976) (per Kennedy, J.) (compelled enemas violate the Fourth Amendment because “a clear indication that the suspect is concealing contraband does not authorize government officials to go to any and all means at their disposal to retrieve it.”)

Here, defendants have failed to address the exigency of the circumstances faced.

As discussed by this Court:

ISP and Yount have failed to make clear why a urine test would have been superior to a blood test. ISP and Yount do not allege the drug traces remaining in Miller’s blood would have been eliminated by the time transport to the hospital was completed. ISP and Yount only state Miller had no right to avoid seizure of his bodily fluids where probable cause for a DUI arrest was present and where the specimen was taken in a medically reasonable manner.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 11, citing Memorandum in Response to Plaintiff’s Motion for Summary Judgment, p. 6. Defendants argue Miller has no constitutionally protected right to be free from compelled blood or urine tests. Reply Memorandum in Support of Motion for Reconsideration, p. 6. Defendants go on to urge the Court to rely on *U.S. v. Edmo*, 140 F.3d 1289 (1998) in support of the argument that the seizure of urine without consent is only violative of the Fourth Amendment if there was excessive force used. Reply Memorandum in Support of Motion for Reconsideration, p. 7. However, *Edmo* involved a criminal defendant being told to provide a urine sample after having stated he wanted an attorney present during questioning. The facts set forth in *Edmo* distinguishable:

...Officer Boone returned and told Edmo that he would have to provide a urine sample. At first, Edmo refused. Edmo was advised by Officer

Boone that he believed “that there was dissipating evidence in his [Edmo’s] urine and due to the exigent circumstances he would have to give the urine.” Edmo agreed to give the sample but stated, “the urine would probably not be clean” because he had been using cocaine and methamphetamine.

140 F.3d 1289, 1291. Again, exigent circumstances regarding whether evidence was dissipating has not been addressed by defendants in the present case. Defendants focus on the following quote from *Edmo*: “*Schmerber* teaches us that there is no constitutional right to refuse to provide a urine sample.” Reply Memorandum in Support of Defendants’ Motion for Reconsideration, p. 4. However, this Court can find no case law which mandates “there is no constitutional right to refuse to provide a urine sample, **and if you do refuse, an officer can catheterize you or order a health care professional to catheterize you in order to obtain such a sample.**”

Defendants next argue the Court applied an incorrect standard regarding qualified immunity. Reply Memorandum in Support of Motion for Reconsideration, p. 8. Defendants state “the Court improperly relied upon the unsupported allegations in Plaintiff’s unverified complaint to create a question of fact as to Defendant Yount’s intent.” *Id.* In response, Miller argues:

If this was not a reasonable search, then Jason Miller should prevail on his claims under 42 U.S.C. § 1983. Furthermore, if this was not a reasonable search then Jason Miller’s allegation that Trooper Yount acted in a malicious fashion should be submitted to a jury, as it is reasonable to infer that ordering someone to be catheterized when one does not have legal authority to do so is a malicious act.

Memorandum in Response to Defendants’ Motion to Reconsider, pp. 2-3. Regarding the Idaho Tort Claims Act (ITCA), Idaho courts have defined actual malice as a wrongful act without justification combined with ill will. *Evans v. Twin Falls County*, 118 Idaho 210, 216, 796 P.2d 87, 93 (1990). This Court held: “[t]he question of whether ordering catheterization is so unreasonable as to amount to ill will or knowingly performing a proscribed act is a

question for the jury.” Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 16. Having not provided any new evidence, defendants are faced with two remaining jury questions regarding malice: (1) whether the search was unreasonable and unlawful so as to amount to a wrongful act without justification and (2) whether this wrongful, unjustified act was combined with ill will.

Defendants’ final argument is that the Court erred when it stated Yount “ordered” the catheterization at issue. Defendants’ Motion for Reconsideration, pp. 10-11. Defendants state that after Miller declined the request for a urine sample, “Trooper Yount then took him to the hospital where R.N. Lamp offered to perform a catheterization to obtain a sample.” *Id.*, p. 10. The argument appears to be that Yount did not order Lamp to perform the catheterization. See *id.*, p. 11. As argued by Miller, at issue is not whether Yount ordered Lamp to perform the procedure, but whether Yount ordered Miller to submit. Memorandum in Response to Defendants’ Motion to Reconsider, p. 2. In the facts as set forth by the Court in its Memorandum Decision and Order on Cross-Motions for Summary Judgment, the Court does not claim at any point that Yount “ordered” Lamp to catheterize Plaintiff. Rather, the Court writes:

About forty minutes later, at Bonner General Hospital, Yount asked a registered nurse, Shirin Lamp, to withdraw a urine sample from Miller. Lamp said, “she administers catheters all the time and would be happy to.”

Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 2.

III. CONCLUSION AND ORDER.

For the reasons stated above, defendants’ Motion for Reconsideration must be denied.

IT IS HEREBY ORDERED defendants’ Motion for Reconsideration is DENIED.

DATED this 11th day of September, 2009.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of September, 2009 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Plaintiff's Attorney – Peter Jones, FAX (509) 921-0802

CLERK OF THE DISTRICT COURT BONNER
COUNTY

Defendants' Attorney – Peter J. Johnson FAX (509) 747-3175

BY: _____
Deputy