UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH M. MCADAM,

Plaintiff,

CASE NO: l:11-cv-00170

v.

HON. JANET T. NEFF

OFFICER MATTHEW WARMUSKERKEN, DEPUTY DEREK WILSON, DEPUTY OSCAR DAVILA, CITY OF LUDINGTON and COUNTY OF MASON,

Defendants.

Steven J. Vander Ark (P32471)
Attorney for Plaintiff
29 Pearl Street, N.W., Suite 145
Grand Rapids, MI 49503
(616) 454-6500
steve.vanderark@gmail.com

Joshua P. Fahlsing (P72737)
FAHLSING LAW, PLLC
Co-Counsel for Plaintiff
29 Pearl Street, N.W., Suite 145
Grand Rapids, MI 49503
(616) 558-2592
joshfahlsing@gmail.com

Allan C. Vander Laan (P33893)
Andrew J. Brege (P71474)
CUMMINGS, MCCLOREY, DAVIS & ACHO, PLC
Attorneys for Defendant Warmuskerken
2851 Charlevoix Drive, S.E., Suite 327
Grand Rapids, MI 49546
(616) 975-7470
avanderlaan@cmda-law.com
abrege@cmda-law.com

Patrick A. Aseltyne (P23293)
Jason D. Kolkema (P55936)
JOHNSON, ROSATI, LABARGE, ASELTYNE & FIELD, P.C.
Attorneys for Defendants Wilson, Davila and Mason County
303 S. Waverly Road
Lansing, MI 48917
(517) 886-3800
paseltyne@jrlaf.com
jkolkema@jrlaf.com

DEFENDANT MATTHEW WARMUSKERKEN'S REPLY TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

***** ORAL ARGUMENT REQUESTED *****

Defendant Matthew Warmuskerken, through his attorneys, submits the following Reply to Plaintiff's Response to his Motion for Summary Judgment.[1]

1. Reply to Plaintiff's Response Regarding Application of *Heck v. Humphrey*

Regarding Plaintiff's guilty plea to assault and battery, he asserts at page 12 of his brief in opposition to Defendant Warmuskerken's Motion for Summary Judgment the following: "The only facts known at this point and time is that Joe pled guilty to simple assault and battery. Nobody knows when or how the assault occurred." At page 15, Plaintiff attempts to claim the assault could have occurred at several different times before the altercation on the street with the Mason County Sheriff's Deputies. However, Plaintiff already testified regarding the assault:

Q. Well, let's go with you pled guilty to a simple assault. Do you recall what officer or which officers you assaulted on July 20, 2009?
A. They didn't say. They didn't specify.
Q. I'm asking you what you say.
A. I don't -- I don't -- I didn't -- I don't think I specified. I don't know of any -- **what they explained to me was that when -- when they tackled me that -- like somehow** -- I don't know, that -- I don't understand this. I don't -- whatever -- if you have the paperwork, I mean, I'll --
Q. Well, give me your best --
A. I'll agree to what I -- to what I pled to.
Q. Put that aside for a minute. Let's just stick with assault. We can agree that you pled guilty to assault, correct, simple assault?
A. I would -- I would say yes.
Q. Okay. **And that assault, was that an incident that occurred on July 19,**

[1]Plaintiff's counsel asserts that Defendant Warmuskerken's brief is not in compliance with this Court's guidelines because there is no separately annexed statement of facts, insinuating sanctions should be imposed against Defendants. Before filing and serving the motion and brief, defense counsel forwarded to Plaintiff's counsel a proposed joint statement of facts that could be used, as requested by the Court at the pre-motion conference. (**Ex. 1**, 5/1/2012 e-mail with attached proposed statement of facts). Counsel for Mason County, Deputy Davila, and Deputy Wilson already concurred in the statement. (**Ex. 2**, 4/30/2012 e-mail from Mr. Kolkema). Mr. Vander Ark responded, indicating he would supply his own counter statement. (**Ex. 3**, 5/2/2012 letter). Defendant's counsel included the statement of facts in his brief, as done in previous motions filed before this Court.

July 20, 2009, correct?
A. Correct.
Q. Involving officers from Mason County and from the City of Ludington, correct?
A. That incident involved them, yes.
Q. Okay. And that's the incident that -- it was from that incident that you pled guilty to assault?
A. Yes.
Q. Okay. I take it that had you thought you weren't guilty, you wouldn't have pled guilty to it?
A. Could you repeat that again?
Q. Can I assume that had you thought you were not guilty, you would not have pled guilty to assault?
A. I think you can assume that, yes.
(**Ex. 4**, Pl Dep at 71-72) [emphasis supplied].

The facts must be construed in the light most favorable to the non-moving party under the standard for summary judgment, Fed. R. Civ. P. 56. Here, Plaintiff's own testimony conclusively establishes the assault for which he pled guilty involved "officers from Mason County and from the City of Ludington". It is undisputed that Deputies Davila and Wilson were not "involved" in Plaintiff raising his fists against Officer Warmuskerken, or with Plaintiff holding his iPhone in Officer Warmuskerken's face. (See **Ex. 5**, Davila Dep at 22-23, indicating he was still in his car during these events; **Ex. 6**, Wilson Dep at 21-22, indicating Plaintiff was already walking away from Officer Warmuskerken as he approached the scene on foot). The only time the Deputies were involved was during the altercation and arrest in the street.

In ***Cummings v. City of Akron***, 418 F.3d 676, 682-683 (6th Cir. 2005), a case involving a misdemeanor simple assault conviction similar to Plaintiff's here, the Court held the "struggle between [the plaintiff] and the officers gave rise to both [the plaintiff's] assault conviction and the excessive force claim, and the two are inextricably intertwined. Additionally, [the plaintiff] could have raised excessive force as a defense to the assault charge, but instead he chose not to contest the

charge." Therefore, the excessive force claim was barred by ***Heck***. Here, Plaintiff testified the assault occurred during the incident involving the Sheriff's Department and City of Ludington officers. This can only mean the incident in the street, since there is no other which could be considered an "assault" after the deputies arrived. Since excessive force is an affirmative defense to assault and battery under Michigan law, a successful excessive force claim by Plaintiff in this action would necessarily invalidate his conviction and, therefore, is barred by ***Heck***.

Plaintiff cites to ***Potvin v. City of Westland Police Dep't***, 2006 U.S. Dist. LEXIS 85138, unpublished decision, (E.D. Mich., Nov. 7, 2006) (**Ex. 7**), in support of his interpretation of the ***Heck*** doctrine. However, the ***Potvin*** case is significantly distinguishable. In that case, the claimed use of excessive force could have occurred after Potvin was arrested. "Plaintiff's testimony creates a genuine issue of material fact as to at what point Plaintiff was arrested by Defendant police officers and whether Defendants used any excessive force *after the arrest was effectuated*." ***Id***. at *28 [emphasis added]. Here, it is undisputed Plaintiff's arrest was not effectuated until after all three drive stuns and then the probes had been administered against Plaintiff. Even under Plaintiff's version of the facts, there was no use of force against him on Ludington Avenue after he was finally handcuffed.

Here, Plaintiff's testimony established his assault on Officer Warmuskerken occurred in the street, after the County Deputies arrived. It is undisputed that no force was used after Plaintiff's arrest was effectuated. Since Plaintiff never raised excessive force or any other challenge to the lawfulness of the officers' actions when he pled guilty, his claims are barred by ***Heck***.

2. Reply to Plaintiff's Response Regarding Qualified Immunity

Plaintiff relies on two unpublished cases from the Sixth Circuit to assert Officer

Warmuskerken should not be entitled to qualified immunity. Both cases are distinguishable on their facts and law.

In ***Roberts v. Manigold***, 240 Fed. Appx. 675 (6th Cir. 2006), the plaintiff claimed excessive force by Officer Stricklen for use of her taser. The Court succinctly summarized the facts:

> The officers chased [the plaintiff], and Stricklen pulled out her taser and attempted to use it on Roberts. Roberts felt the initial shock, pulled a prong of the taser out of his back, and continued to run. After Roberts fell face-down into a snow bank, Webb, a 225-pound former running back at the University of Michigan, a lesser Big 10 power, pinned him by holding his leg on top of Roberts's back. Webb grabbed Roberts's arm to try to handcuff him, and Roberts continually cried out for help. Although Webb had Roberts completely pinned, Stricklen repeatedly used her taser on Roberts. Stricklen did not wait for Webb to get Roberts under control before she used her taser on him, and Webb admits that he would have been able to subdue Roberts without Stricklen's assistance.

The Court held that given these facts, a jury could find that Stricklen's use of the taser was excessive. That is, Stricklen's decision to employ the taser before Officer Webb had a chance to subdue the plaintiff, could be unreasonable.

Here, all three officers struggled with Plaintiff, attempting to subdue him. It is undisputed all three officers were unable to get Plaintiff to release his arms and handcuff him. This is not a situation where the officers took him to the ground and another officer immediately employed his or her taser before less intrusive means could be attempted. Rather, this is a case where it was clear the officers used less intrusive means, and only resorted to the taser after those less intrusive means were unsuccessful. Therefore, ***Roberts*** is inapposite and cannot be used to form the basis of denying qualified immunity to Officer Warmuskerken.

In ***Landis v. Baker***, 297 Fed. Appx. 453 (6th Cir. 2008), the plaintiff's decedent was "was unarmed, knee deep in muddy water, surrounded by at least four law enforcement officers, and was

no longer trying to resist arrest" when the officers struck him with a baton several times and used a taser on him at least four times. Further, the evidence indicated the officers should have been aware that he may have been suffering from a mental illness and was not actively resisting. The Court held that under these circumstances, a jury could find the force used was excessive.

This case is not even remotely similar to ***Landis***. There, the officers were holding the decedent face down in muddy water when they deployed numerous baton strikes and taser drive stuns. Evidence indicated one officer used his taser up to five times against the decedent. Here, Plaintiff was not in a similar situation, he was actively resisting three officers who were trying to subdue him, and only after attempting less intrusive means, did Officer Warmuskerken deploy his taser one time in drive stun mode against Plaintiff. The facts of ***Landis*** are so dissimilar it cannot be reasonably relied upon to deny Officer Warmuskerken qualified immunity.

Further, at page 20 of his brief, Plaintiff asserts an alleged "violation of departmental policies may be considered" in determining reasonableness in a Fourth Amendment excessive force case. This assertion is not supported by the law, as the violation of a particular department's policies and procedures is not evidence of a constitutional violation under 42 U.S.C. § 1983. For example, in ***Smith v. Freland***, 954 F.2d 343 (6th Cir. 1992), the plaintiff alleged the defendant police officer used excessive force when he fired his weapon at plaintiff's decedent's moving vehicle. In support, the plaintiff argued the officer's actions violated the department's policy on use of force. The Court upheld summary judgment in favor of the officer, rejecting the plaintiff's position:

> [T]he fact that [the officer]'s actions may have violated Springdale's policies regarding police use of force does not require a different result. Under § 1983, the issue is whether [the officer] violated the Constitution, not whether he should be disciplined by the local police force. A city can certainly choose to hold its officers to a higher standard than that required by the Constitution without being subjected

> to increased liability under § 1983. To hold that cities with strict policies commit more constitutional violations than those with lax policies would be an unwarranted extension of the law, as well as a violation of common sense.
> ***Id***. at 347-348.

See also ***Washington v. Starke***, 855 F.2d 346, 350 (6th Cir. 1988) (holding that qualified immunity would not be precluded where the "violation of the intra-departmental regulation would not have given rise to a cause of action for damages under either federal or Michigan law" at the time of violation).

Here, Plaintiff's allegation Officer Warmuskerken's action violated the Ludington Police Department's use of force policy has no bearing on whether a constitutional violation occurred.[2]

3. Plaintiff's Allegation that Officer Warmuskerken Failed to Intervene

Plaintiff asserts Officer Warmuskerken is liable for Deputies Davila and Wilson's use of their tasers on him, under the theory he failed to prevent the Deputies from using their tasers. Generally, a police officer who fails to prevent the use of excessive force by others may be held liable when "(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." ***Turner v. Scott***, 119 F.3d 425, 429 (6th Cir. 1997), *citing* ***Anderson v. Branen***, 17 F.3d 552, 557 (2d Cir. 1994). However, an officer observing a situation is not the guarantor of an arrestee's safety, and the Sixth Circuit has held that officers have no duty to intervene where an entire incident unfolds "in a matter of seconds." ***Ontha v. Rutherford County, Tenn.***, 222 F. Appx. 498, 506 (6th Cir. 2007).

---

[2]Defendant denies Officer Warmuskerken's actions, even construed in a light most favorable to Plaintiff, amounted to a violation of the Ludington policy. Plaintiff was refusing officer commands, would not allow the officers to handcuff him and, therefore, was actively resisting arrest. Officer Warmuskerken only resorted to using his taser in drive stun mode one time after the three officers struggled with Plaintiff and were unable to subdue him using less intrusive means.

That is, the police officer must have a "realistic opportunity" to intercede and prevent the attack. ***Murray-Ruhl v. Passinault***, 246 F. Appx. 338, 348 (6th Cir. 2007) (*citing* ***Gaudreault v. Municipality of Salem***, 923 F.2d 203, 207 n.3 (1st Cir. 1990)("A police officer cannot be held liable for failing to intercede if he has no 'realistic opportunity' to prevent an attack") and ***O'Neill v. Krzeminski***, 839 F.2d 9, 11-12 (2d Cir. 1988) ("This was not an episode of sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator"). Officers who do not themselves participate in the alleged use of excessive force have a duty to intervene only when the "underlying episode of excessive force has spanned a sufficient period of time for a nearby defendant to both perceive what was happening and intercede to stop it." ***Ontha***, *supra* at 506.

Here, Plaintiff claims "Officer Warmuskerken watched idly while he had the opportunity to say something or prevent the subsequent three tasings by Deputy Davila and Deputy Wilson, and to prevent Deputy Wilson from initially tasing [Plaintiff] at Memorial Medical Center." Plaintiff's Brief at 24. During the Ludington Avenue incident, Officer Warmuskerken along with the Deputies were actively attempting to get Plaintiff to comply with his arrest. All three officers were still struggling with Plaintiff when Officer Warmuskerken applied the first drive stun. When Plaintiff failed to comply after that drive stun, the three officers continued to struggle with Plaintiff before Deputy Davila applied his drive stun, and then Deputy Wilson. This all occurred within a very short period of time, before Deputy Davila finally deployed his probes. It was after the probe deployment when Plaintiff stopped resisting and was brought under control.

At no time was Officer Warmuskerken "idly" watching the other officers use excessive force against Plaintiff. It is disingenuous to assert he had a reasonable opportunity to prevent the Deputies

from continuing to bring Plaintiff under control. It is undisputed all four uses of the taser were within seconds of each other. Under Plaintiff's theory, after Officer Warmuskerken first applied his drive stun, which it is undisputed did not cause Plaintiff to comply with the lawful arrest, Officer Warmuskerken should have somehow intervened to prevent the Deputies from applying their tasers? That is, after applying the drive stun, which did not bring Plaintiff under control, Officer Warmuskerken had time to both consider Deputies Davila and Wilson would also apply their tasers and also to reasonably prevent them from doing so, all during the course of a continuous struggle in the road. This is nonsensical and cannot form the basis of liability against Officer Warmuskerken.

At a minimum, Officer Warmuskerken is entitled to qualified immunity with regard to this theory of liability. The case law in the Sixth Circuit is clear that Officer Warmuskerken must have had an opportunity and reasonable means to prevent the alleged excessive force. See ***Floyd v. City of Detroit***, 518 F.3d 398, 406 (6th Cir. 2008); ***Turner***, *supra*; ***Ontha***, *supra*; ***Murray-Ruhl***, *supra*. Here, while engaged with a resisting individual, Officer Warmuskerken could not have known his failure to prevent Deputies Davila and Wilson from deploying their tasers shortly after his own use proved unsuccessful, was a constitutional violation. There is no clearly-established right that an officer, who unsuccessfully applied his electronic control device on a resisting arrestee, must immediately prevent other officers from using their electronic control devices. Therefore, qualified immunity is appropriate. See ***Turner***, *supra* at 429.

With regard to the incident in Memorial Medical Center, Officer Warmuskerken was similarly not in a position where he could have reasonably prevented Deputy Wilson's initial attempt to drive stun Plaintiff. Plaintiff had been compliant, but when he was told he would not be getting his iPhone back, he attempted to get up from the hospital bed and refused Deputy Wilson's

commands to calm down. Officer Warmuskerken was only present as an assisting officer to Deputy Wilson and Deputy Davila's arrest, and had no authority over these officers. Further, this was not a situation where Officer Warmuskerken stood by "idly" as Deputy Wilson arbitrarily used force against Plaintiff. This was a dynamic situation which rapidly evolved from Plaintiff being compliant, to becoming agitated, aggressive, and non-compliant when he was told he could not have his phone. There was simply no reasonable opportunity for Officer Warmuskerken to both observe Deputy Wilson was going to use excessive force, and then have a reasonable opportunity to prevent it. Therefore, Officer Warmuskerken cannot be liable under this theory with regard to the Memorial Medical Center incident.

4. Conclusion

In all remaining respects, Defendant relies on the arguments and legal analysis included in his initial motion and brief. For the reasons stated above and in the initial motion and brief, Defendant Warmuskerken respectfully requests this Honorable Court grant summary judgment in his favor and dismiss Plaintiff's claims against him. Further, Defendant concurs in and adopts the legal arguments presented by Co-defendants Wilson, Davila and County of Mason to the extent these are applicable.

Respectfully submitted:

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

/s/ Allan C. Vander Laan

Allan C. Vander Laan (P33893)
Andrew J. Brege (P71474)
Attorneys for Defendant Warmuskerken
Cummings, McClorey, Davis & Acho. P.L.C.
2851 Charlevoix Drive, SE, Ste. 327
Grand Rapids, MI 49546
616/975-7470
E-mail: avanderlaan@cmda-law.com

abrege@cmda-law.com

Dated: June 14, 2012