APP. A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 19a0194n.06

Case Nos. 18-5177/5179

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 16, 2019
DEBORAH S. HUNT, Clerk

WILLIAM CHARLES BURGESS and GRACE BURGESS, Plaintiff-Appellees, v. CHUCK BOWERS, JR., WESLEY G. NORRIS, DEBBIE JENKINS, STEPHEN A. BALLARD, GREGORY H. STANLEY, and DAVID THOMPSON, Defendant-Appellants,	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE **OPINION**

BEFORE: BOGGS, KETHLEDGE, and NALBANDIAN, Circuit Judges.

NALBANDIAN, Circuit Judge. Officers with the Knox County Sheriff's Department entered Grace Burgess's home without a warrant to search for and arrest her son, William Burgess. The officers believed they had probable cause to arrest William because he had been evading their attempts to serve him process for weeks. They eventually found William hiding inside a crawlspace within the basement, but because William failed to heed their repeated warnings to come out, they deployed a canine to apprehend him. When that did not work, they tased him three times, which incapacitated him and allowed the officers to arrest him.

Grace and William ("the Burgesses") subsequently brought this § 1983 action asserting state and federal claims against the officers. After the officers moved for summary judgment, the district court denied them qualified immunity, and this appeal followed. For the following reasons,

we AFFIRM in part, REVERSE in part, VACATE in part, and REMAND for proceedings consistent with this opinion.

I

Officer Chuck Bowers attempted to serve civil process on William Burgess several times over several weeks to no avail. As William put it, he had been "evading and hiding" from Bowers to avoid being served. [R. 1, Compl. at PageID #2 ¶ 5.] One day, Bowers attempted to serve William at his mother's home, which he also uses as a business address. The Burgesses operate a landscaping business near the house called Turf Masters.

After learning from an employee that William was on the property, Bowers called for backup, so Officer Debbie Jenkins and other officers were dispatched to assist him. While on her way, Jenkins called her supervisor, Captain Wesley Norris, who advised her that she could enter the property if she had probable cause to make an arrest for evasion of process or obstruction of justice.

Upon her arrival, Jenkins made her way to the back of the house where she found Officers Stanley and Thompson speaking to William's mother, Grace Burgess. Stanley and Thompson told Jenkins that they could hear Grace speaking back and forth with William, begging for him to come out, and that he was refusing.

When Grace confirmed that William was inside, Jenkins believed she had probable cause to enter the house and arrest him. Over Grace's objection, Jenkins entered the house with Thompson, and together they searched the main level of the house. At some point, Officer Ballard also arrived on the scene and, together with Stanley and Thompson, found William hiding in the crawlspace of the basement underneath a vapor barrier. The officers repeatedly commanded William to come out, but he refused, so Ballard sent a canine to apprehend him. When William

attempted to fight off the dog, Stanley and Thompson tased him three times.[1] The officers' tasers rendered William unable to defend himself from the canine, which continued to bite him, leaving him with permanent injuries. Thereafter, the officers arrested William.

A grand jury indicted William on one count of preventing and obstructing an arrest and on two separate counts of preventing and obstructing civil service of process in violation of T.C.A. § 39–16–602—all class B misdemeanors. While William's criminal trial was pending, he and Grace filed this § 1983 action against the officers. In their complaint, they asserted Fourth Amendment unreasonable-search-and-seizure claims along with aggravated-assault and false-arrest claims under Tennessee law.

William was convicted after a jury trial, although his conviction was eventually overturned on appeal. *See State v. Burgess*, 532 S.W.3d 372 (Tenn. Crim. App. 2017). Meanwhile, the parties had submitted several filings in this action in which they moved for certain relief and simultaneously responded to previous filings.[2] These filings culminated in the officers' renewed motion to dismiss based on collateral estoppel and their supplemental motion for summary judgment based on qualified immunity. The district court granted the officers qualified immunity on William's state-law claim of false arrest. But it denied the officers qualified immunity with respect to the Burgesses' Fourth Amendment unreasonable-search-and-seizure claims. The court also denied the officers' renewed motion to dismiss.

This appeal followed.

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[1] On appeal, William asserts that he was "effectively" tased five times. But in his complaint and in his response to the officers' motion for summary judgment, he asserted he was tased three times. And that is consistent with his trial testimony.

[2] *See* R. 70, Op. and Order at PageID #1119–20 for a list of these filings.

II

"Qualified immunity shields government officials from standing trial for civil liability in their performance of discretionary functions unless their actions violate clearly established rights." *Thompson v. City of Lebanon*, 831 F.3d 366, 369 (6th Cir. 2016) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Once an official invokes the defense of qualified immunity in a § 1983 action, the plaintiff bears the burden of overcoming the defense. "At the summary judgment stage, the plaintiff must show that (1) the defendant violated a constitutional right and (2) that right was clearly established." *Id.* (citing *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 680 (6th Cir. 2013)).

Ordinarily, we may not review a district court's denial of summary judgment because we only have jurisdiction to hear appeals from final decisions. *See* 28 U.S.C. § 1291. "In the context of a denial of qualified immunity, however, a denial of summary judgment may be treated as final under § 1291." *Barry v. O'Grady*, 895 F.3d 440, 443 (6th Cir. 2018) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). But our review is circumscribed by the interlocutory posture of the appeal. We have jurisdiction to review the pure legal question of whether "the undisputed facts or the evidence viewed in the light most favorable to the plaintiff fail to establish a prima facie violation of clear constitutional law." *Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir. 1998). With limited exceptions, however, we may not review the district court's determinations of "which facts a party may, or may not, be able to prove at trial." *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

III

Grace's Unreasonable-Search Claim. The officers argue that the district court erred in denying them qualified immunity on Grace's unreasonable-search claim because she "produced no cases clearly establishing that a warrant is required to enter a building that is open to the public for the sale of mulch but also serves as a residence." [Bowers Opening Br. at 24.] But the parties

vigorously contest whether, in fact, Grace's home contains a mulch shop that is open to the public or whether, instead, the shop is located in a separate building. This is quintessentially the type of factual dispute we lack jurisdiction to review on appeal from a district-court order denying qualified immunity. *See Johnson*, 515 U.S. at 313.

What the parties (and the district court) agree on is that the building is Grace's home. As a result, our analysis of Grace's unreasonable-search claim is straightforward. Absent exigent circumstances, officers violate a person's rights if they enter her home without a warrant or her consent solely to execute an arrest warrant for another person. *See Steagald v. United States*, 451 U.S. 204, 213–14 (1981). Much less, it follows, may officers enter her home to make an arrest with no warrant at all. Thus, a "third party homeowner" whose home is invaded to arrest someone else "may . . . pursue a civil action alleging that the entry into his home without a search warrant violated his civil rights." *United States v. Buckner*, 717 F.2d 297, 300 (6th Cir. 1983).

Here, the officers knew that the building was used as Grace's home. They further admit that they lacked both a warrant and her consent to enter her home. And it is undisputed that there were no exigent circumstances justifying their warrantless entry. Moreover, before the officers searched Grace's home, we had already held that a warrantless entry into a person's home to arrest someone else for a misdemeanor violates clearly established rights. *See Smith v. Stoneburner*, 716 F.3d 926, 933 (6th Cir. 2013). Hence, the officers had "fair warning" that their "forced warrantless entry" violated clearly established law. *See Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005).

Alternatively, the officers argue that they are entitled to qualified immunity because they were operating in accordance with counsel's advice when they conducted their warrantless search of Grace's home. Specifically, the officers contend that the sheriff's chief legal counsel advised

Norris, who advised Jenkins, that Jenkins could enter Grace's home if she had probable cause to make an arrest for evasion of service of process or obstruction of justice. But our circuit "has determined that reliance on counsel's legal advice constitutes a qualified immunity defense only under extraordinary circumstances." *Silberstein v. City of Dayton*, 440 F.3d 306, 318 (6th Cir. 2006) (internal quotations omitted); *accord Ross v. City of Memphis*, 423 F.3d 596, 603–04, 604 n.3 (6th Cir. 2005). And here, the officers have failed to make any showing of extraordinary circumstances.

We therefore affirm the district court's judgment that Bowers, Norris, and Jenkins are not entitled to qualified immunity on Grace's unreasonable-search claim. Bowers and Jenkins were among the first two officers to search Grace's home, and they conducted their illegal search with Norris's approval. *See Smith v. Heath,* 691 F.2d 220, 225 (6th Cir. 2010) (holding that an officer who directs his subordinates to interfere with the civil rights of another can be held liable for the subordinates' actions).

In regard to Ballard, Stanley, and Thompson, it seems the district court may have intended to grant summary judgment in their favor. Although Grace addressed her unreasonable-search claim to all the officers, the district court limited its analysis to Norris, Jenkins, and Bowers because they "were involved in the decision to enter the building in the first place." [R. 70, Op. and Order at PageID #1141.] The court did not elaborate on its decision to cabin its analysis to just those officers beyond that brusque statement. Moreover, the court specifically stated that it was "deny[ing] summary judgment as to Grace Burgess's unreasonable search claims against Officers Norris, Jenkins, and Bowers." [*Id.* at PageID #1158.] Naturally, the parties' briefing on this issue largely focuses on the conduct of Bowers, Norris, and Jenkins to the exclusion of the other officers.

But in the final section of its opinion, the court appears to have denied all the officers qualified immunity on Grace's unreasonable-search claim.

We are thus unable to provide meaningful appellate review of the district court's decision with respect to Grace's unreasonable-search claim against Ballard, Stanley, and Thompson. As such, we vacate that part of the district court's judgment and remand for the court to analyze Grace's claims against those officers. On remand, the district court must assess each officer's liability "individually based on his own actions." *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010) (citing *Dorsey v. Barber*, 517 F.3d 389, 399 n.4 (6th Cir. 2008)). And it should make clear whether it is denying or granting qualified immunity to each officer.

IV

We turn now to William's claims. The officers initially contend that the district court erred in construing the Burgesses' pleadings as asserting Fourth Amendment unreasonable-search and false-arrest claims for William. We find that the court did no such thing.

William's Purported Unreasonable-Search Claim. The court's sole analysis of an unreasonable-search claim appears in the final three pages of its opinion. There, at the outset, the court stated that it was addressing "Grace Burgess's unreasonable search claim." [R. 70, Memorandum Op. and Order at PageID at PageID #1156.] At no point did it indicate that it was analyzing any unreasonable-search claim other than hers. And it ended its analysis by concluding that it was denying "summary judgment as to Grace Burgess's unreasonable-search claim[]." [*Id.* at PageID #1158.] We find, therefore, that the court did not construe the Burgesses' pleadings as stating a Fourth Amendment search claim for William.

William's Purported False-Arrest Claim. We likewise find that the court did not construe the Burgesses' pleadings as stating a Fourth Amendment false-arrest claim for William (or Grace,

for that matter). Near the beginning of its opinion, the court went out of its way to explain that, based on the parties' pleadings, it was exclusively construing William's false-arrest claim as arising under Tennessee state law. And the court went on to grant summary judgment to the officers on that claim. Conversely, the court noted that it was exclusively construing William's "unreasonable seizure claim" as arising under federal law, and it refused to grant summary judgment on that claim.[3]

William's Payton Claims. The officers' confusion stems from their failure to apprehend that the district court construed William's "unreasonable seizure claim" as a *Payton* claim. Consequently, much of the officers' argument misses the point. Essentially, the officers argue that they had probable cause to arrest William and so William's unreasonable-seizure claim, which they read as a false-arrest claim, must fail. But while it is true that the absence of probable cause is an essential element of a false-arrest claim, *see Stemler v. City of Florence*, 126 F.3d 856, 871 (6th Cir. 1997), the same is not true of a *Payton* claim.

A *Payton* violation occurs when, in the absence of exigent circumstances, an officer makes a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest, even if "probable cause is clearly present." *Payton v. New York*, 445 U.S. 573, 589 (1980) (internal

[3] Assuming William alleged a Fourth Amendment false-arrest claim, it must fail. A claim for false arrest rises or falls depending on whether the plaintiff can show, in light of clearly established law, that that no reasonably competent officer would have found there was probable cause to arrest him. *See Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007). Although William was ultimately acquitted of the charges against him, "it has been long settled that 'the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer.'" *Barnes v. Wright*, 449 F.3d 709, 716 (6th Cir. 2006) (quoting *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002)). Some exceptions to this rule exist, as "when the defendants knowingly present false testimony to the grand jury to obtain an indictment or when they testify with a reckless disregard for the truth." *Bickerstaff v. Lucarelli*, 830 F.3d 388, 398 (6th Cir. 2016) (internal quotations omitted). But William has made no showing that any of these exceptions apply to his case.

quotation omitted). That said, *Payton* does not control our analysis. It is undisputed that William was arrested in Grace's home—not his own home. But *Payton* established a suspect's right to be free from a warrantless arrest in his own home—not someone else's. *See Payton*, 445 U.S. at 576 ("Hold[ing] that the Fourth Amendment . . . prohibits the police from making a warrantless and nonconsensual entry into *a suspect's home* in order to make a routine felony arrest.") (emphasis added). In fact, the *Payton* Court explicitly acknowledged that the "narrow question" presented in the case did not address the "authority of the police . . . to enter a third party's home to arrest a suspect." *Id.* at 583.

A little over one year after *Payton* was decided, the Court held that in order to enter a third party's home to arrest a suspect, the police need a search warrant. *Steagald*, 451 U.S. at 212. But as we noted in *Buckner*, *Steagald* was concerned with the Fourth Amendment rights of the third-party homeowner, not the Fourth Amendment rights of the suspect in the third party's home. *See Buckner*, 717 F.2d at 299. The latter issue, however, was squarely presented in *Buckner*. *Id.*

As it happens, there the suspect was challenging the police's entry into his mother's apartment to arrest him. *Id.* at 298. We denied the suspect relief based on standing, reasoning that there was "nothing in [the] record to indicate that the defendant had a legitimate expectation of privacy in his mother's apartment." *Id.* at 300. We noted that "the defendant did not live there and there [were] no facts other than his relationship to the occupant of the apartment which would show that he had standing to challenge the search of his mother's apartment." *Id.* Although the police had an arrest warrant for the suspect, they did not need it. *Id.* The suspect's rights were sufficiently protected by the presence of probable cause to arrest him.[4] *Id.* at 301.

[4] To be sure, we also held (in the alternative) that *if* the suspect had a reasonable expectation of privacy in his mother home, we would deny the suspect relief because the police had a warrant for his arrest. *Buckner*, 717 F.2d at 300. We reasoned that it was unnecessary for the police to have

Similarly, in *United States v. Love*, 70 F.3d 116, 1995 WL 675562 (6th Cir. 1995) (unpublished table decision), we held that a defendant could not challenge his warrantless arrest in his mother's home because he did not have a "legitimate expectation of privacy" in the residence. *Id.* at *4. In so holding, we noted that the defendant did not live there and was not an overnight guest. *Id.* Instead, we found that the defendant "was essentially a casual visitor." *Id.* "To be sure," we said, "the defendant is the house owner's son, but that relationship does not . . . establish an expectation of privacy, for Fourth Amendment purposes, beyond that of an unrelated invited guest making a brief visit." *Id.*

Thus, although *Payton* clearly establishes that a suspect has the right to be free from a warrantless arrest in his own home, it is substantially less clear when a suspect is entitled to claim the same right in someone else's home. Like the suspects in both *Bucker* and *Love*, William was not living in his mother's home when the officers arrested him. Nor is there any indication that he was an overnight guest. At the same time, William was certainly more than a casual visitor since he used Grace's basement as a workshop. But it is difficult to know what significance to assign that fact. The Burgesses described the workshop as "simply an area where [William] would build things." [R. 62, Supp. Resp. to Defs' Mot. to Dismiss at PageID #1069.] They also asserted that it made "no difference" to their claims that "William [] has a little workshop downstairs." [*Id.*] In any event, we need not decide today whether—under these circumstances—the officers violated William's constitutional rights when they arrested him in his mother's home without a warrant

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a search warrant in addition to an arrest warrant because "[i]t would be illogical to afford the defendant any greater protection in the home of a third party than he was entitled to in his own home." *Id.* at 300. *See United States v. Pruitt*, 458 F.3d 477, 480–82 (6th Cir. 2006) (holding that an arrest warrant was sufficient to protect a suspect's Fourth Amendment rights in a third party's home where the suspect had "a limited expectation of privacy" as an overnight guest in the residence).

(but with probable cause).[5] It will suffice to say that, after extensive research, we cannot say that such a right, if it exists, was clearly established.[6] We therefore reverse the district court's judgment and hold that all of the officers are entitled to qualified immunity on William's unreasonable seizure claim.

V

William's Excessive-Force Claims. Finally, the officers argue that the district court erred in denying them qualified immunity on William's excessive-force claims. Those claims relate to Ballard's use of a canine and Stanley's and Thompson's use of tasers to apprehend William.

The right of an individual to be free from an officer's use of excessive force derives from the Fourth Amendment's prohibition against unreasonable seizures. *See Graham v. Connor*, 490 U.S. 386, 394–95 (1989). "Whether the force was excessive turns on its objective reasonableness under the totality of the circumstances." *Baxter v. Bracey*, No. 18-5102, 2018 WL 5877253, at *2 (6th Cir. Nov. 8, 2018) (citing *Graham*, 490 U.S. at 395–96).

As we have noted recently, the law in our circuit with respect to excessive-force claims involving canine seizures is clearly established at the outer bounds. On one end of the spectrum, "we have held that officers cannot 'use[ ] an inadequately trained canine, without warning, to

[5] We are permitted to dispose of a claim based on the "clearly established" prong of a qualified-immunity analysis without having to determine whether an individual's constitutional rights were violated. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Doing so is often appropriate in cases where "the briefing of constitutional questions is woefully inadequate" and the opinion is designated as not precedential. *See Pearson v. Callahan*, 555 U.S. 223, 239 (2009). Since that is the case here, we limit our review of William's claim accordingly.

[6] We note that in *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), we held that the police violated the defendant's Fourth Amendment rights when they arrested him at his mother's home without a warrant. *Id.* at 1166. But there, the facts strongly indicate that the defendant lived at the house, and so he had a legitimate expectation of privacy therein. *See id.* at 1165 (referring to the house as "[the defendant's] home"); *see id.* at 1168 (referring to the house as "the Morgan home").

apprehend two suspects who were not fleeing.'" *Baxter v. Bracey*, No. 18-5102, 2018 WL 5877253, at *2 (6th Cir. Nov. 8, 2018) (alterations in original) (quoting *Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2012)). On the other end, "we have upheld the use of a well-trained canine to apprehend a fleeing suspect in a dark and unfamiliar location." *Baxter*, 2018 WL 5877253, at *2 (citing *Robinette v. Barnes*, 854 F.2d 909, 913–14 (6th Cir. 1988)). "These cases and their progeny establish guidance on the ends of the spectrum, but the middle ground between the two proves much hazier." *Baxter*, 2018 WL 5877253, at *2.

Viewing the facts in the light most favorable to William, his case is much closer to *Robinette* than it is to *Campbell*. Like *Robinette*, "this is a case where an officer was forced to explore an enclosed unfamiliar area in which he knew a man was hiding." 854 F.2d at 914. When Ballard arrived on the scene, William was hiding in the crawlspace of the basement underneath a plastic vapor barrier and refusing to come out. Very little light entered the openings of the crawlspace, so the area was difficult to see and none of the officers could be sure that William was not armed. And because the crawlspace height was as low as eighteen inches in some areas, an officer would need to enter it on his hands and knees, making it difficult for an officer to defend himself.

Moreover, the officers repeatedly warned William to surrender or else they would deploy the canine.[7] Still, William refused to comply. So, as in *Robinette*, the officers were confronted with

[7] On appeal, William selectively quotes Stanley's trial testimony to support his claim that the officers "did not give any warning *when the K-9 found Mr. Burgess*." [Burgesses No. 18-5179 Response Br. at 8 (emphasis added).] But that does not contradict the officers' declarations—and the part of Stanley's trial testimony that William does not quote—that the officers gave William multiple warnings *before* Ballard deployed the dog to apprehend him:

> Q. And what did you witness? If you would, tell the jury what you witnessed when the K-9 unite arrived.
>
> A. Officer Ballard arrived. He came down the steps. He made — and I don't know what their protocol is, but they make announcements whenever they're going to

a man who "knew the building was surrounded, who had been warned . . . that a dog would be used, and who gave every indication of unwillingness to surrender." *Robinette*, 854 F.2d at 913 (ellipses in original).

Of course, the facts here do not match those in *Robinette* perfectly. There, the plaintiff was suspected of committing a felony. Here, in contrast, William was only suspected of committing a misdemeanor. William also makes much of the fact that the canine continued to bite him while he was being tased by the officers and after he was subdued. Still, William never rebutted the officers' declarations that they tased him because he was attempting to fight off the dog. And during his criminal trial, William admitted that Ballard called off the canine once the other officers finished tasing him and he was subdued.

We have said that "a delay in calling off [a] dog may rise to the level of an unreasonable seizure." *Greco v. Livingston Cty.*, 774 F.3d 1061, 1064 (6th Cir. 2014) (citing *Campbell*, 700 F.3d at 787). But it does not follow that Ballard violated William's clearly established constitutional rights just because there was some unspecified delay between the time he called off the dog and the time the canine reacted to his command. As the Supreme Court has exhorted, to be clearly

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> search an area, you know, Knox County Sheriff's Office, K–9. This is Officer Ballard. If you don't come out immediately with your hands up, I'm going to send in the dog, and so on and so forth. And he makes that announcement several times.
>
> Q. Did you hear him making those kinds of announcements?
>
> A. Yes, ma'am. I was standing a foot from him.

[R. 61-9, Officer Stanley Test. at PageID #745.] Furthermore, William admitted in his own testimony that the officers warned him about the dog:

> Q. All right. Let's take it from that point right there. When — once you realized where was a dog — an officer and his dog, what happened?
>
> A. Actually, at this point, I was in disbelief. They were actually in my mother's home with a dog. *And then they threatened me with — they threatened me with the dog.*

[R. 61-18, William Burgess Test. at PageID #934–35 (emphasis added).]

established, it is not enough that a legal principle "is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018).

The district court found that, "[e]ven adopting plaintiffs' version of the facts," William's case fell "somewhere in the middle of the spectrum" of our canine-seizure precedents where the law is not clearly established. [R. 70, Op. and Order at PageID #1153.] Nevertheless, it denied Ballard qualified immunity because it was "not left with a clear picture of the facts in this case." [*Id.* at PageID #1154.] This was error. Having concluded that William failed to show that Ballard violated clearly established law, the court should have granted him qualified immunity. *See Thompson*, 831 F.3d at 369. To the extent the court was uncertain about whether his conduct violated clearly established law even after adopting William's version of the facts, that was not a proper basis for denying qualified immunity. "Once a defendant invokes qualified immunity, the plaintiff bears the burden to show that qualified immunity is inappropriate." *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 681 (6th Cir. 2013). Accordingly, we hold that Ballard is entitled to qualified immunity.

As with our canine-seizure cases, the law with respect to our taser cases is clearly established in two opposing situations: "It is clearly established in this Circuit that the use of a taser on a non-resistant suspect constitutes excessive force. Conversely, it is also clearly established that tasing a suspect who actively resists arrest and refuses to be handcuffed" does not violate the Fourth Amendment." *Kent v. Oakland Cty.*, 810 F.3d 384, 396 (6th Cir. 2016) (internal quotations omitted). Based on the undisputed facts, we find that William's case is closer to the latter situation than the former. William never disputed Stanley and Thompson's explanation that

they tased him because he was stomping the canine's head with his right foot in the crawlspace. Nor did he dispute the officers' statements indicating that they tased him for only as long as was necessary to subdue him.

The district court denied Stanley and Thompson qualified immunity because, in its view, "it is not clear whether William Burgess was resisting arrest or whether the taser was deployed after the dog" began biting William. [R. 70, Op. and Order at PageID #1155.] The court reasoned that if the tasers were deployed after the canine began biting William, then he "had a right to be free from" being tased. [*Id.*] But in so reasoning, the court created a false dichotomy. The court never explained why William could not have been resisting arrest *while* the dog was trying to apprehend him. And we find no basis in the record or the law to suggest that the two are mutually exclusive. *See McQueen v. Johnson*, 506 F. App'x 909, 916 (11th Cir. 2013) (finding that the simultaneous use of tasers and a canine were a reasonable use of force against a noncompliant suspect). As such, we find that Stanley and Thompson are entitled to qualified immunity.

The district court's order is ambiguous as to whether it was denying Bowers, Norris, and Jenkins qualified immunity on William's excessive-force claims, too. But we hold that they are entitled to qualified immunity as well since there is no allegation that they used any force against William. We construe the district court's order as denying all the officers qualified immunity on William's excessive-force claims. As such, we reverse that part of the district court's judgment.

VI

For the foregoing reasons, we AFFIRM in part, REVERSE in part, and VACATE in part the judgment of the district court. And we REMAND for proceedings consistent with this opinion.

APP. B

Nos. 18-5177/5179

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 05, 2019
DEBORAH S. HUNT, Clerk

WILLIAM CHARLES BURGESS, et al.,

Plaintiffs-Appellees,

v.

CHUCK BOWERS, Officer, et al.,

Defendants-Appellants.

ORDER

BEFORE: BOGGS, KETHLEDGE, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: June 05, 2019

Mr. Houston Scott Havasy
Mr. David S. Wigler
Knox County Law Director's Office
400 Main Street
Suite 612
Knoxville, TN 37902

Mr. Anthony Philip Lomonaco
Law Offices
800 S. Gay Street
Suite 2610
Knoxville, TN 37929

Re: Case No. 18-5177/18-5179, *William Burgess, et al v. Chuck Bowers, et al*
Originating Case No. 3:14-cv-00502

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager

cc: Mr. John L. Medearis

Enclosure

APP. C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

WILLIAM CHARLES BURGESS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No.: 3:14-CV-502-TAV-CCS
	)	
OFFICER CHUCK BOWERS, JR., *et al.*	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This civil action is before the Court on the following motions: (1) Defendants' Renewed Motion to Dismiss for Collateral Estoppel [Doc. 49]; and (2) Defendant's Supplemental Motion for Summary Judgment [Doc. 50].[1] For the reasons that follow, the

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[1] The parties filed several combined filings in which they move for certain relief and simultaneously respond and/or reply to previous filings. The following documents relate to defendants' Renewed Motion to Dismiss [Doc. 49]:

1. Defendants' Motion to Dismiss for Failure to State a Claim [Doc. 22];
2. Plaintiffs' Response to Motion to Dismiss [Doc. 29];
3. Defendants' Reply to Response to Motion to Dismiss [Doc. 32];
4. Courts' Order Granting in Part and Denying in Part Defendant's Motion to Dismiss [Doc. 33];
5. Defendants' Renewed Motion to Dismiss for Collateral Estoppel [Doc. 49];
6. Plaintiffs' Response to Defendant's Renewed Motion to Dismiss [Doc. 51];
7. Defendants' Reply to Response to Renewed Motion to Dismiss [Doc. 52];
8. Plaintiffs' Response to Defendant's Renewed Motion to Dismiss [Doc. 62]; and.
9. Plaintiffs' Reply to defendants' responses to all pending motions [Doc. 65].

The following documents relate to defendants' Supplemental Motion for Summary Judgment:

1. Defendants' Motion for Summary Judgment by Bowers, Jenkins, Norris [Doc. 35];
2. Defendants' Motion for Summary Judgment Based on Qualified Immunity by Stanley, Thompson [Doc. 37];

Court will deny defendants' motion to dismiss and grant in part and deny in part defendants' motion for summary judgment.

I. Background

Plaintiffs allege that on September 3, 2013, defendant Officer Chuck Bowers attempted to serve plaintiff William Burgess with a civil summons on a civil warrant ("the Civil Warrant") [Doc. 1 ¶ 2]. Bowers and other officers continued to attempt to serve William Burgess with the Civil Warrant for the next several weeks [*Id.* ¶ 4]. On October 24, 2013, Knox County deputies arrived at the home of William Burgess's mother, plaintiff Grace Burgess, located at 7756 Oak Ridge Highway, which plaintiffs allege William Burgess used as a business address [*Id.* ¶ 7]. The deputies believed that William Burgess was at the residence and aimed to serve him with the Civil Warrant.

When Grace Burgess refused to allow the deputies to enter and search the premises, defendants Sergeant Debbie Jenkins, Deputy David Thompson, Deputy Greg

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3. Defendants' Motion for Summary Judgment Based on Qualified Immunity by Ballard [Doc. 38];
4. Defendants' Supplemental Motion for Summary Judgment [Doc. 50];
5. Plaintiffs' Response to Defendants' Motion for Summary Judgment by Bowers, Jenkins, Norris [Doc. 55];
6. Plaintiffs' Response Defendants' Motion for Summary Judgment Based on Qualified Immunity by Stanley, Thompson [Doc. 56];
7. Plaintiffs' Response to Defendants' Motion for Summary Judgment Based on Qualified Immunity by Ballard [Doc. 57];
8. Plaintiffs' Response to Defendants' Supplemental Motion for Summary Judgment [Doc. 58];
9. Plaintiffs' Response to Defendants' Motion for Summary Judgment by Bowers, Jenkins, Norris [Doc. 61];
10. Defendants' Reply to defendants' responses to all pending motions [Doc. 65]; and,
11. Affidavit by William Burgess [Doc. 63–1].

Stanley, and Deputy Stephen Ballard, along with a police dog, entered the home without permission or a criminal warrant. They allegedly began to search "the entire home" while a Knox County Sheriff's Department helicopter hovered overhead [*Id.* ¶¶ 12–13].

The deputies ultimately located plaintiff William Burgess in the crawl space beneath the house. He was hiding under a plastic barrier and refused to come out [*Id.* ¶¶ 14–15]. Plaintiffs allege that Officer Stephen Ballard instructed his dog to bite William Burgess, which it did. Defendants Greg Stanley and David Thompson proceeded to taze him several times, which rendered William Burgess unable to move. Plaintiffs allege that the dog then tore "pieces of flesh" from William Burgess's arm, causing permanent injury [*Id.* ¶¶ 19–20].

William Burgess was then arrested for preventing or obstructing service of civil process, and the deputies left the Civil Warrant with his papers at the jail [*Id.* ¶¶ 21–22]. William Burgess was convicted on March 27, 2015, of the crimes of obstructing service of process and resisting arrest [Doc. 22-1 pp. 4–6]. He was sentenced to six months' imprisonment, which was suspended to probation [*Id.* at 7–8]. During his trial, William Burgess asserted self-defense as a potential defense to the charges against him [*Id.* at 10–11].

Plaintiffs William and Grace Burgess filed suit against Officer Chuck Bowers, Captain Wesley Norris, Sergeant Debbie Jenkins, Officer Stephen Ballard, Officer Gregory Stanley, and Officer David Thompson on October 23, 2014, pursuant to 18 U.S.C. § 1983 [Doc. 1]. William Burgess poses claims for false arrest, aggravated

assault, and excessive force under Tennessee law and the Fourth Amendment, and Grace Burgess sets forth an unlawful search claim under the Fourth Amendment. Defendants subsequently filed a motion to dismiss all claims against them for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) [Doc. 22].

On November 15, 2016, this Court granted in part and denied in part defendants' motion to dismiss [Doc. 33]. The Court granted this motion only with respect to the false arrest and unlawful seizure claims, holding that under *Heck v. Humphrey,* defendants could not assert the § 1983 claim because success on the false arrest and unlawful seizure claims would invalidate Mr. Burgess's criminal conviction and interfere with state criminal proceedings. 512 U.S. 477, 487 (1994). Accordingly, the Court dismissed these claims [*Id.*]. This will be discussed in further detail below.

Defendants then filed motions for summary judgment on behalf of the officers [Docs. 35, 37–38]. On February 10, 2017, the Court denied the motions for summary judgment, with leave to refile, and stayed proceedings at the request of defendants until plaintiff William Burgess's appeal from his underlying criminal convictions was final [Doc. 43]. On May 15, 2017, the Tennessee Court of Criminal Appeals dismissed all charges against plaintiff William Burgess. Plaintiffs subsequently filed a motion to lift the stay on this case [Doc. 47] and a motion to reinstate his claims of false arrest and unlawful seizure [Doc. 48]. This Court granted both motions [Docs. 53, 54]. This, too, will be addressed in further detail below.

While plaintiffs' motion to lift the stay and motion to reinstate the claims were both pending, defendants filed a renewed motion to dismiss on grounds of collateral estoppel [Doc. 49]. Defendants also filed a supplemental motion for summary judgment [Doc. 50]. On November 30, the Court heard oral argument on all outstanding motions. The Court asked for post-hearing briefs on several issues that needed to be more fully developed on the record [Doc. 60]. The parties subsequently filed post-hearing briefs that the Court will consider in addressing both pending motions [Docs. 62, 64–65].

II. Renewed Motion to Dismiss

In defendants' initial motion to dismiss, defendants sought to dismiss William Burgess's claims for false arrest and aggravated assault under Tennessee law and unreasonable seizure and excessive force under the Fourth Amendment [Doc. 22]. Defendants also sought to dismiss Grace Burgess's unlawful search claim under the Fourth Amendment [Doc. 22]. Defendants argued that this Court lacked subject-matter jurisdiction and that plaintiffs failed to state a claim upon which relief can be granted. Defendants asserted that the doctrine of collateral estoppel prevented plaintiffs from litigating William Burgess's claims for unreasonable seizure and false arrest. Defendants also asserted that these claims were barred under the *Heck* doctrine. With regard to plaintiff Grace Burgess's unlawful search claim, defendants argued that she lacked standing, lacked probable cause, and did not suffer the requisite cognizable injury.

The Court granted defendants' motion to dismiss with respect to William Burgess's false arrest and unreasonable seizure claims, agreeing with defendants that the

claims were barred under the *Heck* doctrine, and thus the Court lacked subject-matter jurisdiction [Doc. 33]. The Court rejected defendants' theory that collateral estoppel barred litigation of the unreasonable seizure and false arrest claims because the state court criminal conviction was still pending. However, since the Court dismissed the claims, William Burgess's state court criminal conviction was fully litigated, and the state appellate court dismissed the conviction. *See Tennessee v. Burgess*, 532 S.W. 3d 372 (Tenn. Ct. App. 2017).

Because the state criminal conviction was dismissed, the *Heck* doctrine no longer applies to the false arrest and unreasonable seizure claims. Accordingly, this Court reinstated the claims that were previously dismissed [Doc. 54]. In their renewed motion to dismiss [Doc. 49], defendants now seek to apply the doctrine of collateral estoppel to the false arrest and unreasonable seizure claims, asserting the state court judgment is now final and that this Court no longer has subject-matter jurisdiction.[2] Defendants move this

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[2] Pursuant to Federal Rule of Civil Procedure 12(h)(3), the Court may properly consider the renewed motion to dismiss for lack of subject-matter jurisdiction. Courts have discretion to define the scope of arguments that the Court may consider on a renewed motion to dismiss. *See, e.g., Morris v. Corr. Med. Servs.*, No. 07–10578, 2010 WL 728996, at *1 (E.D. Mich. Feb. 24, 2010) (stating that while there is "no categorical prohibition on renewed or successive motions to dismiss . . . such renewed motions are generally limited to matters which have not been decided or supported by an expanded factual record"); *Wechsler v. Hunt Health Sys.*, 198 F. Supp. 2d 508, 514 (S.D.N.Y 2002) (holding that while renewed motions for summary judgment should typically be supported by new material and should not revisit the same issues resolved previously, the district court has discretion in determining the scope of reconsideration). Because defendants argue that the Court lacks subject-matter jurisdiction, the Court may properly consider the renewed motion to dismiss. Fed. R. Civ. P. 12(h)(3). Furthermore, because the underlying state criminal conviction was dismissed, a significant change has occurred on the record, so review is warranted. Accordingly, the Court will consider the renewed motion to dismiss and all corresponding documents in their entirety.

Court to dismiss William Burgess's false arrest and unreasonable seizure claims under Federal Rule of Civil Procedure 12(b)(1).

Before analyzing the merits of defendants' motion to dismiss, it is necessary to clarify plaintiffs' claims. In the complaint, plaintiffs clearly assert a false arrest claim under Tennessee state law and an unreasonable seizure claim under federal law [Doc. 1 ¶¶ 25–26].[3] In defendants' original motion to dismiss [Doc. 22], defendants first sought to dismiss "all claims of Plaintiff William Burgess" [*Id.* at 1]. They later acknowledge both the Tennessee state law claims and the Fourth Amendment claims "for the same conduct" [*Id.* at 3]. However, plaintiffs title the relevant section "False Arrest and Unlawful Seizure under the Fourth Amendment," and the plaintiffs conclude that the claims "under the Fourth amendment must be dismissed" [*Id.* at 3–4]. In the renewed motion to dismiss, defendants indicate that both the "false-arrest claim and unlawful seizure claims" are defeated by the existence of probable cause [Doc. 49 p. 4]. Based on the motion to dismiss and the renewed motion to dismiss, the Court will treat defendants' request as a motion to dismiss both the Tennessee state law false arrest claim and the § 1983 unlawful seizure claim.

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[3] For purposes of this order, the "false arrest claim" will exclusively refer to the state law claim and the "unreasonable seizure claim" will exclusively refer to the federal law claim. Although these terms are used interchangeably throughout the record, the Court will distinguish the two claims to promote clarity.

A. Legal Standard

Federal courts are courts of limited jurisdiction, possessing "only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). Therefore, subject-matter jurisdiction is a threshold issue, which the Court must consider prior to reaching the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998); *see* Fed. R. Civ. P. 12(h)(3) (stating that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"). Unlike a motion to dismiss on the merits under Rule 12(b)(6), "where subject-matter jurisdiction is challenged under Rule 12(b)(1) . . . the plaintiff has the burden of proving jurisdiction in order to survive the motion." *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996) (quoting *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986) (internal quotation marks omitted)).

"Motions to dismiss for lack of subject-matter jurisdiction fall into two general categories: facial attacks and factual attacks." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). "A *facial* attack is a challenge to the sufficiency of the pleading itself." *Id.* In considering whether jurisdiction has been established on the face of the pleading, "the court must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party." *Id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232, 235–37 (1974)).

"A *factual* attack, on the other hand, is not a challenge to the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject-matter jurisdiction." *Id.* In considering whether jurisdiction has been proved as a matter of fact, "a trial court has wide discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Ohio Nat'l Life Ins. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990) (citations omitted). "[N]o presumptive truthfulness applies to the factual allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Ritchie*, 15 F.3d at 598 (internal citation omitted).

Defendants assert that this Court lacks subject-matter jurisdiction because plaintiffs are collaterally estopped from relitigating the probable cause issue. This is a factual attack—subject-matter jurisdiction only exists if plaintiffs are allowed to litigate this issue. Thus, this Court may consider affidavits, documents, and evidence on the record.

B. Factual Attacks on Subject-matter Jurisdiction

The Tennessee Court of Criminal Appeals's decision means that the state court judgment is now "final" for purposes of collateral estoppel. Because this Court previously rejected defendants' collateral estoppel argument based on the pending appeal and a lack of finality, the Court now must address the other elements of collateral estoppel to determine whether the Court has subject-matter jurisdiction.

Federal courts must give the same preclusive effect to a state court judgment as that judgment would be given under the law of the state in which the judgment was rendered. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Therefore, federal courts must analyze the question of whether an issue is precluded based on the state's collateral estoppel law. *Id.* Under Tennessee law, collateral estoppel "bars the same parties or their privies from relitigating in a later proceeding legal or factual issues that were actually raised and necessarily determined in an earlier proceeding." *Mullins v. State*, 294 S.W. 3d 529, 534 (Tenn. 2009).

An issue is precluded under the doctrine of collateral estoppel when: (1) the issue sought to be precluded is identical to the issue decided in the earlier suit; (2) the issue was actually litigated and decided on the merits; (3) the judgment in the earlier suit has become final; (4) the party against whom collateral estoppel is asserted was a party, or is in privity with a party, to the earlier suit; (5) and the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier suit to litigate the issue now sought to be precluded. *Id.* at 535. Under Tennessee law, a judgment in the earlier suit is not considered final where an appeal of the matter is pending. *See Brown v. Burch, Porter & Johnson PLLC*, No. 15–2167, 2015 WL 5737802, at *5 (W.D. Tenn. Sept. 30, 2015) ("Unlike federal law, under Tennessee law a 'judgment is not final . . . where an appeal is pending.'" (quoting *McBurney v. Aldritch*, 816 S.W.2d 30, 34 (Tenn. Ct. App. 1991))).

In response to defendants' collateral estoppel argument, plaintiffs asserted that there had not been a final judgment on the merits and that there was not privity between defendants and the state government in William Burgess's criminal suit [Doc. 29 pp. 4–7]. Defendants did not address either argument in their reply to plaintiffs' response [Doc. 32]. Now, in the renewed motion to dismiss, defendants assert that the state court judgment is final and that the parties are in privity [Doc. 49].

Defendants claim the plaintiffs are collaterally estopped from relitigating the probable cause issue. Defendants argue that "judicial findings of probable cause" exist because William Burgess was bound over to the grand jury after a preliminary hearing and was then indicted by the grand jury for "obstructing" and "preventing" law enforcement officers from serving a civil warrant [Doc. 49 pp. 2–3]. Even if the charges were ultimately dismissed, defendants argue that the grand jury indictment alone shows that the officers had probable cause to arrest William Burgess [*Id.*]. In response, plaintiffs argue that defendants' collateral estoppel defense "evaporated" upon the dismissal of William Burgess's state court charges [Doc. 51 p. 3].

The only issue for the Court to consider in deciding defendants' renewed motion to dismiss is whether the doctrine of collateral estoppel bars plaintiffs from litigating the existence of probable cause to arrest William Burgess. The Court must consider whether (1) there is an identical issue that (2) was actually litigated and decided on the merits, and (3) resulted in a final judgment, (4) against the same party or a party in privity with the same party in the earlier suit, (5) who had a full and fair opportunity to litigate the issue.

See Wilkerson, 2012 WL 2361972, at *4. The Court will now address each element in turn.

1. Identical Issue

First, the Court must determine that the issue sought to be precluded is identical to the issue decided in the earlier suit. In this case, the issue of William Burgess's evasion of service of process was decided in state court. His conviction was overturned and dismissed because the Tennessee Criminal Court of Appeals held that the evidence of William Burgess's activities did not fall within the criminal statute, and so he did not obstruct service of process or prevent officers from arresting him. *See Tennessee v. Burgess*, 532 S.W.3d 372 (Tenn. Ct. App. 2017). This matter is before the Court today, however, on William Burgess's claims of false arrest and unlawful seizure. Both sides discuss the issue of probable cause, but neither clearly addresses how probable cause relates to the relationship between the state court evasion of service of process claim and the present false arrest claim. Before proceeding, the Court will address this relationship

An issue that "was necessarily adjudicated in a prior cause of action" and "is presented in a subsequent suit" would be barred under the doctrine of collateral estoppel. *Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 589 (6th Cir. 2009). In an unreasonable seizure or false arrest claim, the plaintiff must show "that the arresting officer lacked probable cause to arrest the plaintiff." *Sykes v. Anderson,* 625 F.3d 294, 305 (6th Cir. 2010) (quoting *Voyticky v. Village of Timberlake, Ohio*, 412 F.3d 669, 677 (6th Cir. 2005)); *see Arnold v. Wilder*, 657 F.3d 353, 363 (6th Cir. 2011). Probable causes exists if

"there is a 'fair probability' that the individual to be arrested has either committed or intends to commit a crime." *Firdley v. Horrighs*, 291 F.3d 867, 872 (6th Cir. 2002) (quoting *Northrop v. Trippett*, 265 F.3d 372, 379 (6th Cir. 2001)).

The Sixth Circuit has previously held that parties were collaterally estopped from litigating the issue of probable cause in a § 1983 proceeding after it had been litigated in a state court proceeding. *Buttino v. City of Hamtramck*, 87 F. App'x 499, 499–500 (6th Cir. 2004). In *Buttino*, the defendant was charged with murder, and after the preliminary hearing, the judge bound him over for trial upon a finding that there was probable cause to think he committed the crimes charged. *Id.* The defendant was acquitted, and he sued the officers, alleging false arrest and other § 1983 claims. *Id.* at 500. The court held that he was barred from relitigating the issue of probable cause because, although he was acquitted, the "determination of probable cause made in the course of the preliminary examination in the state criminal proceedings" precluded him from relitigating the issue. *Id.* at 501.[4] Even though the murder charge against the defendant and the false arrest

[4] In *Buttino*, the issue at the preliminary hearing was whether probable cause existed for the defendant's arrest. However, in the defendant's § 1983 action against the officers, one of his arguments was that the magistrate judge was given false information to establish probable cause in granting the initial arrest warrant. 87 F. App'x at 504. The court noted that the legitimacy of the arrest warrant and the existence of probable cause were, in fact, *not* identical issues. *See Darrah v. City of Oak Park,* 255 F.3d 301, 311 (6th Cir. 2001) (holding that collateral estoppel does not bar a defendant in a criminal trial from later litigating in a civil action the question of whether the officer made false or misleading statements to establish probable cause). However, the court held that the state court's determination of probable cause at the preliminary hearing, as opposed to the magistrate judge's determination of probable cause in granting an arrest warrant, was the identical question being litigated in the subsequent civil action. *Buttino*, 87 F. App'x at 504.

claim against the officer were separate claims with separate elements, probable cause was required in both the criminal case to bind the defendant over to the grand jury and in the false arrest claim to show that the officer had probable cause to arrest the defendant. *Id.* Thus, the same issue that was litigated in the criminal trial previously was barred from being relitigated in the civil rights case.

In the case before this Court, both parties appear to agree that if William Burgess was evading service of process, the officers had probable cause to arrest him. The parties merely disagree as to what aspect of the state court proceedings proved the existence or absence of probable cause. Defendants assert that probable cause arose from pre-trial proceedings. Plaintiffs assert that probable cause exists only if William Burgess was convicted in state court. Regardless of where in the proceedings the issue of probable cause was actually decided, the question of whether the officers had probable cause to arrest William Burgess is identical in this civil action as with the issue in the state court criminal proceeding.

2. Actually Litigated

The next question is whether the issue was actually litigated in the state court. To be "actually litigated," an issue "must have been 'properly raised, by the pleadings or otherwise, and . . . submitted for determination, and . . . determined.'" *Mullins*, 294 S.W.3d at 536 (quoting Restatement (Second) of Judgments § 27 cmt. d (Am. Law Inst. 2017)). As long as it was placed in issue and decided in a prior proceeding, this requirement is typically met. *Id.* In situations where it is not clear whether an issue was

essential to the judgment, the Court then looks to whether the issue "was actually recognized by the parties as important and by the trier as necessary to the first judgment." Restatement (Second) of Judgments § 27 cmt. j.

In the state court proceeding, the jury found that William Burgess had evaded service of process. This jury determination properly decided whether he had committed an offense, which would show that the officers had probable cause to arrest him. On appeal, the question became whether "evasion of service of process" was the same as "interference or obstruction of service of process" for purposes of Tenn. Code Ann. § 39-16-602(b). The Tennessee Court of Criminal Appeals held that it was not, and it dismissed the charges. *See State v. Burgess*, 532 S.W. 3d 372 (Tenn. Crim. App. 2017). Even so, the state court proceedings related to William Burgess's behavior, which would establish whether or not the officers had probable cause to arrest him for purposes of the federal action. While the issue in the state court was not whether probable cause existed for his arrest, the state criminal charge was the basis for his arrest. Thus, the question of whether William Burgess was evading service of process, which establishes probable cause, was actually litigated in state court.

3. Final Judgment

The parties agree that there has been a final judgment on the merits. In the renewed motion to dismiss, defendants "acknowledge that [p]laintiff's appeal from the criminal convictions underlying this case was successful, and a final judgment dismissed his charges" [Doc. 49 p. 2]. In this Court's order denying defendants' motion to dismiss,

the Court rejected the collateral estoppel doctrine on finality alone. The Court held that because the state court conviction was pending appeal, the theory of collateral estoppel failed. The state court conviction is no longer pending and has since been dismissed; thus, there has been a final judgment on the merits.

4. Privity

The parties to the second proceeding must be the same as the parties in the first proceeding. If they are not the exact same parties, then the new party in the second proceeding must be in privity with the party in the first proceeding. The privity requirement is not met unless the parties are "so connected in law" that they represent "the same legal right." *Samuelson v. McMurtry*, No. 01A-01-9602-CV-00060, 1996 WL 507314, at *3 (Tenn. Ct. App. Sept. 6, 1996). Privity is defined as "an identity of interest, that is, a mutual or successive interest to the same rights." *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 180 (Tenn. Ct. App. 2000).

In *Bowen v. Arnold*, the Tennessee Supreme Court adopted Sections 29 and 85 of the Restatement (Second) of Judgments and abolished the mutuality requirement for both defensive and offensive collateral estoppel in Tennessee. 502 S.W.3d 102 (Tenn. 2016). Because the mutuality requirement has been abolished in Tennessee, courts should follow Section 29 of the Restatement (Second) of Judgements, which precludes parties from re-litigating issues so long as the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue previously. Here, collateral estoppel is being asserted against plaintiffs. In denying defendants' motion to dismiss, this Court did not

make a finding regarding defendants' privity; however, the Court did note that defendants were likely not in strict privity with the government in William Burgess's criminal trial.

There are two categories of collateral estoppel: defensive and offensive. *Trinity Indus., Inc. v. McKinnon Bridge Co.*, 77 S.W.3d 159, 184–85 (Tenn. Ct. App. 2001). Defensive collateral estoppel refers to a defendant seeking to prevent a plaintiff from re-litigating an issue that the plaintiff has previously litigated and lost. Offensive collateral estoppel refers to a plaintiff attempting to prevent the defendant from relitigating an issue that defendant has previously litigated and lost. *See Bowen*, 502 S.W. 3d at 110–11. Here, this is a question of defensive collateral estoppel since defendants are the ones seeking to prevent plaintiffs from re-litigating the issue of evasion of service of process. William Burgess, one of the two plaintiffs, was a party to the state court proceeding, and so under non-mutual collateral estoppel, the privity requirement is met.

5. Full and Fair Opportunity to Litigate

While this requirement sounds similar to the "actually litigated" requirement previously discussed, it is a distinct requirement. It looks to the parties themselves, and asks whether the previous proceedings were extensive and fair. *See Mullins,* 294 F. 3d. at 538. The Court should consider the limitations that existed in the first proceeding, the plaintiff's incentive to litigate the issue, and the parties' anticipation of later litigation. *Id.* Here, the parties dispute the stage of the proceedings in which the question of probable cause was determined, which is critical for determining whether the parties had a fair and full opportunity to litigate the issue. Because William Burgess's criminal

charge was dismissed on appeal, the only way that the issue of probable cause could be barred from relitigation under the doctrine of collateral estoppel would be to show that, at some other point during the state proceedings, William Burgess's actions, while not criminal, were found to establish probable cause for his arrest. Defendants assert that the preliminary hearing and grand jury deliberations are dispositive of this issue, whereas plaintiffs argue that the state court's decision to dismiss the action is determinative.

In *Buttino*, the court did not allow relitigation of the issue of probable cause because it had been determined during the "course of the preliminary examination in the state criminal proceedings." 87 F. App'x at 501. However, during the preliminary hearing in state court, the prosecution called witnesses, which the defendant was able to cross-exam, to show that probable cause existed to arrest the defendant and charge him with the crime. *Id.* Thus, although the defendant was ultimately acquitted, the district court held that the issue of probable cause had been fairly litigated previously.

The parties before this Court, however, have not shown the Court whether the parties had a full and fair opportunity to litigate the claim. Certainly a grand jury proceeding is not a forum where probable cause, which is based on William Burgess's evasion of service of process, could have been actually litigated, and so the question is whether William Burgess had an opportunity to litigate the question of probable cause at his preliminary hearing in state court. *See Smith v. Buttry*, 111 F. App'x 372, 373–374 (6th Cir. 2004) ("The trial court determined that the record was insufficient to determine if Smith had a fair and full opportunity to litigate the issue of probable cause at the

preliminary hearing."). The parties provide no evidence regarding this point. Thus, the Court cannot say whether William Burgess had a full and fair opportunity to litigate the issue of probable cause at the preliminary hearing.

6. Probable Cause Not Dispositive of Claims

Even if plaintiffs were collaterally estopped from litigating the question of probable cause, the Court would not be able to dismiss the unreasonable seizure and false arrest claims. Under the Fourth Amendment, police are prohibited from making "a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." *Payton v. New York*, 445 U.S. 573, 576 (1980). Similarly, officers are not allowed to enter the home of a third party to search for the subject of an arrest warrant absent consent or exigent circumstances. *Steagald v. United States*, 451 U.S. 204, 216 (1981).

Here, plaintiffs assert that the officers entered Grace Burgess's home in order to arrest William Burgess. While there is dispute as to whether the building was a home or a commercial business, the distinction is not critical at this stage in the proceedings. At most, defendants assert that the building was used "substantially" for William Burgess's business, but they do not deny the fact that Grace Burgess resided in the building [Doc. 35 p. 3]. In order for the Court to dismiss the unreasonable seizure and false arrest claims against the officers, defendants would have to show that they had probable cause to arrest William Burgess *and* that exigent circumstances, or some other exception to the warrant requirement, existed to enter Grace Burgess's home absent her consent. Alternatively,

they must show that the distinction between the home and a commercial business is meaningful for purposes of a warrantless arrest. *See, e.g., New York v. Burger*, 482 U.S. 691,702 (1987) (holding that in "closely regulated" industries, a warrantless inspection of a business for regulatory compliance might be reasonable); *Dow Chemical Co. v. United States*, 476 U.S. 227, 235 (1986) ("Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment.").

Whether or not probable cause existed to arrest William Burgess is only one piece of the puzzle. Defendants must overcome significantly more to show that the unreasonable seizure and unlawful search claims should be dismissed. Accordingly, plaintiffs are not collaterally estopped from litigating the issue of probable cause, and the Court will deny defendants' renewed motion to dismiss [Doc. 49].

III. Supplemental Motion for Summary Judgment

Before the Tennessee Court of Criminal Appeals overturned William Burgess's conviction, defendants had filed three separate motions for summary judgment [Docs. 35, 37–38]. In defendants' Motion for Summary Judgment of Wesley Norris, Deborah Jenkins, and Charles Bowers, Jr., defendants moved for summary judgment based on qualified immunity and qualified good-faith immunity [Doc. 35]. Defendants' Motion for Summary Judgment of Gregory Stanley and David Thompson asserted that summary judgment was warranted based on qualified immunity and lack of subject-matter jurisdiction [Doc. 37]. Defendants' Motion for Summary Judgment of Stephen Ballard sought summary judgment based on qualified immunity [Doc. 38].

After the Tennessee Court of Criminal Appeals overturned William Burgess's conviction, defendants supplemented their motion for summary judgment, asserting that even if plaintiffs were not collaterally estopped from relitigating probable cause and excessive force, the claims were still barred under the doctrine of qualified immunity [Doc. 50]. The supplemental motion is the only pending summary judgment that the Court must rule on; however, it incorporates the three previously filed motions. Plaintiffs responded to the pending supplemental motion for summary judgment by separately addressing each of defendants' previous summary judgment motions [Docs. 55–58]. Plaintiffs assert that genuine disputes of material facts exist as to whether defendants used excessive force and whether they violated Grace Burgess's Fourth Amendment rights [*Id.*].

A. Legal Standard

Summary judgment is proper where there is "no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). The Court may consider the pleadings, discovery, affidavits, and other evidence on the record. *Id.* In the Sixth Circuit, there is a genuine issue of fact "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 451 (6th Cir. 2004). "A fact is material only if its resolution will affect the outcome of the lawsuit." *Id.* at 451–52. The Court must view the evidence in the light most favorable to the non-movant, as well as draw all reasonable inferences in the non-movant's favor. *See Sutherland v. Mich. Dep't of Treasury*, 344

F.3d 603, 613 (6th Cir. 2003). Thus, "the moving party has the initial burden of showing the absence of a genuine issue of material fact." *Hedrick*, 355 F.3d at 451 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). On a motion for summary judgment by a defendant asserting a sovereign immunity defense, the Court must adopt the plaintiff's version of the facts. *Campbell v. City of Springboro*, 700 F.3d 779, 786 (6th Cir. 2012).

The Court must assess each defendant's liability individually. *See Pollard v. City of Columbus,* 780 F.3d 395, 402 (6th Cir. 2015). Government officials are shielded from liability under the doctrine of qualified immunity so long 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 (2009) (internal quotation marks omitted). Plaintiffs, therefore, have the burden of showing that each individual defendant violated a constitutional right that was "clearly established" at the time of the defendant's alleged misconduct. *Id.* at 232.

The Sixth Circuit uses a "segmented approach" when evaluating excessive force claims. *Livermore v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007). The Court must first identify the seizure and then determine whether the force used was reasonable based on the totality of circumstances. *Id.* Plaintiffs must show that a defendant was "personally involved" in the use of excessive force, which is evaluated on an individual basis. *See Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010).

B. Analysis

Defendants argue that they did not violate the Constitution [Doc. 35]. In analyzing a defendants' qualified immunity defense, the initial question is whether the right that was allegedly violated was clearly established at the time of the alleged offense. *Simmonds v. Genesee County*, 682 F.3d 438, 443–44 (6th Cir. 2012). The Court can then determine whether that right was violated. *Id.* The Court will address each of plaintiffs' claims in turn, first discussing whether the right was clearly established and then discussing whether that right was violated.

With respect to defendants Norris, Jenkins, and Bowers, the Court will focus on William Burgess's § 1983 unreasonable seizure claim, his Tennessee state law false arrest claim, and Grace Burgess's unlawful search claim. These officers were involved in the decision to enter the building in the first place [Doc. 1]. The factual questions are whether the officers reasonably believed they had probable cause to enter the premises to arrest William Burgess and whether it was reasonable for them to believe the premises were a commercial business.

With respect to defendants Stanley and Thompson, the focus is on William Burgess's excessive force claim. These officers were not involved in the initial decision to enter the building, but they used tasers to subdue William Burgess in the basement after the police dog had been employed. The relevant factual questions are centered on the timeline of events in the crawlspace. The parties dispute if and when the officers

gave a warning and whether William Burgess was resisting arrest even after the police dog was used.

With respect to defendant Stephen Ballard, the focus is on William Burgess's excessive force claim. He was in charge of the police dog that was used to subdue William Burgess in the crawlspace. Again, the timeline of events is significant, and the parties dispute if and when defendant Ballard called off the police dog.

1. Tennessee False Arrest Claim

To the extent the plaintiffs are still seeking relief under Tennessee state law for the false arrest claim, the Court will briefly discuss the legal bar to this claim. To succeed on a false arrest claim under Tennessee law, a plaintiff must show that the detention was against the plaintiff's will and unlawful. *Coffee v. Peterbilt of Nashville, Inc.*, 795 S.W. 2d 656, 659 (Tenn. 1990). However, pursuant to Tenn. Code Ann. § 29-20-205, public officers are immune from suit if the injury arises out of a false arrest. *See Limbaugh v. Coffee Med. Ctr.*, 59 S.W. 3d 73, 79 (Tenn. 2001) (identifying Tenn. Code Ann. § 29-20-205(2) as the "intentional tort exception" that bars certain claims, including false arrest). Both parties fail to address this issue, and given Tennessee law, the Court must grant defendants' supplemental motion for summary judgment on plaintiff's state law claim of false arrest [*See* Doc. 1 ¶ 25].

2. §1983 Unreasonable Seizure Claim

The success of plaintiffs' §1983 unreasonable seizure claim depends in part on whether the officers had probable cause to arrest William Burgess without a warrant.

The Court must also consider the body of Fourth Amendment law discussing warrantless arrests in a home or commercial business. To overcome a qualified immunity claim, the Court must find that the law was clearly established at the time of the alleged offense and that the officers violated that law.

Both parties launch into discussions about probable cause and whether the fact that the Tennessee Court of Criminal appeals held that "evasion" is not "obstruction" under Tenn. Code Ann. § 39-16-602 is significant for purposes of the present claim.[5] Irrespective of whether the officers had "probable cause," the Court must first address the warrantless entry into the building located at 7756 Oak Ridge Highway. Under the Fourth Amendment, a person is protected from unreasonable searches when he exhibits a subjective expectation of privacy and that expectation is one that society recognizes as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Supreme Court has historically given particular significance to the fact that a warrantless search takes place in a home. *Id.* While the standard under the Fourth Amendment can vary for commercial businesses, it is not the case that officers are free to

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[5] Defendants point to the lower court proceedings as evidence that the law is not clearly established [Doc. 50]. A General Sessions Court judge and a grand jury indicted William Burgess on the charge of evading service of process, which is a misdemeanor in Tennessee and would be grounds for an arrest. Later, the trial judge accepted and approved the conviction rendered by the jury in the case. Defendants assert that even if the Tennessee Court of Criminal Appeals reversed the decision on the basis that evasion of service of process is not obstruction of service of process, defendants still had probable cause to arrest William Burgess because, at the time of the arrest, they believed he was committing the offense of obstruction of service of process. Plaintiffs rely on the fact that the Court of Criminal Appeals overturned the conviction and dismissed the charges against William Burgess. They argue that this dismissal shows that the officers had no probable cause to arrest William Burgess.

enter commercial premises without a warrant and search for anything they please or arrest anyone suspected of engaging in criminal activity. *See, e.g.*, *Burger*, 482 U.S. at 702; *Dow Chemical Co.*, 476 U.S. at 235.

In this case, the parties dispute whether the building located at 7756 Oak Ridge Highway was a house or a commercial business.[6] Plaintiffs assert that the building was the home of Grace Burgess, William Burgess's mother. Defendants assert that the building was William Burgess's business. Either way, it is likely that William Burgess has a privacy interest in the building. Pictures entered into evidence show a workshop where he purports to conduct business [Doc. 64]. Even if it is his mother's home, he had an expectation of privacy to use his workshop [Doc. 57 p. 10]; *see Minnesota v. Olson*, 495 U.S. 91, 96–98 (1990) ("Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when . . . we visit our parents . . . [and] we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home."); *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) ("It has long been settled that one has standing to object to a search of his office, as well as his home."). Because he had a privacy interest, he has standing to challenge the warrantless entry. It is incumbent upon plaintiffs to show that there is an (1) injury in fact, (2) a causal connection between the injury and the conduct, and (3) the injury is "likely" to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*,

[6] Defendants do not dispute that William Burgess worked from the residence [Doc. 29 p. 12].

504 U.S. 555, 560–61 (1992). In this case, William Burgess claims to have suffered a false arrest, which resulted from an unlawful entry, and this injury can be redressed by holding officers accountable for their actions.

While the Court will later address Grace Burgess's unreasonable search claim, the warrantless entry is significant for determining whether the arrest of William Burgess was also reasonable. Even if the Court agreed with defendants that the 7756 Oak Ridge Highway was "substantially" commercial, which it does not, the officers would not have been free to enter the building to search for a person or evidence absent a warrant, consent, or exigent circumstances. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978) ("The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes."); *cf. Kentucky v. King*, 563 U.S. 452 (2011) (holding that warrantless entries are allowed when there are exigent circumstances such as the need to prevent the destruction of evidence); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (holding that a warrantless search of a home is valid when police obtain voluntary consent to enter and search); *Oliver v. United States*, 466 U.S. 170, 179 (1984) (holding that homes, offices, and commercial structures are distinguishable from open fields and that such places would not constitute open fields).

Defendants do not point to any exception, like exigency or consent, that authorized the officers to enter into a commercial business to search the premises for William Burgess. Regardless of whether the building was Grace Burgess's home or William Burgess's business, defendants have not provided sufficient evidence to show that initial

entry was not unreasonable under the Fourth Amendment. The law on the matter is clear, and based on the record, the defendants have not provided evidence to show that a genuine dispute exists as to the unreasonableness of the initial entry.

Even though the officers entered the premises to arrest William Burgess, the Fourth Amendment does not allow officers to effectuate an arrest in any location they desire. As previously discussed, police are prohibited from making "a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." *Payton*, 445 U.S. at 576. For homes of a third party, officers are not allowed to enter to search for the subject of an arrest warrant absent consent or exigent circumstances. *Steagald v. U.S.*, 451 U.S. at 216. If the building is Grace Burgess's home, as plaintiffs assert, then under *Steagald*, the officers were not authorized to enter the building to search for William Burgess, even if they had a warrant. If the building is a "substantially" commercial business, as defendants assert, then the officers were still not allowed to enter the building to search for the subject of the arrest, even if they had a warrant. *See Dow Chemical*, 476 U.S. at 235.

Defendants argue that even without a warrant, consent, or exigent circumstances, they could enter the building and arrest William Burgess because the crime was being committed in the presence of the officers. The Supreme Court has held that an officer, who has probable cause to believe someone has committed an offense in the officer's presence, may arrest the individual without a warrant. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). In this case, the crime that William Burgess was alleged to be

committing in the officers' presence was obstructing or interfering with service of process. The officers interpreted "evading" as "obstructing," and so as long as William Burgess was not making himself available for service of process, he was committing a crime. If the officers were present at a location where William Burgess was, and he was not available for service of process, then according to the officers, he was committing a crime in their presence.

This logic cannot stand. The Fourth Amendment clearly protects an individual's privacy within his or her own home. Officers seeking to arrest an individual for possessing methamphetamine, for example, could not simply march through the individual's front door without a warrant just because they knew the individual was using methamphetamine in his living room at that precise moment. *See King*, 563 U.S. at 466. They might argue that the crime was being committed in their presence because they were only separated from known criminal activity by an exterior wall. Without exigent circumstances, consent, or a warrant, though, the officers could not make an arrest. A defendant "evading" service of process is no different. The alleged crime of "evasion" does not transcend the barriers of an individual's home or business. *See United States v. Thomas*, 430 F.3d 274, 276 (6th Cir. 2005) (noting that a "firm line" has been drawn at the entrance of an individual's home). To have a crime committed in an officer's presence means that the officer witnessed the defendant committing a crime—for example, an officer saw William Burgess running down the street or speeding away in his car to avoid service of process. The officers could have sought a warrant for his arrest, or

they could have simply waited in their vehicles for William Burgess to exit Grace Burgess's home. The one thing they could not do under the Fourth Amendment was conduct a warrantless search of the home of another person so that they could then conduct a warrantless arrest of an individual who was not committing a crime in their presence. Without a warrant, the officers could not arrest William Burgess in Grace Burgess's house.

Furthermore, the Sixth Circuit has held that "warrantless in-home arrests for misdemeanor offenses absent consent or exigency violate the Fourth Amendment." *Denton v. Rievley*, 353 F. App'x 1, 12 (6th Cir. 2009). Here, the officers all agreed that William Burgess was evading service of process, which the officers believed fell within the definition of preventing or obstructing service of process. *See* Tenn. Code. Ann. § 39-16-602. Even though this mistake was a reasonable mistake to make, the crime that William Burgess was believed to have committed is a Class B misdemeanor. *Id* ("A violation of this section is a Class B misdemeanor unless the defendant uses a deadly weapon . . ."). Defendants never assert that they had any reason to believe William Burgess was carrying or using a deadly weapon. Because the entry and search violated William Burgess's clearly established rights, the subsequent arrest was also unlawful. Alternatively, because they were seeking to arrest him for a misdemeanor, the situation did not amount to "exigent circumstances."

Based on the facts alleged in this case, William Burgess had a clear right to be free from a warrantless search and a warrantless arrest given the fact that there was no

consent, no exigency, and the crime was not being committed in the officers' presence. Because the initial search was unreasonable based on William Burgess's privacy interest, his subsequent arrest was also unreasonable. In addition, the officers knew that he was being arrested for a misdemeanor, which means that they had no basis to enter his home and conduct the arrest. Accordingly, summary judgment on the officers' qualified immunity is not warranted.

3. §1983 Excessive Force Claim

Next the Court asks whether Fourth Amendment protections against excessive force by use of police dogs and taser guns were clearly established at the time of the incident. Defendants assert that they did not use excessive force [Doc. 35 p. 3] and that it is not clearly established that police must refrain from using a police dog to effectuate the arrest in the circumstances of this case [Doc. 50 p. 6]. Plaintiffs claim that the right to be free from excessive force was well-established at the time of the alleged incident [Doc. 55 p. 18].[7]

In deciding whether the right was clearly established, the Court must first define the right. The general right to be free from excessive force, as plaintiffs assert, is too broad. The "clearly established law should not be defined at a high level of generality[;] . . . [it] must be particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (internal quotation marks omitted). In *Pauly*, the Supreme Court looked to the

[7] Officer Stephen Ballard oversaw the use of the police dog [Doc. 38], and Officers Stanley and Thompson each possessed a taser.

circumstances unique to that case and asked whether a case existed where officers acting in similar circumstances were held to have violated the plaintiff's constitutional rights. *Id.* Similarly, here, the Court must look to the particular circumstances present in this situation to decide whether the right to be free from excessive force *under these circumstances* was clearly established at the time of the alleged offense. Here, the officers used a taser and a police dog to arrest William Burgess, who was hiding in the crawl space under a plastic vapor barrier. Thus, the issue is whether a person had a right to be free from the use of a taser and a police dog when an individual was hiding from officers.

Defendants submit statements by the officers explaining why the use of a police dog was appropriate in this situation given William Burgess's lack of cooperation with the officers [*See, e.g.*, Doc. 38–2 pp. 3–4]. Plaintiffs claim that the officers issued no warnings and did not pull the police dog off until it was too late [Doc. 55 p. 6–7]. Plaintiffs therefore argue that the officers' inaction led to excessive force being used against William Burgess.[8]

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[8] In the initial motions for summary judgment, defendants distinguish between the "pre-subdual" and "post-subdual" excessive force claims. Defendants assert that the Court's previous order held that it did not have subject-matter jurisdiction over the "pre-subdual" claim [*See* Doc. 33 pp. 13–16]. While this distinction is important, the Court notes that the Tennessee Court of Criminal Appeals dismissed the charge against William Burgess for resisting arrest. *See State v. Burgess*, 532 S.W. 3d 372 (Tenn. Crim. App. 2017). The Court will consider the entirety of the confrontation between William Burgess and the officers in evaluating the excessive force claim on summary judgment.

The Sixth Circuit has held that "the right to be free from physical force when one is not resisting the police is a clearly established right." *Wysong v. City of Heath*, 260 F. App'x 848, 856 (6th Cir. 2008). In determining what constitutes "physical force" and "excessive force," courts have looked to both the behavior of the person against whom force is used and of the officers themselves. *Campbell v. Springboro*, 700 F.3d 779, 789 (6th Cir. 2012) (holding that an officer "acted contrary to clearly established law when he used an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing"); *Grawey v. Drury*, 567 F.3d 302, 311 (6th Cir. 2009) (holding that an officer used excessive force when he used pepper spray on a suspect who was not informed he was under arrest); *Lee v. Metro. Gov't of Nashville & Davidson County*, 596 F. Supp. 2d 1101, 1118 (M.D. Tenn. 2009) (holding that it would be clear to a reasonable officer that repeatedly tazing a cornered, unarmed, non-violent, naked suspect who did not commit a serious crime would be unlawful). The Court must consider the facts and circumstances present in this case.[9]

One of the issues in dispute is the use of a police dog. Based on the Sixth Circuit's previous decisions, the permissibility or use of police dogs depends on the totality of the circumstances. The Court can consider factors like the dogs' training, whether the suspect was fleeing, where the suspect was located, what crime the suspect

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[9] The Court notes that plaintiff initially cited to parts of the record in the state court proceedings that were not included in the record for the present case. Plaintiff has since filed numerous exhibits [Doc. 61] regarding the state court proceedings that the Court will thus consider based on discussions at the November 30, 2017 hearing [Doc. 60].

was accused of committing, whether the officers gave the suspect warning, among others. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (holding that the reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"). In *Robinette v. Barnes*, the Sixth Circuit held that, under the totality of circumstances, an officer was justified in using a police dog when he "was forced to explore an enclosed unfamiliar area in which he knew a man was hiding." 854 F.2d 909, 914 (6th Cir. 1988) (holding that the use of a police dog that resulted in suspect's death did not constitute deadly force). The suspect in *Robinette* was believed to be a dangerous felon based on the crime he had committed. *Id.*

Likewise, in *Campbell v. City of Springboro*, the Sixth Circuit looked to whether the police dog had adequate training, whether the officers warned the suspect, and whether the suspect was fleeing. 700 F.3d at 789. The Sixth Circuit noted that an officer's use of a police dog falls on a spectrum. *Id.* On one end are the cases where courts have resolved the summary judgment motion in favor of the officers when the suspect was dangerous, exhibiting irrational behavior, or hiding in buildings or heavily wooded areas where the police were vulnerable to ambush. *Id.* On the other end of the spectrum are cases where summary judgment was denied because the dog was not well trained and had previously failed to obey commands. *Id.* On this end of the spectrum would also be cases like *Rainey*, where the Sixth Circuit held that when the suspect was

not dangerous, was not fleeing, and had only committed a minor traffic violation, the police used excessive force by employing the police dog. 534 F. App'x 391, 396 (6th Cir. 2013).

This case falls somewhere in the middle of the spectrum outlined by the Sixth Circuit. On one hand, defendant Ballard stated that he knew that William Burgess had previously tried to run over an officer with a dump truck [Doc. 38 p. 6]. It also appears that William Burgess did not respond to defendants when they came into the crawlspace [*Id.* at 5]. Regardless of whether they gave him an official warning, he continued to hide underneath the plastic. Furthermore, the crawlspace was dark, and the defendants did not know if William Burgess was armed [*Id.* at 7]. On the other hand, William Burgess was only believed to be evading service of process, which is a non-violent misdemeanor [*Id.* at 5]. He did not threaten the officers, and the parties disagree as to whether he actively resisted arrest or was merely hiding. The parties do not address whether the police dog was properly trained or had a history of not following commands.

The law on the use of police dogs is clear, but it is only clear in certain situations with certain facts that fall on either end of the spectrum discussed in *Campbell.* 700 F.3d at 789. Even adopting the plaintiffs' version of the facts, *see Parsons v. City of Pontiac*, 533 F.3d 492, 500 (6th Cir. 2008), the fact remains that officers had entered a dark, dusty crawlspace to pursue William Burgess and were unable to clearly see what was happening. Plaintiffs assert in their motion for summary judgment that he was not "resisting arrest, fleeing from arrest, or presenting a danger to the officers." This

conflicts with other parts of the record where plaintiffs state that William Burgess was hiding from officers and refused to come out [*See, e.g.*, Doc. 1 ¶ 15; Doc. 57 pp. 5–6 ("Mr. Burgess was hiding in the crawl space and refusing to make himself available to be served.")]. Even if the Court adopts plaintiffs' version of the facts, the Court is not left with a clear picture of the facts in this case. If William Burgess was not resisting arrest or threatening the officers, and they did not give him a warning that he was under arrest, then the law is clear that use of a police dog would constitute excessive force. *Id.* If, however, he was resisting arrest and threatening officers, and he was told that he was under arrest, then the law is clear that use of a police dog would not constitute excessive force. *Id.* In a situation where the law clearly establishes a totality of the circumstances test, whether the law is clearly established depends on the circumstances of a particular case. Because the facts are not clear, even adopting plaintiffs' version of events, the Court cannot determine at this time whether the law was clearly established in this case, and thus it must deny summary judgment as to Officer Ballard.

The Court must next consider whether the law is clear as to the use of the tasers by Officers Stanley and Thompson. In *Cockrell v. City of Cincinnati*, the court noted that cases discussing the use of tasers typically fall into two groups. 468 F. App'x 491, 495 (6th Cir. 2012). One group "involves plaintiffs tased while actively resisting arrest by physically struggling with, threatening, or disobeying officers," and the second group involves plaintiffs who have "done nothing to resist arrest or [are] already detained." *Id.* at 495–96 (holding that only plaintiffs in the second group have a valid § 1983 excessive

force claim). Again, the court looks to whether the force used was "objectively reasonable" by looking at the "facts and circumstances." *Graham*, 490 U.S. at 397.

Just like the law on the use of police dogs, the law on the use of tasers is clear as long as the officers' behavior falls into two categories. *See Cockrell*, 468 F. App'x at 495. Adopting plaintiffs' version of the facts, the officers commanded William Burgess to come out, he refused, and a taser was deployed twice [Doc. 56 p. 6].[10] Plaintiffs also assert that the tasers were deployed while the police dog was engaging with William Burgess [*Id.* at 7]. Plaintiffs also agree that the crawl space was dark and the officers had low visibility [*Id.*]. From the facts discussed by both plaintiffs and defendants, it is not clear whether William Burgess was resisting arrest or whether the taser was deployed after the police dog, and so the Court cannot determine whether William Burgess had a right to be free from the force used given the circumstances in this case. *See Lucier v. City of Ecorse*, 601 F. App'x 372, 379 (6th Cir. 2015) ("Because a genuine issue of material fact exists . . . Defendants are not entitled to summary judgment on the basis of qualified immunity as to the excessive force claim arising from the tasings that occurred

[10] Defendants assert in declarations that Officer Stanley's taser was ineffective and it was only Officer Thompson who used an effective taser [Doc. 37 p. 7]. Plaintiffs assert that both officers deployed their tasers [Doc. 56 p. 7] and they cite to parts of the record where Officer Stanley, in the state court proceedings, admitted that the first time the taser was used it failed, but the second time, he was not sure if it was effective [Doc. 61–9 p. 16]. Given that the record supports both versions of the event, the Court must adopt plaintiffs' version of the facts, and so the excessive force claim remains viable against both Officer Thompson and Officer Stanley.

in the basement."). Accordingly, the Court must deny summary judgment for Officers Stanley and Thompson.

4. Unreasonable Search Claim

Finally, the Courts will address Grace Burgess's unreasonable search claim. The Court must ask whether Grace Burgess had a reasonable expectation of privacy in a building with mixed residential and commercial business use that was clearly established at the time of the incident. The Court must then consider whether the officers violated that expectation of privacy.

For Grace Burgess, this case falls squarely within the Fourth Amendment, which guarantees the "right of the people to be secure in their . . . houses" from unreasonable, warrantless searches. U.S. Const. amend. IV. In determining whether a search was unreasonable, the Court considers whether a person exhibits a subjective expectation of privacy and whether that expectation is one that society recognizes as reasonable. *Katz*, 389 U.S. at 361. In this case, the Court does not have to consider the implications of the Fourth Amendment in a moving vehicle, a container, an electronic device, or one of the numerous other "effects" that courts have wrestled with. The facts at issue with respect to Grace Burgess point directly to the common-law endorsement that a person is free from warrantless searches in her "castle." *See Payton*, 445 U.S. at 598.

Defendants assert that the building where William Burgess was arrested was used for William Burgess's business, and so Grace Burgess did not have an expectation of privacy when the officers entered the premises and arrested William Burgess. In the

alternative, defendants claim that plaintiffs cannot show that entering the premises was a clear constitutional violation because defendants reasonably believed the building was a commercial business. In response, plaintiffs assert that defendants knew the house was Grace Burgess's primary residence because they had visited the home before. Plaintiffs also state that because defendants were seeking to arrest William Burgess for a misdemeanor, the exigent circumstances exception does not apply. *Denton v. Rievley*, 353 F. App'x 1, 4 (6th Cir. 2009) ("[W]arrantless in-home arrests for misdemeanor offenses absent consent or exigency violate the Fourth Amendment").

Even accepting the fact that William Burgess listed the residence as his business address, the record clearly shows that it was a residence for Grace Burgess [*See, e.g.*, Docs. 1, 61, 64]. Because it is her home, she had an expectation to be free from unreasonable, warrantless searches. This right is clear. U.S. Const. amend. IV. And it is clear that when the officers, over her objection, entered the house in search of William Burgess, they violated this right.

Defendants raise the advice-of-counsel defense where they claim that defendants Norris, Jenkins, and Bowers relied on advice from the Sheriff's Office's Chief Legal Counsel that they could enter the premises to make an arrest because William Burgess was evading service of process. *See Bier v. Fleming*, 717 F.2d 308, 313 (6th Cir. 1983). This defense fails. As plaintiffs state, the record merely indicates that Captain Norris spoke "to legal counsel at some point" [Doc. 61–4 p. 10]. In *United States v. Lindo*, the court held that the elements necessary for advice-of-counsel defense are "(1) full

disclosure of all pertinent facts, and (2) good faith reliance on counsel's advice." 18 F.3d 353, 356 (6th Cir. 1994). Defendants fail to provide facts sufficient to satisfy this standard. Furthermore, the Sixth Circuit has not adopted the advice-of-counsel defense as an absolute defense to Fourth Amendment violations; however, this Court may consider it as a relevant factor in determining whether the officers' conduct was reasonable. *See United States v. Chuke*, 554 F.2d 260, 264 (6th Cir. 1977). Defendants appear to have had minimal contact with any legal counsel, and they primarily made the decision on their own accord, so the Court finds that the advice-of-counsel factor does not negate the violations committed by the officers. Accordingly, the Court denies summary judgment as to Grace Burgess's unreasonable search claims against Officers Norris, Jenkins, and Bowers.

IV. Conclusion

Accordingly, for the reasons stated herein, the Court will deny defendants' renewed motion to dismiss [Doc. 49]. The Court will grant defendants' supplemental motion for summary judgment [Doc. 50] as to the state law claims of false arrest. The Court will deny defendants' supplemental motion for summary judgment [Doc. 50] as to William Burgess's § 1983 claims of unreasonable seizure and excessive force, as well as Grace Burgess's § 1983 claim of an unreasonable search.

IT IS SO ORDERED.

s/ Thomas A. Varlan
CHIEF UNITED STATES DISTRICT JUDGE

APP. D

State v. Burgess

Court of Criminal Appeals of Tennessee, At Knoxville

November 16, 2016, Session; May 15, 2017, Filed

No. E2015-02213-CCA-R3-CD

Reporter
532 S.W.3d 372 *; 2017 Tenn. Crim. App. LEXIS 382 **

STATE OF TENNESSEE v. WILLIAM CHARLES BURGESS

Prior History: Tenn. R. App. P. 3 **[**1]** Appeal as of Right; Judgments of the Criminal Court Reversed; Convictions Vacated; Charges Dismissed. Appeal from the Criminal Court for Knox County. No. 103785. Bob R. McGee, Judge.

Disposition: Judgments of the Criminal Court Reversed.

Case Summary

Overview
HOLDINGS: [1]-The evidence was insufficient to support defendant's convictions for preventing or obstructing service of process, as Tenn. Code Ann. § 39-16-602(c) (2014), was not intended to criminalize merely evading or avoiding civil process servers, as defendant did when he remained inside a private residence and chose not to engage with the deputies, who had others means of effective service of process available to them; [2]-Defendant's kicking the police dog, which was not a law enforcement officer, was not sufficient to support defendant's conviction for preventing or instructing an arrest under Tenn. Code Ann. § 39-16-602(a).

Outcome
Judgment reversed.

Counsel: A. Philip Lomonaco, Knoxville, Tennessee, for the appellant, William Charles Burgess.

Herbert H. Slatery III, Attorney General and Reporter; Robert W. Wilson, Assistant Attorney General; Charme P. Allen, District Attorney General; and Amanda Cox and Nathaniel Ogle, Assistant District Attorneys General, for the appellee, State of Tennessee.

Judges: ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and TIMOTHY L. EASTER, JJ., joined.

Opinion by: ROBERT H. MONTGOMERY, JR.

Opinion

[*373] The Defendant, William Charles Burgess, was convicted by a Knox County Criminal Court jury of one count of preventing or obstructing an arrest and two counts of obstructing or preventing service of process, Class B misdemeanors. *See* T.C.A. § 39-16-602 (2014). The trial court sentenced the Defendant to six months, with all but ten days suspended to supervised probation. On appeal, the Defendant contends that the evidence is insufficient to support his convictions. Because the Defendant's conduct **[**2]** did not constitute a criminal offense, we reverse the judgments of the trial court, vacate the Defendant's convictions, and dismiss the charges.

OPINION

This case arises from an October 24, 2013 incident in which Knox County Sheriff's deputies conducted a warrantless entry into the Defendant's mother's home in order to arrest the Defendant for evading civil process related to a delinquent credit card account. The Defendant hid in a basement crawl space and refused to emerge, at which point deputies ordered a police dog to attack the Defendant and shocked him multiple times with a Taser.

The trial testimony established that the Defendant was the owner of an optical lens business and worked part-time for his brother as a commercial landscaper. Both businesses were located at the Defendant's mother's house, and the Defendant had a workshop in his mother's basement.

Knox County Sheriff's Deputy Chuck Bowers testified that he had worked for the sheriff's office in the civil warrants division for twenty-seven years, that he had previously served the Defendant with a civil warrant, and that he attempted to serve the Defendant in the present case. **[*374]** Deputy Bowers identified a civil warrant issued **[**3]** against the Defendant and said Discover Bank was the plaintiff. Deputy Bowers stated that in order to serve the Defendant, Deputy Bowers needed to hand him a copy of the warrant.

Deputy Bowers testified that beginning in early September 2013, he attempted to serve the Defendant between twenty-two and twenty-four times. Deputy Bowers said that he went to the Defendant's house multiple times, that no one answered when he knocked, and that he left a business card. Deputy Bowers stated that on one occasion, he heard an unknown person moving in the house, that Deputy Bowers identified himself, that the person hid and did not open the door, and that Deputy Bowers left. Deputy Bowers said that on another occasion, he spoke with the Defendant's wife and that she was unwilling to accept service on the Defendant's behalf. Deputy Bowers said that he had to have the Defendant's permission to leave the civil warrant with someone at the Defendant's house. Deputy Bowers said that he could not obtain the Defendant's permission to leave the warrant with his wife.

Deputy Bowers testified that he went to the Defendant's mother's house on multiple occasions and that he spoke to the Defendant's parents. **[**4]** Deputy Bowers said that on one occasion, the Defendant's mother told him that the Defendant had just left, that the Defendant's mother called the Defendant and asked him to return, and that he refused. Deputy Bowers stated that the Defendant told his mother to tell Deputy Bowers to get off the Defendant's property because he was trespassing.

Deputy Bowers testified that generally, if he had difficulty serving a civil warrant because he could not find the person, he returned the warrant unserved after thirty and sixty days and that the plaintiff would have to re-file "for us to keep trying it." He said that the only circumstances in which he would serve the warrant by leaving it with a third party was if he spoke to the named defendant on the telephone and obtained permission to leave the warrant with a designated agent. He denied ever leaving a warrant in the screen door of a house. He said that in twenty-seven years, he had never had as much difficulty serving someone as he did the Defendant.

Deputy Bowers testified that on September 18, he parked at the end of the Defendant's driveway, stood outside, and began walking up the driveway when he heard a truck's engine start. Deputy Bowers **[**5]** stated that the truck began coming down the driveway, that the truck came "right at [him]," and that when the truck came within arm's reach, Deputy Bowers drew his gun. Deputy Bowers said that he did not know if the truck was going to hit him and that when he drew his gun, the truck swerved into the yard, crossed the curb onto the road, and "fled the scene." He said that two people were in the truck, that he could not identify the Defendant as the driver, and that he did not take any legal action.

Deputy Bowers identified a list documenting the twenty-four times he attempted to serve the Defendant. He also identified a photograph of the Defendant's lawn. The photograph showed tire tracks on a grassy space connecting a roadside curb and a wooded area. Deputy Bowers said that the line of a driveway was present in the photograph and identified where his vehicle had been parked, where he was standing, and where the truck began to swerve into the grass. He stated that the tire tracks came from "the vehicle that was coming at me."

Deputy Bowers testified that after the incident with the truck, he was cautious in attempting to serve the Defendant and [*375] sometimes asked other deputies to accompany [**6] him. He stated that his subsequent attempts were unsuccessful. He said that when he could not contact a defendant, he returned "the process not to be found."

Deputy Bowers testified that on October 24, 2013, he went to the Defendant's mother's house, that he parked at a restaurant beside the house, and that he thought he saw the Defendant walking across the driveway. Deputy Bowers said that he pulled into the driveway and that an employee of a business in the house told him the Defendant was inside. Deputy Bowers stated that he watched the house and that he requested backup. He said that Sergeant Jenkins arrived first and that other deputies joined them, including a K-9 deputy and his dog.

Deputy Bowers testified that Sergeant Jenkins was his supervisor and that once she arrived, he "sat back" while Sergeant Jenkins spoke with the Defendant's mother. Deputy Bowers said that he entered the front door, went downstairs into the basement, and returned outside to search for the Defendant. Deputy Bowers denied opening drawers or searching in small spaces. He said that other deputies went inside the house. He said that he believed the Defendant had "evaded," obstructed, and prevented service. [**7]

On cross-examination, Deputy Bowers testified that he was persistent in his attempt to serve the Defendant and that generally, he did not have to try twenty times to serve someone. He denied being frustrated by the Defendant and said that he drove past the Defendant's house daily because it was on his way to work.

Relative to the September 18 incident, Deputy Bowers testified that he began walking up the driveway before the truck appeared, that he saw two individuals in the truck, and that he told every deputy who accompanied him after the incident that the Defendant had attempted to run over him. Deputy Bowers denied that every deputy who responded on October 24 thought the Defendant had attempted to run over Deputy Bowers and that the September 18 incident was "general conversation" among the department. Deputy Bowers acknowledged that Sergeant Jenkins and his supervisors knew about the September 18 incident. He said relative to the September 18 incident that he "had a pretty good feeling" the Defendant was driving the truck and that on September 18, he was holding his radio and was dressed in uniform.

Deputy Bowers testified that his uniform consisted of a t-shirt with the sheriff's [**8] office logo, a badge worn on his belt, a gun, and a radio. Deputy Bowers disagreed that the Defendant did not try to hit him with his truck. Relative to the Defendant's swerving the truck away from him, Deputy Bowers said that if someone drew a weapon at him, he would have swerved as well. Deputy Bowers agreed that he believed the Defendant was trying to avoid being served that day and that later in the day, he spoke to the Defendant's mother at the Defendant's workplace. Deputy Bowers said that he stood close enough to hear the Defendant tell his mother to tell Deputy Bowers to leave because he was trespassing. Deputy Bowers denied that the Defendant's mother told him the Defendant would return at 5:00 p.m. Deputy Bowers denied telling an employee at the Defendant's workplace that he had to use the restroom and walking away. Deputy Bowers denied telling another employee at the Defendant's workplace, "[Y]ou better tell [the Defendant] that he better let me serve him or I'm going to get him[.]" Deputy Bowers thought that he spoke to the Defendant's father on September 18 and denied that he spoke to the Defendant.

[*376] Deputy Bowers testified that he requested backup on his radio or by calling [**9] his supervisor. He said that generally, when a deputy called for backup, everyone responded. Deputy Bowers believed he spoke to the Defendant's wife before the September 18 incident but was uncertain. Deputy Bowers did not know what Tennessee Civil Procedure Rule 4 stated about methods of service. Deputy Bowers agreed that the Defendant's wife was a person of suitable age and discretion with whom he could have left the civil warrant. After reviewing Rule 4, he acknowledged that the rule did not require a third party to consent to service on behalf of a named defendant. He agreed that he could have dropped the warrant at the Defendant's wife's feet and told her to give it to the Defendant but said that he had been taught to "cover my rear end" and only to leave the warrant with a defendant, unless he had the defendant's consent. When asked whether the Defendant had to be "avoiding" process, as opposed to "evading" process, in order to serve the Defendant's wife in the Defendant's stead, Deputy Bowers responded, "[T]hat's the way I understand it[.]" Deputy Bowers said that he did not feel comfortable leaving the warrant with the Defendant's wife.

A copy of Tennessee Code Annotated section 16-15-604 was received as an exhibit. Subsection (a) read,

> Original process shall be served **[**10]** on individuals by delivering a copy of the warrant personally . . . or if he evades or attempts to evade service . . . , by leaving a copy thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein[.]

Deputy Bowers testified that the Defendant merited arrest on October 24 when he "[r]olled himself up in plastic [and] hid in a crawl space" and told his mother that he would not come to the door. Deputy Bowers denied that the Defendant put nails in the driveway, shot at him, or prevented him from approaching the house. Relative to the September 18 incident, Deputy Bowers stated that he told a few deputies that the Defendant drove away from him.

Defense counsel played a portion of an October 24 police cruiser video recording.[1] In the recording, Deputy Bowers said "[he] did go that way." Deputy Bowers denied obtaining an arrest warrant for evading. He believed that the Defendant was preventing service of process and said that he did not know if he could have obtained a warrant for the Defendant's arrest based upon his preventing service of process. Deputy Bowers stated that at the time he entered the Defendant's mother's house, he thought **[**11]** a warrant for the Defendant's arrest had been signed by an on-call judge.

Deputy Bowers identified a copy of the Defendant's arrest warrant and agreed the charge listed was "preventing or obstructing service of process." He acknowledged that the narrative section of the warrant stated deputies had requested permission to enter the house, the Defendant's mother told them the Defendant was hiding, and the deputies searched most of the house using a police dog. Deputy Bowers said that he was "not usually involved with arrest warrants" and that he did not know how the warrant was obtained. Deputy Bowers stated that when a crime was being committed in a deputy's presence, the deputy did not always have to obtain a **[*377]** warrant. He said that Sergeant Jenkins and Captain Norris had a conversation about "taking extra steps" to ensure they had a warrant and that Deputy Bowers was not part of the conversation.

On redirect examination, Deputy Bowers testified that if he served someone other than the named defendant, the person he served might claim he or she never received the papers. He said that he did everything he could do to avoid involving the Defendant's parents. He stated that he did not have **[**12]** permission to serve the Defendant's mother and that even if she had wanted to accept service on his behalf, "I'm not going to do that. I don't care what the statute says, I'm covering my rear end." Deputy Bowers denied that frustration influenced his attempts to serve the Defendant.

On recross-examination, Deputy Bowers testified that he "followed statutes, but I followed the one I chose to choose" and that he chose not to follow the statute permitting him to serve the Defendant's wife. Deputy Bowers did not know whether the Defendant's mother volunteered to accept service on October 24. He said that Deputy Thompson eventually served the Defendant and that seven or eight deputies responded to the Defendant's mother's house.

Knox County Sheriff's Captain Wesley Norris testified that he was Deputy Bowers's supervisor and that he discussed with Deputy Bowers the difficulty of serving the Defendant. Captain Norris said that on October 24, he was concerned about the numerous times Deputy Bowers had tried to serve the Defendant and about "some safety concerns[.]" Captain Norris stated that on October 24, he spoke to Sergeant Jenkins, who was the supervisor on the scene, as well as Mike Ruble, **[**13]** legal counsel to the Sheriff's Office. Captain Norris said that his conversation with Mr. Ruble concerned "evasion of process, any alternative means, which had pretty much been exhausted at that point." Captain Norris stated that he made the decision to charge the Defendant with "evading service of process" because it was "obvious" that the Defendant would "go to any length to avoid being served." When asked whether the Defendant obstructed service of process, Captain Norris stated that the Defendant obstructed service by "making himself unavailable, putting other people in positions . . . [to] say he's not here or

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[1] The video recording, parts of which were played during the testimony of Deputy Bowers and Captain Norris, was from Deputy Greg Stanley's police cruiser. The State introduced a redacted copy of the recording, and the complete recording was introduced by the Defendant during Deputy Stanley's testimony.

either say, he's not coming out, basically, things along those ways. Putting other people in the position to obstruct the process." When asked whether the Defendant prevented service of process, Captain Norris stated that the Defendant prevented service by refusing to accept it.

Captain Norris testified that the deputies at the scene did not have an arrest warrant and that an arrest warrant was not required when a misdemeanor occurred in a deputy's presence. When asked which misdemeanor the Defendant committed in the deputies' presence, Captain Norris responded, "Evading **[**14]** process." He said that the Defendant resisted arrest, although he did not see it.

Captain Norris testified that a federal lawsuit was pending as a result of the October 24 incident. He identified a copy of the federal complaint and said that it bothered him. Captain Norris read the substance of the complaint to the jury. Captain Norris stated that several parts of the federal complaint were incorrect. Captain Norris said that the federal complaint requested a $50,000 judgment for the Defendant's mother and $250,000 for the Defendant.

Captain Norris testified that the Defendant's mother said she did not want the deputies to enter her home but that no force was used. Captain Norris said he **[*378]** asked the Defendant questions while they stood at the back of a police cruiser. Captain Norris did not recall seeing Deputy Thompson serve the Defendant, although he was confident Deputy Thompson did. He identified Deputy Thompson's signature on the civil warrant's return. Captain Norris noted that service could have involved "informing" the Defendant because the Defendant was handcuffed and could not hold the warrant. Captain Norris agreed that service required handing a person the warrant, although **[**15]** he later said that service did not require handing it to a person, but rather making the person "personally aware of the service . . . face-to-face, hand-to-hand." He stated,

> Naturally, the occurrence, if I'm there to serve a paper, is to hand it, after you have been told why I'm here to serve this, whatever it is. Naturally, I'm going to hand that to you, as a copy. Is it required? I don't think it is required. You don't have to take it. I can simply drop it at your feet and walk away.

Captain Norris agreed that after Deputy Bowers determined the Defendant was "evading" process, Deputy Bowers could have dropped the warrant at the Defendant's wife's feet. He said, though, that Deputy Bowers's contact with the Defendant's wife occurred at a point in time in which the sheriff's office did not yet know whether the Defendant was evading process.

Captain Norris testified that he instructed Sergeant Jenkins to arrest the Defendant if she believed she had probable cause. He denied that Mr. Ruble told him he had probable cause to arrest the Defendant or enter the house. He denied telling Sergeant Jenkins that she had probable cause to enter the house and said that the deputy at the scene made **[**16]** probable cause determinations. He said that without probable cause to arrest, a deputy could not enter a house. When asked whether hiding from service of civil process gave a deputy probable cause to arrest, Captain Norris responded, "Hiding once, probably not. Hiding 24 times, maybe . . . . it's, I guess, a totality of everything that's occurred up to that point. That's where you arrive at the evading." When asked whether evading was an element of the offense, Captain Norris responded, "It's obstruction, prevention, evading. They pretty much all say the same thing to me." Captain Norris said that he thought evading was the same as obstructing or preventing and that he would have to read the statute to know whether the statute included the word "evading."

On redirect examination, Captain Norris testified that the Defendant was served at the police cruiser by telling the Defendant the contents of the civil warrant. He said that the warrant was placed in the Defendant's belongings to be transported to the jail because the Defendant was handcuffed. Captain Norris stated that if a named defendant refused to take the warrant, the serving deputy could drop it in front of the defendant. He **[**17]** said, though, that the deputy could not drop it if the deputy were serving another person in the named defendant's stead.

On recross-examination, Captain Norris testified that the Defendant's wife did not have to accept the civil warrant and that service of process consisted of informing the individual of the charges, not simply leaving the warrant. Captain Norris said that handing a person the warrant "doesn't necessarily complete that process" and that the warrant was a copy of the information and "your corroboration of what I just told you." Relative to leaving the warrant with the Defendant's wife, Captain Norris responded that if a third party were reluctant to take the paper, he would not leave the paper with the third party **[*379]** "because I have a duty otherwise to not do it." He said that he did not know when Deputy Bowers first spoke with the Defendant's wife.

Knox County Sheriff's Sergeant Deborah Jenkins testified that she had worked in the civil warrants division for twenty years and that she was Deputy Bowers's supervisor. Sergeant Jenkins said that Deputy Bowers occasionally asked her to accompany him when trying to serve the Defendant because he had not been able to reach him **[**18]** several times. She stated that on one occasion, she went with Deputy Bowers to the Defendant's house and that no one answered the door. She stated that she accompanied Deputy Bowers to the Defendant's workplace once or twice before October 24, and that she spoke to the Defendant's parents. Sergeant Jenkins said that she told the Defendant's mother she needed to serve the Defendant with civil process and that she felt uncomfortable leaving the papers with his mother because his mother was "very nervous" and the location was not the Defendant's home address. Sergeant Jenkins stated that the Defendant's mother called the Defendant and that the Defendant wanted the deputies to leave because they were trespassing. Sergeant Jenkins heard the Defendant say that he was not going to make himself available to them.

Sergeant Jenkins testified that on October 24, she received a dispatch call requesting assistance from Deputy Bowers. She said that while driving to Deputy Bowers's location, she called Captain Norris to discuss Deputy Bowers's attempts to serve the Defendant. She said that Captain Norris told her to arrest the Defendant for "evasion of service" if she had probable cause to believe **[**19]** that the Defendant was inside the house.

Sergeant Jenkins testified that when she arrived, two deputies were speaking with the Defendant's mother at the back door. Sergeant Jenkins said that she was still speaking to Captain Norris on the telephone, that she asked Deputies Stanley and Thompson whether the Defendant was inside, and that they responded affirmatively. She said the Defendant's mother stated that she had asked the Defendant to come out but that he refused. Sergeant Jenkins stated that she could hear the Defendant and his mother talking, although she could not see him, and that the Defendant's mother begged him to come out. Sergeant Jenkins stated that the Defendant's mother offered to pay the debt if the Defendant would come out and the deputies would leave.

Sergeant Jenkins testified that she asked the Defendant's mother for permission to enter the house, that the Defendant's mother refused, and that Captain Norris told Sergeant Jenkins that if she had probable cause, she should go in and make an arrest for "Evasion of service, obstruction of justice." When asked how the Defendant was obstructing service of process, Sergeant Jenkins responded, "Well, because of the history **[**20]** in the past . . . [when] his mother had him on the telephone and I plainly heard him say that we were trespassing, that we needed to leave, he was not going to make himself available. That was probable cause." When asked how the Defendant obstructed service on October 24, Sergeant Jenkins said the Defendant "ran into the business, the building there, and would not come out. He would not make himself available . . . . He hid. He hid inside this building."

Sergeant Jenkins testified that she asked the Defendant's mother where the Defendant was located and that the Defendant's mother told her the Defendant was in the kitchen, living area, or bedroom. Sergeant Jenkins stated that she and other deputies entered the house and **[*380]** searched the kitchen, living area, and bedroom. She said that the Defendant's mother began "hysterically crying" and that Sergeant Jenkins attempted to comfort her. Sergeant Jenkins stated that she went downstairs into the basement, looked around, and returned upstairs. Sergeant Jenkins said that two deputies remained in the basement, that she did not search desk drawers, and that she did not see any other deputies search desk drawers. She stated she saw one police dog **[**21]** with Deputy Ballard. She said that she did not know where the Defendant was and that she was not present when the deputies spoke with the Defendant in the basement. She stated that she did not usually arrest a person while serving civil process unless she knew the person had an outstanding criminal warrant.

Sergeant Jenkins testified that she wrote the Defendant's arrest warrant and that she thought the Defendant had obstructed and prevented service of process. She stated that the Defendant did everything possible to prevent the process servers from speaking with him and that the Defendant repeatedly "escalated the situation." She said that if the Defendant had come to the door on October 24, she probably would not have charged him. She stated that she believed the Defendant could have been charged in connection with other incidents before October 24 and that she thought she had been patient with the Defendant. She denied that other deputies behaved aggressively toward the Defendant. She acknowledged that she was named in a federal lawsuit related to the October 24 incident.

On cross-examination, Sergeant Jenkins testified that she reviewed the Rules of Civil Procedure every two or three [**22] months. She said that a person's avoiding service of process was a reason to arrest the person and that if a person avoided civil process, the process server could leave the civil warrant at the person's residence with an adult of appropriate age and discretion. She agreed that the process server's noting the name of the person with whom the server left the warrant complied with the Rules. When asked whether a person's wife was a suitable person to receive process, Sergeant Jenkins responded that it depended on the circumstances. She said that this case was the first time she had made an arrest for "evasion of service" of process and that it was the first time "that anyone has gone to these measures."

Sergeant Jenkins testified that Captain Norris gave her a "direct order to enter the home and make the arrest" if she determined she had probable cause to believe a crime was being committed in her presence and that the Defendant was committing the crime of "evading service of process" by hiding in the house. She said the law stated she could make an arrest every time a person hid from a process server.

On redirect examination, Sergeant Jenkins testified that she believed the Defendant [**23] prevented and obstructed service when he instructed his mother to tell the deputies they were trespassing, when he told his mother he was not going to make himself available to them, and when he "made himself not available to us again" when the deputies entered the house. Sergeant Jenkins agreed that she knew the Defendant's intent was to make himself unavailable "no matter what he had to do." She said that she determined the Defendant was communicating with his mother when she was at the back door, although Sergeant Jenkins could not hear the Defendant's voice.

Knox County Sheriff's Deputy Gregory Stanley testified that on October 24, 2013, he was dispatched to the Defendant's [*381] mother's house to assist with a service of process. Deputy Stanley said that he told the Defendant's mother they were there to serve civil process. He said that he told her if the Defendant came to the door and took the warrant, the deputies would leave. He said that the Defendant's mother pleaded with someone to come out of the house and that he could not hear another person's voice.

Deputy Stanley testified that the Defendant's mother returned and told them the Defendant would not come out and that the Defendant's [**24] father, who was next door, refused to help the Defendant's mother with the situation. Deputy Stanley said that Sergeant Jenkins joined the conversation and that the three deputies entered the house because the Defendant had committed a misdemeanor in their presence "by refusing to come to the door."

Deputy Stanley testified that the deputies explained to the Defendant's mother that they had to enter the house because they did not want to force their way past her. He said that he searched the "main area" near the back door, a bedroom, and the basement and that another deputy searched the attic and the middle level.

Deputy Stanley identified photographs of the crawl space, which were received as exhibits. The photographs depicted the crawl space, a large plastic sheet, which was torn and contained a red substance, a tennis shoe, and a cell phone. He said that half of the basement had a concrete floor and that the other half was a crawl space. He stated that the crawl space had a dirt floor and a layer of plastic as a moisture barrier, that "clutter" was stored in the crawl space, and that the crawl space was accessible through a dumbwaiter door. He stated that the door was about two feet [**25] by two feet in size and that he did not generally enter such small spaces because he was a large man. Deputy Stanley said that he went upstairs and called for a K-9 deputy and his dog because entering the space would have been difficult while wearing police equipment and because it would have posed a "serious risk" to the deputies. Deputy Stanley stated that he was concerned about safety because the Defendant was familiar with the building, would have known where a weapon was located, and could have had a weapon. Deputy Stanley said that he generally assumed any suspect was armed and that the Defendant might have been in a position to assault him.

Deputy Stanley testified that he never entered the crawl space, that he loudly announced himself several times, and that he told the Defendant to come out. Deputy Stanley announced that if the Defendant failed to emerge, he would send in the police dog. Deputy Stanley said he told the Defendant the dog would bite if the Defendant resisted. Deputy Stanley stated that he heard no response, that he returned upstairs, and that he spoke to the Defendant's mother. He said that he told the Defendant's mother a police dog was en route and that he [**26] wanted to

prevent anyone from being bitten. He stated that the Defendant's mother asked if he was threatening her, that he told her he was not, and that he said he was trying to prevent any harm to the Defendant. Deputy Stanley said that the Defendant's mother was overwhelmed and did not know what to do, that Deputy Stanley was concerned for her, and that he "thought it was pretty bad to do your mom this way."

Deputy Stanley testified that he went downstairs and waited about fifteen minutes for the police dog to arrive. He said that Deputy Ballard arrived and announced himself and his dog repeatedly and that the dog had a fifteen-foot leash. Deputy Stanley stated that the dog searched the right side of the crawl space, **[*382]** that it did not find anything, and that it returned to Deputy Ballard. Deputy Stanley said that Deputy Ballard entered the crawl space with the dog to search the left side, that Deputy Stanley heard a commotion, and that Deputy Ballard began commanding the Defendant to show his hands. Deputy Stanley stated that he saw the dog bite the Defendant's pants leg, that the Defendant held his hands underneath his body and refused to move them, and that Deputy Ballard continued **[**27]** to command the Defendant to show his hands.

Deputy Stanley testified that the Defendant attempted to trap and stomp the police dog's head. He said that he was concerned for the safety of Deputy Ballard and the dog because the Defendant hid his hands. Deputy Stanley said he shocked the Defendant with his Taser but did not remember if he announced his intent to use the Taser before firing it.

Deputy Stanley testified that when he fired the Taser, Deputy Ballard immediately pulled the police dog off the Defendant to protect the dog from being shocked. Deputy Stanley said that pulling the dog away also protected the Defendant because being shocked could cause the dog to "go outside of his training" and lose control. Deputy Stanley stated that the Defendant began to comply after the second shot from the Taser. Deputy Stanley said that another deputy fired his Taser, that the Defendant threw up his hands, and that Deputy Stanley did not intend to fire his Taser at the same time as the other deputy.

Deputy Stanley testified that after the Defendant complied, Deputy Ballard and the police dog left the crawl space and that the Defendant complied with Deputy Stanley's commands about how to exit **[**28]** the crawl space. Deputy Stanley stated that during the altercation, the Defendant and the dog did not make any sounds. Deputy Stanley said the Defendant's silence was unusual.

Deputy Stanley testified that he handcuffed the Defendant and told him he was under arrest for "[e]vading process and resisting arrest." Deputy Stanley stated his opinion that refusing to move was "passive resistance" and constituted resisting arrest. He said that the Defendant's refusing to show his hands "put our lives in jeopardy," that the Defendant put the police dog's life in jeopardy when he attempted to harm it, and that both of these actions constituted resisting arrest.

Deputy Stanley testified that when he handcuffed the Defendant, he noticed a dog bite on one of the Defendant's arms and that the wound looked typical of a dog bite. Deputy Stanley said that he took the Defendant upstairs, that he ensured an ambulance was en route to treat the Defendant, and that he escorted the Defendant to his police cruiser. Deputy Stanley stated that the Defendant was cooperative, that the Defendant did not have any weapons, and that Deputy Stanley did not accompany the Defendant into the ambulance.

On cross-examination, Deputy **[**29]** Stanley testified that Sergeant Jenkins made the decision to enter the house and that before the deputies entered the house, they told the Defendant's mother, "[A]ll we want to do is give him this piece of paper." Deputy Stanley recalled that Deputy Bowers was present but could not remember whether he was at the door. Deputy Stanley said that the deputies set up a perimeter around the house to prevent the Defendant's escaping. Deputy Stanley stated that he had a "duty and obligation" to serve the Defendant. When asked whether he felt he had to serve the Defendant "at all costs," Deputy Stanley responded, "Because once he began hiding . . . he was **[*383]** avoiding process . . . . [Breaking] the law, yes, sir."

When asked to recite the wording of the statute he used to arrest the Defendant, Deputy Stanley responded, "He was obstructing service of process." Deputy Stanley said that the Defendant obstructed service because he was "around the corner and . . . by his inaction, refusing to come to the door and accept process . . . . [E]ventually, he

chose to go in the crawl space downstairs and conceal himself in plastic" and did not respond to commands for him to come out. When asked whether the Defendant's actions **[**30]** before the deputies entered the house were sufficient to justify his arrest, Deputy Stanley responded, "He was committing a misdemeanor in our presence . . . [by] avoiding service of process[.]" Deputy Stanley stated that the Defendant's moving into the crawl space and concealing himself in plastic was "more than hiding." Deputy Stanley said that when the Defendant's mother spoke to someone at the door, the Defendant had to have been close because the Defendant's mother had a conversation with him, although the deputies could not hear the Defendant's voice. Deputy Stanley stated that when the deputies entered the house, the Defendant's mother began to cry.

Knox County Sheriff's Deputy Steven Ballard testified that he was the handler for Marco, his police dog, that he and the dog had worked together for three years, and that he was dispatched to the Defendant's workplace on October 24. Deputy Ballard said that he was called to assist in locating a person hiding in a crawl space. He stated that when he arrived, he harnessed his dog and attached a fifteen-foot leash. Deputy Ballard said that he and his dog entered through a back door and that he went downstairs, where Deputy Stanley explained **[**31]** the situation. Deputy Ballard stated that he announced himself and ordered the Defendant to come out with his hands up and that he warned the Defendant that he would be bitten. Deputy Ballard did not recall if he gave the warning multiple times, and he noted that Deputy Stanley had already given the Defendant the opportunity to surrender.

Deputy Ballard testified that he sent his dog into the crawl space, that the dog remained attached to his leash, that the dog "cleared" the right side of the crawl space, and that Deputy Ballard was unable to direct the dog toward the left side. Deputy Ballard said he entered the crawl space to redirect the dog. Deputy Ballard stated that he was uncomfortable entering the small space, that he drew his gun, and that the dog alerted to a human odor and began digging at rolled-up plastic against the foundation wall. Deputy Ballard said that he ordered the Defendant to show his hands, that the Defendant did not comply, that Deputy Ballard prompted the dog to show him the Defendant's location, and that the dog continued digging at the plastic until shoes were visible.

Deputy Ballard testified that he continued commanding the Defendant to show his hands, **[**32]** that the Defendant continued not to comply, and that Deputy Ballard gave his dog a command to bite the Defendant. Deputy Ballard said that although it was dark, he saw a struggle in which the Defendant hit and kicked the dog in the ribs. Deputy Ballard stated that the dog and the Defendant did not make any sounds during the struggle and that the interaction was short. Deputy Ballard said that when the Defendant began kicking the dog, Deputy Ballard told the Defendant that he would call off the dog if the Defendant stopped kicking.

Deputy Ballard testified that he heard a Taser deployment, that he recalled his dog, that he wrapped the leash around his hand, and that he heard two subsequent **[*384]** Taser deployments. Deputy Ballard said that he was in the crawl space and that he continued commanding the Defendant to stop resisting and to come out. He stated that the Defendant said, "[O]kay," and that Deputy Ballard and the dog backed out of the crawl space. Deputy Ballard said that he backed up the staircase, watched the Defendant emerge, and left the building with his dog.

On cross-examination, Deputy Ballard testified that initially, he was not told the charges for which the Defendant would be arrested. **[**33]** Deputy Ballard said that to his knowledge, the other deputies did not locate the Defendant before he arrived. Deputy Ballard stated that he may have told Deputy Stanley he told the dog to "bite his a--."

Deputy Ballard testified that Deputy Stanley was not standing beside him in the crawl space. Deputy Ballard agreed that his dog bit the Defendant's left arm. Deputy Ballard stated that he never saw the Defendant try to hold the dog away from him. When asked whether the first Taser affected the Defendant, Deputy Ballard said that once he recalled the dog, the other two Taser deployments were simultaneous. Deputy Ballard stated that the dog was by his side before the Defendant was totally affected by the Tasers.

After the conclusion of the State's proof, the Defendant made a motion for a judgment of acquittal. The Defendant argued that the evidence was insufficient to prove that on October 24, he prevented or obstructed service of process. The Defendant noted that "prevented or obstructed" was not further defined in the statute and that the trial court had agreed to apply the normal meaning of the words. The Defendant argued that his hiding and the State's

use of the words "evading" or **[**34]** "avoiding" did not rise to the level of preventing or obstructing. In support of his motion, he cited *State v. Harris*, 919 S.W.2d 619 (Tenn. Crim. App. 1995), for the proposition that a defendant's hiding from service of civil process did not create probable cause for an officer to search a place not open to the public. The Defendant noted that Civil Procedure Rule 4 set out an alternative means of service if a person avoided service and that the alternative means did not include obtaining an arrest warrant or searching a residence without a warrant.

The State responded that it was a jury question whether the Defendant prevented or obstructed service when he "used his physical power to prevent himself from being available to go out there," "physically walked away into that house," "placed himself" in the crawl space, concealed himself in the plastic, and refused to comply with the deputies' demands.

Relative to preventing or obstructing service, the trial court found that the Defendant was "not just hiding" because he was "not just preventing the police from knowing where he was." The court found that the police knew where the Defendant was on several occasions, "[a]nd so that's not hiding." The court found that the Defendant knew the police needed to "put something **[**35]** in his hand and he made sure they couldn't do that." The court found that the Defendant's actions were the equivalent to preventing the deputies from serving him because he refused to come to the door and "made it impossible for them to put that piece of paper in his hand. That's not just hiding." The court noted that the Defendant said he was not going to make himself available or cooperate with deputies in order to prevent them from serving him. The court also noted that the Defendant's possibly "wheeling out" in his truck was a "positive act." The court found that the Defendant prevented the deputies from serving process on October **[*385]** 24, as well as on previous occasions for which he was not charged.

Tammy Burgess,[2] the Defendant's wife, testified that she and the Defendant had been married for thirty-one years, that the Defendant worked part time with his brother's landscaping company, and that she and the Defendant had a business designing and making binoculars and telescopes. She said that the machine shop for the business was at his mother's house and that he was arrested at the machine shop.

Ms. Burgess testified that she obtained a Discover credit card in the Defendant's name, that **[**36]** she did not remember how she obtained the card, that she generally did not use the card, and that she decided to use the card and sign the Defendant's name without his knowledge. Ms. Burgess agreed that they received collection calls and that the Defendant did not believe he owed the credit card company.

Ms. Burgess testified that she received a letter from a local attorney indicating a civil lawsuit had been filed in connection with the credit card and that she did not tell the Defendant about the letter. Ms. Burgess denied being afraid of the Defendant and said, "I can't really explain why I don't tell him everything, but I just don't."

Ms. Burgess testified that on September 16, 2013, at 7:00 p.m., a man came to the door in connection with the civil lawsuit, yelled, and beat on the windows and door. She said that the Defendant was not home, that she was caring for her young grandson, and that she was afraid because the man sounded "crazy." She said that she reached for her cell phone to call 9-1-1 and that the man yelled he was going to call a "squad car."

Ms. Burgess testified that the man beat on at set of sliding-glass doors "like he want[ed] to break them" and yelled that he was going **[**37]** to call for a police dog. She said that the man went to his car for several minutes before returning to her house and that the man told "Charlie and Whiskers to go around to the side." Ms. Burgess stated that she did not believe that the man had dogs with him because Whiskers was an unusual name for a dog. She said the man left after several minutes. She stated that she told the Defendant about the incident and that she did not recall the Defendant's taking any action.

Ms. Burgess testified that on September 25, she was preparing her grandson for school when she saw police cars in the driveway. She said that she left the house and spoke to the deputies, that she did not remember what was

[2] Because the Defendant's wife and the Defendant's mother share the same surname, we refer to them as Ms. Burgess and Mrs. Burgess, respectively.

said, and that the deputies tried to give her a summons. She stated that Deputy Bowers was present and that he was not the deputy who attempted to hand her the summons. She said that she told the deputies she would rather not take it, that she did not wish to make the Defendant mad, that the summons was "his business," and that he probably wanted to accept it himself. Ms. Burgess stated that the Defendant would not hurt her and denied reporting to the deputies that the Defendant was violent.

Ms. Burgess **[**38]** testified that she did not refuse to take the summons but that she said she would rather not take it. She said that had the deputy said she had to take it, she would have accepted it. She agreed that the deputies knew she was the Defendant's wife and that the house was the Defendant's residence. Ms. Burgess stated that she was not present during the September 18 incident.

Joshua Roberts, the Defendant's coworker, testified that on September 18, he **[*386]** was at the Defendant's mother's house where landscaping equipment was kept. He said that the Defendant was present, that Deputy Bowers came into the shop, and that the Defendant asked if he needed help. Mr. Roberts stated that Deputy Bowers was thirty or forty feet from the Defendant, that Deputy Bowers said he needed to use the restroom, and that Deputy Bowers walked away. Mr. Roberts denied that Deputy Bowers asked for the Defendant.

On cross-examination, Mr. Roberts testified that he knew who Deputy Bowers was because the Defendant had pointed out Deputy Bowers. Mr. Roberts said that it was possible the Defendant knew Deputy Bowers was trying to contact him.

The Defendant testified that he designed and produced telescopes and binoculars and **[**39]** worked for his brother's commercial landscaping business. He stated that he generally left for work around 7:00 a.m. and returned between 7:00 and 8:00 p.m. He said that years before the trial, a Discover credit card representative called and left a voicemail message threatening to repossess his car and disconnect his electricity. The Defendant said that he called Discover and told them he did not have a credit card and had never used one. The Defendant stated that he asked the person to call him back with a list of the transactions but that the person did not return the call. He said that he called again one week later, spoke to the person, and considered the matter settled after the conversation. He stated that he "just left them with, I don't want to be contacted. I don't want anybody coming to my door."

The Defendant testified that no one contacted him about the debt for years and that on an autumn day, a male sheriff's deputy came to his house asking for "Charles Burgess," which was the Defendant's son's name. The Defendant said that this incident was the first time he knew a credit card debt still existed and that the deputy did not call the Defendant by his name or serve him. **[**40]** The Defendant stated that he asked the deputy if this was about a Discover card and that the deputy responded he did not know. The Defendant said the deputy was not Deputy Bowers.

The Defendant testified that he first became aware Deputy Bowers was trying to serve him when he drove down his driveway and saw a black SUV blocking the entrance. The Defendant said that his son was with him, that the SUV was turned diagonally across the driveway, and that a man leaned against the front of the SUV. The Defendant stated that utility companies habitually parked in his driveway because he lived off of a rural road, that no roadside parking existed, and that the Defendant considered the SUV's presence normal. The Defendant said that he drove through the yard, that the man began to run toward him when he curved off of the driveway, and that the man was about thirty-five feet from the Defendant's truck.

The Defendant testified that he saw the man in his mirror, that the man held something in his hand, and that the Defendant thought the man had drawn a gun. The Defendant said his son thought the man held a radio or "walkie-talkie." When asked whether he intended to hit the man with his truck, the **[**41]** Defendant said, "No. I was just going around him like I normally do." The Defendant said that he did not know the man and that he only saw him for a second before his view was obstructed.

The Defendant identified photographs of his driveway, which were received as exhibits. The Defendant marked the location of the black SUV on one photograph. He said that in one photograph, which was taken just after the September 18 incident, he parked a van in the same location as **[*387]** the black SUV, although the SUV was

about two feet shorter than the Defendant's van. He stated that the photograph also depicted the tire tracks he made in the grass.

The Defendant testified that later the same day, he went to his mother's house and as he walked toward the house, a man walked "through the narrow place where you can get to the back of the house." The Defendant said that he believed the man had come to buy mulch and that he asked the man if he could help him. The Defendant stated that the man stopped, said he had to use the bathroom, and turned and walked away. The Defendant said that he recognized the man's black SUV as the one parked in his driveway. The Defendant stated that his son and Mr. Roberts saw the **[**42]** man and that the man drove to a restaurant beside the house.

The Defendant testified that he began his work route and that his mother called and told him Deputy Bowers was there. The Defendant said he told his mother that he was out of town, that Deputy Bowers could meet him out of town, and that he would return to the house at 5:00 p.m. He stated that he told her to tell "them" to leave because they were trespassing. The Defendant said that he returned to the house before 5:00, that he waited for two hours for Deputy Bowers to return, that Deputy Bowers did not return, and that he left. The Defendant said that Deputy Bowers spoke to Ms. Burgess on September 25.

The Defendant testified that on October 24, he went to his mother's house and spoke to his parents, who were preparing to leave. He said that they saw five or six police cars pull in the driveway and that he told his mother he was going to the basement. The Defendant said that he went into the basement and that the basement had "vent doors" every ten feet, which allowed him to see and hear the police. He stated that the deputies circled the house and knocked at the back door. The Defendant said that after the deputies made a **[**43]** "very threatening statement" to his mother, he hid under a plastic vapor barrier.

The Defendant testified that Sergeant Jenkins came downstairs, that she was alone, and that she said, "I'm going to get you, you little s—." The Defendant said that he and his mother cried. The Defendant said that when Deputy Ballard came downstairs, the Defendant was in disbelief that the deputies threatened him with a dog. The Defendant stated that the deputies released the dog into the crawl space and that the dog bit his feet and hands. The Defendant said that Deputy Ballard was about ten feet away from him near the crawl space's access door and that Deputy Stanley was standing next to the Defendant, although the Defendant did not think Deputy Stanley was aware of it.

The Defendant testified that he did not hear any commands or conversation from Deputy Ballard's location, although he heard instructions and conversation directed at him and the dog coming from Deputy Stanley's location. The Defendant said that he held the dog away from him with his hands, that the dog twisted around and bit him, and that he had scars on his fingers and arms.

The Defendant testified that suddenly, he was shocked multiple **[**44]** times with Tasers. He said that the pins were fired into his leg, chest, and arm, that he dropped the dog, and that he lay still. The Defendant stated that he had never been shocked and that he could not breathe. The Defendant said that the dog "latched onto" his arm and dragged him three feet in the crawl space. The Defendant stated that Deputy Ballard did not pull the dog back until after the deputies stopped shocking him and that the dog remained **[*388]** near the Defendant's feet and pulled off his shoe and socks. The Defendant identified a photograph of his left ankle, which was received as an exhibit. The photograph showed blood, two large lacerations, small abrasions, and puncture wounds. The Defendant said that the wounds left scars.

On cross-examination, the Defendant testified that he and Discover reached an agreement and that he considered the matter settled years before he spoke to the other process server. The Defendant stated that the man showed him a summons and read from it, that the Defendant did not go by the name Charles, that he invited the man inside, and that the man said he could not enter the house. The Defendant said that he told the man, "[T]his better not be about a Discover **[**45]** card."

The Defendant testified that he told the man he had already resolved the matter with Discover. The Defendant also told the man that he told Discover he would sue if he received collection calls or anyone came to the house. The

man responded that he was "just the messenger." The Defendant said that they discussed the Defendant's name not being reflected on the summons and that the man told him he was not going to have the Defendant sign it. The Defendant said the man returned to his truck, made a telephone call, returned, and spoke to the Defendant again.

The Defendant testified that on September 18, the black SUV was parked in such a manner that the rear bumper was about ten feet from the road and that the front bumper was about twenty feet from the road. The Defendant noted that the SUV "left residue" such that he was able to recreate the SUV's position in a photograph. The Defendant denied stopping when he saw the SUV blocking his driveway. He stated that for eighteen years, a tower had been located at the top of a ridge on the property and that the Defendant signed an agreement allowing six utility companies to enter his property in order to service utility lines running to **[**46]** the tower. He said the utility workers told him to drive around their vehicles. The Defendant denied calling the police and said his son did not think the man had a gun.

The Defendant testified that a date stamp on one of the photographs reflecting "10-30-2013" was created when he transferred the file and that the photograph was taken one or two days after the September 18 incident. The Defendant said that he became afraid and contacted the Federal Bureau of Investigation (FBI) and that Ms. Burgess told him about the previous incident in which a person beat on the door. The prosecutor noted that the Defendant's photographs reflected orange leaves on the trees but that the State's photograph did not. The Defendant said that his photographs showed more trees and different trees than the State's photograph.

The Defendant testified that September 18 was the first time he saw Deputy Bowers. The Defendant said that he saw Deputy Bowers at his mother's house and when the Defendant asked if he needed help, Deputy Bowers said he needed a restroom and drove away. The Defendant said that during the telephone conversation, his mother identified Deputy Bowers to the Defendant. He denied that his **[**47]** mother gave him Deputy Bowers's telephone number and told him to call Deputy Bowers. The Defendant stated that he thought it was odd that the man he saw at the end of his driveway later spoke to his mother.

The Defendant testified that he kept equipment at his mother's house, that he spent his childhood there, and that he was familiar with the basement as a hiding place. He said that he did not generally hide in the basement when he saw a police car. He stated that he was afraid and apprehensive based upon "some things" **[*389]** his mother told him and the incident when Deputy Bowers "pull[ed] a gun." The Defendant stated that he did not call the police after the September 18 incident and that he and Ms. Burgess performed an Internet search "on who handles police things." He said that he discovered the FBI handled the prosecution of police departments and that he contacted the FBI.

The Defendant testified that he decided to crawl under the vapor barrier after he heard five to seven deputies at the back door tell his mother they were there to arrest him. He agreed that after the deputies entered the house, they told him to come out of the basement. He said that he did not come out because he did not think **[**48]** they had the right to enter his workshop without a warrant. He denied wrapping himself in the plastic and said it was impossible to wrap oneself in the plastic because it was held down by rocks. He said that he went under the plastic before the deputies ordered him to come out. When asked whether he left his mother to "deal" with the deputies, the Defendant responded that he thought they would go away.

The Defendant testified that he heard a police dog come down the basement steps and that he did not see it. He agreed that when the dog approached him, he did not come out for about five seconds.

Relative to the federal lawsuit, the Defendant testified that the FBI told him that he and his mother had "a very good case" and that his version of events was contained in the complaint. The Defendant read from the federal complaint and agreed that it stated that he was trying to evade and hide from Deputy Bowers. The Defendant agreed that he was seeking $250,000 in damages from the deputies and that he "fully expect[ed]" the case to be resolved in his favor. He noted that he had permanent damage to his arm and a "blown out" eye that interfered with his binocular business. A photograph of the Defendant's **[**49]** arm was received as an exhibit. The photograph depicted four two- and three-inch lacerations on an upper arm. One laceration was sutured with six staples, and another was sutured with two staples.

Joseph Michael Burgess, the Defendant's son, testified that he worked for his uncle's commercial landscaping business. He said that on September 18, 2013, he and the Defendant left the Defendant's house and that when they were halfway down the driveway, they saw a vehicle parked in the driveway such that they could not go around it. He stated that a man stood at the front driver's side of the vehicle, that they began turning to go through the yard and around the vehicle, and that the man began walking toward them. Mr. Burgess denied that it was the first time the Defendant had driven through the yard. Mr. Burgess said that "about the time [the Defendant] had turned at about 90 degrees," the man lunged at the truck and stuck his hand out "to try to get in the way." Mr. Burgess stated that the man had a walkie-talkie in his hand and that the man did not move from the truck's path. Mr. Burgess agreed that there was "plenty of room" to go around the man. Mr. Burgess denied that he and the Defendant **[**50]** said anything to one another about the man.

Mr. Burgess testified that when he and the Defendant pulled into the parking area at their workplace, he saw the same vehicle pull up, stop, and back up. Mr. Burgess said that he went inside and that when he came out, he saw the vehicle parked at a restaurant next door. He did not see the person in the vehicle talk to anyone. Mr. Burgess stated that the Defendant later received a telephone call from the Defendant's mother. Mr. Burgess said that they returned to their workplace between 4:30 **[*390]** and 6:00 p.m., although he did not remember exactly when they arrived.

On cross-examination, Mr. Burgess testified that the man in the driveway drove an SUV. He agreed that he and the Defendant did not say anything after encountering the man. Mr. Burgess denied seeing a man wearing a sheriff's uniform approach the Defendant with a piece of paper later the same day.

Richard Bean, the operations manager for the Defendant's brother's landscaping company, testified that he was the Defendant's friend and brother-in-law. He said that sometime after September 18, he met Deputy Bowers, that Deputy Bowers asked if the Defendant was there, and that Mr. Bean told Deputy **[**51]** Bowers he was not. Mr. Bean stated that Deputy Bowers told him to tell the Defendant that he needed "take care of this summons, because if he doesn't, I'm going to get him."

Margaret Grace Burgess, the Defendant's mother, testified that she saw Deputy Bowers and a female deputy walk into her yard from the parking lot of a restaurant, that Mrs. Burgess spoke to Deputy Bowers, and that as a result of their conversation, she telephoned the Defendant to tell him Deputy Bowers was there. Mrs. Burgess said that the Defendant told her he was out of town but would return and meet with Deputy Bowers around 5:30 p.m. She stated that she relayed the message and that she had the impression Deputy Bowers was going to meet with the Defendant. She said that the Defendant returned about 5:30 or 6:00 p.m. and waited for Deputy Bowers for "several hours."

Mrs. Burgess testified that on October 24, five police cruisers pulled into her driveway, three additional police cruisers parked at the restaurant next door, and unmarked cars parked in her backyard. Mrs. Burgess stated that deputies knocked abruptly on her back door and that when she answered the door, she told them the home was hers. She said that **[**52]** she thought the police were intruding on her home. She stated that deputies were everywhere and that she did not want them to come inside. She said that she did not give them permission to enter, that they entered anyway, and that she counted six deputies. Mrs. Burgess stated that the deputies searched her entire house, opened and searched her closets and shower, and scared her dogs. She said that the deputies did not show her any documents and that a large police dog was taken to the basement. She stated that when the police were at the door, she attempted to talk to the Defendant and that although she heard his voice, she could not see him.

On cross-examination, Mrs. Burgess testified that the Defendant did not go to the basement until after the police arrived. She said that she asked the Defendant to come out and that she knew the Defendant heard her because he answered her.

Upon this evidence, the Defendant was convicted of obstructing service of process, preventing service of process, and preventing or obstructing an arrest. The trial court merged the obstructing and preventing service of process convictions and sentenced the Defendant to six months' supervised probation and service **[**53]** of ten days in jail.

I. Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to support his convictions. The State responds that the evidence is sufficient.

In determining the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a **[*391]** reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *see State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007). The State is "afforded the strongest legitimate view of the evidence and all reasonable inferences" from that evidence. *Vasques*, 221 S.W.3d at 521. The appellate courts do not "reweigh or reevaluate the evidence," and questions regarding "the credibility of witnesses [and] the weight and value to be given the evidence . . . are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984).

"A crime may be established by direct evidence, circumstantial evidence, or a combination of the two." *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998); *see State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

a. Obstructing or Preventing Service of Process

Relative to the convictions for preventing and obstructing service of process, the Defendant argues that hiding is not **[**54]** criminal behavior as contemplated by the statute. The State responds that the Defendant did more than simply "evade" process because he used "his workshop and mother to hinder service efforts and [hid] to impede the officers."

Tennessee Code Annotated section 39-16-602(c) (2014) states that "[it] is an offense for a person to intentionally prevent or obstruct an officer of the state . . . in serving, or attempting to serve or execute, any legal writ or process." Whether an overt act is required to constitute obstructing or preventing service is an issue of first impression.

In construing a statute, this court must ascertain and give effect to the legislative intent without unduly restricting or expanding the statute beyond its intended scope. *State v. Strode*, 232 S.W.3d 1, 9 (Tenn. 2007). The words in the statute must be given their natural and ordinary meaning in light of their statutory context. *Keen v. State*, 398 S.W.3d 594, 610 (Tenn. 2012). "[A]ny forced or subtle construction that would limit or extend the meaning of the language" must be avoided. *Id.* (citation omitted). "If the statutory language is clear and unambiguous, we apply the statute's plain language in its normal and accepted use." *Id.; see State v. Gibson*, 506 S.W.3d 450, 455-56 (Tenn. 2016).

Merriam-Webster defines "obstruct" as "to block or close up by an obstacle," or "to hinder from passage, action, or **[**55]** operation: impede." *Obstruct*, THE MERRIAMWEBSTER DICTIONARY (New ed. 2016). "Prevent" is defined as "to deprive of power or hope of acting or succeeding" or "to keep from happening or existing." *Prevent, id.* "Evade" is defined as "to slip away" or "to take refuge in escape or avoidance." *Evade, id.* Although hiding by its nature makes service of process difficult, we do not think the common understanding of "obstruct" and "prevent" includes mere concealment in the absence of an overt act against an officer serving process. Hiding is more appropriately categorized as a form of evading or avoiding.

A commonsense reading of Code section 39-16-602 leads us to conclude that the legislature did not intend to criminalize merely evading or avoiding civil process servers. We note that throughout the trial and this appeal, the State and its witnesses referenced the Defendant's placing the sheet of plastic over him, placing the house between the Defendant and the deputies, **[*392]** and placing his mother between the Defendant and the deputies as overt acts by which he "prevented" the deputies from reaching him. However, the Defendant had no legal obligation to

facilitate service of process or otherwise cooperate with the **[**56]** deputies by accepting service of process. The Defendant was inside a private residence and chose not to engage with the deputies, who had other means of effecting service of process available to them but elected not to pursue them. His actions did not foreclose the deputies' opportunity to serve him and merely constituted a lack of cooperation with the deputies' chosen method of service of process. Further, the extraordinary measures taken by the deputies offer some explanation for the Defendant's not being inclined to cooperate with them—the large number of deputies who responded to serve a civil warrant, a warrantless intrusion into a private residence by those deputies, the presence of a police dog to serve a civil warrant, and threats that the dog would bite the Defendant amply explain the Defendant's actions.

We also find *State v. Harris*, 919 S.W.2d 619, 623 (Tenn. Crim. App. 1995), to be instructive. In *Harris*, this court held that even if a sheriff believed a person were hiding from a process server, the sheriff was not justified in entering the curtilage of a home without a warrant. The court noted that "nothing justifies the sheriff's proceeding [into the curtilage] to serve civil process even if the sheriff had believed that [the defendant] **[**57]** [were] 'hiding' from service" and that Tennessee Civil Procedure Rule 4 governed the procedure to be followed if a person evaded service. *Id.* The court specifically noted that, as in the present case, no evidence had established that the defendant intentionally prevented or obstructed the officers who came to serve the civil warrant. *Id.* As a result, we read *Harris* to limit the methods of service available to officers to those specified by Rule 4 and Code section 16-15-903(1) when an individual evades or attempts to evade service of civil process.

Tennessee Civil Procedure Rule 4, as codified by Tennessee Code Annotated section 16-15-903(1) (2014), provides that civil service

> shall be made . . . [u]pon an individual . . . by delivering a copy of the warrant, writ or other papers to the individual personally, or if the individual evades or attempts to evade service, by leaving copies of the warrant, writ or other papers at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing in the dwelling house or usual place of abode, whose name shall appear on the proof of service[.]

The deputies' misunderstanding of the elements of the offense notwithstanding, the record reflects in the light most favorable to the State that the conduct each State's witness **[**58]** described was mere avoiding or evading service. The Defendant retreated to the basement when the deputies knocked on the door, and Mrs. Burgess told the deputies he refused to come out and speak to them. When the deputies entered the home without a warrant, the Defendant was found lying beneath or rolled in a sheet of plastic. The evidence also reflects that the deputies unsuccessfully attempted personal service more than twenty times and that as a result, they could have determined the Defendant was evading or avoiding service of process and left the summons and civil warrant with the Defendant's wife pursuant to Civil Procedure Rule 4. However, the deputies chose not to serve her in accordance with the Rule. The Defendant simply declined to cooperate with a process server, which is not a criminal offense.

[*393] In rendering this conclusion, we have also considered the statutory context of the Code section at issue. Code section 39-16-602(a) prohibits preventing or obstructing an officer from effecting an arrest and mirrors the language of subsection (c), although subsection (a), unlike subsection (c), requires force to be used against a law enforcement officer. The legislature enacted a separate statute, Code section 39-16-603, to prohibit a person's evading arrest.[3] Notably, the legislature **[**59]** did not include language criminalizing evading service of process in either the evading arrest statute or in Code section 39-16-602(c), evidencing its intent to exclude evading service of process from being categorized as a criminal offense. In addition, the existence of alternate methods of service for a named defendant determined to be evading service articulated in Civil Procedure Rule 4, when read in conjunction with Code sections 39-16-602 and -603, indicates that the legislature was aware of evasion of service as a possible behavior and declined to create an affirmative duty on the part of civilians to facilitate their being served with civil process. Again, a lack of cooperation in accepting service of process is not a criminal offense.

[3] We note that the legislature amended Code section 39-16-603 to include the word "conceal," effective July 1, 2016.

We conclude that the Defendant's actions on October 24 did not rise to the level of preventing or obstructing an officer in service of process, and we reverse his convictions in Counts 1 and 2, vacate the convictions, and dismiss the charges.

b. Preventing or Obstructing an Arrest

Relative to his conviction for preventing or obstructing an arrest, the Defendant argues that he acted in self-defense and that the deputies used excessive force to effectuate the arrest. The State responds that the Defendant used **[**60]** force against the police dog, an instrumentality of the police, and therefore prevented or obstructed his arrest.

Tennessee Code Annotated section 39-16-602(a) states that "[it] is an offense for a person to intentionally prevent or obstruct anyone known to the person to be a law enforcement officer . . . from effecting a[n] . . . arrest . . . by using force against the law enforcement officer or another." Code section 39-16-602(b) states, "Except as provided in § 39-11-611, it is no defense to prosecution under this section that the . . . arrest . . . was unlawful." "Passive resistance" generally does not constitute using force as contemplated by the preventing or obstructing an arrest statute. *See State v. Corder*, 854 S.W.2d 653, 655 (Tenn. Crim. App. 1992), (concluding that a defendant's not moving and directing obscene language at officers were not sufficient to support a conviction for resisting arrest); *see also* Tenn. Op. Att'y Gen. 00-147, 2000 Tenn. AG LEXIS 149, 2000 WL 159391 (Sept. 26, 2000) (articulating that passive inaction, specifically sitting in a car and refusing to exit, was not resisting arrest).

As a preliminary matter, we do not agree with the State's assertion that a "plain reading" of Code section 39-16-602(a) prohibits a defendant from using force against "an instrumentality" an officer uses to effectuate an arrest. The State relies upon *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), and **[**61]** State v. Jose Roberto Ortiz, No. M1998-00483-CCA-R3-CD, 1999 Tenn. Crim. App. LEXIS 1339, 1999 WL 1295988 (Tenn. Crim. App. Dec. 30, 1999), *perm. app. denied* (Tenn. Sept. 25, 2000). However, the cited cases only state that police dogs are legitimate law enforcement tools and do not determine **[*394]** whether using force against a police dog is contemplated under the preventing or obstructing an arrest statute.

The record reflects that the indictment for Count 3, preventing or obstructing an arrest, states that the Defendant used force against "law enforcement officers." Tennessee Code Annotated section 39-11-106(a)(21) (Supp. 2011) (amended 2014) defines a law enforcement officer as "an officer, employee or agent of government who has a duty imposed by law to . . . maintain public order . . . [or] make arrests for offenses . . . [and] investigate the commission or suspected commission of offenses."[4]

As the State notes in its brief, our courts have acknowledged the use of police dogs as a legitimate law enforcement tool. However, neither our courts nor our legislature have adopted the concept that a police dog is the equivalent to a human law enforcement officer. For example, in *State v. Kenneth Hayes*, No. W2010-00309-CCA-R3-CD, 2011 Tenn. Crim. App. LEXIS 658, 2011 WL 3655130, at *1 (Tenn. Crim. App. Aug. 19, 2011), *perm. app. denied* (Tenn. Nov. 16, 2011), a defendant repeatedly stabbed a police dog but was not prosecuted for aggravated **[**62]** assault or attempted murder, but rather "attempt to commit the intentional killing of an animal worth over $1000[.]" Similarly, if a person killed a police dog, the person could be prosecuted under Tennessee Code Annotated section 39-14-205 (2010) (amended 2015), which appears in the "Offenses Against Property" chapter of the Code and governs the killing of any animal belonging to a person. In addition, the punishment for such an offense is governed by the dog's value, as indicated by an internal citation to the theft statute. *See id.; see also id.* § 39-14-105 (Supp. 2012) (amended 2016, 2017). Our legislature has not evidenced an intent to include police dogs in the definition of law

[4] We note that the jury instructions, which were attached to the Defendant's brief but not included in the appellate record, tracked the statutory language. The Defendant should have sought to supplement the record with the jury instructions if he intended to reference them in his brief. We note that the Defendant has the burden of preparing a fair, accurate, and complete account of what transpired in the trial court relative to the issues raised on appeal. *See, e.g., State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983); T.R.A.P. 24(b).

enforcement officers based on the plain language of the relevant statutes. *See Keen*, 398 S.W.3d at 610; *Gibson*, 506 S.W.3d at 455-56.

The record reflects that, in the light most favorable to the State, the Defendant's kicking the police dog was the only time he used force in the crawl space, which was presumably to defend against the dog's complying with an order from Deputy Ballard to bite the Defendant. Because the dog was not a law enforcement officer, and no evidence was presented to suggest the Defendant used force against any of the numerous deputies involved in this case, the evidence is insufficient **[**63]** to support the Defendant's conviction for preventing or obstructing an arrest. We reverse the judgment of the trial court relative to Count 3, preventing or obstructing an arrest, vacate the conviction, and dismiss the charge.

In consideration of the foregoing and the record as a whole, we reverse the judgments of the trial court, vacate the Defendant's convictions, and dismiss the charges.

ROBERT H. MONTGOMERY, JR., JUDGE

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APP. E

File Name: 19a0194n.06

Case Nos. 18-5177/5179

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIAM CHARLES BURGESS and GRACE BURGESS,	)	
Plaintiffs-Appellees	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE
v.	)	
CHUCK BOWERS JR., WESLEY G. NORRIS, DEBBIE JENKINS, STEPHEN A. BALLARD, GREGORY H. STANLEY, And DAVID THOMPSON	)	
Defendants-Appellants	)	

PETITION FOR RE-HEARING EN BANC

The panel decision conflicts with decisions of the United States Supreme Court in *Tolan v. Cotton*, 572 U.S. 650 (2014) and *Thomas v. Nugent*, 134 S. Ct. 2289, 189 L. Ed. 2d 169 (2014).

The United States Supreme Court has made it clear that the standard for summary judgement will be followed, even in police excessive force, qualified immunity cases. Therefore, consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

GENERAL OBSERVATIONS ABOUT THE OPINION THE OPINION IS DESIGNATED UNREPORTED[1]

The 6 Cir. L.O.P. 32.1(b)(1) Criteria for Publication Panels consider:

A. Application of an established rule to a novel factual situation.

B. Creates a conflict of authority within this circuit.

C. Discussing a factual issue of continuing public interest.

F. Reverses the decision below.

Each of these sections is affected.

A. The novel factual situation is whether a person who has a "workshop" in the basement of his mother's home has an expectation of privacy while in that basement. The decision fails to decide or rule.

B. The panel ruled the officers had probable cause to arrest Mr. Burgess, which is contrary to established laws under *Dodrill v.*

[1] Federal Rules of Appellate Procedure 36 appears to require a Judgment, signed by the Clerk of the Court after an opinion is rendered. "The clerk must prepare, sign, and enter the judgment." However, counsel was advised by the Clerk's office that no Judgment was going to be issued because it was an unreported decision. This is a trap for the unwary. A practitioner who reads FRAP 36 can be waiting for a Judgment to issue before making an application such as this, and the 14 days following the filing of the Opinion can quickly slip away, making his application untimely. FRAP 40 states, "a petition for panel rehearing may be filed within 14 days after entry of judgment." This discourages further review of unreported cases.

Ludt, 764 F.2d 442, 444 (6th Cir. 1985) and *Erebia v. Chysler Plastic Prods. Corp.*, 891 F.2d 1212, 1215 (6th Cir. 1989) where Courts held that a judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect. Mr. Burgess's convictions were reversed on appeal in the state court, and the District Court correctly ruled that there was no probable cause to arrest Mr. Burgess because hiding from service of process is not a crime. Furthermore, the panel erroneously stated that Mr. Burgess was acquitted of his charges. Mr. Burgess's convictions were reversed and vacated by an appeal court, not acquitted by a jury.

C. Sending six (6) or more armed, uniformed officers with a dog and helicopter to the home of Mr. Burgess's mother to serve a civil summons on a man with no criminal record and employing multiple tasers while a trained police dog is attacking is of continuing public interest.

F. The decision was reversed – a criteria to consider for publication.

Even with these compelling reasons why the opinion should be published, the decision is unreported. Counsel asserts the panel does not want the public to know how they ruled. The panel repeatedly uses the police's version of the

incident rather than following clear U. S. Supreme Court law[2], which further demonstrates the ruling is biased in favor of the police and therefore unreported. Clearly the facts of this case are highly egregious, and the activity of the police is outrageous, yet the panel does not even address the overwhelming use of force under the circumstances. Why is there no reasoned discussion of this behavior? Treatment of the facts and the ultimate rulings demonstrate a decision in favor of the police. The Supreme Court in *Tolan v. Cotton* made it clear to the Fifth Circuit that they failed to view the evidence in the light most favorable to *Tolan* as required on summary judgment; and it failed to credit evidence that contradicted key factual conclusion. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). The panel in this case did the same. The panel mentions controlling authority yet fails to follow it in its application.

This counsel understands the tenor of these remarks is coarse and possibly disturbing to the Court as a whole. However, there is right and there is wrong, and this application seeks the full Court to decide whether the panel followed clearly established precedent in this civil rights arena, or not.

Clearly, this Court has two options. First to continue to hide the record of its

[2] in *Tolan v. Cotton*, 572 U.S. 650 (2014); and *Thomas v. Nugent*, 134 S. Ct. 2289, 189 L. Ed. 2d 169 (2014).

shortcomings or two, to set the record straight and uphold the law and the rules of this Court. Which option this Court decides will determine whether the court is truly honorable in the minds of the Burgess family and their counsel.

SPECIFIC REASONS TO REVERSE THE PANEL

This is an appeal seeking qualified immunity for several Knox County Sheriff Deputies. Not once was the overwhelming force committed by the officers discussed by the panel. The decision is a nit picking of facts and reasoning to grant escape for the officers' behavior.

A. Probable Cause to Arrest

The panel decided the officers had probable cause to arrest Mr. Burgess. This decision allowed the panel to dismiss Mr. Burgess's Forth Amendment false arrest claim. The District Judge ruled that the issue of probable cause was not litigated[3]. The panel said there was probable cause because the state grand jury made a probable cause finding by indicting Mr. Burgess. The officers argued Burgess should be collaterally estopped from litigating probable cause. But before a finding of probable cause can be raised in a later proceeding there must be a finding of all the factors allowing collateral estoppel. When determining whether there was a finding of probable cause, the District Court went through a detailed

[3] The Trial Court also ruled Mr. Burgess had a heightened expectation of privacy in his workshop area in his mother's basement.

analysis of collateral estoppel, which was not addressed at all by this panel. This panel, in a footnote, declared that an indictment upon its face by a properly constituted Grand Jury determines probable cause. [*Sixth Circuit Opinion*; Doc. 36-2, pg. 8, footnote 3]. However, the trial court followed the law and applied it to whether Mr. Burgess could be collaterally estopped from litigating probable cause. [Memorandum Opinion; Doc. 70, Page ID #1136-37].

Mr. Burgess was innocent of committing any crime, but the panel said William Burgess was indicted by a grand jury and therefore, he was estopped to deny probable cause, which gave the police the authority to arrest him, thereby denying his right to a false arrest claim. [*Sixth Circuit Opinion*; Doc. 36-2, pg. 8, footnote 3].

Another argument against probable cause is that the Tennessee Court of Criminal Appeals ruled Mr. Burgess did not commit a crime. The panel did not follow the 6th circuit reported opinion of *Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1989) where the court held that a reversed conviction "vacates the judgment entirely, technically leaving nothing to which we may accord preclusive affect." *See also Erebia v. Chysler Plastic Prods. Corp.*, 891 F.2d 1212, 1215 (6th Cir. 1989) ("A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.") Therefore, under this rule, probable cause did not withstand the

appellate court ruling of innocence. The panel said he was acquitted. William Burgess wasn't acquitted; he was ruled INNOCENT by the Tennessee Court of Criminal Appeals. Acquitted means not guilty. It is not a finding of innocence. A reversed conviction from a higher court is different that an acquittal from a jury.

Thus, the panel cannot reverse the District court's decision stating that the officers had probable cause when in fact they did not. Therefore, the officers had no probable cause to enter the house and his workshop and the false arrest claim must stand.

The Appellate panel, contrary to law, argued facts and made decisions that were favorable to the moving party. For instance, the panel stated William Burgess was not an overnight guess, but he was "certainly more than a casual visitor since he used Grace's basement as a workshop." [*Sixth Circuit Opinion*; Doc. 36-2, pg. 10, ¶ 2]. Clearly, a person that has a workshop in a private home would have an expectation of privacy in that area to which he was found as much, or even more, than a casual visitor or an overnight guess. The panel stated "it is difficult to know what significance to assign that fact." [*Sixth Circuit Opinion*; Doc. 36-2, pg. 10, ¶ 2]. But then the panel ruled against Mr. Burgess anyway. Doesn't the well-established law of the Sixth Circuit state inferences should be drawn in favor of the non-moving party? The United States Supreme Court thinks so. *Tolan v. Cotton*, 572 U.S. 650 (2014). This is an issue that should be

addressed and ruled upon by the full Court. This a factual issue that should not be decided on a qualified immunity appeal. In *Booher v. Northern Kentucky University Board of Regents*, the Sixth Circuit denied qualified immunity based on *Johnson v. Jones*, 515 U.S. 304, 313 (1995), acknowledging that "an order denying qualified immunity is immediately appealable insofar as the appeal raises purely legal, rather than factual issues." 163 F.3d 395, 396 (6th Cir. 1998).

The panel's treatment of the case is in clear violation of the United States Supreme Court case, *Tolan v. Cotton*, 572 U.S. 650 (2014). The *Tolan* Court is very instructive in both prongs of qualified immunity and clearly, while reversing the Fifth Circuit, held that the evidence should be viewed in a light most favorable to the non-moving party. *Id.* at 657-58. The Supreme Court could have been talking about this decision when they stated:

> In hold that Cotton's actions did not violate clearly establish law, the Firth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party.

Id. at 657 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

B. Taser and Dog Bite/ Excessive Force Claim

In another part of the case the panel weighed the evidence and failed to credit evidence that contradicted the officers' facts involving the use of tasers and

the dog. One of the biggest errors of this panel was taking evidence favorable to the moving party rather than evidence directly contradicting the moving party. In the excessive force part of the opinion, the panel gives lip service to applying the totality of the circumstances test under *Graham v. Connor*, 490 U.S. 386 (1989). However, the panel never discusses or applies the *Graham* factors in this case. *Graham* requires the court to pay careful attention to the facts and circumstance of each case, including, (1) the severity of the crime at issue, (2) whether the suspect possess an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396. Mr. Burgess pointed out the rule in his brief, but the panel never addressed it. The panel stated, "viewing the facts in the light most favorable to William (Mr. Burgess)" but then goes on to use nothing but the officer's facts when exploring whether excessive force was used." [*Sixth Circuit Opinion*; Doc. 36-2, pg. 12, ¶ 2]. After citing several of the facts the officers proffered, the panel, in a footnote, says that William claimed the officers did not give him any warning of the threat of using a canine and the panel states that the officer said that they did give him a warning. The panel takes the words of the officers over the non-moving party and this is a clear violation of the standard of review.

First, applying *Graham* factors, the dog should not have been employed at all. The offense being used to arrest Mr. Burgess, which turned out to be no

offense at all,[4] was a class B misdemeanor. Second, William Burgess did not pose any threat to any officers. He did not threaten the officers, did not make any aggressive movements, did not have any prior arrests, and the officers did not have any reason to believe he was armed and dangerous. Finally, Mr. Burgess was completely passive and offered no resistance of any kind. He was hiding passively in a corner of a basement without making any movements. This court, in a published opinion, stated that "noncompliance alone does not indicate active resistance; there must be something more..." *Eldridge v. City of Warren*, 535 F. App. 529, 535 (6th Cir. 2013). Again, the panel never applied any of these profoundly established *Graham* factors when taking the officers words over Mr. Burgess's statements.

How the panel's decision to take the officers words that they gave warning to Mr. Burgess when the officer himself testified at trial "I kept watching and the canine keeps digging at the plastic and I can see the bottom of his shoe and that's when I told him to bite his ass." Furthermore, Officer Stanley testified that Ballard told him that as soon as he saw Mr. Burgess he told the canine to "bite his ass." [Ballard Testimony; Doc. 61, Ex. 10-12, pg. 200-01, 248, Page ID # 782-83, 830]. Contrary to the officers self-serving affidavits submitted with their motion to

[4] Merely hiding from a civil process server is not a crime in Tennessee. And the officers knew it. Norris stated at trial,

dismiss, at trial, under oath, Officer Ballard was asked if you had already yelled out you better come out or my dog's going to bite you to which he answered "during the time that the incident was taking place under the floor I don't think that I actually said that to your client." [Ballard Testimony; Doc. 61, Ex. 12, pg. 248, Page ID # 830] Yet the panel ruled the officers gave warnings. [*Sixth Circuit Opinion*; Doc. 36-2, pg. 12, ¶ 3]. At most the panel said it was unsure of where in the continuum the amount of force falls. The panel weighed the evidence and decided inferences in favor of the Defendants.

Another clearly factual dispute is the canine biting Mr. Burgess and the Officers tasing Mr. Burgess. In Mr. Burgess' brief, it states Officer Stanley testified that "Well, my taser has two cartridges, so I have a second shot, And, so I fire again. And it appeared that he started complying. [Stanley Testimony, Doc. 61, Ex. 9, Pg. 171-72, Page ID#735-54]. Even though Officer Stanley admitted that Mr. Burgess was complying, Officer Ballard continued to allow the canine to bite Mr. Burgess pulling him out of the crawlspace by his arms and allowing the dogs to continue biting his feet, creating severe permanent disfiguration and damage. As the Sixth Circuit stated, "[t]he same cases holding the police may not use force on a subdued, non-resisting subject, hold that the right to be free from physical force when one is not resisting the police is a clearly established right." *Wysong v. City of Heath*, 260 F. App'x 848 (6th Cir. 2008); *Drew v. Milka*, 555 F. App'x 574 (6th

Cir. 2014)("Just as the government has no law enforcement interest in ordering a dog bite on someone who is neither resisting arrest nor trying to flee, there is a clearly established constitutional right to be free from dog bites when one is neither resisting arrest nor attempting to flee"). Allowing the dog to continue attacking and biting Mr. Burgess after he was tased and complying is clearly excessive force and violate clearly established law. However, the panel says Burgess never rebutted the Officer's declaration that they tased him because he was attempting to fight off the dog. Isn't the panel supposed to take contradictions, let alone, inferences, in a light more favorable to the nonmoving party? Again, the panel violates clearly established precedent of the Sixth Circuit and the United States Supreme Court.

To add insult to injury, the officers testified after hearing pop, pop, pop (of the taser) they heard Mr. Burgess stating "I can't move. I can't do nothing" " [Stanley Testimony; Doc. 61, Ex. 11, Pg. 220-21, Page ID #802-03]. And even to the panel of this case it should make sense that when a person is tased three (3) times he is not going to be very effective at fighting off an attacking dog. That's why the dog dragged him and tore his arm open. Imagine being tased at least three times, unable to move, and being pulled out of a crawl space by four sharp canine teeth stuck in your bicep, all for hiding from a civil process server. Does that not sound excessive to you? Police may not use force on a subdued, non-resistant

suspect.

Another area of the opinion where the panel gives the presumption to the moving party is stating that the delay of calling off the dog was a non-specified delay. [*Sixth Circuit Opinion*; Doc. 36-2, pg. 13]. While the K-9 was attacking Mr. Burgess, Officer Stanley tased Mr. Burgess two times and recycled his taser once for another five seconds. [Stanley Testimony; Doc.61, Ex.9, Pg. 171-72, Page ID #753-54]. A short time later, Officer Thompson deployed his taser at Mr. Burgess and recycled it for another five second burst. [Id.] Mr. Burgess was effectively tased five times, with each tase lasts 5 seconds for a total of 25 seconds. Even after being tased five times, Officer Ballard allowed the dog to attack Mr. Burgess and dragged him through the crawl space and biting his feet. [Id. at 349-50, Page ID #941-42]. Isn't it a question of fact for the jury to decide whether it is unreasonable for Officer Ballard to delay the recall of his K-9 for over more than 25 seconds after Mr. Burgess was subdued? The facts were clearly established that once Mr. Burgess was subdued or in compliance, any use of force is considered unreasonable. *Wysong v. City of Heath,* 260 F. App.'x 848, (6th Cir. 2008)

The panel stated:

> The court [District Court] reasoned that if the tasers were deployed after the canine began biting William, then he 'had a right to be free from' being tased. [*Id.*] But in so reasoning, the court created a false dichotomy. The Court never explained why William could not have been resisting arrest *while* the dog was trying to apprehend him. And we found no basis in the record or the law to suggest that the two are

mutually exclusive.

[*Sixth Circuit Opinion*; Doc. 36-2, pg. 15]. The panel cited *Queen v. Johnson*, 506 F. App' 909, 916 (11th Cir. 2013) (finding that the simultaneous use of tasers and a canine were reasonable use of force against a noncompliant suspect). First, the panel cited to an Eleventh Circuit Court case in order to grant a judgment in favor of Stanley and Ballard. This case is not binding to the Sixth Circuit. Second, Mr. Burgess stated in his brief that the K-9 subdued and apprehended him and therefore, tasing him approximately five times when the K-9 biting him is excessive force. Furthermore, Officer Stanley testified that Mr. Burgess began complying after his second taser deployment, but instead of stopping tasing him, he recycled his taser one more time. [Stanley Testimony; Doc.61, Ex. 9, Pg. 170-72, Page ID #753-55]. Moreover, Officer Stanley testified that "A short time later, [Officer Thompson], from a different vantage point . . . used his taser . . ." on Mr. Burgess and recycled his taser one time after Mr. Burgess was complying. *Id.* Thus, Officer Ballard and Thompson tasing Mr. Burgess after he was complying is excessive force. Third, binding case law in the Sixth Circuit has "consistently held that various types of force applied after the subduing of a suspect are unreasonable and a violation of a clearly established right."). *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004). Clearly, the panel ignored all the facts and established law in the Sixth Circuit

favoring Mr. Burgess. Once again, the panel is deciding inferences in favor of the moving party.

Remember, all this analysis is being stumbled through with the misconception the officers had probable cause. There was no probable cause, the officers did not have probable cause and the District Court followed the law and declared as much.

The panel goes so far as to rearrange or misconstrue the sequence of facts about the dog biting Mr. Burgess. Mr. Burgess' testimony is cited in the Appellee's Brief, as his trial testimony. [William Burgess Testimony; Doc. 61, Ex. 18, Pg. 348-50, Page ID #940-42]. It is offered to show that the dog began biting Mr. Burgess's thumb and fingers and part of his forearm. Mr. Burgess had bite marks because the dog was twisting his head and biting other places other than the foot, and then Mr. Burgess says he gets tased. *Id.* After he is tased he "drops the dog," because he had "never been tased like that" and he could not defend himself. *Id.* He stated that he could not breathe. *Id.* After being tased the dog latched on to Mr. Burgess' arm and jerked him to the crawlspace about 3 feet. *Id.* He testified that Officer Ballard did not pull the dog back until they were done tasing him and when they pulled the dog back the dog stayed down at his feet and ripped his shoe off. *Id.* This contradicts the officer saying he was kicking the dog so they tased him. Once again, the panel takes the officers' words over the nonmoving party.

CONCLUSION

Because the panel weighed the evidence, construed it in favor of the defendants and violated clear Supreme Court precedent that just recently got the 5th circuit reversed, we ask that the full Court of the 6th Circuit hear this case, and thereafter reverse the panel's decision.

s/ A. Philip Lomonaco
A. Philip Lomonaco, BPR#011579
Attorney for Plaintiffs-Appellees
800 S. Gay Street, Suite 1950
Knoxville, TN 37929
(865) 521-7422

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 35(b)(2) and 32(f), I certified that this brief contains 3,641words, according to the word-processing system used to prepare this brief, and that the font used is Time New Roman, font size 14.

s/ A. Philip Lomonaco
A. Philip Lomonaco, BPR#011579
Attorney for Plaintiffs-Appellees
800 S. Gay Street, Suite 1950
Knoxville, TN 37929
(865) 521-7422

CERTIFICATE OF SERVICE

I certify that the foregoing document was served on all parties or their counsel record through CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ A. Philip Lomonaco
A. Philip Lomonaco, BPR#011579
Attorney for Plaintiffs-Appellees
800 S. Gay Street, Suite 1950
Knoxville, TN 37929
(865) 521-7422