APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 15-831-cv

[Filed February 27, 2018]

WILLIAM MCKINNEY,

Plaintiff Appellant,

v.

CITY OF MIDDLETOWN, THOMAS SEBOLD, POLICE OFFICER, JOSHUA WARD, POLICE OFFICER, MICHAEL D'ARESTA, POLICE OFFICER

Defendants Appellees.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX

OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of February, two thousand eighteen.

PRESENT: ROBERT A. KATZMANN,
Chief Judge,
RAYMOND J. LOHIER, JR.,
CHRISTOPHER F. DRONEY,
Circuit Judges.

FOR APPELLANT: SAMUEL ADKISSON, Rule 46.1(e) Law Student, Yale Law School Appellate Litigation Clinic (Brandon C. Thompson, Rule 46.1(e) Law Student, Yale Law School Appellate Litigation Clinic; Benjamin M. Daniels, Tadhg Dooley, Wiggin and Dana LLP, *on the brief*), New Haven, CT.

FOR APPELLEE: THOMAS R. GERARDE (Beatrice S. Jordan, *on the brief*), Howd & Ludorf, LLC, Hartford, CT.

Appeal from a judgment of the United States District Court for the District of Connecticut (Alfred V. Covello, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED in part and VACATED in part, and the case is REMANDED for further proceedings.

William McKinney appeals from a judgment of the District Court (Covello, J.) granting summary judgment in favor of the City of Middletown (the "City") and police officers Thomas Sebold, Joshua Ward, and Michael D'Aresta (collectively, the "Officers"). We assume the parties' familiarity with the facts and record of the prior proceedings, to which we refer only as necessary to explain our decision to affirm in part and vacate in part.

1. Claims Against the Officers

Against the Officers, McKinney asserted Fourth Amendment excessive force claims under 42 U.S.C. § 1983 as well as claims for assault and battery under Connecticut State law. On appeal, McKinney argues, inter alia, that the District Court erred when it determined that no reasonable jury could conclude that the force used against him was objectively unreasonable, as is required to prove a Fourth Amendment violation. See Graham v. Connor, 490 U.S. 386, 395–97 (1989); see also Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015). We agree with McKinney.

Even where "most of the facts concerning the application of force are undisputed," Brown v. City of New York, 798 F.3d 94, 103 (2d Cir. 2015), "granting summary judgment against a plaintiff on [an excessive force claim] is not appropriate unless no reasonable factfinder could conclude that the officers' conduct was

objectively unreasonable," Rogoz v. City of Hartford, 796 F.3d 236, 246 (2d Cir. 2015) (quoting Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 123 (2d Cir. 2004)). An officer's use of force must be reasonable even when an arrestee or detainee is actively resisting. Sullivan v. Gagnier, 225 F.3d 161, 165– 66 (2d Cir. 2000) ("The fact that a person . . . resists, threatens, or assaults the officer no doubt justifies the officer's use of some degree of force, but it does not give the officer license to use force without limit."). Based on the unique circumstances of this case, we think a reasonable jury could conclude that the combination of baton strikes, the use of a taser, and, especially, the use of a police canine was excessive in the context of a confined detention cell, notwithstanding McKinney's resistance. We therefore vacate and remand with respect to McKinney's Fourth Amendment claims. See Brown, 798 F.3d at 103 (leaving "the factual determination of excessiveness to a jury"); Breen v. Garrison, 169 F.3d 152, 153 (2d Cir. 1999) (same). Because the District Court concluded that McKinney's Connecticut law claims for assault and battery failed as a matter of law for the same reasons as his Fourth Amendment claims, see Posr v. Doherty, 944 F.2d 91, 94–95 (2d Cir. 1991), we also vacate and remand with respect to those claims.

We express no view on whether the Officers will ultimately be entitled to qualified or governmental immunity for the claims against them. See Phaneuf v. Fraikin, 448 F.3d 591, 600 (2d Cir. 2006).

2. Claims Against the City

Against the City, McKinney asserted a common law negligence claim and a claim under Connecticut

General Statutes § 52-557n(a)(1)(A), which imposes vicarious liability on municipal employers for the negligent acts of their employees. Because McKinney did not object in the District Court to the City's assertion of governmental immunity under Connecticut law, McKinney has forfeited his argument that the City is not entitled to immunity, and we decline to consider it for the first time on appeal. See Dalberth v. Xerox Corp., 766 F.3d 172, 184 (2d Cir. 2014). We therefore affirm the dismissal of McKinney's claims against the City.

We have considered the parties' remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED in part and VACATED in part, and the case is remanded for further proceedings.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:12CV337(AVC)

[Filed February 11, 2015]

WILLIAM MCKINNEY, plaintiff,	)
v.	)
CITY OF MIDDLETOWN, POLICE OFFICER THOMAS SEABOLD, POLICE OFFICER JOSHUA WARD AND POLICE OFFICER MICHAEL D'ARESTA, defendants.	)

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is an action for damages brought pursuant to 42 U.S.C. section 1983, to redress an alleged violation of the plaintiff's constitutional rights arising from an incident that occurred when officers attempted to transfer him from one cell to another on February 20, 2010. The plaintiff, William McKinney, brings this action against the town of Middletown and police officers Thomas Seabold, Joshua Ward and Michael D'Aresta. The defendants have filed a motion for

summary judgment, arguing that they are entitled to judgment as a matter of law. For the reasons that follow, the motion is granted.

FACTS

An examination of the complaint, pleadings, local rule 56 statements, exhibits accompanying the motions for summary judgment and responses thereto, discloses the following undisputed facts:

On February 19, 2010, the plaintiff, William McKinney, was arrested on charges of robbery, breach of peace and larceny for the alleged robbery of a Subway fast food restaurant, by the Middletown Police Department (hereinafter "MPD"). After his arrest, officers put McKinney into cell #1 in the MPD cell block.

At approximately 3:46 am, officers observed that McKinney obstructed the view of his cell by covering the camera in the cell with wet toilet paper. The defendant, Sebold, thereafter went down to the plaintiff's cell and asked him to remove the obstruction and McKinney removed it.

McKinney thereafter covered the camera a second time. Seabold and Ward proceeded to McKinney's cell to remove the obstruction. Seabold opened the cell door and asked McKinney to remove the toilet paper from the camera. McKinney refused twice, was hostile and yelled and threatened Seabold. McKinney said "fuck you. If I'm going to jail, it won't be for something minor. Come in here and I will go to jail for fucking you cops up." Sebold informed McKinney that he was going to be moved to another cell for mentally disturbed persons (hereinafter "MPD cell"). McKinney did not want to be

moved to a "padded" cell and stated that he was not going to go to that cell. Sebold remained outside the cell while Ward retreated to get the defendant, D'Aresta, to assist them. McKinney continued to yell threats.

Ward and D'Aresta, with his K-9, Hunter, returned and Sebold instructed McKinney to move back from the door so that they could enter the cell, but McKinney refused after numerous requests. McKinney then responded "come on in." The incident report indicates that Sebold cracked the cell door so that McKinney "would see the canine and be deterred from giving the officers any trouble." McKinney refused to leave the cell and told the defendants that they would have to come in and get him. D'Aresta gave the canine a "watch him" command which caused the dog to begin barking. The cell door was cracked open against Sebold's foot. McKinney "clenched his fists, looked Officer Sebold in the eye with clenched teeth and said, 'come on.'" McKinney took the foam mattress pad and folded and used it as a barricade between himself and the officers and then "pressed against the cell door." Sebold expanded his baton, opened the door and attempted to push McKinney back against the wall. When McKinney was on the back wall of the cell, he grabbed Sebold's baton in an attempt to get it out of his hand. Ward, D'Aresta and the canine entered the cell. The defendants state that D'Aresta warned McKinney to "stop or you will be bit."[1] At this point, McKinney "became extremely combative and charged towards the defendants." D'Aresta deployed the canine toward

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[1] McKinney denies this fact because he has little recollection of the events and he was not provided with an audio recording for the video footage of the events.

McKinney's lower right leg and the defendants brought McKinney to the ground. Upon being bitten by the canine, McKinney dropped to the ground and was partially on top of D'Aresta. D'Aresta got up and saw McKinney grabbing at the canine's collar. Sebold struck McKinney a few times on the left thigh and yelled at him to stop resisting. As the struggle continued, Sebold struck McKinney in the left buttock and, subsequently, on his left shoulder. During this time, Sebold was yelling for McKinney to stop resisting. Ward then deployed his taser to McKinney's "left shoulder, ordering the plaintiff to give up his hands so that they could be cuffed." After the use of the taser, McKinney complied and released his left hand. The defendants rolled McKinney onto his stomach but he refused to release his right hand to be handcuffed. Subsequently, McKinney released his right arm and yelled for the defendants to get the canine off of him. Ward and D'Aresta handcuffed McKinney and broke the canine off of his leg.

McKinney does not have "much memory" of what occurred during this incident. Although he does not dispute Sebold's Ward's or D'Aresta's versions of the event in their respective reports, he states that he "was in a state of mental and emotional distress, in a downward spiral, and psychologically decompensating at the time of the incident . . . ."

During the incident, the defendants repeatedly asked McKinney to stop resisting and to stop fighting but McKinney repeatedly resisted their attempts to secure him and physically struggled with them.

The three defendants all "successfully completed the State of Connecticut Police Officer Standards and

Training Academy" and were "not the subject of any complaints, disciplinary proceedings, and/or actions involving claims of excessive force for the five years preceding the incident involving the plaintiff . . . ." Officer D'Aresta and his canine, Hunter, "successfully completed the State of Connecticut fifteen week training program for certification as a patrol dog, and the required state-mandated re-certification training to maintain their certification as a K-9 team."

In a statement of "additional disputed issues of material fact," McKinney states that the officers should have known that he was bipolar and on medication. Prior to his arrest, McKinney ingested alcohol, psychiatric medication and cocaine. His medication was in his possession when McKinney was arrested but was seized and stored in evidence. McKinney informed Sebold that his behavior during the incident in question was "due to his medication." The plaintiff states that because of his history of mental illness, the officers should have observed him more closely and effectuated a better plan for his movement to another cell. Between the two incidents of McKinney covering the cell camera with toilet paper, he tried to injure himself by punching himself and trying to slash his wrist with an unknown object. McKinney points to police regulations regarding mentally ill individuals and maintaining a "calm, quiet and non-threatening approach." Sebold testified that if he knew McKinney was "aggressive and combative" he "would have probably handled things differently in that he would have had more officers in the cell to subdue McKinney so that they could have 'overwhelmed [him] with bodies.'"

McKinney also states that D'Aresta was not trained in the use of his canine for cell extraction, prisoner transfer or on mentally ill individuals. He also states that D'Aresta failed to notify a supervisor prior to utilizing his canine. He states that the use of the canine "further agitated" him and was "inconsistent with maintaining a calm, quiet and non-threatening approach."

After the incident in question, none of the officers sustained injuries. McKinney sustained lacerations about his head and body and several lacerations and puncture wounds to his lower right leg.

STANDARD

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Summary judgment is appropriate if, after discovery, the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.'" Am. Int'l Group, Inc. v. London Am. Int'l Corp., 644 F.2d 348, 351 (2d Cir. 1981) (quoting Heyman v. Commerce and Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975)).

A dispute concerning material fact is genuine "if evidence is such that a reasonable jury could return a

verdict for the nonmoving party." Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). The court must view all inferences and ambiguities in a light most favorable to the nonmoving party. See Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991), cert. denied, 502 U.S. 849 (1991). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Id.

I. Section 1983 Excessive Force[2]

The United States Supreme Court has recognized that "all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard." Graham v. Connor, 490 U.S. 386, 395 (1989). Under Graham, "the 'reasonableness' inquiry in an excessive force case is an objective one, asking whether the officers' actions were 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 396; see also Browner v. County of Inyo, 489 U.S. 593, 599 (1989). Furthermore, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490

[2] With respect to the claims against the City of Middletown, the plaintiff has failed to respond to the defendants' arguments and for the reasons stated in the defendants' brief, the defendants' motion is granted with respect to those claims.

U.S. at 395 (citing Terry v. Ohio, 392 U.S. 1, 20-22 (1968)).

While reasonableness is traditionally a question of fact for the jury, "defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances." Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994); see Curry v. City of Syracuse, 316 F.3d 324, 332 (2d Cir 2003). On the other hand, where the parties' versions of the facts differ significantly, "[t]he issue of excessive force is for the jury, whose unique task it is to determine the amount of excessive force used, the seriousness of the injuries, and the objective reasonableness of the officer's conduct." Breen v. Garrison, 169 F.3d 152, 153 (2d Cir. 1999).

The second circuit has recognized that in determining the reasonableness of an officer's use of force, the court considers, inter alia, whether the individual was "actively resisting . . . ." Sullivan v. Gagnier, 225 F.3d 161, 165 (2d Cir. 2000). "The force used by the officer must be reasonably related to the nature of the resistance and the force used, threatened, or reasonably perceived to be threatened, against the officer." Id. at 166.

The defendants argue that their use of force in subduing McKinney was necessary and reasonable under the circumstances. Based upon the nature of McKinney's undisputed and combative behavior, after being warned on several occasions to cease, the defendants state that their actions were warranted and do not amount to excessive force.

McKinney responds that based upon his bipolar disorder, the defendants' approach was unwarranted and not reasonable considering the totality of the circumstances. Specifically, McKinney states that because of his deteriorating psychological state, the defendants' plan to enter the cell with a baton, taser and canine, was not a reasonable approach and that a better plan would have been to "subdue [McKinney] with bodies." He states that he has no recollection of the events. He also states that he was not a flight risk and, although combative, he was not an immediate threat to the officers. McKinney argues that when he did not respond to the use of the canine, the other officers had an obligation to intervene.

The defendants reply that McKinney has failed to create a genuine issue of material fact by creating vague denials in his statement of material facts. Specifically, the defendants state that only facts known to the officers at the time are relevant. With respect to the defendants' allegedly deficient "plan," the defendants state that the Fourth Amendment does not require "perfect police conduct" or use of "least intrusive means," City of Ontario, California v. Quon, 560 U.S. 746, 763 (2010), and that under the circumstances here, their actions were reasonable. The defendants also state that failure to follow internal police practices does not establish a Fourth Amendment violation. Poe v. Leonard, 282 F.3d 123, 145-46 (2d Cir. 2002).

The court concludes that the officers' actions in this case were reasonable under the totality of the circumstances. The facts of this case are largely undisputed. Officers responded to McKinney's

combative behavior and continually warned him to stop resisting. Each level of force used was in response to McKinney's resistant behaviors. The canine was only deployed upon McKinney's attempt to take the baton from officer Sebold and his attempt to charge toward the defendants. The baton was only used upon McKinney's attempt to grab the canine's collar and his continued refusal to submit to the officers. The taser was then used as a last resort when McKinney continued to refuse to free his right arm to be handcuffed. McKinney does not dispute these behaviors and his continued resistance throughout the defendants' attempt to secure him. With respect to McKinney's history of mental illness, he states that he had taken medication before his arrest. The decision to move him to a MDP cell was based upon his behaviors, including his attempt to harm himself. The plaintiff has failed to provide sufficient facts to create a genuine issue of material fact with respect to the use of force under the circumstances and based upon the officer's knowledge at that time. The defendants provided the plaintiff with numerous opportunities to comply and allow the defendants to secure him, but he continually refused and threatened them. Any claim that the officers' failed to intervene also fails in light of the reasonableness of their use of force. The undisputed facts establish that the defendant officers' use of force was reasonable under the circumstances and did not amount to excessive force in violation of the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 395 (1989); Sullivan v. Gagnier, 225 F.3d 161, 165 (2d Cir. 2000).

II. State Law Claims

The defendants next argue that McKinney's state law claims for assault and battery also fail as a matter of law. Specifically, the defendants argue that because their use of force was reasonable under the circumstances, there was no "unlawful" use of force and, therefore, no assault and battery. The defendants also cite Connecticut General Statutes § 53a-22 for the proposition that their actions were justified as force necessary to effect an arrest.

McKinney responds that the requirements for an assault and battery claim are similar to those for a Fourth Amendment excessive force claim with an additional intent element. Specifically, McKinney states that the defendants were deliberately indifferent to his welfare and the likelihood that he would sustain injuries. McKinney states that motive and intent to cause harm are issues of fact for the jury. He also states that the provisions of C.G.S. § 53a-22 are unfounded and do not circumscribe Fourth Amendment protections.

A claim for assault and battery requires an unlawful use of force. Williams v. Lopes, 64 F. Supp.2d 37, 47 (D. Conn. 1999). The second circuit has recognized that the "essential elements" of excessive force and assault and battery claims are "substantially identical." Posr v. Doherty, 944 F.2d 91, 94-95 (2d Cir. 1991).

Because the court has concluded that officers' actions were reasonable under the circumstances, the plaintiff cannot maintain a claim for assault and

battery. There was no "unlawful" application of force to justify such a claim.[3]

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment (document no. 55) is granted. The clerk is hereby directed to enter judgment for the defendants and close this case.

It is so ordered this 9th day of February, 2015 at Hartford, Connecticut.

/s/
Alfred V. Covello
United States District Judge

[3] Based upon the conclusion that the defendants' conduct was reasonable under the circumstances, the claim for negligent assault and battery also fails.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 15-831

[Filed April 5, 2018]

William McKinney,	)
	)
Plaintiff Appellant,	)
	)
v.	)
	)
	)
City of Middletown, Thomas Sebold, Police Officer, Joshua Ward, Police Officer, Michael D'Aresta, Police Officer,	)
	)
Defendants Appellees.	)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of April, two thousand eighteen.

ORDER

Appellees, City of Middletown, Thomas Sebold, Joshua Ward, and Michael D'Aresta, filed a petition for panel rehearing, or, in the alternative, for rehearing *en*

banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court