IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

TERESA BLACKBURN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:14-CV-560
	)	
TOWN OF KERNERSVILLE, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

The plaintiffs, Teresa Blackburn and Adrian Martinez-Perez, have sued the Town of Kernersville and several police officers for violations of their constitutional rights arising out of a search of Ms. Blackburn's car and a search and arrest of Mr. Martinez-Perez. The defendants move to dismiss the amended complaint, contending that the officers are entitled to immunity and that the allegations of a policy of misconduct are insufficient to state a claim against the Town. Because the amended complaint alleges in detail violations of well-established constitutional rights and sufficiently alleges a policy of unconstitutional misconduct, the Court will deny the motion.

FACTS[1]

On May 22, 2014, Ms. Blackburn and Mr. Martinez-Perez were at Chalarka Tax in Kernersville, North Carolina, to set up two businesses. (Doc. 11 at ¶ 21.) For that

[1] This recitation of facts is based on the allegations in the plaintiffs' amended complaint, (Doc. 11), which the Court must assume are true for purposes of ruling on a motion to dismiss for failure to state a claim.

purpose, Ms. Blackburn had $16,000 in her purse and Mr. Martinez-Perez had $4,000 in his pocket. (Doc. 11 at ¶¶ 22-23.) Leonardo Lopez Garcia was with the plaintiffs. (Doc. 11 at ¶ 24.)

A Chalarka Tax employee called the Kernersville Police Department, (Doc. 11 at ¶ 25), and defendant-police officers Redden, Shumate, Cullison, Long, and Joyner responded. (Doc. 11 at ¶ 26.) Upon arrival, the officers spoke with the employee and with Mr. Lopez Garcia. (Doc. 11 at ¶ 27.)

When Mr. Martinez-Perez offered to translate for Mr. Lopez Garcia, the officers ordered Mr. Martinez-Perez to "put his hands in the air." He complied. (Doc. 11 at ¶¶ 28-30.) Officers Redden and Shumate asked Mr. Martinez-Perez if he had any weapons on his person, and he told them that he carried a small pocket knife in his pocket "for work purposes." (Doc. 11 at ¶ 31.) Officers Redden and Shumate then drew their weapons, rushed Mr. Martinez-Perez, took him to the ground, shoved a foot in his face, twisted his arm behind his back, and arrested him. (Doc. 11 at ¶¶ 32-33.)

Officers Redden, Shumate, and Long searched Mr. Martinez-Perez and seized the money in his pocket. (Doc. 11 at ¶ 36.) Officer Long and other officers falsely claimed to find cocaine residue on one of the seized bills. (Doc. 11 at ¶ 37.)

Officers demanded that Ms. Blackburn consent to a search of her locked vehicle. (Doc. 11 at ¶¶ 38-39.) Ms. Blackburn initially refused, but gave the officers her key after they threatened to take her to jail. (Doc. 11 at ¶ 38.) Officers Cullison and Long and a K-9 searched Ms. Blackburn's car, "ransack[ing]" it and causing "substantial damage." (Doc. 11 at ¶¶ 40-41.) The officers found no drugs or weapons, but seized the $16,000 in

Ms. Blackburn's purse. (Doc. 11 at ¶¶ 41-42.) Ms. Blackburn asked for a receipt, but the officers refused. (Doc. 11 at ¶ 44.)

Mr. Martinez-Perez was taken to the Forsyth County Detention Center and charged with "Resist and Delay an Officer" and "Possession of a Schedule II Controlled Substance." (Doc. 11 at ¶ 45.) Ms. Blackburn was not charged with any crime. (Doc. 11 at ¶ 47.) A state court later entered an order returning the seized money to the plaintiffs. (Doc. 11 at ¶ 51.)

ISSUES

Ms. Blackburn and Mr. Martinez-Perez have sued Officers Redden, Shumate, Cullison, Long, and Joyner in their individual capacities. (Doc. 11 at 1.) Mr. Martinez-Perez asserts a claim for false arrest and excessive force under the Fourth Amendment.[2] (Doc. 11 at ¶¶ 32-34.) Mr. Martinez-Perez and Ms. Blackburn each assert unreasonable search claims and unreasonable seizure claims under the Fourth Amendment, (Doc. 11 at ¶¶ 52-63), due process and equal protection claims under the Fifth and Fourteenth Amendments, (Doc. 11 at ¶¶ 64-76), and unreasonable search and seizure, due process of law, and equal protection claims under Article I, Sections 1 and 19 of the North Carolina Constitution. (Doc. 11 at ¶¶ 77-86.) They also each assert state law claims of trover and

[2] While Mr. Martinez-Perez does not label any cause of action in the amended complaint as one for "excessive force," the defendants addressed his excessive force claim in their briefing. (*See* Doc. 15 at 5; Doc. 19 at 1-2.) This was appropriate, as the allegations are sufficient to put them on fair notice of the excessive force claim. *See, e.g.*, *Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 418 (4th Cir. 2014) (collecting cases and holding that plaintiffs are "not required to use any precise or magical words in their pleading").

conversion, (Doc. 11 at ¶¶ 87-94), intentional infliction of emotional distress, (Doc. 11 at ¶¶ 95-109), and slander per se. (Doc. 11 at ¶¶ 110-22.)

Officers Shumate, Cullison, Long, and Joyner move to dismiss based on failure of service. (Doc. 14 at ¶ 1.) All officers move to dismiss the federal claims based on qualified immunity, (Doc. 14 at ¶ 2), and move to dismiss the state claims based on public official immunity. (Doc. 14 at ¶ 3.)

The plaintiffs also seek damages and injunctive relief against the Town of Kernersville, alleging it is liable because it has a policy of seizing money without probable cause or due process.[3] (Doc. 11 at ¶¶ 48-50, 124-27; Doc. 11 at p. 23 ¶ 2.) The Town contends that the plaintiffs have not alleged sufficient facts demonstrating a policy or custom. (Doc. 14 at ¶ 4.)

ANALYSIS

1. Service of Process

After the officers moved to dismiss the claims against them based on lack of service of process, they executed a waiver of service. (Doc. 16.) Therefore, this aspect of the motion to dismiss is moot.

2. Qualified Immunity of Individual Officers

"Qualified immunity protects officers who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful." *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (*en banc*). While the

[3] The Court does not read the plaintiffs' amended complaint to seek damages from the Town related to Mr. Martinez-Perez's excessive force claim.

defense of qualified immunity may be presented in a motion to dismiss, the defense faces a "formidable hurdle" "when asserted at this early stage in the proceedings . . . and 'is usually not successful.'" *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014) (quoting *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 191-92 (2d Cir. 2006)). This is because the *Twombly* and *Iqbal* plausibility standard only requires that a plaintiff plead sufficient facts that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Owens*, 767 F.3d at 396.

The defendant bears the burden of establishing qualified immunity. *E.g.*, *Owens*, 767 F.3d at 395-96. To decide whether a defendant is entitled to qualified immunity,

> a court must use the two-step procedure of *Saucier v. Katz*, 533 U.S. 194 (2001), that asks first whether a constitutional violation occurred and second whether the right violated was clearly established. A constitutional right is clearly established when its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Cooper v. Sheehan, 735 F.3d 153, 158 (4th Cir. 2013) (internal citations and quotation marks omitted). The individual defendants focus on the second step of this test and assert that the amended complaint on its face establishes that they are entitled to qualified immunity. (*See* Doc. 15 at 4-5.)

a. Due Process Claims, Equal Protection Claims, and Ms. Blackburn's Federal Claims

The defendants make a general qualified immunity argument that, at most, addresses Mr. Martinez-Perez's claims for false arrest, excessive force, unlawful search and seizure of his person, and unlawful seizure of his money. (*See* Doc. 15 at 4-5.) The

defendants' brief makes no mention of either plaintiff's claims for due process and equal protection violations. (*See* Doc. 11 at ¶¶ 64-76; Doc. 15.) While the basis of these claims is not completely clear, the Court understands the due process claims to rest on allegations that the defendants improperly seized the plaintiffs' money without due process of law and understands the equal protection claims to rest on allegations that the plaintiffs were treated differently in the seizure of their money because they are Hispanic. (*See* Doc. 11 at ¶¶ 64-76.)

Nor does the defendants' brief address Ms. Blackburn's claims for the unlawful search of her car and seizure of her money. In fact, in the section of their brief devoted to the qualified immunity issue, the defendants make no mention of Ms. Blackburn at all. (*See* Doc. 15 at 4-5.)

Because the defendants have failed to support their motion to dismiss these claims with any legal argument,[4] the Court will deny the motion as to these claims.

b. Mr. Martinez-Perez's False Arrest, Unlawful Search, Unlawful Seizure, and Excessive Force Claims

Mr. Martinez-Perez alleges that the officers arrested him without probable cause when they drew their weapons and threw him to the ground, (Doc. 11 at ¶¶ 32-33), searched his person despite having no probable cause for his arrest, (Doc. 11 at ¶ 36), and

[4] *See Spath v. Hayes Wheels Int'l–Ind., Inc.*, 211 F.3d 392, 397 (7th Cir. 2000) ("[I]t is not this court's responsibility to research and construct the parties' arguments." (internal quotation marks omitted)); *Hughes v. B/E Aerospace, Inc.*, No. 1:12CV717, 2014 WL 906220, at *1 n.1 (M.D.N.C. Mar. 7, 2014) ("A party should not expect a court to do the work that it elected not to do."); L.R. 7.2(a)(4) (requiring litigants to cite to authorities in support of their arguments).

fabricated evidence that he possessed cocaine so they could seize $4,000 from his pocket without probable cause.[5] (Doc. 11 at ¶¶ 36-37.) Mr. Martinez-Perez further alleges that the officers' use of any amount of force was excessive, since they had no probable cause to arrest him or any reason to feel threatened, and that even if the officers had probable cause to arrest him, the force used to effect his arrest was excessive. (*See* Doc. 12 at 6-7; Doc. 18 at 6-7.)

The defendants contend that "it would not [have been] clear to an objectively reasonable officer that the search of [Mr.] Martinez-Perez was unlawful nor that the manner in which he was searched and arrested was clearly an excessive use of force." (Doc. 15 at 5.) They base this argument on their reading of the amended complaint, which they assert shows that the officers were "called to the scene of an altercation" where there was a "highly energized situation of an ongoing emergency" and where Mr. Martinez-Perez was "armed" with a pocket knife. (Doc. 15 at 4-5; Doc. 19 at 1.) If those facts appeared in the amended complaint, perhaps this argument would bear detailed consideration; however, the plaintiffs allege no such facts.

The amended complaint does not use the words "emergency," "altercation," or any similar words, nor are there facts alleged from which one could draw the inference of an emergency or a fight. Nothing in the allegations indicates the situation was "highly energized" before the officers drew their weapons and threw Mr. Martinez-Perez to the

[5] The Court does not read the amended complaint to challenge the constitutionality of the detention that occurred when the officers asked Mr. Martinez-Perez to put his hands in the air before asking him if he had any weapons. (*See* Doc. 11 at ¶¶ 52-63; Doc. 18 at 6-7.)

ground. The amended complaint alleges only that someone at a business called 911 and that officers responded and talked to witnesses. (*See* Doc. 11 at ¶¶ 25-29.) No facts alleged suggest that any sort of altercation or heated disagreement occurred, that Mr. Martinez-Perez or anyone else threatened the officers or any other person, or that Mr. Martinez-Perez moved towards his pocket knife. Indeed, Mr. Martinez-Perez alleges that he cooperated and immediately complied with the officers' order to put his hands in the air, which happened before the officers learned that he had a pocket knife. (Doc. 11 at ¶¶ 29-31.) The defendants' characterization of the allegations is inaccurate.

Nor have the defendants supported their argument with citations to legal authority. *See supra* note 4. The defendants cite no case to support the proposition that a reasonable officer would believe he was justified in detaining and searching any person on or near the premises of a 911 call who admits to carrying a pocket knife, much less that the officer would be justified in drawing a weapon on a compliant bystander who obeys commands, poses no threat of violence, gives no indication that he is accessing a weapon, and makes no attempt to resist or evade arrest; knocking him to the ground; shoving a foot in his face; and arresting him.[6] The defendants do not identify any crime that they

[6] Cursory research shows several cases to the contrary. *See, e.g.*, *Meyers v. Baltimore Cnty.*, 713 F.3d 723, 735 (4th Cir. 2013) (concluding that an officer was not entitled to qualified immunity for his use of a taser where the plaintiff posed no threat to officer safety and was not actively resisting arrest); *Turmon v. Jordan*, 405 F.3d 202, 208 (4th Cir. 2005) (concluding that an officer was not entitled to qualified immunity where "it would have been clear to a reasonable officer that he could not point his gun at an individual's face, jerk him from his room, and handcuff him when there was no reasonable suspicion that any crime had been committed, no indication that the individual posed a threat to the officer, and no indication that the individual was attempting to resist or evade detention"); *King v. Jefferies*, 402 F. Supp. 2d 624, 632 (M.D.N.C. 2005) (refusing to grant qualified immunity to officers who allegedly slammed the

had probable cause to believe Mr. Martinez-Perez committed before they drew their weapons and no crime is immediately apparent on the face of the amended complaint.[7] They identify no exception to the search warrant requirement that might apply and cite no case in support of its application.[8] The defendants ignore entirely Mr. Martinez-Perez's claim that the officers fabricated evidence of drug possession to seize his money.

The Court appreciates that the amended complaint leaves out a number of relevant facts, including what the employee said during the 911 call and what witnesses said after the officers arrived. But the absence of these facts does not give the defendants a license to create non-existent allegations of "emergencies" and "altercations."[9] (*See* Doc. 15 at 5.) Under a fair reading, the amended complaint more than adequately alleges plausible constitutional claims and does not allege facts that establish qualified immunity as a

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plaintiff's head into a brick wall during an arrest where "the crime was not severe, there was no threat to the safety of the police or others, and [the p]laintiff did not resist arrest"); *see also Foote v. Dunagan*, 33 F.3d 445, 448-49 (4th Cir. 1994) (collecting cases that discuss the reasonableness of a police officer drawing his weapon on a suspect).

[7] Cursory research indicates that the mere possession of a pocket knife is not a crime in North Carolina, even if it is concealed. *See In re Dale B.*, 96 N.C. App. 375, 376, 385 S.E.2d 521, 522 (1989) (quoting N.C. Gen. Stat. § 14-269(a) (current version at N.C. Gen. Stat. § 14-269(d))) (indicating that an "ordinary pocket knife" is exempt from coverage of the carrying concealed weapons statute). The same indicates that officers do not have probable cause to arrest someone for obstructing a law enforcement officer if the person is cooperative and non-violent. *See, e.g.*, *Wilson v. Kittoe*, 337 F.3d 392, 400-04 (4th Cir. 2003).

[8] As the defendants have not contested Mr. Martinez-Perez's characterization of his detention as an arrest, the Court assumes that the officers are relying on the search-incident-to-arrest exception. Application of that exception, however, requires a lawful arrest. *E.g.*, *United States v. Currence*, 446 F.3d 554, 556 (4th Cir. 2006). Other possible exceptions come to mind, but none have been identified or briefed by the defendants.

[9] The defendants are reminded of Rule 11 of the Federal Rules of Civil Procedure.

matter of law. The defendants have not met their burden to establish the defense at this stage, and the Court will deny the motion to dismiss.

3. State Law Claims and Public Official Immunity

Under the defense of public official immunity, an officer, "engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable" unless his act was malicious, corrupt, or beyond the scope of his duties. *See Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997). An officer acts with "malice" in this context "when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Brown v. Town of Chapel Hill*, ___ N.C. App. ___, ___, 756 S.E.2d 749, 755 (2014) (quoting *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984)), *cert. denied*, 762 S.E.2d 458 (N.C. 2014) (mem.); *see also Wilcox v. City of Asheville*, ___ N.C. App. ___, ___, 730 S.E.2d 226, 230 (2012), *review denied*, 366 N.C. 574, 738 S.E.2d 401 (2013) (mem.). "An act is wanton when it is done of wicked purpose," or when it manifests "reckless indifference to the rights of others." *Grad*, 312 N.C. at 313, 321 S.E.2d at 890-91 (internal quotation marks omitted).

The defendants contend that the plaintiffs have failed to allege that the officers' actions were malicious or corrupt and that they are therefore entitled to public official immunity. (Doc. 15 at 6-7.) As discussed *supra*, Mr. Martinez-Perez and Ms. Blackburn have alleged multiple wrongful acts that, if true, give rise to an inference that the officers acted with malice, corruption, or beyond the scope of their duties. *See, e.g.*, *Evans v. Chalmers*, 703 F.3d 636, 657 n.16 (4th Cir. 2012) (holding that a court may consider

officers' multiple alleged wrongful acts together to present a plausible claim of malice), *cert. denied sub nom. Evans v. City of Durham*, 134 S. Ct. 98 (2013); *Showalter v. N.C. Dept. of Crime Control & Pub. Safety*, 183 N.C. App. 132, 136-37, 643 S.E.2d 649, 652-53 (2007) (holding that evidence that an officer was angry, "very loud and spitting," jerked the plaintiff out of the car, and handcuffed him created a genuine issue of material fact as to whether the officer acted with malice); *Prior v. Pruett*, 143 N.C. App. 612, 624, 550 S.E.2d 166, 174 (2001) (holding that excessive force allegations could support a finding that "the officers acted with malice, corruption, or beyond the scope of authority"). The Court will deny the defendants' motion to dismiss the state law claims.

4. The Town of Kernersville

Generally, a municipality may be held liable only if "it follows a custom, policy, or practice by which local officials violate a plaintiff's constitutional rights." *Owens*, 767 F.3d at 402 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)); *see also Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999) (identifying four possible sources of official policy or custom giving rise to municipal liability). The Town contends that the plaintiffs' allegations against it are insufficient to establish that the conduct at issue arose from a policy or custom. (Doc. 15 at 7.)

Here, the plaintiffs allege that: (1) the Town and the KPD have a policy of seizing money without probable cause and without a violation of a controlled substance statute; (2) the KPD later uses the money to fund its operations; (3) this policy disproportionately affects minorities, such as the plaintiffs; and (4) the KPD has a profit motive to seize citizens' money without lawful authority. (Doc. 11 at ¶¶ 48-50, 124-27.) Taken together

with the allegations about the events at issue, including the number of officers involved, the false charge of drug possession, and the refusal to provide receipts for seized money, the plaintiffs have stated a plausible claim of an official policy or custom. *See Owens*, 767 F.3d at 402-03; *King v. Jefferies*, 402 F. Supp. 2d 624, 633 (M.D.N.C. 2005).

The defendants contend that the plaintiffs have not pled facts that definitively establish the Town's policy of seizing money without probable cause from minorities at higher rates. (Doc. 19 at 3.) This assertion misapprehends the plaintiffs' burden at the pleading stage. *See Owens*, 767 F.3d at 403 ("Although prevailing on the merits of a *Monell* claim is difficult, simply alleging such a claim is, by definition, easier.").

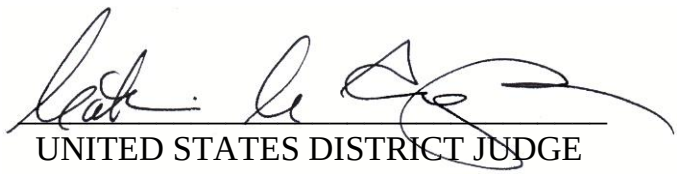
The plaintiffs' amended complaint sufficiently and plausibly alleges the existence of an official policy on the part of the Town. The Court will deny the motion to dismiss the claims against the Town.

5. Plaintiffs' Surreply

The Local Rules for the Middle District only allow for the filing of a motion, a response to a motion, and a reply. *See* L.R. 7.3. A party does not have the right to file a surreply. *See DiPaulo v. Potter*, 733 F. Supp. 2d 666, 670 (M.D.N.C. 2010); *Johnson v. Rinaldi*, No. 1:99CV170, 2001 WL 293654, at *1 (M.D.N.C. Feb. 16, 2001) ("The Court knows of no authority establishing a right to file a surreply…."). In the future, litigants should seek leave of court before filing surreplies, which ordinarily are not necessary. Absent such advance permission, the Court will strike any surreply.

It is **ORDERED** that the defendants' motion to dismiss the original complaint, (Doc. 6), is **DENIED** as moot, and the motion to dismiss the amended complaint, (Doc. 14), is **DENIED** as without merit.

This the 9th day of December, 2014.



UNITED STATES DISTRICT JUDGE