UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

GREGORY V. TUCKER	*	**CIVIL ACTION NO. 17-cv-1485**
vs.	*	**HON. JUDGE FOOTE**
CITY OF SHREVEPORT, *et al.*	*	**MAGISTRATE JUDGE HAYES**

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MAY IT PLEASE THE COURT:

The Defendants in this action, the City of Shreveport, Louisiana ("the City") and four police officers employed by the City, have moved for summary judgment (Doc. 29) on each of the claims set forth in the Complaint (Doc. 1) filed by the Plaintiff, Gregory V. Tucker ("Tucker"). That Complaint alleges that the Defendants are liable to Tucker under 42 U.S.C. § 1983 and the laws of Louisiana for injuries suffered by Tucker as the result of excessive and unreasonable force employed by the Defendant police officers in the course of arresting Tucker in December of 2015.

SUMMARY

The Defendants' motion for summary judgment must be denied. The facts of record in this case demonstrate the defendant officers wantonly brutalized Tucker when Tucker was stopped for the minor, non-violent traffic offense of a broken brake/license plate light. The defendant officers utilized excessive and unreasonable force when arresting Tucker in violation of clearly established law. Tucker complied with the arresting officer's verbal commands, was not suspected of any violent crime, posed no immediate threat to the three arresting officers on the scene, and did not resist arrest. Contrary to the Defendants' claim, the facts they assert as justifying the assault on Tucker are disputed, and some of those asserted "facts" are opinions or legal conclusions. Accordingly, the Defendants' motion for summary judgment must be denied.

STATEMENT OF FACTS

On November 30, 2016, at approximately 11:30 p.m., Shreveport Police Officer Chandler Cisco ("defendant Cisco") activated his police lights and sirens to initiate the traffic stop of Plaintiff Gregory Tucker ("Tucker") for a broken brake light and license plate light. Ex. A (Cisco

deposition excerpts) 25:7-9. Tucker did not feel safe stopping in a deserted area, proceeded to a safe spot that was one-half miles away, and stopped his vehicle. Ex. B (excerpts of Tucker's deposition) at 52:9-19; Ex. C (transcript of Cisco testimony on November 14, 2017 before the Honorable Judge Katherine Dorroh in the First Judicial District Court for the Parish of Caddo, State of Louisiana for the case bearing the caption *State of Louisiana v. Gregory Tucker*, and docket number 345607) at 5:8-12. Once defendant Cisco activated his lights and sirens, defendant Cisco testified that Tucker never sped and committed no moving violations. Ex . C at 10:5-11; see also Ex. A at 27:12-16 & 28:10-12. Defendant Cisco approached Tucker and requested Tucker's license, registration, and proof of insurance; Tucker complied. Ex. B at 53:25-9. Ex. C at 4:19-21. Defendant Cisco ordered Tucker out of his vehicle; Tucker complied. Ex. B at 54:10-12. Defendant Cisco performed two searched of Tucker. Ex. B at 54:12-14; Ex. A at 33:7-11. Defendant Yondarius Johnson ("defendant Johnson") and defendant William McIntire ("defendant McIntire'), both Shreveport Police Officers, arrived on the scene. Defendant Johnson witnessed defendant Cisco search Tucker. Ex. D (excerpts of the deposition of defendant Johnson) at 34:1-4. Tucker was in the process of placing his hands behind his back when Defendant McIntire then approached Tucker and, with no verbal warning, grabbed his arm, threw him to the ground, and began beating him in the face and body. Ex. B at 54:20-55:2 & 57:22-25. Ex. A at 41:6-11. Defendants held each of Tucker's arms and used him "like a broom. Like my face was hitting, fixing to the ground, and I kept turning my face, because it was like they were trying to make my head hit the concrete, my face hit the concrete." Ex. B at 59:5-17. The defendants punched Tucker's face and body with a closed fist over twenty times. Ex. B at 63:8-20. Defendant McIntire held Tucker's head against the pavement while defendants Tyler

Kolb (another Shreveport Police Officer and hereinafter "defendant Kolb") and Cisco repeatedly punched Tucker in the face and body. Ex. E (excerpts of deposition of McIntire) at 44:12-44:3. Ex. B at 59:12-17. After the altercation, Tucker's face was covered in blood. Ex. D at 33:7-18. Emergency medical assistance was called to the scene, and Tucker was later taken to the hospital. Ex. B at 69:25-70:3. Tucker complained of an aching head and arms. Ex. B at 69:25-70:11. Tucker then filed a complaint with the defendant's internal affairs department and instituted this law suit against defendants for their actions.

LAW & ARGUMENT

A party is entitled to summary judgment only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R.Civ.P. 56(c). On a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In reviewing the evidence, the court must refrain from making credibility determinations or weighing the evidence. *Deville v. Marcantel*, 567 F.3d 156, 163-4 (5th Cir. 2009).

To establish a claim of excessive force under the Fourth Amendment, a plaintiff must demonstrate: (1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable. *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009). In *Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017), the court gave the following guidance:

> The test used to determine whether a use of force was reasonable under the Fourth Amendment "is not capable of precise definition or mechanical application." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). Rather, "its proper application requires careful attention to the facts and circumstances of each particular case, 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." *Id*. "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." *Id*. Thus, the overarching question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id*. at 397.

Factors that have been identified in bearing on the objective reasonableness of officers' use of force include whether more than one person was involved and whether other dangerous circumstances existed. *Goldman v. Williams*, 101 F. Supp. 3d 620, 648 (S.D. Tex. 2015) (citing *Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989)).

I. There Are Genuine Disputes of Material Fact

Summary judgement is not proper because there are genuine disputes as to material facts, such as whether Tucker's injuries were *de minimus*; whether the Defendant officers' use of force was excessive and unreasonable; whether Tucker posed an immediate threat to the arresting officers; and whether Tucker resisted the Defendant officers.[1] These genuine disputes of material fact, viewed in the light most favorable to Tucker and without making any credibility determinations, preclude summary judgment.

A. Tucker's Injuries Are Not *De Minimis*

There is a dispute as to whether Tucker suffered only *de minimis* injuries. The Defendants' description of the injuries as mere scrapes and a bump on the forehead minimizes

[1] There is another fact-intensive dispute regarding whether a reasonable police officer would believe Tucker was resisting discussed in Section III of this memorandum.

the harm Tucker suffered and excludes other parts of the record. Tucker testified that he was thrown to the ground with an officer holding each arm and the officers had Tucker "like a broom. Like my face was hitting, fixing to the ground, and I kept turning my face, because it was like they were trying to make my head hit the concrete, my face hit the concrete." Ex. B at 59:5-17. The defendants punched Tucker's face and body with a closed fist over twenty times. Ex. B at 63:8-20. Tucker suffered pain and discomfort significant enough that he believed one of his arms was broken and the other was dislocated. Doc. 29-3, at 70. In fact, the doctors at the hosital initially advised Tucker that his arm was broken. Ex. B at 70:4-15. Tucker also suffered a severe headache and believed he had a concussion. Ex. B at 62:7-8. Tucker suffered lacerations on his lips, injuries to both arms and the side of his face, and his "forehead was bust." Ex. B at 69:3-17. Tucker's face was covered in blood after the encounter, swollen for two weeks, and had a significant amount of skin scraped off. Doc. 29-3, at 72. Tucker also suffered a black eye that lasted five to six days, the knot on his head remained for several months, and his knee was sprained for several months. Doc. 29-3, at 73. Moreover, the injuries were severe enough that the Defendant officers themselves called for emergency medical assistance and later took Tucker to the hospital. Ex. B at 69:18 - 70:2. The psychological trauma has left Tucker thinking that "one of them [police] might kill me one day. I'm just serious. My mom's scared for me. Everybody's been scared for me." Ex. B at 81:11-13. These injuries cannot be considered so minor as to be constitutionally insignificant.

Regardless of the severity of Tucker's injury, whether an injury is cognizable for purposes of an excessive force claim does not depend on the extent of the injury alone but also on the reasonableness of the force used. The Fifth Circuit has made clear that a court's

determination of whether an injury is *de minimis* and whether the amount of force used was clearly unreasonable are inextricably linked. *Brown v. Lynch*, 524 F. App'x 69, 80 (5th Cir. 2013) (citing *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012); *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004); *Williams v. Bramer*, 180 F.3d 699, 704 (5th Cir. 1999); *Ikerd v. Blair*, 101 F.3d 430, 434-35 (5th Cir. 1996). In *Brown v. Lynch*, the Court held that although a *de minimis* injury is not cognizable, the extent of injury necessary to satisfy the injury requirement is "directly related to the amount of force that is constitutionally permissible under the circumstances." *Id.*, 524 Fed. Appx. at 80. Any force found to be objectively unreasonable necessarily exceeds the *de minimis* threshold. Even relatively insignificant injuries and purely psychological injuries pose a question of fact as to whether they are *di minimus* when resulting from an officer's unreasonably excessive force. *See Bone v. Dunnaway*, 657 Fed. Appx. 258, 262 (5th Cir. 2016) (fact question existed as to whether bruising and swollen cheek suffered by excessive force plaintiff constitute *de minimis* injury) and *Williams v. Bramer*, 180 F.3d 699, 704 (5th Cir. 1999) (choking of plaintiff by police, causing dizziness and coughing, was a cognizable injury for an excessive force claim).[2]

Here, Tucker undeniably suffered injuries at the hands of the Defendant police officers. There is, however, a question of fact as to whether the use of force was excessive and

[2] The cases the Defendants cite to support their contention that Tucker suffered only *de minimis* injuries are either distinguishable or fail to apply the controlling Fifth Circuit analysis set forth in *Brown v. Lynch*. For example, the courts in *Elphage v. Gautreaux*, 969 F. Supp. 2d 493, 509 (M.D. La. 2013), and *Reaux v. Sibley*, 2011 WL 2455759 (M.D. La. May 25, 2011) (which was actually an Eighth Amendment claim), did not analyze the plaintiff's injuries in the context of the amount of force employed by the police. And in *Golla v. City of Bossier City*, 687 F. Supp. 2d 645, 660 (W.D. La. 2009), the plaintiff admitted he suffered no harm from the force employed by police officers.

unreasonable that must be determined in order to know whether the injuries suffered by Tucker are cognizable under an excessive force claim.

B. The Force Used Was Excessive and Unreasonable

The defendants used excessive and unreasonable force to arrest Tucker. Tucker was stopped for a minor traffic offense and was not suspected of any violent offense. Tucker was not an immediate threat because he had already submitted to a search prior to being beaten. At least two of the three armed defendant officers knew Tucker was unarmed, and the defendants outnumbered Tucker three (and eventually four) to one. Finally, Tucker disputes he resisted at any time and the video does not show Tucker resisting.

Despite defendants' claim, the policies of the Shreveport Police Department are irrelevant and have no bearing on whether the Defendant officers employed excessive force in Tucker's arrest. In *Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 2006), the appellate court held that the trial court properly excluded evidence of a police department's general orders on use of force in a lawsuit seeking recovery under 42 U.S.C. § 1983 for excessive force. "The fact that excessive force is 'not capable of precise definition' necessarily means that, while the CPD's General Order may give police administration a framework whereby commanders may evaluate officer conduct and job performance, it **sheds no light** on what may or may not be considered 'objectively reasonable' under the Fourth Amendment given the infinite set of disparate circumstances which officers might encounter." *Id.* at 454 (emphasis added). The court went on to point out that § 1983 "protects plaintiffs from constitutional violations, not violations of state laws or, in this case, departmental regulations and police practices." *Id. citing Scott v. Edinburg*, 346 F.3d 752, 760 (7th Cir. 2003).

Accordingly, the proper determination of whether the force used on Tucker during his arrest was excessive and unreasonable is based, not on Shreveport Police Department policies, but on a careful consideration of the facts and circumstances of the particular case. See *Graham*, 490 U.S. at 396. This involves careful consideration of (1) the severity of the crime at issue, (2) whether Tucker posed an immediate threat to the officers, and (3) whether Tucker was actively resisting arrest or attempting to evade arrest by flight. *Trammel*, 868 F.3d at 340. "Thus, the overarching question is 'whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them.'" *Id.* at 340 *citing Graham*, 490 U.S. at 397.

Here, the defendant officers' actions were not objectively reasonable, and each factor favors Tucker's claims.

(i) The Severity of the Crime at Issue

The first factor favors Tucker. Tucker was stopped for minor traffic offenses: "he had a brake light out as well as a license plate light out." Ex. A at 25:7-9. These minor offenses were the crimes at issue and should make the need for force substantially lower. *See Deville*, 567 F.3d at 167 (fact that arrestee was stopped for the traffic offense of speeding made the need for force substantially lower). However, the Defendants do not seek to claim that the non-moving traffic violation for which Tucker was stopped is a serious offense that makes the use of force against Tucker more reasonable. Defendants do suggest that Tucker committed the offense of flight from an officer, La. R.S. § 14:108.1(A), by failing to immediately stop when Defendant Cisco activated his light and siren after driving his police vehicle up behind Tucker. Regarding flight, the arresting officer testified that after he activated his police lights and sirens, Tucker committed no traffic offenses other than "not using his turn signal" and "never sped." Ex A at 27:12-16 &

28:10-12. Note that Cisco gave in-court testimony that Tucker committed no non-moving violations after Cisco activated his police lights and sirens. Ex. C at 10:5-13. The video shows Tucker was not in the act of fleeing from the defendant officers when the officers employed excessive force. Tucker submitted to the stop and was standing behind defendant Cisco's police cruiser (as directed by defendant Cisco), after being searched by defendant Cisco. Doc. 29-3 at p. 3. Defendant Johnson testified Tucker's hands were on the hood of defendant Cisco's police car when he approached. Ex. D at 22:22-4. Even if Tucker did criminally flee from an officer, that offense is not a violent offense, either intrinsically or with respect to Tucker's actual actions, which could justify the force employed by the Defendant officers.

(ii) Immediate Threat to the Officers

The second factor also favors Tucker. Tucker did not pose an immediate threat to the officers at the time he was thrown to the ground and the Defendant officers began beating him. Defendant Cisco had already performed two separate pat-downs of Tucker, removing a pocket knife, and thus knew that Tucker did not possess any weapons. Ex. A at 33:1-12. Cisco's search of Tucker was made in view of the other officers on the scene, as Defendant Johnson testified he saw the search. Ex. D 34:1-4. Any threat an unarmed Tucker could have posed was eliminated by the fact that three armed police officers (and eventually four) were on the scene to control him. Officer Johnson confirmed this when he testified that he did not feel unsafe as he was approaching Tucker because "three officers was [sic] there." Ex. D at 37:4. Given that Tucker was unarmed, not suspected of any violent offense, outnumbered three-to-one by armed police officers, and an arresting officer testified he felt safe in Tucker's presence (while Tucker was un-

cuffed), it cannot be said that he posed an immediate threat to the officers when the Defendant officers threw him to the ground or thereafter.

The Defendants suggest he was a threat because he was "agitated and aggressive" during the encounter with police. However, voicing displeasure with the police does not equate with being a threat to police nor it is unlawful. The Fifth Circuit has "distinguished, for purposes of qualified immunity, cases in which officers face verbal resistance but no fleeing suspect, from those in which officers face some form of verbal or physical resistance *and* a fleeing suspect." *Bone*, *supra*, 657 App'x at 265. Tucker made no indication that he was going to commit violence against the officers and his verbal objections were to being stopped. Nor did Tucker make any threatening gestures toward any of the defendants. Tucker complied with the instructions given to him by Cisco and the other officers. Under these circumstances, there is no basis for concluding that Tucker was an immediate threat to the officers when they slammed him into the ground. *See also Darden v. City of Fort Worth*, 880 F.3d 722, 732-3 (5th Cir. 2017) (where the arrestee was not suspected of any violent crime and did not make not threatening statements or gestures to police, a jury could conclude that he did not pose an immediate threat to the police for purposes of an excessive force claim).

(iii) Actively Resisting Arrest

As to the third factor, Tucker did not actively resist attempts by police to handcuff or otherwise seize his person. Tucker denies any such resistance and such resistance is not visible on the video. Ex. B at 57:9-11 & 21:12-17. Tucker complied with Cisco's requests to stop his vehicle, exit his vehicle, put his hands on the hood of Cisco's car, identified himself, and placed his hands behind his back was advised to do so. Ex. B at 53:25 - 54:23. Even if Tucker had

previously engaged in "flight" by not stopping his vehicle immediately upon Defendant Cisco's use of his flasher and siren,[3] any such flight was not "actively" occurring at the time of or just before the application of force by the police. Tucker had stopped, gave identification, and submitted to the seizure long before he was thrown to the ground. A jury could conclude, based on the video of the incident and the testimony of the parties, that Tucker did not physically resist the arrest. Accordingly, this factor favors Tucker's claims.

All *Graham* factors favor Tucker, and thus the defendants used excessive and unreasonable force to arrest Tucker. Tucker was suspected of a non-violent and minor traffic offense; posed no immediate threat to three arresting officers; and did not actively resist arrest.

II. Even If Tucker Resisted, Defendants' Use of Force is Still Unreasonable

Summary judgment is not proper because, even if Tucker did pull his arms away or become tense when approached by defendant McIntire, as claimed by the defendants, this resistance does not warrant the extreme force utilized on Tucker. Several cases are on point and illustrate this.

In *Trammel v. Fruge*, *supra*, the court reversed a grant of summary judgment to police officers on a Fourth Amendment excessive force claim because the evidence, including a video recording of the plaintiff's arrest, did not demonstrate without dispute that the plaintiff engaged in the kind of resistance that warranted throwing the plaintiff to the ground and striking him

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[3] Tucker's driving after Defendant Cisco signaled for him to pull over are wholly inconsistent with an attempt to avoid arrest. The video of the incident indicates that Tucker drove for approximately one minute after Defendant Cisco activated his signals, Tucker engaged in no evasive maneuvers during that time, and he drove at or below the speed limit the entire time. Thus, Tucker was not engaged in an attempt to flee from being seized by Defendant Cisco, but instead was, as he stated in his deposition, seeking to find a place that would be safe for him during his encounter with the police. Ex. B at 52:9-19.

numerous times in an effort to secure handcuffs. After initially finding that the evidence did not demonstrate the offense plaintiff committed (public intoxication) was serious, that he was fleeing, or that he posed a danger, the court ruled that even though the plaintiff had pulled his arm away when an officer attempted to grab it in order to apply the handcuffs, a jury could conclude that this did not constitute the kind of "active resistance" that would justify tackling the plaintiff to the ground and striking him repeatedly. *Trammell*, 868 F.3d at 342. Additionally, the court noted that it "has several times found that the speed with which an officer resorts to force is relevant in determining whether that force was excessive to the need," and that fact that only three seconds elapsed between the request that the plaintiff place his hands behind his back and when the three officers teamed up to take the plaintiff to the ground meant that "a reasonable jury could infer that the officers used very little, if any, negotiation before resorting to physical violence" in violation of the plaintiff's Fourth Amendment rights. *Id.*

Similarly, in *Newman v. Geudry*, 70 F.3d 757 (5th Cir. 2012), the court ruled that police officers were properly denied summary judgment on the plaintiff's excessive force claim where video of the incident did not contradict the plaintiff's claim that he complied with the orders of the police during a traffic stop, but they nonetheless struck him with a baton and shot him with a taser. Although the officers contended that the plaintiff was resisting their attempts to pat him down and handcuff him and that their actions were necessary to prevent serious injury or death to themselves, the plaintiff denied that he resisted the officers or failed to comply with any commands and that the officers used force in response to nothing more than an off-color joke. "Mindful that we are to view the facts in a light most favorable to [the plaintiff]," the court wrote, "and seeing nothing in the three video recordings to discredit his allegations, we conclude,

based only on the evidence in the summary-judgment record, that the use of force was objectively unreasonable in these circumstances." *Newman*, 703 F.3d at 762.

And in *Darden v. City of Fort Worth, supra*, the court reversed a grant of summary judgment to police officers on an excessive force claim where the evidence in the record, including a video of the incident, did not demonstrate that the officers' use of force was justified by the suspect's resistance. Because the other *Graham* factors did not favor the officers' decision to force the suspect's body and face into the ground (which eventually caused him to stop breathing), the court acknowledged that the case turned on whether the suspect was actively resisting police attempts to arrest and subdue him. It found the evidence in the record on this in conflict:

> Based on the evidence in the record, a jury could conclude that no reasonable officer on the scene would have thought [the suspect] was resisting arrest. The videos show that [he] raised his hands when the officers entered the residence, and it appears that he rolled over onto his face at one point after the officers instructed him to do so.

Id. at 705. That court continued: "[w]e have consistently held that a police officer uses excessive force when the officer chokes, punches, or kicks a suspect who is not resisting arrest," and if a jury finds that no reasonable officer on the scene would have perceived the suspect was actively resisting arrest, then a jury could also conclude that the officers used excessive force by choking and "repeatedly punching and kicking him in the face." *Id.* at 707.

See also De Ville, *supra* 567 F.3d at 167-68 (district court erred in granting summary judgment on excessive force claim where there was a factual dispute over the plaintiff's resistance to police attempts to take her into custody; the plaintiff did not actively resist police and a jury could reasonably find that the degree of force the officers used in this case was not

justifiable under the circumstances); *Bone v. Dunnaway*, 657 Fed. Appx. 258 (5th Cir. 2016) (where there is a genuine dispute as to whether any *Graham* factor justified use of force by police, summary judgment should not have been granted on an excessive force claim); and *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008) (where, under the plaintiff's account of events, plaintiff slammed her head into a vehicle as they were attempting to arrest her and she was not resisting or attempting to flee, the police were not entitled to summary judgment on her excessive force claim).

While defendants point to *Griggs v. Brewer*, 841 F.3d 308 (5th Cir. 2016) in support of their position, that case is distinguishable. *Griggs* involved a clearly observable, lurching movement made by the plaintiff which a reasonable police officer could have believed indicated the plaintiff was attempting to flee. There is no such action by Tucker that can be seen on the video which would similarly justify the extreme force employed by the Defendant officers.

Here, as in the above cases, the force defendants employed is clearly excessive and unreasonable. The defendants claim Tucker pulled away at their attempts to handcuff him and was tense and agitated. This assertion is disputed by Tucker. The video, which must be viewed in a light most favorable to Tucker's claim,[4] shows Tucker was complying with the directions given to him by Defendant Cisco and submitting to the seizure and searches when the other Defendant officers arrived on the scene and *immediately* throw him to the ground and began beating Tucker. Doc. 29-3 at 3. The video does not show Tucker resisting and trying to pull away from the officers. Tucker denies that he has ever resisted arrest (Ex. B at 21:12-17) and states that he did not ever try to pull away from the arresting officer. Ex. B at 57:9-11. At least one arresting

[4] *Matsushita Elec. Indus. Co.*, 475 U.S. at 587

officer, defendant Johnson, felt safe while approaching an un-cuffed Tucker and believed the arrest should not have happened the way it did. Ex. D at 37:7-18. Defendant Johnson acknowledged that police officers are trained to not punch people in the face. Ex. D at 40:16-41:9. Defendant McIntire admits that he gave no verbal command to Tucker but instead immediately grabbed Tucker's arm and threw him down. Ex. E at 34:6-12. Defendant McIntire's testimony indicates that he arrested Tucker, not because Tucker was resisting arrest, but because Tucker was voicing his displeasure with Cisco and so that "it's done and over with." Ex. E at 34:5-7. Defendant Cisco stated that Tucker complied with Cisco's request for Tucker to put his hands behind his back. Ex. A at 41:6-11 and 39:17-21. The later claims of Cisco and McIntire that Tucker was "pulling his left arm" cannot be seen on the video footage and is denied by Tucker. The speed at which Tucker was thrown to the ground, the savageness of the beating he endured, along with no visible resistance all evidence that the defendants' used unreasonable force in arresting Tucker even if Tucker pulled his arm away from defendants.

III. Defendants Are Not Entitled to Qualified Immunity

The Defendants are not entitled to be granted qualified immunity. The reasonable police officer would know clearly established law states arresting officers may not use extreme force to subdue someone who is not actively resisting or attempting to flee. This principle is clear and has been upheld in several instances.

When determining whether qualified immunity applies, the relevant inquiry is whether the defendant officers' use of force was objectively reasonable in light of clearly established law. *Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 410 (5th Cir. 2009); *Bone v. Dunnaway*, 657 Fed. Appx. 258.

It is clearly established law that police may not use extreme force, including slamming a person face first into the ground and pummeling him with punches, if the arrestee is not fleeing or resisting. Thus, a police officer is not entitled to qualified immunity if he brutalizes a person who is not actively resisting. In *Bush v. Strain*, *supra*, the court rejected a police officer's claim to qualified immunity at the summary judgment phase of the plaintiff's excessive force lawsuit, writing as follows:

> At the time of Bush's arrest, the law was clearly established that although the right to make an arrest "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it," the permissible degree of force depends on the severity of the crime at issue, whether the suspect posed a threat to the officer's safety, and whether the suspect was resisting arrest or attempting to flee. Here, under Bush's account of the events, **she was not resisting arrest or attempting to flee when Detective Galloway forcefully slammed her face into a nearby vehicle during her arrest**, thereby causing significant injuries. While the Fourth Amendment's reasonableness test is "not capable of precise definition or mechanical application," the test is clear enough that Galloway should have known that he could not forcefully slam Bush's face into a vehicle while she was restrained and subdued.

Bush, 513 F.3d at 502 (emphasis added).

Likewise, in *Trammell*, 868 F.3d at 343, the court rejected the claim to qualified immunity where the facts viewed in favor of the plaintiff indicated he was not resisting. "Accordingly, the law at the time of Trammell's arrest clearly established that it was **objectively unreasonable** for several officers to tackle an individual who was not fleeing, not violent, not aggressive, and **only resisted by pulling his arm away from an officer's grasp**." *Id*. (emphasis added). In *Newman*, 703 F.3d at 764, the court held summary judgment could not be granted against the plaintiff on the basis of qualified immunity because in the arrestee's version of the incident he "posed no threat to anyone's safety and did not resist the officers or fail to comply

with a command." And in *Bone v. Dunnaway*, *supra*, the court again rejected an argument of qualified immunity because clearly established law holds that police may not use enhanced force against a suspect who is not fleeing or physically resisting and the arrestee claimed she did not resist. *Id*., at 263-4.

In the instant case, the evidence does not establish that a reasonable officer would believe Tucker was resisting arrest. Tucker himself has provided testimony that he was compliant and not resisting, and nothing in the video recording of the incident contradicts his claims. Ex. B at 57:9-11 & 21:12-17. Tucker made no movements that could be interpretted as an attempted attack or escape. Tucker complied with Cisco's commands; provided his license and registration; and stepped out of his vehicle.[5] Even defendant Johnson felt safe as he approached an un-cuffed Tucker (Ex. D at 37:3-6) and thought the arrest "shouldn't have happened like [sic] quite like that…" Ex. D at 37:16-17. Tucker was in the process of placing his hands behind his back when defendant McIntire approached and immediately grabbed him and threw him to the ground. Ex. A at 41:6-11; Ex. B at 57:22-25. If Tucker's version is true, clearly established law holds that the police could not use the kind of violence and enhanced force that they used on Tucker. Additionally, Tucker's expert has opined that the defendant officers "violated accepted law enforcement practice as well as their training…," "did not follow proper law enforcement training or guidelines concerning the amount of force to be used in taking someone into

[5] It should be noted that Defendant Cisco initially testified in his deposition that Tucker did not provide his license upon request. Ex. A at 30:2-20. However, when impeached in the same deposition with testimony he gave during a hearing regarding Tucker's criminal charges wherein he stated that Tucker did in fact step out of his vehicle and provided Cisco with his paperwork, his license, and his registration, Cisco admitted he was unsure. Ex. A at 62:20-63:13. Ex. C at 4:19-21.

custody…," and "failed to follow their PPCT training…" Ex. F (expert report of W. Lloyd Grafton) at 3.

Summary judgment may not be entered for Defendant officers on the basis of qualified immunity because it is clearly established law that an arresting officer may not brutalize a non-fleeing, non-violent, and non-aggressive individual, and there is a dispute as to whether a reasonable officer would believe Tucker was actively resisting arrest.

IV. The City Cannot Claim Qualified Immunity

The City cannot be granted qualified immunity, and thus summary judgment cannot be proper on this issue as to the City. Qualified immunity is only available as to claims against officers in their personal or individual capacities; it does not protect governmental entities from liability. *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *see also Leatherman v. Tarrant County Narcotics-Intelligence*, 28 F.3d 1388, 1398 n. 15 (5th Cir. 1994) ("it is well-established that an individual officer's qualified immunity does not protect a municipality."). Thus, to the extent the Defendants' motion is granted only on the basis of qualified immunity, the City itself would not be entitled to summary judgment in its favor.

CONCLUSION

For the reasons set forth above, the Defendants motion for summary judgment must be denied, and Tucker respectfully requests an order be entered denying the Defendants' Fed. R. Civ. P. 56 motion in all respects and for the costs of defending against Defendants' motion.

CERTIFICATE OF SERVICE

I hereby certified that the foregoing document was electronically filed with the Clerk of Court using CM/ECF and is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF on this December 21, 2018.

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