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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 PHILLIP SANDERS,
11 Plaintiff,

12 v.

13 OFFICERS MARK BISHOP AND IGNACIO
14 RUIZ,

15 Defendants.
16

1:06-cv-01264 OWW GSA

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
(DOC. 98)

17 I. INTRODUCTION.

18 Plaintiff Phillip Sanders ("Sanders") brings this *pro se*
19 action pursuant to 42 U.S.C. § 1983, alleging he was improperly
20 searched and arrested without probable cause by Fresno Police
21 Department ("FPD") officers in violation of his Fourth Amendment
22 rights. The allegations concern arrests of Plaintiff on November
23 30, 2005 by Defendant Officer Mark Bishop ("Bishop") and on May
24 6, 2006 by Defendant Officer Ignacio Ruiz ("Ruiz").

25 Before the court for decision are two motions by Defendants.
26 First, Defendants move for summary judgment on the following
27 grounds: a) Plaintiff has failed to establish a Fourth Amendment
28 violation because Plaintiff waived his Fourth Amendment rights as

1 part of his probation conditions and thus had no reasonable
2 expectation of privacy, b) even though Plaintiff's Fourth
3 Amendment rights were waived, Defendant Officers had probable
4 cause and reasonable suspicion when they searched and arrested
5 Plaintiff for probation violations, and c) Defendant Officers are
6 entitled to qualified immunity. Second, and in the alternative,
7 Defendants move to sever this action pursuant to Fed. R. Civ. P.
8 21 on the grounds that the two arrest incidents alleged by
9 Plaintiff are unrelated, involve different parties, there are no
10 questions of law or fact common to both parties, and it would
11 prejudice Defendants to try these incidents together. The motion
12 to sever was granted in an order dated December 15, 2008. (Doc.
13 116.)

14
15 II. FACTUAL AND PROCEDURAL BACKGROUND.

16 A. October 2002 Arrest Leading to Probation.

17 A review of Plaintiff's prior arrests is in order as they
18 provide background to the instant lawsuit and demonstrate
19 Defendant Officers' history of interactions with Plaintiff.
20 Defendants maintain that they have received extensive training in
21 handling individuals on probation, including how to make re-
22 arrests of probationers who violate their probation terms and how
23 to evaluate behavior and demeanor to determine whether a person
24 is under the influence of alcohol or a controlled substance.
25 (Defendants' Separate Statement of Undisputed Material Facts
26 ("DSSUMF") ## 1 and 2.) Both Officers Bishop and Ruiz have been
27 employed as officers with the FPD since 1998. (Docs. 98-8 and
28 98-10, Declaration of Mark Bishop and Declaration of Ignacio

1 Ruiz.)

2 On October 2002, Plaintiff was arrested for felony
3 possession of firearms, public disturbance, and resisting arrest
4 after he had an altercation with a bus driver on a city bus.
5 (DSSUMF #3.) Plaintiff entered felony and misdemeanor guilty
6 pleas to all charges and was scheduled to appear for sentencing
7 on April 13, 2004. (DSSUMF ## 4 and 5.)

8 On April 13, 2004, Plaintiff appeared with his attorney
9 Eddie Ruiz at his sentencing in the Superior Court of California,
10 County of Fresno, before Judge Edward Sarkisian for the October
11 2002 arrest incident. (DSSUMF #10.) Judge Sarkisian sentenced
12 Plaintiff to four years in prison and then stayed execution of
13 the sentence for three years, granting probation based on a
14 number of terms and conditions. (DSSUMF #12.) On the record,
15 Judge Sarkisian stated the terms and conditions of probation,
16 including a condition not to consume any alcohol and a search and
17 seizure condition:

18 And I want to state at this point, and I'll state at
19 the end of the sentencing proceeding, that if Mr.
20 Sanders doesn't literally follow every term and
21 condition of probation that I'm going to state, the
22 Court will have no hesitancy in lifting the stay and
23 committing him to the Department of Corrections.

