UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6251

THOMAS BRADFORD WATERS, a/k/a Thomas Waters,

Plaintiff - Appellant,

v.

JOHN STEWART, Lake City Police Department; MARK STRICKLAND, Lake City Police Department; SERGEANT ANTHONY BACKHUSS, Lake City Police Department; JODY COOPER, Lake City Police Department,

Defendants - Appellees,

And

A.T.F. AGENT ALAN C. TOWNSEND; JOHN DOE, #1, Florence County E.M.S. Worker; JOHN DOE, #2, Florence County E.M.S. Worker,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Florence. R. Bryan Harwell, Chief District Judge. (4:15-cv-04143-RBH-TER)

Submitted: August 22, 2019 Decided: August 26, 2019

Before KING and RICHARDSON, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Thomas Bradford Waters, Appellant Pro Se. Lisa Arlene Thomas, THOMPSON & HENRY, PA, Conway, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Thomas Bradford Waters appeals the district court's orders accepting the recommendations of the magistrate judge and granting Defendants summary judgment in Waters' 42 U.S.C. § 1983 (2012) action. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Waters v. Stewart*, No. 4:15-cv-04143-RBH-TER (D.S.C. Sept. 24, 2018; Dec. 20, 2018; Mar. 13, 2019). We grant Waters' motion to amend his informal brief, but deny his motion for the appointment of counsel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: October 1, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6251
(4:15-cv-04143-RBH-TER)

THOMAS BRADFORD WATERS, a/k/a Thomas Waters

Plaintiff - Appellant

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Defendants

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

THOMAS BRADFORD WATERS, Plaintiff, -vs- LAKE CITY POLICE OFC. JOHN STEWART, LAKE CITY POLICE OFC. MARK STRICKLAND, LAKE CITY POLICE OFC. SGT. ANTHONY BACKHUSS, LAKE CITY POLICE OFC. JODY COOPER, ATF AGENT ALAN C. STRICKLAND, Defendant.	)	Civil Action No.: 4:15-cv-4143-RBH-TER **REPORT AND RECOMMENDATION**

I. INTRODUCTION

Plaintiff, who is proceeding pro se, brings this action pursuant to 42 U.S.C. § 1983, alleging that Defendants violated his constitutional rights under the Fourth Amendment through unlawful seizure and excessive force during his arrest. Presently before the court is Defendants' Motion for Summary Judgment (ECF No. 140). Because Plaintiff is proceeding pro se, he was advised by an Order (ECF No. 141) pursuant to Roseboro v. Garrison, 528 F.3d 309 (4th Cir. 1975), that a failure to respond to Defendants' motion for summary judgment could result in dismissal of his Complaint. Following several extensions of time, Plaintiff filed his Response (ECF No. 168). All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(d), DSC.

II. FACTS

This action arises from Plaintiff's arrest on March 12, 2015. On that date, Corporal Mark

Strickland and Narcotics Investigator John Stewart, both with the Lake City Police Department, were dispatched to South Morris Street where a caller stated "there were two black males in the middle of the road fighting and that one that did not have on a shirt on had a gun and was headed to 439 South Morris Street (Coker Mobile Home Park)." Incident Report (Ex. to Def. Motion). Plaintiff asserts in his Complaint that he was unarmed. It was near dark when Strickland and Stewart arrived on the scene, separately but at approximately the same time. Stewart Aff. ¶¶ 3-4 (Ex. to Def. Motion). As Stewart exited his vehicle and turned on his flashlight, he immediately saw a gun sticking out of the back pocket of a man fitting the description from dispatch. Stewart Aff. ¶ 4. The Incident Report, prepared by Strickland, indicates "we saw the suspect walk back behind a mobile home after he stuck the pistol in his right rear pocket." Incident Report. Strickland later clarified in his testimony during Plaintiff's criminal trial and in his affidavit that he did not personally observe the gun in Plaintiff's back pocket at that time but Stewart noticed it and yelled "gun!" to alert Strickland. Strickland Aff. ¶ 4 (Ex. to Def. Motion); Strickland Trial Transcript (Ex. C to Pl. Resp.). Plaintiff does not deny having a gun in his possession. Stewart and Strickland recognized Plaintiff and knew that he was a convicted felon and not allowed to possess a firearm. Stewart Aff. ¶ 5; Strickland Aff. ¶ 4.

Plaintiff put his hands up at first but then moved his right hand down next to the pocket where the gun was located. Incident Report; Strickland Aff. ¶ 5; Use of Force Form (Ex. to Def. Motion). Plaintiff asserts that he never reached for his gun and points to a portion of a transcript stating, "You've heard it but, once again, he said: You've got that gun, you blanket tough, and you

didn't want to get to the ground; if you reach for it, you be dead." Transcript (Ex. E to Pl. Resp.).[1] Stewart avers that he drew his weapon and shouted for Plaintiff to get on the ground several times. Stewart Aff. ¶ 4. Plaintiff refused, and Stewart grabbed him. Stewart Aff. ¶ 4. Plaintiff then swung his arm and knocked Stewart's hand off of his shoulder. Incident Report (Supplemental). At that point Strickland tased Plaintiff with one full five-second burst followed by two bursts that lasted maybe a second or two and Plaintiff fell to the ground. Stewart Aff. ¶ 4; Incident Report (Supplemental); Strickland Aff. ¶ 5; Use of Force Form. However, Plaintiff asserts that he was already on the ground (as directed by the officers) and unarmed[2] at the time he was tased. Compl. p. 3 of 13. Further, during Plaintiff's criminal trial, Strickland testified that he did not deploy his taser while Plaintiff was standing, but while he was fighting with Stewart on the ground. Strickland Cross Transcript (Ex. K to Pl. Resp.). Plaintiff also asserts that he was shot with the taser four times: once in the back, once in the back of his right hand, once in the back of his left hand, and once in the back of his right leg. Compl. p. 3 of 13. He attached pictures to his complaint showing injuries only in three places: a thumb, a finger, and an area unidentifiable from the picture. See Compl. Attachments. As Plaintiff was being tased, Stewart removed the weapon from Plaintiff's back pocket and turned it over to Strickland to secure it. Stewart Affidavit ¶ 4; Strickland Aff. ¶ 5.

Plaintiff was told several times while he was on the ground to put his hands behind his back, but the Plaintiff refused. Incident Report (Supplemental). Stewart was able to cuff one of his hands

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[1]The portion of the transcript submitted by Plaintiff does not indicate who the speaker is. However, from the context, it appears to be a closing argument.

[2]Plaintiff asserted in his complaint that he was unarmed. He does not, however, argue that he was unarmed in his Response to the Motion for Summary Judgment. As discussed below, Plaintiff was convicted of possessing a firearm as a felon under 18 U.S.C. § 922(g).

when the taser leads broke.[3] Stewart Aff. ¶ 4; Incident Report (Supplemental). Stewart had to fight with Plaintiff to get his other hand cuffed. Incident Report (Supplemental). During the struggle to get the other hand cuffed, Stewart's finger was cut as Plaintiff was swinging the one hand that was already cuffed. Incident Report (Supplemental).

Once he got both hands cuffed, Stewart lead Plaintiff to the car where Plaintiff became belligerent and started cursing. Stewart Aff. ¶ 4. As Plaintiff refused to get into the car, Stewart grabbed Strickland's taser and got ready to touch-tase Plaintiff, but Plaintiff fell into the car head first and began kicking his feet. Stewart Aff. ¶ 4. As Stewart was attempting to touch-tase Plaintiff, Plaintiff grabbed the taser from Stewart's hand and tried to turn it towards Stewart, stating "I've got your gun." Stewart Aff. ¶ 4. Stewart pulled his handgun and Plaintiff returned the taser to him. Stewart Aff. ¶ 4.

The gun retrieved from Plaintiff was run through NCIC, which indicated that it was stolen out of Darlington County. Incident Report. Defendant Bacchuss presented an affidavit to a judge to procure a warrant for Plaintiff's arrest. Stewart Aff. ¶ 8; Arrest Warrant (Ex. to Def. Motion). His affidavit was based on information on the incident reports and accounts given to him by both Stewart and Strickland. Stewart Aff. ¶ 8. The judge signed off on the warrant finding probable cause for the charge of receiving stolen goods. Arrest Warrant. This charge was subsequently nolle prossed. See Letter from Solicitor (Ex. J to Pl. Resp.). However, Plaintiff was also charged with and subsequently convicted of possessing a firearm as a felon and is currently serving his sentence within the Federal Bureau of Prisons. Stewart Aff. ¶ 6; Judgment (Ex. to Def. Motion).

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[3]Strickland testified that Plaintiff either pulled the taser leads out or they came out during the struggle. Strickland Cross Transcript (Ex. K to Pl. Resp.).

III. STANDARD OF REVIEW

Under Fed.R.Civ.P. 56, the moving party bears the burden of showing that summary judgment is proper. Summary judgment is proper if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment is proper if the non-moving party fails to establish an essential element of any cause of action upon which the non-moving party has the burden of proof. Id. Once the moving party has brought into question whether there is a genuine dispute for trial on a material element of the non-moving party's claims, the non-moving party bears the burden of coming forward with specific facts which show a genuine dispute for trial. Fed.R.Civ.P. 56(e); Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). The non-moving party must come forward with enough evidence, beyond a mere scintilla, upon which the fact finder could reasonably find for it. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir. 1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. Barber v. Hosp. Corp. of Am., 977 F.2d 874-75 (4th Cir. 1992). The evidence relied on must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993).

To show that a genuine dispute of material fact exists, a party may not rest upon the mere allegations or denials of his pleadings. See Celotex, 477 U.S. at 324. Rather, the party must present evidence supporting his or her position by "citing to particular parts of materials in the record,

including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed.R.Civ.P. 56(c)(1)(A); see also Cray Communications, Inc. v. Novatel Computer Systems, Inc., 33 F.3d 390 (4th Cir. 1994); Orsi v. Kickwood, 999 F.2d 86 (4th Cir. 1993); Local Rules 7.04, 7.05, D.S.C.

IV. DISCUSSION

Plaintiff brings this action alleging that Defendants arrested him without probable cause and used excessive force to effectuate his arrest. His claims fall under 42 U.S.C. § 1983. Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" Albright v. Oliver, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (quoting Baker v. McCollan, 443 U.S. 137, 144, n. 3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)). A legal action under § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). To be successful on a claim under § 1983, a plaintiff must establish two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). Plaintiff alleges violations of his Fourth Amendment right to be free from unlawful seizure and his right to be free from excessive force during an arrest.[4] Defendants do not dispute that they were

[4]Plaintiff also lists the Eighth Amendment in his complaint. However, protection against force used during arrest is provided by the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). All claims of use of excessive force during an investigatory stop or arrest or other seizures are governed by the Fourth Amendment's "objective reasonableness" standard. Id.

acting under color of state law at all times relevant to this action.

A. Unlawful Seizure

Plaintiff argues that the information Defendants received via an anonymous 911 call was insufficient to create probable cause for an arrest, no one was fighting at the time they arrived on the scene, Strickland did not observe Plaintiff put a gun in his pocket, he never reached for a gun, and he was on his own property at the time and, thus, had an expectation of privacy. "A warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004). "[A]n indictment, fair upon its face, returned by a properly constituted grand jury, conclusively determines the existence of probable cause." Durham v. Horner, 690 F.3d 183, 189 (4th Cir. 2012) (citing Gerstein v. Pugh, 420 U.S. 103, 118, 95 S. Ct. 854, 865, 43 L. Ed. 2d 54 (1975)). Plaintiff was indicted by a federal grand jury on March 24, 2015, and charged with being a felon in possession of a firearm. See U.S. v. Waters, Crim. No. 4:15-cr-158-BHH. "Notwithstanding the conclusive effect of the indictments, our precedents instruct that "a grand jury's decision to indict ... will [not] shield a police officer who deliberately supplied misleading information that influenced the decision." Durham, 690 F.3d at 189 (citing Goodwin v. Metts, 885 F.2d 157, 162 (4th Cir.1989)). Although Plaintiff argues that some of the information provided by Defendants is fabricated, he does not dispute that Stewart saw the gun in Plaintiff's back pocket and both Stewart and Strickland recognized Plaintiff from previous dealings with him and knew that he was a convicted felon and that he was not allowed to have a gun in his possession. Therefore, Plaintiff fails to create an issue of fact that any officer supplied misleading information in obtaining the grand jury indictment. Accordingly, Plaintiff cannot succeed on his claim of

unlawful seizure under the Fourth Amendment.[5]

B. Excessive Force

Plaintiff also argues that Defendants' use of force against him during his arrest was excessive because he never reached for a gun and was already on the ground when he was tased. As previously noted, protection against force used during arrest is provided by the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). All claims of use of excessive force during an investigatory stop or arrest or other seizures are governed by the Fourth Amendment's "objective reasonableness" standard. Id. The test for excessive force in the arrest context requires "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government's interests alleged to justify the intrusion." Tennessee v. Garner, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The standard for measuring reasonableness of force is wholly objective. The objective reasonableness test requires careful attention to the circumstances of a particular case, including the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting seizure or attempting to evade seizure by flight. Graham, 490 U.S. at 396; Foote v. Dunagan, 33 F.3d 445 (4th Cir.1994). Other relevant factors include the extent of the plaintiff's injury and any effort made by the officer to temper or to limit the amount of force used. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416 (2015) (noting there is

[5]Defendants also argue that Plaintiff's claim is barred by Heck v. Hemphrey, 517 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), which prohibits plaintiffs from collaterally attacking their convictions via a § 1983 claim for damages. However, "a charge that probable cause for a warrantless arrest was lacking, and thus that the seizure was unconstitutional, would not necessarily implicate the validity of a subsequently obtained conviction—at least not in the usual case." Brooks v. City of Winston-Salem, 85 F.3d 178, 182 (4th Cir. 1996) (citations omitted)). Thus, this argument is without merit.

no exclusive list and such factors were listed "only to illustrate the types of objective circumstances potentially relevant to a determination of excessive force"). "In considering whether an officer used reasonable force, a court must focus on the moment that the force is employed," Henry v. Purnell, 652 F.3d 524, 531 (4th Cir. 2011) (citing Elliott v. Leavitt, 99 F.3d 640, 643 (4th Cir.1996)), recognizing that officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. Graham, 490 U.S. at 396.

Defendants were dispatched to Plaintiff's location to investigate a report of a fight between two individuals, one of whom had a gun. Thus, at the time of Defendants' arrival on the scene, they had information of a potentially violent situation. Further, it is undisputed that Stewart observed a gun in Plaintiff's possession and both Stewart and Strickland recognized Plaintiff as a convicted felon from their previous interactions with him. In his affidavit Strickland stated that "we've had to fight [Plaintiff] every time we've dealt with him." Strickland Aff. ¶ 5. While a dispute of fact exists as to whether Plaintiff reached for his gun when Stewart and Strickland first approached him and whether he voluntarily got on the ground at their command, the undisputed facts indicate that Plaintiff actively resisted arrest on the ground while Stewart attempted to handcuff him.[6] Plaintiff does not dispute that he struggled and resisted on the ground as Stewart tried to handcuff him or that he had a gun during this struggle. Stewart Aff. ¶ 4. Strickland testified that at the time he used his taser, Plaintiff and Stewart were on the ground and Stewart was underneath Plaintiff. Strickland Cross Transcript (Ex. K to Pl. Resp.). Based on these facts, the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether

[6]Plaintiff states in his Response that he never tried to flee and did not resist arrest because "I never committed a crime to be placed under arrest and . . . I can't actively resist arrest if I was never placed under arrest." Pl. Resp. p. 13.

Plaintiff was actively resisting seizure all weigh in favor of Defendants and a finding that the force used was reasonable.

"To properly consider the reasonableness of the force employed [the court] must 'view it in full context, with an eye toward the proportionality of the force in light of all the circumstances. Artificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness.'" Smith v. Ray, 781 F.3d 95, 101 (4th Cir. 2015) (citing Waterman v. Batton, 393 F.3d 471, 481 (4th Cir.2005)). "[T]asers are proportional force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser." Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 903 (4th Cir.) (emphasis in original), cert. denied sub nom. Vill. of Pinehurst, N.C. v. Estate of Armstrong, 137 S. Ct. 61, 196 L. Ed. 2d 32 (2016); see also Sawyer v. Asbury, 537 F. App'x 283, 292 (4th Cir. 2013) (citation omitted) ("A law enforcement officer is justified in the use of any force which he reasonably believes to be necessary to effect arrest or hold someone in custody and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm."). Plaintiff fails to create an issue of fact on his excessive force claim in light of all the circumstances present here, where Defendants responded to a report of a physical altercation between two people and one had a gun, observed that Plaintiff had a gun in his possession, recognized Plaintiff as a convicted felon, knew of his criminal history (which includes violent crimes, see Arrest Record (Ex. to Def. Motion)), and knew of his propensity to put up a fight in his encounters with police. In addition, Plaintiff struggled with Stewart on the ground as Stewart attempted to place him in handcuffs. At the time of the struggle, Plaintiff still had possession of the hand gun and was at an advantage over Stewart because Stewart was underneath him. Given

the facts known to Stewart and Strickland at the time they approached Plaintiff, the struggle that ensued between Plaintiff and Stewart on the ground, and the fact that Plaintiff still had possession of a gun while he was struggling with Stewart and resisting arrest, a reasonable officer would perceive some immediate danger that could be mitigated by using the taser. Indeed, once Strickland deployed his taser, Stewart was able to get at least one of Plaintiff's hands cuffed and retrieve the gun from Plaintiff's possession. Although Plaintiff continued to struggle, the threat of danger had been mitigated by the use of the taser to retrieve the gun. Plaintiff has failed to present sufficient evidence to show that Strickland's use of the taser to bring Plaintiff into compliance during his arrest was objectively unreasonable. Accordingly, summary judgment is appropriate on this claim.

C. Respondeat Superior

Plaintiff also names Jody Cooper as a Defendant in this action, who was the Chief of the Lake City Police Department at the time of Plaintiff's arrest. However, he makes no allegations regarding Cooper's involvement in his arrest. Instead, he alleges that Cooper failed to punish Stewart for his misconduct and failed to provide the officers with more up to date equipment, such as tasers with cameras and that could download information regarding the use of the taser. Because there is no doctrine of respondeat superior in § 1983 claims, Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691–94, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a defendant is liable in his individual capacity only for his personal wrongdoing or supervisory actions that violated constitutional norms, see Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir.1994) (setting forth elements necessary to establish supervisory liability under § 1983). A plaintiff must establish three elements to prevail under § 1983 on a theory of supervisory liability under § 1983: "(1) that the supervisor had

actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices,'; and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." Shaw, 13 F.3d at 799. Plaintiff fails to present sufficient evidence to meet any of these three elements. Therefore, summary judgment is appropriate as to his claim against Cooper as well.[7]

V. CONCLUSION

For the reasons discussed above, it is recommended that Defendants' Motion for Summary Judgment (ECF No. 140) be granted and this case be dismissed in its entirety.

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

July 30, 2018
Florence, South Carolina

The parties are directed to the important information on the following page.

[7]To the extent Plaintiff has alleged that Defendants conspired to have him arrested and prosecuted, his claim fails. Establishing a civil conspiracy under 42 U.S.C. § 1983 requires a plaintiff to show that at least two defendants "acted jointly in concert and that some overt act was done in furtherance of the conspiracy which resulted in [plaintiff's] deprivation of a constitutional right." Hinkle v. City of Clarksburg, 81 F.3d 416, 421 (4th Cir. 1996). As discussed above, Plaintiff has failed to present sufficient evidence to create an issue of fact of to whether Defendants violated his constitutional rights. As such, any conspiracy claim necessarily fails as well.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
Post Office Box 2317
Florence, South Carolina 29503

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Thomas Bradford Waters , Plaintiff, v. Lake City Police Ofc. John Stewart, Lake City Police Ofc. Mark Strickland, Lake City Police Sgt. Anthony Backhuss, and Lake City Police Ofc. Jody Cooper, Defendants.	Civil Action No.: 4:15-cv-04143-RBH **ORDER**

Plaintiff Thomas Bradford Waters, a federal prisoner proceeding pro se, brings this action pursuant to 42 U.S.C. § 1983. The matter is before the Court for consideration of Plaintiff's objections to the Report and Recommendation ("R & R") of United States Magistrate Judge Thomas E. Rogers, III, who recommends granting Defendants' motion for summary judgment and dismissing this action.[1] *See* ECF Nos. 172 & 179.

Legal Standards

I. Review of the R & R

The Magistrate Judge makes only a recommendation to the Court. The Magistrate Judge's recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court must conduct a de novo review of those portions of the R & R to which specific objections are made, and it may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the

[1] The Magistrate Judge issued the R & R in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.).

matter with instructions. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

The Court must engage in a de novo review of every portion of the Magistrate Judge's report to which objections have been filed. *Id.* However, the Court need not conduct a de novo review when a party makes only "general and conclusory objections that do not direct the [C]ourt to a specific error in the [M]agistrate [Judge]'s proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). In the absence of specific objections to the R & R, the Court reviews only for clear error, *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005), and the Court need not give any explanation for adopting the Magistrate Judge's recommendation. *Camby v. Davis*, 718 F.2d 198, 199–200 (4th Cir. 1983).

II. Summary Judgment

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Reyazuddin v. Montgomery Cty., Md.*, 789 F.3d 407, 413 (4th Cir. 2015); *see* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party, *Reyazuddin*, 789 F.3d at 413, but the Court "cannot weigh the evidence or make credibility determinations." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 569 (4th Cir. 2015).

Moreover, "the mere existence of *some* alleged factual dispute between the parties will not

defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "A dispute of material fact is 'genuine' if sufficient evidence favoring the non-moving party exists for the trier of fact to return a verdict for that party." *Seastrunk v. United States*, 25 F. Supp. 3d 812, 814 (D.S.C. 2014). A fact is "material" if proof of its existence or nonexistence would affect disposition of the case under the applicable law. *Anderson*, 477 U.S. at 248.

At the summary judgment stage, "the moving party must demonstrate the absence of a genuine issue of material fact. Once the moving party has met his burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show that there is a genuine issue for trial." *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 874–75 (4th Cir. 1992) (internal citation omitted). Summary judgment is not warranted unless, "from the totality of the evidence, including pleadings, depositions, answers to interrogatories, and affidavits, the [C]ourt believes no genuine issue of material fact exists for trial and the moving party is entitled to judgment as a matter of law." *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 385 (4th Cir. 2013); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

Discussion

Plaintiff brings this § 1983 action against Defendants—officers employed by the Lake City Police Department—asserting several claims arising from his arrest on March 12, 2015. Plaintiff was indicted in this district court on March 24, 2015, for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and he proceeded to trial on September 14, 2015, was found guilty, and sentenced to ten years' imprisonment. *See United States v. Waters*, No. 4:15-cr-00158-BHH-1

(D.S.C.).[2] The Fourth Circuit affirmed his conviction and sentence on direct appeal, summarizing the evidence presented at trial regarding Plaintiff's arrest:

> On the evening of March 12, 2015, an anonymous tipster called the Lake City PD to report a fight at the Wedgefield Trailer Park in Lake City. The tipster related that the suspect—who was armed with a handgun—had "no shirt, [a] husky build, [and] short dreads," and had assaulted a person wearing a red shirt. The suspect's lack of a shirt was noteworthy because it was a cold evening. Investigator Stewart accompanied other patrol units, including that of Cpl. Strickland, in responding to the call. While the police officers were en route to Wedgefield, police dispatch reported that the suspect was walking toward Coker Trailer Park, which adjoined Wedgefield.
>
> When Stewart and Strickland arrived at the Coker Park, they saw a man—who turned out to be Waters—fitting the description provided by the tipster. Officer Stewart flashed a light on Waters, at which point Stewart "immediately saw something bulging out of [Waters's] right back pocket that appeared to be the handle of a gun." Stewart promptly drew his service weapon and ordered Waters "several times" to get down on the ground. Waters refused to comply, however, and Stewart then "got behind [Waters] to try to cuff him up." A struggle ensued, and Waters knocked Stewart's hand away. When Strickland saw Waters reach for his back pocket—where Stewart had previously seen what he thought to be the handgun—he tased Waters. Waters fell to the ground, and Stewart retrieved the handgun from Waters's pocket and threw it aside. Stewart had only partially handcuffed Waters's hands when his taser lead broke. Stewart eventually completed the handcuffing of Waters.
>
> Stewart then attempted to place Waters in the police vehicle. At that point, Waters "fell in the vehicle head first and began kicking." Stewart, however, eventually secured Waters in the police car. Stewart then retrieved Waters's handgun from the ground and gave it to Cpl. Strickland. The Hi-Point pistol was promptly identified as having been stolen in Darlington County, South

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[2] The Court takes judicial notice of Plaintiff's criminal case. *See* Fed. R. Evid. 201(c)(1), (d) ("The court . . . may take judicial notice on its own . . . [and] may take judicial notice at any stage of the proceeding."); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) ("The most frequent use of judicial notice of ascertainable facts is in noticing the content of court records.").

Carolina.

United States v. Waters, 697 F. App'x 760 (4th Cir. 2017) (alterations in original; internal citations omitted), *cert. denied*, 138 S. Ct. 705 (2018).

Less than a month after his criminal trial, Plaintiff filed a verified complaint[3] pursuant to 42 U.S.C. § 1983 seeking monetary relief and alleging that he was arrested unlawfully, that Defendants conspired to have him arrested and prosecuted, and that excessive force was used in effectuating his arrest. *See* Ver. Comp. (ECF No. 1) (signed Sep. 28, 2015). Defendants filed a motion for summary judgment, *see* ECF No. 140, and the Magistrate Judge recommends granting the motion. *See* R & R at p. 12. Plaintiff has filed objections to the R & R. *See* Pl.'s Objs. [ECF No. 179]. Defendants have not responded to Plaintiff's objections.

I. Unlawful Seizure and Civil Conspiracy Claims

The Magistrate Judge recommends granting summary judgment as to Plaintiff's unlawful seizure and civil conspiracy claims because he fails to present sufficient evidence to create an issue of fact as to whether Defendants violated his constitutional rights. *See* R & R at pp. 7–8, 12 n.7. Plaintiff objects to this recommendation. *See* Pl.'s Objs. at pp. 1–5, 10.

Regardless, on a separate ground raised and argued by Defendants, the Court finds these two claims are subject to dismissal because they are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).[4]

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[3] Plaintiff's verified complaint is based on personal knowledge and therefore acts an opposing affidavit for summary judgment purposes. *See Carter v. Fleming*, 879 F.3d 132, 141 n.8 (4th Cir. 2018) ("'[A] verified complaint is the equivalent of an opposing affidavit for summary judgment purposes, when the allegations contained therein are based on personal knowledge.'" (alteration in original) (quoting *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991))); *Davis v. Zahradnick*, 600 F.2d 458, 460 (4th Cir. 1979) (holding that factual allegations contained in a verified complaint may establish a prima facie case under § 1983 sufficient to defeat summary judgment).

[4] The Magistrate Judge rejects Defendants' argument regarding *Heck*. *See* R & R at pp. 7–8 & n.5. The Court respectfully disagrees with the Magistrate Judge's conclusion.

In *Heck*, the Supreme Court held that to recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction invalid, a plaintiff bringing a § 1983 claim must establish that the conviction or sentence has been reversed, expunged, or otherwise declared invalid.[5] 512 U.S. at 487; *see Muhammad v. Close*, 540 U.S. 749, 751 (2004) ("[W]here success in a prisoner's § 1983 damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.").

Plaintiff was tried, convicted, and sentenced in this very district court for being a felon in possession of a firearm. In fact, in Plaintiff's criminal case, Judge Hendricks denied his motion to suppress challenging the validity of officers' search and seizure of him. *See Waters*, No. 4:15-cr-00158-BHH-1, at ECF No. 63 (motion); *id.* at ECF No. 96 (transcript of suppression hearing). *Heck* bars Plaintiff's unlawful seizure and civil conspiracy claims because success on them would necessarily imply the invalidity of his federal conviction and sentence (including Judge Hendricks' suppression ruling), which have not been overturned or otherwise called into question. *See Young v. Nickols*, 413 F.3d 416, 417 (4th Cir. 2005) ("*Heck*... bars a prisoner's § 1983 claim if the relief sought necessarily implies the invalidity of his criminal judgment."). Accordingly, the Court will dismiss Plaintiff's unlawful seizure and civil conspiracy claims without prejudice. *See, e.g.*, *Russell v. Guilford Cty. Municipality*, 599 F. App'x 65 (4th Cir. 2015) (indicating a dismissal based on *Heck* should be without prejudice); *Poston v. Conrad*, 580 F. App'x 180 (4th Cir. 2014) (same).

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[5] Although *Heck* does not apply to claims of false arrest in the pre-conviction context when criminal charges are still pending, *see Wallace v. Kato*, 549 U.S. 384 (2007), that is not the case here because Plaintiff has been convicted.

II. Excessive Force Claims

Plaintiff also alleges officers used excessive force in effectuating his arrest.

A. Applicable Law

The Fourth Amendment prohibition against unreasonable seizures bars the use of excessive force on free citizens, whether it be "in the course of an arrest, investigatory stop, or other 'seizure.'" *Graham v. Connor*, 490 U.S. 386, 395 (1989). The Court must apply an "objective reasonableness" standard in determining whether an officer has used excessive force when seizing a free citizen. *E.W. by & through T.W. v. Dolgos*, 884 F.3d 172, 179 (4th Cir. 2018). "The question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force." *Anderson v. Russell*, 247 F.3d 125, 129 (4th Cir. 2001).

This objective inquiry is based on the totality of the circumstances, and it requires an examination of the officer's actions in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation—subjective motives, intent, and/or propensities are irrelevant. *Dolgos*, 884 F.3d 179. A non-exhaustive list of factors to consider include: (1) "the severity of the crime at issue," (2) "whether the suspect poses 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.* (citing *Graham*, 490 U.S. at 396). "Evaluating the reasonableness of the officer's actions 'requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'" *Smith v. Ray*, 781 F.3d 95, 101 (4th Cir. 2015) (quoting *Graham*, 490 U.S. at 396).

B. Analysis

1. Defendants Stewart and Strickland

In his verified complaint, Plaintiff alleges that two instances of excessive force occurred—(1) tasing and handcuffing at the arrest scene and (2) tasing at the jail—and that Defendants John Stewart and Mark Strickland participated in this alleged excessive force. *See* ECF No. 1.

Regarding the first alleged instance of excessive force, Plaintiff alleges in his verified complaint that Defendants Stewart and Strickland "shot me multiple times all from the back while I was face down on the ground. I was hit 4 times with an electronic stun gun/taser. This was done while I was unarmed[,] on the ground[,] and not being a threat to either officer." Ver. Compl. at p. 3. Plaintiff further alleges Defendant "Stewart also put the handcuffs on super tight cutting my wrist all up, and makeing [*sic*] me lose feeling in both of my hands for hours." *Id.* Plaintiff also submitted color photographs of his alleged injuries with his verified complaint. *See* ECF No. 1-1. Meanwhile, in support of their motion for summary judgment, Defendants Stewart and Strickland have submitted affidavits (reiterating their trial testimony) that Plaintiff was actively resisting arrest on the ground while Stewart attempted to handcuff him. Although *Heck* precludes Plaintiff from asserting he did not have a gun during this struggle,[6] *Heck* does not totally bar him from raising an excessive force claim. Moreover, viewing the evidence in the light most favorable to Plaintiff, "the record before the Court nevertheless contains competing factual claims sufficient to create genuine issues of material fact as to the quantity of force used by the officers as well as the circumstances under which the force was used." *Young v. Burke*, No. 2:11-cv-00837-SB, 2012 WL 12898748, at *4 (D.S.C. Aug. 15, 2012) (denying summary judgment for similar reasons). **However, the Court notes that the trial transcript indicates**

[6] As mentioned above, Plaintiff was convicted of being a felon in possession of a firearm, and thus for purposes of this action, the Court cannot accept as true Plaintiff's allegation that he "was unarmed." Ver. Compl. at 3; *see, e.g., Young*, 2012 WL 12898748, at *4 (noting *Heck* precluded the plaintiff—who had been convicted of being a felon in possession of a firearm—from asserting "that he was not in possession of a handgun, as doing so would undermine the validity of his conviction").

Defendant Strickland had a camera during Plaintiff's arrest, and that this video was played during trial. Defendants have not submitted this video with their motion for summary judgment, and the Court requests them to do so.

Regarding the second alleged instance of excessive force, Plaintiff alleges in his verified complaint that after being transported to jail, Defendant "Stewart came to the car and tryed [*sic*] to pull me out by my cuffs. When I pull myself backwards, he [Strickland] then pulled out his taser and shot me in the back of my leg." Ver. Compl. at pp. 4–5. Plaintiff also submitted a color photograph of his alleged injury with his verified complaint. *See* ECF No. 1-1. Plaintiff claims Defendant Strickland "did nothing to protect" him from Defendant Stewart's tasing. The Court notes neither the Magistrate Judge nor Defendants address this second instance of alleged excessive force (i.e., that Plaintiff allegedly was tased while in handcuffs at the jail). Thus, the Court cannot determine if summary judgment is appropriate based on the record.[7]

Based on the foregoing, the Court declines to grant summary judgment on this excessive force claim at this time and will reserve its ruling pending Defendants' supplement to their prior motion for summary judgment. **Defendants shall have thirty (30) days to submit any additional evidence and briefing in support of summary judgment on Plaintiff's excessive force claims against Defendants Strickland and Stewart.**

2. Defendants Backhuss and Cooper

Plaintiff also sues Defendants Jody Cooper and Anthony Backhuss, but his verified complaint

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[7] The Court encourages Defendants to review the trial transcript in Plaintiff's criminal case. There, Defendant Strickland testified Plaintiff was "still belligerent" while being booked at the jail. *See United States v. Waters*, No. 4:15-cr-00158-BHH-1, at ECF No. 142 at p. 74. Defendants should also consider submitting any video footage, affidavits, or other evidence regarding Plaintiff's excessive force claims.

does not indicate these defendants were personally involved in the arrest or the alleged excessive force instances. "In order for an individual to be liable under § 1983, it must be affirmatively shown that the official charged ***acted personally*** in the deprivation of the plaintiff's rights. . . . Consequently, [Defendants] must have had personal knowledge of and involvement in the alleged deprivation of [Plaintiff]'s rights in order to be liable." *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985) (internal quotation marks omitted) (emphasis added); *see* 28 U.S.C. §1915(e)(2)(B)(ii) (providing that in a proceeding in forma pauperis, "the court shall dismiss the case *at any time* if the court determines that . . . the action . . . fails to state a claim on which relief may be granted" (emphasis added)). Also, as the Magistrate Judge correctly explains, Plaintiff fails to establish a § 1983 supervisory liability claims against Defendant Cooper (who was the Chief of the Lake City Police Department at the time of Plaintiff's arrest). The Court will therefore dismiss Plaintiff's excessive force claims against Defendants Cooper and Backhuss due to their lack of personal involvement.

Conclusion

For the foregoing reasons, the Court **ADOPTS IN PART AND AS MODIFIED** the Magistrate Judge's R & R [ECF No. 172] regarding Plaintiff's § 1983 claims for unlawful seizure and civil conspiracy, **GRANTS** Defendants' motion for summary judgment [ECF No. 140] as to these claims, and **DISMISSES** these claims *without prejudice* pursuant to *Heck*.

The Court declines to adopt the R & R as to Plaintiff's excessive force claims, and hereby **RECOMMITS** this matter to the Magistrate Judge for further pretrial handling. **Defendants shall have thirty (30) days to submit any supplemental motion for summary judgment (including additional evidence and briefing) in support of summary judgment on Plaintiff's excessive force claims against Stewart and Strickland.** To clarify, Plaintiff's only remaining claims are his excessive

force claims and the only remaining defendants are Defendants Stewart and Strickland.[8]

IT IS SO ORDERED.

Florence, South Carolina
September 24, 2018

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

[8] Upon recommital, the Magistrate Judge should address the discovery issues raised in Plaintiff's recent motions [ECF Nos. 175 & 183].

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Thomas Bradford Waters , Plaintiff, v. Lake City Police Officer John Stewart and Lake City Police Officer Mark Strickland, Defendants.	Civil Action No.: 4:15-cv-04143-RBH-TER **ORDER**

Plaintiff Thomas Bradford Waters brought this action pursuant to 42 U.S.C. § 1983 asserting claims relating to his arrest on March 12, 2015. Prior to filing this action, Plaintiff had been indicted, tried, and convicted in this district court for being a felon in possession of a firearm; his conviction stemmed from the March 12, 2015 arrest. The Court issued an order granting the named defendants' motion for summary judgment as to Plaintiff's § 1983 claims for unlawful seizure and civil conspiracy but denying the motion as to his excessive force claims. *See* ECF No. 184. As a result of that order, Plaintiff's only remaining claims are his excessive force claims and the only remaining defendants are Defendants John Stewart and Mark Strickland (collectively, "Defendants").[1]

Plaintiff has now filed a motion seeking reconsideration of the Court's prior order. *See* Motion to Reconsider [ECF No. 191]. Defendants have filed a response in opposition to Plaintiff's motion. *See* ECF No. 202. Plaintiff has filed a reply. *See* ECF No. 204. For the reasons below, the Court grants in part and denies in part Plaintiff's motion to reconsider.

[1] As to Plaintiff's excessive force claims, the Court gave Defendants thirty days to submit any supplemental motion for summary judgment and recommitted the matter to the Magistrate Judge for further pretrial handling. *See* ECF No. 184 at p. 10. Defendants have filed their supplemental motion for summary judgment, which is pending before the Magistrate Judge. *See* ECF No. 206.

Legal Standard

Federal Rule of Civil Procedure 54(b) governs the Court's reconsideration of interlocutory orders such as one granting in part and denying in part summary judgment. *See generally Carlson v. Boston Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017); *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003); *see, e.g.*, *McClary v. Lightsey*, 738 F. App'x 230 (4th Cir. 2018) (recognizing an order granting in part and denying in part summary judgment is interlocutory). Rule 54(b) permits a district court to revise "any order or other decision . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b).

The Fourth Circuit has articulated the standard for evaluating Rule 54(b) motions:

> Compared to motions to reconsider *final* judgments pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Rule 54(b)'s approach involves broader flexibility to revise *interlocutory* orders before final judgment as the litigation develops and new facts or arguments come to light. . . .
>
> [However], the discretion Rule 54(b) provides is not limitless. For instance, courts have cabined revision pursuant to Rule 54(b) by treating interlocutory rulings as law of the case. The law-of-the-case doctrine provides that in the interest of finality, when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. Thus, a court may revise an interlocutory order under the same circumstances in which it may depart from the law of the case: (1) a subsequent trial produc[ing] substantially different evidence; (2) a change in applicable law; or (3) clear error causing manifest injustice. This standard closely resembles the standard applicable to motions to reconsider final orders pursuant to Rule 59(e), but it departs from such standard by accounting for potentially different evidence discovered during litigation as opposed to the discovery of new evidence not available at trial.

Carlson, 856 F.3d at 325 (second alteration in original) (internal citations and quotation marks omitted).

"[W]hile Rule 54(b) gives a district court discretion to revisit earlier rulings in the same case, such discretion is subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *U.S. Tobacco Coop. Inc. v. Big S. Wholesale of Virginia, LLC*, 899 F.3d 236, 257 (4th Cir. 2018) (internal quotation marks omitted).

Discussion[2]

Plaintiff asks the Court to reconsider two issues that he claims were not addressed in the Court's prior order. *See* Motion to Reconsider at p. 1. The Court will address each issue in turn.

I. First Issue

First, Plaintiff argues the Court did not address the John Doe defendants—two unknown Florence County EMS employees (collectively, "the Doe defendants") who allegedly failed to treat him after he was arrested and tased—that he had named in his amended complaint.[3] *See id.* at pp. 1–2; *see* ECF No. 78 (amended complaint). A brief summary of the relevant procedural background is necessary to understand Plaintiff's argument.

After Plaintiff filed his amended complaint adding the two Doe defendants to this case, *see* ECF No. 78, the Magistrate Judge issued a proper form order noting the generic John Doe descriptions did not provide the U.S. Marshal sufficient information to effectuate service of process. *See* ECF No. 82

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[2] The facts relating to Plaintiff's arrest and conviction are thoroughly summarized in the Court's prior order and not repeated here. *See* ECF No. 184 at pp. 3–5.

[3] While Plaintiff was previously granted leave to file an amended complaint, *see* ECF No. 41, his amended complaint simply added the two Doe defendants. *See* ECF No. 78. Plaintiff's original, verified complaint—which names Defendants Stewart and Strickland and serves as an opposing affidavit for summary judgment purposes—remains an operative pleading (as these named Defendants, the Magistrate Judge, and the Court have all treated it as such). *See* ECF No. 1. In light of how this case has proceeded to this point, it is proper to view Plaintiff's amended complaint as a supplemental pleading and to treat both it and his original/verified complaint as joint pleadings.

at p. 1 n.1. Plaintiff subsequently filed a motion to compel Defendants to produce any information relating to the Doe defendants;[4] and the Magistrate Judge issued a discovery order directing Defendants to provide an affidavit attesting that they did not possess this information (as Defendants had indicated in their supplemental response to Plaintiff's discovery request). *See* ECF Nos. 63 & 115. In accordance with the Magistrate Judge's discovery order, Defendants then sent Plaintiff the affidavit of Sergeant Trey Miles.[5] *See* ECF No. 131-1. However, as the Magistrate Judge observed in a subsequent order, Sergeant Miles's affidavit was not entirely clear regarding "whether he [was] averring to the veracity of the supplementary responses or only the second supplementary responses specifically addressed in the affidavit." ECF No. 152 at p. 5.

Thereafter, neither the Magistrate Judge nor the Court specifically addressed the Doe defendants and/or Plaintiff's inability to properly identify them to effectuate service of process and bring this case into proper form.[6] Instead, the Magistrate Judge issued a Report and Recommendation ("R & R") recommending granting the named Defendants' motion for summary judgment and dismissing this case in its entirety (which would necessarily entail dismissal of the Doe defendants), *see* ECF No. 172; and the Court adopted the R & R in part in its prior order summarized above. *See* ECF No. 184. The Clerk terminated the Doe defendants from this case after entering the Court's order. *See* ECF No. 188 (court-only docket entry).

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[4] Defendants had responded to Plaintiff's discovery request in part by stating they "ha[d] no records revealing the names of the EMS workers who responded to Plaintiff when he was arrested." ECF No. 113 at p. 2; *see* ECF No. 113-1 at p. 3 (Defendants' supplemental responses to Plaintiff's request for production).

[5] Plaintiff acknowledged receiving this affidavit. *See* ECF No. 134; *see* ECF No. 152 at p. 3.

[6] Plaintiff continued to complain of Sergeant Miles's unclear affidavit and of his (Plaintiff's) inability to identify the Doe defendants. *See* ECF Nos. 157, 171, & 175. Additionally, Plaintiff provided summons and USM-285 documents for the Doe defendants, but these simply identified them as "Florence County EMS worker John Doe #1" and "#2." *See* ECF No. 121 (court-only docket entry). Service has never been authorized for the Doe defendants.

"John Doe suits are permissible only against real, but unidentified, defendants. The designation of a John Doe defendant is generally not favored in the federal courts; it is appropriate only when the identity of the alleged defendant is not known at the time the complaint is filed and the plaintiff is likely to be able to identify the defendant after further discovery." *Chidi Njoku v. Unknown Special Unit Staff*, 217 F.3d 840, 2000 WL 903896, at *1 (4th Cir. 2000) (unpublished) (internal quotation marks and citation omitted). "While we recognize the necessity for allowing John Doe suits in the federal courts, we are not unaware of the right of the district court to manage its docket and the danger of permitting suits with unnamed parties to remain on the docket unprosecuted." *Schiff v. Kennedy*, 691 F.2d 196, 198 (4th Cir. 1982). "'[I]f it does not appear that the true identity of an unnamed party can be discovered through discovery or through intervention by the court, the court could dismiss the action without prejudice.'" *Massey v. Ojaniit*, 759 F.3d 343, 347 n.1 (4th Cir. 2014) (quoting *Schiff*, 691 F.2d at 198).

In his motion to reconsider, Plaintiff continues to challenge the ambiguity in Sergeant Miles's affidavit and Defendants' alleged failure to give him information concerning the identify of the Doe defendants. *See* ECF No. 191 at pp. 1–2. Defendants have responded to Plaintiff's motion and included a supplemental affidavit from Sergeant Miles, who avers that he assisted defense counsel "in answering all questions asked of the Defendants by the Plaintiff through discovery" and that "**[a]ll of the answers given by the Defendants to all the Plaintiff's discovery questions are true and correct to the best of my knowledge and I attest to the veracity of all responses provided.**" *See* ECF No. 202-1 (bold emphasis added). Similarly, defense counsel Lisa Thomas states Defendants have "no information

regarding the identities of the two EMS workers [Plaintiff] seeks to serve." ECF No. 202 at p. 1.[7] Given the sworn, unambiguous statements of Sergeant Miles and the representations of defense counsel (who is an officer of this Court), it is clear Defendants do not have any information that could identify the Doe defendants for Plaintiff.

Accordingly, because Plaintiff remains unable to identify the Doe defendants (who he named in his amended complaint that was filed over two years ago), the Court will revise its prior order to reflect that the Doe defendants are dismissed *without prejudice* from this action. *See Massey*, 759 F.3d at 347 n.1; *Schiff*, 691 F.2d at 198; *see, e.g.*, *Ball v. City of Columbia*, No. 3:11-cv-01519-MBS, 2014 WL 1320254, at *7 n.5 (D.S.C. Mar. 27, 2014) ("Because Plaintiff has failed to identify the Unnamed Defendants, the court dismisses the Unnamed Defendants from this action without prejudice.").[8]

II. Second Issue

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[7] Attorney Thomas also signed the discovery disclosures. *See generally* Fed. R. Civ. P. 26(g)(1) ("By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: (A) with respect to a disclosure, it is complete and correct as of the time it is made; and (B) with respect to a discovery request, response, or objection, it is: (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.").

[8] Separately, the Court questions whether Plaintiff's amended complaint even states a plausible § 1983 claim against the Doe defendants. Plaintiff alleges, "2 unknown E.M.S. workers came to the Lake City Police Department to treat me for being tased so many times. These 2 workers didn't do anything. They didn't document where I was tased or how many times I was hit with the tasers. They only checked my blood pressure. These E.M.S. workers w[ere] clearly covering for the 2 police that tased me too many times." ECF No. 78 at p. 5. Plaintiff's allegations do not appear to plausibly allege that the Doe defendants were deliberately indifferent to his serious medical needs or otherwise violated his federal rights, and therefore summary dismissal for failure to state a claim would likely be proper pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). *See Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017) ("[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (internal quotation mark omitted) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))); *Young v. City of Mount Ranier*, 238 F.3d 567, 575–76 (4th Cir. 2001) ("[D]eliberate indifference to the serious medical needs of a pretrial detainee violates the due process clause. . . . Deliberate indifference requires a showing that the defendants actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious need for medical care."). In any event, the Court is dismissing the Doe defendants without prejudice for the separate reason explained above.

Second, Plaintiff asserts the Court "never addressed" his unlawful seizure claim that he sought to bring pursuant to the Supreme Court's decision in *Franks v. Delaware*[9] and the Fourth Circuit's application of *Franks* to a § 1983 action in *Miller v. Prince George's County*.[10] *See* Motion to Reconsider at pp. 2–4. Although the Court's prior order did not specifically cite *Franks* or *Miller*, the Court concluded Plaintiff's unlawful seizure (and civil conspiracy) claims were barred by *Heck*[11] because "Plaintiff was tried, convicted, and sentenced in this very district court for being a felon in possession of a firearm." ECF No. 184 at p. 6. The Court's ruling necessarily disposed of Plaintiff's reliance on *Franks* and *Miller*, both of which involved unlawful seizure issues. *See Miller*, 475 F.3d at 627 (recognizing *Franks* implicates a "claim alleging a seizure that was violative of the Fourth Amendment"). Plaintiff cannot proceed with his unlawful seizure claim because "the criminal proceedings [were not] terminated in his favor." *Id.*[12]

Conclusion

For the above reasons, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's motion to reconsider [ECF No. 191]. The Court **REVISES** its prior order [ECF No. 184] for the limited purpose of **DISMISSING** Defendants John Doe #1 and John Doe #2 *without prejudice.* Again, Plaintiff's only remaining claims are his excessive force claims and the only remaining defendants are

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9 438 U.S. 154 (1978).

10 475 F.3d 621 (4th Cir. 2007).

11 *Heck v. Humphrey*, 512 U.S. 477 (1994).

12 *Franks* and *Miller* deal with defective warrant affidavits. In contrast, Plaintiff's March 12, 2015 arrest did not involve a warrant. Based on Plaintiff's arguments, he apparently believes he can attack the affidavits submitted *in support of Defendants' motion for summary judgment* based on *Franks* and *Miller*. *See, e.g.*, Motion to Reconsider at pp. 2–3 (referencing Defendant Strickland's affidavit submitted with the motion for summary judgment). Plaintiff has a misunderstanding of *Franks* and *Miller*—they deal with affidavits *supporting an arrest warrant* (not a summary judgment motion in civil litigation).

Defendants Stewart and Strickland.

IT IS SO ORDERED.

Florence, South Carolina
December 20, 2018

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

Additional material from this filing is available in the Clerk's Office.