IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GARY B. CAMPBELL,

OPINION AND ORDER

Plaintiff,

04-C-661-C

v.

WOOD COUNTY SHERIFF DEPUTY
TODD JOHNSON,

Defendant.

- -

A high speed pursuit and arrest in the early morning hours of March 31, 2004 provide the backdrop for this civil action for monetary relief under 42 U.S.C. § 1983. Plaintiff Gary Campbell led police officers, including defendant Todd Johnson on a six-minute, four-mile chase that ended with plaintiff's being forcibly removed from his vehicle and arrested for evading police officers, resisting arrest and possession of marijuana, among other things. In this lawsuit, plaintiff claims that defendant violated his rights under the Fourth Amendment by using excessive force to remove him from his vehicle and place him under arrest. Jurisdiction is present. 28 U.S.C. § 1331.

On February 3, 2005, defendant filed a motion for summary judgment and a set of

proposed findings of fact in accordance with this court's summary judgment procedures. Plaintiff responded to the motion on March 21, 2005 with his own brief and proposed findings of fact. Neither party has responded to the other party's proposed findings and their accounts of the relevant events differ significantly, especially with respect to the events that occurred after plaintiff had been placed in handcuffs. Defendant contends that he and another police officer handcuffed plaintiff while he was lying on his stomach, assisted him to his feet and placed him in a squad car. Dft.'s PFOF, dkt. #19, at ¶¶ 27-31. By contrast, plaintiff contends that he was handcuffed while on his feet and then shoved to the ground, at which point defendant sat on plaintiff's back, grinded his face into the pavement, punched him in the back and directed profanity and racial slurs at him. Plt.'s PFOF, dkt. #33, at ¶¶18, 20-22. Needless to say, defendant denies striking plaintiff with a fist or foot after handcuffing him. Because the parties present different accounts of the same incident, genuine issues of material fact exist. Payne v. Pauley, 337 F.3d 767, 770 (7th Cir. 2003) ("summary judgment cannot be used to resolve swearing contests between litigants"); Bell v. Irwin , 321 F.3d 637, 641 (7th Cir. 2003) ("When material facts are in dispute, then the case must go to a jury, whether the argument is that the police acted unreasonably because they lacked probable cause, or that they acted unreasonably because they responded overzealously and with too little concern for safety."); E.E.O.C. v. United Parcel Service, 94 F.3d 314, 319 (7th Cir. 1996) (credibility determinations inappropriate at summary

judgment stage). In this case, a reasonable jury could believe plaintiff's version of events and conclude that defendant used excessive force on plaintiff after he had been handcuffed.

Recognizing that the material facts regarding the force used by defendant after plaintiff had been handcuffed are disputed, defendant has withdrawn its motion for summary judgment as it relates to post-handcuffing uses of force. Dft.'s Reply Br., dkt. #41, at 2. However, defendant's motion remains pending with respect to the events that occurred before plaintiff was handcuffed. I will grant defendant's motion as it pertains to pre-handcuffing uses of force because no reasonable jury could conclude that the force used by defendant Johnson in removing plaintiff from his vehicle was unreasonable under the circumstances. This conclusion makes it unnecessary to consider defendant's argument that he is entitled to qualified immunity with respect to events occurring before plaintiff was handcuffed.

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

UNDISPUTED FACTS

A. Parties

Plaintiff Gary Campbell and defendant Todd Johnson are adult residents of the state of Wisconsin. At the time of the relevant events in this case, defendant Johnson was

employed as a deputy sheriff by the Wood County Sheriff's Department.

B. Pursuit and Arrest of Plaintiff

On March 31, 2004, defendant Johnson was working the 11:00 p.m. to 7:00 a.m. shift as a patrol deputy for the Wood County Sheriff's Department. Defendant Johnson was on duty in full uniform and was driving a marked squad car. Around 1:30 a.m., plaintiff left Lance's Never Inn bar. Soon thereafter, defendant Johnson observed the vehicle plaintiff was driving, a Chevrolet van, turn onto 16th Street in the town of Grand Rapids. Defendant followed the vehicle and activated his radar, which indicated that the vehicle was going 72 miles per hour in a 35 mile per hour zone. Defendant activated his siren and police lights and pursued the vehicle. Plaintiff did not know that a police officer was following him; the music in his van was so loud that he did not hear defendant Johnson's siren. He continued to drive at a high rate of speed and made no effort to stop his car. Defendant Johnson continued to follow plaintiff and called for assistance. Officers from the town of Grand Rapids, the city of Wisconsin Rapids and the Wood County Sheriff's Department responded. On two occasions during the pursuit, plaintiff drove around squad cars that were parked in intersections on the pursuit route for the purpose of stopping plaintiff's vehicle. In addition, plaintiff made a number of turns during the pursuit in an apparent effort to backtrack and avoid pursuing officers.

In total, the pursuit lasted six minutes and covered approximately four miles; it ended when plaintiff came to a dead end, drove his car up on a curb and stopped his vehicle partially on the road and partially on adjacent grass. According to plaintiff, he stopped his vehicle immediately after becoming aware that the officers pursuing him wanted him to pull over. Defendant Johnson and another deputy who had joined the pursuit, Dorshorst, positioned their squad cars to prevent plaintiff from turning his vehicle around and driving away. They approached plaintiff's vehicle, defendant with his gun drawn, and ordered plaintiff to step out of his vehicle several times. Plaintiff failed to comply; he observed the officers "yelling something" but could not hear what they were saying because of the loud volume of the music in his van.

Defendant attempted to break the glass in the driver's side window after plaintiff did not get out of the van. He was unable to do so but deputy Dorshorst was able to open the driver's side door. Plaintiff was pulled out of his vehicle, placed on the ground and handcuffed.

DISPUTED FACTS

The parties dispute whether plaintiff drove through a red light and several stop signs during the pursuit. In addition, they disagree about plaintiff's movement inside his vehicle while defendant and deputy Dorshorst ordered plaintiff out of his van. Defendant contends

that he observed plaintiff moving his arms around as if he was throwing something into the back of the van. Plaintiff states that he kept his hands raised because he feared being shot if he moved them. Also, the parties disagree about which deputy pulled plaintiff out of his van. Defendant contends that deputy Dorshorst pulled plaintiff from the van by grabbing plaintiff's left arm while defendant held the driver's side door open. Plaintiff contends that defendant pulled him out of the van by reaching across his body and grabbing his right arm with enough force that he pulled plaintiff's arm out of its socket.

DISCUSSION

A. Standard of Review

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 322-23 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The mere existence of some alleged factual dispute is insufficient to defeat a properly supported motion for summary judgment. Liu v. T & H Machine, Inc., 191 F.3d 790, 796 (7th Cir. 1999). Rather, there must be evidence such that a reasonable jury could return a verdict in favor of the non-moving party. Lawrence v. Kenosha County,

391 F.3d 837, 842 (7th Cir. 2004).

B. Excessive Force

The parties agree that plaintiff's claim is governed by Graham v. Connor, 490 U.S. 386 (1989), wherein the Supreme Court held that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." Id. at 395 (emphasis in original). As the Court explained in Graham, the reasonableness standard cannot be defined precisely or applied in a mechanical fashion. Id. at 396. "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Id. (internal quotations and citation omitted). The determination whether a police officer utilized excessive force is a fact-specific inquiry that depends on the totality of the circumstances surrounding the encounter. Jacobs v. City of Chicago, 215 F.3d 758, 773 (7th Cir. 2000). Courts must pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest or attempting to evade arrest by flight."

Graham, 490 U.S. at 396 (citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)). In addition, the reasonableness inquiry is an objective one: The "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, 490 U.S. at 396. In assessing the reasonableness of a police officer's actions, courts must remember that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." Id. at 396-97.

Because an excessive force claim is analyzed from the perspective of the police officer, it is irrelevant whether plaintiff is telling the truth when he says he did not know he was being followed by police officers and that the loud music playing in his van prevented him from hearing defendant's siren during the pursuit or defendant's repeated orders for plaintiff to get out of his vehicle after the pursuit ended. Smith v. City of Chicago, 242 F.3d 737, 743-44 (7th Cir. 2001). However, because plaintiff is the non-movant, I will accept his version of the disputed facts for the purpose of resolving defendant's motion for summary judgment. Payne, 337 F.3d at 773. Thus, I will assume that plaintiff did not drive through any red lights or stop signs during the pursuit, that he kept his hands raised at all times while defendant and deputy Dorshorst ordered him out of his vehicle, that defendant, not deputy Dorshorst, pulled him out of the van by reaching across him body and grabbing his right arm and that plaintiff's shoulder became dislocated while he was being pulled out of the van.

Taken in the light most favorable to plaintiff, the facts show that defendant's use of force in pulling plaintiff out of his vehicle and handcuffing him was objectively reasonable. Plaintiff led police officers from multiple jurisdictions on a six-minute, four-mile high speed chase. Defendant initiated the pursuit after his radar indicated that plaintiff was driving more than double the speed limit (72 miles per hour in a 35 mile per hour zone) at approximately 1:30 a.m. Plaintiff failed to stop after defendant activated the lights and siren on his marked squad car and demonstrated an intent to evade his pursuers by twice driving around police cars that had been parked in intersections for the purpose of stopping plaintiff. The chase ended when plaintiff stopped his van half on a curb and half on the street. Given these facts, defendant had good reason to believe that plaintiff posed a threat to defendant and the public.

The force used by defendant was an objectively reasonable response to the threat he believed plaintiff presented. The facts indicate that defendant approached plaintiff's vehicle with his gun drawn, attempted to break the glass in the driver's side window of plaintiff's van, forcibly removed plaintiff from his vehicle by reaching across his body and grabbing his right arm and then pulled plaintiff from the vehicle. Although plaintiff contends that his shoulder came out of its socket while defendant was pulling him from the van, defendant's actions were not excessive in relation to the threat he reasonably perceived.

Smith provides a useful comparison. In that case, a motorist committed a traffic

violation and was followed by an unmarked police car with its siren activated. The motorist refused to pull over and drove for twelve blocks within the speed limit until marked squad cars pulled in front of him. After stopping the motorist, officers pulled him from his car "pinned his arms behind his back, slammed him against the hood of his car, and handcuffed him." Smith, 242 F.3d at 744. In upholding summary judgment on the motorist's excessive force claim, the Court of Appeals for the Seventh Circuit noted that the degree of force used by the officers "was not high, let alone excessive." Id. The force used by defendant in the present case is akin to that used by the officers in Smith; both cases involve police officers using force to remove drivers out of their vehicles. However, plaintiff posed a greater threat than the motorist in Smith because he evaded officers at high speeds and drove around marked squad cars that were placed in intersections along the pursuit route for the purpose of stopping him.

Although there are some factual disputes with respect to the events that led up to plaintiff's forcible removal from his van, a trial is not necessary with respect to defendant's pre-handcuffing use of force. Even when the facts are construed in the light most favorable to plaintiff, they indicate that defendant reasonably perceived plaintiff to present a threat and that his use of force in responding to that threat was measured and justified. Bell, 321 F.3d 637, 640 (7th Cir. 2003) ("when material facts (or enough of them to justify the conduct objectively) are undisputed, then there would be nothing for a jury to do *except*

second-guess the officers, which Graham held must be prevented."). Therefore, defendant is entitled to summary judgment with respect to pre-handcuffing use of force.

ORDER

IT IS ORDERED that defendant Todd Johnson's motion for summary judgment is GRANTED on plaintiff Gary Campbell's claim of excessive force with respect to the force applied by defendant before plaintiff was handcuffed. This case will proceed to trial on the question whether defendant violated plaintiff's Fourth Amendment rights by using excessive force during and after the time plaintiff was handcuffed on March 31, 2004.

Entered this 24th day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge