CASREF,PAW

U.S. District Court
Southern District of Florida (Ft. Lauderdale)
CIVIL DOCKET FOR CASE #: 0:11-cv-61846-DMM

Sweeney v. Almanzar et al
Assigned to: Judge Donald M. Middlebrooks
Referred to: Magistrate Judge Patrick A. White
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 08/17/2011
Jury Demand: None
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Russell Sweeney
Prisoner ID: DC #096670

represented by **Russell Sweeney**
DC #096670
Jackson Work Camp
5607 Highway 71 North
Malone, FL 32445
PRO SE

V.

Defendant

Orlando Almanzar
of the Ft. Lauderdale Police Department

represented by **Robert Hunt Schwartz**
McIntosh Schwartz, P.L.
888 SE 3rd Avenue
Suite 500
Fort Lauderdale, FL 33335-9002
954-523-5885
Fax: 954-760-9531
Email: rhs@mcintoshschwartz.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Michael Holdorff
of the Ft. Lauderdale Police Department

represented by **Robert Hunt Schwartz**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Paul Rogers
of the Ft. Lauderdale Police Department

represented by **Robert Hunt Schwartz**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text

08/17/2011	1	COMPLAINT against Orlando Almanzar, Michael Holdorff, Paul Rogers. Filing fee $ 350.00. IFP Filed, filed by Russell Sweeney.(jua) (Entered: 08/18/2011)
08/17/2011	2	Judge Assignment to Judge Donald M. Middlebrooks (jua) (Entered: 08/18/2011)
08/17/2011	3	Clerks Notice of Magistrate Judge Assignment to Magistrate Judge Patrick A. White. Pursuant to Administrative Order 2003-19 for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. (jua) (Entered: 08/18/2011)
08/17/2011	4	MOTION for Leave to Proceed in forma pauperis by Russell Sweeney. (jua) (Entered: 08/18/2011)
08/25/2011	5	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF $350.00 and Granting 4 Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 8/25/2011. (tw) (Entered: 08/25/2011)
08/25/2011	6	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 8/25/2011. (tw) (Entered: 08/25/2011)
09/26/2011	7	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AND INDIVIDUAL. The United States Marshal shall serve a copy of the complaint and appropriate summons upon:Officer Orlando Almanzar, Fort Lauderdale Police Dept., 1300 West Broward Boulevard, Fort Lauderdale, FL 33312; Officer Michael Holdorff, Fort Lauderdale Police Dept., 1300 West Broward Boulevard, Fort Lauderdale, FL 33312 and Officer Paul Rogers, Fort Lauderdale Police Dept., 1300 West Broward Boulevard, Fort Lauderdale, FL 33312. Signed by Magistrate Judge Patrick A. White on 9/23/2011. (tw) (Entered: 09/26/2011)
09/26/2011	8	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Russell Sweeney. Recommending. The excessive use of force claim should proceed against all three officers. 2. The unlawful search and seizure claims proceed against the defendant officers. 3. The unlawful arrest claims proceed against the three officers. Objections to R&R due by 10/14/2011. Signed by Magistrate Judge Patrick A. White on 9/26/2011. (tw) (Entered: 09/26/2011)
09/28/2011	9	Summons Issued as to Orlando Almanzar. (br) (Entered: 09/28/2011)
09/28/2011	10	Summons Issued as to Michael Holdorff. (br) (Entered: 09/28/2011)
09/28/2011	11	Summons Issued as to Paul Rogers. (br) (Entered: 09/28/2011)
10/03/2011	12	SUMMONS (Affidavit) Returned Executed on 1 Complaint Orlando Almanzar served on 10/3/2011, answer due 10/24/2011. (yha) (Entered: 10/03/2011)
10/03/2011	13	SUMMONS (Affidavit) Returned Executed on 1 Complaint Michael Holdorff served on 10/3/2011, answer due 10/24/2011. (yha) (Entered: 10/03/2011)

10/03/2011	14	SUMMONS (Affidavit) Returned Executed on 1 Complaint Paul Rogers served on 10/3/2011, answer due 10/24/2011. (yha) (Entered: 10/03/2011)
10/24/2011	15	*Defendants'* ANSWER and Affirmative Defenses to Complaint *[DE 1]* by Orlando Almanzar, Michael Holdorff, Paul Rogers.(Schwartz, Robert) (Entered: 10/24/2011)
10/26/2011	16	SCHEDULING ORDER: Amended Pleadings due by 3/6/2012. Discovery due by 2/21/2012. Joinder of Parties due by 3/6/2012. Motions due by 3/27/2012.. Signed by Magistrate Judge Patrick A. White on 10/25/2011. (tw) (Entered: 10/26/2011)

PACER Service Center			
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11/15/2011 17:03:00			
PACER Login:	vl0006	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	0:11-cv-61846-DMM
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-CV-61846-MIDDLEBROOKS/WHITE

The attached hand-written document has been scanned and is also available in the SUPPLEMENTAL PAPER FILE

cat/div 1983/1550/FIL
Case #
Judge Mag PAW
Motn lfp Yes Fee pd $ No
Receipt #

PROVIDED TO JACKSON W.C. ON
AUG 12 2011
FOR MAILING

A COMPLAINT UNDER THE CIVIL RIGHTS ACT,
42 U.S.C. §1983

FILED by D.C.
AUG 17 2011
STEVEN M. LARIMORE
CLERK U. S. DIST CT
S. D. of FLA. – MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Russell Sweeney)
)
)
)
(Enter above the full name of the plaintiff or plaintiffs in this action.))
)
v.)
Orlando Almanzar)
Michael Holdorff)
Paul Rogers)
Of the Ft. Lauderdale Police Dept.
(Enter above the full name of the defendant or defendants in this action.)

Instructions for Filing Complaint by Prisoners
Under the Civil Rights Act, 42 U.S.C. §1983

This packet includes four copies of a complaint form and two copies of a forma pauperis petition. To start an action you must file an original and one copy of your complaint for each defendant you name and one copy for the court. For example, if you name two defendants, you must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original.

The clerk will not file your complaint unless it conforms to these instructions and to these forms.

Your complaint must be legibly handwritten or typewritten. The plaintiff or plaintiffs must sign and swear to the complaint. If you need additional space to answer a question, you may use the reverse side of the form or an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, it is necessary for you to file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

In order for this complaint to be filed, it must be accompanied by the filing fee of $ 120.00. In addition, the United States Marshal will require you to pay the cost of serving the complaint on each of the defendants.

If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauparis. Two blank petitions for this purpose are included in this packet. One copy should be filed with your complaint; the other copy is for your records. After filling in the petition, you must have it notarized by a notary public or other officer authorized to administer an oath.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and the copies to the Clerk of the United States District Court for the Southern District of Florida, 301 North Miami Avenue, Miami, Florida 33128-7788.

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?
Yes ( ) No (✓)

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs: _____

_____

Defendants: _____

_____

2. Court (if federal court, name the district; if state court, name the county): _____

_____

3. Docket number: _____

4. Name of judge to whom case was assigned: _____

_____

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?):

_____

_____

6. Approximate date of filing lawsuit: _____

7. Approximate date of disposition: _____

II. Place of present confinement: Jackson Work Camp, 5607 Hwy. 71 North, Malone, Fla. 32445

A. Is there a prisoner grievance procedure in this institution? Yes (✓) No ( )

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes ( ) No (✓)

C. If your answer is YES:

1. What steps did you take? _____

_____

_____

2. What was the result? _____

_____

D. If your answer is NO, explain why not: This action is against The Broward County Police Department, Ft. Lauderdale Police Department

III. Parties

(In Item A below, place your name in the first blank and place your present address in the second blank. Do the same additional plaintiffs, if any.)

A. Name of plaintiff Russell Sweeney

Address Jackson W.C., 5607 Hwy. A. Malone, Fla. 32445

In Item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item C for the names, positions, and places of employment of any additional defendants.

B. Defendant Orlando Almanzar

is employed as Police Officer

at Ft. Lauderdale Police Dept. 1300 W. Broward Blvd. Ft. Lauderdale, Fla. 33312

C. Additional Defendants: Michael Feldgoff, and Paul Rodgers, Police Officers for Ft. Lauderdale Police Dept., 1300 West Broward Blvd. Ft. Lauderdale, Fla. 33312

IV. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not

give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet if necessary.)

On 1-17-2009, approx. 0445 hours, Plaintiff and his friend Debra Ettenberg pulled into the Race Track Gas Station at 2300 W. Broward Blvd. for Gas and drinks. Ms. Ettenberg went inside the Station to pay for the purchases and use the restroom. During this time Defendants Almanzar, Holdorff and Rodes were in the parking lot station conversating. When Ms. Ettenberg exited the Station Defendants stoped her and began questioning her. Plaintiff observing this confrontation completed pumping his gas and then parked his vehicle to wait on Ettenberg. After approx. 5 minutes, plaintiff yelled out his window to Ettenberg "Stating let's go." Defendant Holdorff then approached Plaintiff's vehicle and requested to see his license and Registration. While Plaintiff was retrieving the documents Defendant Holdorff opened his car door and ordered Plaintiff to get out of the car with his hands on his head. Defendant Holdorff then handcuffed Plaintiff and ordered him to sit on the ground. Defendants then began searching Plaintiff's vehicle without permission or consent. After searching the vehicle, Defendant Holdorff began questioning Plaintiff as to what he was doing in the area. During the conversation Defendant Holdorff asked Plaintiff what did he have in his mouth. Before Plaintiff could respond Defendant Holdorff grabed him by the neck and began choking Plaintiff. Both Defendants Almanzar and Rodes became involved, who started punching and kicking Plaintiff. Defendant Holdorff then used his taser gun shooting Plaintiff in his left

V. Relief

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.

Plaintiff sues Defendants for False Arrest, Unnecessary use of Force, Battery and Violation of his Civil Rights.

Extra Sheet

side. After the beating and tazering of Plaintiff, Defendant Almanzar picked up off the ground a plastic baggie saying it appeared to be Cocaine or had Cocaine in it. Plaintiff was arrested, charged with Possession of Cocaine and denied Medicial treatment. Ms. Eronberg was released and caught a cab home.

On 6-25-09 charge were droped against Plaintiff.

Plaintiff Sues each Defendants for Compensation in The Amount of One Hundred dollars $100.00

Signed this 12th day of August, 2011

(Signature of plaintiff or plaintiffs)

VERIFICATION

State of Florida)

County of Jackson)

Russell Sweeney, being first duly sworn, under oath, says: that he is the plaintiff in this action and knows the content of the above complaint; that it is true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes to be true.

(Signature of affiant-plaintiff)

Subscribed and sworn to before me this 12th day of August, 2011.

Deborah R Lockett

NOTARY PUBLIC STATE OF FLORIDA

DEBORAH R. LOCKETT
MY COMMISSION # EE 010492
EXPIRES: July 20, 2014
Bonded Thru Budget Notary Services

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.11-61846-CIV-MIDDLEBROOKS
MAGISTRATE JUDGE P.A. WHITE

RUSSELL SWEENEY, :

Plaintiff, :

v. :

ORLANDO ALMANZAR, ET AL., :

Defendants. :

REPORT OF
MAGISTRATE JUDGE

I. Introduction

The plaintiff, Russell Sweeney, currently incarcerated at the Jackson Work Camp, filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 for damages. (DE# 1). The plaintiff has been granted leave to proceed in forma pauperis.

This civil action is before the Court for an initial screening pursuant to 28 U.S.C. §1915.

II. Analysis

A. Applicable Law for Screening

As amended, 28 U.S.C. §1915 reads in pertinent part as follows:

> Sec. 1915 Proceedings in Forma Pauperis
>
> * * *
>
> (e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that -
>
> * * *
>
> (B) the action or appeal -

* * *

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief from a defendant who is immune from such relief.

This is a civil rights action Pursuant to 42 U.S.C. §1983. Such actions require the deprivation of a federally protected right by a person acting under color of state law. See 42 U.S.C. 1983; Polk County v Dodson, 454 U.S.312 (1981); Whitehorn v Harrelson, 758 F. 2d 1416, 1419 (11 Cir. 1985. The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). A complaint is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on factual allegations that are "clearly baseless." Denton v. Hernandez, 504 U.S. 25, 31 (1992). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the

Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998).

To determine whether a complaint fails to state a claim upon which relief can be granted, the Court must engage in a two-step inquiry. First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Twombly applies to §1983 prisoner actions. See Douglas v. Yates, 535 F.3d 1316, 1321 (11 Cir. 2008). These include "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." Second, the Court must determine whether the complaint states a plausible claim for relief. Id. This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." The plaintiff is required to plead facts that show more than the "mere possibility of misconduct." The Court must review the factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief." When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred.[1]

B. Statement of the Claims

The plaintiff names as defendants Ft. Lauderdale Police Officers Orlando Almanzar, Michael Holdorff, and Paul Rogers. He alleges that on January 17, 2009, he was approached while sitting in his parked vehicle by Holdorff, who requested to see his licence and

[1] The application of the Twombly standard was clarified in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

registration. He claims that Haldorff asked him to get out of the car, handcuffed him and told him to sit on the ground. He then allegedly searched his car without consent or probable cause. He asked plaintiff what he was doing in the area and then asked what was in his mouth. Before plaintiff could respond he grabbed him by the neck and began choking him. Almanzar and Rodgers started punching and kicking him and Haldorff tazered him on his left side. Plaintiff states that Almanzar then picked a plastic baggie off the ground which appeared to be cocaine. He was then arrested and charged with possession of cocaine. He claims that on June 25, 2009, the charges were dropped. He seeks monetary damages.

C. Sufficiency of the complaint
Excessive Force

Liberally construing the complaint, Sweeney alleges that the three officers used excessive force during a seizure in violation of his Fourth Amendment rights.

Claims of excessive force by police officers are cognizable under 42 U.S.C. §1983, as are claims that officers who were present failed to intervene. Fundiller v. City of Cooper City, 777 F.2d 1436 (11 Cir. 1985). A claim that a law enforcement officer used excessive force in the course of an arrest, an investigatory stop, or any other seizure of a free citizen is to be analyzed under the Fourth Amendment and its "reasonableness" standard. Graham v. Connor, 490 U.S. 386 (1989)("all claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard"); Ortega v. Schram, 922 F.2d 684, 694 (11 Cir. 1991).

Sweeney states he was choked, kicked and tazered. He has stated minimally sufficient facts under the Twombly or any "heightened pleading" standard so that the excessive use of force claim should proceed against the three officers. A determination of whether the officers might be entitled to qualified immunity cannot be determined at this juncture or upon consideration of a motion to dismiss. Sweeney has not stated the officers be sued in their official capacities, and the complaint is construed as a suit against the defendants in their individual capacities.

Unlawful Search and Seizure

Sweeney also argues that the three officers violated his Fourth Amendment rights by conducting an unlawful search and seizure. As stated by the Eleventh Circuit in U.S. v. Alexander, 835 F.2d 1406, 1408 (11 Cir. 1988), the basic premise of the **search** doctrine is that "searches undertaken without a warrant issued upon probable cause are 'per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.'" (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). Whether the encounter constitutes a **seizure**, thereby triggering the citizen's constitutional rights, turns on whether a reasonable person would feel free to disregard the police and go about his business. Florida v. Bostick, 501 U.S. 429, 434 (1991). A seizure occurs when a person submits to an officer's show of authority. California v. Hodari D., 499 U.S. 621, 628 (1991).

In this case, Sweeney alleges that the officers handcuffed him while he was attempting to produce his licence and registration. He further alleges that they searched the car without permission. Further, they apparently attempted to forcefully search his person for drugs. Nothing in the complaint suggests that the officers

possessed probable cause or reasonable suspicion. In light of the foregoing, Sweeney alleges sufficient facts under the Twombly standard to permit the unlawful search and seizure claims to proceed against the three officers.

False Arrest

Sweeney asserts that the officers violated his constitutional rights by falsely arresting him. Although a warrantless arrest without probable cause violates a person's constitutionally protected liberty interest, and forms the basis for a section 1983 claim, Marx v. Gumbinner, 950 F.2d 1503, 1505-06 (11 Cir. 1990); Motes v. Meyers, 810 F.2d 1055 (11 Cir. 1987), the Constitution does not guarantee that only the guilty will be arrested, Baker v. McCollan, 443 U.S. 137 (1979), and the existence of probable cause is an absolute bar to a section 1983 action for false arrest. Marx, 950 F.2d at 1506. Moreover, the fact that an arrested individual is ultimately acquitted, or charges against him are dropped, is of no consequence in determining the validity of the arrest. Id. at 1507; Mills v. Town of Davie, 48 F. Supp. 2d 1378, 1380 (S.D. Fla. 1999). Probable cause "requires more than mere suspicion, but does not require convincing proof." Bailey v. Board of County Commiss'rs of Alachua County, 956 F.2d 1112, 1120 (11 Cir. 1992). The definition of probable cause is well established, see, e.g., United States v. Elsoffer, 671 F.2d 775 (11 Cir. 1982), and it has been long recognized that probable cause to arrest exists where the facts and circumstances within an arresting officer's knowledge, and of which he had reasonably trustworthy information, are sufficient for a man of reasonable caution to believe that an offense has been or is being committed. Hunter v. Bryant, 502 U.S. 224, 229 (1991). Moreover, the existence of circumstances in which an arresting officer has only *arguable*

probable cause, if not actual probable cause, is sufficient for a defendant officer to be entitled to qualified immunity. See Lee v. Ferraro, 284 F.3d 1188, 1195 (11 Cir. 2002); Scarborough v. Myles, 245 F.3d 1299, 1302 (11 Cir. 2001). Arguable probable cause exists where reasonable officers in the same circumstances, and possessing the same knowledge as the defendant officer(s) could have believed that probable cause existed to arrest. Scarborough, 245 F.3d at 1302.

Following his arrest, the plaintiff states that the charges were dropped. Although the plaintiff states that a plastic baggie was found on the floor after the assault, the facts contained in the complaint do are not sufficient to establish probable cause to arrest Sweeney at this very early stage. Thus, Sweeney has raised sufficient factual allegations such that his false arrest claim should proceed against the officers beyond this initial screening, as his allegations meet the Twombly standard.

III. Recommendation

1. The excessive use of force claim should proceed against all three officers.

2. The unlawful search and seizure claims proceed against the defendant officers.

3. The unlawful arrest claims proceed against the three officers.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

It is so recommended at Miami, Florida, this 26th day of September, 2011.

UNITED STATES MAGISTRATE JUDGE

cc: Russell Sweeney, Pro Se
Jackson Work Camp
Malone, FL
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-61846-CIV-MIDDLEBROOKS

RUSSELL SWEENEY,

Plaintiff,

vs.

ORLANDO ALMANZAR, MICHAEL HOLDORFF,
PAUL ROGERS, of the Fort Lauderdale Police
Department,

Defendants.
_____/

DEFENDANTS ORLANDO ALMANZAR, MICHAEL HOLDORFF AND PAUL ROGERS' ANSWER & AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT [DE 1]

Defendants, ORLANDO ALMANZAR ("ALMANZAR"), MICHAEL HOLDORFF ("HOLDORFF") and PAUL ROGERS ("ROGERS") by and through their undersigned counsel, hereby file their Answer and Affirmative Defenses to Plaintiff's RUSSELL SWEENEY'S ("SWEENEY") Complaint [DE 1], and state as follows:

1. ALMANZAR, HOLDORFF and ROGERS deny each and every allegation contained within SWEENEY'S Complaint [DE 1] and demand strict proof thereof.

AFFIRMATIVE DEFENSES

2. ALMANZAR, HOLDORFF and ROGERS allege and assert that they are entitled to qualified immunity because they did not act in any way that would violate any clearly established rights guaranteed to SWEENEY under the Constitution of the United States and/or under any statutory law, of which a reasonable person and/or reasonable police officer would have known.

2. ALMANZAR, HOLDORFF and ROGERS allege and assert that, at all times material, they had probable cause and/or arguable probable cause, and/or reasonable suspicion, and a duty, as well as lawful authority, to stop, detain, search, and/or arrest SWEENEY.

3. ALMANZAR, HOLDORFF and ROGERS allege and assert that the actions taken by them, including any alleged use of force, with regard to the apprehension and arrest of SWEENEY, were reasonable upon objective evaluation and not so grossly disproportionate to the need to take those actions so as to warrant recovery pursuant to 42 U.S.C. § 1983.

4. ALMANZAR, HOLDORFF and ROGERS allege and assert that, at all times material, they used only such force as was reasonable or necessary under the circumstances.

5. ALMANZAR, HOLDORFF and ROGERS allege and assert that SWEENEY unjustifiably resisted lawful arrest with and/or without violence as prohibited by § 776.051, § 843.01, and/or § 843.02, Fla.Stat.

6. ALMANZAR, HOLDORFF and ROGERS allege and assert that, at all times material, they used only such alleged force as was justifiable as enumerated in § 776.05, § 776.051, and § 776.07, Fla.Stat., i.e., pursuant to arrest, in self defense, in the protection of others, and/or in attempts to prevent an escape.

7. ALMANZAR, HOLDORFF and ROGERS allege and assert that SWEENEY's conduct is the sole cause of his alleged injuries and damages, if any.

8. ALMANZAR, HOLDORFF and ROGERS allege and assert that SWEENEY has failed to mitigate his alleged damages.

DEMAND FOR ATTORNEY'S FEES

9. ALMANZAR, HOLDORFF and ROGERS further demand reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988, should they prevail in this action.

RESERVATION OF RIGHTS

10. ALMANZAR, HOLDORFF and ROGERS reserve the right to amend and supplement these affirmative defenses adding such affirmative defenses as may appear to be appropriate upon further discovery being conducted in this case.

WHEREFORE, having fully answered SWEENEY's Complaint [DE 1], ALMANZAR, HOLDORFF and ROGERS pray they be dismissed with prejudice and costs and fees awarded to ALMANZAR, HOLDORFF and ROGERS.

Dated: October 24, 2011
Fort Lauderdale, Florida

Respectfully submitted,

s/Robert H. Schwartz

ROBERT H. SCHWARTZ (301167)
rhs@mcintoshschwartz.com
McINTOSH SCHWARTZ, P.L.
888 Southeast 3rd Avenue, Suite 500
Fort Lauderdale, Florida 33316
Telephone: (954) 556-1483
Facsimile: (954) 760-9531

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Robert H. Schwartz
ROBERT H. SCHWARTZ

SWEENEY V. ALMANZAR, HOLDORFF and ROGERS
Case No. 11-61846-CIV-MIDDLEBROOKS

SERVICE LIST

Russell Sweeney, *Pro Se*
DC#096670
Jackson Work Camp
5607 Highway 71 North
Malone, Florida 32445
Pro Se Plaintiff
[via Regular U.S. Mail]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-61846-CIV-MIDDLEBROOKS
MAGISTRATE JUDGE P. A. WHITE

RUSSELL SWEENEY, :

Plaintiff, :

v. :

ORLANDO ALMANZAR, et al., :

Defendants. :

ORDER SCHEDULING PRETRIAL PROCEEDINGS WHEN PLAINTIFF IS PROCEEDING PRO SE

The plaintiff in this case is incarcerated, without counsel, so that it would be difficult for either the plaintiff or the defendants to comply fully with the pretrial procedures required by Local Rule 16.1 of this Court. It is thereupon

ORDERED AND ADJUDGED as follows:

1. All discovery methods listed in Rule 26(a), Federal Rules of Civil Procedure, shall be completed by **February 21, 2012.** This shall include all motions relating to discovery.

2. All motions to join additional parties or amend the pleadings shall be filed by **March 6, 2012.**

3. All motions to dismiss and/or for summary judgment shall be filed by **March 27, 2012.**

4. On or before **April 10, 2012,** the plaintiff shall file with the Court and serve upon counsel for the defendants a document called "Pretrial Statement." The Pretrial Statement shall contain the following things:

(a) A brief general statement of what the case is about;

(b) A written statement of the facts that will be offered by oral or documentary evidence at trial; this means that the plaintiff must explain what he intends to prove at trial and how he intends to prove it;

(c) A list of all exhibits to be offered into evidence at the trial of the case;

(d) A list of the full names and addresses of places of employment for all the non-inmate witnesses that the plaintiff intends to call (the plaintiff must notify the Court of any changes in their addresses);

(e) A list of the full names, inmate numbers, and places of incarceration of all the inmate witness that plaintiff intends to call (the plaintiff must notify the Court of any changes in their places of incarceration); and

(f) A summary of the testimony that the plaintiff expects <u>each</u> of his witnesses to give.

5. On or before **April 24, 2012,** defendants shall file and serve upon plaintiff a "Pretrial Statement," which shall comply with paragraph 4(a)-(f).

6. Failure of the parties to disclose fully in the Pretrial Statement the substance of the evidence to be offered at trial may result in the exclusion of that evidence at the trial. Exceptions will be (1) matters which the Court determines were not discover-

able at the time of the pretrial conference, (2) privileged matters, and (3) matters to be used solely for impeachment purposes.

7. If the plaintiff fails to file a Pretrial Statement, as required by paragraph 4 of this order, paragraph 5 of this order shall be suspended and the defendants shall notify the Court of plaintiff's failure to comply. The plaintiff is cautioned that failure to file the Pretrial Statement may result in dismissal of this case for lack of prosecution.

8. The plaintiff shall serve upon defense counsel, at the address given for him/her in this order, a copy of every pleading, motion, memorandum, or other paper submitted for consideration by the Court and shall include on the original document filed with the Clerk of the Court a certificate stating the date that a true and correct copy of the pleading, motion, memorandum, or other paper was mailed to counsel. All pleadings, motions, memoranda, or other papers shall be filed with the Clerk and must include a certificate of service or they will be disregarded by the Court.

9. A pretrial conference may be set pursuant to Local Rule 16.1 of the United States District Court for the Southern District of Florida, after the pretrial statements have been filed. Prior to such a conference, the parties or their counsel shall meet in a good faith effort to:

(a) discuss the possibility of settlement;

(b) stipulate (agree) in writing to as many facts and issues as possible to avoid unnecessary evidence;

(c) examine all exhibits and documents proposed to be used at the trial, except

that impeachment documents need not be revealed;

(d) mark all exhibits and prepare an exhibit list;

(e) initial and date opposing party's exhibits;

(f) prepare a list of motions or other matters which require Court attention; and

(g) discuss any other matters that may help in concluding this case.

10. All motions filed by defense counsel must include a proposed order for the undersigned Magistrate Judge's signature.

DONE AND ORDERED at Miami, Florida, this 25th day of October, 2011.

s/Patrick A. White
UNITED STATES MAGISTRATE JUDGE

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Hon. Donald M. Middlebrooks, United States District Judge