24 It's clear from a reading of this report that Mr.
25 Sanders has, and hopefully in the future will not have,
26 but has difficulty in complying with a grant of
27 probation or parole. But I'm going to pronounce
28 judgment, stay execution of that judgment, and then
proceed as I indicated at the time the plea was
entered.

So in this matter for the offense of Penal Code Section
12021, subdivision (a)(1), as charged and pled to in
Count One, the Court notes that the factors in
aggravation far outweigh those in mitigation, noting
Defendant's repeated appearances before the Court and
his prior inability to comply with probation/parole.

1 Those factors clearly outweigh the factors in
2 mitigation. So as to the offense of 12021(a) in Count
3 One it will be the judgment and sentence of the Court
4 that the Defendant be imprisoned in the Department of
5 Corrections for the upper term or aggravated term of
6 three years.

7 Defendant will be further ordered to serve an
8 additional and consecutive one year term for the
9 enhancement pursuant to Penal Code Section 667.5,
10 subdivision (b), for a total commitment of four years.

11 Consistent with the Court's indicated sentence, the
12 Court will stay execution of that judgment. Noting that
13 the probation report itself states that the Defendant
14 is eligible for probation, but in their view not a
15 suitable candidate for a grant of probation. I will
16 stay execution of that judgment for a period of three
17 years. And find that the Defendant is an extremely
18 marginal candidate for a grant of probation at this
19 time. For a period of three years under the following
20 terms and conditions:

21 First, that he is to obey all laws and all directives
22 of the probation officer.

23 He is ordered to report to and maintain contact with
24 the Probation Department as directed by the Probation
25 Office.

26 He is further ordered not to drive a vehicle unless
27 properly licensed and insured.

28 Additionally, to seek and maintain gainful employment
during the period of probation.

Additionally, not to have in his possession any
restricted or dangerous drugs or narcotics, nor to
associate with known users or sellers.

Further, to submit to drug testing and to participate
in and complete a treatment program for narcotic abuse
as directed by the probation officer.

Further, *not to consume any alcoholic beverages* or be
in places where alcohol is the chief item of sale.

Additionally, to submit to alcohol testing and to
participate and complete a treatment program for
alcohol abuse as directed by the Probation Office.

Further, to attend and complete any anger management
classes as directed by the probation officer.

Further, to participate and complete any mental health
treatment as directed by the probation officer.

Further, to sign all necessary waivers of
confidentiality concerning these treatment programs.

He is further ordered not to possess any type of
firearm, dangerous or deadly weapon.

Additionally, not to use any force or violence or the
threat of force or violence against any person.

Additionally, not to have any contact with the victim
in this case or any members of the victim's family.

1 *To submit his person, property, place of abode and*
2 *vehicle to search and seizure at any time of the day or*
3 *night, with or without a warrant, by any peace or*
4 *probation officer....*

5 And specifically to enroll in and complete any
6 substance abuse program...

7 And, Mr. Ruiz, I'll give you a moment to confer with
8 Mr. Sanders to ascertain if he understands and accepts
9 the conditions of probation as just stated.

10 (DSSUMF #13, Reporter's Transcript from April 13, 2004 Sentencing
11 Hearing at 22:4-26:17) (emphasis added).

12 After conferring with Mr. Sanders, Mr. Ruiz told the court,
13 "He informs me he understands and accepts those conditions."
14 (Reporter's Transcript at 26:20-21.) Judge Sarkisian then asked
15 Mr. Sanders whether that was correct and Sanders replied, "Yes,
16 sir." (Reporter's Transcript at 26:22-23.)

17 On July 2, 2004, Plaintiff signed the Probation Department
18 Recommendations and Court Orders, which included a no-alcohol
19 condition and a search and seizure condition that stated,
20 "[s]ubmit person and property, including financial records,
21 vehicles, and place of abode to search and seizure at any time of
22 the day or night by any law enforcement officer, including
23 probation officers, with or without a search warrant, or other
24 process." (DSSUMF ## 19 and 20.)

25 At his deposition, Plaintiff did not recall the judge
26 telling him to refrain from alcohol consumption as part of his
27 probation conditions. (DSSUMF #17.) He also asserts in his
28 "Third Amended Complaint" that "[n]o probation instructions were
 signed permitting any search not to speak of the seizure or
 arrest." (DSSUMF #18.) This is in direct and material

1 contravention of the sentencing transcript, Sanders's express
2 acceptance of the search terms and conditions on the record in
3 open court, and his written acceptance of the warrantless search
4 conditions are voluntary, knowing and binding.

5
6 **B. Other Relevant Arrests.**

7 After Plaintiff was arrested in October 2002 but before the
8 April 2004 sentencing hearing, Officer Bishop was dispatched to a
9 food market on North Avenue on March 25, 2004 in response to a
10 female claiming Sanders assaulted her with a broom, threatened to
11 kill her with a gun, and tried to run her over with a car.

12 (DSSUMF ## 6 and 7.) Bishop arrested Plaintiff at his residence
13 for assault with a deadly weapon, threats to commit a crime, and
14 battery on a person he was dating. (DSSUMF ## 8 and 9.)

15 In a separate incident, on July 28, 2004, Officer Bishop and
16 another officer arrested Plaintiff without incident after
17 receiving information he was wanted on two felonies - threats to
18 commit a crime and dissuading a witness from testifying at trial
19 - for allegedly threatening a female friend inside Taha's store.

20 (DSSUMF #21.) The broadcast indicated Sanders was known to carry
21 a gun. (*Id.*)

22
23 **C. Arrest At Issue: November 30, 2005**

24 In his Third Amended Complaint, Plaintiff complains of a
25 December 3, 2005 unlawful search and arrest by Officer Bishop.
26 In his deposition, Plaintiff acknowledged that the actual date of
27 the arrest was November 30, 2005 and he incorrectly stated the
28 date in his complaint as December 3. (Sanders Deposition

1 Transcript at 21.)

2 Defendant Bishop contends he and Officer Christopher Aranas
3 made initial consensual contact with Sanders in an open parking
4 lot on November 30 as Plaintiff walked northbound away from a
5 group of people on the southeast corner of Fig and North Avenues,
6 a corner known for narcotic use. (DSSUMF ## 25 and 26.) Officer
7 Aranas drove the patrol car near Plaintiff. Plaintiff said he
8 was just walking to the bus stop. (DSSUMF #26.) Officer Aranas
9 asked him if he was on probation or parole. Officer Bishop asked
10 Plaintiff the reason he was on probation. (*Id.*) Plaintiff
11 stated "that information is already available." (*Id.*)

12 Plaintiff stated he was just going to the store and pointed
13 east. (DSSUMF #27.) Defendant Bishop states he knew no store in
14 that direction was open at that time of night. Defendant Bishop
15 claims he recognized Sanders from his prior interactions and
16 arrests of Sanders and believed Plaintiff was on probation and
17 lying to the officers. (*Id.*) Bishop notes that his observation
18 of Plaintiff's behavior led him to believe Plaintiff possibly had
19 in his possession an illegal item or substance. (*Id.*) Plaintiff
20 provided his identification and a records check was conducted.

21 Bishop contends he smelled a strong alcoholic odor coming
22 from Plaintiff and observed "moderate eye lid flutter," a sign of
23 possible narcotic use. (DSSUMF #28.) He further asserts that
24 Plaintiff was uncooperative and argumentative during the
25 encounter. The records check revealed Plaintiff was on active
26 felony probation with a search condition and a no-alcohol
27 condition. (*Id.*) Bishop searched Plaintiff's person and found
28 no illegal items. He arrested him because "due to the no alcohol

1 condition and lying to officers about his probation status, I had
2 probable cause to believe Mr. Sanders was under the influence of
3 alcohol, and was in violation of his probation terms and
4 conditions." (Bishop Declaration at 4.)

5 While a copy of the police reports for the March 2004 and
6 July 2004 arrest incidents is provided, Defendants do not furnish
7 a copy of the police report for the November 2005 incident.

8 D. Arrest At Issue: May 6, 2006

9 Defendant Officer Ruiz observed a vehicle parked in the
10 driveway of 347 W. Almy Street, partially in the driveway and
11 partially on the road, at about 10:47 p.m. during his normal
12 duties. (DSSUMF #30.) The area is a high-gang activity and
13 narcotic use area and the car appeared suspicious to Ruiz because
14 the house was far back from the road. (*Id.*) Officer Ruiz put a
15 spotlight on the car and noticed a person sitting inside. He
16 approached the car on the driver's side. The driver was Phillip
17 Sanders and Ruiz determined he was on probation. (*Id.*)

18 Ruiz claims he observed the following symptoms in speaking
19 with Sanders: dilated pupils, no pupillary reaction to light,
20 eyelid tremors and involuntary muscle movements. (DSSUMF #31.)
21 Ruiz states these symptoms are indicated when a person is under
22 the influence of crack cocaine. (*Id.*) Ruiz contacted dispatch
23 which relayed information that Sanders was on probation with a
24 search and seizure condition and was subject to alcohol and
25 narcotic testing. (DSSUMF #32.) Ruiz maintains he believed
26 Sanders was under the influence of a controlled substance,
27 suspecting crack cocaine usage, and that he was in violation of
28 his probation. (DSSUMF #33.)

1 Ruiz arrested Plaintiff and contacted Plaintiff's female
2 friend, who was in the house, to move Plaintiff's car instead of
3 calling a tow truck to remove the car. (DSSUMF ## 33 and 34.)
4 Defendants attach an FPD event report which lists dates and
5 history Ruiz received when he ran Plaintiff's name with dispatch.
6 Defendants do not provide the police report containing
7 information about the arrest.

8 Plaintiff denies he was under the influence of any substance
9 and claims the officers fabricated the description of his
10 condition.

11
12 III. LEGAL STANDARD.

13 Summary judgment is warranted only "if the pleadings,
14 depositions, answers to interrogatories, and admissions on file,
15 together with the affidavits, if any, show that there is no
16 genuine issue as to any material fact." Fed. R. Civ. Pro. 56(c);
17 *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998).
18 Therefore, to defeat a motion for summary judgment, the non-
19 moving party must show (1) that a genuine factual issue exists
20 and (2) that this factual issue is material. *Id.* A genuine
21 issue of fact exists when the non-moving party produces evidence
22 on which a reasonable trier of fact could find in its favor
23 viewing the record as a whole in light of the evidentiary burden
24 the law places on that party. See *Triton Energy Corp. v. Square*
25 *D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); see also *Anderson v.*
26 *Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986). The evidence
27 must be viewed in a light most favorable to the nonmoving party.
28 *Indiana Lumbermens Mut. Ins. Co. v. West Oregon Wood Products,*

1 *Inc.*, 268 F.3d 639, 644 (9th Cir. 2001), amended by 2001 WL
2 1490998 (9th Cir. 2001). Facts are "material" if they "might
3 affect the outcome of the suit under the governing law."
4 *Campbell*, 138 F.3d at 782 (quoting *Liberty Lobby, Inc.*, 477 U.S.
5 at 248).

6 The moving party bears the initial burden of demonstrating
7 the absence of a genuine issue of fact. *Devereaux v. Abbey*, 263
8 F.3d 1070, 1076 (9th Cir. 2001). If the moving party fails to
9 meet this burden, "the nonmoving party has no obligation to
10 produce anything, even if the nonmoving party would have the
11 ultimate burden of persuasion at trial." *Nissan Fire & Marine*
12 *Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th
13 Cir. 2000). However, if the nonmoving party has the burden of
14 proof at trial, the moving party must only show "that there is an
15 absence of evidence to support the nonmoving party's case."
16 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the
17 moving party has met its burden of proof, the non-moving party
18 must produce evidence on which a reasonable trier of fact could
19 find in its favor viewing the record as a whole in light of the
20 evidentiary burden the law places on that party. *Triton Energy*
21 *Corp.*, 68 F.3d at 1221. The nonmoving party cannot simply rest
22 on its allegations without any significant probative evidence
23 tending to support the complaint. *Devereaux*, 263 F.3d at 1076.

24 [T]he plain language of Rule 56(c) mandates
25 the entry of summary judgment, after
26 adequate time for discovery and upon
27 motion, against a party who fails to make a
28 showing sufficient to establish the
existence of an element essential to the
party's case, and on which that party will
bear the burden of proof at trial. In such
a situation, there can be "no genuine issue

1 as to any material fact," since a complete
2 failure of proof concerning an essential
3 element of the nonmoving party's case
necessarily renders all other facts
immaterial.

4 *Celotex Corp.*, 477 U.S. at 322-23.

5 "In order to show that a genuine issue of material fact
6 exists, the nonmoving party must introduce some 'significant
7 probative evidence tending to support the complaint.'" *Rivera v.*
8 *AMTRAK*, 331 F.3d 1074, 1078 (9th Cir. 2003) (quoting *Liberty*
9 *Lobby, Inc.*, 477 U.S. at 249). If the moving party can meet his
10 burden of production, the non-moving party "must produce evidence
11 in response....[H]e cannot defeat summary judgment with
12 allegations in the complaint, or with unsupported conjecture or
13 conclusory statements." *Hernandez v. Spacelabs Med., Inc.*, 343
14 F.3d 1107, 1112 (9th Cir. 2003). "Conclusory allegations
15 unsupported by factual data cannot defeat summary judgment."
16 *Rivera*, 331 F.3d at 1078 (citing *Arpin v. Santa Clara Valley*
17 *Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001)).

18
19 IV. DISCUSSION.

20 A. Waiver of Plaintiff's Fourth Amendment Rights With Respect
21 to Warrantless Searches.

22 Defendants contend that Plaintiff waived his Fourth
23 Amendment right to be free from unreasonable search and seizure
24 when he orally accepted and then signed the probation conditions
25 from his April 2004 sentencing. Specifically, Defendants argue
26 that California law allows a suspicionless search of a
27 probationer who has a probation condition permitting warrantless
28 searches, referred to as "searchable probation." Defendants cite

1 a series of California cases holding probationers subject to
2 searchable probation have waived their Fourth Amendment rights.
3 See *People v. Ramos*, 34 Cal.4th 494, 506 (2004) (“[B]y accepting
4 probation, a probationer consents to the waiver of Fourth
5 Amendment rights in order to avoid incarceration.”); *People v.*
6 *Bravo*, 43 Cal.3d 600, 607 (1987) (probationer’s consent to the
7 probation search condition was “a complete waiver of that
8 probationer’s Fourth Amendment rights, save only his right to
9 object to harassment or searches conducted in an unreasonable
10 manner”); *People v. Brown*, 191 Cal.App.3d 761, 766 (1987)
11 (“Defendant, by accepting probation with a condition of a search
12 waiver, simply did not have a reasonable expectation of privacy.
13 That is precisely the point of the condition.”); *People v. Mason*,
14 5 Cal.3d 759, 765 (1971) (“[A] probationer who has been granted
15 the privilege of probation on condition that he submit at any
16 time to a warrantless search may have no reasonable expectation
17 of traditional Fourth Amendment protection.”).

18 However, California state court cases are of limited
19 authority. Defendants also contend the Supreme Court’s decision
20 in *Samson v. California*, 547 U.S. 843 (2006), which upheld
21 suspicionless searches of parolees with parole search conditions
22 under the Fourth Amendment, portends similar results for
23 probation searches. Defendants argue the Court’s reasoning in
24 *Samson* - that parolees do not have a legitimate expectation of
25 privacy - is equally applicable to probationers, in that
26 probationers also do not have the same privacy rights afforded to
27 average citizens. *Samson* stated:

28 this Court has repeatedly acknowledged that a State’s

1 interests in reducing recidivism and thereby promoting
2 reintegration and positive citizenship among
3 probationers and parolees warrant privacy intrusions
4 that would not otherwise be tolerated under the Fourth
5 Amendment.

6 547 U.S. at 853. In another passage, the Court referred to "a
7 parolees's substantially diminished expectation of privacy." *Id.*
8 at 855. The Court also addressed the "concern that California's
9 suspicionless search system gives officers unbridled discretion
10 to conduct searches" by noting this concern "is belied by
11 California's prohibition on arbitrary, capricious, or harassing
12 searches." *Id.* at 856.

13 Defendants further contend that most parole search
14 conditions in California are identical to probation search
15 conditions and the expectation of the probationer with respect to
16 privacy is similarly constricted. Defendants argue that the
17 Ninth Circuit has consistently found no "constitutional
18 difference between probation and parole for purposes of the
19 Fourth Amendment." *Motley v. Parks*, 432 F.3d 1072, 1083 n. 9
20 (9th Cir. 2005) (en banc).

21 However, Defendants concede that the issue of whether
22 warrantless *probation* searches need to be supported by reasonable
23 suspicion has not been resolved by the courts. In *United States*
24 *v. Knights*, the Supreme Court upheld a warrantless search of a
25 probationer's residence where his acceptance of a probation
26 search condition "significantly diminished [the probationer's]
27 reasonable expectation of privacy." 534 U.S. 112, 120 (2001).
28 But the Court declined to decide whether the probation condition
completely eliminated the probationer's reasonable expectation of
privacy such that a suspicionless search would be constitutional

1 because, in *Knights*, the search was supported by reasonable
2 suspicion. *Id.* at 120, n. 6.

3 It is likely given the comparable situation and conditions
4 imposed on both parolees and probationers that the Ninth Circuit
5 would interpret *Samson* to also allow suspicionless searches of
6 probationers on searchable probation. The Supreme Court has
7 stated that both parolees and probationers have, respectively,
8 "substantially" and "significantly" diminished expectations of
9 privacy. See *Samson*, 547 U.S. at 855; *Knights*, 534 U.S. at 120.
10 Moreover, California's protections against arbitrary, capricious
11 or harassing searches serve as checks on police authority for
12 both parolees and probationers. Finally, the Ninth Circuit has
13 indicated in dictum in *United States v. Lopez* that it interprets
14 *Samson*, which addressed a parole search, to have resolved the
15 constitutionality of suspicionless searches left undecided by
16 *Knights*, which dealt with a probation search. *United States v.*
17 *Lopez*, 474 F.3d 1208, 1213-14 (9th Cir. 2007) (referring to
18 footnote in *Knights* declining to address constitutionality of
19 suspicionless probation search and stating "[w]e note that
20 *Knights* left open the issue decided in *Samson*").

21 It is undisputed Plaintiff was on probation subject to
22 warrantless search at the time of the arrests. The court
23 transcript and probation recommendations report evidence clearly
24 that warrantless search conditions were imposed on and accepted
25 by Plaintiff. In light of *Samson*, there is no material fact
26 dispute that Plaintiff could be searched for any reason, without
27 a search or arrest warrant.

28 For the foregoing reasons, with respect to Plaintiff's

1 unlawful search claim, Defendants' motion for summary judgment is
2 GRANTED as to both defendants.

3 B. False Arrest Claim.

4 "A claim for unlawful arrest is cognizable under § 1983 as a
5 violation of the Fourth Amendment, provided the arrest was
6 without probable cause or other justification." *Dubner v. City*
7 *and County of San Francisco*, 266 F.3d 959, 964 (9th Cir. 2001).
8 Probable cause is a defense to a false arrest claim and exists
9 when "under the totality of circumstances known to the arresting
10 officers, a prudent person would have concluded that there was a
11 fair probability that [the defendant] had committed a crime."
12 *Grant v. City of Long Beach*, 315 F.3d 1081, 1085 (9th Cir. 2002).

13 Plaintiff contends the officers arrested him without
14 probable cause and even without any level of suspicion of
15 criminal wrongdoing. He argues the officers are lying when they
16 state that Plaintiff showed signs of being under the influence of
17 alcohol or a controlled substance. He notes that no officer
18 conducted a drug or alcohol test, despite the mandatory testing
19 conditions stated in Plaintiff's probation order. Plaintiff also
20 points out that he was released without charges from both arrests
21 after being detained multiple days.

22 Defendants argue both arrests were supported by probable
23 cause, and they assert the defense of qualified immunity.
24 Deciding qualified immunity entails a two-step analysis. *Saucier*
25 *v. Katz*, 533 U.S. 194, 201 (2001). First, a court must ask
26 whether, taken in the light most favorable to the plaintiff, the
27 facts alleged show the officers' conduct violated a
28 constitutional right. *Id.* If the answer to this question is

1 yes, the court must then inquire whether the right violated was
2 "clearly established" by asking whether a reasonable officer
3 could believe that the defendant's actions were lawful. *Id.*
4 The traditional summary judgment approach should be used in
5 analyzing the first step of the *Saucier* analysis:

6 A court required to rule upon the qualified immunity
7 issue must consider, then, this threshold question:
8 Taken in the light most favorable to the party asserting
9 the injury, do the facts alleged show the [official's]
 conduct violated a constitutional right? Where the facts
 are disputed, their resolution and determinations of
 credibility are manifestly the province of a jury.

10 *Wall v. County of Orange*, 364 F.3d 1107, 1110-1111 (9th Cir.
11 2004) (internal citations and quotations omitted). In the second
12 step, the court must ask whether it would be clear to a
13 reasonable official that his conduct was unlawful in the
14 situation confronted. Although this inquiry is primarily a legal
15 one, where the reasonableness of the officer's belief that his
16 conduct was lawful "depends on the resolution of disputed issues
17 of fact...summary judgment is not appropriate." *Wilkins v. City*
18 *of Oakland*, 364 F.3d 949, 1110-11 (9th. Cir. 2003) (citing
19 *Saucier*, 533 U.S. at 216 (Ginsburg J., concurring)).

20 Officer Bishop contends he smelled an alcoholic odor coming
21 from Sanders and observed "moderate eye lid flutter," a sign of
22 narcotic use. Officer Ruiz maintains that he observed symptoms
23 of use of a controlled substance by Sanders such as dilated
24 pupils, no pupillary reaction to light, eyelid tremors, and
25 involuntary muscle movements. Sanders argues he exhibited no
26 such symptoms. He asserts that the officers are lying and used
27 his probation status to harass him and arrest him without
28 probable cause. He maintains that he has two witnesses who will

1 attest to this - Glenda Tony and Milesa Nutt.¹

2 This is a credibility determination - whether the officers'
3 version of events is accurate or whether the Plaintiff's version
4 is accurate. As such, this genuine issue of material fact is in
5 dispute and must be resolved by the trier of fact.

6 For the foregoing reasons, Defendants' motion for summary
7 judgment with respect to the false arrest claim is DENIED

8 The motion granting severence of the two cases has been
9 GRANTED by separate order. IT IS SO ORDERED.

10 Dated: December 29, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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26 _____
27 ¹ Defendants object to Sanders's reliance on these
28 witnesses, arguing that Plaintiff did not identify them in his
Rule 26 initial disclosures. Their statements are not considered
for the purposes of this motion.