

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

OLIVER O'NEAL MANUEL §
v. § CIVIL ACTION NO. 6:13cv152
JASON McENTIRE, ET AL. §

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Plaintiff Oliver Manuel, an inmate currently confined in the Buster Cole State Jail in Bonham, Texas, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged deprivations of his constitutional rights. The lawsuit was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges. The named defendants are Athens police officers Jason McEntire and Marshall Passons.

Manuel's complaint reads, in its entirety, as follows:

On 1-26-12 I was at Brookshires 807 East Tyler SH 31 East Athens Texas 75751 when Officer Passons approach me in the parking lot and he did question, search me and he stated that I don't have nothing on me but a crack pipe. The next thing I know Officer Cook found some crack in a silver lighter case. Which Passons told Officer Cook it's not enough to do anything with.

At this time Sgt. McEntire comes and assist the problem by going inside the store to talk with the manager. When he comes out with criminal trespassing statement warning that's when he search my belongings and stated that I was being charged with possession of a controlled substance, robbery, PI, poss. of drug pari., and that's when I resisted.

In another portion of his complaint, Manuel states that McEntire “began to use closed hand force on my upper left side of my body and head,” and that Passons applied “[excessive] use of force by Tazing me more than three times.”

The Defendants have been ordered to answer the lawsuit and have filed a motion for summary judgment, to which Manuel did not file a response. In this motion, the Defendants state that Officers Passons and Dustin Cook were dispatched to the Brookshires grocery store in Athens, Texas to investigate a suspected theft. The police had received a complaint from store manager Michael Rogers, who stated that he had seen Manuel shoplift several items and exit the store.

The officers arrived and located Manuel from the description given over the radio, which was a black man wearing a bright orange jacket. They approached him and detected a strong smell of alcohol. When questioned, Manuel denied taking anything from the store, saying that he had picked up some razors but put them back on the shelf.

The officers then spoke to Rogers, who stated that he had reason to believe that Manuel had stolen items from the store, noting that as Manuel left the store, the shoplifting alarm was activated. Rogers explained that although the alarm locked the doors, Manuel was able to exit the store before the locks activated. Officer Passons performed a light pat-down search while Manuel was seated on his bicycle, but no items were located; however, Manuel appeared to be wearing more than one pair of pants.

Manuel also had a backpack in his possession, and during the search, he told the officers that he had a "crack pipe" in his backpack. Officer Cook searched the backpack and found a crack pipe and a cigarette lighter case which contained a white powder, which the officers suspected to be crack cocaine. Sgt. Jason McEntire arrived at the scene and discussed the shoplifting issue with Rogers.

When the drug paraphernalia and the white powder were found, Passons told Manuel to stand up, and Manuel began to get upset. Passons placed his hand on Manuel's arm to calm him down and out of concern that Manuel might try to run. McEntire told Manuel that he was under arrest and placed his hand on Manuel's right arm. Passons tried to place Manuel's hands behind him for handcuffing, but Manuel "tensed up" and tried to pull away. He then began to struggle against McEntire and Passons, and the officers determined that Manuel was attempting to pull free in order to run and evade arrest.

The officers struggled with Manuel in an effort to bring him under control, but Manuel pulled his left arm free and tried to strike McEntire in the face. Passons regained hold of him and the struggle continued, with all three men falling to the ground. McEntire told Manuel to stop resisting but Manuel did not. The officers believed that Manuel was attempting to pull away and stand up. McEntire used “closed hand force” on Manuel and tried to pull Manuel’s arms behind him, but without success.

As Manuel continued to resist, McEntire gave an order to use a Taser to bring Manuel under control. Passons drew his Taser and discharged it into Manuel’s leg. Manuel then stopped resisting and placed his hands behind his back. He was handcuffed and placed inside the patrol vehicle.

EMS personnel were called to the scene to examine Manuel. No major injuries were identified and he was taken to East Texas Medical Center in Athens where he was examined by a physician and released with a medical clearance.

Manuel was then taken to the Henderson County Jail. While he was changing clothes into his jail uniform, it was discovered that he was wearing multiple pairs of pants, and several items which had been stolen from Brookshires were recovered. Rogers, the store manager, later confirmed that the items had been shoplifted from Brookshires. The white substance was confirmed to be crack cocaine.

The Defendants argue that the summary judgment evidence shows that the officers acted in a non-aggressive manner until Manuel resisted and pulled away. The argue that they had probable cause to arrest Manuel and that Manuel did not suffer any cognizable injury. Even if he did suffer an injury, the Defendants assert that the use of force was not clearly excessive to the need in light of Manuel’s resistance. Finally, the Defendants argue that they are entitled to qualified immunity.

The Summary Judgment Evidence

The first two items of summary judgment evidence are the affidavits of Officer Passons and Sgt. McEntire, recounting their version of events as set out above. The third exhibit is the affidavit of Michael Rogers, manager of the Brookshires grocery store where the incident occurred. This

affidavit says that on the evening of Thursday, January 26, 2012, Rogers saw Manuel walking around inside the store. He saw Manuel pick up some items from the mens grooming aisle and then move to another part of the store. He did not see what Manuel did with those items, but Manuel did not pay for them.

When Manuel tried to leave the store on the west side, without passing through the checkout stands, Rogers states that the alarm sounded and the door locked. Manuel then moved quickly to the east side exit, where the alarm again sounded, but he was able to leave the store before the doors locked. Rogers called the police and officers were dispatched to the area. Rogers states that at the jail, it was confirmed that Manuel had stolen six packages of razors and two containers of body wash from the store.

The fourth exhibit is a videotape of the actual incident, showing various angles from cameras placed in two police cars. This video essentially confirms the account set forth in the motion for summary judgment. It shows that Manuel initially stated that he had gone into the store, purchased some lottery tickets, and then left, but later acknowledged that he had walked through the store and picked up some razors, although he insisted that he had put them back. He told the officers that a pipe found in his possession was used for smoking crack cocaine, although he denied having any crack cocaine on him.

At 12:02 elapsed time on video no. 4882, Camera 1, two police officers are looking through Manuel's bag while Manuel was talking to an officer standing next to him. Manuel is straddling his bicycle. One of the officers says something inaudible to the officer standing by Manuel's bicycle, who tells Manuel "all right, go ahead and stand up." Manuel says "there ain't nothing in there." The officer tells him "hold on, we'll talk about it." The officer who had spoken comes over and the two policemen start to put Manuel's hands behind his back. Manuel is protesting and saying "I'm trying to stand up." The use of force begins at 12:16 on the video, when the officers start to put Manuel's hands behind his back, and ends at 12:48 with Manuel laying on the ground. When the officers try to place his hands behind his back, Manuel appears to stumble over the pedals or wheels of his

bicycle; at the same time, he throws both of his arms, striking Sgt. McEntire, the officer nearest to the camera, with his left elbow. McEntire pulls Manuel down and McEntire, Manuel, and Passons all fall to the ground. The other officer from the car rushes over. Manuel kicks his leg once and rolls over onto his side. He gets up onto his hands and knees while the officers try to hold him down. Manuel is trying to stand up at 12:42 when Passons removes a Taser from his belt and applies it to Manuel's right leg. Manuel yells and rolls over. Passons applies the Taser to Manuel's left leg and Manuel stops fighting. He is placed in the back of the police car. The officers advise him that crack cocaine was found in a cigarette lighter. Medical personnel are called. They examine him and he is taken to the hospital, at which time the video ends.

The fifth exhibit is a submission form to the Texas Department of Public Safety Laboratory, which conforms that the metal container with an off-white rock contained crack cocaine. The final exhibit is an "inmate medical clearance report" by a physician named Dr. Bywaters, finding Manuel medically acceptable for admission to jail.

Legal Standards and Analysis

The Fifth Circuit has explained that in order to make a lawful arrest, an officer must have probable cause to believe that the suspect committed a crime. *Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013). Probable cause exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense. *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004). If an officer reasonably but mistakenly believes that probable cause existed, he is entitled to qualified immunity. *Club Retro, LLC v. Hilton*, 568 F.3d 181, 206 (5th Cir. 2009).

In Texas, the act of resisting can supply probable cause for the arrest itself. *Ramirez*, 716 F.3d at 375, citing *Padilla v. Mason*, 169 S.W.3d 493, 504 (Tex.App.-El Paso 2005, pet. denied) (noting that under Tex. Penal Code Ann. Art. 38.03, it is no defense to prosecution that the arrest or search was unlawful). Pulling out of an officer's grasp is sufficient to constitute resisting arrest.

Pumphrey v. State, 245 S.W.3d 85, 89 (Tex.App.-Texarkana 2008, pet. ref'd); accord, *Torres v. State*, 103 S.W.3d 623, 627 (Tex.App-San Antonio 2003, no pet.) (person who uses force to shake off an officer's detaining grip may be guilty of resisting arrest).

In this case, the summary judgment evidence shows that the manager reported to police that Manuel had stolen some items from the store. Manuel admitted that he had a pipe used for smoking crack cocaine in his possession, and a powdered substance was found which the officers suspected was crack cocaine, a suspicion later confirmed through chemical analysis. When the officers sought to place Manuel under arrest, he stumbled backwards and threw his arms out, striking Sgt. McEntire with his elbow. Manuel later struggled against the officers by getting to his hands and knees while they were attempting to subdue him on the ground. The totality of facts and circumstances make clear that the officers had probable cause to arrest Manuel. To the extent that Manuel raises a claim of false arrest, such claim is without merit.

Manuel also complains that excessive force was used against him in the course of the arrest. To establish a violation of the constitutional right to be free from excessive force, Manuel must show (1) an injury, (2) which resulted from the use of force that was clearly excessive to the need, and (3) the excessiveness of which was objectively unreasonable. *Ramirez*, 716 F.3d at 377, citing *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011). Whether the force was reasonable under the Fourth Amendment is determined from the perspective of a reasonable officer at the scene, and not with the 20/20 benefit of hindsight. *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008).

The reasonableness of the force is ascertained by the totality of the circumstances, with consideration of the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Elizondo v. Green*, 671 F.3d 506, 510 (5th Cir. 2012), citing *Graham v. Conner*, 490 U.S. 386, 396 (1989).

In this case, Manuel does not allege that he suffered any injuries, and Dr. Bywaters determined that he was in a medically acceptable condition to enter the Henderson County Jail. On

the video, the medical personnel arrived at 21:19 elapsed time. The EMT's spoke briefly to the police and then approached the car. The examination of Manuel took place off camera but can be heard. Manuel said that his hand hurts, and initially denied neck or back pain. The medical personnel asked to see his hand. Manuel then said he has a slight pain in his arm and his neck. The medical personnel stated that they wanted to take him over to the truck to get vital signs. Manuel can be heard complaining to the officers about the incident. He told the medical personnel that his ribs don't hurt but he has a pain in his neck; he also referred to his knee.

Thus, while Manuel failed to offer any evidence that he was injured, the video appears to indicate that he complained of injuries to medical personnel at the scene. The element of injury is inconclusive; the Court will assume, without deciding, that Manuel's injuries were sufficient to sustain a constitutional claim.

The second and third elements for an excessive force claim are that the force used be "clearly excessive to the need" and that this excessiveness be "objectively unreasonable." In this case, the summary judgment evidence, including the video and the affidavits, shows that Manuel was identified as having stolen items from the grocery store. He had a smell of alcohol about him and was found to have in his possession a pipe which he acknowledged was used to smoke crack cocaine. When he was placed under arrest, McEntire and Passons tried to place his hands behind him for handcuffing. Manuel stepped back, apparently to get off of his bicycle, and stumbled. When he did, he threw his arms out, striking Sgt. McEntire with his elbow. McEntire fell to the ground, pulling Manuel with him, and Passons went to the ground as well. A struggle ensued with Manuel trying to get to his hands and knees and the officers trying to keep him on the ground. When Manuel was able to get to his hands and knees, he tried to stand up, and Passons tased him in the leg. This action successfully brought Manuel under control. The entire use of force lasted 32 seconds.

In *Walker v. City of Cleveland, Miss.*, slip op. no. 12-60759, 2013 WL 5340741 (5th Cir., September 25, 2013), the decedent Jermaine Williams fled from officers of the Cleveland Police Department. Repeated warnings were given that a Taser gun would be used, but when he continued

to resist, Williams was Tased three or four times. He continued to resist and was only subdued when other officers arrived. After being handcuffed, however, Williams became unconscious and was pronounced dead after being taken to the hospital; the cause of death was determined to be a combination of the toxic effects of cocaine in connection with the Taser shocks.

Williams' family filed suit, alleging *inter alia* a claim of excessive force. The district court determined that the Defendants were entitled to qualified immunity. In affirming this decision, the Fifth Circuit agreed with the district court that under the circumstances in the case, which included Williams' fleeing the scene with drugs in hand, non-compliance, ignored the officers' warnings, and struggled with the officers, the force used was not unreasonable.

By contrast, in *Massey v. Wharton*, 477 Fed.Appx. 256, 2012 WL 2004968 (5th Cir., June 5, 2012), and *Newman v. Guedry*, 703 F.3d 757, 762 (5th Cir. 2012), the defendants were denied summary judgment on the use of force claims. In both of those cases, the persons subjected to the force had not been resisting or attempting to flee; in *Newman*, the officers shoved, hit, and tased the plaintiff after he made an off-color joke.

In the present case, Manuel threw out his arms, striking Sgt. McEntire with his elbow, and then engaged in a struggle with the officers after falling to the ground. Unlike Newman or the Masseys, probable cause existed for the officers to suspect Manuel of criminal activity even prior to the arrest. The summary judgment evidence shows that under the totality of the circumstances, the force used was not excessive to the need, nor was it clearly unreasonable.

Qualified Immunity

The Defendants argue that they are entitled to qualified immunity as to claims for damages brought against them in their individual capacity. The Fifth Circuit has stated that the qualified immunity defense serves to shield a government official from civil liability for damages based upon the performance of discretionary functions if the official's actions were reasonable in light of then clearly existing law. *Atteberry v. Nocona General Hospital*, 430 F.3d 245, 253 (5th Cir. 2005), citing *Thompson v. Upshur County*, 245 F.3d 447, 456 (5th Cir. 2001). In this regard, the Fifth

Circuit has explained that even if the official's conduct violated a clearly established constitutional right, the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable. *Jones v. Collins*, 132 F.3d 1048, 1052 (5th Cir. 1998).

After the defendant properly invokes qualified immunity, the plaintiff bears the burden to rebut its applicability. *Tolan v. Cotton*, 713 F.3d 299, 304 (5th Cir. 2013). In order to abrogate a public official's right to qualified immunity, the plaintiff must show the official's conduct violated a constitutional or statutory right and the official's actions constituted objectively unreasonable conduct in the light of clearly established law at the time of the conduct in question. *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). In other words, as the Fifth Circuit has explained, "when the defendant moves for summary judgment based on qualified immunity, it is the plaintiff's burden to demonstrate that all reasonable officials similarly situated would have then known that the alleged acts of the defendant violated the Constitution." *Stevenson v. Young*, slip op. no. 12-60138, 2013 WL 1152046 (5th Cir., March 19, 2013), citing *Thompson v. Upshur County*, 245 F.3d 447, 460 (5th Cir. 2001).

In this case, Manuel has failed to show that the conduct of the Defendants violated a clearly established constitutional or statutory right, nor that the Defendants' actions were objectively unreasonable in light of clearly established law. A reasonable police officer would not believe that the conduct of the Defendants violated the Constitution, because the force was used in response to Manuel's actions in resisting placement under arrest.

The Fifth Circuit has explained that qualified immunity in an excessive force case involves two distinct reasonableness inquiries. One is whether the officer's use of force is objectively reasonable in light of Fourth Amendment standards, and the other is whether the right was clearly established such that a reasonable officer would know that the particular level of force used was excessive. While the right to be free from excessive force is clearly established in a general sense, the right to be free from the degree of force used in a given situation may not have been clear to a reasonable officer at the scene. *Hogan v. Cunningham*, 722 F.3d 725, 734-35 (5th Cir. 2013).

As explained above, the amount of force used was reasonable in light of Fourth Amendment standards because such force was not clearly excessive to the need. The qualified immunity analysis arrives at the same conclusion. The summary judgment evidence shows that Manuel did not have a clearly established constitutional right to be free from the specific amount of force used by the Defendants under the facts and circumstances known by the Defendants to exist at the time of the use of force. The Defendants did not act in an objectively unreasonable manner and are entitled to the defense of qualified immunity.

Conclusion

On motions for summary judgment, the Court must examine the evidence and inferences drawn therefrom in the light most favorable to the non-moving party; after such examination, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Securities and Exchange Commission v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1994); *General Electric Capital Corp. v. Southeastern Health Care, Inc.*, 950 F.2d 944, 948 (5th Cir. 1992); Rule 56(c), Fed. R. Civ. P.

Summary judgment should be granted when the moving party presents evidence which negates any essential element of the opposing party's claim, including a showing that an essential element of the opposing party's claim is without factual support. *First American Bank & Trust of Louisiana v. Texas Life Ins. Co.*, 10 F.3d 332, 334 (5th Cir. 1994). The granting of summary judgment is proper if the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Caldas & Sons v. Willingham*, 17 F.3d 123, 126 (5th Cir. 1994). Once the movant makes this showing, the burden shifts to the non-movant to come forward with evidence sufficient to establish the existence of a genuine issue of material fact. *Id.* at 126-27.

Although the Court must draw all inferences in favor of the party opposing the motion, an opposing party cannot establish a genuine issue of material fact by resting on the mere allegations

of the pleadings. *Hulsey v. State of Texas*, 929 F.2d 168, 170 (5th Cir. 1991). Similarly, a bald allegation of a factual dispute is insufficient, in itself, to create a genuine issue of material fact. *Recile*, 10 F.3d at 1097 n.15. A non-movant cannot manufacture a factual dispute by asking the Court to draw inferences contrary to the evidence. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In short, a properly supported motion for summary judgment should be granted unless the opposing party produces sufficient evidence to show that a genuine factual issue exists. *Hulsey*, 929 F.2d at 170, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The Fifth Circuit has stated that once the defendants have shifted the burden to the plaintiff by properly supporting their motion for summary judgment with competent evidence indicating an absence of genuine issues of material fact, the plaintiff cannot meet his burden by some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted). The Court added that “summary judgment is appropriate in any case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the non-movant.” *Id.*

The movant has the initial burden of proof to demonstrate the lack of a genuine issue of material fact and the appropriateness of judgment as a matter of law. *John v. State of Louisiana Bd. of Trustees for State Colleges and Universities*, 757 F.2d 698, 708 (5th Cir. 1985). Once the movant has done so, the burden then shifts to the plaintiff, who must identify specific evidence in the record and articulate the precise manner in which that evidence supports his claims; the district court has no duty to sift through the record in search of evidence to support a party’s opposition to summary judgment. *Stults v. Conoco, Inc.*, 76 F.3d 651, 656 (5th Cir. 1996). As for material facts on which the plaintiff will bear the burden of proof at trial, he must come forward with evidence sufficient to enable him to survive a motion for directed verdict at trial. *Id.*; see also *Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004) (non-movant must

identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim).

In this case, the pleadings and the competent summary judgment evidence, viewed in the light most favorable to the Plaintiff, show there are no disputed issues of material fact and that the Defendants are entitled to judgment as a matter of law. Accordingly, the Defendants' motion for summary judgment should be granted.

RECOMMENDATION

It is accordingly recommended that the Defendants' motion for summary judgment (docket no. 20) be granted and that the above-styled civil action be dismissed with prejudice.

A party's failure to file objections to the findings, conclusions, and recommendations contained in this Report within 14 days after service with a copy thereof shall bar that party from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So ORDERED and SIGNED this 27th day of November, 2013.


K. NICOLE MITCHELL
UNITED STATES MAGISTRATE JUDGE