UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEENAN VERNER,

Plaintiff,

v.

Case Number 15-13262
Honorable David M. Lawson

CITY OF SOUTHGATE, BRADFORD G. GRATZ, as the personal representative of the estate of MICHAEL GRATZ, and N. MARONEY,

Defendants.
_____/

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DISMISSING CERTAIN CLAIMS AND DEFENDANTS, AND SCHEDULING TRIAL ON DAMAGES

Keenen Verner was on the last leg of a trip from Florida to Michigan on November 14, 2013, driving his 2012 Audi A8 4.2 Quattro to Detroit for a business meeting. Around noon, he was passing through the City of Southgate, traveling on northbound I-75, when police officers Michael Gratz and Nick Merony effectuated a traffic stop and detained Verner for more than an hour. Verner says the police had no good reason to stop him, and the inordinate delay caused him to miss his meeting and the business opportunities it would have afforded him. He brought the present action against Gratz, Merony, and the City of Southgate asserting various legal theories, including a violation of the Fourth Amendment. Both sides have moved for summary judgment. The motions are fully briefed, and nearly the entire incident was captured on the dash camera in Gratz's police cruiser. Oral argument is not necessary. *See* E.D. Mich. LR 7.1(f)(2). Because the video is comprehensive, it leaves no material facts in dispute. And although Verner has not established a viable case for municipal liability against Southgate, and some of his other theories are unsupported,

the facts plainly establish that he is entitled to judgment as a matter of law against Gratz for violating his Fourth Amendment right to be free from unreasonable searches and seizures. Therefore, the Court will grant the plaintiff's motion for partial summary judgment on count I of the complaint, grant the defendants' motion for summary judgment in part, dismiss the case against Southgate and Merony and the remaining counts of the complaint, and proceed to a jury trial on damages.

I.

The traffic stop occurred around noon. While plaintiff Keenan Verner was driving northbound on I-75, he saw a police car parked in the median between the southbound and northbound lanes. He made eye contact with an officer in the cruiser, but he maintained his speed because he had the cruise control set at 70 miles per hour. The police car pulled out and followed Verner for around two miles. Southgate police officer Michael Gratz was driving; his partner was police officer Nick Merony. Gratz activated his overhead lights, and Verner pulled over to the right shoulder. Gratz (now deceased) got out of the cruiser and came to the passenger side of Verner's car, and Verner rolled down the window. Verner asked, "Did I do anything wrong?" The officer responded "We'll get to that," and then asked Verner for his license and registration, which Verner produced. After a brief conversation, Gratz asked Verner to get back on the highway and follow the police to the nearest off-ramp and onto a residential street away from the interstate. Verner complied. Once they were stopped again on the side street, Gratz asked Verner to get out of his car, which he did.

The dash camera in the police car was rolling the whole time and captured the entire encounter.

Gratz instructed Verner to sit in the back seat of the police car, which he did. Merony was seated in the front passenger side of the police car throughout the encounter. Verner testified that when he asked Merony again why he had been stopped, Merony seemed "angry" and "extremely agitated," and he told Verner to "shut the fuck up and sit back." Verner had his cell phone with him while he was seated in the police car, and he asked if he could call a business contact because he was going to be late to a meeting. Verner made several calls while seated in the back of the police car, including to his wife.

Verner testified that Gratz asked him "a lot of questions" during the stop, such as where he was driving from, where to, and if he had driven straight through. Gratz also asked Verner "how a person like [him] could afford a car like that." Verner says that he paid $60-65,000 for the Audi A8 4.2 Quattro through eBay. Verner responded by asking, "What do you mean, because I'm black I cannot afford this car?" Verner told Gratz that he worked hard and owned his own business and he could buy whatever car he wanted. When he was stopped, Verner had two cell phones in the car with him, both in a cup holder. Verner also holds a concealed carry permit, and he carries a gun at all times. When he got out of his car, Verner told Gratz about the permit and that he had a weapon with him in the car, but he did not have the gun on his person when he got out of the car.

The parties mutually adopted as an exhibit in support of their respective motions the dash camera video recording. The video includes a running timestamp and certain other indicators, such as whether the police car's lights and siren were on, the police car's speed of travel, and when the brakes were applied. The video begins with the police car following the plaintiff's car in the middle lane of a three-lane highway. The weather appeared clear and dry. The police car's indicated speed was 72 miles per hour.

After the police car had followed the plaintiff's vehicle for approximately a minute, it appears that the right side tires of the plaintiff's car came close to the inside of the white lane marker line briefly between the middle and right lanes. *See* Time Stamp (TS) 12:31:08. Thirty seconds later, the plaintiff signaled a lane change and moved from the middle to the left lane; at that point it appears that his car may be within a couple car lengths of the vehicle he was overtaking. TS 12:31:37. Officer Gratz then activated the lights on the police car, and the plaintiff pulled over. At TS 12:32:13, the plaintiff was stopped in the emergency lane. Shortly after, Gratz and Merony got out of the police car, and at TS 12:32:46, Gratz is seen standing beside the car on the passenger side; he leaned into the passenger window and spoke to the plaintiff, but most of the conversation is inaudible. At TS 12:33:17, Gratz said, "I'm just doing my job out here." At TS 12:33:40, Gratz told the plaintiff to follow the officers off the interstate to a safer location on a residential side street, and the plaintiff said he would. All together, less than 60 seconds passed between the officers' first contact with the plaintiff at the roadside stop and the direction to proceed off the highway to another location.

At TS 12:35:50, the video shows the plaintiff's car stopped on a residential side street. Gratz told the plaintiff to get out of the car and asked to pat him down. The plaintiff got out and allowed Gratz to do a pat down. Gratz asked the plaintiff if he had any weapons, and the plaintiff answered that he had a gun in the car and that he held a concealed pistol license (CPL). Gratz then asked why the plaintiff did not disclose the CPL and the presence of the weapon earlier, and Verner responded, "You didn't ask. I didn't do anything." (TS 12:35:58.)

Between 12:36:17 and 12:37:23, the following exchange occurred between Officer Gratz and Verner, while the two were standing in front of the patrol car:

Gratz: How much cash you got in your pocket?
Verner: (Inaudible)
. . .
Gratz: Step back over here. [pointing to patrol car] You have the gun in the car, right?
Verner: Yes.
. . .
Gratz: You're coming to Michigan, from where?
Verner: From Florida.
Gratz: Driving straight through?
Verner: No.
Gratz: Where [did] you stop at?
Verner: That's none of your business.
. . .
Verner: You're asking too many questions. I've got a meeting with an auto dealer at 1:00.
Gratz: Where at?
Verner: In Detroit.
Gratz: Do you have any information with the dealer?
Verner: I have no information.
Gratz: Is there anything illegal in the vehicle?
Verner: Nothing.
Gratz: Any narcotics?
Verner: No narcotics.
Gratz: Any marijuana?
Verner: No marijuana. I don't smoke it. I don't do none of that.
Gratz: Cocaine? Heroin?
Verner: Nothing.
Gratz: How much money is in the car?
Verner: No money is in the car.
Gratz: How much money do you have in your pocket?
Verner: That's none of your business.
Gratz: Do you mind if I search the vehicle?
Verner: No, you can't search my vehicle.
Gratz: Ok, we're going to detain you then; we're going to wait for a canine.

After their roadside colloquy, Officer Gratz told Verner to sit in the back of the police car to wait, and Verner complied. He remained seated in the back of the police car for the rest of the stop. At TS 12:50:15, Gratz is seen looking through base of the windshield of Verner's car, opening the driver side door, and looking at the edges of the door and searching inside the car. Gratz then

is heard saying "He's got the VIN tag off the car too." At TS 12:51:20, Gratz asked Verner why the VIN tag was off the car. The plaintiff responded that he just bought the car, it was "rebuilt," and he just had it inspected and registered. At TS 12:57:04, Gratz opened the driver side door again, leaned into and looked around inside the car; then went to the passenger side, opened both side doors in turn, leaned into the car through those doors, and looked around in the front and rear passenger areas. At TS 13:00:20, Gratz opened the driver side door and popped the trunk. He searched inside the trunk and then closed the trunk lid. At TS 13:00:53, Gratz again said, "Can't find any VIN anywhere."

The defendants do not contest the fact that the model year 2012 Audi A8 that Verner owned was not subject to the extra VIN sticker requirement that applies to certain high value cars sold in the United States. The plaintiff asserts, however, that there was a sticker on the car in the door jamb area showing a VIN that matches the windshield tag. Verner testified knew that the car had been "rebuilt," but when he bought the car he had checked the VIN displayed in the windshield against the number on the title and knew that they matched. Verner testified that none of the VINs on the car were mismatched.

At TS 13:02:40 in the video, Gratz is seen pacing along the sidewalk beside the car, speaking on his cell phone — the person on the other end of the call is unidentified. Gratz's side of the conversation went in part as follows:

> Here's what I have: Very uncooperative; coming from Florida to buy a car; owns his own business; won't give me any information where he's going; didn't disclose his CPL right away; I called the number in Florida from the back of the CPL, they said you do have to disclose it; and I can't find any VIN — the federal VIN stickers are off the car, which is a federal offense — I mean, it may not be stolen, I'm not worried about that — I kinda want to search the car. But . . . that is a federal offense; I just don't know; I'd love a canine to walk around it, and if it hits on it we search it, if not we can always kick him lose — give him a ticket and send him on his way.

> But he's getting antsy, that's the problem. The metal [VIN] plate is there; the stickers on the sides of the doors are off.

Gratz then made one or two phone calls attempting to secure a canine unit to respond to the scene; this took around 20 minutes, during which Verner remained seated in the police car.

By TS 13:23:39, Sergeant Oscar Garza arrived on the scene with his dog. Gratz can be seen speaking to Garza on the sidewalk, and they had the following exchange:

> Gratz: Alright, well this guy's a little antsy obviously; he's been here a while, we're just trying to get a dog here for about a half hour now. I got him detained; these are some of the indicators: He's coming from Florida to Detroit to pick up a car; won't tell me where he's going; says [there is] no money in the car, no narcotics; strong smell of air freshener; and got multiple cell phones — the VIN plates are all — not the VIN plate up there [pointing to the front of the car] but the VIN stickers, are all taken off the car too. . . . I just want to do a canine sniff; if my hunch is here — then there might be something here, but if not —
>
> Garza: Alright, I can — based on what you're telling me, I can do the exterior. . . . I can ask him — did you already ask him if we can search with the dog?

