UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ENRIQUE R. CORDOVA, Plaintiff, v. POLICE OFFICER JEFF ELY, Defendant.	No. CV-11-3066-CI REPORT AND RECOMMENDATION FOR ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSAL

Before the court on Report and Recommendation is Defendants' Motion for Summary Judgment. (ECF No. 20.) Plaintiff was in the custody of the Yakima County Department of Corrections when he filed this action. (ECF No. 1.) He is proceeding *pro se* and *in forma pauperis*. (ECF. No. 8.) Defendant is represented by attorneys Robert C. Tenny and Peter M. Ritchie, of Meyer, Fluegge & Tenney, P.S., in Yakima Washington. The matter was noted for hearing without oral argument. (ECF No. 21.) The parties have not consented to proceed before a magistrate judge.

PROCEDURAL HISTORY

Plaintiff filed a civil rights complaint on June 10, 2011, alleging violations of his constitutional rights pursuant to 42 U.S.C. § 1983. (ECF. No. 1.) On August 9, 2011, the court directed service on Defendant Ely, who answered the Complaint with jury demand on October 7, 2011. (ECF No. 10.) The court entered its scheduling order on December 13, 2011. (ECF No. 18.) The deadline

for filing dispositive motions and supporting briefs was set for June 1, 2012. *Id.* at 4. Defendant filed his Motion for Summary Judgment and the Clerk of the Court sent a "Notice to Pro Se Litigants of the Dismissal and/or Summary Judgment Rule Requirements" to Plaintiff on April 10, 2012, at Plaintiff's address of record.[1] Despite receiving notice pursuant to *Rand v. Rowland,* 154 F.3d 952 (9th Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999), Plaintiff has not responded to this Motion.[2] Accordingly, the facts

[1] Plaintiff notified the court he was released from incarceration on November 16, 2011, and notified the court of his current address of record in Yakima, Washington. (ECF No. 16.)

[2] LR 7.1, Local Rules for the Eastern District of Washington, states that failure to respond to a motion may be considered consent by the non-moving party to entry of an adverse order. LR 7.1(h)(5). However, the court may consider assertions in a plaintiff's complaint as evidence in opposition of a motion for summary judgment if (1) the facts asserted are based on personal knowledge, (2) they are admissible in evidence, and (3) the plaintiff has declared under penalty of perjury that the contents of the complaint are true and correct. *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995); *McElyea v. Babbitt,* 833 F.2d 196, 197 (9th Cir. 1987). Plaintiff's Complaint is verified pursuant to 28 U.S.C. § 1746. ECF No. 1 at 4. Therefore, allegations therein are considered by the court. However, although the court holds a *pro se* prisoner complaint to "less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and will not dismiss a Complaint due simply to inartful pleadings, a party opposing summary

as presented in Defendant's Statement of Facts are admitted to exist without controversy. LR 56.1(d).

COMPLAINT

Liberally construing Plaintiff's Complaint, he alleges his constitutional rights were violated when Defendant Ely illegally stopped and arrested him on December 17, 2008. He alleges Defendent unlawfully used excessive force during the stop by using a Taser gun on him twice. (ECF No. 1, 9 at 3-4.) He seeks declaratory judgment, compensatory and punitive damages, and attorney fees and costs. *Id.* at 4.

UNCONTROVERTED FACTS

In support of his Motion for Summary Judgment dismissal, Defendant Ely filed a Statement of Facts (SOF), supported by the Declaration of Debra Freiches, certified transcriptionist (ECF No. 25); and the Declaration of expert witness James Pugel, Assistant Chief for the Investigation Bureau Commander for the Seattle Police Department. Mr. Pugel attached his report and opinions regarding the degree of force used during the December 17, 2008, traffic stop as represented in the COBAN recording. (ECF No. 26.) In addition,

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judgment must present "significant probative evidence tending to support the complaint" to defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Plaintiff is not entitled to rely on mere allegations in his Complaint in opposing Defendant's motion for summary judgment. *See, e.g., Lew v. Kona Hosp.*, 754 F.2d 1420, 1423-24 (9th Cir. 1985).

Defendant has filed as non-scannable exhibit, a CD-ROM of the COBAN[3] video/sound recording of the traffic stop/arrest. Plaintiff has not objected to, or controverted by responsive memorandum, the Defendant's Statement of Facts (SOF) or evidence submitted in support of the facts. Therefore, under LR 56.1(b)(d), the following material facts are admitted to exist without controversy.

At about 1:50 a.m. on December 17, 2008, in Yakima, Washington, Defendant observed Plaintiff pull out of a parking lot onto a city street without first coming to a complete stop. Defendant's patrol car is equipped with a dashboard video/audio camera (COBAN) which was activated during the entire incident. Defendant pursued Plaintiff's vehicle which was proceeding within the speed limit down the city street. Plaintiff failed to stop his vehicle after Defendant activated his flashing lights, air horn, and siren. Rather, Plaintiff continued to drive about three quarters of a mile after the flashing lights were activated. Plaintiff drove to a secluded residential driveway and parked his car in the driveway. When Defendant pulled up behind Plaintiff's car, Plaintiff exited his vehicle, approached Defendant's patrol car while taking off his jacket and sweatshirt and swearing. Defendant, who was the only officer at the scene and had no back up at that time, exited the patrol car with his handgun drawn. It was dark. Plaintiff is much larger than Defendant. When Defendant saw Plaintiff did not have a

[3] "COBAN" is the tradename for the dashboard video/audio camera installed in Defendant's patrol car. Plaintiff and Defendant agree the December 17, 2008, stop/arrest was recorded on the COBAN video. (ECF No. 1 at 5; ECF No. 24.)

weapon, he holstered the handgun and took out his Taser. Defendant instructed Plaintiff 13 times to stop and get on the ground. When Plaintiff refused to cooperate, Defendant subdued him by deploying the Taser two times. He then handcuffed Plaintiff and took him into custody. Defendant issued Plaintiff a infraction citation for failure to stop before entering a city street under RCW 46.61.365.

Plaintiff did not contest the traffic infraction. On January 9, 2009, a jury found Plaintiff guilty of the following charges arising from the incident: driving with a suspended license, obstruction, driving under the influence, failing to stop when requested, and possession of an illegal substance (marijuana). Yakima County Superior Court affirmed Plaintiff's convictions for driving under the influence, obstruction, and failing to stop when requested. (ECF No. 22 at 3-4; ECF No. 23; ECF No. 24; ECF No. 27.)

SUMMARY JUDGMENT

FED. R. CIV. P. 56(c) states a party is entitled to summary judgment in its favor, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Once the moving party has carried the burden under Rule 56, the party opposing the motion must do more than simply show there is some "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The party opposing the motion must present facts in evidentiary

form and cannot merely rest on the pleadings. *Anderson*, 477 U.S. at 248. Genuine issues are not raised by mere conclusory or speculative allegations. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990). The court will examine the direct and circumstantial proof offered by the non-moving party and the permissible inferences which may be drawn from such evidence. A party cannot defeat a summary judgment motion by drawing strength from the weakness of the other party's argument or by showing "that it will discredit the moving party's evidence at trial and proceed in the hope that something can be developed at trial in the way of evidence to support its claim." *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987); *see also, Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216 (9th Cir. 1995).

Finally, the Supreme Court has ruled that FED. R. CIV. P. 56(c) requires entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. "A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. The question on summary judgment, then, is "whether the evidence is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-52. Where there is no evidence on which a jury could reasonably find for the non-moving party, summary judgment is appropriate. *Id.* at 252.

42 U.S.C. § 1983: FOURTH AMENDMENT

To state a claim under 42 U.S.C. § 1983, Plaintiff must allege (1) the violation of a right secured by the Constitution and laws of the United States, and (2) the deprivation was committed by a person acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988). A person subjects another to a deprivation of a constitutional right when committing an affirmative act, participating in another's affirmative act, or omitting to perform an act which is legally required. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Here, there is no issue to whether Defendant was acting under color of state law; the only question is whether Defendant's acts were unconstitutional.

A citizen's claim that a law enforcement officer used excessive force in the course of a traffic stop and arrest is governed by the Fourth Amendment and analyzed under the "objective reasonableness" standard. *Graham v. Conner*, 490 U.S. 386, 388 (1989). In determining whether an officer's actions were reasonable, several factors are considered: the severity of the crime at issue, whether the suspect posed an immediate threat of safety to the officer or others, and whether the plaintiff was actively resisting arrest or attempting to evade by flight. *Id.* at 396; *Reed v. Hoy*, 891 F.2d 1421, 1424 (9th Cir. 1989). These factors are not exclusive. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011). As explained by the Ninth Circuit, reasonableness for purposes of Fourth Amendment analysis requires a careful balancing of the nature of the intrusion

and the "countervailing governmental interests at stake." *Id.* (*quoting Graham*, 490 U.S. at 396). Reasonableness in this context is determined from the totality of the circumstances. However, the law is clear: the most important factor considered is whether the suspect posed an "immediate threat to the safety of the officers or others." *Id*.

Plaintiff claims Defendant violated his constitutional rights when he used a Taser gun on him during an illegal traffic stop and arrest.[4] In 2010, the Ninth Circuit determined a Taser used in the dart-mode constitutes "an intermediate, significant level of force," causing intense pain. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). Its use "must be justified by the governmental interest involved." *Id*.

In light of Plaintiff's refusal to comply with the Defendant's orders to stop and get on the ground gave, Defendant's use of the

[4] In his Complaint, Plaintiff alleges the December 17, 2008, traffic stop was illegal. (ECF No. 1, 9.) This conclusory allegation does not raise a genuine issue. *Lujan*, 497 U.S. at 888. Further, Plaintiff is estopped from asserting this claim under the *Heck* doctrine. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994)(dismissal of § 1983 claim required where judgment in favor of plaintiff would imply invalidity of state conviction or sentence). The evidence shows Plaintiff was convicted of committing the infraction of failure to stop under RCW 46.61.365. (ECF No. 27 at 27, 29.) He neither alleges nor provides evidence this conviction has been invalidated. Therefore the illegal stop claim under § 1983 is barred.

Taser to stop Plaintiff was reasonable. *Mattos*, 661 F.3d at 441 (applying *Graham* factors). Plaintiff actively resisted the police officer's efforts to stop him. Plaintiff refused to pull over on the main streets in response to the patrol car's flashing lights, air horn, and siren. Rather he continued to drive on to the driveway of an isolated residential area, and once he stopped, he exited his car after being instructed by Defendant to stay in the car. While being ordered repeatedly to stop and get on the ground, Plaintiff approached Defendant in a threatening manner that Defendant perceived as preparing for a fight. Defendant could not see if Plaintiff was armed, but he could see Plaintiff was significantly larger than him. Defendant reasonably feared for his safety. *See, e.g., Cook v. City of Bella Villa*, 582 F.3d 840 (8th Cir. 2009)(tasing of passenger not excessive force where lone officer pulled car over and passengers exited vehicle in threatening manner).

Once Defendant saw Plaintiff was unarmed, he holstered his gun and took out his Taser gun. After having ordered Plaintiff 13 times to get on the ground, Defendant activated his taser gun in dart mode and tased Plaintiff two times. Plaintiff complied after the second discharge, and Defendant took him into custody. Plaintiff presents no evidence of serious injury from the Taser darts. The COBAN audio establishes Plaintiff was conscious, verbal, and coherent once he was taken into custody and placed in the patrol car. (ECF No. 23, 24, 26, 27.)

Uncontroverted evidence, including the COBAN video, establishes Defendant's concerns for his safety during the stop and arrest were

justified. *See Draper v. Reynolds*, 396 F.3d 1270, 1278 (11th Cir. 2004)(plaintiff's repeated refusal to obey lone officer's commands, use of profanity, and belligerent, uncooperative behavior justified use of Taser force during late night traffic stop and arrest). Defendant reasonably feared for his safety when Plaintiff approached him aggressively and resisted arrest. The use of intermediate force was reasonable under the circumstances. *(See* ECF No. 26, *Declaration of James Pugel*.) After the second Taser discharge, Plaintiff complied and no further significant force was used in the arrest by Defendant.

Considering all inferences most favorable to Plaintiff drawn from the uncontroverted material facts, and in light of the circumstances confronting Defendant during the stop and arrest, Defendant's use of the Taser in dart mode to subdue Plaintiff is an objectively reasonable use of force. *Graham,* 490 U.S. at 397 (reasonableness embodies police officer's need to make "split-second judgments - in circumstances that are tense, uncertain and rapidly evolving"). Accordingly, **IT IS RECOMMENDED** Defendant's Motion for Summary Judgment on Plaintiff's claim of excessive force be **GRANTED** and the Complaint be **DISMISSED.**

QUALIFIED IMMUNITY

Even if Defendant's action violated the Fourth Amendment, Defendant is entitled to qualified immunity. The doctrine of qualified immunity protects a police office from liability where, as here, his conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Even if a

law enforcement officer's action resulted from a mistake of law or mistake of fact, the doctrine of qualified immunity shields him from the burdens of litigation and liability, as long as the officer was performing his duties reasonably. *Id*. at 231.

The qualified immunity analysis involves two steps: determination of whether (1) the alleged constitutional right was clearly established "in light of the specific context of the case," and (2) the officer reasonably believed his conduct did not violate "a clearly established constitutional right." *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009). The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). To defeat the affirmative defense of qualified immunity, Plaintiff must prove the constitutional right was sufficiently clear that a reasonable officer would understand what he is doing is unconstitutional. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004).

Defendant's decision to stop Plaintiff for violation of a traffic infraction was reasonable, since Defendant observed the infraction. (ECF No. 23 at 1-2.) *See Wren v. United Sates*, 517 806, 810 (1996) (stop is reasonable if officer has probable cause to beliefs a traffic violation occurred). Further, given the circumstances surrounding the pursuit and arrest of the Plaintiff, no reasonable officer would have been aware that the use of a Taser in dart mode twice to subdue an aggressive suspect would be a violation of a suspect's constitutional right. At the time of the December 2008 stop and arrest, the law was neither developed nor clearly established regarding the use of the Taser gun in dart mode.

See, e.g., *Bryan,* 630 F.3d at 826 (November 2010 Ninth Circuit holding that taser use in dart mode constitutes an intermediate use of force). Defendant's actions were reasonable in the context of this case, and the state of law regarding taser use was unclear at the time of incident; therefore Defendant is entitled to qualified immunity.

CONCLUSION

Because Plaintiff has failed to respond to Defendants' Motion, the facts presented by Defendants are uncontroverted and accepted as true. Plaintiff's allegations, unsupported by probative evidence, are insufficient to preclude the granting of summary judgment. Viewing the evidence in the light most favorable Plaintiff, his allegations do not rise to the level of constitutional violations. The evidence presents no issue of material fact, and there is no evidence before the court on which a jury could reasonably find for Plaintiff. In addition, Defendant is entitled to qualified immunity. Under the circumstances established by uncontroverted evidence, Defendant's actions during the encounter with Plaintiff were reasonable. Defendant did not violate clearly established law. Accordingly, **IT IS RECOMMENDED** Defendant's Motion for Summary Judgment be **GRANTED** and all claims against Defendant be dismissed with prejudice.

OBJECTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report within **fourteen (14)** days following service with a copy thereof. Such party shall file written objections with the Clerk of the Court and serve objections on all

parties, specifically identifying the portions to which objection is being made, and the basis therefor. Any response to the objection shall be filed within **fourteen (14)** days after receipt of the objection. Attention is directed to FED. R. CIV. P. 6(d), which adds additional time after certain kinds of service.

A district judge will make a de novo determination of those portions to which objection is made and may accept, reject, or modify the magistrate judge's determination. The judge need not conduct a new hearing or hear arguments and may consider the magistrate judge's record and make an independent determination thereon. The judge may, but is not required to, accept or consider additional evidence, or may recommit the matter to the magistrate judge with instructions. *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P. 72(b)(3); LMR 4, Local Rules for the Eastern District of Washington.

A magistrate judge's recommendation cannot be appealed to a court of appeals; only the district judge's order or judgment can be appealed.

The District Court Executive is directed to file this Report and Recommendation and provide copies to Plaintiff, counsel for Defendant and the referring district judge.

DATED July 16, 2012.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE