UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

TEDDY RAY MITCHELL and wife, JUDY LEE MITCHELL	)	
v.	)	No. 2:07-CV-146
CITY OF MORRISTOWN, HAMBLEN COUNTY, OFFICER FRANK LANE, OFFICER MATT STUART, OFFICER TROY WALLEN, OFFICER ANDREW KYLE, OFFICER ERIC CARSON, LT. CHRIS WISECARVER, CHIEF OF POLICE ROGER OVERHOLT, MAYOR GARY JOHNSON, and JOHN DOES	)	

ORDER

This is a civil rights matter brought pursuant to 28 U.S.C. § 1331. Pending before the Court are Defendants City of Morristown, Frank Lane, Matt Stuart, Troy Wallen, Andrew Kyle, Chris Wisecarver, Roger Overholt, and Gary Johnsons' Motion for Summary Judgment [Doc. 83], Defendants Hamblen County and Eric Carson's Motion for Summary Judgment [Doc. 87], and plaintiffs' Motion for Partial Summary Judgment [Doc. 90].

I. PROCEDURAL HISTORY

As a result of his actions while attending a rally on June 24, 2006, plaintiff Teddy Ray Mitchell ("Mitchell") was indicted in Hamblen County, Tennessee on misdemeanor charges of disorderly conduct and resisting arrest. A jury subsequently convicted him on the disorderly conduct charge and acquitted him on the charge of resisting arrest. Mitchell's conviction was affirmed by the Supreme Court of Tennessee. *State v. Mitchell*, 343 S.W.3d 381 (Tenn. 2011) ("*Mitchell I*").

Prior to the affirmance of his disorderly conduct conviction by the Tennessee Supreme Court, Mitchell filed the instant action asserting seven (7) causes of action. Counts A, B and E assert causes of action pursuant to 42 U.S.C. § 1983 for alleged violations of Mitchell's First Amendment rights; Count C asserts a § 1983 cause of action for false arrest; Count D asserts a § 1983 cause of action for excessive force; Count F asserts a state law cause of action for negligence, and Count G asserts a state law cause of action for malicious prosecution with respect to both the disorderly conduct charge and also the charge of resisting arrest.

In light of the holding in *Mitchell I*, plaintiffs now concede that some of their claims are no longer viable, and they concede that summary judgment as to all defendants is warranted with respect to Count C (false arrest) and Count G, to the extent it alleges malicious prosecution for disorderly conduct. Accordingly, the Court will grant defendants summary judgment on these claims and will not discuss them

further.

II. FACTS

Unless otherwise noted, the following material facts are either not in dispute or are viewed in the light most favorable to the plaintiffs.

A rally was scheduled at 2:00 p.m. on June 24, 2006, at the Hamblen County Courthouse grounds in Morristown by a group attempting to raise public awareness of the effects of illegal immigration. Organizers promoted the event with a pamphlet that extended a general invitation to attend the rally, "[b]ring your family, wave the American flag proudly, and display signage that educates."

Lieutenant Chris Wisecarver, a training officer with the Morristown Police Department, was placed in charge of the planning and coordination of security for the rally. Because he had received information that between three and five hundred members of an Hispanic organization, having views on the immigration issue that were in conflict with the organizers of the event, also planned to attend, Wisecarver, with the assistance of the Hamblen County Sheriff's Department and the Tennessee Highway Patrol, arranged a security force of between seventy-five and ninety law enforcement officers in an effort to avoid possible confrontations between the two groups. Some officers were stationed on the roofs of buildings, a number of squad cars and an armored personnel carrier were present, designated parking areas were

established, and a perimeter of the rally area was marked with temporary orange fencing. At a checkpoint established by the police, attendants were screened and searched in order to assure that no weapons were present. The security plan permitted the American flag and signs, but did not permit flagpoles or signs on poles or sticks[1] of any size to be carried into the demonstration area for fear that they might either contain a hidden weapon or be used as a weapon. A single flagpole displaying the American flag was placed near the speaker stand, which was separated from those in attendance by a fence and several officers.

The course of the events that led to the arrest of Teddy Ray Mitchell for disorderly conduct are well documented not only by the deposition testimony in this matter, but also by two digital video recordings. These video recordings are part of the record and their authenticity is not in dispute. One of these videos was taken by the Tennessee Highway Patrol (the "THP video") from the upper floor of the courthouse and the other was taken from a different angle by a spectator (the "Spectator video").

The THP video is greater than an hour in duration and focuses during all relevant time periods on the police checkpoint at the entrance to the rally. The video depicts Mitchell walking toward the checkpoint after parking his vehicle. For

[1] This latter part of the plan is not implicated in this case since Mitchell tried to enter the rally only with an American flag on a flagpole, not a sign.

whatever reason, Mitchell fails to stop at the screening checkpoint and attempts to walk straight through. Consequently, an officer at the checkpoint steps in front of Mitchell to block his path. Almost immediately thereafter, Mitchell can be heard yelling and shouting at the officers, though little is intelligible. The officers cannot be heard. The video depicts Mitchell being arrested shortly after his arrival at the checkpoint. The Spectator video, which is not in a fixed position, focuses on the checkpoint shortly after Mitchell's arrival there. The audio portion is marginally better than the THP video, and Mitchell can be heard yelling at the officers at the checkpoint seconds before his arrest, "Can you take the damn Mexican flag in here?" Neither video recording used time-stamping to reference specific portions of the video.

According to uncontested deposition testimony, Mitchell's encounter with the police began on June 24, 2006, when he attempted to park his vehicle at the rally. As Mitchell attempted to park along the sidewalk near the front of the courthouse, Andre Kyle, an African-American patrol officer with the Morristown Police Department, walked up to Mitchell's car window and informed him that he could not park there during the rally. Officer Kyle claims that Mitchell got irate and said, "There's no nigger going to tell me where I can and can't park." Kyle also claims that he had to call for back-up from a white officer. Mitchell disputes this, though he admits that he

questioned Officer Kyle about why he could not park there. Furthermore, Mitchell agrees that a second (white) officer, Matt Stuart, did approach his car window and speak with him before he finally agreed to move his car. Regardless of what exactly transpired between Mitchell and Officers Kyle and Stuart, it is clear that this interaction made an impression on Stuart sufficient that he informed the officers at the security checkpoint to be on the lookout for Mitchell and to prepare themselves for a possible altercation. Furthermore, Officers Kyle and Stuart positioned themselves at the checkpoint to act as back-up in case a confrontation were to ensue with Mitchell.

As noted, *supra*, after parking his car, Mitchell approached the security checkpoint at a relatively brisk speed and failed to stop at the security checkpoint. Thus, an officer stepped in front of Mitchell to block his way. What the officers then told Mitchell is in dispute. Mitchell, who is deaf in his left ear, claims that the officers told him that he was not permitted to take his American flag into the rally. The officers claim that they merely told Mitchell that, for safety reasons, he could not take the flag pole into the rally but that the American flag itself was permitted. Following this initial exchange, Mitchell can be heard on the Spectator video yelling at the officers, "Can you take the damn Mexican flag in here? Can you take the Mexican flag in here?"

Following some additional exchange between Mitchell and the officers

regarding whether he would be permitted to take his flag and/or flag pole into the rally, the THP video shows that Officer Stuart reached out and placed his hands on Mitchell's arm. In response Mitchell stepped back and pulled away. Mitchell also admits that, concurrent with these actions, he told Officer Stuart, "Don't touch me." At this point, Stuart took Mitchell down to the ground with the aid of four other officers. The THP video depicts that just as the four officers took Mitchell down to the ground, a fifth officer, Frank Lane, rushed to the scene and simultaneously tasered (or attempted to taser - there is some dispute whether the taser made contact with Mitchell's body) Mitchell. After Mitchell was taken to the ground, handcuffs were applied and he was lifted up and placed into the back of a police car.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). The Court cannot weigh the evidence, judge

the credibility of witnesses, or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To refute such a showing, the non-moving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material factual dispute. *Id.* at 322. A mere scintilla of evidence is not enough. *Anderson*, 477 U.S. at 252; *McClain v. Ontario, Ltd.*, 244 F.3d 797, 800 (6th Cir. 2000). This Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the non-moving party. *Anderson*, 477 U.S. at 248-49; *Nat'l Satellite Sports*, 253 F.3d at 907. If the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323. If this Court concludes that a fair-minded jury could not return a verdict in favor of the non-moving party based on the evidence presented, it may enter a summary judgment. *Anderson*, 477 U.S. at 251-52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

The party opposing a Rule 56 motion may not simply rest on the mere allegations or denials contained in the party's pleadings. *Anderson*, 477 U.S. at 256.

Instead, an opposing party must affirmatively present competent evidence sufficient to establish a genuine issue of material fact necessitating the trial of that issue. *Id.* Merely alleging that a factual dispute exists cannot defeat a properly supported motion for summary judgment. *Id*. A genuine issue for trial is not established by evidence that is "merely colorable," or by factual disputes that are irrelevant or unnecessary. *Id.* at 248-52.

III. ANALYSIS

a. 42 U.S.C. § 1983 Claim of Excessive Force (Count D)

Section 1983 imposes liability on any "person who, under color of any statute, ordinance, regulation, custom or usage, of any State" subjects another to "the deprivation of any rights, privileges, or immunities secured by the Constitution or laws." 48 U.S.C. § 1983. In order to prevail on such a claim, a § 1983 plaintiff must establish "(1) that there was the deprivation of a right secured by the Constitution and (2) that the deprivation was caused by a person acting under color of state law." *Wittstock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003). " Section 1983 is not the source of any substantive right, but merely provides a method for vindicating federal rights elsewhere conferred." *Humes v. Gilless*, 154 F.Supp.2d 1353, 1357 (W.D. Tenn. 2001).

Government officials, including police officers, are immune from civil liability

unless, in the course of performing their discretionary functions, they violate the plaintiff's clearly established constitutional rights. *Hills v. Kentucky*, 457 F.3d 583, 587 (6th Cir. 2006). In other words, a "defendant enjoys qualified immunity on summary judgment unless the facts alleged and evidence produced, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established." *Jefferson v. Lewis*, 594 F.3d 454, 459-60 (6th Cir. 2010). The defense of qualified immunity "ordinarily applies unless it is obvious that no reasonably competent official would have concluded that the actions taken were [ ]lawful." *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009). When qualified immunity is asserted, the plaintiff bears the burden of showing that the defendants are not entitled to that defense. *Id*. at 907. Specifically, the plaintiff "must show both that, viewing the evidence in the light most favorable to [him], a constitutional right was violated and that the right was clearly established at the time of the violation." *Id*.

The Supreme Court has explained, "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion or threat of force thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "All claims that law enforcement

officers have used excessive force - deadly or not ... should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id*. at 394.[2] The Court must apply "the objective reasonableness standard, which depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight." *Jefferson*, 594 F.3d at 461. Such factors include (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." *Id*. at 396-97. Further, the Court conducts the reasonableness inquiry objectively, based on the "information possessed" by the officer, without regard to the officer's subjective beliefs and without regard to facts not known by the officer at the time of the incident. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The Court holds that the defendant officers are entitled to qualified immunity from plaintiffs' § 1983 claims because plaintiffs cannot show that the officers violated

[2] Plaintiffs mistakenly bring their claim of excessive force pursuant to the Fourteenth Amendment. In accordance with *Graham*, the Court will analyze their claim under the Fourth Amendment.

Mitchell's Fourth Amendment right to be free from the use of excessive force. According to their Amended Complaint, plaintiffs base their excessive force claim on the following theories: (1) that it was objectively unreasonable for the officers to "gang-tackl[e]" Mitchell, and (2) that it was objectively unreasonable that Mitchell was tasered.

Based on the record, plaintiffs cannot make any of these showings. When assessing the reasonableness of a law enforcement officer's actions, the Court must analyze the arrest in segments. *Morrison v. Board of Trustees of Green Tp.*, 583 F.3d 394, 401 (6th Cir. 2009). Therefore, the Court will consider each of plaintiffs' allegations of excessive force as they occurred on June 24, 2006.

i. Gang-tackling

The plaintiffs assert that Mitchell was gang-tackled and that the officers jumped on him. As a preliminary matter, the Supreme Court has made it clear that "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Graham*, 490 U.S. at 396. With this in mind, the Court will apply the *Graham* factors. Mitchell was arrested for disorderly conduct, a relatively minor misdemeanor offense. With respect to the second factor, the evidence clearly shows that the officers could reasonably have feared for their immediate safety as well as the safety of those around them. As the Tennessee

Supreme Court noted in *Mitchell I*, "the jury concluded that the Defendant [Mitchell] had, 'in a public place and with intent to cause public annoyance or alarm . . . [e]ngage[d] in fighting or in violent or threatening behavior [.]" *Mitchell I*, 343 S.W.3d at 390. Indeed, Lt. Wisecarver stated in his affidavit that he ordered Mitchell arrested because he believed that the politically-charged crowd could get "worked up" and "become agitated" if Mitchell were permitted to continue in his disorderly conduct at the security entrance to the rally. With respect to the third and final factor, it is beyond dispute that Mitchell failed to submit to the authority of the police officers when they arrested him and that he offered some resistance - even if such resistance did not rise to the level of violating the Tennessee statute on resisting arrest. *See* Tenn.Code Ann. § 39-16-602 (requiring that "force" be used by arrestee against officer to constitute resisting arrest); *State v. Corder*, 854 S.W.2d 653, 655 (Tenn.Crim.App. 1992) (explaining that while defendant's refusal to comply with officer's instructions coupled with obscene language directed at officer would be sufficient to sustain conviction for crime of resisting arrest in many states, it is not sufficient to sustain conviction under Tennessee statute which requires the use of force). Mitchell admits that when Officer Stuart laid hands on him to arrest him, he was "upset," that he stepped backwards away from Stuart,[3] and that he simultaneously

[3] The THP video confirms Mitchell's admission that, rather than complying with Stuart's directives, he attempted to extricate himself from Stuart's grasp by pulling backwards.

exclaimed, "Don't touch me!"[4] Mitchell further admits in his deposition that he was non-compliant during his arrest and states that as a result of being taken to the ground and tased, only then did he learn that he should have heeded the officers' instructions rather than giving the officers instructions. Mitchell offered further clarification for this statement, explaining that because he had never experienced an encounter with law enforcement officials before, he simply did not know that he should follow their instructions.[5] For all these reasons, it is clear that the defendant officers were permitted to apply a level of force against Mitchell which exceeded the minimal force level that would be expected if all three of the *Graham* factors were in Mitchell's favor.

Mitchell claims that six officers tackled him and/or jumped on him. However, this claim is belied by the THP video. To the extent that the video clearly refutes plaintiffs' claims, the Court will disregard plaintiffs' claims for purposes of the instant motion. *See 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

[4] The Court, in its editorial discretion, has included an exclamation mark at the end of this quote because Mitchell states in his deposition, "I did raise my voice."

[5] It is not clear why Mitchell claimed to have never had a prior encounter with law enforcement personnel because he testified earlier in this deposition that he had experienced problems with law enforcement dating back to his youth when he was "court-martialed" out of the Navy for "drinking and fighting."

purposes of ruling on a motion for summary judgment.").

The THP video depicts Officer Stuart first laying hands on Mitchell and pulling him away from the security checkpoint. Next, Mitchell resists for a brief moment by pulling backwards. In response, Stuart takes Mitchell to the ground and Stuart goes to the ground with him in what appears to be a very deliberate and controlled procedure. Three officers assist Stuart,[6] though Stuart is the only officer whose body clearly goes down to the ground with Mitchell. While there is a bystander and a bush partially obstructing what occurred once Mitchell was on the ground, it is clear that two of the three assisting officers never went down onto the ground with Mitchell. Thus, viewing the videotape in the light most favorable to Mitchell, the Court will assume, *arguendo*, that two officers - Stuart and the officer whose body is partially blocked by the bystander for a moment applied some or all of their body weight against Mitchell in taking him to the ground. Notwithstanding this, the Court concludes that plaintiffs have failed to demonstrate that defendants' actions were objectively unreasonable.

By way of comparison, the Court finds instructive the case of *Sullivan v. City of Pembroke Pines*, 2005 WL 6108998 (S.D. Fla. April 15, 2005). Here, the officer responded to a 911 call regarding a fight between the plaintiff and her then sixteen

[6] A fourth officer, identified as Officer Lane, also assisted insofar as he allegedly tasered defendant. The Court will examine Officer Lane's actions in the next section.

year old daughter. The plaintiff called 911 and asked for assistance controlling her daughter, who had jumped out of plaintiff's minivan while it was being driven down the street and had refused to get back in. During the phone call, the plaintiff could be heard yelling at her daughter and exclaiming, "I need the damn police!" When the officer arrived on the scene, the officer directed the plaintiff to return to her car. Plaintiff became verbally abusive towards the officer and was non-compliant with his continued requests that she return to her minivan. Plaintiff then called 911 in an "agitated" state, requested that the officer's supervisor be dispatched to the scene, and continued screaming at the officer exclaiming, "Don't touch me! Who the hell are you?!" Plaintiff was arrested for her behavior and she subsequently filed a § 1983 claim against the officer alleging excessive force.

Viewing the evidence in the light most favorable to the plaintiff, the court noted the above facts and assumed the veracity of plaintiff's allegations which were as follows: In effectuating plaintiff's arrest, the defendant officer "grabbed her arm, twisted it behind her back, threw her to the ground and placed his knee in her back." The court also assumed, *arguendo*, that the plaintiff had used no force whatsoever against the officer at any point in the moments leading up to, nor during, her arrest.

Notwithstanding this, the court concluded that the officer was entitled to qualified immunity, stating,

> In this case . . . the Court has already concluded that Defendant . . . had probable cause to believe that Plaintiff was violating the Florida laws prohibiting disturbing the peace . . .. Furthermore . . . it is unclear that Plaintiff did not pose a threat to anyone at the scene or that she did not actively resist Defendant . . . . To the contrary, Plaintiff repeatedly approached the officer and yelled, among other things, "Don't touch me! Who the hell are you?!" For these reasons . . . . Plaintiff has failed to satisfy her burden of demonstrating that case law involving materially similar facts would have given a reasonable officer in Defendant['s] . . . position fair and clear warning that . . . [his actions were] an unlawful response to Plaintiff's statements and actions preceding and during her arrest.

Sullivan, 2005 WL 6108998 at *9. The Court finds the logic of *Sullivan* persuasive because the material facts therein are nearly identical to those in this case, except that in this case Mitchell clearly applied some physical force against the officers - a fact which creates an even stronger justification for the use of force by the officers in the instant case than in *Sullivan*. Furthermore, plaintiffs have failed to cite a case involving materially similar facts which would have put the defendant officers on notice that taking Mitchell to the ground to subdue him was an unlawful response to his statements and actions preceding and during his arrest. For all these reasons, the Court concludes as a matter of law that the defendant officers are entitled to qualified immunity from plaintiffs' excessive force claim under § 1983 as it relates to the

tackling allegations.[7]

ii. Tasering

The plaintiffs also assert that Mitchell was inappropriately and/or excessively tased. The parties dispute whether Mitchell was tased by Officer Frank Lane and the Court agrees that there is a genuine issue of material fact regarding this.[8] Consequently, the Court will assume for purposes of the instant motion that Officer Lane tased Mitchell. The evidence establishes that Lane's taser creates a record each time it is used which can be subsequently downloaded to a computer. Officer Lane's taser records reflect that he fired his taser for exactly one second, which is consistent with Officer Lane's testimony and the Spectator video in which the firing of the taser is audible for exactly one second during Mitchell's arrest. Furthermore, Mitchell himself admits in his deposition that he had no estimate of how long he was tased. Thus, the Court concludes as a matter of law that, if Mitchell was tased, he was tased for one second.

Notwithstanding the foregoing, Mitchell argues that he was tasered three or four times in what the Court has already concluded was a one-second period of time.

[7] This conclusion is buttressed by the fact that Mitchell has failed to establish that he suffered anything more than *de minimus* injury as a result of the tackling - in fact, he did not even require so much as a band-aid after the incident. *See Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011) ("The degree of injury [suffered by an arrestee] is certainly relevant insofar as it tends to show the amount and type of force used.").

[8] Officer Lane testified that, in his hurried attempt to tase Mitchell, he believes that he instead tased Officer Kyle by mistake.

While this might aptly be described as the "magic taser theory," the Court need not pass judgment on the validity of such theory. Suffice it to say that plaintiffs fail to cite any legal precedent which establishes that, for purposes of § 1983 excessive force claims, there is a legally cognizable difference between tasing an arrestee in three different places on his body for a sum total of one-second as compared to tasing an arrestee in a single place for a one-second period of time. Consequently, the Court concludes that, under the unique facts of this case, Mitchell's allegation that he was tased multiple times is of no legal significance in evaluating the objective reasonableness of Officer Lane's actions.

In light of the foregoing, and for the reasons which follow, the Court concludes as a matter of law that Lane's excessive force claim fails because (1) Officer Lane's use of the taser was reasonable and did not violate Mitchell's constitutional right to be free from the excessive use of force, and (2) even if Lane's use of the taser did violate Mitchell's Fourth Amendment right, such right was not clearly established in 2006.

In a recent opinion, the Sixth Circuit explained that cases addressing qualified immunity for taser use fall into two groups. *Cockrell v. City of Cincinnati*, 2012 WL 573972 (6th Cir. Feb. 23, 2012). "The first involves plaintiffs tased while actively resisting arrest by physically struggling with, threatening, or disobeying officers." *Id*.

at *4. "In the second group of cases, a law-enforcement official tases a plaintiff who has done nothing to resist arrest or is already detained." *Id*. at *5. As the Sixth Circuit noted, defendants in the former group of cases were entitled to qualified immunity whereas defendants in the latter group were not. *Id*. at *4-*5. The facts of this case fit squarely within the first group. As discussed, *supra*, it is beyond dispute that Mitchell provided some physical resistance and disobeyed police directives.

Mitchell tries to escape this conclusion by arguing that Officer Lane tased him after he was already detained. However, such assertion is clearly refuted by the THP video. Watching this video in slow-motion, Officer Lane is depicted as approaching Mitchell just as Officer Stuart begins to take him down to the ground. Shortly after Mitchell is taken to the ground, Officer Lane can be seen walking away with Taser in hand. Thereafter, Officer Kyle can be seen removing a pair of handcuffs from his belt to place on Mitchell. Consequently, a reasonable jury would have no choice but to conclude that Lane's use of his taser against Mitchell preceded the point in time at which Mitchell was subdued. In any event, the fact that plaintiff was arguably "subdued" when the taser was used does not necessarily compel the conclusion that use of the taser was unreasonable. *See Caie v. West Bloomfield Township*, 2012 WL 2301648 (6th Cir. June 18, 2012). Thus, the Court concludes that Officer Lane's actions were objectively reasonable and within the bounds of the Fourth Amendment.

However, even if this Court were mistaken, Officer Lane would still be entitled to qualified immunity because there is no materially similar case preceding June 24, 2006 which holds that tasing an arrestee under the foregoing circumstances violates his constitutional rights. *See, e.g., Cockrell,* 2012 WL 573972 at *4 (holding that misdemeanant, fleeing from scene of a non-violent misdemeanor, but offering no other resistance and disobeying no official command, did not have a clearly established right not to be tased in 2008); *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010) (holding that 2005 taser deployment against a motorist yelling angrily and acting erratically - but not threateningly - after traffic stop for failing to wear seatbelt violated Fourth Amendment, but not clearly established law).

For the foregoing reasons, the Court concludes that defendants are entitled to summary judgment on plaintiffs' § 1983 claim of excessive use of force (Count D).[9]

b. 42 U.S.C. § 1983 Claim of First Amendment Violations (Counts A, B, E)

Plaintiffs claim that defendants violated Mitchell's First Amendment rights by prohibiting him from taking the American Flag into the secure rally area. Specifically,

[9] For the sake of thoroughness, the Court notes that Judy Mitchell is a named plaintiff for the sole reason that she seeks damages for loss of consortium stemming from what plaintiffs allege was the excessive use of force by the defendants. While an entitlement to such damages is foreclosed by the Court's determination that defendants are entitled to summary judgment on Count D, the Court wishes to note that Ms. Mitchell's claim is also foreclosed for the separate and independent reason that "there is no loss of consortium claim under § 1983." *Murray v. Harriman City*, 2010 WL 546590 at *6 (E.D. Tenn Feb. 10, 2010). *See also Claybrook v. Birchwell*, 199 F.3d 350, 357 (6th Cir. 2000) ("In the Sixth Circuit, a section 1983 cause of action is entirely personal to the direct victim of the alleged constitutional tort.").

plaintiffs claim that defendants' acts violated Mitchell's freedom of speech (Count A), his freedom of assembly (Count B), and that they conspired to do so (Count E). As noted, *supra*, the joint security task force adopted and implemented a contingency security plan to protect the safety of any protestors and counter-protestors who might choose to attend the rally. It is undisputed that this plan allowed for flags of any kind to be brought into the secure rally area, but that flag-poles and/or sticks would not be permitted for safety reasons. To the extent plaintiffs attack the legality of this policy, such argument is frivolous and the Court concludes that such policy was objectively reasonable. *See Grider v. Abramson*, 180 F.3d 739 (6th Cir. 1999) (Rally plan which prohibited, *inter alia*, poles and sticks of any size in secure rally areas was "eminently rational" and "accorded due weight" to individual and collective exercises of constitutional rights.). Further, because a rally plan similar to the one at issue in this matter was held to be constitutional in *Grider*, defendants were entitled to rely on *Grider* in choosing to implement the rally plan at issue in this case. Consequently, defendants are entitled to qualified immunity for adopting and implementing the plan that prohibited poles and sticks inside the secure rally area.

In light of the foregoing, it is clear that plaintiffs are not entitled to injunctive relief on the merits. Regardless, injunctive relief is also not available because they lack standing to pursue such relief. *See, e.g., Riggs v. City of Albuquerque*, 916 F.2d

582, 586 (10th Cir. 1990) (Plaintiffs "seeking prospective relief must show more than past harm or speculative future harm."); *accord, Miller v. Jones*, 2012 WL 2044366 at *2 (6th Cir. June 6, 2012). Here, plaintiffs have failed to make any showing of future harm to themselves that would rise above the speculative level.

In light of the foregoing, plaintiffs' First Amendment claims come to hinge on Mitchell's bare assertion that one or more of the defendant officers instructed him at the security checkpoint that he would not be permitted to take his flag into the rally - an assertion which defendants vehemently deny, pointing to the videos which clearly document that a number of rally participants were permitted to bring flags (but not poles) inside the rally area. Assuming, *arguendo*, that one or more officers did tell Mitchell that he would not be permitted to bring the flag itself into the rally, plaintiffs' claims still must fail because they have failed to establish that the actions of the defendants resulted in the injury plaintiffs now complain of.

Mitchell testified in his deposition as follows:

> Q. Did you at any time ever ask the officers at the security point could you just take the flag in and leave the pole?
>
> A. No.
>
> [Doc. 109-1 at 189].
>
> Q. If you were told to give up the pole, but you could take the flag in, would you have had any problem with that?

A. I'd have went home.

Q. Why?

A. Because I won't do it.

[Doc. 109-1 at 189-90].

Q. But if they said: You can take the sign in, but you can't take the pole, would you have still gone home?

A. Yeah, I'd have went home.

[Doc. 109-1 at 191].

Q. Let's say they tell you you can't take the stick but you can take the sign. You still would have gone home?

A. Yes.

[Doc. 109-1 at 192].

From his deposition, it is clear that Mitchell had tied his lawful desire to display the American Flag with his unlawful desire to brandish a potential weapon at the rally. This is fatal to plaintiffs' First Amendment claims. "A plaintiff must allege factual causation - i.e., 'but for' causation - in order to state a claim under § 1983." *Scott v. Hern*, 216 F.3d 897, 911 (10th Cir. 2000). Mitchell claims he was injured when he was not permitted to engage in protected speech, and that this injury resulted from the officer(s)' unconstitutional directives. However, this is refuted by Mitchell's deposition testimony. Such testimony reveals that it was Mitchell's personal (self-

imposed) unwillingness to engage, *in a lawful manner*, in First Amendment conduct that caused him to suffer his injury. Therefore, Mitchell has failed to establish a constitutional violation. Having failed to establish an underlying constitutional violation, plaintiffs' civil conspiracy claim must also fail. *See, e.g., Novotny v. Tripp County, S.D.*, 664 F.3d 1173, 1180 (8th Cir. 2011).

c. Tennessee State Law Claims (Counts G & F)

In light of the foregoing, the only remaining Counts (Counts G & F) in this matter are pendent state law claims. "Whether or not to dismiss a pendent state claim after all federal claims have been disposed of is a question generally left to the discretion of the district court." *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987). Moreover, this circuit has consistently expressed a strong policy in favor of dismissing such state law claims. *See*, *Service, Hospital Nursing Home & Public Employees Union, Local No. 47 v. Commercial Property Services, Inc.*, 755 F.2d 499 (6th Cir. 1985). After careful consideration, the Court concludes that dismissal of the remaining pendent state law claims (Counts G & F) is warranted.

IV. CONCLUSION

For the foregoing reasons, Defendants City of Morristown, Frank Lane, Matt Stuart, Troy Wallen, Andrew Kyle, Chris Wisecarver, Roger Overholt, and Gary Johnsons' Motion for Summary Judgment [Doc. 83] is hereby **GRANTED**,

Defendants Hamblen County and Eric Carson's Motion for Summary Judgment [Doc. 87] is **GRANTED**, and plaintiffs' Motion for Partial Summary Judgment [Doc. 90] is **DENIED**.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE