IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JIM E. TEYNOR,

Plaintiff,

v.

MICHAEL D. KING, M.A. FULCHER, G.D. TIPPERY and JENNIFER CRARY,

Defendants.

OPINION AND ORDER

01-C-146-C

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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Pro se plaintiff Jim E. Teynor contends that defendants M. A. Fulcher and G. D. Tippery violated his Fourth Amendment rights by arresting him unlawfully and by using excessive force and violated his Eighth Amendment rights by denying him adequate medical treatment. He contends that defendant Michael D. King was negligent in training and supervising defendants Fulcher and Tippery. Finally, plaintiff contends that defendants conspired to commit these alleged constitutional violations.

Presently before the court is a motion for summary judgment filed by defendants Michael D. King, M. A. Fulcher and G. D. Tippery. As a preliminary matter, I note that

plaintiff filed an affidavit, dkt. #29, signed on November 13, 2001, after plaintiff's deposition on September 5, 2001, and after defendants filed their motion for summary judgment on November 1, 2001. Defendants maintain that plaintiff's affidavit should be disregarded because it is an attempt to patch up his deposition testimony. See Russell v. Acme-Evans Co., 51 F.3d 64, 67 (7th Cir. 1995). In his affidavit, plaintiff contradicts and supplements his deposition testimony despite the fact that defense counsel explored the events of July 12, 2000, and July 26, 2000, at the deposition. For example, at his deposition, plaintiff stated that defendant Tippery did not participate in the takedown. Dep. of Teynor, dkt. #11, at 40. In his affidavit, plaintiff alleges that "the officers then rushed me and forced me physically to the ground." Affid. of Jim Teynor, dkt. #29, at 1.

Parties cannot defend a summary judgment motion by "creating 'sham' issues of fact with affidavits that contradict their prior testimony." Bank of Illinois v. Allied Signal Safety Restraint Systems, 75 F.3d 1162, 1168 (7th Cir. 1996). This does not mean that subsequent affidavits may not be considered if they are offered to clarify ambiguous or confusing testimony or are based on newly discovered evidence. See id. at 1171-72. The rule prohibiting the creation of false disputes of fact must be applied with caution; it is the jury's role to resolve questions of credibility. See id. at 1169. In this instance, however, plaintiff's affidavit does not merely clarify his deposition testimony; it supplies new material to which plaintiff never referred in his deposition and it contradicts portions of his

deposition testimony. Plaintiff makes no attempt to show why he omitted any reference in his deposition to the details he now incorporates in his affidavit.

It is important to note that plaintiff's affidavit not only postdates his deposition, it also postdates defendants' brief in support of their motion for summary judgment, in which defendants argue that they are entitled to summary judgment because plaintiff has failed to state a claim for unlawful arrest, the use of excessive force, deliberate indifference to a serious medical need, negligent training and supervision and conspiracy. The interplay between defendants' brief and plaintiff's affidavit fits the "classic pattern" in which "a party seeks to create an issue of fact by simply submitting an affidavit which directly contradicts a witness' earlier sworn comments." Bank of Illinois, 75 F.3d at 1173 (Cudahy, J., concurring). When such an affidavit "pops up in the immediate context of summary judgment" it is "easy" to conclude that the affidavit is a "sham" and that it must be disregarded. Id. I reach that conclusion in this case and for that reason, I have not considered any of plaintiff's responses to defendants' proposed findings of fact or any of plaintiff's supplemental proposed facts that rely on his affidavit.

I also note that the parties' submissions on summary judgment were not in substantial compliance with this court's Procedure to be Followed on Motions for Summary Judgment. Specifically, plaintiff was informed in an order entered on November 16, 2001, that he was required to respond to each of defendants' proposed findings of fact paragraph by paragraph

and that he should state his own version of the facts, citing to the specific evidence in the record that would support his version of the fact. Procedure III.C.3.c. Although plaintiff did respond to defendants' facts in numbered paragraphs, he did not cite to the record to support any of his propositions. Although it appears that plaintiff intended to rely in large part on his affidavit that he filed at the same time as his response to defendants' proposed findings of fact, see Affid. of Jim Teynor, dkt. #29, I am not considering any facts that rest on plaintiff's affidavit alone. Defendants did not clarify the matter in their reply to the proposed findings of fact. In most instances, defendants did not cite to specific paragraphs of plaintiff's response and they did not cite to the record to support their version of the facts. Therefore, I considered only facts that were readily identifiable in the record, with the exception of plaintiff's proposed facts that depend on his affidavit.

Because I find that plaintiff has failed to adduce sufficient evidence to allow a reasonable jury to find in his favor on his claims for unlawful arrest, the use of excessive force, deliberate indifference to a serious medical need or conspiracy against defendants Fulcher or Tippery, I will grant defendants' motion for summary judgment for defendants Fulcher and Tippery with respect to these claims. Because he has failed to adduce sufficient evidence to allow a reasonable jury to find in his favor on his claim for negligent training or inadequate policies against defendant King, defendants' motion for summary judgment will be granted for defendant King with respect to this claim. Because the undisputed facts do

not suggest that "defendants" conspired to commit the alleged constitutional violations and because this contention is plaintiff's only claim against defendant Crary, summary judgment will be granted in favor of defendant Crary on the court's own motion. Borcherding-Dittloff v. Corporate Receivables, Inc., 59 F. Supp. 2d 822, 826 (W.D. Wis. 1999) (where record reveals that non-moving party is entitled to summary judgment, appropriate for court to enter judgment on its own motion).

From the findings of fact proposed by the parties, I find the following facts to be material and undisputed.

FACTS

A. Parties

Plaintiff Jim Teynor is a resident of Wisconsin. Defendant Michael D. King is the Police Chief for the City of Prairie du Chien, Crawford County, Wisconsin. Defendants M. A. Fulcher and G. D. Tippery are police officers for the City of Prairie du Chien Police Department. Defendant Jennifer Crary is plaintiff's estranged live-in girlfriend and a State of Wisconsin Department of Corrections employee.

B. Incident of July 12, 2000

On the evening of July 12, 2000, plaintiff and defendant Crary had an argument in

their home. Plaintiff was angry that defendant Crary was going out with friends that evening, leaving plaintiff responsible for watching her son. After Crary left the house, plaintiff left also and followed Crary and a friend to Kwik Trip. When he reached the Kwik Trip, he approached Crary in her car and yelled profanities at her. Plaintiff then opened the hood of Crary's car in order to disconnect the spark plug wires so that Crary could not leave. Plaintiff continued to argue with Crary, took a package of cigarettes from her hand, crushed the package and threw it to the ground. Crary's friend came out of the Kwik Trip and indicated that the police had been called. Plaintiff departed.

Defendants Tippery and Fulcher received a dispatch call regarding a disturbance at the Kwik Trip South in the City of Prairie du Chien. Arriving at the scene, defendant Tippery met with an adult female in the parking lot, who identified herself as Jennifer Crary. Crary told Tippery that plaintiff was her live-in boyfriend and that she had had a fight with him earlier in the evening in their home. Crary explained to Tippery that plaintiff had followed her to the Kwik Trip and had yelled at her before leaving in his vehicle. Defendant Tippery told Crary that he would investigate the matter and try to locate plaintiff for questioning. Defendant Fulcher spoke with the Kwik Trip clerk briefly but did not speak with defendant Crary. Defendant Tippery left Kwik Trip and began a visual search for plaintiff in the surrounding area from his vehicle, without finding him. Defendant Fulcher also left Kwik Trip in his squad car and tried to locate plaintiff.

After leaving Kwik Trip, plaintiff drove around local streets to collect his thoughts. He saw the police arrive at Kwik Trip and watched them talk to defendant Crary. After the police left Kwik Trip, plaintiff waited for Crary to leave and then followed her. Because plaintiff was following her, defendant Crary returned to the Kwik Trip. Plaintiff followed her back to the store. Crary and her friend went inside the Kwik Trip, where the store clerk locked the door and called the police. Plaintiff remained outside the Kwik Trip and asked Crary to come outside and talk with him. Plaintiff approached Crary's vehicle, removed the gasoline cap and then left Kwik Trip.

While they were trying to find plaintiff, defendants Tippery and Fulcher each received a second dispatch call indicating that another altercation was taking place between plaintiff and Crary at the Kwik Trip. When defendant Tippery arrived at the Kwik Trip, Crary explained to him what had happened. Tippery told Crary to stay at the Kwik Trip while he and defendant Fulcher tried to find plaintiff for questioning. Tippery left the Kwik Trip and proceeded around the block, where he discovered plaintiff's empty truck. Fulcher also located plaintiff's truck and parked his squad car approximately one block from it, waiting for plaintiff to return. Tippery returned to the Kwik Trip to talk with Crary.

A short time later, plaintiff returned to his truck and drove away. Defendant Tippery, who was at the Kwik Trip, received a radio call from defendant Fulcher, who reported that he was following plaintiff, who had gotten into his vehicle and was driving in the direction

of his home. Tippery left Kwik Trip and headed toward the Teynor - Crary home. Defendant Fulcher followed plaintiff but did not activate his emergency lights to pull plaintiff over. Fulcher followed plaintiff from a distance of approximately one block.

Plaintiff drove home, pulled into his driveway, got out of his truck and decided to take his motorcycle for a drive. Plaintiff started his motorcycle and pulled it out of the garage. At that moment, plaintiff saw defendant Fulcher getting out of his squad car. Plaintiff got off the motorcycle, pointed a finger at defendant Fulcher and yelled at him to get off his lot. Plaintiff suspected that Fulcher was approaching him because of the incident at Kwik Trip. Defendant Fulcher asked plaintiff to come to the sidewalk so that Fulcher could speak with him. Plaintiff refused. (Plaintiff states that he started walking toward the house. In a Prairie du Chien Police Department incident report dated July 12, 2000, defendant Fulcher noted that plaintiff approached him, pointing his finger at him and in a loud and threatening voice yelled at him to get off his land because it was private property.) Plaintiff took off the leather vest that he was wearing and threw it on the ground. (According to plaintiff, he took off the vest because he was not going for a bike ride any longer and did not need to wear it.)

When defendant Tippery arrived at plaintiff's home, he saw Fulcher get out of his squad car. He then saw Fulcher yell at plaintiff to stop where he was and to stop approaching Fulcher. Plaintiff ignored Fulcher's order and continued yelling at him.

(According to Tippery, plaintiff's posture was definitely threatening.)

Plaintiff and defendant Fulcher came within two or three feet of one another. (Plaintiff believes he was walking away from defendant Fulcher and toward the house; in the incident report, Fulcher notes that plaintiff was walking toward him.) Defendant Fulcher used a simple takedown movement that is consistent with the training and experience of City of Prairie du Chien police officers: he grabbed plaintiff's arm with one hand on his wrist and placed one hand on plaintiff's shoulder. Fulcher then pushed plaintiff past him, pulling plaintiff's arm around and behind him, pushing him to the ground. Plaintiff's glasses broke during the takedown. (According to plaintiff, Fulcher pushed his face into the ground so hard that his glasses broke. According to Fulcher, plaintiff's glasses were knocked off in the course of securing and handcuffing plaintiff.) Fulcher then told plaintiff that he was under arrest.

Once plaintiff was on the ground, he was secured and allowed himself to be handcuffed. Defendant Tippery then approached and helped defendant Fulcher secure and arrest plaintiff. Tippery did not use any force against plaintiff. Defendant Tippery believes that the amount of force defendant Fulcher used in arresting plaintiff was appropriate and is consistent with police training. According to defendant Fulcher, the force he used was the minimum necessary to effect plaintiff's arrest and minimize risk of harm to both himself and plaintiff.

Defendant Fulcher and Tippery placed plaintiff in the squad car and returned to the yard with flashlights to look for plaintiff's glasses, which they were unable to find. After returning to the squad car, defendant Fulcher determined that he would be unable to interview plaintiff safely about the incident at Kwik Trip because of plaintiff's threatening demeanor and highly agitated state. Fulcher decided that plaintiff needed to be in a secure environment before the incident could be discussed and plaintiff could be issued a citation.

Before this incident, defendant Fulcher did not know defendant Crary. (In his complaint, plaintiff alleges that "it was made clear" to him that police officers and corrections officers work together. In his deposition testimony, he said nothing about a police officer making statements to him about a conspiracy between the police force and employees of the Department of Corrections. According to defendant Fulcher, he never made any statements to plaintiff suggesting that police officers and correctional officers "work together.")

Defendant Fulcher transported plaintiff to the Crawford County Sheriff's Department which is adjacent to the police department in the City of Prairie du Chien. When they arrived, plaintiff told defendant Fulcher that he was diabetic and was becoming light-headed. Plaintiff asked for and received a glass of water. Plaintiff never asked to go to the hospital. He asked to go home so that he could get his insulin. The officers placed plaintiff in a holding cell, took some time, wrote him a ticket, had plaintiff sign it and then drove him

home. On July 12, 2000, plaintiff was issued a Wisconsin Uniform Municipal Court Citation for disorderly conduct, for which he was convicted in a trial to the court on August 18, 2000.

Any time that force is used in the course of an arrest by a City of Prairie du Chien police officer, the arresting officer must fill out a "use of force report" and Chief King must review the report to determine whether the use of force was justified. Defendant Fulcher completed a use of force form. Defendant King found the amount of force used to apprehend plaintiff to be justified.

C. Incident of July 26, 2000

On July 24, 2000, a temporary restraining order against plaintiff was issued to defendant Crary. Plaintiff was served with a copy of the order on July 26, 2000. The terms of the restraining order included the following, among others:

> The respondent [shall] avoid contacting or causing any person other than a party's attorney to contact the petitioner, unless the petitioner consents in writing. Contact includes contact at work, school, public places or by phone or in writing.
>
> If requested, the sheriff shall serve and assist in executing this temporary restraining order and accompany the petitioner and assist in placing the petitioner in physical possession of his or her residence; and
>
> respondent shall not go within 500 feet of the petitioner, her residence, her place of employment or her vehicle.

In the afternoon of July 26, 2000, plaintiff served defendant Crary with documents at her place of employment, in violation of the restraining order.

On the evening of July 26, 2000, plaintiff went to and entered the Teynor - Crary residence at approximately 8 p.m. The restraining order prohibited plaintiff from going within 500 feet of defendant Crary's residence, but plaintiff did not believe that the restraining order prohibited him from going to his home, which he owned jointly with Crary. Plaintiff's father, Clarence, joined plaintiff at the house to keep him company until 10 p.m., when defendant Crary got off work. Plaintiff anticipated that there would be a problem when Crary came home. At approximately 10:01 p.m., plaintiff heard a police dispatch over the police scanner in his home, indicating that he had violated his restraining order. Plaintiff and his father waited in the living room for the police to arrive.

On July 26, defendant Fulcher received a dispatch call from the police station indicating that defendant Crary had called the police to report that plaintiff was in her home in violation of the restraining order. Defendant Fulcher and two other officers went to the Teynor - Crary house to help Crary gather her things so she could spend the night with a friend. When the officers arrived at the house, they approached the front door and knocked. The officers could see plaintiff and his father inside the house through a window, but no one would answer the door. (Plaintiff and defendants dispute whether plaintiff was violating the restraining order by locking himself in the house.) Plaintiff believes that the house was

surrounded by police officers and squad cars. On July 26, 2000, there were no more than three officers on duty between the hours of 8 p.m. and 5:30 a.m.

Defendant Crary was waiting outside the house about a block away with a co-worker. Both women had come directly from work and were wearing State of Wisconsin Department of Corrections uniforms. After discussion, defendant Fulcher and the other officers determined that it would be safer for Crary to go to her friend's house for the night rather than to try to go into the Teynor - Crary house while plaintiff and his father were inside. Crary left the area and no further action was taken. Plaintiff was not arrested on July 26, 2000.

Defendant King was not involved in the police calls concerning plaintiff on July 12, 2000, or July 26, 2000.

OPINION

I. DEFENDANTS FULCHER AND TIPPERY

A. Fourth Amendment: Unlawful Arrest

As a result of the July 12, 2000 incident, plaintiff was arrested for disorderly conduct. Plaintiff argues that instead of throwing him to the ground, handcuffing him and taking him to the station, defendants Fulcher and Tippery could have simply written him a ticket, which was the ultimate outcome of the July 12, 2000 incident. According to defendants, they had

probable cause to arrest plaintiff and the force used against plaintiff was reasonable under the circumstances. Defendants' assertion that the arrest was reasonable is reinforced by the fact that plaintiff was ultimately convicted of disorderly conduct. Defendants also contend that they have qualified immunity.

To determine whether defendants violated plaintiff's rights under the Fourth Amendment, I must first determine whether defendants had probable cause to arrest him. If probable cause existed at the time of the arrest, then plaintiff is precluded from asserting a § 1983 claim for unlawful arrest and the issue of qualified immunity is rendered moot. See Potts v. City of Lafayette, 121 F.3d 1106, 1113 (7th Cir. 1997) ("The existence of probable cause for arrest is an absolute bar to a § 1983 claim for unlawful arrest."); Boyce v. Fernandes, 77 F.3d 946, 948 (7th Cir. 1996) (concluding that answer to question of probable cause resolves plaintiff's § 1983 claim that her arrest was unlawful, both on merits and for purposes of officer's claim to qualified immunity). "While the existence of probable cause is often a jury question, summary judgment is appropriate when there is no room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them." Qian v. Kautz, 168 F.3d 949, 953-54 (7th Cir. 1999); see also Lanigan v. Village of East Hazel Crest, 110 F.3d 467, 473 (7th Cir. 1997).

In order to have probable cause for an arrest, law enforcement agents must reasonably believe, in light of the facts and circumstances within their knowledge at the time of the

arrest, that the suspect had committed or was committing an offense. United States v. Kincaid, 212 F.3d 1025, 1028 (7th Cir. 2000); United States v. Osborn, 120 F.3d 59, 62 (7th Cir. 1997). The probable cause standard is a flexible, practical common sense one that is met if the facts are sufficient to warrant a person of reasonable caution in believing that an offense has been or is being committed. United States v. Colonia, 870 F.2d 1319, 1323 (7th Cir. 1989) (citations omitted); United States v. Evans, 27 F.3d 1219, 1228 (7th Cir. 1994). Just before going to the Teynor - Crary house, defendants Fulcher and Tippery spoke with the victim, defendant Crary, at the Kwik Trip about plaintiff's aggressive behavior that evening. As a result of these conversations, defendant Fulcher had information sufficient to support a reasonable belief that plaintiff had harassed Crary repeatedly, had perhaps caused damage to her car and was guilty of disorderly conduct. When they arrived at the house, defendants Fulcher and Tippery observed plaintiff engaging in behavior that they perceived to be aggressive and hostile. Plaintiff threw his jacket to the ground as he pointed his finger at defendant Fulcher and yelled at him to get off his land. These acts reinforced defendants' position that they had probable cause to arrest plaintiff. Because defendants Fulcher and Tippery had probable cause and made a lawful arrest, they did not violate plaintiff's rights under the Fourth Amendment when they arrested him and took him to the police station.

Even if defendants Fulcher and Tippery did not have probable cause, they are protected under the doctrine of qualified immunity. Under this doctrine, public officials

may not be held personally liable for performing discretionary functions as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity shields the defendants if a "reasonable officer could have believed [plaintiff's arrest] to be lawful, in light of clearly established law and the information the arresting officers possessed." McDonnell v. Cournia, 990 F.2d 963, 968 (7th Cir. 1993) (citing Hunter v. Bryant, 502 U.S. 224, 226 (1991)). Even law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" are entitled to immunity. Anderson v. Creighton, 483 U.S. 635, 641(1987).

Plaintiff argues that defendants did not need to throw him to the ground, handcuff him and arrest him but could have simply written him a ticket. Although he makes known his preference to be written a ticket rather than arrested and taken to the station, plaintiff does not suggest that defendants Fulcher and Tippery did not have the discretion to handle the situation in the manner in which they did. Plaintiff does not cite any case law in his brief in opposition to defendants' motion for summary judgment that establishes that defendants violated plaintiff's constitutional rights by arresting him. To the contrary, I have already determined that defendants had probable cause to arrest plaintiff for disorderly conduct. In short, defendants cannot be considered to have violated plaintiff's "clearly established statutory or constitutional rights of which a reasonable person would have

known" for qualified immunity purposes. Harlow, 457 U.S. at 818. Because I find that defendants Fulcher and Tippery had probable cause to arrest plaintiff and that they are shielded by qualified immunity, defendants' motion for summary judgment will be granted as to the claim of unlawful arrest.

B. Fourth Amendment: Excessive Force

Claims that law enforcement officers have used excessive force in the course of an arrest or other seizure must be analyzed under a reasonableness standard. Graham v. Connor, 490 U.S. 386 (1989). Under this standard, the trier of fact must determine whether it was reasonable under the circumstances for the officer or officers to have used whatever force they employed. Id. at 396. Determining whether the force used was unreasonable "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. Although "police officers do not have the right to shove, push, or otherwise assault innocent citizens without any provocation whatsoever," Clash v. Beatty, 77 F.3d 1045, 1048 (7th Cir. 1996),

> [n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-

> second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 397. The 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.

It is undisputed that plaintiff took off his leather vest and threw it to the ground as he pointed his finger at defendant Fulcher and yelled at him to get off his property. Both defendants Fulcher and Tippery found that plaintiff had a threatening demeanor and was in a highly agitated state. It is undisputed that defendant Fulcher grabbed plaintiff by the arm at the wrist and shoulder and used plaintiff's arm to push him to the ground in a standard takedown movement. The parties disagree whether plaintiff was walking toward defendant Fulcher or toward his house at the time of the takedown. Although it is undisputed that plaintiff's glasses broke as a result of the takedown, it is not clear whether they were simply knocked off plaintiff's face (defendant Fulcher's belief) or whether defendant Fulcher pushed plaintiff's face into the ground so hard that the glasses broke (plaintiff's belief). Plaintiff does not assert that he was injured as a result of the takedown and is not seeking compensation for any sort of physical injury. Moreover, plaintiff waited in the squad car after he was arrested while defendants Fulcher and Tippery searched for his glasses without asking for medical treatment or telling defendants that he was injured. Despite the ambiguity in the record regarding the direction in which plaintiff was walking

and how plaintiff's glasses were broken, the record is clear that defendants Fulcher and Tippery were faced with an individual who had been accused of threatening his live-in girlfriend and who was interacting with the officers in a threatening manner. I conclude that it was reasonable under the circumstances for defendant Fulcher to use the force that he did. It follows that the force was insufficient to violate plaintiff's Fourth Amendment rights. Because it is undisputed that defendant Tippery was not involved in the takedown and did not use any force against plaintiff, plaintiff has failed to state a claim against defendant Tippery.

Even if plaintiff had stated a claim for excessive force, I find that defendants Fulcher and Tippery are protected from liability under the doctrine of qualified immunity.

> Police officers who use force in making an arrest are entitled to qualified immunity from suits for damages under 42 U.S.C. § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. It is the plaintiff who bears the burden of establishing the existence of the allegedly clearly established constitutional right.

Rice v. Burks, 999 F.2d 1172, 1174 (7th Cir. 1993). In order to establish the existence of this clearly established constitutional right, plaintiff can either (1) point to a closely analogous case establishing that he has the right to be free from the type of force the police officers used on him or (2) show that the force used was so "plainly excessive" that the police officers should have been on notice that they were violating his constitutional rights. Id.

As to the closely analogous case, it is not sufficient to introduce only cases that

establish the general right to be protected from a police officer's use of excessive force. Id. To the contrary, the case must describe the right in a sufficiently particularized manner so as to put the officer on notice that the conduct is probably unlawful. Id. (citing Colaizzi v. Walker, 812 F.2d 304, 308 (7th Cir. 1987)). In this case, plaintiff has not pointed to a case holding that a police officer may not pull the arm of an individual behind his back, force him to the ground while pushing his face to the ground and handcuff him when that individual is acting in a threatening manner. Research did not reveal any such cases. In addition, the Court of Appeals for the Seventh Circuit noted that it has "not discovered any law . . . that clearly established . . . a right to be free from one non-injurious poke or push when a citizen fails to abide by police instructions." Lanigan, 110 F.3d at 476. Here, the facts establish that plaintiff was not physically injured by the takedown and they suggest that plaintiff was not following defendant Fulcher's instructions either to stop advancing toward him (defendant Fulcher's version) or to approach defendant Fulcher in order to talk with him (plaintiff's version). In any case, plaintiff has not carried his burden of demonstrating that the law was clearly established that the use of force by defendant Fulcher violated the Constitution.

Similarly, plaintiff cannot circumvent qualified immunity by showing that defendant Fulcher's use of force was so plainly excessive that it should have put the officer on notice that his conduct was likely unconstitutional. In making this determination, the court must

determine "whether, at the time of the alleged seizure, a reasonable officer could have believed that officer's conduct was constitutional." McDonald v. Haskins, 966 F.2d 292, 293 (7th Cir. 1992). Taking the facts in the light most favorable to plaintiff, plaintiff's description of the events do not lead to the conclusion that the officers' acts were plainly unconstitutional. Even if plaintiff was walking toward the house when defendant Fulcher performed the takedown and even if defendant Fulcher pushed plaintiff's face into the ground, it is undisputed that plaintiff had been reported to have threatened Crary earlier in the evening, that plaintiff was yelling and pointing his finger at Fulcher, that plaintiff threw his leather vest to the ground and that he was acting in a threatening manner. Moreover, plaintiff did not sustain any injuries as a result of the takedown. "If the injury is minimal, it is likely that the force creating the injury was also minimal." Hannula v. City of Lakewood, 907 F.2d 129, 132 (10th Cir. 1990). On the basis of these facts, I find that defendant Fulcher's use of force was not so plainly excessive that he should have been put on notice that he was probably violating plaintiff's rights under the Constitution. Thus, plaintiff is unable to establish that defendants Fulcher and Tippery are not entitled to qualified immunity. Defendants' motion for summary judgment as to plaintiff's claim for excessive force will be granted.

C. Eighth Amendment: Deliberate Indifference to Serious Medical Need

It has been well settled since 1977 that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." Estelle v. Gamble, 429 U.S. 97, 104 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). Although the rights of arrested individuals such as plaintiff derive from the due process clause of the Fourteenth Amendment rather than the Eighth Amendment, Bell v. Wolfish, 441 U.S. 520, 535 n.6 (1979), those rights are analyzed in essentially the same manner as the rights of sentenced inmates.

Decisions of the Supreme Court subsequent to Estelle and Wolfish have added a gloss to "deliberate indifference" and "serious medical needs." In Farmer v. Brennan, 511 U.S. 825, 837 (1995), the Court explained that a prison official cannot be held liable under the Eighth Amendment unless "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez v. Peters, 111 F.3d 1364 (7th Cir. 1997).

In this case, it is undisputed that plaintiff was without his insulin during the period of time in which he was at the police station while defendant Fulcher wrote him a ticket.

It is also undisputed that plaintiff was given a glass of water when he asked for one and that he never asked to go to the hospital. Defendant Fulcher drove plaintiff home after he issued the ticket. Plaintiff does not allege that he was denied medical attention. These facts simply do not rise to the level of deliberate indifference to a serious medical need under the Eighth Amendment. Defendants did not know of and disregard an excessive risk to plaintiff's health. In addition, the facts do not establish that plaintiff's going without insulin for the period of time he was at the police station was a life-threatening condition or that not having insulin for that period of time inflicted needless pain and suffering. Defendants' motion for summary judgment as to plaintiff's claim for deliberate indifference to a serious medical need will be granted.

D. Conspiracy

To establish a claim of civil conspiracy, plaintiff must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under § 1983.

However, a bare allegation of conspiracy is insufficient to support a conspiracy claim. Ryan v. Mary Immaculate Queen Center, 188 F.3d 857, 860 (7th Cir. 1999). Rather, a plaintiff must allege facts from which a trier of fact could reasonably conclude that a meeting of the minds occurred among all members of the conspiracy and that each member of the conspiracy understood its objective to inflict harm on the alleged victim. Hernandez v. Joliet Police Dept., 197 F.3d 256, 263 (7th Cir. 1999).

Nothing in the undisputed facts supports such an inference. Plaintiff has provided no explanation of how defendants would have conspired to harass him on the evening of July 26. In addition, plaintiff has failed to allege when the conspiracy was formed. Ryan, 188 F.3d at 860 ("A conspiracy is an agreement and there is no indication of when an agreement between [defendants] was formed.") The basis for plaintiff's conspiracy claim appears to be that police officer defendants Fulcher and Tippery and correctional officer defendant Crary surrounded plaintiff in the Teynor - Crary house in order to arrest him for violating the temporary restraining order. The fundamental flaw in plaintiff's claim is that it is not unlawful to conspire to commit a lawful act. Papapetropoulous v. Milwaukee Transport Services, 795 F.2d 591, 595 (7th Cir. 1986). Plaintiff had violated the temporary restraining order earlier the same day by serving papers on defendant Crary at her work and the officers had probable cause to believe that he was violating the order's terms a second time by being present in the Teynor - Crary house. Although plaintiff may have believed

that he was entitled to go into the house because his address was listed as the Teynor - Crary house on the order, the order also stated that plaintiff was not to go within 500 feet of Crary or her residence. It is undisputed that plaintiff and defendant Crary owned the house jointly. Thus, defendants had probable cause to arrest plaintiff. Nonetheless, they did not arrest him but attempted instead to get him to answer the door and leave the house. After no one would answer the door, eventually defendants left. Plaintiff has failed to state a claim for conspiracy. Defendants' motion for summary judgment as to plaintiff's claim for conspiracy will be granted.

I note that plaintiff contends that "defendants" conspired to violate his constitutional rights. Pltf.'s Amended Cpt., dkt. #13, at 2. This conspiracy claim is plaintiff's only claim against defendant Crary. However, for the same reasons stated above, I find that the undisputed facts do not establish that defendant Crary conspired against plaintiff any more than they show that defendants Fulcher or Tippery conspired against him. There is simply no evidence that defendant Crary and the other defendants had a meeting of the minds to violate plaintiff's constitutional rights. Because plaintiff's conspiracy claim fails and it is the only claim brought against defendant Crary, I will enter summary judgment for defendant Crary on this claim, as is permitted where the record reveals that a non-moving party is entitled to judgment. Borcherding-Dittloff v. Corporate Receivables, Inc., 59 F. Supp. 2d 822, 826 (W.D. Wis. 1999); see also 10A Charles A. Wright, Arthur R. Miller & Mary Kay

Kane, Federal Practice and Procedure 3d § 2720 at 347 (1998) (summary judgment may be entered in favor of non-moving party even though no formal cross-motion has been filed).

II. DEFENDANT KING

It is well established that liability under § 1983 must be based on the defendant's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). In a § 1983 action, there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. Gentry, 65 F.3d at 561; Del Raine, 32 F.3d at 1047; Wolf-Lillie, 699 F.2d at 869. Under this authority, it is clear that defendant King is not liable for the deprivation of any of plaintiff's constitutional rights because the undisputed facts do not establish that King participated personally in any deprivation of plaintiff's constitutional rights. Instead, plaintiff asserts that King was negligent in allowing his police officers to act in the manner alleged by plaintiff. Although plaintiff argues, in effect, that defendant King was negligent in training defendants Fulcher and Tippery, nothing in the undisputed facts suggests that King failed to train defendants Fulcher or Tippery properly or that he failed to develop policies that would have averted the alleged constitutional violations. Finally, plaintiff's

claim against defendant King must fail because I have already found that defendants Fulcher and Tippery did not violate plaintiff's constitutional rights. Defendant King's motion for summary judgment as to plaintiff's claim for negligent training and supervision will be granted.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Michael D. King, M.A. Fulcher and G.D. Tippery is GRANTED.

2. On the court's own motion, summary judgment is GRANTED to defendant Jennifer Crary.

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 7th day of February, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge