IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WESTLY BARNES, and CUPID BROOKINS	:	CIVIL ACTION
v.	:	
OFFICER WILLIAM DUNN, ET AL.	:	NO. 04-4137

MEMORANDUM

Padova, J. **April 12, 2007**

Plaintiffs Westly Barnes and Cupid Brookins filed a Complaint in this Court against three former Philadelphia Police Officers, William Dunn, Joe Morales, Jr., and Victor Ortiz, Sherman Washington, a former probation officer, and the City of Philadelphia. Plaintiffs allege state law claims against the individual Defendants of unlawful arrest and false imprisonment (Count I), conspiracy (Count II), and unlawful taking of property (Count III). They also allege a catch-all "State Law Claim" (Count V), in which they allege false arrest, false imprisonment, intentional infliction of emotional distress, unlawful taking of property, invasion of privacy, gross negligence, and "supervision under the laws of the Commonwealth." Count IV alleges a claim against the City of Philadelphia only based on 42 U.S.C. § 1983. Presently before the Court is a motion by the City of Philadelphia for summary judgment on Count IV. For the reasons that follow, the motion is granted.

I. FACTS

The basic facts pled by the Plaintiffs are not in dispute. On September 2, 2002, Officers Dunn, Morales and Ortiz initiated a vehicle stop of the Plaintiffs' car at the corner of C and Ruscomb Streets in Philadelphia. Plaintiffs were ordered out of their vehicle and both were frisked and then searched by Morales and Dunn. Barnes told the officers that he was carrying a firearm for which he had a carrying permit. Plaintiffs were handcuffed and placed in a police vehicle. The Officers discovered approximately $10,000 in cash on the persons of the Plaintiffs during the search.

While the Plaintiffs were sitting in the police car, Dunn telephoned his cousin Washington to see if he knew the Plaintiffs. Washington did know Barnes from his neighborhood. Dunn then held the phone up to Barnes' ear (he was handcuffed at the time). Washington told Barnes that the officers were "going to want some change," meaning they are going to want to take some of the Plaintiffs' money in exchange for dropping the gun charges they anticipated bringing against Barnes. When Barnes told Washington that he had a permit to carry the gun, Dunn took the phone away from Barnes. Washington appeared on the scene approximately forty-five minutes later. The officers then drove Brookins and Barnes several blocks to Rising Sun Avenue and Rockland Street, where they proceeded to seize the money. They allege that Dunn and Washington left in Washington's vehicle, while the Plaintiffs continued to be held in custody by Morales and Ortiz. The two later returned and the officers agreed to release the Plaintiffs. They also returned Barnes' gun. The Plaintiffs then followed Washington to his vehicle several blocks away where Washington returned approximately one-half of the money that was taken from them. Brookins and Barnes later filed an internal affairs report on the incident. (Pl. Ex. 1.) Washington, Dunn, Morales and Ortiz were eventually arrested and charged with theft and related offenses. Washington and Dun entered guilty pleas. Morales and

Ortiz went to trial. Morales was convicted but Ortiz was acquitted.

The additional facts relevant to the pending motion concern the City's customs and policies concerning police stops. Officer Dunn testified that police policy requires that officers maintain a patrol log to record all activities of the officer on patrol, and that this policy is taught at the police academy. (Dunn Dep. 16:25-18:10.) At the end of a shift, the log is to be turned in to a supervisor. (Id. 94:17-95:6.) The Defendant Officers did not record the stop of the Plaintiffs in their patrol log. (Id. 95:7-10; 154:19-23.) Dunn testified that he knew that not recording the stop in his log was wrong. (Id. 155:11-13.) He stated that the policy of recording stops in the patrol log is often not followed. (Id. 155:16-156:11.)

Upon making an automobile stop, an officer is required to notify dispatch. (Id. 35:21-24; 143:13-18.) The stop of the Plaintiffs' vehicle was not reported to dispatch. (Id. 37:23-38:9; 50:3-16.) Dunn has made stops without notifying dispatch "plenty of times." (Id. 110:13-19.) He explained that "just because somebody is detained doesn't mean that a [sic] investigation is going to go further or past that." (Id. 114:3-7.) He admitted that he has made vehicle stops, and transported the occupant of the vehicle from one location to another, without notifying other officers or dispatch. (Id. 115:7-12.) Dunn could not identify any consequence for failing to notify dispatch. (Id. 143:19-144:12.) He also could not identify any supervisory procedure in place to ensure that patrol officers notify dispatch that a stop has occurred, although he testified he was "pretty sure there are." (Id. 144:13-145:6; 147:19-148:5.) He admitted that if the stop is not recorded in the patrol log, there would be no way for supervisors to know a stop occurred. (Id. 145:7-19.) The only way a supervisor would know is if a citizen made a complaint. (Id. 146:24-5.)

It is department policy for a supervisor to be called to the scene of a vehicle stop when a

weapon is found. (Id. 148:10-13.) Although a weapon was found here, no supervisor was called. (Id. 148:17-149:4.) Dunn denied there is a similar policy that a supervisor be called when large amounts of money are found during a stop. (Id. 149:5-9.) The City also maintains a policy called "live stop," allowing officers who make a traffic stop and find the driver cannot present proper identification to further investigate the driver, take the driver out of the vehicle, detain them, and take them to headquarters for further investigation, secure the vehicle, look in any open area, and tow the vehicle. (Id. 41:3-42:8.)

II. SUMMARY JUDGMENT STANDARD

A Court may grant a Motion for Summary Judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Technologies,

Inc., 78 F. Supp. 2d 402, 407 (E.D. Pa. 2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. A.E.V., Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999) (citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993)). The Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

III. THE MONELL CLAIM

In Monell v. Dept. of Soc. Services, 436 U.S. 658 (1978), the Supreme Court established that municipal liability under 42 U.S.C. § 1983 may not be proven under the respondeat superior doctrine, but must be founded upon evidence that the government unit itself supported a violation of constitutional rights. Id. at 691-95. Thus, municipal liability attaches only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. at 694. "Policy is made when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986)). Custom, on the other hand, can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law. Andrews, 895 F.2d at 1480; see also Fletcher v. O'Donnell, 867 F.2d 791, 793-94 (3d Cir. 1989) ("Custom may be established by proof of knowledge and acquiescence.").

To show either a policy or a custom, a plaintiff must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom. Andrews, 895 F.2d at 1480. In order to identify who has policymaking

responsibility, "a court must determine which official has final, unreviewable discretion to make a decision or take an action." Id. at 1481. "Under § 1983, only the conduct of those officials whose decisions constrain the discretion of subordinates constitutes the acts of the municipality." Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990). Practices "'so permanent and well settled' as to have 'the force of law' [are] ascribable to municipal decisionmakers." Anela v. City of Wildwood, 790 F.2d 1063, 1067 (3d Cir. 1986) (quoting Monell, 436 U.S. at 691).

Plaintiffs "must identify a municipal policy or custom that amounts to deliberate indifference to the rights of people with whom the police come into contact." Carswell v. Borough of Homestead, 381 F.3d 235, 244 (3d Cir. 2004) (citing City of Canton v. Harris, 489 U.S. 378, 388 (1989)). Deliberate indifference is the result of "'a deliberate choice to follow a course of action [that] is made from among various alternatives' by city policymakers." City of Canton, 489 U.S. at 389 (quoting Pembaur, 475 U.S. at 483-84. "It is a particularly wilfull type of recklessness that is inherent in the deliberate indifference standard." Simmons v. City of Philadelphia, 947 F.2d 1042, 1060 n.13 (3d Cir. 1991). That indifference must be attributed to "lawmakers or other officials with the authority to make municipal policy." Id. at 1059. Whether one has the authority to formulate official municipal policy is a matter of state law. Id. at 1061-62. The Third Circuit has held that "neither [an unconstitutional municipal policy or custom] could be established absent conscious decisionmaking or acquiescence in a longstanding custom or practice on the part of a policymaker." Id. at 1064 (citing Andrews, 895 F.2d at 1481). Negligence on the part of state officials is not enough to impute liability under § 1983. See generally Daniels v. Williams, 474 U.S. 327 (1986).

The City argues that even if Plaintiffs can demonstrate a violation of their civil rights at the hands of the individual officers, they cannot show that the officers did so while executing an

officially adopted policy declared by City officials, or that they were acting pursuant to an officially adopted custom. It adds that Plaintiffs have adduced no evidence of a pattern or practice of violating citizens' constitutionally protected rights, or of a conscious decision or deliberate indifference of high level officials to the rights of citizens. The City contends that this is merely a case of specific officers acting illegally on their own volition and in contravention of departmental policies.

Plaintiffs respond that Officer Dunn testified that he frequently made stops of individuals in contravention to police policy by not calling in to dispatch. They assert that their stop "was in furtherance of a practice that defendant Dunn had knowledge of and had participated in frequently." His testimony, they assert, confirmed a "de facto policy" of stopping individuals without reasonable suspicion or probable cause on a regular basis. They argue that the City has previously been found to have a policy or custom of condoning investigatory detentions without probable cause. See Glass v. City of Philadelphia, 455 F. Supp. 2d 302, 345 (E.D. Pa. 2006) (finding that a claim of policy or custom of condoning investigatory detentions without probable cause had merit).

Dunn's testimony and the holding of Glass do not satisfy Plaintiffs' burden on summary judgment of coming forward with evidence to show a policy or custom. Dunn's testimony showed only that he and his fellow officers acted improperly. He did not testify that the City had a policy or custom condoning what the Defendants did here, nor did his admission that he stopped individuals without probable cause "plenty of times" establish a de facto policy of the City to be deliberately indifferent to the rights of citizens. To the contrary, Dunn admitted that his actions violated police procedures. He did not follow the police policy taught at the academy requiring that he record all stops in his log and turn that log in to supervisors at the end of his shift. He also violated known police procedures when he did not call into dispatch to report the stop, and call a supervisor when

he found the weapon.[1] There is no evidence that Dunn or the other officers had supervisory authority.[2] Thus, their actions did not "constrain the discretion of subordinates" and thus cannot

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[1]At oral argument, Plaintiffs' counsel drew the Court's attention to the fact that, in contrast to the affirmative policy that officers must call a supervisor to the scene of an arrest involving a firearm, there is no policy that officers must call a supervisor to the scene of an arrest involving substantial amounts of cash found in possession of a suspect. Counsel argued that this omission could itself be a ground for Monell liability. We agree with the City that, to the extent the failure to require supervisory officers to come to the scene of a traffic stop involving suspects in possession of large amounts of money can constitute a policy, Plaintiffs have failed to demonstrate a causal link between the purported policy and the alleged constitutional deprivation. A plaintiff must "establish that the government policy or custom was the proximate cause of the injuries sustained." Kneipp v. Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996). Once a § 1983 plaintiff identifies a municipal policy or custom, he must "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 404 (1997). "If . . . the policy or custom does not facially violate federal law, causation can be established only by 'demonstrat[ing] that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences.'" Berg v. County of Allegheny, 219 F.3d 261, 276 (3d Cir. 2000) (quoting Brown at 407 (alterations in original) (citations omitted).

The failure to call a supervisory officer to a traffic stop involving large amounts of money is not a facial violation of federal law. Thus, Plaintiffs were required to come forward with evidence showing deliberate indifference to known or obvious consequences of failing to require supervisory officers at such traffic stops. While one could image that an obvious consequence arising from the lack of said policy would be that officers of questionable ethics would be presented with an opportunity to engage in illegal activity, imagination is insufficient to create a genuine issue for trial. Nothing in the summary judgment record satisfies the Plaintiffs' burden on this issue. Neither can the Court draw a legitimate inference that the failure to implement a policy requiring a supervisor to come to the scene of a stop involving a large amount of money was the "moving force" behind the injury the Plaintiffs' suffered. The actions of the individual officers, in flagrant violation of stated departmental policy, was the moving force behind the violations of the Plaintiffs' constitutional rights. By the time they discovered the money, the officers had already violated several police policies, including the failure to log the stop, the failure to notify dispatch of the stop, the failure to notify dispatch of the presence of a firearm, and the failure to call for a supervisory officer upon finding the firearm. The failure of the City to implement another policy – which the officers would also have flagrantly violated under the facts presented – does not constitute deliberate indifference.

[2]Dunn testified:

> Q. Who's in charge of this particular unit, you, Officer Morales or Officer Ortiz?
> A. We're no officers. There's no commander or no sergeant.
> Q. Well, who's making the decisions that night, or that day?

constitute the acts of the municipality. Bielevicz, 915 F.2d at 850.

We find that the Plaintiffs' reliance on Glass is misplaced. The Glass holding was based on evidence presented in that record which has no equivalent here. The case involved a pattern of police harassment of a family that occurred in 1998, including detentions without probable cause, and testimony from a police inspector corroborating such a practice, policy and procedure, "going on for many years prior to February of 1998." Glass, 455 F. Supp. 2d at 347. This evidence led the Court to conclude that the

> testimony describes a custom of bringing suspects to the police station for questioning without probable cause to arrest, which is in clear contravention of the mandate set forth by the Supreme Court as early as 1979: investigatory detentions without probable cause to arrest violate an individual's Fourth Amendment right to be free from unreasonable seizures. Therefore, . . . the City of Philadelphia violated [plaintiffs'] Fourth Amendment rights on February 10, 1998 when they were brought involuntarily to the police station in the back of a police car, handcuffed and placed in a cell for 2 to 3 hours for investigative purposes, without probable cause to arrest.

Id.

The evidence of a custom established to exist in 1998 does not establish that the custom existed in 2004. Furthermore, the custom established in Glass was a custom of bringing suspects to a police station without probable cause. There is no similar allegation here. It was incumbent on Plaintiffs to create a summary judgment record of the Police Department's custom to condone its officers stealing money from citizens at the time of the Plaintiffs' own detentions. They have failed to do so. There is no lay or expert testimony establishing conscious decision making or acquiescence in a longstanding custom or practice on the part of policymakers. There is also no evidence, other

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> A. What do you mean? Everybody – I mean, we all know what goings on? Again, there's no boss.

(Dunn Dep. 49:3-11.)

than the one instance involving Plaintiffs, to show a pattern of thefts from detainees. On this record, the Plaintiffs have not demonstrated a genuine issue for trial on policy or custom.

Accordingly, the City's motion for summary judgment on Count IV is granted. An appropriate order follows.

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ORDER

AND NOW, this 12th day of April, 2007, upon consideration of the motion of Defendant City of Philadelphia for summary judgment (Docket Entry # 13), all responses thereto, and oral argument conducted April 10, 2007, **IT IS HEREBY ORDERED** that said motion is **GRANTED**.

Judgment is **ENTERED** in favor of Defendant City of Philadelphia and against Plaintiffs Westly Barnes and Cupid Brookins.

BY THE COURT:

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John R. Padova, J.