At TS 13:24:55, immediately after he finished speaking with Gratz, Sergeant Garza walked to the back of the police car (off camera) and had the following conversation with Verner:

> Garza: Hi there, sir. . . . I'm here with the canine unit, sir. I'm just going to request, if it's ok, if I can search the interior of your vehicle — if that's ok.
>
> Verner: For what?
>
> Garza: Is that your vehicle?
>
> Verner: Yes, that's my vehicle.
>
> Garza: I'm just asking — yes or no, I mean.
>
> Verner: No — go ahead, have your dog do whatever you do. I don't — I don't do anything. Nothing. You're just wasting my time. . . . I've been sitting here now for 55 minutes. I haven't [done] a thing wrong. This is clear profiling. This is what gives the police department a bad name. I'm a tax-paying citizen, retired military, that did nothing. Just because he looked up and saw I was black, and pulled me over.
>
> Garza: Ok, sir. . . . I'm just — that's why I'm here.
>
> Verner: Go ahead — go ahead and have your dog do whatever you do.

At TS 13:28:01, Sergeant Garza brought his dog out, walked the dog around the outside of the car, and then opened the doors and allowed the dog to search inside car. After the search concluded, Garza told Gratz that the dog showed some "interest," but that he was not comfortable that there was any indication sufficient to justify any further search of the car. After some brief ensuing conversation between the plaintiff and the officers, at TS 13:34:33, the plaintiff is seen walking back to his car, and at TS 13:36:03 he drove away. From start to end, the encounter lasted more than an hour. More than 50 minutes elapsed from the time Verner was told he would be detained to wait for a canine unit until the time he returned to his car to leave. Before leaving the traffic stop, Verner asked Officer Gratz for his name and badge number. Gratz refused to give Verner that information, but he gave Verner an incident report number.

Verner asserts that when he arrived for the meeting, his business associate was gone, and he was unable to conclude his planned meeting, which was for the purpose of viewing and buying several used cars.

Defendant Merony testified that Gratz pulled Verner over because, while they were following him, Gratz observed the right side tire of Verner's car touch the white marker line between two lanes, which Merony testified is a civil infraction, and possibly "an indication of drunk driving." During the stop, Merony remained in the police car and ran the license plate of Verner's car through the LEIN system to check if it was stolen, but the plate check returned nothing suspicious. He testified that all together the traffic stop lasted around 50 minutes, and he attributed the length of the stop to waiting for a canine unit to arrive to perform a sniff search of the car. Merony testified that the decisions to follow Verner, to pull him over, to detain him, and to call for a canine unit all were made by Gratz during the course of the encounter. No citation was issued during the traffic stop,

and Verner was released with a verbal warning. Merony testified that the suspicion leading to the decision to detain Verner was developed by Gratz, as a result of Gratz's interactions with Verner. However, Merony testified that, hypothetically, the heavy smell of air freshener in a car, the fact that a person is traveling across several states, the presence of multiple cell phones, the absence of a VIN sticker on the car door, and the fact that a driver did not immediately disclose his possession of a concealed weapon and that he had a concealed carry permit, all would give him reason to suspect that the person was being "deceptive" and that criminal activity could be afoot.

Sergeant Garza, who is not a party to this case, testified that he was called to the scene of the stop with his dog, and Gratz told him that he wanted Garza to do a sniff search of the car because the heavy scent of air freshener made him suspicious that Verner was trying to mask the odor of narcotics in the car. Garza arrived on the scene with his dog at approximately 1:23 p.m. Garza did not believe that he had probable cause to search the inside of the car with the dog based on what Gratz had told him, but he spoke with Verner and asked for permission to search the interior of the car, which he believed Verner gave, saying, "I didn't do anything illegal," but "go ahead and have your dog do whatever you do." Garza testified that the sniff search took around 10 minutes, and the dog did not indicate that any drugs were present in the car.

The plaintiff filed his complaint on September 16, 2015 alleging violations of his Fourth Amendment rights via 42 U.S.C. § 1983 against Gratz and Merony (count I); violation of the Fourteenth Amendment's Equal Protection Clause against Gratz and Merony (count II); violation of the Fourteenth Amendment's Privileged and Immunities Clause against Gratz and Merony (count III); conspiracy to violate civil rights under 42 U.S.C. § 1985(3) against Gratz and Merony (count IV); and municipal liability for all of these constitutional violations against the City of Southgate

(count V). Discovery closed on September 2, 2016, and both sides have filed summary judgment motions.

II.

The fact that the parties have filed cross motions for summary judgment does not automatically justify the conclusion that there are no facts in dispute. *Parks v. LaFace Records*, 329 F.3d 437, 444 (6th Cir. 2003) ("The fact that the parties have filed cross-motions for summary judgment does not mean, of course, that summary judgment for one side or the other is necessarily appropriate."). Instead, the Court must apply the well-recognized summary judgment standards when deciding such cross motions: the Court "must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party." *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003).

Summary judgment is appropriate "if 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). A trial is required when "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The video from the police car tells a pretty complete story. Therefore, to the extent that the video recording discloses facts or observations at odds with either party's position or testimony, the Court must accept the circumstances plainly depicted by the video, and it must reject contrary testimony and other information presented by the parties. *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts

for purposes of ruling on a motion for summary judgment."); *see also Shreve v. Franklin County, Ohio*, 743 F.3d 126, 132 (6th Cir. 2014) ("[W]itness accounts seeking to contradict an unambiguous video recording do not create a triable issue.").

In a defensive motion for summary judgment, the party who bears the burden of proof must present a jury question as to each element of the claim. *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000). Failure to prove an essential element of a claim renders all other facts immaterial for summary judgment purposes. *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 895 (6th Cir. 1991).

When the moving party also bears the ultimate burden of persuasion, the movant's affidavits and other evidence not only must show the absence of a material fact issue, they also must carry that burden. *Vance v. Latimer*, 648 F. Supp. 2d 914, 919 (E.D. Mich. 2009); *see also Resolution Trust Corp. v. Gill*, 960 F.2d 336, 340 (3d Cir. 1992); *Stat-Tech Liquidating Trust v. Fenster*, 981 F. Supp. 1325, 1335 (D. Colo. 1997) (stating that where "the crucial issue is one on which the movant will bear the ultimate burden of proof at trial, summary judgment can be entered only if the movant submits evidentiary materials to establish all of the elements of the claim or defense"). The plaintiff therefore "must sustain that burden as well as demonstrate the absence of a genuine dispute. Thus, it must satisfy both the initial burden of production on the summary judgment motion — by showing that no genuine dispute exists as to any material fact — and the ultimate burden of persuasion on the claim — by showing that it would be entitled to a directed verdict at trial." William W. Schwarzer, et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 477-78 (1992) (footnotes omitted).

A.

As an initial matter, the plaintiff has presented no facts, argument, or legal authority in his motion papers or responsive briefing addressing his claims for "equal protection" or "privileges and immunities" violations, or the conspiracy or municipal liability claims. He also does not make any attempt to identify any "custom, policy, or practice" of the City of Southgate or its police department that he contends was the moving force behind defendant Gratz's conduct. Moreover, he does not dispute officer Merony's testimony that Merony played essentially no role in the encounter beyond conducting routine computer inquiries on the plaintiff's license and registration, and that he did not participate in any material way in the investigation, or make any of the decisions to stop the plaintiff's car, detain the plaintiff after the stop, or request a canine unit to come to the scene to conduct a sniff search of the car. The plaintiff does not dispute Merony's testimony that Gratz acted alone and at his own sole discretion in making all of those decisions. The Court must conclude, therefore, that the plaintiff has abandoned the claims raised in counts II through V of the complaint, as well as his claims against officer Merony individually and against the City of Southgate under a theory of municipal liability. Summary judgment will be granted on those claims and parties and they will be dismissed from this lawsuit.

B.

What remains are Verner's claims in count I against defendant Gratz under 42 U.S.C. § 1983. To prevail, Verner must establish (1) a "deprivation of a right secured by the Constitution or laws of the United States; (2) caused by a person acting under the color of state law." *Baynes v. Cleland,* 799 F.3d 600, 607 (6th Cir. 2015) (citing *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006)). There is no question officer that Gratz, in his capacity as a Southgate police officer, was

acting under color of state law during his encounter with the plaintiff. Verner contends that Gratz deprived him of his rights under the Fourth Amendment throughout the encounter, from the initial stop (which lacked any legal justification), through the extended detention (for which there was no reasonable suspicion or probable cause), to the search of this car (same).

Gratz contends that he had probable cause to initiate the traffic stop based on two observed traffic violations: a lane infraction and following too closely. Gratz also argues that once the stop was made, he became suspicious when he observed through the open passenger window "a strong odor of air freshener" and "multiple cell phones." After Gratz directed the plaintiff to drive to a safer location on a side street, he says his suspicions were further raised when the plaintiff disclosed that he had a gun in the car and possessed a concealed pistol license, which he had not mentioned during the initial stop on the highway. Then, he says, when the plaintiff refused to answer several of Gratz's questions, responding that the information asked for was "none of your business," his suspicion was piqued further. That behavior, coupled with the absence of VIN stickers from the doors of the car, Gratz maintains, justified the prolonged detention waiting for the dog to arrive. And Gratz also says that the eventual canine search inside the car was done with the plaintiff's consent. Finally, Gratz insists that because none of those acts violated the Fourth Amendment, he is entitled to qualified immunity.

1. The Initial Stop

The Fourth Amendment prohibits a "violat[ion]" of "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV; *United States v. Pacheco*, 841 F.3d 384, 389 (6th Cir. 2016). A police officer who initiates a traffic stop "seizes," within the meaning of the Fourth Amendment, the motorist and all of his passengers. *Id.*

at 389-90 (citing *Brendlin v. California*, 551 U.S. 249, 256-59 (2007)). But because traffic stops are usually brief, the level of justification required for a traffic stop is more like reasonable suspicion, as described by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), rather than the probable cause necessary for "a full blown arrest." *Pacheco*, 841 F.3d at 390 n.1; *see also Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (noting that "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest") (internal citations omitted).

Applying this framework, the Sixth Circuit has described two lawful bases for a police officer to stop a motorist: "when he possesses probable cause of a civil infraction or has reasonable suspicion of criminal activity." *Pacheco*, 841 F.3d at 390 (citing *United States v. Lyons*, 687 F.3d 754, 763 (6th Cir. 2012)); *see also United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008). Gratz does not suggest that he stopped Verner because he had any suspicion of criminal activity at the outset; he relies instead on his observation of a purported traffic law infraction. Verner accused Gratz of profiling him, especially due to Gratz's questioning him "how a person like [him] could afford a car like" Verner's Audi Quattro. But "[t]he subjective intent of the officer making the stop is irrelevant in determining whether the stop violated the defendant's Fourth Amendment rights." *United States v. Collazo*, 818 F.3d 247, 253 (6th Cir. 2016) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)). "'[P]olice officers [may] stop vehicles for any infraction, no matter how slight, even if the officer's real purpose was a hope that narcotics or other contraband would be found as a result of the stop.'" *Blair*, 524 F.3d at 748 (quoting *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir. 1995)).

The problem for Gratz, however, is that the uncontroverted video record of the initial encounter and ensuing stop amply demonstrates that there was nothing about the plaintiff's driving

immediately before the stop that Gratz reasonably could have construed as probable cause to believe that the plaintiff committed the traffic violations of improper lane use, following too closely, or any other traffic infraction.

Michigan's lane use statute states simply: "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the operator has first ascertained that the movement can be made with safety." Mich. Comp. Laws § 257.642(1)(a). Verner's car never left the middle lane of the freeway until he signaled his intention to pass the car in front of him. The video shows that his right tires may have kissed the inside right lane marker. But regardless of whether Gratz was calling the game like football (the line is "out") or baseball (the line is "in"), the fleeting — possibly non-existent — contact of the plaintiff's right side tires with a lane line did not establish probable cause for a purported "improper lane use" violation. *See United States v. Freeman*, 209 F.3d 464, 466-67 (6th Cir. 2000) ("Adams's failure to follow a perfect vector down Interstate Forty did not give Officer Tate probable cause to stop the motor home.") (construing the same "as nearly as practicable" statutory language and finding no probable cause to believe that an improper lane use infraction was committed or that the driver was intoxicated).

As for following too closely, Michigan law states: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon, and the condition of, the highway." Mich. Comp. Laws § 257.643(1). Although the video is not crystal clear on the point, nothing about the plaintiff's operation of his car constituted probable cause to believe that he was "following too closely." At TS 12:30:43, when recording begins, the video plainly shows the plaintiff following well behind a

maroon sedan driving in front of him in the middle lane, separated at least five car lengths. At TS 12:31:03, the maroon sedan is obscured from view by the plaintiff's vehicle. At TS 12:31:17, the maroon sedan is again visible, but the plaintiff still is three or more car lengths behind. At TS 12:31:19, the view of the preceding vehicle is blocked again. At TS 12:31:30, just 11 seconds later, the plaintiff signaled a lane change to the left; as he made that lane change, the preceding vehicle appears to be slowing and preparing to change lanes to the right, into the path of a large truck that is in the rightmost lane. It is apparent from the clear video record that the plaintiff signaled a proper lane change and moved to the left in response to the maroon sedan slowing down and attempting to move to the right — in other words, the plaintiff merely reacted to a fleeting incident of close following by changing lanes to avoid it. At TS 12:31:39, after the maroon sedan was fully in the right lane, the plaintiff signaled a lane change to the right and returned to middle lane; at that point the video indicates that the patrol car's signal lights were activated.

Just as in *Freeman*, a single momentary incident of overtaking and passing a vehicle within a couple of car lengths — perhaps not even that close — does not amount to probable cause to believe that the plaintiff was following the car before him "more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon, and the condition of, the highway." In fact the video shows the opposite: when confronted with circumstances that might have led to a momentary and possibly imprudent proximity to the car that he was following, the plaintiff safely and properly changed lanes to *avoid* the possible hazard, and only returned to the middle lane once the danger had passed. No reasonable juror would conclude otherwise after viewing the video.

It was clearly established well before the December 2013 roadside encounter in this case that a motorist had a constitutional right to be free from unreasonable seizures in the form of unjustified traffic stops. Although defendant Gratz contends that he saw traffic violations that allowed him to pull over plaintiff Verner, the unimpeached video record does not support that position. No fact finder viewing the video reasonably could conclude that anything about the plaintiff's operation of his vehicle in the minutes preceding the stop was illegal, unsafe, or even incautious. Officer Gratz therefore had no reason to initiate a traffic stop, and his seizure of the plaintiff violated the Fourth Amendment. On this claim, Verner has established the elements of his section 1983 cause of action as a matter of law.

2. The Extended Detention

The information that Gratz discovered after he pulled over the Audi does not validate the initial stop. A *Terry* "stop must be justified at its inception." *Blair*, 524 F.3d at 750 (citing *Terry*, 392 U.S. at 19-20). Verner also argues that regardless of the legality of the initial stop, the detention lasted much longer than was reasonable in light of the purported justification for the stop. Verner's point is well taken. As with *Terry* stops, "the [traffic] stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (quoting *Terry*, 392 U.S. at 29). As the Supreme Court has explained, "[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." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (citing *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)); *see also Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 185-86 (2004) (noting that a "seizure cannot continue for an excessive period of time").

Gratz argues that after he pulled Verner over, he developed additional facts that raised his suspicion and warranted further detention and investigation. He relies on the rule that even after a traffic stop is completed, the police may continue the detention if "something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention." *United States v. Perez,* 440 F.3d 363, 370 (6th Cir. 2006) (quotation omitted). However, the uncontroverted video record reveals that nothing he "discovered" during the traffic stop was sufficient to sustain any reasonable suspicion that illegal drugs were present in the plaintiff's car, or that the car was stolen. The ensuing detention after the initial traffic stop and license and registration inquiry strayed well beyond the time and tasks needed to address the purported traffic violation. The extended detention awaiting the arrival of a canine unit therefore was illegal, because that waiting period extended the stop beyond a reasonable scope and duration.

It was well settled law in December 2013 that an investigative detention — a *Terry* stop — "must be supported by specific and articulable facts that would 'warrant a man of reasonable caution in the belief that the action taken was appropriate.'" *Blair,* 524 F.3d at 750 (quoting *Terry,* 392 U.S. at 22). "In other words, [an] officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity.'" *Ibid.* (quoting *Illinois v. Wardlow,* 528 U.S. 119, 124 (2000) (internal quotation marks omitted)). "Additionally, the stop . . . must be reasonably related in scope to the circumstances which justified the interference in the first place." *Ibid.* (citing *Terry,* 392 U.S. at 19-20).

Gratz contends that during the stop, he learned additional information that allowed him to detain Verner to investigate possible illegal drug trafficking. The scenario, he says, tracks the facts in *United States v. Rodriguez,* 485 F. App'x 16 (6th Cir. 2012). In that case, the court listed the

"specific and articulable facts" that justified extending the traffic stop to investigate a possible drug crime as follows:

> 1) Rodriguez leaned back in his seat when he passed the patrol car in an apparent attempt to hide his face behind the door post; 2) Rodriguez immediately slowed down when he passed the police car; 3) the stretch of I-94 between Chicago and Detroit is a pipeline corridor for drugs; 4) the van smelled strongly of air fresheners, which are commonly used to mask the odor of drugs; 5) the van was not registered to Rodriguez; 6) Rodriguez stated that he was going to his cousin's bachelor party, but he did not know the date of the wedding; and 7) Rodriguez said that the party was taking place on Thursday, which seemed like an unusual night for a bachelor party.

Rodriguez, 485 F. App'x at 20. That case does not help Gratz; there is almost no overlap between the circumstances of this case and those adverted to in *Rodriguez*. And there are several telling differences.

First, Gratz has not identified any efforts by the plaintiff to evade the attention of police; he made no apparent attempt to conceal his identity (e.g., to "hide his face"), and he did not "immediately slow down" or undertake any other apparent evasive maneuvers after the police pulled out and began to follow him. The video record, and the testimony by officer Merony, do not contradict the plaintiff's own testimony that in fact he "made eye contact" with officer Gratz as he passed the police car stopped in the highway median, and that the plaintiff continued driving at a safe and legal speed thereafter. *Second*, there is no suggestion in the record that the stretch of highway where the plaintiff was driving was a known "pipeline corridor" or otherwise an avenue for high volume trafficking of illegal drugs by automobile. *Third*, there is no suggestion that any discrepancies in the vehicle's registration or the plaintiff's license were revealed by officer Merony's computer inquiries during the stop. *Fourth*, there was no apparent inconsistency or irregularity in the plaintiff's account of his travel itinerary, destination, and purpose. The plaintiff

freely disclosed to officer Gratz that he was driving from Florida to Michigan, that he had not driven straight through, and that he was headed to Detroit because he had a 1:00 p.m. meeting with a business associate to discuss the purchase of some used cars. Gratz has not suggested any way in which the plaintiff's account of his travels was implausible, or even unusual. The only circumstance in common between this case and *Rodriguez* was the purported "strong smell of air freshener," which, it may be noted, was never even mentioned by Gratz during the course of the encounter until near the end of the video record, as an afterthought to the discussion with officer Garza about the basis for Gratz's desire to have a dog search the car.

Moreover, the circumstances identified by the defendants are not sufficient in themselves, either alone or taken all together, to give rise to any reasonable suspicion that the plaintiff was engaged in drug trafficking. All of those circumstances — the use of air freshener, possession of two cell phones, carrying a registered pistol with a lawful permit, and driving across state lines — are entirely innocent facts, fully consistent with law-abiding behavior. If Gratz's observations in this case were sufficient to justify an extended detention of any automobile, then any citizen engaging in the entirely legal conduct described here could be subjected to a stop and extended detention at the whim of a police officer exercising unfettered authority. Such arbitrariness is at odds with a tolerable standard of conduct for police operating within the constraints of the Fourth Amendment. *See Camara v. Mun. Ct. of San Francisco,* 387 U.S. 523, 528 (1967) (stating that the "basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials").

The defendants contend that the purported "discrepancy" of the missing VIN stickers also contributed to the basis for a reasonable suspicion of drug trafficking or other illegality. But they

concede that the plaintiff's car was not, in fact, subject to the supplementary VIN labeling regulation on which Gratz based his suspicion. Moreover, the defendants admit that the regulation in question applies only to certain enumerated "high theft" car models sold in the United States. Therefore, a reasonable officer in Gratz's position, being aware of that regulation and knowing that it only covers certain cars, but evidently having no information about whether the plaintiff's car specifically was covered by it, could not reasonably have construed the mere absence of a VIN sticker from a particular part of a vehicle as evidence of any purported "federal offense," without first making a specific inquiry to see if the car in question was covered by the regulation. Finally, as the plaintiff points out, and the video record substantiates, Officer Gratz did not even make the purported "discovery" of the VIN discrepancy until more than 13 minutes after he made the decision to detain the plaintiff, and well after he already had told the plaintiff he would be detained to await a canine unit. The plaintiff contends — and has produced some evidence to show — that in fact there were VIN stickers present in the car's door area — just not in any place where officer Gratz looked. The defendants have not rebutted that evidence. Gratz's failure to find those stickers does not support the extended detention.

The defendants also assert that the plaintiff was "uncooperative" and "deceptive" when he refused to give "any information" about where he was traveling, or why. But the video record flatly contradicts that position. In fact the plaintiff answered almost all of the questions that Officer Gratz posed with specific information, including where he had traveled from, where he was going, whether he drove straight through, the reason for his trip, and the time, purpose, and area of the business meeting that he was traveling to attend. The plaintiff only refused to answer two questions about where he had stayed over, and how much money was in his pockets, responding simply that the

information was "none of your business." But the mere refusal to answer questions is insufficient in itself to give rise to any reasonable suspicion of criminal activity, particularly where, as here, the plaintiff should have been free to leave the scene, where any nominal purpose for the traffic stop (which itself was illegal), had been fully exhausted. *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) ("The person approached [by police] need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." (citations omitted)).

The defendants finally point to the plaintiff's failure to "immediately" disclose that he held a CPL and had a weapon in the car as further evidence of "deceptive" behavior. It is apparent from the video, as the plaintiff stated on camera, that the reason he did not offer that information earlier than he did was simply because officer Gratz did not ask. The less than one-minute conversation at the fleeting interstate stop evidently was taken up entirely by Gratz's initial questions, his demand for the plaintiff's license and registration (which immediately were supplied), and Gratz's directions for the plaintiff to follow him to a safer roadside location. When the plaintiff stepped out of the car at the second location, and when Gratz asked if he had a weapon in the car, the plaintiff immediately volunteered that he did have a gun in the car, and that he held a license to carry a concealed pistol which allowed him lawfully to possess the gun. Nothing in the plaintiff's behavior or his statements about the weapon and permit suggest any attempt at evasion or deception.

Gratz explained to officer Garza, the dog handler, that he wanted the dog to search Verner's car because he was playing a "hunch." *See* Video at TS 13:23:39 ("[I]f my hunch is here — then there might be something here, but if not . . . ."). And it is true that if a canine unit happens to be

present, an exterior sniff of a vehicle during an otherwise lawful traffic stop is not a cognizable Fourth Amendment intrusion. *D.E. v. John Doe*, 834 F.3d 723, 727-28 (6th Cir. 2016) ("A canine sniff [of a car's exterior] is not a constitutionally cognizable infringement under the Fourth Amendment when conducted during a *lawful* traffic stop." (emphasis added)) (citing *Caballes*, 543 U.S. 405, 409-10 (2005)). But where a routine traffic stop is extended beyond the scope and duration necessary to issue a citation or make routine license and registration inquiries, for the sole stated purpose of awaiting the arrival of a canine unit that is not already on the scene, that extended and unjustified detention is unreasonable under the Fourth Amendment absent "specific and articulable facts" that justify further investigation. *Blair*, 524 F.3d 740, 752 (6th Cir. 2008) ("Officer Holmes then informed Blair that he believed drugs were in the car and that he would call a canine unit to the scene. This action extended the scope and duration of the stop beyond that necessary to issue a citation for a tag-light violation."). A "hunch of criminal activity" will not suffice. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

The undisputed facts show that Gratz's detention of Verner cannot be justified on the basis of any "reasonable suspicion" that Gratz could have harbored, as that term is commonly understood in Fourth Amendment jurisprudence. Even if the traffic stop was justifiable initially (which it was not), the continued detention for over an hour violated Verner's rights under the Fourth Amendment.

3. The Car Search

The defendants argue that the canine search of the car and the attendant delay were vitiated by the plaintiff's consent. The undisputed facts do not support that argument.

"It is well established that a search is reasonable when the subject consents." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) (citing *Schneckloth v. Bustamante*, 412 U.S. 218, 219

(1973)). "Consent [] need not be explicit. It 'may be in the form of words, gesture, or conduct.'" *Smith v. City of Wyoming*, 821 F.3d 697, 709-10 (6th Cir. 2016) (quoting *United States v. Carter*, 378 F.3d 584, 587 (6th Cir. 2004)). "But it is valid only if given voluntarily, and whether consent is 'voluntary' is a question of fact to be determined from the totality of all the circumstances." *Ibid.* (citing *Ohio v. Robinette*, 519 U.S. 33, 40 (1996); *Schneckloth*, 412 U.S. at 227 (quotations omitted)).

The "totality" of factors on the question of the voluntariness of a consent to search must include the "content" and context of the person's expression of consent. *United States v. Worley*, 193 F.3d 380, 386 (6th Cir. 1999). To establish valid consent upon which a reasonable officer could rely, the defendants must show that the plaintiff made "an unequivocal statement of free and voluntary consent, not merely a response conveying an expression of futility in resistance to authority or acquiescing in the officers' request." *Ibid.* (quoting *United States v. Tillman*, 963 F.2d 137, 143 (6th Cir. 1992)); *see also United States v. Jones*, 641 F.2d 425, 429 (6th Cir. 1981) ("the consent [must be] uncontaminated by duress, coercion, or trickery."). The grant of permission to search must exhibit "more than the mere expression of approval to the search." *Ibid.*

The video record here establishes beyond dispute that the plaintiff plainly told officer Gratz at the outset that he did not consent to a search of his car. Gratz then told the plaintiff that he would be detained to await the arrival of a canine unit to search the car. Finally, after waiting more than 40 minutes for the canine unit to arrive, with no imminent end to the illegal detention in sight, the plaintiff told officer Garza to "go ahead" and "do whatever you do," because he evidently believed — with good reason — that he would not be allowed to go on his way until the dog search was done. That concession to the inevitable was not in any sense "an unequivocal statement of free and

voluntary consent"; rather, it was, by all indications, merely an "expression of futility in resistance to authority," and resignation to the officers' request.

The Sixth Circuit has held that a request by an officer for consent to search a vehicle at the conclusion of an otherwise lawful traffic stop does not transform the stop into an illegal detention, as long as the driver is free to reject the request and leave. But if officers refuse to allow a motorist to leave the scene after he or she refuses to consent to a search, then any purported consent later obtained is invalid and cannot justify an otherwise unreasonable search. *United States v. Erwin*, 155 F.3d 818, 822-23 (6th Cir. 1998) (stating that "when a law enforcement officer no longer has any reasonable suspicion of criminal activity, the detained individual is constitutionally free to leave, and if the officer rejects the individual's indication that he would like to leave, valid consent can no longer be obtained" (citations omitted)).

The initial stop was not supported by probable cause, and the extended detention was not supported by any reasonable suspicion that drugs were present in the plaintiff's car. Because the preceding stop and detention were illegal, the purported "consent" obtained to the eventual canine search of the vehicle was not valid, because it was not voluntarily given. Instead, it was simply the plaintiff's evident concession to what he perceived to be the inevitable — that officer Gratz was not going to release him until his unfettered curiosity had run its course. The canine search, therefore, also violated the plaintiff's Fourth Amendment rights. *See United States v. Page*, 154 F. Supp. 2d 1320, 1328-29 (M.D. Tenn. 2001).

4. Qualified Immunity

Defendant Gratz's argument that he is entitled to qualified immunity is predicated on the premise that the plaintiff has not shown any constitutional violations. The defense of qualified

immunity is available to "governmental officials performing discretionary functions," and it protects them from "civil 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." *Baynes*, 799 F.3d at 609 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Phillips v. Roane Cnty., Tenn.*, 534 F.3d 531, 538-39 (6th Cir. 2008)). "A right is 'clearly established' if '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 610 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "The relevant inquiry is 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Ibid.* (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

The Fourth Amendment law at play in this case was well and clearly established at the time of officer Gratz's encounter with the plaintiff. If Gratz wanted to play his hunch, he had to have a legal basis to stop and detain the plaintiff. It is inconceivable that Gratz did not have "fair warning that [his] alleged treatment of [the plaintiff] was unconstitutional.'" *Ibid.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 741 (2002)). Qualified immunity will not shield Gratz from the consequences of his unconstitutional conduct directed under color of law toward the plaintiff.

III.

The plaintiff's claims against defendants Nick Merony and the City of Southgate have no support in the record, and those defendants are entitled to judgment of dismissal as a matter of law. Likewise, there is no factual support for the plaintiff's claims against defendant Gratz based on the Equal Protection Clause, the Privileged and Immunities Clause, and the civil rights conspiracy statute, 42 U.S.C. § 1985(3). However, the plaintiff has shown that there are no material facts in

dispute on his claim that defendant Gratz violated his rights under the Fourth Amendment, and he has sustained his burden on liability for that claim.

Accordingly, it is **ORDERED** that the motion be decided on the papers submitted. *See* E.D. Mich. LR 7.1(f)(2).

It is further **ORDERED** that the hearing on the motions for summary judgment scheduled for December 22, 2016 is **CANCELLED**.

It is further **ORDERED** that the defendants' motion for summary judgment [dkt. #26] is **GRANTED IN PART AND DENIED IN PART**.

It is further **ORDERED** that counts II through V of the complaint are **DISMISSED WITH PREJUDICE**, and count I of the complaint is **DISMISSED WITH PREJUDICE** as to defendants Nick Merony and the City of Southgate, **ONLY**.

It is further **ORDERED** that the plaintiff's motion for partial summary judgment [dkt. #27] is **GRANTED** as to defendant Michael Gratz, **ONLY**, and liability is established in the plaintiff's favor and against defendant Bradford G. Gratz, Personal Representative of the Estate of Michael Gratz, deceased.

It is further **ORDERED** that the case will proceed to trial as scheduled on **January 24, 2017** on the issue of damages.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 13, 2016

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 13, 2016.

s/Susan Pinkowski
SUSAN PINKOWSKI