No. 20-7000
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JERIEL EDWARDS,	)	
	)	
Appellant/Plaintiff,	)	
	)	
v.	)	**Case No. 20-7000**
	)	**(D.C. No. 6:18-CV-00347-SPS)**
STEVEN HARMON, BOBBY LEE, GREG FOREMAN, AND DILLON SWAIM,	)	**(E.D. Okla.)**
	)	
Appellee/Defendant.	)	

On appeal from the United States District Court
for the Eastern District of Oklahoma
The Hon. Steven P. Shreder
No. 18-cv-347-SPS

APPELLANT/PLAINTIFF JERIEL EDWARD'S OPENING BRIEF

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PRIOR OR RELATED APPEALS

There are no prior or related appeals in this case.

GLOSSARY OF TERMS AND ABBREVIATIONS

Edwards	Appellant/Plaintiff Jeriel Edwards
Officer Harmon	Appellee/Defendant Steven Harmon
Officer Lee	Appellee/Defendant Bobby Lee
Officer Foreman	Appellee/Defendant Greg Foreman
Officer Swaim	Appellee/Defendant Dillon Swaim

Appellees/Defendants will be collectively referred to as “Officers” or “Defendant Officers.”

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Appellant/Plaintiff,	)	
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v.	)	**Case No. 20-7000**
	)	**(D.C. No. 6:18-CV-00347-SPS)**
STEVEN HARMON, BOBBY LEE,	)	**(E.D. Okla.)**
GREG FOREMAN, AND DILLON	)	
SWAIM,	)	
	)	
Appellees/Defendants.	)	

APPELLANT/PLAINTIFF JERIEL EDWARD'S OPENING BRIEF

Appellant/Plaintiff Jeriel Edwards ("Edwards"), submits the following Opening Brief in the above referenced case against Appellees/Defendants Steven Harmon ("Harmon"), Bobby Lee ("Lee"), Greg Foreman ("Foreman"), and Dillon Swaim ("Swaim"). Appellees/Defendants will be collectively referred to as the "Defendants." Edwards respectfully requests that this Court reverse the District Court's Order granting summary judgment in favor of Defendants, dated December 16, 2019. (Attachment 1.) In support of this appeal Edwards states:

JURISDICTIONAL STATEMENT

Plaintiff Edwards filed this action in the United States District Court for the Eastern District of Oklahoma pursuant to 42 U.S.C. § 1983, which asserted that Edwards' rights under the Fourth Amendment of the United States Constitution were

violated due to the use of excessive force employed against him during his arrest by the Defendant Officers who were employed by the City of Muskogee, Oklahoma. The basis for the District Court's jurisdiction of the action was 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The Opinion and Order that granted the Motion for Summary Judgment in favor of Defendants was filed on December 16, 2019. (Attachment 1.) Judgment was entered in favor of those persons on the same day. [Appx. 0247.] Edwards' Notice of Appeal was filed on January 13, 2020. [Appx. 0248.] Therefore, the Notice of Appeal was timely filed pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Officers used excessive force against Edwards during and after their arrest of him.

2. Whether, as a matter of law, the Officers' alleged actions violated clearly established constitutional law.

3. Whether the Officers' use of force was objectively reasonable in light of the circumstances of their arrest and restraint of Edwards.

4. Whether the Officers were entitled to qualified immunity with regard to their excessive use of force against Edwards during his arrest and restraint.

5. Whether the District Court should have ruled that there was a genuine issue of material fact concerning whether the Officers used excessive force, and

whether this issue should have been decided by a jury, rather than the District Court.

STATEMENT OF THE CASE

I. Nature of the Case, the Course of the Proceedings, and Disposition of the Court Below.

This case proceeded pursuant to Edwards' Second Amended Complaint. [Appx. 0009-0027.] The Second Amended Complaint alleged that Defendant Officers of the City Muskogee, Oklahoma, during the arrest of Edwards, used unjustified force, which caused serious injuries to Edwards, and resulted in him being taken by ambulance to the hospital. These facts were confirmed by the materials produced during the summary judgment proceedings, and are not controverted.

Edwards, an African-American, contends that the force used was excessive and unjustified. Because of the force used, the Officers' actions violated clearly established Constitutional law, and the Officers were not entitled to the qualified immunity.

The District Court rejected Edward's contentions and granted summary judgment in favor of the four Defendant Officers. In its Opinion and Order, the Court ruled that the Defendant Officers were entitled to qualified immunity with regard force used against Edwards. [Appx. 0223-0246.]

Edwards appeals the District Court's ruling that the Defendant Officers were entitled to qualified immunity, and the Court's awarding of summary judgment to

the Officers, Edwards respectfully submits that a jury should determine the factual issues relating to the imposition of force upon Edwards by the Officers.

II. Statement of Facts.

The allegations of Edwards that are relevant to this appeal are set forth in Edwards' Second Amended Complaint. [Appx. 0009-0027.] The facts relevant to this appeal are contained in the Officers' Motion for Summary Judgment with Exhibits 1- 10 [Appx. 0063-0190], Edwards' Response to that Motion for Summary Judgment [Appx. 0191-0211], and the video recording submitted by Defendant Foreman in support of the Defendant's Motion for Summary Judgment. [Appx. 0111, filed conventionally.] These filings and the supporting document are contained in Edwards's Appendix, which is being filed contemporaneously with this Brief.

The arrest of Edwards took place in Muskogee Oklahoma on October 25, 2016, when the Officers found Edwards nearly unconscious in his parked car. The Officers then subjected Edwards to excessive force. The Affidavits and reports of the four Muskogee police officers: Officers Harmon, Lee, Foreman, and Swaim, [Appx, 0097-0144], attached to Defendant's Motion for Summary Judgment describe the excessive force they used on Edwards. This force included the Officers hitting Edwards with three closed fist punches, striking him with a flashlight, the tasing of Edwards, and "stapling" of that tasing. These documents also show that both Officers Foreman and Lee applied lateral vascular neck restraints to Edwards.

[Appx. 0136, third paragraph and, Appx. 106 ¶¶ 6-9.] Also, Edwards's nose was broken during the arrest, and he was taken to the hospital and treated there for these injuries. [Appx. 0136.] All of the events in this case occurred on October 26, 2016.

These facts are taken directly from the Officers' Affidavits, and their reports, which were used in support of the Officers' Motion for Summary Judgment. Appx. 0063-0190.

STANDARD OF REVIEW

The court of appeals reviews a district court's determination as to qualified immunity de novo. *Elwell v. Byers*, 699 F.3d 1208, 1212 (10th Cir. 2012). A motion for summary judgment in a § 1983 action on qualified immunity grounds will be reversed if the appellate court finds that there was a genuine issue of material facts presented by a plaintiff who shows that the defendants actions were objectively unreasonable and a violation of the plaintiff's clearly established constitutional rights. *Leslie v. Hancock County Board of Education*, 720 F.3d 1338, 1343 (11th Cir. 2013). *See also S.R. Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019); noting that the appellate court reviews de novo a grant of summary judgment to determine whether "a rational trier of fact might resolve the issue in favor of the nonmoving party." *Id.*

In so doing, the court reviews the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor. *Id.* The court also

reviews de novo a district court's grant of summary judgment on qualified immunity grounds. *Id.*

SUMMARY OF ARGUMENT

1. The Officers' own statements and the video provided by Defendant Foreman show that excessive force was applied against Edwards, in violation of clearly established Fourth Amendment principles. A jury should be allowed to determine whether the Officers used excessive force against Edwards.

2. The Officers' punching, tasing, stapling, striking with a flashlight, and twice applying a lateral vascular neck restraint to Edwards, was objectively unreasonable, and it constituted excessive force.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE OFFICERS; THE RECORD AND THE VIDEO FILED IN THE DISTRICT COURT SHOW THAT THERE WAS A GENUINE ISSUE OF MATERIAL FACT REGARDING THE EXCESSIVE FORCE USED AGAINST EDWARDS BY THE OFFICERS, AND THEY WERE NOT ENTITLED TO QUALIFIED IMMUNITY.

Edwards respectfully contends that the District Court was in error when it granted the Defendant Officers' Motion for Summary Judgment, ruling that that these Officers were entitled to the qualified immunity defense for their actions in arresting Edwards, and their use of force against him during that arrest. Edwards contends that Defendants' actions violated the Fourth Amendment to the United States Constitution, and the principles of 42 U.S.C. § 1983.

As the Statement of the Facts above demonstrated, the Affidavits and Reports of the Defendant Officers, and the video show the following: On October 25, 2016, Defendant Officers Foremen and Harmon removed Edwards from his car, forced him to the ground, beat him, and handcuffed him. Edwards repeatedly told the Officers, "stop hitting me." Officer Foremen then deployed his taser into Edwards' back. Officer Foreman also used a technique known as "stapling," which involved connecting a wire onto Edwards' calf in order to obtain "neuromuscular incapacity." [Appx. 0099 and 0136.]

Officer Foreman then used his flashlight to strike Edwards on his upper right arm. Officer Lee then arrived, and placed Edwards in a sitting position on the ground. Officer Lee noticed that Edwards had two taser probes in his upper back. Officers Lee and Foreman both applied a lateral vascular neck restraint to Edwards. In his Affidavit, Officer Lee stated that this restraint "momentarily disrupts the carotid blood to the brain and will make a combative suspect lose consciousness for a few seconds, allowing the suspect to be handcuffed." [Appx. 0106.]

It is significant that Edwards was arrested for a non-violent crime, that is, the possession and use of PCP. [Appx. 153.] Furthermore, no weapon was found on Edwards' person or in his car, and none of the Officers were injured during or after the arrest. [Appx. 97, 101, 104, 108, 125.]

The following authorities show that the District Court erred in granting summary judgment in favor of the Officers. Edwards contends that a genuine issue of material fact existed as to whether the case should be presented to a jury. This would be in order to determine whether the force used on Edwards by the Officers violated clearly established Fourth Amendment principles.

In *McCoy v. Meyers,* 887 F.3d 1034, 1049 (10th Cir. 2018), the court held that police officers were not entitled to qualified immunity regarding the officers' post-restraint in this case in an arrestee's § 1983 claim alleging that officers used excessive force. This was when one officer placed the arrestee in a carotid restraint for approximately five to ten seconds. With regard to the post-restraint excessive force, the court held that the officers were not entitled to qualified immunity. *Id.* at 1049-54.

In the present case, Edwards was subjected to unlawful and excessive, "Pre and Post-Restraint Force" by the Defendant Officers, who violated clearly established constitutional law in this regard, and, therefore, the Officers were not entitled to qualified immunity for the force inflicted upon Edwards. Edwards respectfully contends that summary judgment was improperly granted to the Officers, and that a genuine issue of fact existed as to whether excessive force was inflicted upon Edwards in violation of clearly established law regarding the Fourth Amendment.

The court in *McCoy* noted that it was clearly established that officers may not continue to use force against a suspect who is effectively subdued. *Id.* at 1053. The court stated that it was clearly established that "officers may not use force-namely, pressure on back, tasering, and neck restraint—'on a person who is not resisting and who is restrained in handcuffs'" *Id. McCoy* noted that *Dixon* v. *Richer,* 922 F.2d 1456 (10th Cir. 1991), and *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007) involved the use of excessive force—"beating, choking, and tasering"—in violation of the Fourth Amendment against "plaintiffs who were not suspected of serious crimes, posed little to no threat, and put up little to no resistance." *McCoy,* 887 F.3d at 1052 n.21. The court in *McCoy* also noted that the officers also used "carotid restraints," which is also what the Officers in the instant case engaged in. *Id.*

In *Hanks v. Rogers*, 853 F.3d 738, 745-46 (5th Cir. 2017), the court held that a genuine issue of material fact existed as to whether force applied by city police officer on arrestee, allegedly including "half spear" takedown, was clearly excessive and unreasonable, precluding summary judgment on arrestee's § 1983 excessive force claim. The court also held that where an individual stopped for a minor traffic offense offers, at most, passive resistance and presents no threat or flight risk, abrupt application of physical force rather than continued verbal negotiating, which may include threats of force, is clearly unreasonable and excessive. *Id.* at 748-49.

In *McCowan v. Morales*, 945 F.3d 1276, 1287 (10th Cir. 2019), the court cited *McCoy,* and noted that "the Fourth Amendment prohibits the use of force without legitimate justification, as when a subject poses no threat or has been subdued." *McCoy*, 887 F.3d at 1052. In *Griffith v. Coburn*, 473 F.3d 650, 657-60 (6th Cir. 2007), the court held that a genuine issue of material fact as to whether police officer's use of a caroid neck restraint on arrestee was unreasonable, in violation of arrestee's well-established Fourth Amendment right to be free from gratuitous violence during arrest, which precluded the granting of summary judgment on qualified immunity grounds on a § 1983 claim against an officer.

In *Valenzuela v. City of Anaheim*, SACV1700278CJCDFMX, 2019 WL 2949035, at *8 (C.D. Cal. Feb. 12, 2019), the court ruled that the parties disputed the amount of force that Officers Jun and Wolfe employed when applying their respective neck restraint hold, and that a genuine dispute of material fact also remained as to whether the officers conduct was objectively reasonable with regard to the officers who applied a carotid neck hold. The court held that a reasonable jury could conclude that based on the information in the case, the continued application of a restraint hold was not objectively reasonable when the plaintiff no longer posed an "immediate threat" to officer or civilian safety. *Id.* The court also held that there remained a genuine dispute of material fact as to whether the restraint holds at issue here—whether a misapplied carotid restraint hold or an air choke hold—constituted

excessive force. *Id.* Accordingly, the court held that the officers were not entitled to qualified immunity on summary judgment of Plaintiffs' excessive force claim. *Id.* at *9.

In the instant case, the record demonstrates that two different officers, Forman and Lee, applied a carotid restraint on Edwards. Significantly, this is similar to the facts in *McCoy*, where the officer placed the arrestee, "who was not resisting, in a second carotid restraint for less than 10 seconds. . . ." *McCoy*, 887 F.3d at 1042.

In the instant case, Edwards contends that the pre- and "post-restraint" excessive force actions of Defendant Officers violated clearly established constitutional law as defined in *McCoy*. *McCoy, id.*, at 1048-54.

Whether an individual has been subdued from the perspective of a reasonable officer depends on the officer having "enough time [ ] to recognize [that the individual no longer poses a threat] and react to the changed circumstances." *McCoy,* at 1048*,* quoting *Fancher v. Barrientos*, 723 F.3d 1191 (10th Cir. 2013). In *Fancher,* the court held that a deputy sheriff was not entitled to qualified immunity with respect to six shots he fired after his first shot hit the suspect in a vehicle, in a § 1983 action by the suspect's mother alleging use of excessive force in a confrontation that resulted in the suspect's death. *Id.* After the first shot, the suspect was no longer able to control his vehicle, escape, or fire a weapon. Therefore, the court held that the deputy lacked probable cause to believe that the suspect posed threat of serious harm

to the deputy or others, and a reasonable officer in the deputy's position would have known that firing shots two through seven was unlawful. *Id.*

In the present case, Edwards had been tased by Officer Foreman, and was not resisting, when the lateral vascular restraint was applied by both Officer Foreman and Officer Lee. It is clear that this infliction of what has been recognized as a serious and sometimes dangerous restraint, used against Edwards, who was restrained and unable to resist the lateral restraint upon his neck, was clearly a violation of the Fourth Amendment.

In *Trammell v. Fruge*, 868 F.3d 332, 343(5th Cir. 2017), the court held that the officers' alleged conduct, in tackling a person suspected of the minor offense of public intoxication after very minimal physical resistance, that is, pulling away from an officer after the officer grabbed suspect's arm, violated clearly established law, with respect to Fourth Amendment protection against excessive force. Therefore, the officers were not entitled to qualified immunity in the suspect's § 1983 action. *Id.*

Where an excessive force claim is made against a law enforcement officer related to conduct involving an arrest, the conduct should be analyzed under an objective reasonableness standard. *Jackson v. Stair*, 944 F.3d 704, 710 (8th Cir. 2019). The court in *Jackson* held that there was a genuine issue of material fact as to whether the officer's second use of his stun gun on an arrestee was reasonable, given that the arrestee was on his back, on the ground, appeared not to have had time

to show compliance or continued resistance after the first use of the stun gun, and was several feet away from the nearest officer, precluding summary judgment on his § 1983 excessive force claim. *Id.* at 711-12. The court stated the arrestee had a clearly established right to be free from excessive force at time of the officer's use of stun gun on the arrestee for the second time. *Id.* at 712-13. Therefore, qualified immunity did not shield the officer from any potential liability regarding the arrestee's § 1983 excessive force claim that was related to the officer's use of a stun gun. *Id.* This was where the arrestee was a non-threatening, non-fleeing, non-resisting misdemeanor suspect at time of officer's use of the stun gun.

In *Herrera v. Bernalillo County Bd. of County Commissioners*, 361 Fed. Appx. 924, 928 (10th Cir. 2010), the court, in an opinion written by then Judge (now Justice Gorsuch), noted that the crime that Herrera was suspected of having committed was "resisting, evading or obstructing an officer," which in New Mexico is treated as a misdemeanor. Therefore, the deputies were not faced with someone who had committed a "severe" crime, citing *Fisher v. City of Las Cruces*, 584 F.3d 888, 895 (10th Cir. 2009); and *Casey v. City of Federal Heights,* 509 F.3d 1278, 1281 (10th Cir. 2007).

The court in *Herrera* upheld the district court's rejection of the deputies' claim to qualified immunity. *Id.* at 926. However, the court noted, in reaching the conclusion, it would not suggest that the deputies would not ultimately be entitled to

immunity. After trial, for example, a jury might choose to discredit certain of Herrera's factual assertions that we must take as true in an appeal. *Id.*, at 928. The court stated that "we simply held that, on the record as it currently exists, we cannot say, as we must to grant summary judgment, that no reasonable jury could find that the deputies' use of force was excessive." *Id.* at 928-29.

In *Perea v. Baca*, 817 F.3d 1198, 1203 (10th Cir. 2016), the court noted that although use of some force against a resisting arrestee may be justified, continued and increased use of force against a subdued detainee is not. The court stated that in an action alleging that police officers used excessive force in violation of Fourth Amendment in making an arrest after a suspect biked through a stop sign, and continued to resist by thrashing and swinging a crucifix, a fact question as to whether the officers continued to use stun gun on the suspect after he was subdued precluded summary judgment for officers based on qualified immunity. *Id.*

In *Coker v. Arkansas State Police*, 734 F.3d 838, 840-43 (8th Cir. 2013), the Eighth Circuit held that a genuine issue of material fact existed as to whether state trooper's use of force was excessive, and it was undisputed that the trooper broke the arrestee's cheek bones by striking him, either when he kicked his face or struck him with the flashlight. *Id.*

In *Estate of Ceballos v. Husk,* 919 F.3d 1204, 1212-19 (10th Cir. 2019), the court held that the alleged conduct of a police officer in August 2013, in fatally

shooting a homeowner when the police responded to a report from the homeowner's wife that the homeowner had a baseball bat and was acting crazy in the home's driveway and was drunk and possibly on drugs, violated clearly established law concerning excessive force in violation of the Fourth Amendment. This conduct by the officer caused the court to preclude qualified immunity under § 1983. *Id.*

II. THE VIDEO CAPTURED BY OFFICER FOREMAN CORROBORATES THE FACTS THAT SHOW THAT THE DEFENDANT OFFICERS USED EXCESSIVE FORCE AGAINST EDWARDS, BUT THE OFFICERS' AFFIDAVITS SUPPLY THE CRUCIAL FACTS SHOWING THE EXCESSIVE FORCE THAT EDWARDS WAS SUBJECTED TO. THE AFFIDAVITS CORROBORATE THE FACTS SET FORTH ON THE VIDEO.

The District Court's Order at 4 [Appx 0226] sets forth a discussion of the force used against Edwards. This includes the chronology of the force used against Edwards as well as the statement by Edwards, "Why are you punching me, sir?" The District court also noted that "Defendant Harmon delivered three punches to Mr. Edwards's ribs. . . ." *Id.* Significantly, Edwards was not resisting when these punches were inflicted.

Edwards respectfully contends that the video in the instant case also documents the excessive force imposed upon him. [Appx. 0111, Filed Conventionally.] In *Poole v. City of Shreveport*, 691 F.3d 624, 625 n.1 (5th Cir. 2012), the court observed that the videotape of the arrest significantly aided the court's understanding of those events, citing *Scott v. Harris*, 550 U.S. 327 (2007).

In *Poole*, the court noted that the Supreme Court in *Scott* had instructed that courts should view purported facts in dispute in the light depicted by the videotape. *Id.*

However, the present case, the Officers' statements, referred to in Propositions I and II, *supra,* are the most significant evidence of the excessive force that the Officers imposed upon Edwards. The video does reveal that prior to the initial takedown Edwards showed no sign of resistance, disobedience, or violence.

The video also shows that the Officers did not give Edwards sufficient time to obey the command to put his hands behind his back**.** The Officers intentionally prevented Edwards from turning around and had his only free arm completely extended and pressed against the car door, literally making it impossible for him to obey their commands. Just as the Officer's recklessness cannot justify the use of lethal force, their intentional obstruction of a person's attempts to comply did not justify the Officers' escalation of force regarding Edwards.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the importance of the issues excessive force and qualified immunity discussed above, counsel thinks that oral argument would be helpful to the Court.

CONCLUSION

For the reasons stated, Edwards respectively requests that this Court reverse the District Court's granting of summary judgment in favor of Defendants Harmon,

Foreman, Lee and Swain, and to remand the case for the jury to determine the fact issues in this case.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32 (a)(7)(c), this is to certify that this Brief has not exceeded the maximum pages allowed by the Rule and that it has been properly formatted, proportionately spaced, and contains 3,738 words and 321 lines. I relied upon my word processor to obtain the count and it is Microsoft Word Standard 2013.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ David W. Lee
David W. Lee

CERTIFICATIONS UNDER ECF PROCEDURES

The undersigned certifies, pursuant to the Tenth Circuit Court of Appeals CM/ECF User's Manual as follows:

1. All required privacy redactions have been made;

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3. The ECF submission of this document was scanned for viruses with the most recent version of a commercial virus scanning program: Symantec Endpoint Protection, updated, and according to the program is free of viruses.

s/ David W. Lee
David W. Lee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was furnished through (ECF) electronic service to the following on this March 9, 2020:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

JERIEL EDWARDS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-18-347-SPS**
	)	
STEVEN HARMON, BOBBY LEE, GREG FOREMAN, and DILLON SWAIM,	)	
	)	
Defendants.	)	

OPINION AND ORDER

This case arises out of an encounter between Jeriel Edwards and police officers with the City of Muskogee Police Department. The Plaintiff sued a number of individuals and entities, including the remaining four Defendants in the case: Steven Harmon, Bobby Lee, Greg Foreman, and Dillon Swaim. The claims against these Defendants are made pursuant to 42 U.S.C. § 1983, and the Defendants have filed a summary judgment motion asserting qualified immunity. For the reasons set forth below, the Court finds that Defendants Steve Harmon, Bobby Lee, Greg Foreman and Dillon Swaim's Brief in Support of their Motion for Summary Judgment [Docket No. 54] should be GRANTED.

I. Procedural History

On October 23, 2018, the Plaintiff filed the present case in this Court. In his Second Amended Complaint, Plaintiff alleged two causes of action against the various Defendants,

ATTACHMENT 1

but only the first implicates these four defendants.[1] The Plaintiff's First Cause of Action is raised pursuant to 42 U.S.C. § 1983 as to all four Defendants, alleging unconstitutional use of excessive and unreasonable force.

II. Law Applicable

Summary judgment is appropriate if the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving party must show the absence of a genuine issue of material fact, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), with the evidence taken in the light most favorable to the non-moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). However, "a party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . or . . . showing that the materials cited do not establish the absence or presence of a genuine dispute[.]" Fed. R. Civ. P. 56(c).

III. Factual Background

The undisputed facts reflect that on October 25, 2016, City of Muskogee Police Officer Greg Foreman was flagged down by a citizen who asked him to check out a vehicle in the driveway behind a Wendy's restaurant in Muskogee, Oklahoma. Defendant

[1] The Plaintiff's Second Cause of Action, arising under the Oklahoma Constitution as to the Defendant City of Muskogee, was previously dismissed. *See* Docket Nos. 33, 45.

Foreman pulled into the restaurant parking lot, located the vehicle in the driveway behind the restaurant, and got out of his patrol car to approach the vehicle. Defendant Foreman believed that Mr. Edwards was under the influence of alcohol, drugs, or both, and that it was likely PCP. Video footage of the encounter from Defendant Foreman's body camera reflects that when Defendant Foreman approached the vehicle, he asked Mr. Edwards several questions that produced no response, prompting Defendant Foreman to ask, "Can you talk?" Starting at the 2:43 mark on the video, Defendant Foreman instructed Mr. Edwards to put his car in park at least four times before he complied, also once asking how much he had had to smoke, while Mr. Edwards repeatedly moved his hands in and out of his pockets. Defendant Foreman asked Mr. Edwards for identification, but it was not until the 3:54 mark that Mr. Edwards was able to retrieve his wallet from his pocket. The parties agree that Mr. Edwards seemed confused, had trouble understanding what was happening, and kept putting his hands in his pockets. For nearly a minute after retrieving his wallet, Defendant Foreman instructed Mr. Edwards to keep his hands out of his pockets and put his wallet down on the console of his car before he complied. The Plaintiff nonetheless asserts that Mr. Edwards responded immediately to all attempts to engage and obeyed all commands. Defendant Foreman, believing Mr. Edwards to be under the influence of PCP, thought it best to remove Mr. Edwards from the car and place him under arrest and in handcuffs.

As Mr. Edwards was getting out of the vehicle, Defendant Foreman instructed Mr. Edwards to turn around and put his hands behind his back. Defendant Harmon arrived around this time and also began instructing Mr. Edwards to comply with Defendant

Foreman's instructions to put his hands behind his back. Defendants asserts that Mr. Edwards did not comply with this instruction, while Mr. Edwards contends that the officers prevented him from complying. Defendant Foreman then reached for Mr. Edwards's right hand to attempt to handcuff him, and also radioed for help with Mr. Edwards. Defendant Harmon then pushed Mr. Edwards back into the space between the car door and the car, and Defendant Foreman ordered Mr. Edwards to get on the ground, a safety tactic officers use to subdue a suspect actively resisting arrest. Defendants Harmon and Foreman then forced Mr. Edwards to the ground, which Plaintiff asserts they did without waiting for Mr. Edwards to comply.

Over the next four minutes, officers attempted to handcuff Mr. Edwards. On the video, officers can repeatedly be heard instructing him to put his hands behind his back while they struggled and appeared to be grappling with the Plaintiff's hands and arms, and Mr. Edwards can be heard asking, "Why are you punching me, sir?" During this time, it is undisputed that Defendant Harmon delivered three punches to Mr. Edwards's ribs, a technique taught for use when a subject is resisting being handcuffed. Footage is grainy and not clearly trained on Mr. Edwards as Defendants Foreman and Harmon struggled with Mr. Edwards. Defendants assert that they could not control Mr. Edwards's hands and arms and that he was extremely strong, but Mr. Edwards contends that they *did* have control of his hands and arms and were preventing him from complying with their commands.

During the struggle, Defendant Foreman smelled an odor he associated with persons under the influence of PCP, and Plaintiff does not dispute his knowledge that such substance could cause suspects to fight officers and be at a higher risk of excited delirium,

which could result in death. At the 6:24 mark on the body cam footage, Defendant Foreman deployed his Taser in an effort to get Mr. Edwards into custody. Defendant Foreman first deployed the Taser into Mr. Edwards's back then immediately moved the connecting wires to his calf to obtain neuromuscular incapacitation, a technique referred to as "stapling." Defendants assert the Taser had no effect on Mr. Edwards, while he contends that it had a "debilitating" effect on him and that he never resisted arrest. After deploying the Taser, the video shows Mr. Edwards attempting to sit up on his right side, with his right arm propping him up and his left arm stretched in front of him. Defendant Foreman again instructed Mr. Edwards to put his hands behind his back, and Mr. Edwards responded that they were, although they were not. Around the 6:45 minute mark, Mr. Edwards appeared to attempt to stand up, and what followed was a struggle among all parties on the video. Another officer appears on the video at the 7:09 mark to assist Defendants Foreman and Harmon, and Mr. Edwards shortly thereafter can be seen in a partially seated position near his vehicle while officers continued to attempt to get him in handcuffs and instruct him to stop resisting. He can be heard stating, "I'm not resisting," and "Let go of me."

Shortly after the 8:00 mark on the video, Defendant Lee began applying a lateral vascular neck restraint to Mr. Edwards, although Plaintiff asserts it was not properly applied and that Defendant Lee did so immediately upon his arrival and without reason. A number of officers seem to have arrived within this time frame, as the Plaintiff is surrounded by them at this point. At the 8:23 mark, officers were then able to get the first handcuff on Mr. Edwards's right arm. The neck restraint was discontinued as officers attempted to move Mr. Edwards to a facedown position and attach the second handcuff.

Video footage is unsteady but shows at least six officers attempting to attach the second handcuff to his left arm, which is done at the 9:03 mark. Defendant Swaim had arrived during this time and assisted in placing the second handcuff; he also later removed the Taser prongs from Mr. Edwards's back. At the 9:10 mark an officer announces that Mr. Edwards has been handcuffed. The officers surrounding Mr. Edwards then stepped away, and Mr. Edwards can be seen lying partially face down, with more weight on his left side, while one officer keeps hands on his right arm and back. Another officer then places a knee over Mr. Edwards's right shoulder while all the officers discuss calling EMS for Mr. Edwards. Defendants assert, and Plaintiff does not dispute, that after he was secured by the handcuffs no additional force was used on him. This means that all allegations of excessive force apply to the time period prior to the handcuffs being secured on Mr. Edwards.

Following the incident, Mr. Edwards was charged in Muskogee County District Court in Case No. CF-2016-1198 with: (i) DUI Drugs – felony, (ii) possession of a controlled dangerous substance (PCP) – felony, (iii) resisting an officer – misdemeanor, and (iv) possession of a controlled dangerous substance (Xanax) – felony. *See* Docket No. 54, Ex. 10, p. 3-4. The form on which Mr. Edwards entered a plea is a form for entering a plea of guilty, but the word "guilty" is stricken out and the word "no contest" was handwritten as to the heading and all questions concerning the type of plea he was entering. *Id.* at p. 16-21. The Judge signed a document which states that "The Defendant's plea(s) of no contest is/are knowingly and voluntarily entered and accepted by the Court," where "no contest" was handwritten. *Id.* at 23. The notice of the right to appeal likewise has the

word "guilty" stricken and interlineated with "no contest." *Id.* at p. 26. However, the Judgement *and* Amended Judgment and Sentence state, in all caps with no interlineation, that Mr. Edwards entered a plea of guilty. *Id.* at 32-33.

Analysis

The Defendants have all moved for summary judgment, asserting that Mr. Edwards is barred by collateral estoppel from bringing his Fourth Amendment claim because he pleaded guilty to resisting arrest, and therefore excessive force is not possible. Alternatively, they contend they are each entitled to qualified immunity. The Plaintiff challenges all these arguments, first contending that he actually pleaded "no contest," and that his plea is not a bar to the Fourth Amendment claim. Furthermore, he contends that the Defendants are not entitled to qualified immunity because they engaged in unconstitutional and excessive force in violation of clearly established law. For the reasons set forth below, the Court finds that the Defendants Harmon, Lee, Foreman, and Swaim are entitled to qualified immunity.

A. Collateral Estoppel.

The Court first addresses the Defendants' argument that Mr. Edwards is precluded from asserting a Fourth Amendment claim at all because he pleaded guilty to resisting arrest. Under Oklahoma law, "[t]he doctrine of collateral estoppel, or issue preclusion, is activated when an ultimate issue has been determined by a valid and final judgment – that question cannot be relitigated by parties, or their privies, to the prior adjudication in any future lawsuit." *Carris v. John R. Thomas and Associates, P.C.*, 1995 OK 33, ¶ 9, 896 P.2d

522, 527. Defendants argue that because the Plaintiff has been found guilty of resisting arrest in this incident, his resistance supports the amount of force used to arrest him.

The Plaintiff contends that he did not plead guilty, but rather pleaded "nolo contendere," or "no contest." Defendants respond that because the Judgment and Amended Judgment "clearly stated" that the Plaintiff pleaded guilty, his plea could not possibly have been "no contest," and any case law regarding "no contest" pleas is therefore irrelevant. Regardless of whether the Plaintiff pleaded guilty to resisting arrest or pleaded "no contest," however, the Court finds that such conviction is not determinative as to his Fourth Amendment claim. First, the factual issues in the present case are not identical to the fact issues presented in the Plaintiff's criminal case, and the doctrine of collateral estoppel is therefore not implicated. *See Rome v. Romero*, 2006 WL 322589, at *6 (D. Colo. Feb. 10, 2006) ("The § 1983 claim here concerns whether the Defendants actually used excessive force, rather than Rome's belief about lawfulness of the arrest or the force used. Because the factual issues in the criminal case and in this case are not identical the doctrine of collateral estoppel does not apply. Thus, the doctrine of collateral estoppel does not entitle Defendants to summary judgment on Rome's excessive force claim.").

Second, a conviction for resisting arrest can coexist with an officers' use of excessive force. In *Perea v. Baca*, the Tenth Circuit found that Mr. Perea's resistance to arrest "did not justify the officers' severe response," holding that "[a]lthough use of some force against a resisting arrestee may be justified, continued and increased use of force against a subdued detainee is not." 817 F.3d 1198, 1203 (10th Cir. 2016). "*Perea* therefore puts the Defendant Officers on notice that . . . the force used should be no more than is

necessary to subdue the suspect." *Coronado v. Olsen*, 2019 WL 652350, at *6 (D. Utah Feb. 15, 2019). *See also Martinez v. City of Albuquerque*, 184 F.3d 1123, 1127 (10th Cir. 1999) ("Thus, whether Martinez resisted arrest by failing to heed instructions and closing his vehicle's window on the officer's arm is likewise a question separate and distinct from whether the police officers exercised excessive or unreasonable force in effectuating his arrest. The state court's finding that Martinez resisted a lawful arrest[] may coexist with a finding that the police officers used excessive force to subdue him. In other words, a jury could find that the police officers effectuated a lawful arrest of Martinez in an unlawful manner.") (internal citations omitted); *Riggs v. City of Wichita, Kan.*, 2013 WL 978713, at *3 (D. Kan. Mar. 12, 2013) ("Plaintiff does not challenge the lawfulness of her arrest and conviction, but rather challenges Defendant's use of excessive force in effectuating her arrest. Thus, Plaintiff's previous resisting arrest conviction does not necessarily foreclose an excessive force claim here."). *Cf. Strepka v. Jonsgaard*, 2010 WL 4932723, at *7 (D. Colo. Nov. 8, 2010) ("Again, because a finding in this suit that Defendant Jonsgaard used excessive force would not invalidate the conviction, Plaintiff's excessive force claim is not barred by *Heck*."). Therefore, the Plaintiff's First Cause of Action is not barred by the doctrine of collateral estoppel.

B. Plaintiff's Plea in the Prior Criminal Case

Even if the Plaintiff's conviction for resisting arrest does not bar his claim under the Fourth Amendment, it raises the question of what effect it has on the analysis of the case, at both the summary judgment and trial stages. The Court is not prohibited from looking behind the Judgment to determine the nature of the plea. *See, e. g.*, *Bland v. State*, 2000

OK CR 11, ¶ 88, 4 P.3d 702, 726 ("Appellant asserts that as the jury found him guilty of malice aforethought murder, the reference to felony murder [on the Judgment] was a scrivener's error which should be corrected. The State does not dispute this claim. A review of the record supports Appellant's contentions. Therefore, the trial court is ordered to correct the judgment and sentence to reflect the jury's verdict by striking the reference to a conviction for felony murder."). Here, every document aside from the Judgment and Amended Judgment related to the Plaintiff's plea indicates that it was a "no contest plea," including Court findings signed by the Judge and dated December 5, 2016, which required him to handwrite the type of plea being entered [Docket No. 54, Ex. 10, p. 23]. The Court thus finds that the Plaintiff pleaded no contest to, *inter alia*, resisting arrest, a misdemeanor.

Under Oklahoma law, the "legal effect" of a nolo contendere plea "shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." 22 Okla. Stat. § 513. *See also Martin v. Phillips*, 2018 OK 56, ¶ 6, 422 P.3d 143, 146. Likewise, Fed. R. Evid. 410 states, "In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in plea discussions: [](2) a nolo contendere plea[.]" The Tenth Circuit has held that "although a plea of nolo contendere has the same *legal* effect as a guilty plea, it is not a *factual* admission to the underlying crime." *Rose v. Uniroyal Goodrich Tire Co.*, 219 F.3d 1216, 1220 (10th Cir. 2000) (emphasis in original).

However, in *Rose*, the Tenth Circuit went on to state that the rules holding nolo contendere pleas to be inadmissible "assume a situation in which the criminal defendant is

being sued later in a civil action, and the plea is offered as proof of guilt." *Id.* The Sixth Circuit found "a material difference between using the nolo contendere plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission which would preclude liability. Rule 410 was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil *liability*." *Walker v. Schaeffer*, 854 F.2d 138, 142 (6th Cir. 1988) (emphasis in original). The Sixth Circuit thus "decline[d] to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the arresting police." *Id.* The Oklahoma Court of Criminal Appeals in 1992 found Fed. R. Evid. 410 and 12 Okla. Stat. § 2410 "virtually identical," and stated, "We agree with, and adopt, the reasoning of the Sixth Circuit Court in the *Walker* case." *Irwin v. SWO Acquisition Corp.*, 1992 OK CIV APP 48, ¶¶ 10-11, 830 P.2d 587, 590. This holding was reiterated in *Delong v. State ex rel. Oklahoma Dept. of Public Safety*, 1998 OK CIV APP 32, ¶¶ 6-7, 956 P.2d 937, 938-939 ("We are likewise persuaded by the *Walker* analysis as the proper analysis to be employed in our case. Under that rationale, Delong's *nolo contendere* pleas to the charges of resisting arrest and attempted escape from detention are admissible defensively, and admit the validity of those charges, thus likewise establishing probable cause for the arrest on those charges, and waiving any irregularities in the criminal proceedings including lack of probable cause."). *But see Delong*, 1998 OK CIV APP 32, ¶ 8 (Hansen, Carol, J., dissenting) ("Because § 2410 is clearly unambiguous, the requisite plain language reading can lead to no other conclusion than that § 2410

precludes admission of evidence of a *nolo contendere* plea for any purpose, even when the one entering the plea is the plaintiff in a later civil action. The majority erroneously interprets § 2410 to give it a meaning which is in conflict with what the statute clearly dictates.”).

In light of the aforementioned case law, the Tenth Circuit has stated that “[t]here is a proscription on the use of nolo contendere pleas in subsequent civil proceedings, but it applies only to ‘‘offensive’ use . . . to establish the criminal defendant's subsequent potential civil liability, *not* to . . . ‘defensive’ use . . . in a case where the criminal defendant [has] sought to recover damages for an alleged unlawful arrest.’” *Jackson v. Loftis*, 189 Fed. Appx. 775, 779 (10th Cir. 2006). *Cf. Sharif v. Picone*, 740 F.3d 263, 270 (3d Cir. 2014) (“Regardless of whether he engaged in assaultive conduct, Sharif remains free to contend that the reaction of the corrections officers was such that it constituted excessive force in comparison to the threat he posed. . . . Given these considerations, we hold that Rule 410 barred the admission of Sharif's plea of nolo contendere [to aggravated assault]. . . . Sharif's claim that he did nothing wrong was not inconsistent with his previous plea of nolo contendere, and, thus, would not be relevant in assessing his character for truthfulness.”).

Accordingly, “Plaintiff's conviction [by way of a nolo contendere plea] for resisting arrest will be relevant to the determination of whether Defendant used excessive force to effectuate h[is] arrest.” *Riggs v. City of Wichita, Kan.*, 2013 WL 978713, at *3 (March 12, 2013). The Court thus finds that the Plaintiff's conviction for resisting arrest, by way of a

no contest plea, is relevant and admissible under both Tenth Circuit and Oklahoma law to determining whether the Defendants used excessive force, although it is not determinative.

C. Qualified Immunity.

The Court now turns to the Defendants' contention that they are entitled to qualified immunity here. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Clark v. Wilson*, 625 F.3d 686, 690 (10th Cir. 2010), *quoting Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "Additional steps are taken when a summary judgment motion raises a defense of qualified immunity." *Cunningham v. New Mexico*, 2014 WL 12791236, at *4 (D. N.M. May 12, 2014), *citing Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009).

"When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right *and* (2) the constitutional right was clearly established. The court may consider either of these prongs before the other 'in light of the circumstances in the particular case at hand.'" *Cunningham v. New Mexico*, 2014 WL 12791236, at *4 (D. N.M. May 2, 2014) (emphasis added), *quoting Pearson*, 555 U.S. at 236. "In other words, immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *White v. Pauly*, _ U.S. _, 137 S. Ct. 548, 551 (2017), *quoting Mullenix v. Luna*, _ U.S. _, 136 S. Ct. 305, 308 (2015). "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law."

Rojas v. Anderson, 727 F.3d 1000, 1003 (10th Cir. 2013) (internal quotation marks omitted).

It is also important to note that "[p]laintiffs must do more than show that their rights 'were violated' or that 'defendants,' as a collective and undifferentiated whole, were responsible for those violations. They must identify specific actions take by particular defendants[] that violated their clearly established constitutional rights." *Pahls v. Thomas*, 718 F.3d 1210, 1228 (10th Cir. 2013) (internal citations omitted). *See also Henry v. Storey*, 658 F.3d 1235, 1241 (10th Cir. 2011) ("§ 1983 imposes liability for a defendant's own actions—personal participation in the specific constitutional violation complained of is essential."). In other words, "the complaint must 'isolate the allegedly unconstitutional acts of each defendant'; otherwise the complaint does not 'provide adequate notice as to the nature of the claims against each' and fails for this reason." *Matthews v. Bergdorf*, 889 F.3d 1136, 1144 (10th Cir. 2018), *quoting Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008). The exception to this, though, is sometimes found at the summary judgment stage of excessive force cases where there is active and joint participation in the use of force.[2] *See Estate of Booker v. Gomez*, 745 F.3d 405, 421 (10th Cir. 2014)

[2] The Tenth Circuit also noted in *Estate of Booker v. Gomez* that "failure to conduct an individualized analysis is [also] not reversible error" where an individual's actions do not constitute excessive force but the "deputy could be liable under a failure-to-intervene theory." 745 F.3d 405, 421-422 (10th Cir. 2014). However, the Plaintiff has neither alleged in the Complaint that officers failed to intervene nor argued on the basis of this in his Response, and the Court will therefore not consider this alternative to the active and joint participation of the four named Defendants. *Lynch v. Board of Cty. Commissioners of Muskogee County, Oklahoma*, 2019 WL 4233382, at *5 (10th Cir. Sept. 6, 2019) ("A plaintiff does not have to separately plead a failure to intervene cause of action, but the pleadings must make clear the grounds on which the plaintiff is entitled to relief. Here, the pleadings did not make clear that the appellants are entitled to relief on a failure to intervene theory.") (internal quotations omitted).

("Although we frequently conduct separate qualified immunity analyses for different defendants, we have not always done so at the summary judgment stage of excessive force cases. Where appropriate, we have aggregated officer conduct.") (collecting cases). This is generally seen where the Defendants appear to have engaged in a "group effort." *See, e. g.*, *Stout v. United States*, 2016 WL 4130231, at *2 (W.D. Okla. Aug. 2, 2016) ("Given that all of the individual Defendants are alleged to have fired into the car, it is not necessary to determine which of the officers fired the shot that resulted in Stout's death."). *See also Estate of Booker*, 745 F.3d at 422 ("Because the Defendants here engaged in a group effort, a reasonable jury could find them liable for an underlying finding of excessive force."). But an aggregate analysis is not required. *See Lynch v. Board of County Commissioners of Muskogee County, Oklahoma*, 2019 WL 4233382, at *4 n.3 (10th Cir. Sept. 6, 2019) ("Because we address each officer separately, we need not opine as to whether group-analysis would have been appropriate."). It thus appears that group analysis is often accompanied by either an indivisible activity such as all officers firing weapons at the same time (as discussed in *Stout*, above), or when each officer's active participation is nevertheless also made part of the analysis. *See Moore v. Stadium Management Company, LLC*, 2016 WL 879829, at *8 (D. Colo. March 8, 2016) (citing to *Estate of Booker* and noting that, "in finding that aggregating the conduct of multiple officers was appropriate, the Tenth Circuit's decision cited evidence of each officer's active participation in the challenged use of force.").

Here, Defendants assert in their Reply that Plaintiff has failed the requirement of *Pahls* to "make clear exactly *who* is alleged to have done *what to whom*, . . . as distinguished

from collective allegations." 718 F.3d at 1225 (quotation omitted) (emphasis in original). The undisputed facts reflect that Defendant Harmon delivered three punches to the Plaintiff's ribs, Defendant Foreman deployed the Taser on the Plaintiff, Defendant Lee employed the lateral vascular neck restraint on the Plaintiff, and Defendant Swaim helped to place the second handcuff on the Plaintiff. The Plaintiff refers to the chokehold, the Taser, and an unnamed officer or officers who placed a knee on his back to subdue him as applications of excessive force. It thus appears that there are facts supporting a coordinated use of force as to Defendants Harmon, Foreman, and Lee, but perhaps not as to Defendant Swaim. However, since it was a "group effort," including Defendant Swaim, it is possible a reasonable jury could find all of them, including Defendant Swaim, liable for any finding of excessive force. The Court finds, for the reasons set forth below, that the officers are entitled to qualified immunity under either analysis.

"To state an excessive force claim 'under the Fourth Amendment, plaintiffs must show *both* that a 'seizure' occurred and that the seizure was 'unreasonable.''" *Thomas v. Durastanti*, 607 F.3d 655, 663 (10th Cir. 2010) (emphasis in original), *quoting Childress v. City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000). "[A] 'seizure' requires restraint of one's freedom of movement and includes apprehension or capture by deadly force." *Brooks v. Gaenzle*, 614 F.3d 1213, 1219 (10th Cir. 2010). The parties do not challenge that a seizure occurred, as the Defendants were in the process of arresting the Plaintiff. It remains, however, for the Plaintiff to demonstrate that the actions of each of these Defendants was unreasonable.

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). And it is an objective inquiry: "the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397 (internal quotations omitted). An officer does not have to use the least intrusive means, as long as his conduct was reasonable, which is based on the totality of the circumstances. *Thomas*, 607 F.3d at 670; *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). Because it is based on the totality of circumstances of each case, "[r]easonableness" does not have a precise test but rather "requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396. "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed." *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004), *quoting Saucier v. Katz*, 533 U.S. 194, 205 (2001). "[W]e are mindful: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment.'" *Lundstrom v. Romero*, 616 F.3d 1108, 1126 (10th Cir. 2010), *quoting Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009).

The Supreme Court in *Graham* set out several important factors, including "[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." 490 U.S. at 396. Also, "[t]he reasonableness of Defendants'

actions depends both on whether the officers were in danger at the *precise moment* that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995) (emphasis added). Finally, "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396.

As to the first factor, the severity of the crime, the Court finds that it weighs slightly in favor of the Plaintiff. He was being arrested for several drug-related felonies, and "[f]elonies are deemed more severe," *see Clark v. Bowcutt*, 675 Fed. Appx. 799, 807 (10th Cir. 2017), but "Defendants do not contend that any of [the Plaintiff's] alleged crimes were accompanied by violence." *Estate of Ronquillo by and through Estate of Sanchez v. City and County of Denver*, 720 Fed. Appx. 434, 438 (10th Cir. 2017) ("The officers were pursuing Mr. Ronquillo for arrest warrants related to aggravated vehicle theft. However, as the district court noted, Defendants do not contend that any of Mr. Ronquillo's alleged crimes were accompanied by violence. We thus weigh this factor in favor of the estate."). *Cf. Huntley v. City of Owasso*, 497 Fed. Appx. 826, 830 (10th Cir. 2012) ("Faced with a complaint of potentially *felonious domestic violence*, the officers find support from the first *Graham* factor.") (emphasis added).

The second factor—the immediacy of the harm—requires the closest analysis and "is undoubtedly the 'most important' and fact intensive factor in determining the objective reasonableness of an officer's use of force." *Pauly v. White*, 874 F.3d 1197, 1216 (10th

Cir. 2017), *quoting Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). This factor is analyzed "at the precise moment that the officer used force." *Estate of Ronquillo*, 720 Fed. Appx. at 438. "The court conducts this analysis from the perspective of a reasonable officer on the scene, rather than with the vision of 20/20 hindsight, acknowledging that the officer may be forced to make split-second judgments in certain difficult circumstances." *Estate of Ronquillo by and through Estate of Sanchez v. City and County of Denver*, 2016 WL 10843787, at *3 (D. Colo. Nov. 17, 2016). Again, this analysis takes into account "the totality of circumstances." *Thomson v. Salt Lake City*, 584 F.3d 1304, 1319 (2009). Here, Defendants contend that noncompliant suspects under the influence of PCP are extremely dangerous and unpredictable, often possessing enhanced physical strength, endurance, and resistance to pain. Plaintiff contends instead that he was peaceful and cooperative, and that intoxicated persons pose a minimal threat, citing *Novitsky v. City of Aurora*, 491 F.3d 1244, 1255 (10th Cir. 2007), in which the Tenth Circuit found the immediacy of the harm was mitigated because although the Plaintiff was intoxicated, he had not resisted arrest and his demeanor was "benign" when an officer employed a "twist lock" on his arm. But *Novitsky* is distinguishable from this case. Although Plaintiff contends he always cooperated, he in fact pleaded no contest to resisting arrest. And the Plaintiff does not dispute that he was intoxicated, seemed confused, and had trouble understanding with and complying with Defendant Foreman's instructions. Such documented noncompliance bolsters the immediacy of the threat to the officers, as "intoxicated people are often unpredictable and inject uncertainty into interaction with law enforcement." *Ornelas v. Lovewell*, 2014 WL 1238014, at *2 (D. Kan. March 26, 2014). "The situation presented to [the officers] was

clearly a tense, uncertain, and rapidly evolving situation that we do not like to second-guess using the 20/20 hindsight found in the comfort of a judge's chambers." *Phillips v. James*, 422 F.3d 1075, 1084 (10th Cir. 2005). This factor therefore weighs in favor of the Defendants.

The third factor, whether the Plaintiff was resisting arrest, goes along with the second factor and also weighs more in the Defendants' favor. In light of the fact of the Plaintiff's resistance to arrest, the officers who attempted to arrest the Plaintiff were justified in some use of force in arresting the Plaintiff. As stated above, the evidence reflects that the Plaintiff pleaded no contest to resisting arrest in violation of 21 Okla. Stat. § 268, which provides that it is a misdemeanor to "knowingly resist[], by the use of force or violence, any executive officer in the performance of his duty." Additionally, the Affidavit signed by Defendant Foreman as part of the arrest record states that the Plaintiff "resisted arrest and had [controlled dangerous substance] in his vehicle." *See* Docket No. 54, Ex. 10, p. 7. As discussed above, in this Circuit the Plaintiff is not entitled to use his no contest plea to recover damages. *See Jackson*, 189 Fed. Appx. at 779 ("There is a proscription on the use of nolo contendere pleas in subsequent civil proceedings, but [] *not* to . . . 'defensive' use . . . in a case where the criminal defendant [has] sought to recover damages for an alleged unlawful arrest.'"). The Court notes that the Plaintiff challenges the Defendants' interpretation of the events in the body camera video, but he does not challenge that he pleaded "no contest" to resisting arrest, and such fact is admissible under these circumstances. The remaining question, of course, is how much force was justified.

The facts reflect that Defendant Foreman and Defendant Harmon attempted to handcuff the Plaintiff but were unsuccessful and took him to the ground. It is not clear from the video or the briefing, but this may also be the point where Plaintiff refers to the full force of an officer on his prone body. Defendant Harmon first delivered three blows to the Plaintiff's ribs in an effort to get him to comply with the arrest, and these two officers grappled with the Plaintiff in order to get his hands behind his back. Defendant Foreman then employed the Taser in the "stapling" method, but officers were still unable to handcuff the Plaintiff. While the use of a Taser can be excessive under certain circumstances, *see Estate of Booker*, 745 F.3d at 424-425 ("Under prevailing Tenth Circuit authority, it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance.") (internal quotation omitted), the use of a Taser is not per se objectively unreasonable when a subject is not clearly under an officer's control. *See Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) ("Even if Perea initially posed a threat to officers that justified tasering him, the justification disappeared when Perea was under the officers' control."). Then as more officers arrived to assist, Defendant Lee applied the neck restraint which allowed the officers to get the first handcuff on the Plaintiff, and then get him back facedown again to get the second handcuff attached. Once the second handcuff was attached, all but one of the officers backed away from the Plaintiff within seconds, and it is undisputed that there was no additional force after the handcuffs were secured. Based on the totality of the circumstances here, the Court therefore finds that the actions of each officer, individually and collectively, were objectively reasonable.

But even assuming *arguendo* that the officers' actions were objectively unreasonable, the Plaintiff must also establish that Defendants' actions violated a clearly established constitutional right. "Ordinarily, a plaintiff may show that a particular right was clearly established at the time of the challenged conduct 'by identifying an on-point Supreme Court or published Tenth Circuit decision; alternatively, 'the clearly established weight of authority from other courts must have found the law to be as he maintains.'" *A.M. v. Holmes*, 830 F.3d 1123, 1135 (10th Cir. 2016), *quoting Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015). However, "'clearly established law' should not be defined 'at a high level of generality.'" *Pauly*, 137 S. Ct. at 552, *quoting Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Instead, it "must be 'particularized' to the facts of the case. Otherwise, plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*, *quoting Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987). Therefore, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, __ U.S. __, 136 S. Ct. 305, 308 (2015) (emphasis in original).

Although the Plaintiff has advocated for a "sliding-scale" approach measuring degrees of egregiousness, *see Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) ("[B]ecause excessive force jurisprudence requires and all-things-considered inquiry with careful attention to the fact and circumstances of each particular case . . . [w]e have therefore adopted a sliding scale to determine when law is clearly established."), the Tenth Circuit has noted that such scale has come into question and "may arguably conflict with recent Supreme Court precedent on qualified immunity" because it "may allow us to

find a clearly established right even when a precedent is neither on point nor obviously applicable." *Lowe v. Raemisch*, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017).

The Plaintiff also points to *Estate of Booker* as to clearly established law, arguing that because that case involved the use of a choke hold, pressure on the back of an arrestee, and a taser, the Defendants here were on notice that "use of such force on a person who is not resisting and who is restrained in handcuffs is disproportionate." 745 F.3d at 428-429. But here, none of those actions occurred while the Defendant was in handcuffs, and the Defendant *was* resisting. Moreover, the choke hold in this case occurred while the Plaintiff was sitting up, while in *Estate of Booker* the Plaintiff was face down with an officer on top of him while the restraint was applied.

Finally, the Plaintiff points to *Weigel v. Broad*, 544 F.3d 1143 (10th Cir. 2008), a case involving positional asphyxiation where "Mr. Weigel was fully restrained and posed no danger, [but] the defendants continued to use pressure on a vulnerable person's upper torso while he was lying on his stomach." 544 F.3d at 1154. The Tenth Circuit held there that "the law was clearly established that applying pressure to Mr. Weigel's upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions." *Id.* at 1155. Such facts are clearly distinguishable from this case, where those techniques were applied only until the Plaintiff was placed in restraints. *See McCoy v. Meyers*, 887 F.3d 1035, 1048 (10th Cir. 2018) ("[T]he preexisting precedent would not have made it clear to every reasonable officer that striking Mr. McCoy and applying a carotid restraint on him [before he was subdued] violated his Fourth Amendment rights. The cases cited by Mr. McCoy—

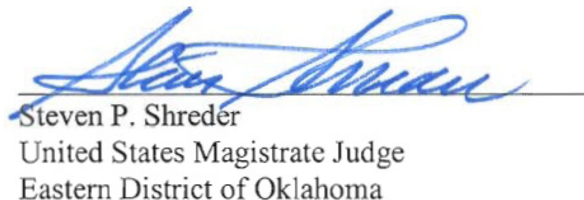
Dixon [*v. Richer*, 922 F.2d 1456 (10th Cir. 1991)], *Casey*, and *Weigel*—involved force used on individuals who either did not pose a threat to begin with or were subdued and thus no longer posed any threat."). *See also Waters v. Coleman*, 632 Fed. Appx. 431, 437 (10th Cir. 2015) ("The key fact here is that while Officer Jones was applying force, Mr. Ashley was resisting being taken into custody. In several cases decided before 2011, this court upheld use of force by officers who faced physical resistance, including against persons who were impaired. Further, the pre-2011 cases holding that force may be excessive tend to emphasize a detainee's *lack* of resistance.") (emphasis in original) (collecting cases).

The Court thus concludes that it is not clearly established that any of the Defendants violated the Constitutional rights of the Plaintiff. Because he has failed to carry his burden of establishing a violation of his constitutional rights, and because the law is not clearly established that the Defendants' actions violated the law, Defendants Harmon, Foreman, Lee, and Swaim are granted qualified immunity on Plaintiff's claim under 42 U.S.C. § 1983.

CONCLUSION

In summary, the Defendants Steve Harmon, Bobby Lee, Greg Foreman and Dillon Swaim's Brief in Support of their Motion for Summary Judgment [Docket No. 54] is hereby GRANTED.

DATED this 16th day of December, 2019.



Steven P. Shreder
United States Magistrate Judge
Eastern District of Oklahoma

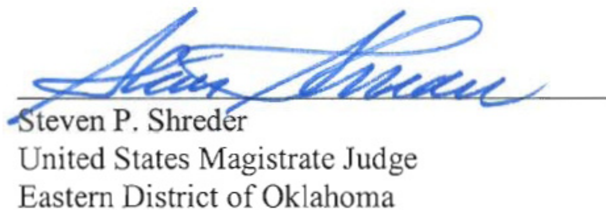
**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

JERIEL EDWARDS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-18-347-SPS**
	)	
STEVEN HARMON, BOBBY LEE, GREG FOREMAN, and DILLON SWAIM,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with this Court's Order, Docket No. 64, granting the Defendants Steve Harmon, Bobby Lee, Greg Foreman and Dillon Swaim's Brief in Support of their Motion for Summary Judgment [Docket No. 54], this Court hereby enters judgment for the Defendants and against the Plaintiff pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED this 16TH day of December, 2019.



Steven P. Shreder
United States Magistrate Judge
Eastern District of Oklahoma

ATTACHMENT 2