IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERRENCE BUCHANAN,

Plaintiff,

OPINION AND ORDER

v.

11-cv-238-wmc

SHERIFF DEPUTY KEITH KELLY,

Defendant,

v.

STATE OF WISCONSIN,

Intervenor.

Plaintiff Terrence Buchanan brings this civil action pursuant to 42 U.S.C. § 1983, alleging that Dane County Deputy Sheriff Keith Kelly violated his right to be free from unreasonable searches and seizures during a traffic stop, which resulted in Buchanan's arrest on drug charges and probation violations. Because Buchanan was in prison at the time he filed his complaint, the court screened the pleadings under 28 U.S.C. § 1915A. On February 13, 2012, the court granted Buchanan leave to proceed with a Fourth Amendment claim of false arrest and state law claims of false imprisonment, malicious prosecution and conversion.

There are several pending motions in this case. Buchanan has filed a motion to reconsider the screening order and a proposed amended complaint, along with a motion for leave to proceed on that complaint. Buchanan also moves for a writ of mandamus regarding interference with his access to courts. Kelly has filed a motion for summary judgment, arguing that (1) Buchanan cannot demonstrate a valid claim under the Fourth

Amendment; and (2) even assuming a constitutional violation occurred, he is entitled to qualified immunity from liability under § 1983. Kelly also argues that Buchanan is barred from proceeding on his state law claims because he did not give notice of his claim as required by Wis. Stat. § 893.80. Buchanan filed more than one response to Kelly's summary judgment motion, including his own motion to challenge the constitutionality of the Wisconsin notice-of-claim statute, in response to which the State of Wisconsin has moved to intervene.

After considering all of the pleadings and submissions, along with the applicable law, the court will deny each of Buchanan's motions, grant Kelly's motion for summary judgment and dismiss this case.

FACTS[1]

A. The Parties

At the time of the allegations underlying the complaint, plaintiff Terrence Buchanan was a resident of Madison, Wisconsin. Defendant Keith Kelly is a Dane County Deputy Sheriff.

B. The Stop

Shortly after 8:00 p.m. on March 31, 2009, Deputy Kelly was on patrol when he stopped Buchanan's 1977 Pontiac Catalina for a defective license plate lamp on the rear

[1] Except where specifically noted, the following facts are undisputed or are inferred in favor of Buchanan as the non-moving party on summary judgment.

of the vehicle. Kelly noted that the exhaust was extremely loud as well.[2] The stop occurred half a block from the corner of Hammersley Road and Whitney Way, which is a residential area four blocks from Buchanan's home.[3] The car had two occupants. Buchanan was driving and Aaron Williams was a passenger in the rear seat directly behind Buchanan. Both Buchanan and Williams are African American.

After Buchanan pulled over, Kelly asked him for information, including his name, his address, whether he had a driver's license, whether he knew why he had been stopped, and if he knew that his license plate lamp was out. Kelly also asked Buchanan a few basic interview questions about where he had been, where he was headed, why his passenger was not sitting in the front seat and whether they had weapons or contraband in the vehicle.

Buchanan showed Kelly an auto repair receipt for a rear taillight bulb, attempting to show that he would have replaced the license plate lamp had he known it was out. Buchanan also produced a valid driver's license. Kelly claims that Buchanan's hand was shaking as he did so, which Buchanan disputes. Williams's hands were either "folded in the center of his legs" or tucked in between them. To Kelly, Buchanan and Williams appeared nervous and avoided eye-contact, but the parties dispute whether they actually were nervous, distracted or otherwise avoiding eye contact during the initial encounter.

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[2] Kelly continues to maintain that another reason for the stop was loud exhaust; Buchanan disputes this.

[3] For some time, this area has been a focus of law enforcement as one of relatively high crime and drug dealing in Madison, but Deputy Sheriff Kelly repeatedly disavowed this either as a basis for his stop or for any reasonable suspicions or probable cause he may have had for his subsequent searches and seizures. Accordingly, the court will not take judicial notice of that fact for purposes of its Fourth Amendment analysis.

At the time of the stop, Kelly had been employed as an officer with the Dane County Sheriff's Department for fifteen years. Based on this experience, Kelly's impression of Buchanan's conduct led him to believe "that there was something else going on inside the vehicle." For example, Kelly thought it was unusual for a passenger to sit in the back seat when the front seat was open. Kelly knew from his training that sometimes people sit on the same side of the vehicle when selling controlled substances from the vehicle.

Kelly's initial questioning of Buchanan took about five minutes. After retrieving their identification, Kelly then returned to his vehicle to run record checks on Buchanan and Williams. The parties dispute how long Kelly was in the car, but agree it was between two and seven minutes. During this time, a City of Madison police officer also pulled behind Kelly's vehicle. Kelly's record checks revealed that Buchanan, who was 21 years of age at the time of the traffic stop, already had a significant criminal record that included multiple felony convictions, including drug offenses.[4] Buchanan was on probation at the time of the stop.

[4] Electronic court records reflect that, in addition to an arrest for armed robbery and conviction for possession of cocaine, *State v. Buchanan*, Case No. 07CF1900, Buchanan had several other felony convictions in Dane County for robbery with use of force, *State v. Buchanan*, Case No. 05CF2207; unauthorized use of a motor vehicle, *State v. Buchanan*, Case No. 07CF422; theft, *State v. Buchanan*, Case No. 07CF443; and aggravated battery with intent to cause great bodily harm, *State v. Buchanan*, Case No. 08CF1189 (Dec. 17, 2008), for which he was on bond while awaiting a sentencing hearing.

On the night that he stopped Buchanan's car, Kelly happened to have a drug-sniffing dog named Rico in his squad car.[5] Kelly is a trained K-9 officer, who has conducted hundreds of searches using dogs. Given the results of the record checks, Kelly decided to conduct an investigation for drugs by having Rico "sniff" around Buchanan's vehicle. A drug sniff takes only a couple of minutes. If the dog detects an odor of a controlled substance, he is trained to sit and stare at the source of the odor or "finalize." If the dog does not detect an odor of a controlled substance, he will move up and down the vehicle without hesitation. Typically, the dog's behavior will change if he is "working" an odor intensely, such as sniffing a certain portion of a vehicle or attempting to track the odor to its source, even if he does not finalize.

Kelly started with Rico at the rear of the vehicle on the driver's side. Rico exhibited a change of behavior in that he started "working" the seams on the vehicle doors and the door handles.[6] When Kelly tried to get the dog to sniff up the passenger

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[5] The summary judgment record does not indicate why a Dane County Sheriff's Deputy would happen to be making a seemingly routine traffic stop on the near west side of the City of Madison with his drug-sniffing dog in tow. A likely explanation is that he was part of the Dane County Crime and Gang Task Force, but the record does not reflect this and the court need inquire no further, as Buchanan concedes that his license plate light was out and that Deputy Sheriff Kelly acted within his jurisdiction in making the traffic stop. Still, some of the circumstances here are disquieting. *See* David Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999). Nevertheless, the Supreme Court unanimously held in *Whren v. United States,* 517 U.S. 806 (1996), that any pretextual motives cannot invalidate the stop where police have probable cause to stop traffic offenders. Moreover, as Kelly points out, Buchanan has come forward with no evidence of selective enforcement, except that he and his passenger are of a different race from defendant, either as to Kelly specifically or the Dane County Sheriff's Department generally. *See*, discussion, *infra*, pp. 8-10.

[6] Buchanan disputes Kelly's version of the drug sniff, pointing out Kelly failed to include any mention any of these facts in his "Summary Statement of Probable Cause" submitted to the

side of the vehicle, the dog refused. Kelly believed the dog's refusal was due to the excessive amount of exhaust coming from Buchanan's vehicle, which Buchanan disputes. Kelly also claims that Buchanan pulled out a lighter and lit a cigarette during the sniff. Buchanan disputes this as well, explaining that he was already smoking a cigarette before being pulled over. Nevertheless, Kelly knew from drug-interdiction training that people will sometimes use a cigarette to cover the odor of narcotics in the car.

Although Rico did not "finalize" on the vehicle, Kelly knew that he might not do so in cases where the odor is light or he cannot get close enough to the source inside the vehicle. Kelly considered the sniff to be "partially successful" based on Rico's interest in the driver's side door.

At this point, Kelly told Buchanan to step out of the vehicle; Buchanan hesitated; Kelly told Buchanan a second time to step out of the vehicle; this time, Buchanan complied. Kelly then told Buchanan to go to the rear of the vehicle. After exiting the vehicle, Buchanan took off his jacket, despite it being cold (in the 30s) and windy, and despite being told by Kelly to keep it on. Buchanan then attempted to put his coat back in the car, ultimately dropping it near the car's rear axle.[7]

Although Buchanan was also wearing a long-sleeved shirt and may have been wearing an undershirt, Kelly thought it strange that Buchanan would want to take his jacket off while getting out of a running car on such a cool evening. Given Buchanan's

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criminal judge. Construing all reasonable inferences in Buchanan's favor, the court will treat this as a factual dispute.

[7] Buchanan does not remember whether he took the jacket off or, if he did, what he did with the jacket once it was off, but this does not put the fact in dispute.

apparent desire to separate himself from the jacket, Kelly wondered whether there might be weapons or evidence of a crime in the jacket.

C. The Searches

At this point, Kelly patted down Buchanan and found a marijuana pipe in his pocket.[8] Buchanan was also wearing an electronic monitoring bracelet on his ankle, which confirmed that he was on probation. Kelly then retrieved Buchanan's cast-off jacket and searched it, finding multiple bags of marijuana and a digital scale. At that time, Kelly placed Buchanan under arrest. Williams was released at the scene.

Kelly and the City of Madison police officer also searched the vehicle, finding a marijuana blunt in the ashtray. Rico "finalized" on a couple of other items in the vehicle, but Kelly found no additional drugs there. Kelly then had Buchanan's vehicle towed, giving Buchanan's key ring to the tow truck driver. Buchanan's house key was on the key ring. Buchanan asked to have his mother pick up the car, but Kelly denied the request.

D. State Proceedings

Buchanan was charged in Dane County Circuit Court with possession with intent to deliver THC and held in the jail from March 31 until October 5, 2009. At that time, the circuit court granted his motion to suppress the drug evidence seized after he exited his car and the charges against Buchanan were dismissed.[9]

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[8] The parties dispute whether Kelly subsequently asked for Buchanan's consent to perform a pat-down search and whether Buchanan consented.

[9] Dane County Circuit Judge Julie Genovese's suppression ruling was oral and no transcript was ordered, so the specific factual or legal basis for her ruling is unknown. In any event, the ultimate issue here -- whether Kelly violated a clearly-established Fourth Amendment right --

Buchanan never served Dane County or Deputy Kelly with a notice of claim pursuant to Wis. Stat. § 893.80. The first notice Dane County received of Buchanan's claim was in March 2012, when Deputy Kelly was served with the summons and complaint in this case.

OPINION

I. Motions to Amend Complaint and Reconsider

As an initial matter, Buchanan has moved to proceed on a proposed amended complaint, as well as to reconsider the scope of his authorized claims. The proposed amended complaint contains very little in the way of new *factual* allegations. Rather, Buchanan mainly offers argument urging the court to recognize an additional claim for selective enforcement based on racial profiling. Since "plaintiffs are not required to plead legal theories," *Del Marcelle v. Brown County Corp.*, 680 F.3d 887, 909 (7th Cir. 2012), Buchanan's motion to amend is arguably unnecessary, except to the extent that he is seeking to plead a new cause of action not authorized by the court's screening order of February 13, 2012, which is also the subject of his motion to reconsider.

Challenges based on racial profiling are deemed to be claims under the Fourteenth Amendment's Equal Protection Clause and require proof that the defendant's actions had a discriminatory effect and were motivated by a discriminatory purpose.[10] *See United*

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is different from that considered by the state court as discussed below and, of course, may also be different under the Wisconsin Constitution.

[10] Buchanan's filings are somewhat difficult to understand, but it appears that he seeks to bring his racial profiling claim in two different ways: an equal protection claim under 42 U.S.C. § 1981 and a "selective enforcement" claim. Section 1981, however, is inapplicable to

States v. Barlow, 310 F.3d 1007, 1010 (7th Cir. 2002); *Chavez v. Illinois State Police*, 251 F.3d 612, 635-36 (7th Cir. 2001). Discriminatory effect in turn requires a showing "that [plaintiffs] are members of a protected class, that they are otherwise similarly situated to members of the unprotected class, and that plaintiffs were treated differently from members of the unprotected class." *Chavez*, 251 F.3d at 636 (citing *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000)).

To show discriminatory intent, a plaintiff must similarly demonstrate that "decisionmakers in [his] case acted with discriminatory purpose." *Id.* at 645. This requires "more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of '. . . its adverse effects upon an identifiable group.'" *Id.* (citing *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987)).

Unfortunately, Buchanan provides no support for his claim other than arguing that (1) historically, young black men have faced racial profiling by law enforcement; and (2) defendant acted unreasonably in his search in this case. At most, plaintiff surmises racial profiling must have taken place in this case, arguing that "[i]t is plausible, thus true, that the Defendant did, or would have treated differently with enforcement of the law . . . a young Caucasian."

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this action because it protects the right of persons to make and enforce contracts. *See Smith v. Bray*, 681 F.3d 888, 895-96 (7th Cir. 2012). In any case, the distinction between these claims is unimportant here because a selective enforcement claim *is* an equal protection claim that can be brought under 42 U.S.C. § 1983. *See, e.g., Chavez v. Illinois State Police,* 251 F .3d 612, 635 (7th Cir. 2001).

Alleging that something is "plausible" is not enough to state a claim upon which relief may be granted. Buchanan must include enough *allegations of fact* to make the claim plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Atkins v. City of Chicago*, 631 F.3d 823, 830-32 (7th Cir. 2011) ("After *Twombly* and *Iqbal,* a plaintiff to survive dismissal must plead some facts that suggest a right to relief that is beyond the speculative level.") (internal quotations omitted). Because Buchanan failed to include any allegations suggesting that Kelly had any discriminatory intent in his actions, he fails to state an equal protection selective enforcement claim. *See, e.g., Britt v. Peoria County*, 2011 WL 1979859, *2 (C.D. Ill. May 20, 2011) ("Nor can Britt's allegations against these Defendants reasonably be construed as a demonstration of discriminatory intent without resorting to pure speculation and conjecture."). Accordingly, the court will deny Buchanan's motions to amend and reconsider.

II. Motion for Writ of Mandamus

On January 7, 2013, Buchanan also filed a "motion for writ of mandamus," seeking to order officials at the Green Bay Correctional Institution to stop retaliating against him by destroying or blocking his legal documents and mail. This court does not have jurisdiction to issue a mandamus against state officials. *See Robinson v. Illinois*, 752 F. Supp. 248, 248-49 (N.D. Ill. 1990) (citing 28 U.S.C. § 1361, which restricts federal mandamus jurisdiction to actions against "an officer or employee of the United States or any agency thereof"). Moreover, a plaintiff would ordinarily have to file a separate

lawsuit to raise a claim that prison officials are tampering with his legal documents. Even then, plaintiff could only proceed after he exhausts his administrative remedies.

If prison officials were "actively and physically preventing [the plaintiff] from prosecuting" the case at hand, the court might consider an access to the courts claim within the current lawsuit. *See, e.g., Olson v. Morgan*, Case No. 11-cv-282-slc (W.D. Wis. Mar. 21, 2012); *Tessen v. Helgerson*, Case No. 10-cv-104-wmc (W.D. Wis. May 24, 2010); *Almond v. Pollard*, Case No. 09-cv-335-bbc (W.D. Wis. May 17, 2010). Here, such an extraordinary intervention is unnecessary because there is no evidence that Buchanan has been precluded from pursuing this lawsuit. On the contrary, Buchanan has submitted timely responses to defendant's summary judgment motion and various other motions, as well as pursued his own motions to compel, reconsider and amend. Because there is no indication that Buchanan has been kept from fully litigating this case, his motion for an extraordinary writ of mandamus will be denied.

III. Motion for Summary Judgment

Kelly has filed a motion for summary judgment on all of Buchanan's claims, arguing that the traffic stop and subsequent searches after additional investigation was reasonable. Alternatively, Kelly argues that he is entitled to qualified immunity from liability, arguing that "there was no clearly-established law at the time precluding him from taking the actions that he did." Kelly contends further that Buchanan's state law claims must be dismissed because he failed to comply with procedural statutes before filing his complaint in this court.

Summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The district court's function in reviewing a summary judgment motion "is not himself to weigh the evidence and determine the truth of the matter," but simply to determine whether there is a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "Factual disputes are genuine 'only if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the evidence presented,' and they are material only if their resolution might change the suit's outcome under the governing law." *Maniscalco v. Simon*, 712 F.3d 1139, 1143 (7th Cir. 2013) (quotation omitted).

In determining whether a genuine issue exists, the court must construe all facts in the light most favorable to Buchanan as the nonmoving party, drawing all reasonable inferences in his favor. *See, e.g.*, *Ault v. Speicher*, 634 F.3d 942, 945 (7th Cir. 2011). Even so, Buchanan may not simply rest on "mere allegations or denials in [his] pleadings[.]" *Serendnyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 547 (7th Cir. 2013). Rather, he must "affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hunter v. Amin*, 583 F.3d 486, 490 (7th Cir. 2009) (quoting *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007)). This Buchanan has not done.

A. Fourth Amendment False-Arrest Claim

Buchanan does not dispute that the lamp on his license plate was inoperable or

that the initial stop was authorized for the traffic violation.[11] Rather, Buchanan argues that the stop became invalid after the initial traffic stop was made and Deputy Kelly decided to extend his investigation. Thus, Buchanan maintains that the stop was unnecessarily prolonged, making Kelly's investigative detention and search unreasonable and his arrest a violation of the Fourth Amendment.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend IV. By its terms, the Fourth Amendment does not proscribe all state-initiated searches and seizures, only unreasonable ones. *See Florida v. Jimeno*, 500 U.S. 248, 250 (1991); *see also Gonzalez v. Village of West Milwaukee*, 671 F.3d 649, 655 (7th Cir. 2012) ("'False arrest' is shorthand for an unreasonable seizure prohibited by the Fourth Amendment.") (citation omitted). "Reasonableness" is determined by balancing the intrusiveness of the search on the individual against the legitimate interest of the government in conducting the search. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). This determination "is predominantly an objective inquiry," asking whether "the circumstances, viewed objectively, justify [the challenged] action." *Ashcroft v. al-Kidd*, — U.S. —, 131 S. Ct. 2074, 2080 (2011) (internal citation and quotation omitted).

It is well established that "[t]emporary detention of individuals during the stop of an automobile by police, even if only for a brief period and for a limited purpose, constitutes a 'seizure'" for purposes of the Fourth Amendment. *Whren v. United States*,

[11] Operating a vehicle without a working license plate lamp violates Wis. Stat. § 347.13(3), which requires the rear registration plate to be illuminated and clearly legible from a distance of 50 feet.

517 U.S. 806, 809-810 (1996) (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). The decision to conduct an automobile stop is reasonable, and therefore constitutional, as long as the officer has "probable cause to believe that a traffic violation has occurred." *Whren*, 517 U.S. at 810 (citations omitted); *see also Pennsylvania v. Mimms*, 434 U.S. 106, 1098 (1977) (per curiam). In other words, a traffic stop supported by probable cause is considered a valid arrest. *See United States v. Childs*, 277 F.3d 947, 953 (7th Cir. 2002) (en banc).

Buchanan does not dispute that the initial traffic stop of his vehicle was supported by probable cause: here, an inoperable license plate lamp in violation of Wis. Stat. § 347.13(3). Instead, Buchanan argues that the stop became unlawful once Kelly decided to extend his investigation beyond the traffic violation by conducting a dog sniff and asking him to step from the car. Accordingly, Buchanan's primary argument is that the extended duration of his traffic stop was unjustified because Kelly lacked the requisite reasonable suspicion to support additional investigation.

The Fourth Amendment "does not require the release of a person arrested on probable cause at the earliest moment that can be accomplished. What the Constitution requires is that the entire process remain reasonable." *Childs,* 277 F.3d at 953-54. Nevertheless, a traffic stop that is "lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois v. Cabranes*, 543 U.S. 405, 407 (2005) (citing *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)). "A seizure that is justified solely by the interest in

issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Cabranes*, 543 U.S. at 407. The extended length of the stop is reasonable if either (1) the extra time added to the stop is essentially *de minimis* or "incremental," *United States v. Carpenter*, 406 F.3d 915, 916-917 (7th Cir. 2005); or (2) information lawfully obtained during the stop provided "reasonable suspicion of criminal conduct that . . . justif[ied] prolonging the stop to permit a reasonable investigation," *United States v. Martin*, 422 F.3d 597, 602 (7th Cir. 2005).

Noting that the state court granted his motion to suppress the drug evidence uncovered by Kelly, Buchanan essentially argues that he has established a constitutional violation. However, whether the Dane County Circuit Court, this court or even the Seventh Circuit conclude that the search and seizure here violated the Fourth Amendment is a separate question for purposes of deciding the defendant's possible civil liability under § 1983. As Kelly notes, even assuming that a violation occurred, the real question under the doctrine of qualified immunity is whether a reasonable person would have known that Kelly was violating Buchanan's clearly-established constitutional rights at the time.

B. Qualified Immunity

The doctrine of qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818

(1982)). Qualified immunity will shield officers from a suit for damages if "a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (quotation omitted). Thus, the doctrine of qualified immunity shields 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 determining whether an official is entitled to qualified immunity, the court typically asks two questions: (1) whether the facts, taken in the light most favorable to the plaintiff, make out a violation of a constitutional right; and (2) if so, whether that constitutional right was clearly established at the time of the alleged violation. *Pearson*, 555 U.S. at 232 (discussing the two-prong test set forth in *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Courts may exercise discretion in deciding which question to address first. *Pearson*, 555 U.S. at 236. A police officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment. *Id*. at 243-44 (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson*, 555 U.S. at 244 (quotation and citation omitted).

Here, Buchanan alleges that Kelly unreasonably violated his Fourth Amendment rights in four separate ways: (1) the duration of Kelly's initial stop for the issuance of a traffic ticket or warning; (2) Kelly's continuation of the stop after the K-9 unit failed to "finalize" or confirm the presence of controlled substances; (3) Kelly's search of his

clothing and vehicle without his consent; and (4) Kelly depriving plaintiff of his keys and the seizure of his vehicle. The focus of the court's inquiry for qualified immunity purposes is on the objective reasonableness of each of these actions by Kelly in light of clearly established law at the time the search occurred on March 31, 2009. To be clearly established for purposes of qualified immunity, "a right must be sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right." *Reichle v. Howards*, — U.S. —, 132 S. Ct. 2088, 2093 (2012) (citing *Ashcroft v. al-Kidd*, — U.S. —, 131 S. Ct. 2074, 2078 (2011)) (citation and internal quotation marks omitted). "In other words, 'existing precedent must have placed the . . . constitutional question beyond debate.'" *Reichle*, 132 S. Ct. at 2093 (quoting *al-Kidd*, 131 S. Ct. at 2083).

1. Duration of the initial stop

As noted above, Buchanan concedes that he was stopped lawfully for a license plate lamp violation. He also concedes that Kelly's initial questions were reasonable. Nevertheless, he argues that the stop was unreasonably long because Kelly chose not to end the initial encounter either by writing a ticket or giving a warning. Instead, Kelly extended the search by going back to his car for a records search and then conducting the dog sniff.

As a preliminary matter, neither of these activities is inherently unreasonable during a traffic stop. *United States v. McRae*, 81 F.3d 1528, 1535–36 n.6 (10th Cir. 1996) ("[Criminal history] checks are run largely to protect the officer. Considering the tragedy of the many officers who are shot during routine traffic stops each year, the

almost simultaneous computer check of a person's criminal record, along with his or her license and registration, is reasonable and hardly intrusive"); *United States v. Taylor*, 596 F.3d 373, 377 (7th Cir. 2010) (use of a drug-sniffing dog in the course of a traffic stop does not constitute a search and, therefore, does not in itself violate the Fourth Amendment).

Even if the time taken to perform either of these tasks made it subject to objection, Kelly points out that "[h]e was not required to ignore signs that something did not seem right." According to Kelly's proposed findings of fact, those signs included: Buchanan acting nervously and not making eye contact, as well as Williams sitting alone in the back, directly behind the driver, a position Kelly associated with drug dealing. On summary judgment, the court is required to resolve all disputed facts in the non-moving side's favor. Because Buchanan avers that he neither acted nervously, nor failed to make eye contact, the court cannot consider defendant's disputed facts on this subject in determining whether Kelly acted reasonably as a matter of law, and the seating arrangement by itself would not create reasonable suspicion forming the basis for prolonging the stop for further investigation.

The question, therefore, is whether the additional time taken to perform a criminal background checks and conduct the dog sniff was unreasonably long. The parties agree that Kelly's initial questioning of Buchanan took about five minutes. Then Kelly went back to his car to perform records checks, including criminal background checks, on Buchanan and Williams. The parties disagree about how long this took; Kelly says two minutes and Buchanan says seven. The parties agree that the dog sniff took a

"couple minutes." Adopting a generous reading of Buchanan's version of the story, these additional investigative steps took roughly ten minutes or so.[12]

In previous cases, the Seventh Circuit has held that additional times ranging from a few seconds to around five minutes have been reasonable. *See, e.g., Childs*, 277 F.3d at 953 ("By asking one question about marijuana, officer Chiola did not make the custody of Childs an 'unreasonable' seizure."); *United States v. McBride*, 635 F.3d 879, 883 (7th Cir. 2011) (noting that "the additional questions extended the stop by 'roughly two minutes' at most"); *United States v. Dixie*, 382 F. App'x 517, 519 (7th Cir. 2010) (concluding that the stop was not unreasonably prolonged where the district court noted that it took "only seconds longer" for the officer to ask the defendant about any weapons on his person and then to recover the defendant's knife and unlicensed gun when he answered in the affirmative); *United States v. Brown*, 355 F. App'x 36, 38-39 (7th Cir. 2009) (concluding that the defendant's detention was reasonable because the trooper's additional questioning "transpired in less than one minute after he issued the warning"); *United States v. Johnson*, 331 F. App'x 408, 409-10 (7th Cir. 2009) (noting that only two minutes passed between the time the defendant signed the written warning and his admission that someone smoked marijuana in the car that day, which provided an additional reason to prolong the stop).

The Seventh Circuit seemed less comfortable with a nine-minute delay (while the driver was forced to sit in a squad car "with a police dog pacing at his back"), but

[12] Arguably, the length of the entire stop, which the state court suppression hearing suggests may have been double or triple this time, is also relevant, but since each of the additional steps adding further time to the stop are analyzed below as to whether separately justified for reasonable suspicion of a crime or officer safety, the court does not consider that time here.

ultimately did not rule on whether this delay violated the Fourth Amendment. *United States v. Bueno*, 703 F.3d 1053, 1062 (7th Cir. 2013) ("[e]ven if this amounted to an impermissible inconvenience, . . . we conclude that the continuation of Bueno's detention beyond its otherwise lawful limits was justified in light of the circumstances that developed during the stop"). Moreover, at least one circuit has approved of search times longer than ten minutes. *United States v. Hernandez*, 418 F.3d 1206, 1212 n.7 (11th Cir. 2005) ("Where at its inception a traffic stop is a valid one for a violation of the law, we doubt that a resultant seizure of no more than seventeen minutes can ever be unconstitutional on account of its duration: the detention is too short.").

In determining whether the right against being detained an additional ten minutes for Kelly to perform background checks or a dog sniff is so "clearly established" that it overcomes Kelly's qualified immunity from civil liability, the court looks first to controlling precedent from the Supreme Court and this circuit. *Phillips v. Community Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012). If there is no such precedent, the court looks to all relevant case law to determine "whether there was such a clear trend in the case law that [the court] can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Id.* (quoting *Estate of Escobedo v. Bender*, 600 F.3d 770, 781 (7th Cir. 2010) (internal quotation marks and citation omitted)).

As the case law cited already discussed above illustrates, there is neither a controlling precedent, nor discernible signs of a developing trend that clearly-establishes as unconstitutional an additional ten minutes of investigation time during a traffic stop.

At most, earlier Seventh Circuit case law suggests that Kelly may have been approaching an ill-defined time limit. Moreover, like *Bueno*, the continuation of Buchanan's stop was at least arguably justified here "in light of the circumstances that developed during the stop." 703 F.3d at 1063. As discussed, Kelly did not need reasonable suspicion to run a criminal history check before returning to Buchanan's car; nor did he need it to perform a dog sniff. Lacking evidence that either of these permissible actions took an unreasonable amount of time, there is no clearly-established case law that the combined time to complete these tasks violates the Fourth Amendment. Because the doctrine of qualified immunity gives Kelly the benefit of the doubt where the scope of Buchanan's Fourth Amendment rights is not "clearly established," summary judgment must be granted to Kelly as it pertains to this phase of the seizure.

2. Asking Buchanan to step out of car

Even if the duration of the stop through the dog sniff was not clearly unconstitutional, Buchanan argues that Kelly clearly violated his Fourth Amendment rights in asking him to step out of the car after the K-9 unit failed to "finalize" on controlled substances. Kelly responds that while not "finalizing," the dog "showed interest" in the driver side door seam and handle, despite the powerful smell of exhaust fumes, and that this made him suspicious that a crime might be in progress. Buchanan disputes this account, (1) noting that Kelly failed to include "evidence" in his probable cause report given to the state circuit court and (2) arguing that this failure at least permits an inference by the trier of fact that the K-9 unit did not indicate enough to give Kelly reasonable suspicion to extend the search and seizure.

Aside from the K-9 evidence, Kelly argues that further investigation was reasonable because his passenger sat directly behind him (a possible indication of drug dealing); Buchanan seemed nervous, avoided eye contact and lit up a cigarette (perhaps in an attempt to mask other odors); Buchanan had a long criminal history, including convictions for drug dealing offenses; and he was on probation at the time of the stop. Buchanan disputes being nervous, avoiding eye contact and claims he had already been smoking at the time he was pulled over.

Even accepting Buchanan's version of the facts, however, ordering a driver to exit his vehicle does not violate the Fourth Amendment's proscription of unreasonable searches and seizures, as it is considered a *de minimis* intrusion and is reasonable in light of the need to secure officer safety. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). Accordingly, this phase of the search was reasonable, or more accurately not *un*reasonable, given the government's "legitimate and weighty" interest in officer safety. *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (quoting *Mimms,* 434 U.S. at 110-111).

3. Searches

The next phase Buchanan challenges concerns Kelly proceeding to conduct a series of searches of Buchanan and his car, beginning with Kelly patting Buchanan down (the parties dispute whether he consented). When the pat down revealed a marijuana pipe in Buchanan's pocket, Kelly then searched the jacket Buchanan had dropped. The jacket contained multiple bags of marijuana and scales, which led to his arrest and the subsequent search and impoundment of his car.

Regarding the pat down, the law on how far an officer may proceed has been somewhat muddled in the Seventh Circuit since that court, sitting en banc, held that a probable cause stop for a traffic violation put the violator under arrest. *See Childs*, 277 F.3d at 953. Because the Supreme Court previously had held that officers may conduct a full search of the arrestee's person incident to arrest, *United States v. Robinson*, 414 U.S. 218, 224 (1973), the Seventh Circuit held in *Childs* that a full search is permitted for a person being held (however briefly) on a traffic stop, unless its duration was unreasonable. 277 F.3d at 952 ("What is more, a person stopped on probable cause may be searched fully, while a person stopped on reasonable suspicion may be patted down but not searched."). While even the *Childs* decision left open the question whether the duration of a typical traffic stop would allow for a full search, a brief pat down would appear within legal bounds given that Kelly knew by that point he was dealing with a known criminal on probation.

Of course, the constitutionality of Kelly's decision to perform a pat down on March 31, 2009, had been rendered more suspect by the Supreme Court's January 29, 2009, decision in *Arizona v. Johnson*, 555 U.S. 323 (2009), confirming dictum in earlier cases "that officers who conduct 'routine traffic stop[s]' may perform a 'pat down' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." *Id.* at 332 (quoting *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998)). It may be asking much of Deputy Kelly to be aware that *Johnson* may have called into question the Seventh Circuit's apparently more liberal view of whether a search of the driver is permitted incident to a traffic stop in *Childs*. *See Robinson v. Bibb*, 840 F.2d 349 (6th Cir.

1988)(reviewing case law as to how soon knowledge of a change or clarification of law should be imputed to a reasonable officer).

Assuming, as seems likely, Kelly were to be held to the *Johnson* standard after two months, that court upheld an officer's pat down for safety reasons of a passenger "wearing clothing, including a blue bandana, she considered consistent with Crips [gang] membership"; possession of "a scanner" that "most people" would not carry "unless they're going to be involved in some kind of criminal activity or [are] going to try to evade the police"; was from an area of Arizona that was "home to a Crips gang"; and "had served time in prison for burglary and had been out for about a year." *Id.* at 328. Here, Kelly knew that Buchanan had a long criminal history, including dealing drugs; was on probation; and had acted suspiciously (at least in Kelly's perception) both before use of a K-9 unit (by riding with a lone passenger directly behind him), during its use (by smoking and keeping the car running) and after its use (by refusing to keep his jacket on after exiting the warm car, despite being told to do so and it being cold outside). While perhaps not an ironclad basis to proceed with a pat down (as the Dane County Circuit Court apparently held), neither is it a violation of a clearly-established Fourth Amendment right, even after *Johnson*.

Perhaps Buchanan's strongest argument is that Kelly should have simply let him drive away with a warning for a defective lamp light after the ambiguous behavior of the drug sniffing dog, but here the Supreme Court's decision in *Johnson* cuts against Buchanan, having found that the officer "surely was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first

ensuring that, in so doing, she was not permitting a dangerous person to get behind her." 555 U.S. at 334.

The rest of the search after the pat down was also reasonable given the recovery of the marijuana pipe in Buchanan's pocket. Along with Buchanan's strange behavior in dropping his jacket, Kelly arguably had probable cause to search for additional drugs in the jacket Buchanan had suspiciously tossed aside or, at least, grounds to examine the jacket near the rear axle to prevent Buchanan's possible access to a hidden weapon within his reach. Once discovery of both a pipe and two bags of marijuana were made, Kelly also had probable cause to search the vehicle for evidence of the then offense of arrest for possession and violation of probation. *Arizona v. Gant*, 556 U.S. 332, 343-344 (2009).

4. Seizure of car and keys

Finally, Buchanan argues that it was unreasonable to have the car towed and his house key taken away. In *United States v. Duguay*, 93 F.3d 346, 352 (7th Cir. 1996), the Seventh Circuit explained:

> Impoundments by the police may be in furtherance of "public safety" or "community caretaking functions," such as removing "disabled or damaged vehicles," and "automobiles which violate parking ordinances, and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic." An impoundment must either be supported by probable cause, or be consistent with the police role as "caretaker" of the streets and completely unrelated to an ongoing criminal investigation.

Id. at 352 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368-70, n.5 (1976).

The court does not understand Kelly to be arguing that he was exercising a community caretaking function by having the car towed, nor does it appear to have been necessary. Buchanan states that the car was pulled over in a residential area only four

blocks from his home and that either the other passenger or Buchanan's mother could have taken care of getting the car home.

Instead, Kelly argues that he was permitted to impound the car because he had probable cause to believe it was involved in criminal activity. He also argues "it was reasonable to refuse to give Buchanan's friends or family members access to the car while authorities completed a thorough search."

The court concludes that this aspect of Kelly's actions was also within the realm of reason given the contraband found in the car. *Duguay*, 93 F.3d at 353. "[I]t is eminently sensible not to release an automobile to the compatriots of a suspected criminal in the course of a criminal investigation." *Id.* To the extent that Buchanan is attempting to bring a claim for Kelly's failure to return his car and keys (Buchanan states that the car "is a special antique collect[o]r's [sic] . . . that can never be replaced"), there is no Fourth Amendment right to reclaim property after it has been seized by law enforcement. *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003) ("Once an individual has been meaningfully dispossessed, the seizure of the property is complete, and once justified by probable cause, that seizure is reasonable. The amendment then cannot be invoked by the dispossessed owner to regain his property.")

Admittedly, there is something disquieting about an officer's escalation of a traffic stop -- ostensibly to give a warning about a missing license plate lamp -- into a full blown search. Because each step of the search and seizure was at least arguably reasonable under the current state of federal constitutional law, however, the court must grant

Kelly's motion for summary judgment on Buchanan's Fourth Amendment claim under the doctrine of qualified immunity.

C. State Law Claims

Kelly argues that Buchanan's state law false imprisonment, malicious prosecution and conversion claims should be dismissed because Buchanan failed to comply with the notice of claim requirements under Wis. Stat. § 893.80 before filing the lawsuit. *Schwartz v. City of Milwaukee*, 43 Wis. 2d 119, 128, 168 N.W.2d 107, 111 (1969) ("action shall be dismissed" if plaintiff fails to comply with notice of claim requirements). This statute provides that -- with certain exceptions not applicable to this case -- a civil action may not be brought against a political corporation, governmental subdivision or its employees acting in their official capacity unless:

> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. . . . and
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

Wis. Stat. § 893.80(1d).

Section 893.80(3) provides a tort damages cap:

> . . . the amount recoverable by any person for any damages, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 181 or 213, political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employees for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed $50,000.

The parties agree that Buchanan did not file a notice of claim under this statute, which would ordinarily require dismissal of the claims. Likely understanding this, Buchanan filed his own "Motion for Constitutional Challenge" earlier in the proceedings, arguing that the notice of claim statute is unconstitutional because it violates the equal protection rights of persons suing governmental defendants by giving them a shorter deadline to "recognize the compensable nature of [their] injuries" than plaintiffs suing non-governmental defendants. Similarly, he argues that the damages cap is unconstitutional. On this issue, the State of Wisconsin intervened and provided its own brief.[13]

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. With both "suspect classes" and denials of "fundamental rights," such as freedom of speech or religion, the government's justification for the regulation must satisfy the "strict scrutiny" test to pass muster under the Equal Protection Clause. *Srail v. Village of Lisle, Ill.*, 588 F.3d 940, 943 (7th Cir. 2009); *Vision Church v. Vill. of Long Grove, Ill.*, 468 F.3d 975, 1000 (7th Cir. 2006). In the absence of

[13] The state initially argues that Buchanan did not properly serve the state attorney general under Federal Rule of Civil Procedure 5.1 (in his certificate of service, Buchanan states that he sent the attorney general a copy of his motion via U.S. mail, but does not include any proof that it was sent via certified or registered mail as called for by Rule 5.1). Because the court resolves the merits of the constitutionality issue in the state's favor, however, it need not address this argument. The state also argues that Buchanan should not have been able to raise the issue in a stand-alone motion because, at the time it moved to intervene, Buchanan had not mentioned that he was challenging the constitutionality of the notice of claim statute in his complaint, and there had not yet been a dispositive motion filed raising the issue. Because Kelly's motion for summary judgment raised the notice of claim statute, this issue is moot.

deprivation of a fundamental right or the existence of a suspect class, the proper standard of review is "rational basis." *Vision Church*, 468 F.3d at 1000-01.

Buchanan does not raise an argument suggesting that the strict scrutiny standard applies, and "the vast majority of courts" have previously applied the rational basis standard to similar notice-of-claim and damage cap provisions, including the Wisconsin provisions at issue in this case. *Johnson v. Maryland State Police*, 628 A.2d 162, 167 (1993) (listing notice-of-claim cases); *Bostco v. Milwaukee Metrop. Sewerage Dist.*, 2011 WI App 76, ¶ 40, 334 Wis. 2d 620, 800 N.W.2d 518; *Riccitelli v. Broekhuizen*, 227 Wis. 2d 100, ¶ 36, 595 N.W.2d 392 (1999). *See also*, *e.g.*, *Sadler v. New Castle County*, 524 A.2d 18, 27 (Del. Super. Ct. 1987); *Batchelder v. Haxby*, 337 N.E.2d 887, 889 (Ind. App. 1975).

Rational basis review requires the plaintiff to prove that (1) the state actor intentionally treated plaintiffs differently from others similarly situated; (2) this difference in treatment was caused by the plaintiffs' membership in the class to which they belong; and (3) this different treatment was not rationally related to a legitimate state interest. *Smith v. City of Chicago*, 457 F.3d 643, 650-51 (7th Cir. 2006). Courts have generally agreed that provisions similar to the ones challenged here are constitutional. *Johnson*, 628 A.2d at 167 (listing cases); *Bostco*, 2011 WI App 76, ¶ 53, 334 Wis. 2d 620, 800 N.W.2d 518 (Upholding damages cap, stating, "[I]t is the role of the legislature to balance its dual purposes: 'To compensate victims of government tortfeasors while at the same time protecting the public treasury.'") (citation omitted); *Riccitelli*, 227 Wis. 2d at ¶ 41, 595 N.W.2d 392 (upholding notice-of-claim provision).

Since Buchanan provides no meaningful argument to the contrary, the court concludes that the Wisconsin notice-of-claim statute is constitutional. Moreover, because Buchanan has not complied with the statute, this court is procedurally barred from deciding his state-law claims on their merits. Those claims will, therefore, be dismissed. Buchanan's stand-alone motion to determine the constitutionality of the statute will be denied as unnecessary.

ORDER

IT IS ORDERED that:

(1) Plaintiff Terrence Buchanan's motion for leave to amend his complaint (dkt. #41) is DENIED.

(2) Plaintiff's motion for reconsideration of the court's original screening order in this action (dkt. #24) is DENIED.

(3) Plaintiff's motion for writ of mandamus (dkt. #50) is DENIED.

(4) Plaintiff's state-law false imprisonment, malicious prosecution and conversion claims are DISMISSED for plaintiff's failure to comply with Wisconsin's notice-of-claim provision.

(5) Plaintiff's motion for a constitutional challenge to state statute (dkt. #25) is DENIED.

(6) Defendant Keith Kelly's motion for summary judgment (dkt. #43) is GRANTED.

(7) The clerk of court is directed to enter judgment for defendant and close the case.

Entered this 3rd day of June, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge