IP 00-1534-C T/K Curry v Consolidated Cty Inpls
Judge John D. Tinder Signed on 2/27/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CURRY, DAVID A,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
INDIANAPOLIS POLICE DEPARTMENT,	)	CAUSE NO. IP00-1534-C-T/?
TUDOR, TOM, INDIVIDUALLY, AND	)	
IN HIS CAPACITY AS AN OFFICER	)	
OF THE INDPLS POLICE DEPT, AND	)	
EMPLOYEE OF THE CONSOLIDATED	)	
CITY OF INDPLS, IN,	)	
	)	
Defendants.	)	

π Stuart T Bench
Bench Law Office
5202 Madison Ave
Indianapolis, IN 46227

π David A Curry
Pro Se
3838 Forest Grove
4-A
Indianapolis, IN 46202

Peggy D Dallmann
Office of the Corporation Counsel
City County Building Suite 1601
200 East Washington Street
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID A. CURRY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 00-1534-C-T/K
	)	
CONSOLIDATED CITY OF INDIANAPOLIS; INDIANAPOLIS POLICE DEPARTMENT; TOM TUDOR, Individually, and in his capacity as an Officer of the Indianapolis Police Department, and Employee of Consolidated City of Indianapolis, Indiana,	)	
	)	
Defendants.	)	

ENTRY ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[1]

Defendants filed a Motion for Summary Judgment. Plaintiff opposes the Motion.

This court now **GRANTS** the Motion.

I. Factual and Procedural Background[2]

---

[1]This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion to be sufficiently novel or instructive to justify commercial publication of the Entry or the subsequent citation of it in other proceedings.

[2]These facts are not disputed. Additional facts may be set forth in the discussion sections as necessary. That section also will address various disputes about factual

(continued...)

Tom Tudor is a homicide detective employed by the Indianapolis Police Department for the last seventeen years. On the morning of February 6, 1999, Tudor was called to investigate a death on the west side of Indianapolis. Tudor discovered a body lying in a parking lot. He then visited the home of the deceased man and discovered another body. During the course of his investigation, Tudor interviewed a witness, Kelly Oglesby, who had been in that house at the time of the murders. Oglesby told Tudor that someone named Lonnie came to the door, then there were shots, and she hid. Tudor also interviewed another witness, Darrell Wallsmith, who said that on the night of the murders, Lonnie came to his door to ask where one of the victims was. Wallsmith exited his home and pointed to the nearby house where one of the victims was murdered. Wallsmith watched Lonnie get in a car with two other people and go to the house. He then heard a gunshot and watched as Lonnie got back into the passenger side of the car and the car drove away. After returning to his home, Wallsmith heard a car go by and two more shots.

Wallsmith later identified Lonnie as Lawrence Echols and on July 7, 1999, identified David Curry as one of the people in the car with Echols. Wallsmith also picked Curry out of a photo line-up. On August 6, Wallsmith was deposed by Echols' attorney. At the deposition, Wallsmith testified that he did not know the identity of the two people in the car with Echols. However, on cross-examination, Wallsmith appeared to contend that his

---

[2](...continued)
submissions proffered by Curry.

deposition testimony was consistent with his earlier discussions with Tudor.[3] Although Tudor accompanied Wallsmith to the deposition, he was not present during the deposition and was not told of Wallsmith's apparent change in testimony.

On September 1, Tudor arrested Curry. The next day, Tudor prepared a probable cause affidavit and the state court judge determined that there was probable cause to hold Curry. On September 3, Curry was charged with two counts of murder. On November 3, the State dismissed the charges against Curry in order to set the matter over to the grand jury. There is no indication that an indictment was ever returned against the Plaintiff. On September 13, 2000, Curry filed this lawsuit against Tudor, the Indianapolis Police

---

[3]As the portion of the deposition quoted below illustrates, Wallsmith's testimony could be described as confusing:

> Q: So if those taped statements say anything different than you told me today, they'd be incorrect, is that right?
> A: Yeah.
> Q: What you're telling me today is what actually happened?
> A: Yeah.
> Q: And anything different that's in those statements that you gave to Detective Tudor wouldn't be the truth?
> A: Yes.
> Q: They wouldn't be the truth?
> A: They would be the truth.
> Q: They would be the truth?
> A: Yeah.
> Q: Even if they were different from what you told me today?
> A: Yeah, still be the same.
> Q: They'd still be the same as what you told me today?
> A: Yes.
> Q: Have you told Detective Tudor anything different than you told me today?
> A: No, huh-uh.

(Wallsmith Dep. at 37-38.) Nonetheless, the court will draw inferences from this testimony in the Plaintiff's favor and conclude that Wallsmith asserted that his testimony was inconsistent with his earlier discussions with Tudor.

Department ("IPD"), and the City of Indianapolis claiming violations of his federal and state constitutional rights, slander, libel, defamation, false arrest, and false imprisonment. Defendant filed this Motion for Summary Judgment on June 28, 2001. Plaintiff filed its opposition on August 20. The court now rules as follows.

II. Summary Judgment Standard[4]

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The motion should be granted only if no reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the party opposing the motion bears the burden of proof at trial on an issue, that party can avoid summary judgment only by setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). When ruling on a motion for summary judgment, the court must construe the

---

[4]Although Plaintiff cites to several older federal cases in his discussion of the summary judgment standard, he fails to note the trilogy of Supreme Court cases that guide district courts in this area. Furthermore, Plaintiff contends that "Indiana decisions are helpful in determining the standard for measuring when Summary Judgment is appropriate." (Pl.'s Mem. in Resp. to Mot. for Summ. J. at 2.) Federal courts, such as this one, are governed by the Federal Rules of Civil Procedure and the cases interpreting those rules. In some contexts, the state and federal rules are identical; however, summary judgment law is not one of those areas. *See Lenhardt Tool & Die Co. v. Lumpe,* 722 N.E.2d 824 (Ind. 2000) (Boehm, J., dissenting from the denial of a petition to transfer) (discussing differences in Indiana and federal summary judgment law).

evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *Anderson*, 477 U.S. at 255. Speculation, however, is not the source of a reasonable inference. *See Chmiel v. JC Penney Life Ins. Co.*, 158 F.3d 966, 968 (7th Cir. 1998) (noting that the court is not required to draw every conceivable inference from the record in favor of the non-movant, but only those inferences that are reasonable).

III. Claims Against Detective Tudor

A. *State Law Claims*

Defendants claim that there can be no suit against Tudor in his individual capacity on the state law torts claims because he was acting within the scope of his employment. Indiana Code 34-13-3-5(b) provides that: "A lawsuit alleging that an employee acted within the scope of the employee's employment must be exclusive to the complaint and bars an action by the claimant against the employee personally." Subsection (c) provides that "[a] lawsuit filed against an employee personally must allege that an act or omission of the employee that causes a loss is: criminal; clearly outside the scope of the employee's employment; malicious; willful and wanton; or calculated to benefit the employee personally." (numbering omitted). Furthermore, the complaint must contain a reasonable factual basis supporting the allegations. *Id.*

The complaint is not a model of clarity, but it does not appear to allege that Tudor was acting outside the scope of his employment. The concept of scope of employment deals with the relationship between the act and the nature and duties of the employment. In paragraph four of the complaint, Plaintiff claims that Tudor

> as an employee or assign of the Consolidated City of Indianapolis, Indiana, and the Indianapolis Police Department, was at all times relevant herein to the best of Plaintiffs [sic] knowledge, a resident of the County of Marion, and the State of Indiana, and employed at all times herein in a capacity as a 'Detective' for the Indianapolis Police Department.

This paragraph appears to refer to actions taken in the course of employment.

Furthermore, Plaintiff has not satisfied subsection (c) of Indiana Code section 34-13-3-5, requiring suits against individual employees to clearly allege that the acts are outside of the scope of employment or otherwise subject a municipal employee to personal liability. Because the complaint makes no claim that Tudor was acting outside the scope of his employment, but rather implies that he was acting within the scope of employment, the court can only conclude that Plaintiff was asserting this claim against Tudor for conduct as an employee of Indianapolis. In addition, in another section of his brief, Plaintiff appears to concede that Tudor was acting within the scope of his employment. (Pl.'s Mem. in Resp. to Mot. for Summary J. at 14 ("Plaintiff does acknowledge that Tudor was acting within the scope and course of his employment, however, the Defendant' immunity from liability is not present.").) This, combined with the failure to plead any of the requirements of Indiana Code section 34-13-3-5(c) requires judgment in favor of Tudor on the state law claims.

B. *§ 1983 Claims*

Defendant Tudor further claims that he is entitled to summary judgment on Plaintiff's § 1983 claims because he had probable cause to arrest Plaintiff. Although not specifically pleaded, Curry appears to bring his federal claim pursuant to 42 U.S.C. § 1983, which provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Liability under 42 U.S.C. § 1983 requires proof that the defendants were acting under color of state law and that the defendants' conduct violated the plaintiff's rights, privileges, or immunities secured by the Constitution or laws of the United States. *Yang v. Hardin*, 37 F.3d 282, 284 (7th Cir. 1994) (citations omitted). The parties in this case do not appear to dispute that the defendant was acting under color of state law during the incident. Rather, the parties dispute whether Curry can produce facts to establish a deprivation of his constitutional rights.

The first step in analyzing a § 1983 claim is to identify the specific constitutional right allegedly infringed. Courts analyze a claim of false arrest and imprisonment under the Fourth Amendment, which guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Tudor's arrest of Curry was a quintessential "seizure" for Fourth Amendment purposes.

Curry contends that Tudor violated his rights under the United States Constitution when Curry arrested Tudor on October 22, 1998. Tudor maintains that he is entitled to summary judgment on Curry's § 1983 claim because Tudor had probable cause to arrest Curry for murder. Probable cause is an absolute defense to a false arrest claim under the Fourth Amendment. *Biddle v. Martin*, 992 F.2d 673, 678 (7th Cir. 1993). A law enforcement officer has probable cause to arrest someone when a prudent person, knowing the facts and circumstances within the knowledge of the arresting officer, would believe that the suspect had committed or was committing an offense. *Booker v. Ward*, 94 F.3d 1052, 1057 (7th Cir. 1996). Because the issue of whether probable cause existed is usually a question for the jury, a court may find that probable cause existed as a matter of law only when there is no room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them. *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1246 (7th Cir. 1994); *accord Qian v. Kautz*, 168 F.3d 949, 953 (7th Cir. 1999).

When police officers obtain information from an eyewitness or victim establishing the elements of a crime, the information is almost always sufficient to provide probable cause for an arrest in the absence of evidence that the information, or the person providing it, is not credible. *Sheik-Abdi,* 37 F.3d at 1247. When probable cause has been gained from a reasonably credible victim or eyewitness, there is no constitutional duty to investigate further. *Woods v. City of Chicago*, 234 F.3d 979, 997 (7th Cir. 2001); *Sheik-Abdi*, 37 F.3d at 1247 (noting that evidence of interviews and investigations is "not in any way a prerequisite to a finding of probable cause").

This fact-intensive, on-the-spot determination of probable cause often involves an exercise of judgment, which "turn[s] on the assessment of probabilities in particular factual contexts–not readily, or even usefully, reduced to a neat set of legal rules." *Maxwell v. City of Indianapolis*, 998 F.2d 431, 434 (7th Cir. 1993) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). Therefore, courts evaluate probable cause "not on the facts as an omniscient observer would perceive them but on the facts as they would have appeared to a reasonable person in the position of the arresting officer–seeing what he saw, hearing what he heard." *Mahoney v. Kesery*, 976 F.2d 1054, 1057 (7th Cir. 1992). The test, an objective one, is whether a reasonable officer would have believed the person had committed a crime. "If so, the arrest is lawful even if the belief would have been mistaken." *Id*. at 1057-58. Thus probable cause has been described as a "zone within which reasonable mistakes will be excused." *Sheik-Abdi*, 37 F.3d at 1246. However, even if probable cause does not exist for the crime charged, "proof of probable cause to arrest the plaintiff on a closely related charge is also a defense." *Kelley v. Myler*, 149 F.3d 641, 647-48 (7th Cir. 1994).

Indiana law provides that a person commits the offense of murder when the person knowingly or intentionally kills another human being. Ind. Code § 35-42-1-1 (1998). One who harbors, conceals or otherwise assists a person who has committed a crime, while intending to hinder the capture or punishment of such person, is guilty of assisting a criminal. *Id.* § 35-44-3-2. One who knowingly or intentionally aids, induces or causes another person to kill is guilty of murder. *Id.* § 35-41-2-4. In this case, Tudor was told by

Wallsmith that Wallsmith had seen Curry in the car with the shooter before and directly after one of the two related murders and had identified Curry from a photo array. He consulted with the a deputy prosecutor to determine whether there was sufficient evidence to arrest Curry. Tudor was not aware that Wallsmith later apparently retracted his statement.[5] This is sufficient information from which Tudor could conclude that Curry either assisted in a double homicide or aided in it. Plaintiff claims that there are material questions of fact which preclude granting summary judgment for Defendants. First, Plaintiff contends that the only evidence that Tudor has was that Curry was a passenger driven to and from a homicide. However, this is sufficient information to establish a probability or substantial chance that Curry at least assisted in a double homicide. *See Vitek v. State,* 750 N.E.2d 346, 352 (Ind. 2001); *Hauk v. State,* 729 N.E.2d 994, 998 (Ind. 2000).

Second, Plaintiff points to the fact that Wallsmith retracted his identification of Curry as one of the passengers with Echols at the murder scene. Plaintiff claims that Defendant Tudor had "specific knowledge" of Wallsmith's later deposition, which contained the contradictory statement. Although Tudor may have had knowledge of the deposition, he had no knowledge of the contents of the deposition. (Tudor Decl. ¶ ¶ 12-13.) Plaintiff presents no evidence to contradict this assertion,[6] but instead calls Tudor's actions "lax

---

[5]As noted, this retraction is arguably confusing because Curry first claims that his second statement is correct, then states that any earlier statements would be the truth as well, and finally contends that his deposition statement and statement to Tudor were the same. (Wallsmith Dep. at 37-38.)

[6]Paragraph seven of Plaintiff's Statement of Material Facts states that all

(continued...)

police work" and "gross negligence." Although this may true, negligence or inefficient police work do not give rise to claims under § 1983. *Davis v. Owens,* 973 F.2d 574, 577 (7th Cir. 1992). As the Seventh Circuit recently noted, "Although the officers might have saved a law-abiding citizen considerable tumult by asking more questions or digging deeper into the case, the Fourth Amendment did not require them to do so." *Pasiewicz v. Lake County Forest Preserve Dist.,* 270 F.3d 520, 525 (7th Cir. 2001).

Even if probable cause had existed, Defendants also seek summary judgment under the doctrine of qualified immunity. Police officers are entitled to qualified immunity so long as their conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Frazell v. Flanigan*, 102 F.3d 877, 886 (7th Cir. 1996). Qualified immunity is intended to shield from civil liability "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). In deciding qualified immunity, the court focuses on the objective reasonableness of the defendant's actions: whether a reasonable police officer could have believed that his conduct was constitutional

---

[6](...continued)
Defendants were aware that Wallsmith changed his statement. In support of this proposition, Plaintiff relies on attached exhibits and his own affidavit. The only statement in this material that supports Plaintiff's contention is paragraph eleven of his own affidavit, "To the best of my knowledge, Detective Tudor had the information available to him that I was not present at the time of the shooting or a passenger in the alleged vehicle." First, this is not an area on which Curry has personal knowledge. *See* Fed. R. Civil P. 56(e). Second, whether the information was available to Tudor or not, Tudor has testified that he did not have the information. As discussed above, inefficient police work does not give rise to a § 1983 claim.

"in light of the clearly established law and the information he possessed at the time." *Frazell*, 102 F.3d at 886 (quotations and citations omitted).

There is a two-part test to determine whether an officer is entitled to qualified immunity. First, the court must determine if the law was clearly established at the time of the alleged violation. Second, the court must examine the objective reasonableness of the defendant's conduct. The law is clear that a person cannot be arrested without probable cause. That leaves the question of whether Tudor's actions were objectively reasonable. "With an unlawful arrest claim in a § 1983 action when a defense of qualified immunity has been raised, [the court] will review to determine if the officer actually had probable cause, or, if there was no probable cause, whether a reasonable officer could have mistakenly believed that probable cause existed." *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998). If reasonable officers would have believed that probable cause existed to arrest Curry, Tudor is entitled to qualified immunity.

The Seventh Circuit has recognized that there is an overlap on the issues of immunity and the merits of the unlawful arrest claim. *See Kelley*, 149 F.3d at 648; *Maxwell*, 998 F.2d at 435. The question that is dispositive of both immunity and the merits is the issue of probable cause. *Kelley,* 149 F.3d at 648. In this case, the issue was decided against Curry. Because a reasonable officer could have believed that Curry had committed the offense of murder,[7] Tudor was not acting contrary to clearly established law

[7]And indeed, one day after his arrest, a state court judge determined that there was
(continued...)

when he arrested Curry and thus is entitled to qualified immunity. *See Kelley*, 149 F.3d at 648.

Curry has not cited any authority which establishes that Tudor violated clearly established law based on the facts of this case. Therefore, Tudor's decision to arrest Curry "easily falls within the zone of probable cause[ ] and even more easily into the zone of qualified immunity[ ]." *Sheik-Abdi*, 37 F.3d at 1247-48; *accord Humphrey*, 148 F.3d at 725-26 (holding that officer was entitled to qualified immunity on false arrest claim despite jury verdict for plaintiff on merits of claim).

IV. Claims Against the Indianapolis Police Department

Defendant IPD contends that it is not a legal entity subject to lawsuits. Indiana Code section 36-1-4-3 provides that a "unit" of local government may sue or be sued. Section 36-1-2-23 provides that a unit is a "county, municipality, or township." The IPD is none of these. The IPD has no separate corporate existence and is "merely a vehicle through which the [city] government fulfills its policy functions." *Jones v. Bowman*, 694 F. Supp. 538, 544 (N.D. Ind. 1988).

Plaintiff contends that IPD is a person who may be sued and that IPD is the principal of agent Tudor and can therefore, be sued for the actions of its agents working in

---

[7](...continued)
probable cause to hold Curry. (Defs.' Designated Evidence in Supp. of Mot. for Summary J., Attach. 4 at 2.)

their official capacity. This is true except that the City of Indianapolis is the principal and can be sued for the actions of its agent, Tudor, acting in his official capacity as an Indianapolis Police Officer. After making these arguments, Plaintiff then appears to concede that the IPD cannot be named as a Defendant. (Pl.'s Mem. in Resp. to Mot. for Summ. J. at 6.) Because the IPD is not a proper party to sue, the counts against it must be dismissed. In this case, the Plaintiff has also named the City of Indianapolis as a Defendant, so there does not appear to be any practical effect of this dismissal.

V. Claims Against the City of Indianapolis

A. *State Law Claims*

Defendants claim that judgment must be entered in favor of the City on the state law claims because the City is immune under the Indiana Torts Claim Act ("ITCA"), Indiana Code sections 34-13-3-3(7) and (9). Subsection seven provides that a governmental entity or employee is not liable for a loss if it results from "the adoption or enforcement of . . . a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment." In this case, Tudor arrested Curry based on an eyewitness identification of him at the crime scene. He conferred with a deputy prosecutor before making the arrest. Tudor was not acting against standard department procedures or in an egregious manner. Rather he was arresting a suspect based on probable cause. This clearly falls under the enforcement of a law exception to the ITCA. Therefore, all the state

law tort claims, except the claims for false arrest and imprisonment, are barred by Indiana Code section 34-13-3-3(7).

The false arrest and imprisonment claims also cannot go forward because, as determined above, Tudor had probable cause to arrest Curry. Probable cause is an absolute defense to state law claims of false arrest and imprisonment. *Conwell v. Beatty*, 667 N.E.2d 768, 775 (Ind. Ct. App. 1996). If there has been no tort committed, there can be no municipal liability whatsoever. Given the discussion above that Tudor had probable cause to arrest Curry, the City of Indianapolis is not liable for the torts of false arrest and imprisonment.[8]

B. *§ 1983 Claims*

Defendants also claim that Plaintiffs have failed to present evidence that their injuries were the result of an unconstitutional policy, custom, or practice. Municipalities are liable under § 1983 only when the municipality, in executing an official policy or practice, has caused a constitutional violation. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). Liability attaches only when the governmental entity causes the

[8]The claims against Tudor in his official capacity are synonymous with suits against the City itself. Ind. Code § 34-13-3-5 (2001); *Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985); *accord Monell*, 436 U.S. at 690 n.55 ("official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent."). For the same reasons judgment was awarded in favor of the City on the claims against it, judgment must be entered in favor of Tudor in his official capacity.

violation; merely showing that an agent or employee afflicted an injury is not enough. The government cannot be held liable under a respondeat superior theory. *Id*. at 692-94.

Plaintiff concedes that he did not plead a policy, custom, or practice, but argues that the "basis of [his] Complaint is that he was falsely arrest, imprisoned, and detained." Plaintiff claims that in the process of falsely arresting and imprisoning him, his rights under the United States and Indiana Constitutions were infringed and "[t]hese claims are ancillary to and form a claim for compensatory damages." Plaintiff then concludes by agreeing that he has not stated a § 1983 claim. This court is unclear what distinction Plaintiff is trying to make by claiming that his federal constitution claims are ancillary, but in any event, this court can conceive of, and the Plaintiff has directed it to, no basis for a cause of action for damages under the federal constitution unless under § 1983. Plaintiff does not plead a policy, custom, or practice, present any support for such a claim, and admits as much. (Defs.' Mem. in Resp. to Mot. for Summ. J. at 7.) Therefore, judgment is entered in favor of the City of Indianapolis on the § 1983 claims against it.

VI. Claim Under the Indiana Constitution

Defendants also challenge Plaintiff's ability to pursue a claim for damages under the Indiana Constitution. Plaintiff claims, with no citation to authority, that his constitutional claims are ancillary to the state law tort claims of false arrest and imprisonment and therefore are not barred. This court has previously held that there is no cause of action for damages under the Indiana Constitution. *See Boczar v. Kingen*, No. IP 99-0141-C T/G,

2000 WL 1137713, at *24-25 (S.D. Ind. March 9, 2000). In that case, the court addressed that issue as follows:

> The court holds that the Plaintiffs cannot prevail against any Defendant on a claim for damages directly under Article I, Section 12 of the Indiana Constitution. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court recognized an implied right of action for damages under the United States Constitution against federal agents for violations of federal constitutional rights. The Indiana Supreme Court has not directly addressed whether there is an analogous cause of action under the Indiana Constitution. One federal district court has held that a plaintiff may bring a damages action under the equal protection clause of the Indiana Constitution. *See Discovery House v. Consolidated City of Indianapolis*, 43 F. Supp.2d 997, 1004 (N.D. Ind. 1999). Judge Hamilton of this court, however, declined to recognize an implied right to sue for damages under the Indiana Constitution. *See Craig v. Christ*, No. IP 96-570-C H/G, Entry on Defs.' Mots. for Summ. J. and to Dismiss and City's Mot. to Strike at 5 (Dec. 15, 1998). The undersigned finds Judge Hamilton's decision more persuasive than that in *Discovery House*.
>
> In reaching the decision in *Discovery House*, the court relied on the Indiana Supreme Court's implicit acceptance of such an action in *Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991), and the decisions of lower Indiana courts in *Hilburt v. Town of Markleville*, 649 N.E.2d 1036 (Ind. Ct. App. 1995), and *Orr v. Sonnenburg*, 542 N.E.2d 201 (Ind. Ct. App. 1989). *See Discovery House*, 43 F. Supp.2d at 1004. The Indiana Supreme Court did not expressly recognize a cause of action for damages under the Indiana Constitution in *Bayh*. The court did not decide the issue in *Hilburt*, but rather, merely assumed such an action could be maintained. Though the court upheld a damages award under the Indiana Constitution in *Orr*, the court simply concluded without discussion, that such an action could be maintained. Thus, as the *Discovery House* court acknowledged, none of these decisions expressly recognized a cause of action for damages under the Indiana Constitution. It is unlikely that the Indiana courts would recognize an implied right of action for damages under the Indiana Constitution for at least two reasons. First, Indiana's courts have been hesitant to recognize implied rights of action under Indiana statutory law. By analogy, the Indiana courts would begin with the intent of the framers of the Indiana Constitution to determine whether there is a private cause of action for damages for constitutional violations. It is unlikely that the framers intended such an action

> because they would have understood sovereign immunity to bar such an action. This court declines to recognize a cause of action for damages directly under the Indiana Constitution absent clear indication from the Indiana Supreme Court (or even Indiana's appellate courts) that such an action may be maintained.

Id. (citations **omitted**).

Curry has presented no compelling reason to reexamine this issue and this court declines to find a cause of action for money damages for a violation of the Indiana Constitution.

VII. Conclusion

For the foregoing reasons the Defendants' Motion for Summary Judgment is **GRANTED**.

ALL OF WHICH IS ORDERED this 27th day of February 2002.

John Daniel Tinder, Judge
United States District Court

Copies to:

Stuart T. Bench
Bench Law Office
5202 Madison Ave.
Indianapolis, IN 46227

Peggy D. Dallmann
Office of the Corporation Counsel
1601 City County Building
Indianapolis, IN 46204