UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JERIEL EDWARDS, Plaintiff - Appellant, v. CITY OF MUSKOGEE, OKLAHOMA, a municipal corporation; STEVEN HARMON; BOBBY LEE; GREG FOREMAN; DILLON SWAIM, Defendants - Appellees.	No. 20-7000 (D.C. No. 6:18-CV-00347-SPS) (E.D. Okla.)

ORDER AND JUDGMENT*

(Filed Jan. 5, 2021)

Before **HARTZ**, **McHUGH**, and **CARSON**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Jeriel Edwards appeals from a district-court order granting summary judgment to City of Muskogee Police Officers Greg Foreman, Steven Harmon, Bobby Lee, and Dillon Swaim on his excessive-force claims under 42 U.S.C. § 1983. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKROUND[1]

Shortly after 10 p.m. on October 25, 2016, Officer Foreman was on patrol in his vehicle when he was flagged down by a man concerned about a car stopped in a restaurant's driveway. According to the man, the car had been there for about an hour and the driver was "just out of it." Aplt. App. at 113 (internal quotation marks omitted).

Officer Foreman drove up behind the car, the front of which was "sticking partially out into the street." *Id.*

[1] In determining whether qualified immunity applies, "we ordinarily accept the plaintiff's version of the facts—that is, the facts alleged." *Redmond v. Crowther*, 882 F.3d 927, 935 (10th Cir. 2018) (internal quotation marks omitted). But those "facts must find support in the record." *Id.* (internal quotation marks omitted). Thus, if the plaintiff's "version of the facts is blatantly contradicted by the record, so that no reasonable jury could believe it, then we should not adopt that version of the facts." *Id.* (internal quotation marks omitted). In recounting the background facts of this case, we rely on video footage showing Edwards's encounter with police, the transcript of that encounter, the officers' affidavits and reports, and the state-court records. In opposing summary judgment in the district court, Edwards submitted no evidence. Thus, to the extent Edwards asserts a factual version that conflicts with this universe of evidence, we do not adopt his version.

at 98. He exited his patrol vehicle, approached the car's driver-side door, and asked the driver several times, "How's it going," "Let me see your I.D.," and "Can you talk?" *Id.* at 113-14 (internal quotation marks omitted). The driver was barely responsive. For example, Officer Foreman had to instruct him several times to "put [the] car in park" before he complied. *Id.* at 98.

Officer Foreman believed, based on his training and experience, that the driver was under the influence of drugs or alcohol. In particular, he suspected that the driver "was under the influence of PCP because [of] the way he was acting." *Id.* at 136.[2] He soon recognized the driver as Edwards, whom he had encountered previously. He radioed the dispatcher, asking for a record check on Edwards. Edwards found his wallet and gave his ID to Officer Foreman. Throughout their interaction, Edwards "kept putting his hands in and out of his pants pockets." *Id.* at 98.

Officer Foreman decided to arrest Edwards for driving under the influence. He ordered him to get out of the car and to stop putting his hands in his pockets. Officer Harmon arrived on the scene and approached to assist.

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[2] "Officers at the Muskogee Police Department are instructed that non-compliant suspects under the influence of PCP are extremely dangerous because they are unpredictable, have enhanced physical strength and endurance, and are impervious to pain." Aplt. App. at 106. They are also told that such individuals can experience "excited delirium when they are involved in extended fights or struggles, and officers are instructed to get them into custody as quickly as possible." *Id.*

Officer Foreman opened the driver-side car door while Edwards unbuckled his seat belt and placed his wallet on the console. Edwards still had difficulty following Officer Foreman's instructions. When Edwards stood up out of the car, Officer Foreman told him to face away with his hands behind his back. Edwards initially faced away, but both officers had trouble handcuffing Edwards, as he did not keep his arms behind him. Officer Harmon repeated several times, "Hands behind your back." *Id.* at 116 (internal quotation marks omitted). Officer Foreman radioed for assistance.

From this point forward, it would take officers almost four minutes to handcuff Edwards, who is 6'1" tall and weighed 225 pounds. Based on his training and experience, Officer Foreman thought it was "safer to take a non-compliant suspect who is actively resisting to the ground when attempting to subdue and handcuff [him]." *Id.* at 99. He therefore ordered Edwards to "get on the ground." *Id.* at 116 (internal quotation marks omitted). When Edwards did not comply, the officers forced him to the ground, where they continued to struggle to handcuff him, attempting to pull his arms behind his back while he faced downward and kept his arms in front of him. Officer Foreman said that he "could not control . . . Edward's [sic] hands and arms," as "[h]e was extremely strong." *Id.* at 99.

Officer Harmon similarly thought that Edwards possessed "extraordinary strength." *Id.* at 103. He delivered "three closed fist punches to [Edwards's] rib area in the attempt to get [him] to comply that had no effect." *Id.* at 144. Edwards asked, "Why're you

punching me?" *Id.* at 117 (internal quotation marks omitted). The officers continued ordering Edwards to put his hands behind his back.

Officer Harmon positioned himself briefly on Edwards's back while he continued trying to pull Edwards's arms behind him. Edwards kept asking, "Why're you punching me, sir?" *id.* at 117 (internal quotation marks omitted), but the videos do not indicate that any further blows were delivered. The officers told him, "Stop resisting" and "Quit resisting." *Id.* at 118 (internal quotation marks omitted). Edwards responded, "I ain't resisting," although he did not comply with their demands. *Id.* (internal quotation marks omitted). During the struggle Officer Foreman "could smell an odor [he] associated with persons under the influence of PCP." *Id.* at 99.

Unable to handcuff Edwards, Officer Harmon said, "Okay . . . taze him." *Id.* at 118 (ellipsis in original, internal quotation marks omitted). As Edwards was lying in the parking lot, Officer Foreman "deployed [his] Taser into . . . Edwards['s] back." *Id.* at 99. When that failed to elicit compliance, he tried "stapling"—that is, "mov[ing] the connecting wires onto . . . Edwards['s] calf[ ] in an effort to obtain neuromuscular incapacitation." *Id.* Edwards yelled, "Hey!!" and momentarily stopped struggling as Officer Harmon worked near his head to secure his arms. *Id.* at 118 (internal quotation marks omitted). But Edwards resumed struggling with Officer Harmon while Officer Foreman repeatedly directed him to "[p]ut [his] hands behind [his] back," *id.* at 118 (internal quotation marks omitted), and

"cycl[ed] the [Taser] device through 2 five second cycles" *id.* at 99. Three times, Edwards responded, "My hands behind my back!" *Id.* at 118 (internal quotation marks omitted). But each time his hands were still in front of him or underneath him as he attempted to rise to his knees. Officer Foreman commented that the Taser was not affecting Edwards, and Officer Harmon agreed.

At this point, Edwards had risen to his hands and knees. Attempting to stand up, he reached around the back of Officer Harmon's neck and asked, "Why're you doing this shit to me?" *Id.* at 118 (internal quotation marks omitted). Edwards was soon on his feet but bent forward as Officer Harmon tried to push his upper body toward the ground. Officer Foreman fell forward but was able to push Edwards backward onto his buttocks, against the driver-side compartment of Edwards's car and the open car door.

Another officer arrived and joined the effort. Officer Foreman told Edwards twice more to stop resisting. Edwards said he was not resisting, but he grabbed the arm of Officer Foreman, who struck Edwards's arm with his flashlight and yelled "Let go of me!!!" *Id.* at 119 (internal quotation marks omitted).

Lt. Lee arrived as the other officers were engaged with Edwards at his open car door. He "slid in behind [Edwards, who was in a seated position,] and applied a bilateral neck restraint."[3] *Id.* at 106. Within about 20

[3] This type of "restraint momentarily disrupts the carotid [artery] blood flow to the brain" in order to make a person "lose

seconds, Officer Foreman was able to handcuff one of Edwards's wrists.

More officers began arriving, including Officer Swaim. He "grabbed [Edwards's] other arm and helped the other officers force [Edwards's] other wrist into . . . the handcuffs." *Id.* at 109. One of the officers ordered Edwards to "Relax . . . relax . . . relax!" *Id.* at 119 (ellipses in original; internal quotation marks omitted).

Edwards was soon fully handcuffed and the officers began backing away. Two officers remained with him, however, holding him in place. Officer Harmon asked, "Anybody need EMS?" *Id.* at 120 (internal quotation marks omitted). Officer Foreman responded, "We need EMS for [Edwards]." *Id.* (internal quotation marks omitted). Edwards asked, "What are you guys doing?" *Id.* (internal quotation marks omitted). Lt. Lee called for EMS [Aplt. App. at 142] and another officer told Edwards he was going to jail for having "fought the police . . . intoxicated." *Id.* (ellipsis in original; internal quotation marks omitted).

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consciousness for a few seconds." Aplt. App. at 106. Edwards claims that Officer Foreman also applied a neck restraint; and Officer Foreman indicated in his police report that after striking Edwards with his flashlight, he "eventually had to put [Edwards] in a neck restraint in an attempt to control him." *Id.* at 136. But even if both Officer Foreman and Lt. Lee used a neck restraint, it would not change the outcome of this appeal. There is no evidence that the neck restraint was applied in an improper manner or that Edwards suffered any long-term injury from the restraint; nor has Edwards argued that use of this type of restraint is per se excessive force.

Officer Swaim sat Edwards up and "noticed a strong chemical smell." *Id.* at 109. An inventory search of Edwards's car revealed two Xanax tablets and a bottle containing a liquid that smelled like PCP.

EMS arrived and evaluated Edwards, determining that his "vitals were fine." *Id.* at 142. Officer Foreman then took Edwards to the hospital for a blood test and to get "medically cleared" for jail. *Id.* at 106. The hospital admitted Edwards because he had become "unresponsive." *Id.* at 136. As Officer Foreman later learned, Edwards had suffered a broken nose during his arrest.

Edwards was charged in state court with driving under the influence of drugs (a felony), resisting an officer (a misdemeanor), and possessing a controlled dangerous substance (two felony counts—PCP and Xanax). Edwards pleaded no contest[4] and was sentenced.

In 2018, Edwards filed this civil-rights action against the City of Muskogee and Officers Foreman, Harmon, Lee, and Swaim. He claimed that (1) the individual officers were liable for using excessive force under the Fourth Amendment, as he had provided no resistance; and (2) the City was liable for excessive force under Oklahoma's Constitution.

The district court dismissed Edwards's claim against the City, and the case proceeded against the

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[4] Although the Amended Judgment and Sentence states that Edwards entered a guilty plea, that statement appears to be a mistake.

individual defendants, who moved for summary judgment on the basis of qualified immunity. The district court granted the motion, concluding that Edwards had not shown the violation of a constitutional right or that the asserted right was clearly established.

DISCUSSION

I. Standards of Review

Ordinarily, "[w]e review a grant of summary judgment de novo." *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1137 (10th Cir. 2016). Summary judgment is required "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." *Id.* (internal quotation marks omitted).

But when a defendant asserts a qualified-immunity defense, our review "differs from that applicable to review of other summary judgment decisions." *Redmond v. Crowther*, 882 F.3d 927, 935 (10th Cir. 2018) (internal quotation marks omitted). "A defendant's motion for summary judgment based on qualified immunity imposes on the plaintiff the burden of showing both (1) a violation of a constitutional right; and (2) that the constitutional right was clearly established at the time of the violation." *Burke v. Regalado*, 935 F.3d 960, 1002 (10th Cir. 2019) (internal quotation marks omitted). Only if the "plaintiff meets this heavy burden" must "the defendant . . . prove that there are no genuine disputes of material fact and that he is entitled to

judgment as a matter of law." *Puller v. Baca*, 781 F.3d 1190, 1196 (10th Cir. 2015).

II. Excessive Force

The Fourth Amendment's reasonableness standard governs "[a]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other seizure of a free citizen." *Graham v. Connor*, 490 U.S. 386, 395 (1989) (emphasis and internal quotation marks omitted). Thus, we employ "a standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Pauly v. White*, 874 F.3d 1197, 1215 (10th Cir. 2017) (internal quotation marks omitted). "The right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion . . . to effect it." *Lundstrom v. Romero*, 616 F.3d 1108, 1126 (10th Cir. 2010) (internal quotations marks omitted). But to assess the propriety of the coercion under specific facts, we "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," *id.* (internal quotation marks omitted), paying "careful attention to the facts and circumstances of each particular case, including [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," *Graham*, 490 U.S. at 396 (emphasis and internal quotation marks omitted).[5]

A. Severity of Edwards's Suspected Crime

Officer Foreman suspected that Edwards was driving under the influence of PCP. Although "minor non-violent offenses clearly weigh against the objective need to use much force against [an arrestee]," *Mglej v. Gardner*, 974 F.3d 1151, 1168 (10th Cir. 2020), Edwards's suspected crime was a felony, which generally tilts the first *Graham* factor against the arrestee, *see Est. of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1061 n.2 (10th Cir. 2020). Moreover, while "our cases have not considered the nature of a felony in determining that it is a serious offense under the first *Graham* factor," *id.*, we note that Muskogee police officers are instructed that individuals under the influence of PCP can be extremely dangerous.

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[5] Although § 1983 liability must ordinarily be "traceable to a defendant-official's own individual actions," *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (internal quotation marks omitted), an "individualized analysis" is not required in an excessive-force case where, as here, "all Defendants actively participated in a coordinated use of force," and they were "engaged in a group effort." *Est. of Booker v. Gomez*, 745 F.3d 405, 421-22 (10th Cir. 2014). Although Lt. Lee and Officer Swaim were not engaged with Edwards for the same amount of time as Officers Foreman and Harmon, a jury might find that they all participated in a coordinated use of force against Edwards to handcuff him. Thus, "we will consider the officers' conduct in the aggregate." *Pauly*, 874 F.3d at 1214.

We conclude that the first *Graham* factor—severity of the crime—weighs against Edwards.

B. Whether Edwards Posed an Immediate Threat to Officer Safety

"The second *Graham* factor, whether the suspect posed an immediate threat to the safety of the officers or others[,] is undoubtedly the most important." *Emmett v. Armstrong*, 973 F.3d 1127, 1136 (10th Cir. 2020) (internal quotation marks omitted). "[A]n officer may use increased force when a suspect is armed, repeatedly ignores police commands, or makes hostile motions towards the officer or others." *Mglej*, 974 F.3d at 1168 (internal quotation marks omitted).

Here, officers employed considerable force against Edwards. They forced him to the ground, delivered three closed-fist punches to his ribs, tasered and stapled him, struck him with a flashlight, and placed him in a neck restraint, all while wrestling with him to gain control of his arms and force his wrists into handcuffs. He suffered a broken nose.

Nevertheless, we cannot say the force used was unreasonable from the perspective of an officer on the scene concerned about safety. Edwards moved his hands in and out of his pockets while Officer Foreman initially interacted with him, and he ignored officers' repeated commands to put his hands behind his back. He struggled with officers, at times grabbing them and attempting to rise to his feet. He had an imposing physical stature and exhibited both incoherence and

PCP-enhanced effort and imperviousness to pain. Significantly, it took multiple officers engaged in a prolonged struggle with him to place him in handcuffs.

Edwards contends that officers "did not give [him] sufficient time to obey the command to put his hands behind his back," and that "prior to the initial takedown [he] showed no sign of resistance, disobedience, or violence." Aplt. Opening Br. at 16. But the videos show Edwards moving his arms and body as Officers Foreman and Harmon first attempted to handcuff him. And during this handcuffing attempt, Officer Foreman recognized the need for assistance and called for back up. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. To the extent that Edwards claims he was "subdued" by the time Officer Harmon delivered the three closed-fist punches to his ribs, Reply Br. at 9, the record contradicts that claim.

We conclude that the second *Graham* factor—threat to officer safety—weighs against Edwards.

C. Whether Edwards Actively Resisted Arrest

Edwards characterizes his effort to avoid being handcuffed as no more than passive or minimal resistance. For the same reasons we determined that the second *Graham* factor weighs against Edwards, we conclude that the third *Graham* factor—active resistance

to arrest—also weighs against him. The record contradicts Edwards's portrayal of limited resistance. Officers Foreman and Harmon were unable to handcuff him even after tasing and stapling him. Indeed, Edwards attempted to stand up while continuing to struggle with both officers. And after a third officer joined the struggle, Edwards still managed to grab Officer Foreman by the arm. It took several additional officers working together to force Edwards's wrists into the cuffs while Lt. Lee employed a neck restraint on Edwards before he was finally subdued. No reasonable jury could conclude that Edwards was not actively resisting arrest from the moment Officer Foreman first tried to handcuff him until his eventual handcuffing by multiple police officers.

Because all three *Graham* factors weigh against Edwards, his excessive-force claim fails, and the defendants are entitled to summary judgment in the absence of a constitutional violation. *See Puller*, 781 F.3d at 1196 ("Failure on either element [of the qualified-immunity analysis] is fatal to the plaintiff's claims."); *see, e.g.*, *Hinton v. City of Elwood*, 997 F.2d 774, 781-82 (10th Cir. 1993) (qualified immunity available based on no constitutional violation where officers wrestled plaintiff to the ground and used a stun gun on him for "actively and openly resisting [their] attempts to handcuff him").

CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Harris L Hartz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

JERIEL EDWARDS,	)	
Plaintiff,	)	
v.	)	
STEVEN HARMON, BOBBY LEE, GREG FOREMAN, and DILLON SWAIM,	)	**Case No. CIV-18-347-SPS**
Defendants.	)	

OPINION AND ORDER

(Filed Dec. 16, 2019)

This case arises out of an encounter between Jeriel Edwards and police officers with the City of Muskogee Police Department. The Plaintiff sued a number of individuals and entities, including the remaining four Defendants in the case: Steven Harmon, Bobby Lee, Greg Foreman, and Dillon Swaim. The claims against these Defendants are made pursuant to 42 U.S.C. § 1983, and the Defendants have filed a summary judgment motion asserting qualified immunity. For the reasons set forth below, the Court finds that Defendants Steve Harmon, Bobby Lee, Greg Foreman and Dillon Swaim's Brief in Support of their Motion for Summary Judgment [Docket No. 54] should be GRANTED.

I. Procedural History

On October 23, 2018, the Plaintiff filed the present case in this Court. In his Second Amended Complaint, Plaintiff alleged two causes of action against the various Defendants, but only the first implicates these four defendants.[1] The Plaintiff's First Cause of Action is raised pursuant to 42 U.S.C. § 1983 as to all four Defendants, alleging unconstitutional use of excessive and unreasonable force.

II. Law Applicable

Summary judgment is appropriate if the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving party must show the absence of a genuine issue of material fact, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), with the evidence taken in the light most favorable to the non-moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). However, "a party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . or . . . showing that the materials cited do not

[1] The Plaintiff's Second Cause of Action, arising under the Oklahoma Constitution as to the Defendant City of Muskogee, was previously dismissed. *See* Docket Nos. 33, 45.

establish the absence or presence of a genuine dispute[.]" Fed. R. Civ. P. 56(c).

III. Factual Background

The undisputed facts reflect that on October 25, 2016, City of Muskogee Police Officer Greg Foreman was flagged down by a citizen who asked him to check out a vehicle in the driveway behind a Wendy's restaurant in Muskogee, Oklahoma. Defendant Foreman pulled into the restaurant parking lot, located the vehicle in the driveway behind the restaurant, and got out of his patrol car to approach the vehicle. Defendant Foreman believed that Mr. Edwards was under the influence of alcohol, drugs, or both, and that it was likely PCP. Video footage of the encounter from Defendant Foreman's body camera reflects that when Defendant Foreman approached the vehicle, he asked Mr. Edwards several questions that produced no response, prompting Defendant Foreman to ask, "Can you talk?" Starting at the 2:43 mark on the video, Defendant Foreman instructed Mr. Edwards to put his car in park at least four times before he complied, also once asking how much he had had to smoke, while Mr. Edwards repeatedly moved his hands in and out of his pockets. Defendant Foreman asked Mr. Edwards for identification, but it was not until the 3:54 mark that Mr. Edwards was able to retrieve his wallet from his pocket. The parties agree that Mr. Edwards seemed confused, had trouble understanding what was happening, and kept putting his hands in his pockets. For nearly a minute after retrieving his wallet, Defendant Foreman

instructed Mr. Edwards to keep his hands out of his pockets and put his wallet down on the console of his car before he complied. The Plaintiff nonetheless asserts that Mr. Edwards responded immediately to all attempts to engage and obeyed all commands. Defendant Foreman, believing Mr. Edwards to be under the influence of PCP, thought it best to remove Mr. Edwards from the car and place him under arrest and in handcuffs.

As Mr. Edwards was getting out of the vehicle, Defendant Foreman instructed Mr. Edwards to turn around and put his hands behind his back. Defendant Harmon arrived around this time and also began instructing Mr. Edwards to comply with Defendant Foreman's instructions to put his hands behind his back. Defendants asserts that Mr. Edwards did not comply with this instruction, while Mr. Edwards contends that the officers prevented him from complying. Defendant Foreman then reached for Mr. Edwards's right hand to attempt to handcuff him, and also radioed for help with Mr. Edwards. Defendant Harmon then pushed Mr. Edwards back into the space between the car door and the car, and Defendant Foreman ordered Mr. Edwards to get on the ground, a safety tactic officers use to subdue a suspect actively resisting arrest. Defendants Harmon and Foreman then forced Mr. Edwards to the ground, which Plaintiff asserts they did without waiting for Mr. Edwards to comply.

Over the next four minutes, officers attempted to handcuff Mr. Edwards. On the video, officers can repeatedly be heard instructing him to put his hands

behind his back while they struggled and appeared to be grappling with the Plaintiff's hands and arms, and Mr. Edwards can be heard asking, "Why are you punching me, sir?" During this time, it is undisputed that Defendant Harmon delivered three punches to Mr. Edwards's ribs, a technique taught for use when a subject is resisting being handcuffed. Footage is grainy and not clearly trained on Mr. Edwards as Defendants Foreman and Harmon struggled with Mr. Edwards. Defendants assert that they could not control Mr. Edwards's hands and arms and that he was extremely strong, but Mr. Edwards contends that they *did* have control of his hands and arms and were preventing him from complying with their commands.

During the struggle, Defendant Foreman smelled an odor he associated with persons under the influence of PCP, and Plaintiff does not dispute his knowledge that such substance could cause suspects to fight officers and be at a higher risk of excited delirium, which could result in death. At the 6:24 mark on the body cam footage, Defendant Foreman deployed his Taser in an effort to get Mr. Edwards into custody. Defendant Foreman first deployed the Taser into Mr. Edwards's back then immediately moved the connecting wires to his calf to obtain neuromuscular incapacitation, a technique referred to as "stapling." Defendants assert the Taser had no effect on Mr. Edwards, while he contends that it had a "debilitating" effect on him and that he never resisted arrest. After deploying the Taser, the video shows Mr. Edwards attempting to sit up on his right side, with his right arm propping him up and his

left arm stretched in front of him. Defendant Foreman again instructed Mr. Edwards to put his hands behind his back, and Mr. Edwards responded that they were, although they were not. Around the 6:45 minute mark, Mr. Edwards appeared to attempt to stand up, and what followed was a struggle among all parties on the video. Another officer appears on the video at the 7:09 mark to assist Defendants Foreman and Harmon, and Mr. Edwards shortly thereafter can be seen in a partially seated position near his vehicle while officers continued to attempt to get him in handcuffs and instruct him to stop resisting. He can be heard stating, "I'm not resisting," and "Let go of me."

Shortly after the 8:00 mark on the video, Defendant Lee began applying a lateral vascular neck restraint to Mr. Edwards, although Plaintiff asserts it was not properly applied and that Defendant Lee did so immediately upon his arrival and without reason. A number of officers seem to have arrived within this time frame, as the Plaintiff is surrounded by them at this point. At the 8:23 mark, officers were then able to get the first handcuff on Mr. Edwards's right arm. The neck restraint was discontinued as officers attempted to move Mr. Edwards to a facedown position and attach the second handcuff. Video footage is unsteady but shows at least six officers attempting to attach the second handcuff to his left arm, which is done at the 9:03 mark. Defendant Swaim had arrived during this time and assisted in placing the second handcuff; he also later removed the Taser prongs from Mr. Edwards's back. At the 9:10 mark an officer announces that Mr.

Edwards has been handcuffed. The officers surrounding Mr. Edwards then stepped away, and Mr. Edwards can be seen lying partially face down, with more weight on his left side, while one officer keeps hands on his right arm and back. Another officer then places a knee over Mr. Edwards's right shoulder while all the officers discuss calling EMS for Mr. Edwards. Defendants assert, and Plaintiff does not dispute, that after he was secured by the handcuffs no additional force was used on him. This means that all allegations of excessive force apply to the time period prior to the handcuffs being secured on Mr. Edwards.

Following the incident, Mr. Edwards was charged in Muskogee County District Court in Case No. CF-2016-1198 with: (i) DUI Drugs – felony, (ii) possession of a controlled dangerous substance (PCP) – felony, (iii) resisting an officer – misdemeanor, and (iv) possession of a controlled dangerous substance (Xanax) – felony. *See* Docket No. 54, Ex. 10, p. 3-4. The form on which Mr. Edwards entered a plea is a form for entering a plea of guilty, but the word "guilty" is stricken out and the word "no contest" was handwritten as to the heading and all questions concerning the type of plea he was entering. *Id.* at p. 16-21. The Judge signed a document which states that "The Defendant's plea(s) of no contest is/are knowingly and voluntarily entered and accepted by the Court," where "no contest" was handwritten. *Id.* at 23. The notice of the right to appeal likewise has the word "guilty" stricken and interlineated with "no contest." *Id.* at p. 26. However, the Judgement *and* Amended Judgment and Sentence state, in

all caps with no interlineation, that Mr. Edwards entered a plea of guilty. *Id.* at 32-33.

Analysis

The Defendants have all moved for summary judgment, asserting that Mr. Edwards is barred by collateral estoppel from bringing his Fourth Amendment claim because he pleaded guilty to resisting arrest, and therefore excessive force is not possible. Alternatively, they contend they are each entitled to qualified immunity. The Plaintiff challenges all these arguments, first contending that he actually pleaded "no contest," and that his plea is not a bar to the Fourth Amendment claim. Furthermore, he contends that the Defendants are not entitled to qualified immunity because they engaged in unconstitutional and excessive force in violation of clearly established law. For the reasons set forth below, the Court finds that the Defendants Harmon, Lee, Foreman, and Swaim are entitled to qualified immunity.

A. Collateral Estoppel.

The Court first addresses the Defendants' argument that Mr. Edwards is precluded from asserting a Fourth Amendment claim at all because he pleaded guilty to resisting arrest. Under Oklahoma law, "[t]he doctrine of collateral estoppel, or issue preclusion, is activated when an ultimate issue has been determined by a valid and final judgment – that question cannot be relitigated by parties, or their privies, to the prior

adjudication in any future lawsuit." *Carris v. John R. Thomas and Associates, P.C.*, 1995 OK 33, ¶ 9, 896 P.2d 522, 527. Defendants argue that because the Plaintiff has been found guilty of resisting arrest in this incident, his resistance supports the amount of force used to arrest him.

The Plaintiff contends that he did not plead guilty, but rather pleaded "nolo contendere," or "no contest." Defendants respond that because the Judgment and Amended Judgment "clearly stated" that the Plaintiff pleaded guilty, his plea could not possibly have been "no contest," and any case law regarding "no contest" pleas is therefore irrelevant. Regardless of whether the Plaintiff pleaded guilty to resisting arrest or pleaded "no contest," however, the Court finds that such conviction is not determinative as to his Fourth Amendment claim. First, the factual issues in the present case are not identical to the fact issues presented in the Plaintiff's criminal case, and the doctrine of collateral estoppel is therefore not implicated. *See Rome v. Romero*, 2006 WL 322589, at *6 (D. Colo. Feb. 10, 2006) ("The § 1983 claim here concerns whether the Defendants actually used excessive force, rather than Rome's belief about lawfulness of the arrest or the force used. Because the factual issues in the criminal case and in this case are not identical the doctrine of collateral estoppel does not apply. Thus, the doctrine of collateral estoppel does not entitle Defendants to summary judgment on Rome's excessive force claim.").

Second, a conviction for resisting arrest can coexist with an officers' use of excessive force. In *Perea v.*

Baca, the Tenth Circuit found that Mr. Perea's resistance to arrest "did not justify the officers' severe response," holding that "[a]lthough use of some force against a resisting arrestee may be justified, continued and increased use of force against a subdued detainee is not." 817 F.3d 1198, 1203 (10th Cir. 2016). "*Perea* therefore puts the Defendant Officers on notice that . . . the force used should be no more than is necessary to subdue the suspect." *Coronado v. Olsen*, 2019 WL 652350, at *6 (D. Utah Feb. 15, 2019). *See also Martinez v. City of Albuquerque*, 184 F.3d 1123, 1127 (10th Cir. 1999) ("Thus, whether Martinez resisted arrest by failing to heed instructions and closing his vehicle's window on the officer's arm is likewise a question separate and distinct from whether the police officers exercised excessive or unreasonable force in effectuating his arrest. The state court's finding that Martinez resisted a lawful arrest[] may coexist with a finding that the police officers used excessive force to subdue him. In other words, a jury could find that the police officers effectuated a lawful arrest of Martinez in an unlawful manner.") (internal citations omitted); *Riggs v. City of Wichita, Kan.*, 2013 WL 978713, at *3 (D. Kan. Mar. 12, 2013) ("Plaintiff does not challenge the lawfulness of her arrest and conviction, but rather challenges Defendant's use of excessive force in effectuating her arrest. Thus, Plaintiff's previous resisting arrest conviction does not necessarily foreclose an excessive force claim here."). *Cf. Strepka v. Jonsgaard*, 2010 WL 4932723, at *7 (D. Colo. Nov. 8, 2010) ("Again, because a finding in this suit that Defendant Jonsgaard used excessive force would not invalidate the conviction,

Plaintiff's excessive force claim is not barred by *Heck*."). Therefore, the Plaintiff's First Cause of Action is not barred by the doctrine of collateral estoppel.

B. Plaintiff's Plea in the Prior Criminal Case

Even if the Plaintiff's conviction for resisting arrest does not bar his claim under the Fourth Amendment, it raises the question of what effect it has on the analysis of the case, at both the summary judgment and trial stages. The Court is not prohibited from looking behind the Judgment to determine the nature of the plea. *See, e. g.*, *Bland v. State*, 2000 OK CR 11, ¶ 88, 4 P.3d 702, 726 ("Appellant asserts that as the jury found him guilty of malice aforethought murder, the reference to felony murder [on the Judgment] was a scrivener's error which should be corrected. The State does not dispute this claim. A review of the record supports Appellant's contentions. Therefore, the trial court is ordered to correct the judgment and sentence to reflect the jury's verdict by striking the reference to a conviction for felony murder."). Here, every document aside from the Judgment and Amended Judgment related to the Plaintiff's plea indicates that it was a "no contest plea," including Court findings signed by the Judge and dated December 5, 2016, which required him to handwrite the type of plea being entered [Docket No. 54, Ex. 10, p. 23]. The Court thus finds that the Plaintiff pleaded no contest to, *inter alia*, resisting arrest, a misdemeanor.

Under Oklahoma law, the "legal effect" of a nolo contendere plea "shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." 22 Okla. Stat. § 513. *See also Martin v. Phillips*, 2018 OK 56, ¶ 6, 422 P.3d 143, 146. Likewise, Fed. R. Evid. 410 states, "In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in plea discussions: [](2) a nolo contendere plea[.]" The Tenth Circuit has held that "although a plea of nolo contendere has the same *legal* effect as a guilty plea, it is not a *factual* admission to the underlying crime." *Rose v. Uniroyal Goodrich Tire Co.*, 219 F.3d 1216, 1220 (10th Cir. 2000) (emphasis in original).

However, in *Rose*, the Tenth Circuit went on to state that the rules holding nolo contendere pleas to be inadmissible "assume a situation in which the criminal defendant is *being sued* later in a civil action, and the plea is offered as proof of guilt." *Id.* The Sixth Circuit found "a material difference between using the nolo contendere plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission which would preclude liability. Rule 410 was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil *liability*." *Walker v. Schaeffer*, 854 F.2d 138, 142 (6th Cir. 1988) (emphasis in original). The Sixth Circuit thus "decline[d] to interpret the rule

so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the arresting police." *Id.* The Oklahoma Court of Criminal Appeals in 1992 found Fed. R. Evid. 410 and 12 Okla. Stat. § 2410 "virtually identical," and stated, "We agree with, and adopt, the reasoning of the Sixth Circuit Court in the *Walker* case." *Irwin v. SWO Acquisition Corp.*, 1992 OK CIV APP 48, ¶¶ 10-11, 830 P.2d 587, 590. This holding was reiterated in *Delong v. State ex rel. Oklahoma Dept. of Public Safety*, 1998 OK CIV APP 32, ¶¶ 6-7, 956 P.2d 937, 938-939 ("We are likewise persuaded by the *Walker* analysis as the proper analysis to be employed in our case. Under that rationale, Delong's *nolo contendere* pleas to the charges of resisting arrest and attempted escape from detention are admissible defensively, and admit the validity of those charges, thus likewise establishing probable cause for the arrest on those charges, and waiving any irregularities in the criminal proceedings including lack of probable cause."). *But see Delong*, 1998 OK CIV APP 32, ¶ 8 (Hansen, Carol, J., dissenting) ("Because § 2410 is clearly unambiguous, the requisite plain language reading can lead to no other conclusion than that § 2410 precludes admission of evidence of a *nolo contendere* plea for any purpose, even when the one entering the plea is the plaintiff in a later civil action. The majority erroneously interprets § 2410 to give it a meaning which is in conflict with what the statute clearly dictates.").

In light of the aforementioned case law, the Tenth Circuit has stated that "[t]here is a proscription on the use of nolo contendere pleas in subsequent civil proceedings, but it applies only to "offensive' use . . . to establish the criminal defendant's subsequent potential civil liability, *not* to . . . 'defensive' use . . . in a case where the criminal defendant [has] sought to recover damages for an alleged unlawful arrest.'" *Jackson v. Loftis*, 189 Fed. Appx. 775, 779 (10th Cir. 2006). *Cf. Sharif v. Picone*, 740 F.3d 263, 270 (3d Cir. 2014) ("Regardless of whether he engaged in assaultive conduct, Sharif remains free to contend that the reaction of the corrections officers was such that it constituted excessive force in comparison to the threat he posed. . . . Given these considerations, we hold that Rule 410 barred the admission of Sharif's plea of nolo contendere [to aggravated assault]. . . . Sharif's claim that he did nothing wrong was not inconsistent with his previous plea of nolo contendere, and, thus, would not be relevant in assessing his character for truthfulness.").

Accordingly, "Plaintiff's conviction [by way of a nolo contendere plea] for resisting arrest will be relevant to the determination of whether Defendant used excessive force to effectuate h[is] arrest." *Riggs v. City of Wichita, Kan.*, 2013 WL 978713, at *3 (March 12, 2013). The Court thus finds that the Plaintiff's conviction for resisting arrest, by way of a no contest plea, is relevant and admissible under both Tenth Circuit and Oklahoma law to determining whether the Defendants used excessive force, although it is not determinative.

C. Qualified Immunity.

The Court now turns to the Defendants' contention that they are entitled to qualified immunity here. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Clark v. Wilson*, 625 F.3d 686, 690 (10th Cir. 2010), *quoting Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "Additional steps are taken when a summary judgment motion raises a defense of qualified immunity." *Cunningham v. New Mexico*, 2014 WL 12791236, at *4 (D. N.M. May 12, 2014), *citing Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009).

"When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right *and* (2) the constitutional right was clearly established. The court may consider either of these prongs before the other 'in light of the circumstances in the particular case at hand.'" *Cunningham v. New Mexico*, 2014 WL 12791236, at *4 (D. N.M. May 2, 2014) (emphasis added), *quoting Pearson*, 555 U.S. at 236. "In other words, immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017), *quoting Mullenix v. Luna*, ___ U.S. ___, 136 S. Ct. 305, 308 (2015). "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact

and that he or she is entitled to judgment as a matter of law." *Rojas v. Anderson*, 727 F.3d 1000, 1003 (10th Cir. 2013) (internal quotation marks omitted).

It is also important to note that "[p]laintiffs must do more than show that their rights 'were violated' or that 'defendants,' as a collective and undifferentiated whole, were responsible for those violations. They must identify specific actions take by particular defendants[ ] that violated their clearly established constitutional rights." *Pahls v. Thomas*, 718 F.3d 1210, 1228 (10th Cir. 2013) (internal citations omitted). *See also Henry v. Storey*, 658 F.3d 1235, 1241 (10th Cir. 2011) ("§ 1983 imposes liability for a defendant's own actions—personal participation in the specific constitutional violation complained of is essential."). In other words, "the complaint must 'isolate the allegedly unconstitutional acts of each defendant'; otherwise the complaint does not 'provide adequate notice as to the nature of the claims against each' and fails for this reason." *Matthews v. Bergdorf*, 889 F.3d 1136, 1144 (10th Cir. 2018), *quoting Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008). The exception to this, though, is sometimes found at the summary judgment stage of excessive force cases where there is active and joint participation in the use of force.[2] *See Estate of Booker*

[2] The Tenth Circuit also noted in *Estate of Booker v. Gomez* that "failure to conduct an individualized analysis is [also] not reversible error" where an individual's actions do not constitute excessive force but the "deputy could be liable under a failure-to-intervene theory." 745 F.3d 405, 421-422 (10th Cir. 2014). However, the Plaintiff has neither alleged in the Complaint that officers failed to intervene nor argued on the basis of this in his

v. Gomez, 745 F.3d 405, 421 (10th Cir. 2014) ("Although we frequently conduct separate qualified immunity analyses for different defendants, we have not always done so at the summary judgment stage of excessive force cases. Where appropriate, we have aggregated officer conduct.") (collecting cases). This is generally seen where the Defendants appear to have engaged in a "group effort." *See, e. g.*, *Stout v. United States*, 2016 WL 4130231, at *2 (W.D. Okla. Aug. 2, 2016) ("Given that all of the individual Defendants are alleged to have fired into the car, it is not necessary to determine which of the officers fired the shot that resulted in Stout's death."). *See also Estate of Booker*, 745 F.3d at 422 ("Because the Defendants here engaged in a group effort, a reasonable jury could find them liable for an underlying finding of excessive force."). But an aggregate analysis is not required. *See Lynch v. Board of County Commissioners of Muskogee County, Oklahoma*, 2019 WL 4233382, at *4 n.3 (10th Cir. Sept. 6, 2019) ("Because we address each officer separately, we need not opine as to whether group-analysis would have been appropriate."). It thus appears that group analysis is often accompanied by either an indivisible activity such as all officers firing weapons at the same time (as

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Response, and the Court will therefore not consider this alternative to the active and joint participation of the four named Defendants. *Lynch v. Board of Cty. Commissioners of Muskogee County, Oklahoma*, 2019 WL 4233382, at *5 (10th Cir. Sept. 6, 2019) ("A plaintiff does not have to separately plead a failure to intervene cause of action, but the pleadings must make clear the grounds on which the plaintiff is entitled to relief. Here, the pleadings did not make clear that the appellants are entitled to relief on a failure to intervene theory.") (internal quotations omitted).

discussed in *Stout*, above), or when each officer's active participation is nevertheless also made part of the analysis. *See Moore v. Stadium Management Company, LLC*, 2016 WL 879829, at *8 (D. Colo. March 8, 2016) (citing to *Estate of Booker* and noting that, "in finding that aggregating the conduct of multiple officers was appropriate, the Tenth Circuit's decision cited evidence of each officer's active participation in the challenged use of force.").

Here, Defendants assert in their Reply that Plaintiff has failed the requirement of *Pahls* to "make clear exactly *who* is alleged to have done *what to whom*, . . . as distinguished from collective allegations." 718 F.3d at 1225 (quotation omitted) (emphasis in original). The undisputed facts reflect that Defendant Harmon delivered three punches to the Plaintiff's ribs, Defendant Foreman deployed the Taser on the Plaintiff, Defendant Lee employed the lateral vascular neck restraint on the Plaintiff, and Defendant Swaim helped to place the second handcuff on the Plaintiff. The Plaintiff refers to the chokehold, the Taser, and an unnamed officer or officers who placed a knee on his back to subdue him as applications of excessive force. It thus appears that there are facts supporting a coordinated use of force as to Defendants Harmon, Foreman, and Lee, but perhaps not as to Defendant Swaim. However, since it was a "group effort," including Defendant Swaim, it is possible a reasonable jury could find all of them, including Defendant Swaim, liable for any finding of excessive force. The Court finds, for the reasons set forth

below, that the officers are entitled to qualified immunity under either analysis.

"To state an excessive force claim 'under the Fourth Amendment, plaintiffs must show *both* that a 'seizure' occurred and that the seizure was 'unreasonable.'" *Thomas v. Durastanti*, 607 F.3d 655, 663 (10th Cir. 2010) (emphasis in original), *quoting Childress v. City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000). "[A] 'seizure' requires restraint of one's freedom of movement and includes apprehension or capture by deadly force." *Brooks v. Gaenzle*, 614 F.3d 1213, 1219 (10th Cir. 2010). The parties do not challenge that a seizure occurred, as the Defendants were in the process of arresting the Plaintiff. It remains, however, for the Plaintiff to demonstrate that the actions of each of these Defendants was unreasonable.

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). And it is an objective inquiry: "the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397 (internal quotations omitted). An officer does not have to use the least intrusive means, as long as his conduct was reasonable, which is based on the totality of the circumstances. *Thomas*, 607 F.3d at 670; *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). Because it is based on the totality of circumstances of each case, "[r]easonableness" does not have a precise

test but rather "requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396. "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed." *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004), *quoting Saucier v. Katz*, 533 U.S. 194, 205 (2001). "[W]e are mindful: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment.'" *Lundstrom v. Romero*, 616 F.3d 1108, 1126 (10th Cir. 2010), *quoting Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009).

The Supreme Court in *Graham* set out several important factors, including "[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." 490 U.S. at 396. Also, "[t]he reasonableness of Defendants' actions depends both on whether the officers were in danger at the *precise moment* that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995) (emphasis added). Finally, "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396.

As to the first factor, the severity of the crime, the Court finds that it weighs slightly in favor of the Plaintiff. He was being arrested for several drug-related felonies, and "[f]elonies are deemed more severe," *see Clark v. Bowcutt*, 675 Fed. Appx. 799, 807 (10th Cir. 2017), but "Defendants do not contend that any of [the Plaintiff's] alleged crimes were accompanied by violence." *Estate of Ronquillo by and through Estate of Sanchez v. City and County of Denver*, 720 Fed. Appx. 434, 438 (10th Cir. 2017) ("The officers were pursuing Mr. Ronquillo for arrest warrants related to aggravated vehicle theft. However, as the district court noted, Defendants do not contend that any of Mr. Ronquillo's alleged crimes were accompanied by violence. We thus weigh this factor in favor of the estate."). *Cf. Huntley v. City of Owasso*, 497 Fed. Appx. 826, 830 (10th Cir. 2012) ("Faced with a complaint of potentially *felonious domestic violence*, the officers find support from the first *Graham* factor.") (emphasis added).

The second factor—the immediacy of the harm—requires the closest analysis and "is undoubtedly the 'most important' and fact intensive factor in determining the objective reasonableness of an officer's use of force." *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017), *quoting Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). This factor is analyzed "at the precise moment that the officer used force." *Estate of Ronquillo*, 720 Fed. Appx. at 438. "The court conducts this analysis from the perspective of a reasonable officer on the scene, rather than with the vision of 20/20 hindsight, acknowledging that the officer may be forced to

make split-second judgments in certain difficult circumstances." *Estate of Ronquillo by and through Estate of Sanchez v. City and County of Denver*, 2016 WL 10843787, at *3 (D. Colo. Nov. 17, 2016). Again, this analysis takes into account "the totality of circumstances." *Thomson v. Salt Lake City*, 584 F.3d 1304, 1319 (2009). Here, Defendants contend that noncompliant suspects under the influence of PCP are extremely dangerous and unpredictable, often possessing enhanced physical strength, endurance, and resistance to pain. Plaintiff contends instead that he was peaceful and cooperative, and that intoxicated persons pose a minimal threat, citing *Novitsky v. City of Aurora*, 491 F.3d 1244, 1255 (10th Cir. 2007), in which the Tenth Circuit found the immediacy of the harm was mitigated because although the Plaintiff was intoxicated, he had not resisted arrest and his demeanor was "benign" when an officer employed a "twist lock" on his arm. But *Novitsky* is distinguishable from this case. Although Plaintiff contends he always cooperated, he in fact pleaded no contest to resisting arrest. And the Plaintiff does not dispute that he was intoxicated, seemed confused, and had trouble understanding with and complying with Defendant Foreman's instructions. Such documented noncompliance bolsters the immediacy of the threat to the officers, as "intoxicated people are often unpredictable and inject uncertainty into interaction with law enforcement." *Ornelas v. Lovewell*, 2014 WL 1238014, at *2 (D. Kan. March 26, 2014). "The situation presented to [the officers] was clearly a tense, uncertain, and rapidly evolving situation that we do not like to second-guess using the 20/20 hindsight

found in the comfort of a judge's chambers." *Phillips v. James*, 422 F.3d 1075, 1084 (10th Cir. 2005). This factor therefore weighs in favor of the Defendants.

The third factor, whether the Plaintiff was resisting arrest, goes along with the second factor and also weighs more in the Defendants' favor. In light of the fact of the Plaintiff's resistance to arrest, the officers who attempted to arrest the Plaintiff were justified in some use of force in arresting the Plaintiff. As stated above, the evidence reflects that the Plaintiff pleaded no contest to resisting arrest in violation of 21 Okla. Stat. § 268, which provides that it is a misdemeanor to "knowingly resist[ ], by the use of force or violence, any executive officer in the performance of his duty." Additionally, the Affidavit signed by Defendant Foreman as part of the arrest record states that the Plaintiff "resisted arrest and had [controlled dangerous substance] in his vehicle." *See* Docket No. 54, Ex. 10, p. 7. As discussed above, in this Circuit the Plaintiff is not entitled to use his no contest plea to recover damages. *See Jackson*, 189 Fed. Appx. at 779 ("There is a proscription on the use of nolo contendere pleas in subsequent civil proceedings, but [ ] *not* to . . . 'defensive' use . . . in a case where the criminal defendant [has] sought to recover damages for an alleged unlawful arrest.' "). The Court notes that the Plaintiff challenges the Defendants' interpretation of the events in the body camera video, but he does not challenge that he pleaded "no contest" to resisting arrest, and such fact is admissible under these circumstances. The remaining question, of course, is how much force was justified.

The facts reflect that Defendant Foreman and Defendant Harmon attempted to handcuff the Plaintiff but were unsuccessful and took him to the ground. It is not clear from the video or the briefing, but this may also be the point where Plaintiff refers to the full force of an officer on his prone body. Defendant Harmon first delivered three blows to the Plaintiff's ribs in an effort to get him to comply with the arrest, and these two officers grappled with the Plaintiff in order to get his hands behind his back. Defendant Foreman then employed the Taser in the "stapling" method, but officers were still unable to handcuff the Plaintiff. While the use of a Taser can be excessive under certain circumstances, *see Estate of Booker*, 745 F.3d at 424-425 ("Under prevailing Tenth Circuit authority, it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance.") (internal quotation omitted), the use of a Taser is not per se objectively unreasonable when a subject is not clearly under an officer's control. *See Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) ("Even if Perea initially posed a threat to officers that justified tasering him, the justification disappeared when Perea was under the officers' control."). Then as more officers arrived to assist, Defendant Lee applied the neck restraint which allowed the officers to get the first handcuff on the Plaintiff, and then get him back facedown again to get the second handcuff attached. Once the second handcuff was attached, all but one of the officers backed away from the Plaintiff within seconds, and it is undisputed that there was no additional force after the

handcuffs were secured. Based on the totality of the circumstances here, the Court therefore finds that the actions of each officer, individually and collectively, were objectively reasonable.

But even assuming *arguendo* that the officers' actions were objectively unreasonable, the Plaintiff must also establish that Defendants' actions violated a clearly established constitutional right. "Ordinarily, a plaintiff may show that a particular right was clearly established at the time of the challenged conduct 'by identifying an on-point Supreme Court or published Tenth Circuit decision; alternatively, 'the clearly established weight of authority from other courts must have found the law to be as he maintains.'" *A.M. v. Holmes*, 830 F.3d 1123, 1135 (10th Cir. 2016), *quoting Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015). However, "'clearly established law' should not be defined 'at a high level of generality.'" *Pauly*, 137 S. Ct. at 552, *quoting Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Instead, it "must be 'particularized' to the facts of the case. Otherwise, plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*, *quoting Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987). Therefore, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, ___ U.S. ___, 136 S. Ct. 305, 308 (2015) (emphasis in original).

Although the Plaintiff has advocated for a "sliding-scale" approach measuring degrees of egregiousness,

see Casey v. City of Federal Heights, 509 F.3d 1278, 1284 (10th Cir. 2007) ("[B]ecause excessive force jurisprudence requires and all-things-considered inquiry with careful attention to the fact and circumstances of each particular case . . . [w]e have therefore adopted a sliding scale to determine when law is clearly established."), the Tenth Circuit has noted that such scale has come into question and "may arguably conflict with recent Supreme Court precedent on qualified immunity" because it "may allow us to find a clearly established right even when a precedent is neither on point nor obviously applicable." *Lowe v. Raemisch*, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017).

The Plaintiff also points to *Estate of Booker* as to clearly established law, arguing that because that case involved the use of a choke hold, pressure on the back of an arrestee, and a taser, the Defendants here were on notice that "use of such force on a person who is not resisting and who is restrained in handcuffs is disproportionate." 745 F.3d at 428-429. But here, none of those actions occurred while the Defendant was in handcuffs, and the Defendant *was* resisting. Moreover, the choke hold in this case occurred while the Plaintiff was sitting up, while in *Estate of Booker* the Plaintiff was face down with an officer on top of him while the restraint was applied.

Finally, the Plaintiff points to *Weigel v. Broad*, 544 F.3d 1143 (10th Cir. 2008), a case involving positional asphyxiation where "Mr. Weigel was fully restrained and posed no danger, [but] the defendants continued to use pressure on a vulnerable person's upper torso

while he was lying on his stomach." 544 F.3d at 1154. The Tenth Circuit held there that "the law was clearly established that applying pressure to Mr. Weigel's upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions." *Id.* at 1155. Such facts are clearly distinguishable from this case, where those techniques were applied only until the Plaintiff was placed in restraints. *See McCoy v. Meyers*, 887 F.3d 1035, 1048 (10th Cir. 2018) ("[T]he preexisting precedent would not have made it clear to every reasonable officer that striking Mr. McCoy and applying a carotid restraint on him [before he was subdued] violated his Fourth Amendment rights. The cases cited by Mr. McCoy—*Dixon* [*v. Richer*, 922 F.2d 1456 (10th Cir. 1991)], *Casey*, and *Weigel*—involved force used on individuals who either did not pose a threat to begin with or were subdued and thus no longer posed any threat."). *See also Waters v. Coleman*, 632 Fed. Appx. 431, 437 (10th Cir. 2015) ("The key fact here is that while Officer Jones was applying force, Mr. Ashley was resisting being taken into custody. In several cases decided before 2011, this court upheld use of force by officers who faced physical resistance, including against persons who were impaired. Further, the pre-2011 cases holding that force may be excessive tend to emphasize a detainee's *lack* of resistance.") (emphasis in original) (collecting cases).

The Court thus concludes that it is not clearly established that any of the Defendants violated the

Constitutional rights of the Plaintiff. Because he has failed to carry his burden of establishing a violation of his constitutional rights, and because the law is not clearly established that the Defendants' actions violated the law, Defendants Harmon, Foreman, Lee, and Swaim are granted qualified immunity on Plaintiff's claim under 42 U.S.C. § 1983.

CONCLUSION

In summary, the Defendants Steve Harmon, Bobby Lee, Greg Foreman and Dillon Swaim's Brief in Support of their Motion for Summary Judgment [Docket No. 54] is hereby GRANTED.

DATED this 16th day of December, 2019.

/s Steven Shreder
Steven P. Shreder
United States Magistrate Judge
Eastern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

JERIEL EDWARDS,	)	
Plaintiff,	)	
vs.	)	
(1) STEVE HARMON,	)	**Case No.**
(2) STEVEN WARRIOR	)	**18-CV-347-SPS**
(3) BOBBY LEE,	)	
(4) GREG FOREMAN, and	)	
(5) DILLON SWAIM,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[*]

(Filed Oct. 28, 2019)

Plaintiff, through his counsel, Andrea Worden, submits his response to the *Defendants' Motion for Summary Judgment* and requests that such *Motion* be denied.

FACTS

The Defendants' *Statement of the Case* and *Statement of Uncontroverted Facts* are based on Greg Foreman's body camera video, which has been provided to the Plaintiff along with at least fourteen (14) other relevant body camera and dash camera videos. These "statements" provided are for the most part

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* Cover page and table of contents omitted

misleading and false. In response to each of the Defendants' "uncontroverted statements," the Plaintiff offers the following (in corresponding order):

1. Not disputed.
2. In dispute. Defendants' version of the statement provided by the citizen is inaccurate.
3. Not disputed.
4. Disputed. Defendants claim Plaintiff failed to respond to numerous attempts made by the officer to communicate. Plaintiff responded, immediately, to all attempts to engage and obeyed all commands. This is a material fact.
5. Not disputed.
6. Not disputed.
7. Not disputed.
8. Not disputed.
9. Not disputed.
10. Not disputed.
11. Not disputed.
12. Disputed. Defendants claim Plaintiff failed to comply with the orders to put his hands behind his back. Plaintiff denies the assertion and asserts that the officers intentionally prevented him from placing his hands behind his back. This is a material fact.
13. Not disputed.
14. Not disputed.

15. Not disputed.

16. Not disputed.

17. Disputed. Defendants did not wait for Plaintiff to obey the command to get on the ground before tackling him to the ground; they did it simultaneously. This is a material fact.

18. Not disputed.

19. Disputed. Defendants claim Plaintiff actively resisted by not allowing himself to be handcuffed. Plaintiff denies resisting and asserts that he tried to comply, desperately, but Defendants prevented him from doing so. This is a material fact.

20. Disputed. Defendants claim Harmon struck Plaintiff in the ribs in effort to get Plaintiff to give up his left arm. The video clearly shows that Harmon already had ahold of Plaintiff's left arm, securely, and actually released it in order to apply the strikes to Plaintiff's ribs. This is a material fact.

21. Not disputed.

22. Disputed. Defendants claim they were unable to control Plaintiff's hands and arms. The video clearly shows that they had control of his hands and arms at multiple times throughout the incident, including the times when they were preventing him from putting them behind his back.

23. Not disputed.

24. Not disputed.

25. Not disputed.

26. Not disputed.

27. Disputed. Defendants claim the taser had no effect on Plaintiff and that he continued to resist. Plaintiff adamantly denies the assertion and argues the taser had a debilitating effect on him and that he never resisted arrest. This is a material fact.

28. Disputed. Defendants claim Harmon struck Plaintiff on the upper arm with a Maglite Flashlight. Plaintiff asserts Harmon struck him in the head. This is a material fact.

29. Disputed. Defendants claim Lee arrived and immediately tried to assist the other officers. The video clearly shows he immediately applied the chokehold upon arrival, for no apparent legitimate, lawful reason as the Plaintiff was still restrained. This is a material fact.

30. Disputed. Defendants claim the move was a lateral vascular neck restraint. Plaintiff asserts it was not properly applied and therefore was an unlawful chokehold. This is a material fact.

31. Not disputed.

32. Not disputed.

33. Not disputed.

34. Not disputed.

35. Not disputed.

36. Not disputed.

37. Not disputed.

38. Disputed. Defendants claim the bi-lateral neck restraint is an accepted law enforcement restraint. Plaintiff asserts that, even if properly applied, the

move is widely criticized and controversial. This is a material fact.

39. Not disputed.

40. Not disputed.

41. Not disputed.

42. Disputed. Defendants claim evidence obtained from Plaintiff's car was contraband but did not provide any reliable test results to support the claim. Plaintiff denies the assertion. This is a material fact.

43. Not disputed.

44. Not disputed.

45. Disputed. Defendants claim Plaintiff entered a plea of guilty on all counts. Plaintiff entered a plea of no contest. This is a material fact.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

The Defendants have moved for summary judgment under Fed. R. Civ. P. 56 on Edwards' Fourth Amendment excessive force claim. Under Rule 56(a), summary judgment is allowed only if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. When applying this standard, a court must construe the evidence in the light most favorable to the non-moving party, in this case Edwards. *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir.

2014). Additionally, the court must draw all reasonable inferences in the light most favorable to the nonmoving party. *Lundstrom v. Romero*, 616 F.3d 1108, 1118 (10th Cir. 2010).

Where, as in the instant case, summary judgment is based on the defense of qualified immunity, a two-step inquiry applies. First, taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? If so, the inquiry then becomes whether the right was clearly established. *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1312 (10th Cir. 2002). The normal summary judgment burden of showing that no material facts remain in dispute that would defeat the qualified immunity defense remains on the defendant. If the record shows an unresolved question of fact relevant to this immunity analysis, a motion for summary judgment based on qualified immunity should be denied. *Id.*

II. THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON EDWARDS' EXCESSIVE FORCE CLAIM

A. Collateral Estoppel Does Not Bar Edwards' Fourth Amendment Claim

The Defendants initially argue that because Edwards was convicted on a no contest plea to a misdemeanor resisting an officer charge[1], his claim under

[1] The conviction was entered under 21 O.S. 268, which provides that "[e]very person who knowingly resists, by the use of

42 U.S.C. § 1983 that the Defendants used excessive force on him during his October 25, 2016 arrest is barred. Invoking the doctrine of collateral estoppel, Defendants' contend that this precludes Edwards from prevailing on his Fourth Amendment claim. The Defendants' reasoning is that because Edwards's resistance to his arrest is established by the judgment in the prior criminal case arising from the incident, that resistance "alone support[s] that the amount of force used under the circumstances was reasonable" for purposes of the Fourth Amendment. (Doc. 54, at 14).

This argument is meritless on at least two grounds. First, the plea upon which Edwards' conviction was based was a "no contest" plea. (Doc. 54-10, at 16, 19-21, 23, 26). Oklahoma law provides that with respect to a "nolo contendere" plea, "[t]he legal effect of such plea shall be the same as that of a plea of guilty, *but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based*." 22 O.S. Sec. 513 (emphasis added). *See also Martin v. Phillips*, 422 P.3d 143, 146 (Okla. 2018) (Oklahoma law, mandates that nolo contendere ("no-contest") pleas may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based). The Defendants admit that Oklahoma law governs the preclusive effect to be given the prior judgment in Edwards' criminal case. (Doc. 54, at 12-13

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force or violence, any executive officer in the performance of his duty, is guilty of a misdemeanor."

(citing 28 U.S.C. § 1738)). Because Oklahoma law does not give preclusive effect to the judgment entered upon Edwards' no contest plea, *Martin*, 422 P.3d at 148, it does not give rise to collateral estoppel in these federal court proceedings.

Second, even if the prior no contest plea establishes that Edwards in some manner and to some degree resisted the officers' attempts to arrest him, the fact of resistance alone does not establish as a matter of fact or law that the Defendants did not deprive Edwards of his Fourth Amendment right to be free from the use of excessive force in the course of a seizure. As discussed in more detail *infra*, police violate the Fourth Amendment's prohibition on unreasonable seizures if, in the course of arresting a person, they employ force upon the person that is unreasonable, excessive or not warranted by the circumstances. *Graham v. Conner*, 490 U.S. 386 (1989). There are three, non-exclusive factors relevant to an excessive force inquiry: (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. *Lundstrom v. Romero*, 616 F.3d 1108, 1126 (10th Cir. 2010). The ultimate issue in an excessive force case is whether the defendants' use of force was objectively reasonable when all the relevant facts and circumstances are considered. *Fisher v. City of Las Cruces*, 584 F.3d 888, 894-95 (10th Cir. 2009).

Thus, resistance by the plaintiff bringing an excessive force claim is only one factor that is balanced in

determining whether the defendants' use of force is objectively reasonable. Contrary to the Defendants' collateral estoppel argument, the fact that a plaintiff resisted efforts by police to arrest him does not preclude a Fourth Amendment excessive force claim. For example, in *Chacon v. Copeland*, No. 12-CA-226, 2015 WL 2018937 (W.D. Tex. Apr. 30, 2015). The court there upheld a jury verdict[2] on an excessive force claim where police investigating a report of a man with a gun eventually grabbed the defendant, threw him to the ground and shot him with a taser several times. In the course of trying to subdue the plaintiff, the plaintiff had pulled away from one of the officers and shoved the officer off of him. The defendants alleged that these actions showed that the plaintiff was resisting and justified the force employed on him. But the court rejected this argument, ruling as follows:

> As the Fifth Circuit noted, "[t]he seriousness of Chacon's shove, and whether a finder of fact could conclude that the shove was not active resistance, or was disproportionately minor in relation to the severity of force used by the officers, were fact questions not resolvable by the video and properly put to a trier of fact.

Chacon, 2015 WL 2018937 at *6 (quoting *Chacon v. Copeland*, 577 Fed. Appx. at 362).

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[2] The Court of Appeals for the Fifth Circuit had previously ruled in the case that the police were not entitled to summary judgment on their claim of qualified immunity. *Chacon v. Copeland*, 577 Fed. Appx. 355 (5th Cir. 2014).

Because lack of resistance to an arrest by an excessive force plaintiff is only a factor, and not an element, of a Fourth Amendment excessive force claim, courts have repeatedly rejected collateral estoppel arguments like the one made by the Defendants in their summary judgment motion. In *Donovan v. Thames*, 105 F.3d 291 (3d Cir. 1997), the court reversed summary judgment against a plaintiff in an excessive force case where the judgment was based on the preclusive effect of plaintiff's conviction for resisting the arrest giving rise to the Fourth Amendment claim. "Because the issue of the officers' use of excessive force was not essential to the conviction for resisting arrest and because we have no evidence that the issue of excessive force was actually litigated in the state-court criminal proceeding, we hold based on Kentucky law that issue preclusion does not restrict Donovan's excessive force claim in federal court." *Id.* at 295. Similarly, in *Hernandez v. City of Los Angeles*, 624 F.2d 935, 938 (9th Cir. 1980), the court rejected police officers' claims that collateral estoppel, based on the plaintiff's resisting arrest conviction, barred the plaintiff's excessive force claim because the conviction did not necessarily decide that the defendant police officers did not use excessive force in arresting the plaintiff. *See also Sullivan v. Officer Gagnier*, 225 F.3d 161, 165 (2d Cir. 1999) (fact that plaintiff was convicted of resisting arrest does not foreclose the possibility that the force used by police in response was excessive) and *Courteney v. Reeves*, 635 F.2d 326, 329 (5th Cir. 1981) (plaintiff's conviction for assaulting police officers as they tried to apprehend him did not collaterally estop plaintiff from

prevailing on excessive force claim against officers; admitted assault upon a police officer does not negate the possibility that the officer's alleged force used in course of arrest) .

The Defendants' contention that Edwards' "efforts to resist alone support that the amount of force used under the circumstances was reasonable" (Doc. 54, at 19) is simply wrong and not supported by the cases they cite. The decisions in *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), and *Mayard v. Hopwood*, 105 F.3d 1226 (8th Cir. 1997), do not even mention collateral estoppel, much less apply it, and the courts' references to resisting arrest were simply to note that it was a factor considered in judging the reasonableness of the officers' use of force.

To the contrary, the case law rejects the Defendants' collateral estoppel argument. Indeed, if resisting arrest constituted a bar to excessive force claims, police would be given *carte blanche* to abuse arrestees as they see fit without fear of being held responsible and regardless of the degree of resistance. *Donovan*, 105 F.3d at 328 (citing *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101, 1109 (11th Cir.1992)). Because of this case law and the state law preventing Edwards' no contest plea from having preclusive effect, the Defendants are not entitled to summary judgment on the basis of collateral estoppel.

B. The Defendants' Are Not Entitled To Summary Judgment On The Basis Of Qualified Immunity

The Defendants' also invoke the defense of qualified immunity as grounds for granting summary judgment. Qualified immunity shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law. *Gann v. Cline*, 519 F.3d 1090, 1092 (10th Cir. 2008). As noted above, when a qualified immunity is raised as a basis for summary judgment, a two-step inquiry applies. A plaintiff must show first that the defendants' actions deprived the plaintiff of a constitutional right. If that showing is made, the court must then determine whether the defendants' conduct was objectively reasonable in light of clearly established law at the time it took place. *Weigel v. Broad*, 544 F.3d 1143, 1151 (10th Cir. 2008). Thus, "'if a [constitutional] violation could be made out *on a favorable view of the parties' submissions*, the next, sequential step is to ask whether the right was clearly established.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)) (emphasis by court).

Invocation of qualified immunity does not change the general rules governing summary judgment. Tenth Circuit precedent makes clear that qualified immunity may not be granted in excessive force cases where there are material factual issues in dispute. *Olsen*, 312 F.3d at 1314. *Accord Estate of Booker*, 745 F.3d at 414-15. Additionally, a court must still view the facts in the light most favorable to the non-moving party and resolve all factual disputes and reasonable inferences in

favor of the non-moving party where qualified immunity is raised on a summary judgment motion. *Id.* at 411.

1. The Video Recordings Of Edwards' Arrest Demonstrate A Fourth Amendment Violation

Under the first prong, the inquiry is as follows: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. The facts here, as depicted in the several video recordings of the October 25, 2016 incident, demonstrate a brutalization of Edwards by the several Defendants that was wholly outside the bounds of legitimate police activity and unwarranted by any standard. A disoriented Edwards was smashed against his car, had his arms twisted, thrown to the ground and piled on by the Defendants despite his attempts to comply with their requests to investigate the matter and take him into custody. While on the ground, Edwards face and body were shoved into the pavement by the officers with their bodies and knees, he was punched numerous times in the rib area, he was put in a chokehold, he was tasered, and was struck additional times with a fist and an object wielded by one of the officers.

As shown by the video recordings, the force used by the Defendants upon Edwards was plainly excessive and unreasonable in violation of his rights under

the Fourth Amendment. The standard for excessive force claims was established in *Graham v. Connor*, 490 U.S. 386, 397 (1990), which held that police may, in effecting the seizure of a person, only use that amount of force which is reasonable under all the circumstances. The "inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to underlying intent or motivation." *Id.* at 388. "Reasonableness is evaluated under a totality of the circumstances approach which requires that we consider the following factors: '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.'" *Weigel*, 544 F.3d at 1151-52 (quoting *Graham*, 490 U.S. at 396).

In arguing that their use of force was reasonable under the *Graham* test, the Defendants rely to a large extent on the third *Graham* factor, asserting that Edwards actively resisted them throughout the encounter and that this justified the violence they inflicted on Edwards. But review of the video recordings fail to corroborate the contentions of the Defendants regarding resistance. Instead, the video shows that Edwards complied, albeit unsteadily and with difficulty due to his inebriated condition, to the officers requests to put down objects and to exit his vehicle. Yet the officers suddenly resorted to aggressively physical behavior toward Edwards, wrenching his arm behind him, shoving his body and head onto the vehicle and eventually

throwing him to the ground. Once on the ground, Edwards struggled to keep his face, head and body from being ground into the pavement by the Defendants' pushing and kneeing into his body. This struggle, along with the manner in which Edwards' shirt was lifted up over his head, prevented Edwards from putting his hands behind his back as the Defendants demanded.

The circumstances here and depictions on the video are not unlike the situation presented in *Estate of Booker v. Gomez*, *supra*, in which police officers were sued for excessive force in subduing an arrestee in a manner that caused the arrestee's death from asphyxia. In claiming qualified immunity from the claims of the arrestee's estate, the defendant officers presented affidavits that the arrestee had resisted attempts to place him in a holding cell and that this resistance justified the level of force used. However, surveillance video of the incident was available and, although the defendants asserted this supported their claims of resistance, the court disagreed, ruling as follows:

> Because our record review indicates the primary factual dispute in the district court was Mr. Booker's resistance, we must resolve this dispute in the Plaintiffs' favor on interlocutory review. Our analysis therefore accepts Mr. Booker did not resist during the vast majority of the encounter. The Defendants argue the video evidence belies this conclusion, but they are mistaken. In fact, the video, which shows Mr. Booker motionless on the floor while the deputies subdue him, contradicts

> the Defendants' assertion that Mr. Booker consistently resisted them.

Estate of Booker, 745 F.3d at 414-15.

Similarly, the video recordings of Edwards arrest do not plainly and unequivocally show that Edwards resisted the officers, but instead show Edwards was compliant with the officers' requests and did not make any hostile or threatening moves toward the police before they became physically aggressive and threw Edwards to the pavement. At this stage of the case, the evidence must be viewed in Edwards' favor and all reasonable inference drawn in his favor. *Id.* at 411. Viewing the evidence in this light, the objective reasonableness of the Defendants' conduct must be judged on the basis that Edwards did not resist the efforts to arrest him. *See also Choate v. Huff*, 773 Fed. Appx. 484 (10th Cir. 2019) (police officers were not entitled to summary judgment on excessive force claim for shooting where body camera video footage they relied on did not blatantly contradict the plaintiff's version of the events and fact question precluded granting officers' qualified immunity defense).

Moreover, to the extent Edwards did not follow all the directives that he was given by police, this should not justify the brutal force used upon him by the Defendants for at least two other reasons. First, with respect to the orders Edwards was given to place his hand behind his back, he was prevented from doing so by the Defendants' actions of throwing him to the ground, pulling his shirt over his head, a forcing his

head, face and body toward the pavement. In determining whether force police used was excessive and unreasonable, the officers' own reckless or deliberate conduct can be considered. *Fogarty v. Gallegos*, 523 F.3d 1147, 1159-60 (10th Cir. 2008). Second, any resistance by Edwards was minor and a natural response to being thrown to the ground by the Defendants. The Defendants' responsive force was wholly disproportionate and excessive. *See Chacon*, 2015 WL 2018937 at *6 (whether plaintiff's action was active resistance and was disproportionately minor in relation to the severity of force used by the officers, were fact questions properly put to a trier of fact).

With respect to the offense under investigation, the Defendants here were not faced with a particularly serious situation. Edwards was found sitting peacefully in his car and appeared to be intoxicated. The Defendants saw no indication of a weapon on or about Edwards. As indicated by Defendant Foreman, he planned to arrest Edwards for being under the influence of a controlled substance. While being under the influence is not a minor offense, it certainly is not so serious an offense as to warrant the brutalization Edwards was subjected to as shown on the video recordings. *See Casey v. City of Federal Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007) (where offenses plaintiff was arrested for were not violent offenses, they were not considered severe for purposes of weighing the *Graham* factors).

As to the remaining factor, the video evidence demonstrates that Edwards posed little immediate

threat to the Defendants at the time they became physically aggressive toward Edwards. Although the Defendants rely on Edwards' apparent intoxication as showing he posed a danger, other factors mitigate any threat he posed because of his condition. The video recordings demonstrate that Edwards was peaceful and cooperative with police and made no threatening or furtive gestures toward them. In *Novitsky v. City of Aurora*, 491 F.3d 1244, 1255 (10th Cir. 2007), the court held that an intoxicated person posed a minimal threat to police who seized him using a painful "twist lock" hold under the circumstances of the encounter. "Mr. Novitsky did not make any furtive movements in the car. Moreover, Mr. Novitsky did not resist Officer Wortham in any way; in fact, his demeanor was apparently benign, as he had begun to help himself out of the car when the twist lock was applied." Under these circumstances, any threat to the officers or the public was mitigated and "[v]iewing these facts in the light most favorable to Mr. Novitsky, as we must, we think a reasonable jury could conclude . . . that Officer Wortham's application of the twist lock for officer safety purposes was unreasonable under the Fourth Amendment." *Id.*

When all the circumstances are considered, particularly when viewed in the light most favorable to Edwards, the force used by the Defendants was objectively unreasonable in violation of the Fourth Amendment. This is particularly apparent in light of the kinds of force used against Edwards, some of which was applied after Edwards was restrained and in the control of the police. Thus, the video recordings indicate, and

Defendants have admitted that Edwards was subjected to chokeholds in the course of his arrest. In *Estate of Booker*, 745 F.3d at 425, the court wrote that

> [c]ourts from various jurisdictions have held the use of such force on a non-resisting subject to be excessive. *See United States v. Livoti*, 196 F.3d 322, 327 (2d Cir.1999) (upholding excessive force verdict where officer put victim in choke hold for one minute to render victim unconscious, and where department prohibited such holds); *Valencia v. Wiggins*, 981 F.2d 1440, 1447 (5th Cir.1993) (upholding district court's determination that the defendants' use of a "choke hold and other force . . . to subdue a non-resisting [detainee] and render him temporarily unconscious" constituted excessive force under the Due Process Clause); *Papp v. Snyder*, 81 F.Supp.2d 852, 857 (N.D.Ohio 2000) (denying qualified immunity where jury could conclude that officer used a choke hold and carotid hold when the victim was restrained by others and handcuffed); *McQurter v. City of Atlanta, Ga.*, 572 F.Supp. 1401, 1414 (N.D.Ga.1983) (use of chokehold was "excessive and malicious" when used after victim was "manacled" and "effectively restrained"), *abrogated on other grounds by Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988).

That decision also cited to *Gouskos v. Griffith*, 122 Fed. App. 965, 976 (10th Cir. 2005), where the court reversed a grant of qualified immunity where the plaintiff submitted evidence that an officer put "him in a

chokehold and chok[ed] him almost to unconsciousness when he was already on the ground, he was exclaiming that he was not resisting, and three other officers were sitting on him, holding his legs, and handcuffing him. . . . "

Edwards also was forced into the pavement by the Defendants with a knee to the back and the full force of the officer upon Edwards' prone body. This technique also has been condemned as excessive under similar circumstances. In *Weigel v. Broad*, *supra*, the court upheld an excessive force claim against officers who subdued an arrestee by using one or two knees to pin the arrestee to the ground, resulting in asphyxiation and death of the arrestee. The court upheld the trial court's conclusion that an objectively reasonable police officer would not have continued to apply pressure to the arrestee's upper torso after he was subdued and no longer a threat. *Weigel*, 544 F.3d at 1152. Similarly, in *Estate of Booker*, 745 F.3d at 429, the court found that the use of this technique upon a non-resisting, subdued suspect constitutes excessive force in violation of the Fourth Amendment. Finally, the use of the taser upon Edwards also was objectively unreasonable. Under prevailing Tenth Circuit authority, "it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance." *Casey*, 509 F.3d at 1286. If a reasonable jury could conclude that a lesser degree of force would have exacted compliance and that this use of force was disproportionate to the need, then summary judgment must be denied to

police claiming qualified immunity. *See Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665 (10th Cir.2010) (use of taser unconstitutional where jury could "conclude that [the victim] did not pose an immediate threat" to officer or others and where victim was not actively resisting).

Considering that Edwards was subjected to all these serious applications of violence and force, it can only be concluded that he was a victim of excessive force in violation of the Fourth Amendment. *See Estate of Booker*, 745 F.3d at 427. Therefore, Edwards has satisfied the first prong of the applicable test when qualified immunity is raised.

2. The Defendants' Use Of Force Violated Clearly Established Law

In their motion for summary judgment, the Defendants argue "there must be a Supreme Court or Tenth Circuit decision on point, or a clearly established weight of authority from other courts for the law to be clearly established." (Doc. 54, at 15). However, this is not the qualified immunity test applied in this Circuit, particularly in excessive force cases.

In *Casey*, 509 F.3d at 1284, the court held that because excessive force jurisprudence requires an all-things-considered inquiry with careful attention to the facts and circumstances of each particular case, "there will almost never be a previously published opinion involving exactly the same circumstances. We cannot find qualified immunity wherever we have a new fact

pattern." Indeed, "[t]he plaintiff is not required to show, however, that the very act in question previously was held unlawful in order to establish an absence of qualified immunity." *Weigel*, 544 F.3d at 1153.

Instead, the Tenth Circuit has "adopted a sliding scale to determine when law is clearly established. 'The more obviously egregious the conduct in light of prevailing constitutional principle, the less specificity is required from prior case law to clearly establish the violation.' . . . Thus, when an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do require a second decision with greater specificity to clearly establish the law." *Casey*, 509 F.3d at 1284 (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). *Accord Estate of Booker*, 745 F.3d at 427.

Applying either this test or the standard set forth in the Defendants' motion that the violative nature of particular conduct is clearly established, *Mullinex v. Luna*, 136 S. Ct. 305 (2015), it is plain that the Defendants claim to qualified immunity should be denied. Again, the decision in *Estate of Booker*, 745 F.3d at 428-29,[3] is highly instructive. In ruling that police officers were not entitled to qualified immunity on excessive force claims which involved the use of a choke hold, pressure on the back of the arrestee, and a taser, the

[3] Although *Estate of Booker* technically involved a due process excessive force claim, the Tenth Circuit made clear that the standards of reasonableness it was applying also applied to Fourth Amendment excessive force claims. *Estate of Booker*, 745 F.3d at 428.

court found that, by virtue of prior case law, the defendants were "on notice that use of such force on a person who is not resisting and who is restrained in handcuffs is disproportionate." *Id.* Where the police applied disproportionate force while the arrestee was prone on his stomach and not resisting, they had violated clearly established law and were not entitled to summary judgment on their qualified immunity defense. *Id. See also Lundstrom v. Romero*, 616 F.3d 1108, 1127 (10th Cir. 2010) (it is clearly established that *Graham's* reasonableness standard is violated if there were not substantial grounds for a reasonable officer to believe there was legitimate justification for acting as he did).

The tactics and methods employed by the Defendants against Edwards were clearly excessive, disproportionate and objectively unreasonable under the circumstances the Defendants confronted, and case law specifically addressed the unconstitutional nature of the force employed by the Defendants. Moreover, the video recordings of the incident depict particularly egregious conduct on the part of the Defendants in brutalizing Edwards using choke holds, punches to Edwards' body, tasering, and knees to his back. That each of these tactics has been found to be excessive and unreasonable as to a prone, subdued arrestee means that the Defendants were on notice that their combined use of them against Edwards was a violation of the Fourth Amendment. Because the Defendants' actions violate clearly established law, they are not entitled to summary judgment on the basis of qualified immunity.

The Plaintiff requests this Court deny the Defendants' *Motion*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2019, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants who have appeared in this case.

s/ Andrea L. Worden