APPENDIX A, EIGHTH CIRCUIT OPINION

United States Court of Appeals
For the Eighth Circuit

No. 18-1324

GREGORY CLARK

Plaintiff – Appellant,

v.

AUSTIN CLARK, DEPUTY
in his individual capacity only,

Defendant – Appellee.

June 13, 2019

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Before SMITH, Chief Judge, COLLOTON, and ERICKSON, Circuit Judges

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ERICKSON, Circuit Judge

On January 25, 2016, Ste. Genevieve County Deputies Austin Clark ("Deputy Clark") and Matthew Ballew responded to a 9-1-1 report of gunshots from the vicinity of a rest area. When they arrived at the rest stop to investigate, the officers encountered Gregory Clark ("Gregory") seated at a table adjacent to the building. After calling in Gregory's identification, a brief, somewhat adversarial discussion about Gregory's race ensued. Gregory drove away in his vehicle after the officers went inside the building to continue their investigation. The officers then followed Gregory for approximately 19 miles on the highway, at which point Gregory stopped his vehicle on an exit ramp. After further discussion and investigation, Gregory was allowed to leave. Gregory filed this action against Deputy Clark, alleging constitutional violations under the First Amendment, Fourth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. The district court[1] granted summary judgment in favor of Deputy Clark on all claims on the basis of qualified immunity. We affirm.

I. Background

On the afternoon of January 25, 2016, the principal of Bloomsdale Elementary School called 9-1-1 and reported gunshots coming from the direction of the nearby woods. Approximately 12-15 minutes later, Ste. Genevieve County Deputies Clark and Ballew arrived at a rest area located about 150 yards from the school.

[1] The Honorable Audrey G. Fleissig, United States District Judge for the Eastern District of Missouri.

Appellant Gregory Clark was the only person at the rest area at the time. Gregory was talking on his phone at a table when Deputy Clark and another officer approached him (not in uniform, but with badges and sidearms). Assuming they were police officers, Gregory voluntarily handed the officers his driver's license, his retired military identification, and his concealed carry permit. Gregory informed the officers that he was armed. The officers asked Gregory whether he had heard "anything" or any "gunfire." Gregory said that he had not. The officers then asked Gregory where he was going. He responded that he was on his way to Chicago. Deputy Clark ran Gregory's identification, which came back clean. When Gregory inquired as to the reason his information had been run, Deputy Clark replied that his "boss likes to know who he is talking to." Gregory followed up by asking if "[Deputy Clark would] have done that to anyone else." Gregory admits that his question was directed at whether he was being subjected to racial profiling. Deputy Clark responded angrily by saying "don't play the race card with me." Without any further discussion, Deputy Clark handed the three cards back to Gregory and ended the encounter.

The police officers searched for a suspect inside the building, but found no one. When they came back out of the building, they saw Gregory driving away. The officers followed him onto the highway heading northbound toward Chicago. Gregory noticed the officers following him. He made a U-turn about two miles later, trying to avoid them because he "didn't know what could happen" and "was in fear of [his] life." The officers continued to follow Gregory.

As the officers were following Gregory, Deputy Clark observed Gregory making "exaggerated movements," leaning toward the passenger seat and center console. Because Gregory's vehicle had heavily tinted rear windows, it was difficult to see exactly what Gregory was doing inside the car. After driving approximately three to five more miles, Gregory spotted several more police cars in the area so he turned on his hazard lights and pulled off the highway onto an exit ramp.

After stopping his vehicle, Gregory put both hands outside the driver's side window. Deputy Clark and two other officers approached the vehicle with guns drawn in the "low ready" position. Deputy Clark then raised his gun and ordered Gregory out of the vehicle. Gregory complied. Deputy Clark patted Gregory down and another officer moved him away from the vehicle. Deputy Clark began searching inside the vehicle. Gregory told Deputy Clark that the gun he had told them about at the rest area was in the center console. When Deputy Clark retrieved the gun, he noticed it was cold and missing two bullets.

Deputy Clark questioned Gregory about why the gun was missing two bullets. Gregory indicated that he had not fired the weapon in years and could not explain the two missing rounds. During this conversation, another officer examined the gun and verified that it had not been fired recently. The gun's serial number was run by dispatch. When it came back as stolen, Gregory was handcuffed. Further inquiry revealed that Gregory was the person who had mistakenly reported the gun as stolen when he had merely misplaced it, at which point the officers

remaining at the scene removed the handcuffs, returned Gregory's gun and told Gregory he was free to leave.

Gregory sued Deputy Clark, alleging: (1) he was unlawfully seized when Deputy Clark detained him at the rest area while running his identification; (2) a second unlawful seizure occurred when Deputy Clark detained him on the highway; (3) Deputy Clark used excessive force when he pointed his gun after he voluntarily pulled over; (4) the vehicle search was unconstitutional; (5) the theft of two bullets constituted a substantive due process violation; (6) the entire detention and inquiry at the rest area was based solely on race and violated the equal protection clause; and (7) the entire course of events that took place after inquiring whether he was being singled out because of his race was in retaliation for exercising his First Amendment rights. Deputy Clark successfully moved for summary judgment on all counts. Gregory now appeals the district court's ruling on claims (1), (2), (3), (6) and (7).

II. Discussion

We review the grant of summary judgment on the basis of qualified immunity *de novo*, viewing the evidence in the light most favorable to the nonmoving party. *Peterson v. Kopp*, 754 F.3d 594, 598 (8th Cir. 2014). Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172

L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982)).

"[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, —— U.S. ——, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018) (internal quotation marks omitted). "For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what [the official] is doing violates that right. 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; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L.Ed.2d 666 (2002) (internal citation omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987)). *See also Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L.Ed.2d 271 (1986) ("[Qualified immunity] provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

For Gregory to establish a § 1983 claim for a Fourth Amendment violation, he must demonstrate a search or seizure occurred, and the search or seizure was unreasonable. *McCoy v. City of Monticello*, 342 F.3d 842, 846 (8th Cir. 2003) (citing *Hawkins v. City of Farmington*, 189 F.3d 695, 702 (8th Cir. 1999)). "Reasonableness of a seizure is determined by the totality of the circumstances and must be judged from

the viewpoint of a reasonable officer on the scene, irrespective of the officer's underlying intent or motivation." *Id.* at 848 (citations omitted). If an officer has reasonable suspicion that a crime has occurred and a subject has committed it, the officer may detain the subject while the officer investigates that crime. *Terry v. Ohio*, 392 U.S. 1, 24, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968).

A. Initial Encounter

The initial encounter at the rest stop presents no colorable claim that Gregory's Fourth Amendment rights were violated. "[C]onsensual communications between officers and citizens[ ] involv[e] no coercion or restraint of liberty." *Warren v. City of Lincoln, Neb.*, 864 F.2d 1436, 1438 (8th Cir. 1989). A consensual encounter between an officer and a citizen does not trigger the Fourth Amendment. *United States v. Stewart*, 631 F.3d 453, 456 (8th Cir. 2011) (citing *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L.Ed.2d 389 (1991)). Here, a consensual encounter began with Gregory handing over his identification cards without being asked to do so. This inferred consent was never explicitly revoked. Gregory never gave the officers reason to believe that he no longer wished to engage in the contact. Gregory never asked for the return of his identification cards or whether he could leave. Gregory has not pointed to any physical restraint, blocking action, or other show of authority that would indicate he was not free to leave. Instead, Gregory urges us to find he was detained based upon Deputy Clark's hostility and angry tone in stating "don't play the race card with me." This alleged hostility occurred after Deputy Clark had handed

back Gregory's identification cards. Given the timing of when the statement was made–it was the officer's parting words–it is of little weight when analyzing the totality of the circumstances surrounding the encounter. Because the entire interaction was consensual, there was no seizure.

Even if we assume *arguendo* that the encounter was not consensual, the officers had a sufficient reasonable and articulable suspicion that warranted the intrusion. While a person's mere presence in a suspicious location does not, in and of itself, justify a *Terry* stop, *Johnson v. Phillips*, 664 F.3d 232, 237 (8th Cir. 2011), the court is to "determine whether the facts *collectively* provide a basis for reasonable suspicion." *Stewart*, 631 F.3d at 457. Here, the officers were aware that shots had been fired in the vicinity of the rest area. Gregory was the only person visible outside the rest area. Gregory volunteered that he had a permit to carry a gun and that he actually had one in his possession.[2] Taken in aggregate, these facts would give an objectively reasonable officer articulable suspicion to conduct a Terry stop.

B. Second Encounter

Although a number of facts surrounding the second highway encounter are disputed, Gregory acknowledged that a "detention did not occur when [he] first pulled over his car because he pulled over voluntarily." (Appellant's Br. 34). The parties have

[2] The officers likely could have immediately completed their investigation of Gregory if they would have asked to inspect Gregory's gun at the rest area. The fact that they did not do so, however, does not affect the reasonable suspicion analysis.

debated extensively whether there was anything unusual about the manner or speed in which Gregory left the rest area, or whether there was excessive movement inside Gregory's truck while he was driving, or whether Deputy Clark had the ability to observe Gregory's movement inside the truck. Because Deputy Clark did not conduct a traffic stop of Gregory's vehicle, these disputed issues are insignificant to the particular constitutional issue before us, and resolution of all of them in Gregory's favor would not establish a constitutional violation. The disputed seizure implicating the Fourth Amendment occurred when officers, with guns drawn, ordered Gregory out of his car after he stopped voluntarily on the exit ramp.

To justify an investigative seizure under Terry v. Ohio, a "police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion. 392 U.S. at 21, 88 S. Ct. 1868. When Gregory stopped his vehicle, Deputy Clark knew Gregory had a firearm, but was unsure whether it had been fired recently. After searching the building and grounds of the rest area and failing to find anyone else present, Deputy Clark had reason to follow up with Gregory about inspecting the gun that Gregory told him he had in his possession. Gregory had informed the officers that he was traveling to Chicago, but inexplicably made a U-turn in the opposite direction while being followed by police. Finally, Gregory pulled over and put his hands outside the driver's side window. While this is entirely consistent with Gregory's perspective that he was complying for his own safety, the act is also unusual and may be

indicative of guilty conduct. At the time Gregory stopped his vehicle, police officers had reasonable and articulable suspicion that criminal activity might be afoot.

During the investigative seizure, Deputy Clark investigated the gun quickly and efficiently, and the period of detention lasted no longer than necessary to effectuate the investigation. While Gregory was handcuffed when the officers received information that the firearm had been reported stolen, they were removed as soon as the officers learned that Gregory was the person who had reported the firearm stolen. Handcuffing was a reasonable precaution and did not elevate the Terry stop to an arrest. United States v. Martinez, 462 F.3d 903, 908 (8th Cir. 2006). The seizure of Gregory on the highway exit ramp did not run afoul of the Fourth Amendment and was reasonably related in scope to the circumstances which justified the interference.

C. Excessive Force

"The right to be free from excessive force in the context of an arrest is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures." *Ngo v. Storlie*, 495 F.3d 597, 604 (8th Cir. 2007) (quoting *Samuelson v. City of New Ulm*, 455 F.3d 871, 877 (8th Cir. 2006)). "In determining whether a particular use of force was excessive, we consider whether it was objectively reasonable under the circumstances, 'rely[ing] on the perspective of a reasonable officer present at the scene rather than the 20/20 vision of hindsight.' " *Perry v. Woodruff County Sheriff Dept.*, 858 F.3d 1141, 1145 (8th Cir. 2017) (internal quotation marks omitted)

(quoting *Carpenter v. Gage*, 686 F.3d 644, 649 (8th Cir. 2012)).

We have previously found police officers were entitled to qualified immunity when they pointed a gun at a suspect during a pursuit. *See Edwards v. Giles*, 51 F.3d 155 (8th Cir. 1995). In *Edwards*, we held that the pointing of a gun did not constitute an assertion of authority for Fourth Amendment purposes where the display did not cause the suspect to submit to the police officer's authority and, therefore, no seizure occurred. 51 F.3d at 157. Here, like in *Edwards*, Gregory submitted to Deputy Clark's authority before the gun was drawn.

Gregory relies on cases from this circuit and other circuits that have found that pointing a gun may constitute an unconstitutional display of force. E.g., *Rochell v. City of Springdale Police Dep't*, No. 17-3608, 2019 WL 1859237 (8th Cir. Apr. 25, 2019); *Wilson v. Lamp*, 901 F.3d 981 (8th Cir. 2018); *Mlodzinski v. Lewis*, 648 F.3d 24, 38 (1st Cir. 2011); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1192-93 (10th Cir. 2001). Those cases are not analogous to the circumstances confronting the officers in this case. They involve incidents where guns were pointed at suspects for unreasonably long periods of time, well after the police had taken control of the situation. In this case, Gregory signaled compliance by putting his hands out the driver's side window. A reasonable officer was justified in believing the situation was not fully under control until Gregory had been removed from the vehicle, patted down, and restrained. When Gregory stopped his vehicle, officers knew Gregory had a weapon, were aware that he had been the only

identified person present in an area where shots had reportedly been fired, and had reason to believe he might be a suspect attempting to evade capture. *980 Under these circumstances, pointing a firearm at Gregory for a few seconds while removing him from his vehicle did not constitute excessive force, and did not violate the Fourth Amendment.

D. Equal Protection

To prove an equal protection claim in the context of a police interaction, Gregory must prove that the officer exercised his discretion to enforce a law solely on the basis of race. *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003). This requires a showing of both discriminatory purpose and discriminatory effect. *Id.* (citing *United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L.Ed.2d 687 (1996)). "[E]ncounters with officers may violate the Equal Protection Clause when initiated solely based on racial considerations." *United States v. Frazier*, 408 F.3d 1102, 1108 (8th Cir. 2005) (citing *United States v. Woods*, 213 F.3d 1021, 1022-23 (8th Cir. 2000)). "When the claim is selective enforcement of the traffic laws or a racially-motivated arrest, the plaintiff must normally prove that similarly situated individuals were not stopped or arrested in order to show the requisite discriminatory effect and purpose." *Johnson*, 326 F.3d at 1000 (citing *Chavez v. Ill. State Police*, 251 F.3d 612, 634-48 (7th Cir. 2001); *Gardenhire v. Schubert*, 205 F.3d 303, 319 (6th Cir. 2000)).

Gregory has not provided sufficient evidence to raise a fact question about whether he was singled out for investigation because of his race. He has presented

no evidence to establish that similarly situated individuals were not stopped or investigated. He has not identified any "affirmative evidence from which a jury could find that [Gregory] has carried his ... burden of proving the pertinent motive." *Crawford-El v. Britton*, 523 U.S. 574, 600, 118 S. Ct. 1584, 140 L.Ed.2d 759 (1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)). While the statement "don't play the race card with me" may have been hostile and unprofessional, it does not, alone, carry the burden of showing racial discrimination on Deputy Clark's part– particularly so when the alleged discriminatory acts are consistent with legitimate police work.

E. First Amendment Retaliation

To properly state a claim for First Amendment retaliation, Gregory is required to show "a causal connection between a defendant's retaliatory animus and [his] subsequent injury." *Osborne v. Grussing*, 477 F.3d 1002, 1005 (8th Cir. 2007) (quoting *Hartman v. Moore*, 547 U.S. 250, 259, 126 S. Ct. 1695, 164 L.Ed.2d 441 (2006)). As discussed above, the initial encounter was consensual and Deputy Clark had sufficient reasonable and articulable suspicion to conduct an investigative seizure of Gregory. In light of Deputy Clark's legitimate motive to investigate, Clark has failed to draw the requisite causal connection to state a First Amendment retaliation claim.

III. Conclusion

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

SMITH, Chief Judge, concurring.

I concur in the court's holding that the district court properly granted summary judgment in favor of Deputy Clark, as he lacked "fair notice" of his conduct's unlawfulness. *See Kisela v. Hughes*, —— U.S. ——, 138 S. Ct. 1148, 1158, 200 L.Ed.2d 449 (2018) (per curiam) (explaining that qualified immunity protects officers lacking "fair notice" of their conduct's unconstitutionality). I write separately to express my disagreement with the court's conclusion that Deputy Clark had reasonable suspicion to stop Gregory after Gregory departed from the rest area. While Deputy Clark may have had reasonable suspicion to stop Gregory at the rest area had Gregory not consented to a search, that reasonable suspicion did not extend beyond that interaction.

"A seizure may be accomplished either by physical restraint or by sufficient show of authority. The *Terry* seizure requirement is fulfilled when it is apparent from the circumstances that the individual was not free to ignore the officer and proceed on his way." *United States v. Palmer*, 603 F.2d 1286, 1288–89 (8th Cir. 1979) (cleaned up).

> [I]n determining whether [a] seizure and search were unreasonable, this court looks at whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. The search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.

Wilson v. Lamp, 901 F.3d 981, 986 (8th Cir. 2018) (cleaned up).

The court identifies (1) Deputy Clark knowing that Gregory had a gun and his desire to inspect that gun, (2) Gregory making a U-turn on the highway and, (3) Gregory pulling over and putting his hands out his truck's window as supporting Deputy Clark's reasonable suspicion.

However, Gregory's U-turn and surrender are particularly unsatisfactory bases for reasonable suspicion. By leaving Gregory without instructions to remain and moving to inspect the restrooms, Deputy Clark objectively indicated that the encounter had ended. Gregory left the rest area, reasonably believing his interaction with Deputy Clark had ended. Likewise, after the encounter had ended, Gregory could legitimately avoid further interactions with police. *See Florida v. Royer*, 460 U.S. 491, 498, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983); *see also Illinois v. Wardlow*, 528 U.S. 119, 131, 120 S. Ct. 673, 145 L.Ed.2d 570 (2000) (Stevens, J., concurring in part and dissenting in part) (explaining that "[f]light to escape police detection ... may have an entirely innocent motivation"). Nevertheless, Deputy Clark followed Gregory for 19 miles—including across an overpass after Gregory made a U-turn. Shortly after making the U-turn, Gregory noticed "police cars all over the area," Appellant's Br. at 12, and observed police cars "positioned" at an exit he was nearing, Mem. & Order at 3, *Gregory Clark v. Austin Clark*, No. 1:16-cv-00094-AGF, 2018 WL 513590 (E.D. Mo. Jan. 23, 2018), ECF No. 62; *see also* Gregory Clark Depo. at 138, *Gregory Clark v. Austin Clark*, No. 1:16-

cv-00094-AGF (E.D. Mo. Oct. 23, 2017), ECF No. 49-5 (testifying that he pulled over after observing police cars in front of him on the exit overpass while being followed by Deputy Clark). Afraid, and sensing from this "show of authority" that he "was not free to ... proceed on his way," *Palmer*, 603 F.2d at 1289, Gregory eventually stopped at an exit. Many reasonable people traveling between states would be unnerved by having local police follow and surround them on the highway. *See United States v. Peters*, 10 F.3d 1517, 1522 (10th Cir. 1993) (explaining that a nervous reaction to being followed and stared at by an officer after having already been searched and released was insufficient to support finding reasonable suspicion). This does not resemble a typical stop by police for a driving violation. Nervousness in this scenario could easily reflect a cautious consciousness of an imminent confrontation rather than a guilty conscience. Furthermore, "[r]easonable suspicion cannot be manufactured by the police themselves." *United States v. Yousif*, 308 F.3d 820, 829 (8th Cir. 2002).

Without Deputy Clark's interaction with Gregory at the rest area, Gregory would have been just another traveler. Therefore, for the stop at the exit to have been reasonable, the circumstances at the rest area must have "justified [Deputy Clark's] interference" with Clark, because a "search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *See Wilson*, 901 F.3d at 986 (internal quotations removed). While I agree that Deputy Clark likely had reasonable suspicion for a stop at the rest area, the question is close. Gregory was present near the crime scene, and,

being armed, had had the ability to commit the crime. However, as the court notes, Gregory cooperated with police at the rest area, answering officers' questions and voluntarily providing them with his military identification and concealed carry permit. Furthermore, the caller from the school had not provided a description of the alleged shooter, and Gregory was not engaging in any suspicious activity when approached by Deputy Clark. *C.f. United States v. Quinn*, 812 F.3d 694 (8th Cir. 2016) (finding reasonable suspicion where suspect was not only one of the only people in proximity to the crime scene but also matched a description of the perpetrator and acted suspiciously when approached by police). Considering the closeness of the reasonable suspicion question at the rest stop, Deputy Clark's argument that Gregory's behavior on the highway augmented the suspicion he developed at the rest area is weak. Gregory's behavior on the highway was a natural reaction to being followed and surrounded by police, not behavior likely indicative of a guilty conscience or criminal activity. With no relevant additional information to suggest that Gregory had in fact been the shooter at the rest area, Deputy Clark's decision to stop Gregory at the exit after following him for 19 miles was not "reasonably related in scope to the circumstances which justified the interference in the first place," or "strictly tied" to those circumstances. *See Wilson*, 901 F.3d at 986 (internal quotations omitted).

Neither does Deputy Clark's desire "to follow up with Gregory about inspecting the gun," justify the stop. *See supra* Part II.B. The Fourth Amendment's protections are not so easily undermined by second

thoughts. *See United States v. Garcia*, 23 F.3d 1331, 1335–36 (8th Cir. 1994) (finding officer lacked reasonable suspicion for a second stop where officer released suspects after deciding not to hold them pending the arrival of backup).

Considering the totality of the circumstances, I conclude that Deputy Clark lacked reasonable suspicion for the exit stop and therefore violated Gregory's Fourth Amendment rights.

Nevertheless, that right was not established in a "particularized sense," as of January 2016. *See Mettler v. Whitledge*, 165 F.3d 1197, 1203 (8th Cir. 1999). For the reasons stated by the court in Part II.B. of this opinion, Deputy Clark could have reasonably believed that he had the authority to conduct the stop at the exit. Consequently, the district court properly granted summary judgment in Deputy Clark's favor.

APPENDIX B, DISTRICT COURT OPINION

United States District Court
Eastern District of Missouri
Eastern Division

No. 1:16-CV-00094 AGF

GREGORY CLARK,

Plaintiff,

v.

AUSTIN CLARK, DEPUTY,
in his individual capacity only,

Defendant.

January 23, 2018

Audrey G. Fleissig, United States District Judge

MEMORANDUM AND ORDER

This action, brought by Plaintiff Gregory Clark under 42 U.S.C. § 1983 against Defendant Austin Clark in his individual capacity as deputy sheriff of Ste. Genevieve County, Missouri, is before the Court on Defendant's motion for summary judgment. Although this is a close case in some respects, for the reasons set forth below, the motion will be granted as to all claims.

BACKGROUND

The record establishes the following for purposes of the motion before the Court. In the early afternoon of January 25, 2016, a 911 call was received by the Ste. Genevieve County Sheriff's Department from the Bloomsdale Elementary School about gunshots fired near the school coming from the area of a nearby highway rest stop or adjacent woods. Defendant and Detective Mathew Ballew were driving in the vicinity of the rest stop when the police dispatcher radioed them to investigate the complaint. Specifically, they were advised, "There is a report of shots fired near the rest stop, possibly in the wooded area between the rest stop and the elementary school."

The officers drove to the rest stop, arriving there four to ten minutes after receiving the call. They parked, and saw three vehicles and one person in the parking area. The person was Plaintiff, who is African–American. He was seated at a picnic table near his pick-up truck at the end of the parking area that was near the woodland. The officers approached Plaintiff and asked him if he had heard any shots, and Plaintiff responded that he had not. Plaintiff told the officers that he was armed, and immediately gave the officers, without being asked, his concealed carry permit, his driver's license, and his military identification card. He told the officers that he was on his way from Memphis to Chicago.

Defendant "ran" Plaintiff's identification, that is, he called the information in to the Sheriff's Department to check for warrants or criminal history, and was told that Plaintiff was "clean." This process took one to two minutes. Plaintiff asked Defendant

why he had "run" him and Defendant responded that his boss liked to know to whom he was talking. Plaintiff said words to the effect of, "If I were someone else you wouldn't have run me," and testified that Defendant responded, in an angry tone, "Don't pull the race card on me."

Defendant and Ballew walked away to the building in the rest area that contained a rest room. When the officers were walking to the building, Plaintiff went to the back of his vehicle, got out a bottle of water, got into the vehicle, took his weapon off his side and placed it in the center console. He then drove out of the rest area onto the highway heading north. The officers testified that they believed Plaintiff left to avoid further questioning. They returned to their car and followed Plaintiff, driving close behind him. Defendant testified by deposition that he observed Plaintiff moving about in the front seat of the pick-up, for a "long duration," moving toward the passenger seat and center console. ECF No. 42–2 at 28–29. Although Plaintiff does not deny that he was moving in his truck, he maintains that his back window was tinted, such that Defendant could not have observed this. In support, Plaintiff submits a photograph of the back window of the pick-up. The Court is unable to discern from the photograph whether someone driving behind the pick-up would have been able to observe movement in the front seat. But the Court does rely on this disputed fact in reaching its determination below.

Approximately two miles north of the rest area, Plaintiff exited and crossed over the highway, and reentered the highway travelling south. Plaintiff

testified that he did so to avoid the police. Defendant called for other officers in marked patrol cars to come and pull Plaintiff over. After driving about 19 miles, with Defendant and Ballew following him, Plaintiff neared an exit where other police cars were positioned. Plaintiff testified as follows: "I decided to pull over once I seen there were several police cars all over the area, I decided to pull over on my own. No one pulled me over." ECF No. 42–1 at 22. Upon pulling over, Plaintiff parked his pick-up truck on the exit ramp and put both his hands out the window of his vehicle.

Defendant and about four other officers approached Plaintiff's truck with guns drawn, and told him to get out of the vehicle. Plaintiff did so. Defendant's bodycam recording shows that as he was approaching Plaintiff's vehicle, Defendant's gun was in a "low ready" position, but as he got closer, he raised his arm so that the gun was pointed at Plaintiff. Defendant and/or other officers searched Plaintiff and ordered him to stand away from his vehicle. Plaintiff testified that after he was patted down, Defendant "immediately grabbed the keys" from Plaintiff's vehicle, went to the back of the truck, opened the tailgate, and started searching the back of the truck. EFC No. 42–1 at 25. Defendant asked Plaintiff where his gun was located. Plaintiff stated that it was in the console, and Defendant found it there. Defendant's bodycam recording reflects that Defendant asked Plaintiff how many rounds he had in his gun and Plaintiff responded that he didn't know as he had not fired the gun in years. Defendant determined that Plaintiff's gun was missing two bullets. When asked about the two missing bullets, Plaintiff said he

couldn't explain it, and repeated that he had not fired the gun in several years.

Defendant asserts that he did not search the cargo area of the pick-up, and relies on footage from his bodycam recording to support this assertion. Based on its viewing of the recording, the Court concludes that it refutes Plaintiff's rendition of the facts on this matter—the recording shows the happenings during the time frame in which Plaintiff alleges Defendant searched the cargo area, and it does not depict such a search by Defendant, or any other officer, then, or at any other time.

A deputy at the scene called the gun's serial number into dispatch and a report came back that the gun was stolen. Plaintiff explained to the officers that he had reported the gun as stolen when he had left the military and it was lost in transit, but the gun was found a few days later and he filed a follow-up report. Plaintiff was then handcuffed on Defendant's orders. Defendant and Ballew left the scene, and a few minutes later, the other officers at the scene received confirmation that the gun had been reported as found, and that it did belong to Plaintiff. At some point, an officer smelled Plaintiff's gun and determined it had not been shot recently. Plaintiff was released. Approximately 20 minutes elapsed from when Plaintiff was patted down until he was released. According to Plaintiff, when he got back in his vehicle, he drove a few miles to a gas station, and there checked his gun and determined that there were two bullets less in the gun than had been there at the beginning of the incident.

In his seven-count amended complaint, Plaintiff asserts claims for unconstitutional seizure in detaining Plaintiff at the rest stop while running an identification check on him, in that Plaintiff was not free to leave because Defendant had Plaintiff's permit, license, and identification card (Count I); unconstitutional seizure at the highway exit ramp (Count II); excessive use of force in approaching Plaintiff with a drawn gun at the exit ramp (Count III)[3] ; unconstitutional search of the cargo area of Plaintiff's vehicle at the exit ramp (Count IV); and theft of two bullets, in violation of Plaintiff's substantive due process rights (Count V). Plaintiff also asserts an equal protection claim, alleging that Defendant's first detention of Plaintiff at the rest area, which led to the subsequent events, was based on Plaintiff's race (Count VI); and a First Amendment free speech claim, alleging that Defendant called for additional police cars, detained Plaintiff at the exit ramp, used excessive force, conducted the cargo area search, and stole the bullets all because Plaintiff suggested at the rest stop that Defendant would not have detained someone who was not African–American (Count VII). In each count, Plaintiff seeks compensatory and punitive damages.

ARGUMENTS OF THE PARTIES

In support of his motion for summary judgment, Defendant argues that he is entitled to qualified immunity on all counts. More specifically, he argues that his conduct was objectively reasonable under the circumstances when he ran Plaintiff's

[3] Plaintiff has withdrawn his claim that having him handcuffed was also an unconstitutional use of force.

identification information at the rest stop. Defendant maintains that Plaintiff was "the author of his own detention" by voluntarily giving Defendant the permit, license, and identification that rendered him unfree to leave. Defendant argues that, moreover, Defendant had objectively reasonable grounds to detain Plaintiff for the one minute it took to run the identification information because "Plaintiff's conduct created reasonable suspicion that Plaintiff could have or was about to commit a crime" in light of the "shots fired" dispatch moments earlier. ECF No. 42 at 9. Thus, according to Defendant, the encounter at the rest area was a permissible investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968).

Defendant argues that the totality of circumstances provided him not only reasonable suspicion, but also probable cause that Plaintiff was involved in the reported shots fired, thereby justifying the detainment on the exit ramp. Defendant points to the facts that Plaintiff was the only person visibly present at the rest stop when Defendant and Ballew arrived to investigate the shots fired call, Plaintiff was armed, he was defensive about his information being run, he immediately left the rest stop when the deputies walked away to continue the investigation, he appeared to be moving something in the passenger seat or center console as he was driving, and he changed directions on the highway.

Defendant next argues that he is entitled to qualified immunity with respect to the excessive force claim, as approaching Plaintiff's vehicle with his gun drawn was objectively reasonable under the circumstances. With respect to Plaintiff's remaining

claims, Defendant argues that his bodycam recording shows that he did not search the cargo area of Plaintiff truck, and in any event, probable cause existed for this search; the theft of two bullets, even if true, does not state a substantive due process claim, which requires conscience-shocking conduct; and Plaintiff has failed to provide any evidence showing a discriminatory purpose in Defendant's conduct, or that any of Defendant's actions were motivated by Plaintiff's suggestion at the rest area that Defendant "ran" Plaintiff's information due to Plaintiff's race.

In response to the motion for summary judgment, Plaintiff essentially reasserts the facts and claims in his amended complaint. With respect to Count I, he argues that the circumstances did not provide any articulable facts to support a reasonable suspicion that Plaintiff had fired the shots near the school that would have justified a *Terry* stop, and running Plaintiff's identification, however briefly that took. With respect to Count II, Plaintiff argues that Defendant had no reasonable grounds to stop and detain Plaintiff at the exit ramp and that Defendant, therefore, seized Plaintiff in violation of the Fourth Amendment. Plaintiff maintains that none of the facts relied on by Defendant (such as Plaintiff leaving the rest area, changing direction on the highway, and possessing a gun), separately or in combination, were sufficient to give Defendant a reasonable belief that Plaintiff committed a crime or was dangerous.[4]

[4] In response to the motion for summary judgment, Plaintiff does not argue that the duration of the stop exceeded the time necessary to investigate the matter – he asserts that there was no probable cause or reasonable suspicion for the stop. With

Plaintiff maintains that approaching him with a gun pointed at him was also unreasonable under the circumstances, and thus constituted excessive force under the Fourth Amendment. Plaintiff acknowledges that the Eighth Circuit has not ruled directly on whether pointing a gun at a person can be excessive force, but he points to other circuits that have so held, and argues that the lack of authority from the Eighth Circuit does not mean that a clearly established right is not involved, for purposes of qualified immunity. Plaintiff argues that no reasonable officer could have believed that pointing a gun at Plaintiff under the circumstances presented here, was constitutional.

Plaintiff next addresses the claim that Defendant's search of the cargo area of the pick-up truck was unconstitutional. He maintains that a fact question is presented as to whether the search occurred, and that no circumstances justified this search. With respect to the substantive due process claim involving the alleged theft of two bullets, Plaintiff argues that the theft shocks the conscience because it implied an attempt to frame Defendant for the shots fired near the school, something he did not do.

Plaintiff maintains that his equal protection claim survives summary judgement because the statement by Defendant at the rest stop, "don't play the race card with me," said an angry tone, shows

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respect to the duration, the Court notes that at least half the time of the detention related to the report that the gun was stolen, and the investigation and resolution of that report. Plaintiff has abandoned his related claim that handcuffing him after receipt of the report that the gun was stoles was excessive force.

animus over race. Lastly, Plaintiff argues that his criticism of Defendant at the rest step for "running" Plaintiff's identification ("If I were someone else you wouldn't have run me would you have was run me?") was protected speech, and the connection between that criticism and Defendant's subsequent actions challenged in this case is a question for the jury.

DISCUSSION

Summary Judgment Standard

Federal Rules of Civil Procedure Rule 56(a) provides that summary judgment shall be granted "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, a court is required to view the facts in the light most favorable to the non-moving party. *Sokol & Assocs., Inc. v. Techsonic Indus., Inc.*, 495 F.3d 605, 610 (8th Cir. 2007). "[T]he burden of demonstrating that there are no genuine issues of material fact rests on the moving party," and the court must view "the evidence and the inferences that may be reasonably drawn [therefrom] in the light most favorable to the non-moving party." *Allard v. Baldwin*, 779 F.3d 768, 771 (8th Cir. 2015). "The nonmoving may not rely on allegations or denials, but must demonstrate the existence of specific facts that create a genuine issue for trial....The nonmoving party's allegations must be supported by sufficient probative evidence that would permit a finding in his favor on more than mere speculation." *Mann v. Yarnell*, 497 F.3d 822, 825 (8th Cir. 2007) (citations omitted).

Qualified Immunity

> The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established...constitutional rights of which a reasonable person would have known. he dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. The qualified immunity analysis thus is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question. Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant.

Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (citations omitted).

> [O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. "Clearly established" means that, at the time of the officer's conduct, the law was 'sufficiently clear that every reasonable official would understand that what he is doing is unlawful. In other words, existing law must have placed the constitutionality of the officer's conduct beyond debate.

Dist. of Columbia, v. Wesby, ——S. Ct. ——, 2018 WL 491521, at (Jan. 22, 2018) (citations omitted); *see also Solomon v. Petray*, 795 F.3d 777, 786 (8th Cir. 2015).

> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority.... The clearly established standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Wesby, 2018 WL 491521, at (citations omitted). "[I]f a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). "Once the predicate facts are established, the reasonableness of the official's conduct under the circumstances is a question of law." *Tlamka v. Serrell*, 244 F.3d 628, 632 (8th Cir. 2001) (citation omitted).

Encounter at Rest Area

The Court agrees with Defendant that that he is entitled to qualified immunity on Plaintiff's claim that Plaintiff was subject to an unconstitutional seizure at the rest area. The evidence, even when viewed in the light most favorable to Plaintiff, does not demonstrate the deprivation of a constitutional or statutory right that was clearly established at the time of the encounter. Plaintiff claims that he was detained because he was not free to leave while Defendant had Plaintiff's identification items that Plaintiff gave him.

> Although the Fourth Amendment prevents police officers from seizing a person without a reasonable suspicion of criminal activity, scrutiny under the amendment is not triggered by a consensual encounter between an officer and a citizen. A seizure does not occur simply because a police officer approaches an individual and asks a few questions so long as a reasonable person would feel free to disregard the police and go about his business. Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and request to examine his or her identification. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred.

United States v. Stewart, 631 F.3d 453, 456 (8th Cir. 2011) (citations omitted). Under the undisputed facts of this case, no clearly established rights of Plaintiff were violated at the rest area. Rather it began as a consensual encounter, during which time Plaintiff volunteered his identification and concealed carry permit. Given that Plaintiff admitted he was armed, and was in the area from which there was a report of shots fired, the officers reasonably could detain Plaintiff for the minute or two it took to run an identification check on him. Thus, Defendant did not violate Plaintiff's clearly established rights, nor would it have been clear to a reasonable officer that what he was doing was unlawful.

Detention at Exit Ramp

As noted above, Plaintiff testified that it was his own decision to exit the highway when he saw police cars at the location, and that no one pulled him over. Thus the Court concludes that no police stop occurred until the officers approached Plaintiff's vehicle with guns drawn and ordered him to exit the vehicle. The Court further concludes, that this detention constituted an investigatory, or *Terry* stop. An investigatory, or *Terry*, stop without a warrant is valid

> if police officers have a reasonable and articulable suspicion that criminal activity may be afoot. When justifying a particular stop, police officers must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. A *Terry* stop may turn into an arrest if the stop lasts for an unreasonably long time or if officers use unreasonable force.

United States v. Navarrete–Barron, 192 F.3d 786, 790 (8th Cir. 1999) (citation omitted).

Under the circumstances of this case, the Court concludes that a reasonable officer would not have known for certain that detaining Plaintiff at this point in time was unlawful. Although each separate factor relied upon by Defendant, such as Plaintiff's presence at the rest stop, might not have provided Defendant with a reasonable, articulable suspicion, *see, e.g., Johnson v. Phillips*, 664 F.3d 232, 237 (8th Cir. 2011) (holding that it was clearly established that a person's presence in a suspicious location does not, in and of itself, provide law enforcement with a reasonable,

articulable suspicion to justify a *Terry* stop), taking all the factors present here together, a reasonable officer might have concluded that detaining Plaintiff at the exit ramp was not unlawful. *See United States v. Stewart*, 631 F.3d 453, 457 (8th Cir. 2011) ("In considering the reasonableness of an officer's suspicion, [a court] must determine whether the facts collectively provide a basis for reasonable suspicion, rather than determine whether each fact separately establishes such a basis.").

Again, it is undisputed that Plaintiff was the only person the officers saw at the rest stop within minutes of when they received the dispatch of shots fired near the rest are. Plaintiff admitted he was armed. When the officers went to check the building with the restroom, Plaintiff left and got on the highway. A few miles later, Plaintiff exited and got on the highway driving the opposite direction from where he had told the officers he was headed. After seeing the officers were still following him, and increased police presence, Plaintiff exited the highway, stopped his car, and put his hands out the window. Although Plaintiff has explained that he engaged in this conduct simply to get away from the police, when assessing qualified immunity, the Court must examine the facts from the perspective of those knowable to the officer at the time. Although a contrary conclusion might also be reasonable, objectively viewing the facts, a reasonable officer could conclude that Plaintiff's actions were very suspicious and perhaps even that Plaintiff was ultimately surrendering. In sum, although the events underlying this lawsuit were understandably disturbing to Plaintiff, qualified

immunity is available to Defendant on this claim as well.

Approaching Plaintiff with a Gun Pointed at Him

As to whether Defendant is entitled to qualified immunity on Plaintiff's excessive force claim, "the Fourth Amendment requires [a court] to ask, from the perspective of a reasonable officer on the scene, whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Franklin for Estate of Franklin v. Peterson*, 878 F.3d 631, 635 (8th Cir. 2017) (citation omitted). The Court and the parties were unable to identify Eighth Circuit precedent addressing the issue directly of whether pointing a gun at an individual—in and of itself—can violate the Fourth Amendment under some circumstances, case law from other circuits suggests that it can. *See, e.g., Mlodzinski v. Lewis*, 648 F.3d 24, 38 (1st Cir. 2011); *Robinson v. Solano Cty.*, 278 F.3d 1007, 1013–15 (9th Cir. 2002) (en banc).

However, even if this was "clearly established" as a general rule, the rule's contours were not so well defined such that it would be clear to a reasonable officer that Defendant's conduct was unlawful in the situation he confronted. Defendant knew Plaintiff had a weapon on him, and even if Defendant did not see Plaintiff's movements in the front seat as Plaintiff was driving, it would not have clear to a reasonable officer that approaching Plaintiff with a gun pointed at him was a violation of Plaintiff's rights. *See, e.g., Navarrete–Barron*, 192 F.3d at 790. Thus, the Court concludes, that viewing the evidence in the light most

favorable to Plaintiff, Defendant is entitled to qualified immunity on Plaintiff's excessive force claim.

Remaining Claims

The Court will grant Defendant summary judgment on Plaintiff's remaining claims. As noted above, the Court concludes that Defendant's bodycam recording establishes that Defendant did not search the cargo area of Plaintiff's truck at the exit ramp when or as Plaintiff alleges. Plaintiff does not challenge the accuracy of the recording, and, indeed, it is the same recording on which Plaintiff relies for establishing that Defendant's approached Plaintiff with a gun pointed at him.

The Court agrees with Defendant that even if he took two bullets from Plaintiff's gun, this would not constitute a violation of Plaintiff's substantive due process rights.[5] While Plaintiff claims that the theft shocks the conscience because Defendant took the bullets to frame Plaintiff with them, there is no evidence of this being Defendant's motive, and no evidence to support the claim in general, especially in light of Plaintiff's statements at the exit ramp that he did not know how many bullets were in his gun at the time.

Lastly, as Defendant argues, Plaintiff has presented insufficient evidence to support his Equal Protection or First Amendment claims. Defendant's statement at the rest area, "don't play the race card

[5] Although it remains unclear whether Plaintiff is asserting a property or liberty substantive due process claim, his opposition brief appears to discuss a liberty interest. ECF No. 52 at 26.

with me," even if said in an angry tone, does not provide sufficient evidentiary support to proceed with this claim. *See Johnson v. Crooks*, 326 F.3d 995, 999–1000 (8th Cir. 2003) (holding that a police officer was entitled to summary judgment on a claim that a *Terry* stop was racially motivated, where the plaintiff offered no evidence, other than her own personal opinion, that the stop was racially motivated; such a claim normally requires proof that similarly situated individuals were not stopped); *Ratliff v. City of Shannon Hills*, 52 F. Supp. 3d 904, 913 (E.D. Ark. 2014) (granting qualified immunity to officers on the plaintiff's Equal Protection claim that she was arrested because of her race, due to lack of evidence that similarly-situated people were not stopped or arrested). The First Amendment claim is even more deficient in evidence. Thus, Defendant is entitled to summary judgment on these three remaining claims.

CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that motion of Defendant Austin Clark for summary judgment is GRANTED.

APPENDIX C, DENIAL OF REHEARING

United States Court of Appeals
For the Eighth Circuit

No. 18-1324

GREGORY CLARK,

Plaintiff – Appellant,

v.

AUSTIN CLARK, DEPUTY,
in his individual capacity only,

Defendant – Appellee.

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

JUDGE ORDER: Denying petition for en banc rehearing filed by Appellant Gregory Clark. The petition for panel rehearing is also denied. Judges Gruender did not participate in the consideration or decision of this matter.

July 16, 2019