United States Court of Appeals, Eighth Circuit.

Stuart WRIGHT, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee
John Clark; Walter R. Bradley, in his official capacity as the United States Marshal for the District of Kansas; Sean Franklin, in his official capacity as a Deputy United States Marshal and in his individual capacity; Deputy United States Marshals 1-10, in their official and individual capacities (names unknown at this time); Stacia A. Hylton, in her official capacity; Christopher Wallace, in his official capacity as a Deputy United States Marshal and in his individual capacity, Defendants.

No. 17-2274
Submitted: March 16, 2018
Filed: June 13, 2018

Appeal from United States District Court for the Western District of Missouri–Kansas City

Attorneys and Law Firms

John W. Kurtz, Hubbard & Kurtz, L.L.P., Kansas City, MO, argued, for appellant.
Jeffrey P. Ray, Deputy U.S. Atty., Kansas City, MO, argued (Thomas M. Larson, Acting U.S. Atty., Holly L. Teeter, Asst. U.S. Atty., on the brief), for appellee.
Before WOLLMAN, SHEPHERD, and ERICKSON, Circuit Judges.

Opinion

SHEPHERD, Circuit Judge.

In the third iteration of this unfortunate case of mistaken identity, Plaintiff Stuart Wright ("**Wright**") appeals the district court's[1] grant of summary judgment to the United States and the Deputy U.S. Marshals in their individual and official capacities on Wright's claims under the Federal Tort Claims Act (the "**FTCA**"). Wright argues that the district court erred when it found there was no genuine dispute of material fact and that, as a matter of law, the Marshals were not liable to him under the FTCA for false arrest, false imprisonment, abuse of process, and assault and battery. We disagree and affirm the district court's grant of summary judgment.

I. Background

In 2008, Deputy U.S. Marshals with the U.S. Marshals Service in the District of Kansas began an investigation to locate and arrest Vinol Wilson ("**Wilson**"), who had been indicted by a grand jury in Kansas for conspiracy to manufacture, to possess with intent to distribute, and to distribute cocaine base and to possess with intent to distribute cocaine. The Marshals had an arrest warrant for Wilson, and after learning that he was involved in a local Kansas City, Missouri basketball league, they planned to arrest him during one of the games. Sources told the Marshals that at 6:30 p.m. on August 15, 2009, Wilson would be playing basketball at the Grandview Community Center and that he would be wearing an orange jersey with the number 23. The Marshals also knew that Wilson was a black male body builder born in 1974. That evening around 6:45 p.m., the Marshals entered the gym in plain clothes and interrupted the game. With their weapons drawn, they approached a black

male who was on the court wearing an orange jersey with the number 23 and told him to get on the ground. That man was Wright, not Wilson.

Wright did not understand the Marshals' commands at first, and he stepped backwards away from them. One of the Marshals grabbed Wright's shirt and kicked at his legs. Another applied his Tazer to Wright's back. Once the Marshals subdued Wright, they asked him his name. Wright told the Marshals he was Stuart Wright, and one replied, "don't lie to me." The Marshals then arrested Wright, took him outside, and sat him in the back of a police patrol car. On the way to the car, a police officer told the Marshals that he knew Wright and that they had apprehended the wrong man. Wright's brother also brought Wright's identification to the Marshals to prove to them that he was not Wilson. The Marshals allowed Wright's brother to speak to Wright for a few minutes while still keeping Wright in custody. They then asked Wright a few questions about Wilson. After detaining Wright for 20 minutes, the Marshals released him and warned him that he had two traffic warrants he needed to resolve.

In December 2010, Wright filed this action against the United States. The complaint included FTCA claims for (1) false arrest, (2) false imprisonment, (3) abuse of process, and (4) assault and battery. Following a series of motions and appeals,[2] the FTCA claims were the only ones left before the district court. The Marshals moved for summary judgment on those claims as well. The district court, relying heavily on our findings in a previous appeal in this case that dealt with Bivens[3] claims, found that the United States was entitled to summary judgment on each of Wright's FTCA claims. Wright now appeals.

II. Discussion

"We review the district court's grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmoving party." Hinsley v. Standing Rock Child Protective Servs., 516 F.3d 668, 671 (8th Cir. 2008) (citing Fed. R. Civ. P. 56(c)). "We will affirm the district court if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Id.

Generally, the United States is immune from suit; however, the Federal Government may consent to be sued, as it did with the passage of the FTCA. Id. The FTCA provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The FTCA applies "to any claim arising ... out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" as a result of the "acts or omissions of investigative or law enforcement officers of the United States Government." Id. § 2680(h). The applicable tort law is "the law of the place where the act or omission occurred." Id. § 1346(b)(1). Because this incident took place in Missouri, Missouri's tort law applies.

A. Genuine Issue of Material Fact

Wright argues the Government was required to respond to the concise statement of material facts that he offered in response to the Government's original statement of uncontroverted material facts attached to its motion for summary judgment. Wright asserts that Mo. D. Ct. R. W. D. 56.1(c) ("**Local Rule 56**") states the

Government "must" respond to Wright's list of material facts. Therefore, he claims that the district court should have deemed those facts admitted because the Government failed to respond. However, Wright mischaracterizes the rule. Local Rule 56.1(c) states that in response to a non-moving party's statement of material facts, "[t]he party moving for summary judgment *may* file reply suggestions." (emphasis added). The "must" to which Wright refers appears in the next sentence: "[i]n those suggestions, the [Government] must respond to [Wright's] statement of additional facts in the manner prescribed in Rule 56.1(b)(1)." Id. The word "must" does not command a response: rather, it directs how the Government should respond to Wright's statement of facts should it choose to do so. Therefore, the district court was not required to deem Wright's list of material facts admitted simply because the Government did not directly respond to them.

Next, Wright argues that the district court erred in finding that he did not present evidence demonstrating the existence of a genuine dispute of material fact. Even assuming that Wright's statement of facts should have been deemed admitted, the district court did not err in finding that Wright failed to demonstrate the existence of a genuine issue of material fact. Wright outlines several factual contentions that he claims contradict the district court's factual statements and summary judgment conclusions. However, none of these facts are inconsistent with the district court's statement of material facts. For example, the district court made no reference to where Wright's hands were located during the encounter, but Wright presents a witness affidavit stating that Wright had his hands in the air. This is the only statement

regarding the placement of Wright's hands, and, even if it is true, it is not material because the district court already acknowledged that Wright was not engaging in any threatening behavior. Because none of Wright's proposed facts contradict a material fact that the district court relied on in conducting its summary judgment analysis, we find the district court did not err.

B. False Arrest and False Imprisonment

The Missouri Supreme Court has held that "[t]he essence of the cause of action of false arrest, or false imprisonment, is the confinement, without legal justification, by the wrongdoer of the person wronged." Rustici v. Weidemeyer, 673 S.W.2d 762, 767 (Mo. 1984) (internal quotation marks omitted); see also Celestine v. United States, 841 F.2d 851, 853 (8th Cir. 1988) (per curiam). "However, justification is a complete defense to the cause of action ...." Rustici, 673 S.W.2d at 767. As the district court points out, on a previous appeal, we held that the Marshals had probable cause to arrest Wright. Wright, 813 F.3d at 698. In Wright, we found that under Missouri law it is a crime to resist arrest and that Wright backing away from the Marshals and not yielding to their commands was sufficient to give the Marshals "probable cause to believe that Wright had committed the crime of resisting arrest and justify their twenty minute restraint on Wright's liberty." Id. Thus we have already determined that the initial arrest and detention were justified and reasonable under the circumstances. Accordingly, in line with our prior opinion, we find the district court did not err in holding that both Wright's arrest and 20–minute detention were justified.

C. Abuse of Process

Abuse of process requires: "(1) the present defendant made an illegal, improper, perverted use of process, a use neither warranted nor authorized by the process; (2) the defendant had an improper purpose in exercising such illegal, perverted or improper use of process; and (3) damage resulted." Stafford v. Muster, 582 S.W.2d 670, 678 (Mo. 1979). The district court focused on the second element, finding that the Marshals did not have an improper or ulterior purpose. Wright argues that this was incorrect and that an ulterior purpose is not the sine qua non for an abuse of process claim.

"We may affirm the [district court's] judgment on any basis supported by the record." Holt v. Howard, 806 F.3d 1129, 1132 (8th Cir. 2015) (internal quotation marks omitted). Rather than focusing on the second element, our analysis hinges on the first. As stated above, we held in Wright that both the arrest and 20–minute detention were legally justified and reasonable. Wright, 813 F.3d at 698. Therefore, we have already found that the Marshals did not make "an illegal, improper, [or] perverted use of process," and that the arrest and detention were warranted and authorized by the process. See Stafford, 582 S.W.2d at 678. Accordingly, we find the district court did not err in granting summary judgment to the Government as to Wright's abuse of process claim.

D. Assault and Battery

Under Missouri law, a law enforcement officer can be held liable for damages for assault and battery "*only when in the performance of his duty in making*

the arrest he uses more force than is reasonably necessary for its accomplishment." Neal v. Helbling, 726 S.W.2d 483, 487 (Mo. Ct. App. 1987) (quoting State ex rel. Ostmann v. Hines, 128 S.W. 248, 250 (Mo. Ct. App. 1910)). In Schoettle v. Jefferson County, we held that the officer's use of force was insufficient to qualify as assault and battery under Missouri law because the officer's conduct was objectively reasonable for the purposes of qualified immunity. Schoettle, 788 F.3d 855, 861 (8th Cir. 2015). In Wright, we found that the Marshals were entitled to qualified immunity because "a reasonable officer would not have had fair warning that using a single Tazer shock against a suspected felon would have violated clearly established Constitutional rights." Wright, 813 F.3d at 697. Our qualified immunity holding is dispositive of the assault and battery claim. See Schoettle, 788 F.3d at 861.

Additionally, in Wright, we essentially engaged in a reasonableness analysis when we emphasized that Wilson was a felon who "was considered armed and dangerous" and had a "history of drug, weapons, and aggravated assault offenses." Wright, 813 F.3d at 697. Those facts, combined with our earlier findings that the Marshals had probable cause to believe that Wright was resisting arrest, convinces us that the Marshals' use of force was no more than reasonably necessary to effectuate the arrest. See id. at 697–98. Therefore, we find that the district court appropriately granted the Government summary judgment on Wright's assault and battery claim.

III. Conclusion

For the foregoing reasons, we affirm the district court's grant of summary judgment in all respects.

Footnotes

1The Honorable Sarah H. Hays, United States Magistrate Judge for the Western District of Missouri.

2The previous appeals include Wright v. United States, 545 Fed.Appx. 588 (8th Cir. 2013) (per curiam) (unpublished) and Wright v. United States, 813 F.3d 689 (8th Cir. 2015).

3Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

United States District Court, W.D. Missouri, Western Division.

Stuart WRIGHT, Plaintiff,
v.
UNITED STATES of America, Defendants.

Case No. 10-01220-CV-W-SWH

Filed 05/18/2017

Attorneys and Law Firms

John Wray Kurtz, Hubbard and Kurtz, Kansas City, MO, for Plaintiff.
Jeffrey P. Ray, Holly L. Teeter, United States Attorney's Office, Kansas City, MO, Stephen R. McAllister, Lawrence, KS, Toby Crouse, Foulston Siefkin, LLP, Overland Park, KS, for Defendants.

ORDER

SARAH W. HAYS, UNITED STATES MAGISTRATE JUDGE

I. BACKGROUND

Pending before the Court is the Motion of the United States to Dismiss or, in the Alternative, for Summary Judgment on the Remaining Common Law Tort Claims (doc. #115). Plaintiff's First Amended Complaint contained the following counts against a number of defendants: Count I, a claim under 42 U.S.C. § 1983 for Violations of the Constitution of the United States, the Constitution of the State of Missouri, and

Federal and State Laws; Count II, a claim under 42 U.S.C. § 1985 (Conspiracy) for Violations of the Constitution of the United States, the Constitution of the State of Missouri and Federal and State Laws; Count III a claim under the Federal Tort Claims Act; and Count IV, a claim pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). (Doc. #1, at 16-26)

On May 9, 2012, this Court granted defendants' motions to dismiss Counts I and II of the complaint. (Docs. #67, 68) On September 6, 2012, this Court granted in part and denied in part the Motion of the Individual Capacity Defendants to Dismiss Count IV of Plaintiff's First Amended Complaint or, in the Alternative, for Summary Judgment, and dismissed claims against two individual defendants but left intact claims against defendants Sean Franklin and Christopher Wallace (Wright I)[1]. (Doc. #76) Franklin and Wallace brought an interlocutory appeal and on appeal, the Eighth Circuit remanded the matter for this Court to properly address defendants' qualified immunity defense and make findings of fact and conclusions of law sufficient to permit appellate review (Wright II). (Doc. #82-1, at 4-5)

On remand, this Court granted in part and denied in part defendants' motion for summary judgment (Wright III). (Doc. #104, at 20) The Court granted the portion of the motion seeking summary judgment as to plaintiff's claim against Franklin and Wallace for false arrest, finding that both marshals were entitled to qualified immunity. (Doc. #104, at 8-11) The Court denied the portion of the motion seeking summary judgment as to plaintiff's claims against Franklin and Wallace for excessive force and improper

search and seizure, finding that neither marshal was entitled to qualified immunity. (Doc. #104, at 11-19)

Franklin and Wallace appealed the Court's decision with regard to their claim for qualified immunity on plaintiff's claims of excessive force and improper search and seizure. (Doc. #108-1) On appeal the Eighth Circuit found that the marshals were entitled to qualified immunity on plaintiff's excessive force claim and improper search and seizure claim and remanded the matter for this Court to enter judgment consistent with the Eighth Circuit's determination (Wright IV). (Doc. #108-1, at 10-15) On March 15, 2016, this Court entered the order granting the remaining marshals' motion for summary judgment with respect to Count IV of Plaintiff's First Amended Complaint. (Doc. #111) Plaintiff's only remaining claim is a claim under the Federal Tort Claims Act (Count III) against the United States, which is the subject of the pending motion.

II. SUMMARY JUDGMENT STANDARD

A moving party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A party who moves for summary judgment bears the burden of showing that there is no genuine issue of material fact for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Id. at 247-48. "Material

facts" are those "that might affect the outcome of the suit under the governing law," and a "genuine" material fact involves evidence "such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248.

The initial burden of proof in a motion for summary judgment is placed upon the moving party to establish the absence of any genuine issue of material fact. See Olson v. Pennzoil Co., 943 F.2d 881, 883 (8th Cir. 1991). If the moving party meets its initial burden, the nonmoving party must then produce specific evidence to demonstrate genuine issues for trial. Id. When the burden shifts, the nonmoving party may not rest on the allegations in its pleadings, but must set forth, via citation to material in the record, specific facts showing that a genuine issue of material fact exists. See Fed.R.Civ.P. 56(c)(1); Stone Motor Co. v. General Motors Corp., 293 F.3d 456, 465 (8th Cir. 2002). When considering a motion for summary judgment, a court must scrutinize the evidence in the light most favorable to the nonmoving party and the nonmoving party "must be given the benefit of all reasonable inferences." Mira Chem. Prods. Corp. v. First Interstate Commercial Corp., 950 F.2d 566, 569 (8th Cir. 1991). The Court may not weigh the evidence in the record, decide credibility questions or determine the truth of factual issues, but merely decides if there is evidence creating a genuine issue for trial. See Bell v. Conopco, Inc., 186 F.3d 1099, 1101 (8th Cir. 1999).

III. UNDISPUTED FACTS

In a separate filing before this Court, defendant filed a Statement of Uncontroverted Material Facts and Settled Legal Conclusions. (Doc. #116) Plaintiff has

raised a number of general objections to the form and content of the filing, including objections as to whether Wright IV controls some of the factual findings. (Doc. #120) Nevertheless, plaintiff has not provided any argument or evidence which disputes any of the facts listed below. Additionally, the majority of defendant's undisputed facts appear to be taken almost directly from the Eighth Circuit's decision in Wright IV. Therefore, this Court will not address any of the general objections as stated by plaintiff. (Doc. #120, at 1-7) The Court finds the following facts:

> 1. In 2008, Vinol Wilson ("Wilson") was indicted by a Grand Jury in United States District Court for the District of Kansas for "conspiracy to manufacture, to possess with intent to distribute and to distribute cocaine base 'crack,' and to possess with intent to distribute and to distribute cocaine" in the case styled United States v. Vinol Wilson, 07-20168-07-JWL/DJW (D. Kan.).
> 2. Following the issuance of the indictment, an arrest warrant was issued for Wilson; however, Wilson was not immediately located or apprehended.
> 3. Sean Franklin ("Franklin"), a Deputy U.S. Marshal with the U.S. Marshals Service in the District of Kansas began an investigation to locate and arrest Wilson.
> 4. Based upon his investigation, Franklin learned that Wilson had a history of drug, weapons, and aggravated assault offenses. Wilson had previously spent 78 months in prison for distributing crack cocaine and for using a firearm

during a drug trafficking crime. Wilson was considered armed and dangerous.

5. Based upon his investigation, Franklin also learned that Wilson was a black male, born in 1974, was into steroids, body building and dog fighting, and was known to play basketball with a group of acquaintances in leagues and tournaments in and around the Greater Kansas City area.

6. For example, Franklin learned that Wilson played on a basketball team that participated in the 2008 Sunflower State games.

7. After obtaining a copy of that particular team roster, Franklin undertook to talk with other team members in an effort to locate Wilson pursuant to the outstanding arrest warrant.

8. Eventually, on Wednesday, April 15, 2009, at approximately 9:30 a.m., Franklin made contact with Walt Bethea ("Bethea"), who had played on Wilson's basketball team.

9. Franklin showed Bethea a 2005 Kansas driver's license photo of Wilson that Bethea identified as "V" and Bethea stated that he knew Wilson was wanted by law enforcement for some drug charges.

10. Bethea also informed Franklin that Wilson played in an adult basketball league in Grandview, Missouri, on Wednesday evenings at the Grandview Community Center. Bethea said that Wilson had played in the prior week's game and was scheduled to play again that evening at 7:30 p.m.

11. Bethea stated that Wilson's team was comprised of all black males who wore orange-colored jerseys.

12. At approximately 11:30 a.m., on April 15, 2009, Franklin met with a confidential source ("CS") at the Grandview Community Center.

13. Franklin showed CS the 2005 Kansas driver's license photo of Wilson and CS stated that he had seen the person pictured, but did not know his name. CS stated that he had seen Wilson wearing an orange-colored jersey with the number "23" on the back. CS also said that Wilson had been seen with his hair in braids (or "corn-rows"), sporting a goatee, and with gold-colored teeth.

14. CS obtained access to the roster for the team that he identified as the one Wilson played for. CS explained that individuals playing in the league do not have to produce any identification and rosters are not checked by the Grandview Community Center for any accuracy. The roster included many of the names that had been on the team roster for the 2008 Sunflower State games, including Walt Bethea. Wilson's name was not listed, but there was an entry for "Vyshon Watson." Franklin knew that Wilson had a minor son named Vyshon.

15. CS told Franklin that he would assist in identifying Wilson if he showed up for the basketball game scheduled for that evening.

16. At 5:55 p.m., Franklin received a telephone call from a friend of Bethea's advising him that the basketball game involving Wilson's team had been moved up to 6:30 p.m. Franklin then placed a call to CS to verify the information, but CS did not answer.

17. At around this same time, Franklin set up a briefing area near the parking lot for Grandview

High School to organize the arrest team and the operation to arrest Wilson.

18. At approximately 6:15 p.m., CS called Franklin and confirmed that the game involving Wilson's team had been moved up an hour and was due to start at 6:30 p.m. CS advised Franklin that Wilson had been seen inside the gym.

19. A few minutes later, CS called Franklin again and informed Franklin that Wilson was on the gym basketball floor, shooting baskets before the start of his game, was wearing an orange-colored jersey with the number "23," and had his hair braided.

20. At 6:45 p.m., Franklin arrived at the Grandview Community Center along with five other Deputy U.S. Marshals ("DUSMs"), including Wallace.

21. Franklin made the decision to arrest Wilson during the course of the basketball game because he felt that this offered the greatest protection for the safety of the public and law enforcement. The Grandview Community Center parking lot was crowded with cars and people (including young people) and Franklin believed it might pose an undue public danger to try to apprehend Wilson as he was leaving the Community Center. Franklin also wanted to avoid any high speed vehicle chase. In addition, Franklin felt that by arresting Wilson on the basketball court while a game was in progress, he was somewhat less likely to have a weapon on him.

22. Franklin, Wallace, and the three other DUSMs proceeded to the basketball gym where Franklin showed his badge to the individual

running the clock/scoreboard. Franklin told the individual to sound the buzzer and stop the game.
23. Franklin was wearing his U.S. Marshals Service badge on a chain around his neck.
24. After the buzzer sounded, Franklin and Wallace went out on to the basketball court toward a black male with braided hair, wearing an orange-colored jersey with the number "23" on it.
25. Franklin was not in uniform but was wearing a Kansas City Royals jersey.
26. Stuart Wright, a black male wearing an orange-colored number "23" jersey, was playing a full-court game of basketball when very suddenly, Wright saw a man wearing a Kansas City Royals shirt directly in front of him with a gun pointed at him. The man (Franklin) was not wearing a uniform of any type that Wright was able to recognize. Wright did not see anything identifying the man as a law enforcement officer. The man was yelling things as he came toward Wright, but Wright could not understand what he was saying. At some point, Wright heard the name Vinol mentioned. Wright told the man his name and said that he had identification there in the gym.
27. As Franklin approached Wright he ordered Wright to get on the ground. Wright, however, continued to back away from Franklin, at which point Franklin grabbed Wright's shirt and kicked at his legs. The pulling of Wright and the kicking of Wright's legs brought Wright directly in between Franklin and Wallace. Wallace

deployed his taser hitting Wright in the back and Wright fell to the floor.

28. Franklin leaned over Wright to say in his ear something to the effect of, "What's your name?" Wright told Franklin he name was Stuart Wright, a name that Franklin recognized from the team roster for the 2008 Sunflower State games. Franklin said, "Don't lie to me." Wright told Franklin again that his name was Stuart Wright. Franklin then said something to the effect of, "Let's get him out of here." Wright was then pulled to his feet and handcuffed. Many of the people present were telling the men that Stuart Wright was not Vinol Wilson.

29. As Wright was being taken out of the Community Center, he saw a Grandview Police Officer named Officer Clausing. Wright recognized him as a Grandview High School graduate. Wright said something to the effect of, "My name is Stuart Wright. I graduated from Grandview High School in 1996. You know me." Officer Clausing then said something to the general effect of, "That's not the guy. I know him." Nevertheless, Wright was taken out of the Community Center in handcuffs and put in the back of a police patrol car that was outside the Community Center.

30. Stuart Wright's brother, Stephen Wright, got Stuart's driver's license from his gym bag and gave the license to Franklin very shortly after Stuart had been taken out of the gym. Franklin told Stephen Wright that he knew his brother was not Vinol, but Franklin said that Stuart had information about Vinol. Franklin and one other

man told Stephen to speak to his brother and tell him to tell them what they wanted to hear.

31. Stephen Wright was allowed to speak to Stuart briefly in the car. Stephen told Stuart to give the officers any information he had about Vinol. The officers continued to keep Stuart in custody.

32. The officers asked Stuart Wright questions about whether he played basketball with a man named Vinol Wilson, where Vinol Wilson was, and how Wright could help them find Vinol Wilson. Wright told the men he did not know where Vinol Wilson was or how to find him.

33. Wright heard some of the men talking about taking a vacation day the next day, about how everything had happened so fast, about hearing the "pop-pop" sounds, and about how they had gotten the wrong guy.

34. After fifteen minutes to twenty minutes, the officers pulled Stuart Wright out of the car. They told him that they were going to pull the probes out of him. One of the men asked if he needed an ambulance. Stephen Wright told them that he was going to take Stuart to the hospital (which he did). One of the officers also told Stuart that they were going to un-cuff him. He then said, "Now, you're not going to go all ape-shit on me, are you?" Stuart told him, "No."

35. Franklin told Stuart Wright that he had checked him in the computer and that he had two traffic warrants that he needed to handle.

36. Wright was then released after being in custody for approximately fifteen to twenty minutes.

IV. CONCLUSIONS OF LAW

The Federal Tort Claims Act (hereafter FTCA) waives the government's sovereign immunity with regard to certain tort claims made against the United States. 28 U.S.C.A. § 2674. Specifically, "with regard to acts or omissions of investigative or law enforcement officers of the United States," the FTCA waives the governments sovereign immunity with regard to claims arising "out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C.A. § 2680(h). Such claims are governed by the "law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b). Because the matters described in the First Amended Complaint occurred in Missouri, Missouri substantive law applies to the matter.

In his First Amended Complaint, plaintiff identifies the following torts as actionable under the FTCA: false arrest, false imprisonment, abuse of process, assault and battery.[2] (Doc. #38, at ¶ 44(c)) This Court will address each tort separately, with the exception of false arrest and false imprisonment. As discussed more fully below, claims for false arrest and false imprisonment in Missouri are treated similarly. Therefore, this Court will address both simultaneously.

The parties have given great attention as to whether the law of the case dictates this Court's findings in the instant action. Generally the "doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L.Ed. 2d 318 (1983), decision supplemented, 466 U.S. 144, 104 S. Ct. 1900, 80 L.Ed. 2d 194 (1984). Earlier decisions of the court will thus be followed in the same

case unless there is "clear error or manifest injustice." Alexander v. Jensen-Carter, 711 F.3d 905, 909 (8th Cir. 2013). The law of the case is a rule of practice and not a limitation of power. Kempe v. United States, 160 F.2d 406, 408 (8th Cir. 1947). The doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided[.]" Messenger v. Anderson, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L.Ed. 1152 (1912).

This Court finds the doctrine inapplicable in this matter. The doctrine focuses on a court's ruling as a matter of law. While the Bivens claims and the FTCA claims are complimentary they are not the same issues. Thus, the Eighth Circuit's findings on qualified immunity do not as a matter of law automatically dictate the legal conclusions under the FTCA. However, the rationale behind the grant of qualified immunity for certain Bivens claims may be highly relevant to the issue of whether defendant is entitled to summary judgment on the FTCA claims, especially in view of the fact that the Court should be considering the same factual scenario in deciding the various legal issues. Therefore, rather than simply relying on the law of the case, the Court will consider whether defendant is entitled to summary judgment on each claim brought under the FTCA.

A. False Arrest and False Imprisonment

The Supreme Court of Missouri has explained that the "essence of the cause of action of false arrest, or false imprisonment, 'is the confinement, without legal justification, by the wrongdoer of the person wronged.' " Rustici v. Weidemeyer, 673 S.W.2d 762, 767 (Mo. 1984) (quoting Warrem v. Parrish, 436 S.W.2d 670, 672 (Mo. 1969)). Justification is a complete defense to

both false arrest and false imprisonment. Blue v. Harrah's N. Kansas City, LLC, 170 S.W.3d 466, 473 (Mo. Ct. App. 2005); Rankin v. Venator Grp. Retail, Inc., 93 S.W.3d 814, 822 (Mo. Ct. App. 2002). Therefore, if Franklin and Wallace were justified in arresting plaintiff, then no cause of action may accrue for false arrest or false imprisonment.

In Wright III, this Court found that defendants Franklin and Wallace were entitled to qualified immunity because they had a reasonable belief that the person they arrested (Wright) was the person they had probable cause to arrest pursuant to a warrant (Wilson). (Doc. #104, at 11) In so finding this Court relied on Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971), and cases extrapolating the holding in Hill to civil suits for mistaken identity. (Doc. #104, at 10) In Hill, the Supreme Court found no Fourth Amendment violation where the arresting officers arrested an individual they reasonably and in good faith believed to be the individual sought and that such mistaken belief did not invalidate the arrest. Hill v. California, 401 U.S. 797, 802-04, 91 S. Ct. 1106, 1110, 28 L.Ed. 2d 484 (1971). Therefore, the question in civil cases involving mistaken identity is whether a reasonable officer could have believed that the plaintiff was the person named in the warrant. (Doc. #104, at 10) In Wright III, this Court found that Franklin and Wallace took steps to locate and identify Wilson and given the situation, the marshals could have a reasonable belief that plaintiff was Wilson. (Doc. #104, at 11)

The reasoning behind this Court's decision in Wright III, applies equally to the matter now before us. Vinol Wilson, the man the marshals' sought, was under indictment for drug charges and a warrant for his

arrest had issued. As discussed in Undisputed Facts numbers 4-19, supra, the marshals investigated Vinol Wilson and his whereabouts and took measures to ensure that the person apprehended was Vinol Wilson. Therefore, at the time of the arrest, the marshals were justified in arresting the individual they believed to be Vinol Wilson.

The question now turns to whether the continued detention of Vinol Wilson after the marshals confirmed his identity constitutes false imprisonment. Again justification is a complete defense for false arrest/imprisonment. Blue, 170 S.W.3d at 480. While the decision in Wright IV does not automatically dictate the finding in this instant case, its reasoning with regard to the continued detention is relevant. In Wright IV, the Eighth Circuit found that:

> Wright was held for up to twenty minutes after the Marshals realized that he was not Vinol Wilson. Under the totality of circumstance, we conclude the delay in releasing Wright was reasonable. The Marshals removed Wright from the commotion of the gymnasium and verified his identity. Detaining Wright in the police vehicle allowed the Marshals to defuse the situation and reorient themselves. The twenty minute delay was a minimal intrusion on Wright's liberty interest and may have ensured that no further mistakes were made that day.

(Doc. #108-1, at 14-15) The Eighth Circuit, as well as this Court, previously found that the initial arrest of plaintiff was justified. The Eighth Circuit further determined that the marshals' continued detention of plaintiff was reasonable under the circumstances. This

reasoning applies equally to the common law claim of false arrest and imprisonment. Therefore, defendant's motion for summary judgment with regard to the false arrest and false imprisonment claims is granted.

B. Abuse of Process

In order to prevail on a claim of abuse of power, a claimant must show that "(1) the defendant made an illegal, improper, perverted use of process, which was neither warranted nor authorized by the process; (2) the defendant had an improper purpose in exercising such illegal, perverted, or improper use of process; and (3) the plaintiff sustained damages as a result." Diehl v. Fred Weber, Inc., 309 S.W.3d 309, 320 (Mo. Ct. App. 2010). The Supreme Court of Missouri has explained that "use of process" "refers to some wilful [sic], definite act not authorized by the process or aimed at an objective not legitimate in the proper employment of such process." Stafford v. Muster, 582 S.W.2d 670, 678 (Mo. 1979). Abuse of process is a willful act and the defendant must have "some ulterior purpose[.]" Cmty. Title Co. of St. Louis v. Lieberman Mgmt. Co., 817 S.W.2d 255, 258 (Mo. Ct. App. 1991). Where "the use of process was within the right of the defendant[,]" an abuse of process claim will fail. Missouri Highway & Transp. Comm'n v. Commerce Bank of Kansas City, N.A., 763 S.W.2d 172, 177 (Mo. Ct. App. 1988). At least one Missouri court has found no abuse of process where an officer's actions are "supported by a facially valid warrant and probable cause." Pitts v. City of Cuba, 913 F. Supp. 2d 688, 715 (E.D. Mo. 2012).

Plaintiff argues that there is a genuine dispute as to whether the continued restraint of Wright and questioning Wright as to Vinol Williams was authorized

by the arrest warrant. (Doc. #119, at 19) Plaintiff has not shown any evidence of an ulterior purpose as required. Instead, his argument goes to whether or not the marshals falsely imprisoned plaintiff. As discussed above, the Eighth Circuit has concluded that Wright's continued detention under the circumstances was justified. Therefore, defendant's motion for summary judgment is granted with regard to the abuse of process claim.

C. Assault and battery

In Missouri there is no claim that encapsulates both assault and battery; instead they are two separate claims. Devitre v. Orthopedic Ctr. of St. Louis, LLC, 349 S.W.3d 327, 335 (Mo. 2011). A plaintiff alleging battery must prove that there was "intended, offensive bodily contact with another person." Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238, 246 (Mo. App. 2006). Whereas assault is " 'any unlawful offer or attempt to injure another with the apparent present ability to effectuate the attempt under circumstances creating a fear of imminent peril.' " Phelps v. Bross, 73 S.W.3d 651, 655 (Mo. App. 2002). The analysis is different, however, where an assault and battery charge stems from an arrest by a law enforcement officer. In such situations, "a plaintiff asserting that he was battered in the course of an arrest must prove that the officer used unreasonable force in effecting it." Neal v. Helbling, 726 S.W.2d 483, 487 (Mo. Ct. App. 1987). The plaintiff has the duty to show that the arresting officer "used more force thereabout than was reasonably necessary to effect the arrest." State ex rel. Ostmann v. Hines, 128 S.W. 248, 250 (1910).

Defendant argues that the marshals did not use any more force than was reasonably necessary given the circumstances. (Doc. #115, at 16) Defendant points out that when the marshals approached Wright, they believed Wright to be the individual they sought who was potentially an armed and dangerous fugitive. (Doc. #115, at 16) Additionally, defendant argues that Wright's actions as the marshals came toward him could have led them to believe that Wright was resisting arrest. (Doc. #115, at 16) Defendant also argues that "[n]o claim for assault and battery exists in this case for the same reason that [the Eighth Circuit in Wright IV found that] qualified immunity barred any Constitutional claim for excessive force for 'a single Taser shock causing no lasting injury to a man reasonably identified as the suspect and purported to be armed and dangerous.' " (Doc. #115, at 19)

In Wright IV, the Eighth Circuit did not address the question of whether the force used was excessive. Instead, the question the Eighth Circuit addressed was a narrow question under the qualified immunity analysis of whether a reasonable officer would have been on notice that the officer's conduct violated a clearly established right. (Doc. #108-1 at 8) In Wright III, this Court, citing Shekleton v. Eichenberger, 677 F.3d 361 (8th Cir. 2012), found that a "reasonable officer on the scene would not have believed it necessary to use a taser where the man the officers believed to be Vinol Wilson merely backed away from a man holding a gun on him." (Doc. #104, at 13) This Court reached the conclusion in Wright III based upon its repeated viewings of the video tape, which was offered into evidence by the parties, and which caused this Court to reach the following factual finding:

> 26. Wright never threatened Franklin by any words he said or anything he did. Wright did not push Franklin's arm away and did not take a stance and cock his arm like he was about to throw a punch at Franklin. Wright did not attempt to run away from Franklin. Wright merely backed away from a man in a Royals shirt who had a gun aimed at him.

(Doc. # 104, at 4) (footnote omitted) These facts were key to this Court's original ruling that defendants Franklin and Wallace were not entitled to qualified immunity on the excessive force claim. However, these facts were not adopted by the Eight Circuit opinion nor were they part of defendant's proposed uncontroverted facts. Thus, this Court has not relied upon any findings it reached from its review of the video tape in ruling on the pending summary judgment motion.[3]

The holding of the Eighth Circuit in Wright IV on the issue of plaintiff's constitutional claim of excessive and unreasonable force is clearly relevant to the assault and battery claim. As noted in Schoettle v. Jefferson Cty., Mo., 2014 WL 1117587 (E.D. Mo. Mar. 20, 2014), the reasoning used in granting qualified immunity on an excessive force claim applies equally to granting summary judgment in favor of the government on an assault and battery claim. Schoettle v. Jefferson Cty., Mo., No. 4:12-CV-2075-SPM, 2014 WL 1117587, at *11 (E.D. Mo. Mar. 20, 2014), aff'd sub nom. Schoettle v. Jefferson Cty., 788 F.3d 855 (8th Cir. 2015). Holtgreven v. O'Fallon Police Dep't, 2009 WL 2032164 (E.D. Mo. July 8, 2009), presents a similar situation. There one of the defending officers received a radio call regarding an erratic driver. Holtgreven v. O'Fallon Police Dep't, 2009 WL 2032164, at *3 (E.D. Mo. July 8,

2009). The officer attempted to pull the car over but the car continued on its way, swerving into oncoming traffic and onto the shoulder. Id. When the vehicle finally came to a stop the driver failed to respond to the officer's attempts to show his hands and exit the vehicle. Id. at *4. After several failed attempts to get the driver to exit the vehicle, the officer grabbed the driver and pulled the driver out of the car and onto the ground. Id. at *5. While on the ground, the officer attempted to handcuff the driver, but the driver was combative and failed to comply with the officer's orders. Id. Two other officers observed the officer and the driver struggling and attempted to use the tip of their taser gun to deliver an electrical charge in an attempt to subdue the driver. Id. When that failed to subdue the driver, the officers then deployed their tasers. Id. The driver sued alleging that at the time of the incident he was suffering from diabetic shock. Id. at *3. In ruling on the assault and battery claim against the officers, the court found that the driver failed to demonstrate that the officers "used more force than was reasonably necessary." Id. at *11. In ruling on the assault and battery claim, the court in Holtgreven cited and relied upon its earlier discussion denying plaintiff's constitutional claim of excessive force. The same facts upon which the court relied upon to find that the officers use of force was objectively reasonable on the constitutional claims compelled a finding that the plaintiff "posed a threat to public safety and to the individual officers[, and that his] refusal to exit his vehicle and his subsequent act of resisting arrest necessitated the use of force by the officers." Id. Therefore, the court found that the officers did not use any more force than was reasonably necessary given the facts of the case and that the officers were entitled

to summary judgment on the assault and battery claims for the same reasons they were entitled to summary judgment on the constitutional claim. Id.

The Eighth Circuit in Wright IV also drew a distinct contrast between the facts of this case and the facts in Shekleton v. Eichenberger, 677 F.3d 361 (8th Cir. 2012), upon which this Court had relied in denying qualified immunity to two of the defendants. In Shekleton the plaintiff "was an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the officer, did not attempt to run from [the officer], and did not behave aggressively towards [the officer]." Shekleton, 677 F.3d at 366. In contrast, the Eighth Circuit in Wright IV noted that officers in the instant matter were attempting to apprehend an individual (Wilson) who had a "history of drug, weapons, and aggravated assault offenses[.]" The court stressed that the evaluation as to the reasonableness of the officer's use of force must be made " 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' " (Doc. #108-1, at 11) The court thus found that a "reasonable officer would not have had fair warning that using a single Tazer shock against a suspected felon would have violated clearly established Constitutional rights." (Doc. #108-1, at 11)

Other Eighth Circuit cases also stress that the court must decide the issue based upon facts known to the officers at the time. See Washington v. Drug Enf't Admin., 183 F.3d 868, 874 (8th Cir. 1999); Cook v. City of Bella Villa, 2008 WL 1360838, at *6 (E.D. Mo. Apr. 8, 2008), aff'd, 582 F.3d 840 (8th Cir. 2009).

In this case, the undisputed facts as set forth by defendant, and which were previously adopted by the Eighth Circuit, do not reflect that the marshals used

more force than was reasonably necessary to effect the arrest. The marshals were attempting to locate an individual who had a history of involvement with drug, weapons and aggravated assault offenses. (See Undisputed Fact #4, supra) The marshals investigated the matter and took steps to confirm that the individual sought would be at the Grandview Community Center at a certain time and would be dressed in a uniform with the number "23". (See Undisputed Fact ##4-19, supra) The officers also planned the arrest in order to minimize danger to the public or themselves. (See Undisputed Fact #21, supra) When Wright did not immediately comply with the marshals' demand and was positioned in between the two marshals, albeit unintentionally, the officers use of force was reasonable in light of the marshals' understanding of the individual sought. This Court finds that summary judgment in favor of the United States should be granted.

Based on the foregoing, it is

ORDERED that the defendant's Motion of the United States to Dismiss or, in the Alternative, for Summary Judgment on the Remaining Common Law Tort Claims[4] (doc. #115) is **GRANTED**.

Footnotes

1Adhering to the parties designation, this Court will refer to the following orders herein as follows:

> Wright I This Court's original ruling on qualified immunity (doc. #76)
> Wright II The Eighth Circuit's opinion remanding the case for additional consideration (doc. #82-1)

Wright III This Court's opinion granting in part and denying in part the request for qualified immunity filed by Franklin and Wallace (doc. #104)

Wright IV The Eighth Circuit's opinion reversing the Court's denial of qualified immunity to Franklin and Wallace (doc. #108-1)

Wright V This Court's opinion granting qualified immunity to Franklin and Wallace (doc. #111)

2Paragraph 44(c) of plaintiff's First Amended Complaint also mentions negligence. (Doc. #38, at ¶ 44(c)) Defendant notes that plaintiff has included the term negligence but that the terminology appears to be used in relation to the four tort claims specifically identified and is not to serve as an individual claim of negligence. (Doc. #115, at 6 fn. 7) In his responsive brief, plaintiff states "at issue herein are four FTCA claims which have not yet been considered by either this Court or the 8th Circuit: false arrest, false imprisonment, abuse of process, and assault and battery." (Doc. #119, at 7) Therefore, this Court will treat plaintiff's First Amended Complaint as alleging claims for false arrest, false imprisonment, abuse of process, and assault and battery.

3While plaintiff's claims under the FTCA raise different legal issues from the claims brought against the individual defendants, the facts upon which the Court's legal conclusions are based must be consistent. Had fact number 26 from this Court's decision in Wright III, been adopted by the Eighth Circuit, the Court believes that defendants Franklin and Marshall would not have been entitled to summary judgment on the qualified immunity issue for the reasons discussed in this Court's prior opinion. Therefore, based upon the

8th Circuit's decision in Wright IV, this Court has not relied upon that factual finding in deciding the pending summary judgment motion.

4As an alternative to the request for summary judgment, defendant sought the dismissal of the tort claims under the Supremacy Clause. Given the Court's ruling granting summary judgment on all remaining issues, the Court need not address the alternative motion to dismiss.

United States Court of Appeals,
Eighth Circuit.

Stuart WRIGHT, Plaintiff–Appellee

v.

UNITED STATES of America; John Clark; Walter R. Bradley, in his official capacity as the United States Marshal for the; Stacia A. Hylton, in her official capacity, Defendants

Sean Franklin, in his official capacity as a Deputy United States Marshal and in his individual capacity; Christopher Wallace, in his official capacity as a Deputy United States Marshal and in his individual capacity, Defendants–Appellants.

No. 14–3606.
Submitted: Sept. 21, 2015.Filed: Dec. 23, 2015.

Attorneys and Law Firms

Toby Crouse, Foulston Siefkin LLP, Overland Park, KS, argued (Stephen R. McAllister, Thompson Ramsdell Qualseth & Warner, P.A., Lawrence, KS, on the brief), for appellants Sean Franklin and Chris Wallace.
John W. Kurtz, Hubbard & Kurtz, L.L.P., Kansas City, MO, argued, for appellee.
Before LOKEN, BENTON, and SHEPHERD, Circuit Judges.

Opinion

SHEPHERD, Circuit Judge.

Appellee Stuart Wright filed suit against Deputy United States Marshals Sean Franklin and Christopher Wallace (the "Marshals") seeking damages pursuant to *Bivens*.[1] The Marshals moved for summary judgment based on qualified immunity, and the district court denied their motion. The Marshals brought an interlocutory appeal. We declined to address the merits of the appeal and remanded the case so that the district court could properly make findings of fact and conclusions of law sufficient to permit appellate review. On remand, the district court denied, in part, the Marshals' motion for summary judgment. We reverse and remand.

I.

We recount the facts as found by the district court in the light most favorable to Wright, the nonmoving party. *Johnson v. Blaukat*, 453 F.3d 1108, 1113 (8th Cir.2006). In 2008, a Grand Jury in United States District Court for the District of Kansas indicted Vinol Wilson ("Wilson") for conspiracy to manufacture and possess with intent to distribute crack cocaine, and to possess with intent to distribute cocaine. Following the indictment, an arrest warrant was issued for Wilson.

Sean Franklin, a Deputy United States Marshal with the United States Marshal Service in the District of Kansas, began an investigation to locate and arrest Wilson. Through his investigation, Franklin learned that Wilson had a history of drug, weapons, and aggravated assault offenses and had previously served 78 months in prison for distributing crack cocaine and

for using a firearm during a drug trafficking crime. He was considered armed and dangerous. Franklin also discovered that Wilson used steroids and participated in body building and dog fighting, and played basketball with a group of acquaintances in leagues and tournaments in and around the Greater Kansas City area.

In 2008, Wilson played on a basketball team that competed in the Sunflower State Games. Franklin obtained a copy of the team roster and sought out Wilson's former teammates who might know Wilson's whereabouts. On April 15, 2009, at approximately 9:30 a.m., Franklin met with Walt Bethea, one of Wilson's former teammates from the 2008 Sunflower State Games, and showed him a 2005 Kansas driver's license photo of Wilson. Bethea confirmed that the man in the photo was "V"[2] and indicated that he knew Wilson was wanted by law enforcement on drug charges. Bethea told Franklin that Wilson played in an adult basketball league at the Grandview, Missouri Community Center on Wednesday evenings and he knew that Wilson was scheduled to play that evening at 7:30 p.m. Bethea stated that Wilson's team was comprised of black males who wore orange-colored jerseys.

At approximately 11:30 a.m on April 15, 2009, Franklin met with a confidential source ("CS") at the Grandview Community Center. Franklin showed CS the 2005 Kansas driver's license photo and asked him if he had seen the person pictured. CS stated that he had seen the person pictured, but did not know his name. CS indicated that he had seen the man wearing an orange-colored jersey with the number "23" on the back, with his hair in braids (or "corn-rows"), and sporting a goatee and gold-colored teeth.

CS obtained a roster for the man's team. He explained that the individuals playing in the league are not required to produce identification and the rosters are not checked for accuracy. Franklin recognized some of the names on the roster from the 2008 Sunflower State Games' roster. Wilson's name was not listed on the community center team's roster, but there was an entry for "Vyshon Watson." Franklin knew that Wilson had a son named Vyshon. CS told Franklin that he would assist in identifying Wilson if Wilson arrived for the scheduled game that evening.

At 5:55 p.m., Franklin received a telephone call from a friend of Bethea's advising him that Wilson's team's game had been rescheduled for 6:30 p.m., an hour earlier than planned. Franklin then placed a call to CS to verify this information, but CS did not answer. Around the same time, Franklin set up a briefing area near the parking lot for Grandview High School to organize the arrest team and operation to arrest Wilson.

At approximately 6:15 p.m., CS returned Franklin's call and confirmed that Wilson's game had been moved up an hour and was due to start at 6:30 p.m. Furthermore, CS advised Franklin that Wilson had been seen in the gym. A few minutes later, CS called Franklin again to say that Wilson was on the gym floor, shooting baskets before his game in an orange-colored jersey with the number "23" and wearing his hair in braids.

At 6:45 p.m., Franklin and five other Deputy United States Marshals, including Wallace, arrived at the Grandview Community Center. Franklin decided to arrest Wilson in the middle of the basketball game because he thought it would offer the greatest protection for the safety of the public and law

enforcement. The Grandview Community Center parking lot was crowded with cars and people, including young people, and Franklin believed it might pose an undue public danger to try to apprehend Wilson as he was leaving the Community Center. Franklin also wanted to avoid a high speed vehicle chase. Moreover, Franklin thought Wilson would be somewhat less likely to have a weapon on him if they made the arrest while the basketball game was in progress.

Franklin was wearing his U.S. Marshals Service badge on a chain around his neck. He showed the badge to the individual running the buzzer and game clock and asked the individual to sound the buzzer and stop the game. After the buzzer sounded, Franklin and Wallace walked onto the basketball court and approached Stuart Wright, a black male with braided hair, wearing an orange-colored jersey with number "23" on it, who was playing a full-court game of basketball when Franklin approached him.

Franklin was not in uniform but was wearing a Kansas City Royals jersey. Wright did not see the badge around Franklin's neck or anything identifying him as a law enforcement officer. Franklin pointed his gun at Wright as he approached him. Franklin shouted that he was a United States Marshal, which Wright does not dispute, but Wright could not understand what Franklin was saying. At some point, Wright heard the name Vinol mentioned, and he told Franklin his name and said that he had identification in the gym.

Franklin told Wright multiple times to get on the ground but Wright kept backing away, so Franklin grabbed Wright's shirt and kicked at his legs. Still standing, Wright came directly between Franklin and Wallace. Wallace deployed his Taser, hitting Wright in the back and causing Wright to fall. Franklin leaned

over Wright and asked his name. Wright responded that his name was Stuart Wright, a name that Franklin recognized from the 2008 Sunflower State Games roster. Franklin said, "Don't lie to me." Wright again told Franklin that his name was Stuart Wright. Then, Franklin announced, "Let's get him out of here." Wright was pulled up and handcuffed. People present told the Marshals that he was Stuart Wright not Vinol Wilson.

As Wright was taken out of the Community Center, he spotted Grandview Police Officer Clausing. Wright recognized him as a Grandview High School graduate and said, "My name is Stuart Wright. I graduated from Grandview High School in 1996. You know me." Officer Clausing replied, "That's not the guy. I know him." The Marshals continued to escort Wright outside the Community Center and put him in the back of a police patrol car.

Stuart Wright's brother, Stephen Wright ("Stephen"), retrieved Wright's driver's license from his gym bag and gave the license to Franklin shortly after Wright was removed from the gym. Franklin told Stephen that he knew Wright was not Wilson, but Wright had information about Wilson. Franklin and one other man told Stephen to speak with Wright and encourage Wright to tell the officers what he knew about Wilson. Stephen was allowed to talk to Wright briefly in the car and told Wright to give the officers any information he had about Wilson.

The officers kept Wright in custody and asked him questions about whether he had played basketball with Wilson, where Wilson was, and how Wright could help them find Wilson. Wright told the officers that he did not know where Wilson was or how to find him. Wright overheard some of the officers discussing a

vacation day the next day, how everything had happened so fast, about hearing the "pop-pop" sounds, and how they had gotten the wrong guy.

After fifteen to twenty minutes, the officers pulled Wright out of the car and told him they were going to pull the probes out of him. One of the officers asked if he needed an ambulance, but Stephen told them he was going to take Wright to the hospital, which he did. One of the officers told Wright that they were going to uncuff him, and then asked Wright, "Now, you're not going to go all ape-shit on me, are you?" Wright told him, "No." Franklin told Wright that he had searched for him in the computer and that he had two traffic warrants that he needed to handle. Wright was then released after being in custody for no longer than twenty minutes.

At the time in question, Wilson was approximately 5′11″ tall and weighed roughly 200 pounds. He had gold caps on all of his teeth. Wright was about 6′ 5″ tall and weighed 280 pounds. Wright has not alleged any permanent or lasting injury from the Taser shock.

Appellant Wright filed this *Bivens* action, alleging that the Marshals' false arrest, unreasonable search and seizure, and use of excessive force violated his Fourth and Fifth Amendment rights. The Marshals moved for summary judgment based on qualified immunity, and the district court denied their motion. The Marshals brought an interlocutory appeal. We declined to address the merits of the appeal and remanded the case so that the district court could properly make findings of fact and conclusions of law sufficient to permit appellate review. *Wright v. United States*, 545 Fed.Appx. 588, 590 (8th Cir.2013) (unpublished per curiam).

On remand, the district court granted in part and denied in part the Marshals' motion for summary judgment. Specifically, the court held that the Marshals were entitled to summary judgment on Wright's false arrest claim, but not on his excessive force and improper search and seizure claims. The court found that "[t]he video does not support any indication that Wright would have recognized [the Marshals] as law enforcement officer[s], let alone attempted to evade [the Marshals] or physically resisted [the Marshals'] attempts to take him into custody." *Wright v. United States*, 2014 WL 4630959, at * 8 (W.D.Mo. Sept. 16, 2014). Thus, the Court concluded that the Marshals were not justified in the force that they used. Furthermore, the court determined that the post-arrest conduct of the Marshals was inappropriate as they continued to detain Wright even after they knew he was not Wilson. The Marshals appeal the district court's denial of summary judgment on the excessive force and unreasonable search and seizure claims.[3]

II.

We review the district court's summary judgment decision regarding qualified immunity *de novo*, viewing the facts in the light most favorable to the nonmoving party. *McKenney v. Harrison*, 635 F.3d 354, 358 (8th Cir.2011). Summary judgment is warranted where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

Qualified immunity shields a government official from liability and the burdens of litigation unless the official's conduct violates a clearly established constitutional or statutory right of which a reasonable

person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Evaluating whether a government official is entitled to qualified immunity requires a two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right; and (2) whether that right was clearly established at the time of the defendant's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Courts have discretion to decide which part of the inquiry to address first. *Id.* at 236, 129 S.Ct. 808.

A.

We will first address Wright's excessive force claim. We begin our inquiry by determining whether the Marshals' conduct violated clearly established law at the time of the incident. To avoid summary judgment based on qualified immunity, Wright must offer sufficient evidence to show a genuine issue of material fact about whether a reasonable officer would have been on notice that the officer's conduct violated a clearly established right. *Engleman v. Deputy Murray*, 546 F.3d 944, 947 (8th Cir.2008).

For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 n. 12, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). "But it is to say that in the light of pre-existing law the unlawfulness must be apparent."

Id. (citations omitted). Petitioners can show a clearly established right through "cases of controlling authority in their jurisdiction at the time of the incident" or through a "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). The pertinent inquiry is whether the state of the law at the time gave the official "fair warning" that such conduct was unlawful in the situation he confronted. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If a plaintiff fails to assert a constitutional violation under the law as interpreted at the time, then the defendant is entitled to summary judgment. *Engleman*, 546 F.3d at 947. Whether the right at issue was "clearly established" is a question of law for the court to decide. *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir.2004).

Wright argues that the Marshals, through a footnote in their motion for summary judgment, expressly waived any argument that the right at issue was not clearly established in April 2009. The footnote states, "In the present motion, however, the second prong of *Saucier* is not being argued." While this statement does not constitute an express waiver, it is true that the Marshals did not argue the clearly established issue before the district court in their initial motion for summary judgment. Nor did the Marshals argue the issue in their supplemental brief to the district court after the first interlocutory appeal. "As a general rule, we do not consider arguments or theories on appeal that were not advanced in the proceedings below." *Jolly v. Knudsen*, 205 F.3d 1094, 1097 (8th Cir.2000) (quoting *Wright v. Newman*, 735 F.2d 1073,

1076 (8th Cir.1984)). However, we are to resolve the issue of whether a right was clearly established at the time the conduct occurred using our "full knowledge of [our own and other relevant] precedents." *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) (citing *Davis v. Scherer*, 468 U.S. 183, 192 n. 9, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)). "Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.' " *Id.* (citing *Mitchell*, 472 U.S. at 528, 105 S.Ct. 2806). This question of law must be resolved *de novo* on appeal. *Id.* (citing *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). Therefore, we will proceed with a *de novo* review of whether it was clearly established in April 2009 that a single Taser shock causing no lasting injury to a man reasonably identified as the suspect and purported to be armed and dangerous violated the Fourth Amendment.[4]

Recently, in *Hollingsworth v. City of St. Ann*, we determined that it was not clearly established in July 2009 that the use of a Taser resulting in only *de minimis* injury violated the Fourth Amendment. 800 F.3d 985, 991 (8th Cir.2015). Despite a Taser's "unique capability to cause high levels of pain without long-term injury, 'we have not categorized the Taser as an implement of force whose use establishes, as a matter of law, more than *de minimis* injury.' " *Id.* at 990–91 (quoting *LaCross v. City of Duluth*, 713 F.3d 1155, 1158 (8th Cir.2013)). In April 2009, when the events at issue in this case transpired, the state of the law was no different. " '[A] reasonable officer could have believed that as long as he did not cause more than *de minimis*

injury to an arrestee, his actions would not run afoul of the Fourth Amendment.' " *Id.* at 991 (quoting *Bishop v. Glazier*, 723 F.3d 957, 962 (8th Cir.2013)). Therefore, the Marshals are entitled to qualified immunity on Wright's excessive force claim.

The district court, despite the Marshals' failure to argue the clearly established issue, cited to our decision in *Shekleton v. Eichenberger* in support of the court's conclusion that the tasering of Wright was excessive force in violation of clearly established law at the time. 677 F.3d 361 (8th Cir.2012). In *Shekleton*, we held that the plaintiff had established that a violation of a constitutional right occurred because a reasonable officer would not have deployed his Taser against "an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him." *Id.* at 366. We have since confirmed that "non-violent, non-fleeing subjects have a clearly established right to be free from the use of tasers." *DeBoise v. Taser Intern., Inc.*, 760 F.3d 892, 897 (8th Cir.2014).

The facts in *Shekleton* are distinguishable from those in this case in that a Grand Jury had indicted Vinol Wilson for several felonies. Wilson had previously served 78 months in prison for distributing crack cocaine and for using a firearm during a drug trafficking crime. He was considered armed and dangerous. In contrast, the suspect in *Shekleton* was arrested for public intoxication, a misdemeanor. 677 F.3d at 366. Moreover, the suspect in *Shekleton* was not a fugitive from justice with a felonious past who was considered armed and dangerous. *See id.* We evaluate the reasonableness of an officer's use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v.*

Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The Marshals, well aware of Wilson's history of drug, weapons, and aggravated assault offenses, had been attempting to locate Wilson for months. Their conduct cannot be likened to that of the officer in *Shekleton* who tased a non-violent misdemeanant. Thus, our holding in *Shekleton* does not change our finding that the state of the law in April 2009 was such that a reasonable officer would not have had fair warning that using a single Tazer shock against a suspected felon would have violated clearly established Constitutional rights.

Accordingly, we hold that the Marshals are entitled to qualified immunity on Wright's excessive force claim because it was not clearly established in April 2009 that the use of a Tazer against a suspected armed and dangerous felon violated the Fourth Amendment.

B.

Next, we turn to Wright's unreasonable search and seizure claim. Wright claims that the Marshals violated his Fourth Amendment rights by detaining him after they realized that he was not Vinol Wilson. He does not challenge the validity of the arrest warrant for Vinol Wilson, but complains only of the detention subsequent to the Marshals discovery that they had arrested the wrong man. The Marshals admit that they did not release Wright as soon as they realized that they had made a mistake, but assert three independent bases for Wright's continued detention: (1) Wright resisted arrest; (2) the Marshals discovered two outstanding arrest warrants for Wright after they realized he was not Vinol Wilson; (3) the twenty-minute

detention was a reasonable period of time in which to detain Wright given the confusion at the scene.

Generally, "[c]ontinuing to hold an individual in handcuffs once it has been determined that there was no lawful basis for the initial seizure is unlawful within the meaning of the Fourth Amendment." *Hill v. Scott*, 349 F.3d 1068, 1074 (8th Cir.2003) (quoting *Rogers v. Powell*, 120 F.3d 446, 456 (3d Cir.1997)). Nevertheless, a separate, independent basis may support continued detention. *Id.* (citing *Rogers*, 120 F.3d at 456).

Under Missouri law, it is a crime to resist arrest. Mo. Ann. Stat. § 575.150 (providing that a person commits the crime of resisting arrest "if, knowing that a law enforcement officer is making an arrest, ... the person [r]esists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer"). It is undisputed that Wright backed away from the Marshals who approached him on the basketball court. According to Wright, he did not yield to Franklin's commands to get on the ground because he could not understand what Franklin was saying. We must view the facts in the light most favorable to Wright, but this is sufficient for the Marshals to have probable cause to believe that Wright had committed the crime of resisting arrest and justify their twenty minute restraint on Wright's liberty. *See* *Gerstein v. Pugh*, 420 U.S. 103, 114–15, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) ("a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest").

Wright argues that the Marshals did not articulate this motive for his continued detention until briefing this appeal, and that such a justification never

occurred to them during the detention. Wright's assertion advances a subjective approach that is inconsistent with Fourth Amendment jurisprudence. *See* *Kentucky v. King*, 563 U.S. 452, 464, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (acknowledging that the Supreme Court has never held "an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment"); *Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind ..."). The question we must ask is whether "the circumstances, viewed *objectively*, justify the action." *King*, 563 U.S. at 464, 131 S.Ct. 1849 (quoting *Brigham City*, 547 U.S. at 404, 126 S.Ct. 1943). Moreover, while the Marshals may not have articulated Wright's resisting arrest as a basis for the twenty-minute detention until this appeal, the Marshals have consistently maintained that Wright resisted arrest and disobeyed their commands. Thus, the Marshals may very well have considered Wright's behavior during the arrest when they chose to detain him for twenty minutes. Moreover, once the Marshals confirmed that the man they had arrested was in fact Stuart Wright, not Vinol Wilson, the Marshals discovered that Wright had two outstanding warrants. These, too, provide separate and independent bases for his continued detention.

Finally, a twenty-minute detention is not unreasonable after the scene of confusion and is insufficient to recover on a *Bivens* claim for damages against the Marshals. "What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States v. Montoya De Hernandez*, 473 U.S. 531,

537, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985)). Furthermore, "the Fourth Amendment does not require employing the least intrusive means, because '[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.' " *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 837, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (quoting *United States v. Martinez–Fuerte*, 428 U.S. 543, 556–57, n. 12, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)). The Supreme Court has recognized that "the lapse of a certain amount of time" is a factor in assessing the existence of a constitutional encroachment. *See Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) ("mere detention pursuant to a valid arrest but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty ... without due process of law' "). In *Baker*, the police arrested a man on a warrant intended for his brother and detained him for three days in spite of his repeated assertions of innocence. *Baker*, 443 U.S. at 141, 99 S.Ct. 2689. When the officials realized their error on the third day of the man's detention, they released him. *Id.* The Supreme Court held that the officials did not violate the Constitutional rights of the man mistaken for his brother because the warrant conformed to the requirements of the Fourth Amendment and was supported by probable cause. *Id.* at 145–46, 99 S.Ct. 2689 ("Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an

arrest warrant is required by the Constitution to investigate independently every claim of innocence ...”). The facts in this case do not reflect the precise situation presented in *Baker*, “but, as in all Fourth Amendment cases, we are obliged to look to all the facts and circumstances of this case in light of the principles set forth in ... prior decisions.” *South Dakota v. Opperman*, 428 U.S. 364, 375, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). Wright was held for up to twenty minutes after the Marshals realized that he was not Vinol Wilson. Under the totality of circumstances, we conclude the delay in releasing Wright was reasonable. The Marshals removed Wright from the commotion of the gymnasium and verified his identity. Detaining Wright in the police vehicle allowed the Marshals to defuse the situation and reorient themselves. The twenty minute delay was a minimal intrusion on Wright's liberty interest and may have ensured that no further mistakes were made that day. “A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.” *United States v. Sharpe*, 470 U.S. 675, 686–687, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). Nevertheless, for Fourth Amendment purposes, reasonableness is evaluated from the perspective of a reasonable officer on the scene, not from the more comfortable view of hindsight. *See* *Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (citing *Terry v. Ohio*, 392 U.S. 1, 20–22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *see also* *Young v. City of Little Rock*, 249 F.3d 730, 735 (8th Cir.2001) (“We decline to hold officers in this situation to the niceties of legal distinctions, even though the distinctions might seem persuasive to judges in the light of hindsight.”). The Fourth Amendment does not demand perfection from

law enforcement officers; it only requires that their conduct be reasonable under the totality of the circumstances. The twenty-minute detention was not an unreasonable seizure under the Fourth Amendment, and therefore the Marshals are entitled to summary judgment on Wright's claim for unreasonable seizure.

III.

The judgment denying the Marshals' motion for summary judgment is reversed, and the case is remanded to the district court for entry of an order granting qualified immunity to Deputies Franklin and Wallace.

Footnotes

1*Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).
2The record does not explain this, but presumably "V" is an alias for Vinol Wilson.
3We note that Wright does not appeal the district court's finding that the Marshals were entitled to summary judgment on Wright's false arrest claim.
4In his complaint, Wright further alleges that the Marshals "threw him to the ground." In Wright's declaration, however, he indicated that he fell to the ground as he was tased. Therefore, we consider Wright's fall as relating to the issue of excessive force due to the tasing.

United States District Court,
W.D. Missouri,
Western Division.

Stuart WRIGHT, Plaintiff,
v.
UNITED STATES of America, et al., Defendants.

No. 10–01220–CV–W–SWH.

Signed Sept. 16, 2014.

Attorneys and Law Firms

John Wray Kurtz, Hubbard and Kurtz, Kansas City, MO, for Plaintiff.
Jeffrey P. Ray, United States Attorney's Office, Kansas City, MO, Stephen R. McAllister, Lawrence, KS, Toby Crouse, Foulston Siefkin, LLP, Overland Park, KS, for Defendants.

ORDER

SARAH W. HAYS, United States Magistrate Judge.

Pending before the Court is a remand of its Order denying the motion of defendant Deputy United States Marshals Sean Franklin and Christopher Wallace for summary judgment on Count IV of plaintiff's First Amended Complaint (doc # 49). The Eighth Circuit Court of Appeals found that this Court failed to conduct a proper qualified immunity analysis as this Court merely noted the existence of disputed facts and summarily decided that qualified immunity was inapplicable. (Doc # 82–1 at 4) This Court has been

instructed to properly address defendants' qualified immunity defense and make findings of fact and conclusions of law sufficient to permit appellate review. (*Id.* at 2)

I. *FINDINGS OF FACT*

As instructed by the Eighth Circuit Court of Appeals in its remand judgment, "the district court must examine the record to determine which facts are genuinely disputed and view those facts in the light most favorable to the non-movant, 'as long as those facts are not so blatantly contradicted by the record ... that no reasonable jury could believe [them].' " (Doc # 82–1 at 4) The Court finds the following facts in the light most favorable to plaintiff Stuart Wright.

1. In 2008, Vinol Wilson ("Wilson") was indicted by a Grand Jury in United States District Court for the District of Kansas for "conspiracy to manufacture, to possess with intent to distribute and to distribute cocaine base 'crack,' and to possess with intent to distribute and to distribute cocaine" in the case styled *United States v. Vinol Wilson*, 07–20168–07–JWL/DJW (D.Kan.).
2. Following the issuance of the indictment, an arrest warrant was issued for Wilson; however, Wilson was not immediately located or apprehended.
3. Franklin, a Deputy U.S. Marshal with the U.S. Marshals Service in the District of Kansas began an investigation to locate and arrest Wilson.
4. Based upon his investigation, Franklin learned that Wilson had a history of drug, weapons, and aggravated assault offenses. Wilson had previously spent 78 months in prison for distributing crack cocaine and for

using a firearm during a drug trafficking crime. Wilson was considered armed and dangerous.

5. Based upon his investigation, Franklin also learned that Wilson was a black male, born in 1974, was into steroids, body building and dog fighting, and was known to play basketball with a group of acquaintances in leagues and tournaments in and around the Greater Kansas City area.

6. For example, Franklin learned that Wilson played on a basketball team that participated in the 2008 Sunflower State games.

7. After obtaining a copy of that particular team roster, Franklin undertook to talk with other team members in an effort to locate Wilson pursuant to the outstanding arrest warrant.

8. Eventually, on Wednesday, April 15, 2009, at approximately 9:30 a.m., Franklin made contact with Walt Bethea ("Bethea"), who had played on Wilson's basketball team.

9. Franklin showed Bethea a 2005 Kansas driver's license photo of Wilson that Bethea identified as "V" and Bethea stated that he knew Wilson was wanted by law enforcement for some drug charges.

10. Bethea also informed Franklin that Wilson played in an adult basketball league in Grandview, Missouri, on Wednesday evenings at the Grandview Community Center. Bethea said that Wilson had played in the prior week's game and was scheduled to play again that evening at 7:30 p.m.

11. Bethea stated that Wilson's team was comprised of all black males who wore orange-colored jerseys.

12. At approximately 11:30 a.m., on April 15, 2009, Franklin met with a confidential source ("CS") at the Grandview Community Center.

13. Franklin showed CS the 2005 Kansas driver's license photo of Wilson and CS stated that he had seen the person pictured, but did not know his name. CS stated that he had seen Wilson wearing an orange-colored jersey with the number "23" on the back. CS also said that Wilson had been seen with his hair in braids (or "corn-rows"), sporting a goatee, and with gold-colored teeth.
14. CS obtained access to the roster for the team that he identified as the one Wilson played for. CS explained that individuals playing in the league do not have to produce any identification and rosters are not checked by the Grandview Community Center for any accuracy. The roster included many of the names that had been on the team roster for the 2008 Sunflower State games, including Walt Bethea. Wilson's name was not listed, but there was an entry for "Vyshon Watson." Franklin knew that Wilson had a minor son named Vyshon.
15. CS told Franklin that he would assist in identifying Wilson if he showed up for the basketball game scheduled for that evening.
16. At 5:55 p.m., Franklin received a telephone call from a friend of Bethea's advising him that the basketball game involving Wilson's team had been moved up to 6:30 p.m. Franklin then placed a call to CS to verify the information.
17. At around this same time, Franklin set up a briefing area near the parking lot for Grandview High School to organize the arrest team and the operation to arrest Wilson.
18. At approximately 6:15 p.m., CS called Franklin and confirmed that the game involving Wilson's team had been moved up an hour and was due to start at 6:30 p. m. CS advised Franklin that Wilson had been seen inside the gym.

19. A few minutes later, CS called Franklin again and informed Franklin that Wilson was on the gym basketball floor, shooting baskets before the start of his game, was wearing an orange-colored jersey with the number "23," and had his hair braided.
20. At 6:45 p.m., Franklin arrived at the Grandview Community Center along with five other Deputy U.S. Marshals ("DUSMs"), including Wallace.
21. Franklin made the decision to arrest Wilson during the course of the basketball game because he felt that this offered the greatest protection for the safety of the public and law enforcement. The Grandview Community Center parking lot was crowded with cars and people (including young people) and Franklin believed it might pose an undue public danger to try to apprehend Wilson as he was leaving the Community Center. Franklin also wanted to avoid any high speed vehicle chase. In addition, Franklin felt that by arresting Wilson on the basketball court while a game was in progress, he was somewhat less likely to have a weapon on him.
22. Franklin, Wallace, and the three other DUSMs proceeded to the basketball gym where Franklin showed his badge to the individual running the clock/scoreboard. Franklin told the individual to sound the buzzer and stop the game.
23. Franklin was wearing his U.S. Marshals Service badge on a chain around his neck.
24. After the buzzer sounded, Franklin and Wallace went out on to the basketball court toward a black male with braided hair, wearing an orange-colored jersey with the number "23" on it.
25. Stuart Wright, a black male wearing an orange-colored number "23" jersey, was playing a full-court game of basketball when very suddenly, Wright saw a

man wearing a Kansas City Royals shirt directly in front of him with a gun pointed at him. The man (Franklin) was not wearing a uniform of any type that Wright was able to recognize. Wright did not see anything identifying the man as a law enforcement officer. The man was yelling things as he came toward Wright, but Wright could not understand what he was saying. At some point, Wright heard the name Vinol mentioned. Wright told the man his name and said that he had identification there in the gym.

26. Wright never threatened Franklin by any words he said or anything he did. Wright did not push Franklin's arm away and did not take a stance and cock his arm like he was about to throw a punch at Franklin. Wright did not attempt to run away from Franklin. Wright merely backed away from a man in a Royals shirt who had a gun ai med at him.[1]

27. Franklin grabbed Wright's shirt and kicked at his legs. The pulling of Wright and the kicking of Wright's leg brought Wright directly in between Franklin and Wallace. Wallace deployed his taser hitting Wright in the back and Wright fell to the floor.

28. Franklin leaned over Wright to say in his ear something to the effect of, “What's your name?” Wright told Franklin he name was Stuart Wright, a name that Franklin recognized from the team roster for the 2008 Sunflower State games. Franklin said, “Don't lie to me.” Wright told Franklin again that his name was Stuart Wright. Franklin then said something to the effect of, “Let's get him out of here.” Wright was then pulled to his feet and handcuffed. Many of the people present were telling the men that Stuart Wright was not Vi nol Wilson.

29. As Wright was being taken out of the Community Center, he saw a Grandview Police Officer named

Officer Clausi ng. Wright recognized him as a Grandview High School graduate. Wright said something to the effect of, "My name is Stuart Wright. I graduated from Grandview High School in 1996. You know me." Officer Clausing then said something to the general effect of, "That's not the guy. I know him." Nevertheless, Wright was taken out of the Community Center in handcuffs and put in the back of a car that was outside the Community Center.

30. Stuart Wright's brother, Stephen Wright, got Stuart's driver's license from his gym bag and gave the license to Franklin very shortly after Stuart had been taken out of the gym. Franklin told Stephen Wright that he knew his brother was not Vinol, but Franklin said that Stuart had information about Vinol. Franklin and one other man told Stephen to speak to his brother and tell him to tell them what they wanted to hear.

31. Stephen Wright was allowed to speak to Stuart briefly in the car. Stephen told Stuart to give the officers any information he had about Vinol. The officers continued to keep Stuart in custody.

32. The officers asked Stuart Wright questions about whether he played basketball with a man named Vinol Wilson, where Vinol Wilson was, and how Wright could help them find Vinol Wilson. Wright told the men he did not know where Vinol Wilson was or how to find him.

33. Wright heard some of the men talking about taking a vacation day the next day, about how everything had happened so fast, about hearing the "pop-pop" sounds, and about how they had gotten the wrong guy. Wright heard the men laughing about it all.

34. After fifteen minutes or so in the car, the men pulled Stuart Wright out of the car. They told him that they were going to pull the probes out of him. One of the

men asked if he needed an ambulance. Stephen Wright told them that he was going to take Stuart to the hospital (which he did). The man then said that he did not think Stuart needed to go to the hospital because it was probably only a flesh wound. One of the men also told Stuart that they were going to un-cuff him. He then said, "Now, you're not going to go all ape-shit on me, are you?" Stuart told him, "No."

35. Franklin told Stuart Wright that he had checked him in the computer and that he had two traffic warrants that he needed to handle.

36. The men did not return Wright's driver's license to him. Wright made several calls trying to get it back. They kept telling him that they had in fact given it to him. Wright told them that the license had never been returned to him. Wright left them cell phone numbers for his mother and his wife. Eventually, someone did call his mother's phone and left a message that Wright could come and get his driver's license back. Wright did get the license back at the United States Courthouse in Kansas City, Kansas from Franklin.

37. At the time in question, Vinol Wilson was about 5′11″ tall and weighed about 200 pounds. He had gold caps on all of his teeth. Stuart Wright was about 6′5″ tall and weighed 280 pounds.

II. *CONCLUSIONS OF LAW*

With the dismissal of the claims for supervisory liability against defendants Clark and Bradley,[2] the claims remaining in Count IV of the First Amended Complaint consist of unreasonable search and seizure, excessive force and false arrest against defendants Franklin and Wallace. Defendants Franklin and Wallace contend that summary judgment[3] must be

entered on these *Bivens* claims because they are protected by qualified immunity. Specifically, defendants argue:

> Franklin and Wallace are ... entitled to qualified immunity in this case. Although Wright's First Amended Complaint does not identify any particular actions taken by Franklin and Wallace, it is conceded that Franklin and Wallace had direct participation in the activities that form the basis of Wright's *Bivens* claims. Nonetheless, Franklin and Wallace are entitled to qualified immunity because the actions undertaken by them on April 15, 2009, did not violate Wright's constitutional rights—the first requirement that Wright must establish to avoid the application of qualified immunity.

(Motion ... for Summary Judgment (doc # 49) at 15)

Both plaintiff and defendants agree that the proper test used to determine whether the doctrine of qualified immunity applies was set forth by the Eighth Circuit Court of Appeals in *Howard v. Kansas City Police Department*, 570 F.3d 984 (8th Cir.2009). (*See* Motion ... for Summary Judgment (doc # 49) at 11; Plaintiff's Suggestions in Opposition to Motion ... for Summary Judgment (doc # 56) at 19) The *Howard* court wrote:

> "Qualified immunity protects a government official from liability in a section 1983 action unless the official's conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known." ... To overcome the defense of qualified

> immunity, a plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation.

Howard, 570 F.3d at 987–88 (citations omitted). *Accord Baribeau v. City of Minneapolis*, 596 F.3d 465, 473–74 (8th Cir.2010).

In their original motion, defendants Franklin and Wallace advised that they were only arguing that the facts did not demonstrate the deprivation of any constitutional rights. They were not arguing that the rights were not clearly established at the time of the alleged deprivations. (*See* Motion ... for Summary Judgment (doc # 49) at 11 n. 3)

A. *False Arrest*

According to defendants, defendant Franklin properly arrested and detained plaintiff Wright for resisting arrest as "Franklin had sufficient grounds to arrest Wright after he refused to comply with a directive to get down on the ground, when Wright evaded Franklin by backing away, and when Wright threatened to use physical violence against Franklin." (Motion ... for Summary Judgment (doc # 49) at 15) Therefore, there was no constitutional violation by defendant Franklin. (*Id.*) In the alternative, defendants argue that "Franklin's actions in arresting Wright based on mistaken identity ... did not violate the Constitution" under the Supreme Court decision in *Hill v. California*, 401 U.S. 797 (1971). (*Id.* at 16) As for defendant Wallace, defendants assert "Wallace did not

arrest Wright and, thus, is entitled to qualified immunity on any false arrest constitutional claim because he did not directly participate in the alleged violation." (*Id.* at 16 n. 5)

First, the premise underlying defendants' argument with respect to defendant Wallace is simply wrong. As set forth by the Missouri Supreme Court, "all persons who directly procure, aid, abet, or assist in an unlawful imprisonment are liable as principals." *Rustici v. Weidemeyer*, 673 S.W.2d 762, 768 (Mo.1984)(quoting *Parrish v. Herron*, 225 S.W.2d 391, 399 (Mo.Ct.App.1949)). As set forth above, Wallace participated in the arrest team and deployed his taser, bringing plaintiff Wright to the ground where Wright was then handcuffed. (*See* Fact Nos. 22, 24, 27 and 28, supra) The Court finds that defendant Wallace aided, abetted and assisted in the arrest of plaintiff. Contrary to defendants' argument, defendant Wallace directly participated in the alleged violation.

The "facts"[4] which form the core of defendants' argument that defendant Franklin had sufficient grounds to arrest plaintiff for resisting arrest are not the facts as found above by the Court. Rather, the Court found:

> Wright never threatened Franklin by any words he said or anything he did. Wright did not push Franklin's arm away and did not take a stance and cock his arm like he was about to throw a punch at Franklin. Wright did not attempt to run away from Franklin. Wright merely backed away from a man in a Royals shirt who had a gun aimed at him.

(*See* Fact No. 26, *supra*) Further, the Court found that "[t]he video does not support any indication that Wright would have recognized the man as a law enforcement officer, let alone attempted to evade an officer or physically resisted an officer's attempts to take him into custody." (*See* Fact No. 26 at n. 1) Thus, the Court cannot find that defendants were justified in arresting plaintiff for resisting arrest.

However, defendants' argument that "Franklin's actions in arresting Wright based on mistaken identity ... did not violate the Constitution" under the Supreme Court decision in *Hill v. California*, 401 U.S. 797 (1971), is more compelling. The Hill case was not a civil case brought by the victim of a mistaken identity arrest, but was instead a suppression issue brought by the criminal defendant when his apartment was searched and evidence was seized after the arrest of a person who matched the defendant's physical description and who was found in the defendant's apartment. The Hill court found that the officers reasonably believed the person they arrested was defendant Hill, the person for whom they had probable cause to arrest, and that the actions the officers took after the arrest were, likewise, reasonable. *Id.* at 803–05. Some courts, as cited by defendants, have expanded the analysis in Hill to include civil suits for mistaken identity. In these cases, the issue to be decided was whether a reasonable officer could have believed that the plaintiff was the person named in the warrant. *See Moore v. McMullen*, 152 F.3d 927, *2 (9th Cir.1998)("In addition, the officer must prove that he exercised due diligence to ascertain that the right person is being arrested."); *Sumpter v. United States*, 2008 WL 5378232, *3 (D.S.C. Dec. 19, 2008); *Schultz v. Braga*, 290 F.Supp.2d 637, 649 (D.Md.2003)("the relevant factor in determining

whether a mistaken arrest is valid is ... whether the officers' mistake of identity was a reasonable one").

Given the steps officers took to locate Vinol Wilson, the person for whom they had an arrest warrant, which facts are set forth above at Fact Nos. 5 through 19, the Court finds that the officers' mistake in identity as they ran onto the basketball court was an understandable mistake and the arrest of the person wearing the number "23" jersey was a reasonable response to the situation facing them at the time. These facts do not demonstrate the deprivation of a constitutional or statutory right. Therefore, defendants Franklin and Wallace are entitled to summary judgment on plaintiff's claim of false arrest.

B. *Excessive Force*

The Supreme Court has held that claims against law enforcement officers for the alleged use of excessive force during an arrest or other seizure should be analyzed under the Fourth Amendment's objective reasonableness standard and judged from the perspective of a reasonable officer on the scene of the incident. *See* *Plumhoff v.. Rickard*, 134 S.Ct. 2012, 2020 (2014); *Graham v. Connor*, 490 U .S. 386, 395–96 (1989). The Eighth Circuit Court of Appeals provided further guidance in *Howard v. Kansas City Police Department*, 570 F.3d 984 (8th Cir.2009), where the Court wrote:

> In assessing the reasonableness of the Officers' conduct, we look at the totality of the circumstances and focus on factors such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the

> suspect] is actively resisting arrest or attempting to evade arrest by flight." *[Graham*, 490 U.S. at 396.] ... Additionally, we must judge the reasonableness of the Officers' conduct from the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and with "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 396–97....

570 F.3d at 989.

Defendants first argue that because defendant Wallace was the officer who tasered plaintiff, rather than defendant Franklin, defendant Franklin could only be held liable for his failure to intervene and not as a direct participant in the use of excessive force. (Motion ... for Summary Judgment (doc # 49) at 21) The facts as found above by the Court are that defendant Franklin had a gun pointed at plaintiff, pulled plaintiff between himself and defendant Wallace and held onto plaintiff as he was tasered. (*See* Fact Nos. 25 and 27, *supra*) The Court finds these facts sufficient for a finding that defendant Franklin directly participated in the use of excessive force.

Defendants next argue that it was objectively reasonable for defendant Wallace to deploy his taser gun for the following reasons:

> Wallace reasonable believed that Wright in fact was Vinol Wilson who had a history of drug violence and crimes involving weapons and had

> an outstanding felon arrest warrant for drug trafficking. Wilson was also believed to be a body builder who used steroids. At the scene, Wright repeatedly refused to comply with Franklin's directive to get down on the floor and when Franklin reached out to grab Wright, [Wright] pushed his arm away. Finally, just before the taser gun was deployed, it appeared that Franklin was cocking his arm to strike Franklin.

(Motion ... to Dismiss Count IV ... (doc # 49) at 23)

Again, the "facts" which form the core of defendants' argument that the arresting officers could have reasonably believed that plaintiff Wright was aggressive toward or resisting the officers are not the facts as found above by the Court. Rather, the Court found:

> Wright never threatened Franklin by any words he said or anything he did. Wright did not push Franklin's arm away and did not take a stance and cock his arm like he was about to throw a punch at Franklin. Wright did not attempt to run away from Franklin. Wright merely backed away from a man in a Royals shirt who had a gun aimed at him.

(*See* Fact No. 26, *supra*) Further, the Court found that "[t]he video does not support any indication that Wright would have recognized the man as a law enforcement officer, let alone attempted to evade an officer or physically resisted an officer's attempts to take him into custody." (*See* Fact No. 26 at n. 1) Thus, the Court cannot find that defendants were justified in the force they used. A reasonable officer on the scene

would not have believed it necessary to use a taser where the man the officers believed to be Vinol Wilson merely backed away from a man holding a gun on him. *See* Shekleton v. Eichenberger, 677 F.3d 361, 366 (8th Cir.2012)(plaintiff "established that a violation of a constitutional right occurred in that a reasonable officer would not have deployed his taser under the circumstances [of an unarmed suspected misdemeanant,[5] who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him]").

Having determined that plaintiff Wright has established that a violation of a constitutional right occurred, the case law would next require that the Court determine whether defendants' use of force against Wright constituted a clearly established constitutional violation. However, as set forth above, defendants did not initially argue that the right to be free from excessive force was not clearly established at the time of the alleged deprivation. (*See* Motion ... for Summary Judgment (doc # 49) at 11 n. 3) Even so, as set forth in *Shekleton*, "the right to be free from excessive force dates back to the adoption of the Bill of Rights of our Constitution" and these "general constitutional principles against excessive force that were clearly established at the time of the incident ... were such as to put a reasonable officer on notice that tasering [of an unarmed suspected misdemeanant,[6] who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him,] was excessive force in violation of the clearly established law." Shekleton v. Eichenberger, 677 F.3d 361, 367 (8th Cir.2012). Defendants Franklin and Wallace are not entitled to

summary judgment on plaintiff's *Bivens* claim of excessive force.

C. *Improper Search and Seizure*

Next, defendants argue "[i]nasmuch as Wright's arrest was constitutional, [the] post-arrest conduct [of handcuffing Wright, taking him outside the gym, checking his identification, running a search for outstanding warrants and then releasing Wright from custody after approximately 15 to 20 minutes] likewise did not violate the Fourth Amendment." (Motion ... for Summary Judgment (doc # 49) at 20) As for defendant Wallace, defendants assert "Wallace was not involved in the search and seizure of Wright and, thus, is entitled to qualified immunity on any [improper search and seizure] constitutional claim because he did not directly participate in the alleged violation."[7] (*Id.* at 20 n. 7)

The Court understands plaintiff's complaint as alleging a violation of his liberty interest when he was detained after defendants knew that he was not Vi nol Wilson. The "facts" presented by defendants, i.e. the post-arrest conduct of handcuffing Wright, taking him outside the gym, checking his identification, running a search for outstanding warrants and then releasing Wright from custody after approximately 15 to 20 minutes, are not the pertinent facts as found by the Court. The facts which the Court finds pertinent to plaintiff's improper search and seizure claim are the following:

> 29. As Wright was being taken out of the Community Center, he saw a Grandview Police Officer named Officer Clausing. Wright recognized him as a Grandview High School

graduate. Wright said something to the effect of, "My name is Stuart Wright. I graduated from Grandview High School in 1996. You know me." Officer Clausing then said something to the general effect of, "That's not the guy. I know him." Nevertheless, Wright was taken out of the Community Center in handcuffs and put in the back of a car that was outside the Community Center.

30. Stuart Wright's brother, Stephen Wright, got Stuart's driver's license from his gym bag and gave the license to Franklin very shortly after Stuart had been taken out of the gym. Franklin told Stephen Wright that he knew his brother was not Vinol, but Franklin said that Stuart had information about Vinol. Franklin and one other man told Stephen to speak to his brother and tell him to tell them what they wanted to hear.

31. Stephen Wright was allowed to speak to Stuart briefly in the car. Stephen told Stuart to give the officers any information he had about Vinol. The officers continued to keep Stuart in custody.

32. The officers asked Stuart Wright questions about whether he played basketball with a man named Vinol Wilson, where Vinol Wilson was, and how Wright could help them find Vinol Wilson. Wright told the men he did not know where Vinol Wilson was or how to find him.

33. Wright heard some of the men talking about taking a vacation day the next day, about how everything had happened so fast, about hearing the "pop-pop" sounds, and about how they had gotten the wrong guy. Wright heard the men laughing about it all.

> 34. After fifteen minutes or so in the car, the men pulled Stuart Wright out of the car. They told him that they were going to pull the probes out of him. One of the men asked if he needed an ambulance. Stephen Wright told them that he was going to take Stuart to the hospital (which he did). The man then said that he did not think Stuart needed to go to the hospital because it was probably only a flesh wound. One of the men also told Stuart that they were going to un-cuff him. He then said, "Now, you're not going to go all ape-shit on me, are you?" Stuart told him, "No."
>
> * * *
>
> 36. The men did not return Wright's driver's license to him. Wright made several calls trying to get it back. They kept telling him that they had in fact given it to him. Wright told them that the license had never been returned to him. Wright left them cell phone numbers for his mother and his wife. Eventually, someone did call his mother's phone and left a message that Wright could come and get his driver's license back. Wright did get the license back at the United States Courthouse in Kansas City, Kansas from Franklin.

These facts demonstrate that the post-arrest conduct of the officers was inappropriate as they continued to hold plaintiff in custody and question him even after they knew he was not Vinol Wilson. *See* *Davis v. Hall*, 375 F.3d 703, 714 (8th Cir.2004) (citing *Sanders v. English*, 950 F.2d 1152 (5th Cir.1992)(for the proposition that "failure to release after officer knew ... that plaintiff had been misidentified gives rise to cause

of action under § 1983")). Further, the Court finds that these facts demonstrate that plaintiff was not treated with the respect and deference one would expect would be forthcoming after one was subjected to the pain and indignities to which plaintiff had been mistakenly subjected by the officers. *See* *Davis v. Hall*, 375 F.3d 703, 713 (8th Cir.2004)(citing *Young v. City of Little Rock*, 249 F.3d 730 (8th Cir.2001)(for the proposition that 30–minute detention and strip search of plaintiff (following judge's order of release of plaintiff who had been misidentified) showed a process of administrative foot-dragging, characterized by gross indignities)).

While defendants would have the Court find that a mere twenty minutes of being held in custody does not amount to a Constitutional violation when others have been unlawfully held in custody for hours and days, the Court notes the difference is that in those cases cited by defendants, the persons unlawfully held appear to have been released as soon as the officers realized a mistake had been made. *See* *Baker v. McCollan*, 443 U.S. 137, 141 (1979)("when officials compared his appearance against a file photograph of the wanted man and, recognizing their error, released him"); *Lane v. Sarpy County*, 165 F.3d 623, 624 (8th Cir.1999)("defendants mistakenly arrested and detained plaintiff for approximately six hours, believing him to be a different individual with the same name"). In this case, defendant did not release plaintiff Wright as soon as they realized they had made a mistake. Instead, the officers attempted to capitalize on their mistake by subjecting plaintiff Wright to interrogation. As set forth in *Taylor v. Prince George's County*, 2014 WL 2964093 (D. Md. June 30, 2014), this type of conduct violates a person's Fourth Amendment right to be secure against unreasonable searches and seizures. In

Taylor, the plaintiff was mistakenly identified by officers as Anthony Ford, a person suspected of murder. Plaintiff Taylor was pulled from his car at gunpoint by officers, told to get on the ground, and patted down for weapons. *Id.* at *2. The defendant detective stated that after plaintiff was on the ground, he looked at his face and noticed that he was not Anthony Ford, so he asked plaintiff to stand up. *Id.* at *3. The defendant detective then questioned plaintiff Taylor. *Id.* In discussing plaintiff's Taylor Section 1983 claim for arrest without probable cause, the court stated:

> ... Plaintiff acknowledges that "the police in this case certainly had the right to approach Mr. Taylor and to question him and even to pat down his outer clothing for weapons for their safety given their suspicion that he might have been Anthony Ford.... Plaintiff argues, however, that "any further justification for [the detectives'] decision to continue to hold Mr. Taylor and to question him vanished after they determined that he was *not* Anthony Ford." ... Detective Woodside asserts that Plaintiff was detained even after he determined that Mr. Taylor was not the murder suspect for purposes of investigating whether he had any connection to Anthony Ford. Thus, the issue is whether Plaintiff's encounter with Detective Woodside after it was determined that he was not Anthony Ford constituted a seizure governed by the Fourth Amendment.
>
> * * *
>
> ... Plaintiff's interaction with Detective Woodside after it was determined that he was

> not Anthony Ford is akin to an "investigatory detention" under *Terry*, which requires reasonable articulable suspicion that a crime had been or was about to be committed....
>
> Detective Woodside argues that "[t]he questioning of Taylor to determine whether there was any connection between him and Ford was reasonable given all the information and conclusions reached by the officers." ... In the reply brief, Defendant contends that "[t]he detention was legally justified by Woodside's belief that Ford was driving Taylor's vehicle when he fled from police the day before the incident and the apartment manager's identification of Ford as a person seen at Taylor's apartment." ... Although these events may have justified mistaking Plaintiff for Anthony Ford, once Detective Woodside realized that Plaintiff was not, in fact, Anthony Ford, further detention required consent or reasonable articulable suspicion.... But absent consent or reasonable articulable suspicion of criminal activity by *Mr. Taylor* after Detective Woodside confirmed the mistaken identity, Detective Woodside could not detain an individual who turned out *not* to be the murder suspect in an effort to further his investigation as to Anthony Ford.

Taylor, 2014 WL 2964093 at *7 and 9. As in the *Taylor* case, after Detectives Franklin and Wallace realized that plaintiff Wright was not, in fact, Vinol Wilson, they could not constitutionally detain Wright in an effort to further their investigation as to Wilson.

Having determined that plaintiff Wright has established that a violation of a constitutional right occurred, the case law would next require that the Court determine whether defendants' continued detention of Wright after they knew he was not Vinol Wilson constituted a clearly established constitutional violation. Again, as set forth above, defendants did not initially argue that the right was not clearly established at the time of the alleged deprivation. (*See* Motion ... for Summary Judgment (doc # 49) at 11 n. 3) Even so, as set forth in *Davis v. Hall*, 375 F.3d 703, 719 (8th Cir.2004), a constitutional right is clearly established when it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. The Davis court cited with approval the case of *Sivard v. Pulaski County*, 959 F.2d 662 (7th Cir.1992), for the proposition that "continued detention where sheriff knew it was wrongful states claim under § 1983 for due process violation." *See also Taylor v. Prince George's County*, 2014 WL 2964093, *10 (D. Md. June 30, 2014)("Detective Woodside continued to detain Plaintiff even after he determined that Mr. Taylor was not the murder suspect. The right to be free from detention absent consent or reasonable articulable suspicion was clearly established at the time of the events at issue here.") A reasonable officer would have known that a person arrested because of a mistaken identity should be immediately released upon discovery of the mistake, rather than engaging in harassing behavior towards the person. Defendants Franklin and Wallace are not entitled to summary judgment on plaintiff's Bivens claim of improper search and seizure.

III. *PLAINTIFF'S ALTERNATIVE MOTION*

Plaintiff has re-filed Plaintiff's Alternative Motion to (# 1) overrule and deny the [S.J.] Motion without prejudice, or (# 2) defer considering the [S.J.] Motion and allow time for discovery, or (# 3) issue any other appropriate order (doc # 96).

As set forth above, the Court is denying in part defendants' motion for summary judgment in that it has found that defendants Franklin and Wallace are not entitled to summary judgment on plaintiff's *Bivens* claims of excessive force and improper search and seizure. Therefore, plaintiff's alternative motion is in effect granted in part.

IV. *CONCLUSION*

Based on the foregoing, it is

ORDERED that the Motion ... for Summary Judgment (doc # 49) as remanded is granted in part and denied in part. That portion of the motion seeking summary judgment as to plaintiff's claim against defendants Sean Franklin and Christopher Wallace for false arrest is granted. That portion of the motion seeking summary judgment as to plaintiff's claims against defendants Sean Franklin and Christopher Wallace for excessive force and improper search and seizure is denied. It is further

ORDERED that Plaintiff's Alternative Motion (doc # 96) is granted in part and denied in part. That portion of the motion seeking a denial of defendants' motion for summary judgment is granted to the extent that the Court has found that defendants Franklin and Wallace are not entitled to summary judgment on plaintiff's *Bivens* claims of excessive force and improper search and seizure. The remainder of the motion is denied.

Footnotes

1The Court acknowledges that these findings are at odds with defendants' version of the incident:

> Franklin drew his service weapon and began yelling "Police U.S. Marshal, get on the ground Vinol." The man refused to get down and kept backing away from Franklin. Franklin kept yelling and the man said "I'm not the one you want." Franklin again yelled for the man to get down, but he kept backing away. Franklin reached out with his arm and tried to grab the man, but he pushed Franklin's arm away, took a stance, and cocked his arm like he was about to throw a punch at Franklin.

(Doc # 49 at 5 ¶ 25) This Court's findings are also at odds with the following statement from the Eighth Circuit Court of Appeals' remand judgment:

> A video of the arrest confirms that Wright did not drop to the floor as ordered by the Marshals and instead, retreated, attempted to evade the officers, and physically resisted their attempts to take him into custody.

(Doc # 82–1 at 4) This Court has repeatedly viewed the video of the arrest and cannot make a finding that Wright "pushed Franklin's arm away, took a stance, and cocked his arm like he was about to throw a punch at Franklin" nor that Wright "retreated, attempted to evade the officers, and physically resisted their attempts to take him into custody." Rather, the video shows a five-second interval where Wright (who is

running down the basketball court engaged in a game of basketball) sees a man wearing a Kansas City Royals shirt with a gun pointed at him to where Wright is lying on the floor after being shot in the back with a taser. While the video does show Wright backing away from the man with the gun, there does not appear to be anything confrontational in Wright's actions. The video does not support any indication that Wright would have recognized the man as a law enforcement officer, let alone attempted to evade an officer or physically resisted an officer's attempts to take him into custody. The video supports Wright's assertions that he was bewildered by a man on the basketball court with a gun pointed at him and that he backed up a few steps.

2*See* doc # 76.

3Pursuant to Federal Rule of Civil Procedure 56, summary judgment is granted when the pleadings and evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to show the absence of evidence to support the nonmoving party's case. *See* *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The nonmoving party may not rest upon allegations or general denials, but must come forward with specific facts to prove that a genuine issue for trial exists. *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Court must review the facts in the light most favorable to the party opposing the motion for summary judgment and give that party the benefit of any inferences that logically can be drawn from those facts. *See* *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

4Defendants set forth the following in support of their argument that plaintiff was resisting arrest:

> 25. Franklin drew his service weapon and began yelling "Police–U.S. Marshal, get on the ground Vinol." The man refused to get down and kept backing away from Franklin. Franklin kept yelling and the man said "I'm not the one you want." Franklin again yelled for the man to get down, but he kept backing away. Franklin reached out with his arm and tried to grab the man, but he pushed Franklin's arm away, took a stance, and cocked his arm like he was about to throw a punch at Franklin. Franklin Declaration ¶ 29; Wallace Declaration ¶¶ 15–16.
>
> * * *
>
> 31. After pushing away Franklin's arm, the man in the "23" jersey cocked his arm to a fighting position. Franklin Declaration ¶ 30; Wallace Declaration ¶ 12.
>
> 32. Wallace, at that point standing behind the player, was concerned that the man was disobeying direct orders to get on the ground and appeared to be preparing to strike Franklin. Wallace Declaration ¶ 17.
>
> (Motion ... for Summary Judgment (doc # 49) at 5 and 7)

This Court acknowledges that defendants believed Vinol Wilson, a suspected felon, to be an individual who might resist arrest. However, even given defendants' preconceived assumptions that the arrest of Wilson might prove dangerous or difficult, the officers were not justified in immediately tasering the man they believed to be Wilson when the man could not reasonably have been perceived as being aggressive or resisting arrest. *See* *Taylor v. Prince George's County*, 2014 WL 2964093, *6 (D. Md. June 30,

2014)("Defendant's assertion that Anthony Ford [person for whom officer had warrant] previously fled from the police when they conducted surveillance of his home would not justify applying force when the suspect shows no resistance, as Plaintiff [mistakenly identified as Anthony Ford] argues here.")

6Regardless of the crime Vinol Wilson was suspected of committing, the fact remains that defendants tasered an unarmed man, who did not resist arrest, did not threaten the officers, did not attempt to run from them, and did not behave aggressively towards them.

7Again, the premise underlying defendants' argument with respect to defendant Wallace is simply wrong. As set forth by the Missouri Supreme Court, "all persons who directly procure, aid, abet, or assist in an unlawful imprisonment are liable as principals." *Rustici v. Weidemeyer*, 673 S.W.2d 762, 768 (Mo.1984)(quoting *Parrish v. Herron*, 225 S.W.2d 391, 399 (Mo.Ct.App.1949)). As set forth above, Wallace participated in the arrest team and deployed his taser, bringing plaintiff Wright to the ground where Wright was then handcuffed. (*See* Fact Nos. 22, 24, 27 and 28, *supra*) The Court finds that defendant Wallace aided, abetted and assisted in any unlawful imprisonment or seizure of plaintiff. Contrary to defendants' argument, defendant Wallace directly participated in the alleged violation.

August 29, 2018

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 17-2274

Stuart Wright

Appellant v.
United States of America

Appellee

John Clark, et al.

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:10-cv-01220-SWH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

STATUTORY PROVISION AND RULE INVOLVED

This case involves a statutory provision --- the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1).

> "…the district courts … shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages … for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The relevant provisions of the Local Rule 56.1(c) for the Western District of Missouri are as follows:

> "**Reply Suggestions.** The party moving for summary judgment may file reply suggestions. In those suggestions, the party must respond to the non-moving party's statement of additional facts in the manner prescribed in Rule 56.1(b)(1). Unless specifically controverted by the moving party, all facts set forth in the statement of the opposing party are deemed admitted for the purpose of summary judgment."