No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Rodolfo Rivera Jr.

Petitioner,

v.

Officer John Granillo CSPD #3876

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Appeal Case No.
20-1133, (D.C. No. 1:17-CV-01667-KMT) (D.Colo.)

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Petition for Writ of Certiorari
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Appendix A

UNITED STATES COURTS OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 20-1133, (D.C. No. 1:17-CV-01667-KMT)(D.Colo.)
ORDER AND JUDGMENT
DENYING
APPEAL FROM
THE UNITED STATES DISCTIRCT COURT
(February 18, 2021)

Before
Honorable **MATHESON, BALFOCK**, and **CARSON**, Cir Judges

FILED
United States Court of Appeals
Tenth Circuit

February 18, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RODOLFO RIVERA, JR.,

Plaintiff - Appellant,

v.

OFFICER JOHN GRANILLO, CSPD 3876,

Defendant - Appellee.

No. 20-1133
(D.C. No. 1:17-CV-01667-KMT)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BALDOCK**, and **CARSON**, Circuit Judges.

Proceeding under 42 U.S.C. § 1983, Rodolfo Rivera, Jr., brought claims against Colorado Springs police officer John Granillo for malicious prosecution and excessive force. The district court resolved both claims in Granillo's favor. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. BACKGROUND & PROCEDURAL HISTORY

Granillo arrested Rivera on suspicion of assault and harassment. After booking Rivera in jail, Granillo filled out a probable cause affidavit in support of the arrest, which a local judge reviewed and approved. Rivera spent five days in pretrial detention. He eventually went to trial and the jury acquitted.

Following acquittal, Rivera filed this civil suit, alleging that Granillo lacked probable cause to arrest him (malicious prosecution) and failed to heed his complaints that the handcuffs were painfully tight (excessive force). The district court found that probable cause to arrest was evident as a matter of law on the documents Rivera attached to the complaint, and so dismissed the malicious prosecution claim under Fed. R. Civ. P. 12(b)(6).[1] The district court allowed the excessive force claim to go to discovery.

Following discovery, Granillo moved for summary judgment, asserting both non-liability and qualified immunity. The district court found that the undisputed facts showed Granillo did not wait too long after Rivera's complaints of pain before removing the handcuffs. The court accordingly granted Granillo's motion and entered final judgment against Rivera.

We provide additional details as they become relevant to the various issues discussed below.

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[1] The district court also dismissed a claim for gender discrimination. Rivera does not challenge this dismissal on appeal.

II. ANALYSIS

Rivera challenges the district court's dismissal of his malicious prosecution claim and its grant of summary judgment on his excessive force claim. We review both challenges de novo. *See Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 766 (10th Cir. 2013) (summary judgment); *Janke v. Price*, 43 F.3d 1390, 1391 (10th Cir. 1994) (dismissal for failure to state a claim).

A. Malicious Prosecution

The government violates a person's Fourth Amendment right to be free from unreasonable seizures when "legal process result[s] in pretrial detention unsupported by probable cause." *Manuel v. City of Joliet*, 137 S. Ct. 911, 919 (2017). Our circuit refers to this claim as "malicious prosecution," and holds that the plaintiff must prove, among other things, that "no probable cause supported the original arrest, continued confinement, or prosecution." *Sanchez v. Hartley*, 810 F.3d 750, 754 n.1 (10th Cir. 2016) (internal quotation marks omitted).

The legal process at issue here was the local judge's approval of Granillo's probable cause affidavit, thus requiring Rivera to remain in detention until he could post bond. Although that judge found probable cause, Rivera can nonetheless prove the no-probable-cause element of his claim by demonstrating that Granillo misled the judge into finding probable cause through deliberately false statements or material omissions. *See Taylor v. Meacham*, 82 F.3d 1556, 1562 (10th Cir. 1996). When faced with such a claim, the reviewing court's task is to reconstruct the affidavit as it

should have been (omitting falsities and inserting material omissions) and then decide whether the affidavit still shows probable cause. *Id.*

In this light, we first summarize the affidavit. We then turn to Rivera's claims that Granillo omitted or misrepresented material facts.

1. The Probable Cause Affidavit

The affidavit tells substantially the following story. On the night of October 30, 2015, Granillo was dispatched to a particular residence based on "a reported domestic disturbance." R. vol. 1 at 26. There he met a woman named Janet Miller. Miller said that she and Rivera—whom she described as her boyfriend—got into a prolonged argument the night before (*i.e.*, October 29). During the argument, Rivera "kept repeating the statement, 'You're not answering the question.'" *Id.* Eventually Rivera "punched [Miller] with a closed fist using his right hand striking her in the left upper rib area below her breasts." *Id.* "[T]his caused her pain as she shouted out in pain[,] 'Ow.'" *Id.* Sometime after this, they went to sleep. "Miller stated she did not call police during this incident and did not know why . . . ." *Id.* at 27.

According to Miller, the fight briefly resumed the next morning and Rivera stated, "I didn't hit you, I just touched you, do you want me to really hit you so you can compare them[?]" *Id.* at 26 (internal quotation marks omitted). Then, when Rivera returned home that evening, "she asked him to leave." *Id.* at 27. Rivera "immediately went to his bedroom stating he wanted to be left alone to go to sleep." *Id.* Miller again asked Rivera to leave, and Rivera again stated he wanted to be left

alone, after which he closed the door to the bedroom. That's when Miller called 911, leading to Granillo's dispatch.

Granillo "did not notice any marks on Ms. Miller's body in the area she described she was hit, but photographed it." *Id.* He then spoke with Miller's adult son, who said he was in his own bedroom the previous night, across the hall from where the fight took place. "[H]e could hear Mr. Rivera repeating the same question over and over as if trying to get an answer that he wanted." *Id.* He also "heard his mother scream out 'Ow' as if some type of physical altercation had occurred." *Id.*

Finally, Granillo spoke with Rivera, whose story about what happened since he returned home that night was essentially the same as Miller's (*i.e.*, she asked him to leave but he just wanted to go to bed). As for the previous night's fight, Rivera "stated there was no incident and there was nothing to be talked about." *Id.*

Ultimately, Granillo decided he had probable cause to arrest for third-degree assault and harassment.[2]

2. Alleged Material Omissions

Rivera alleges that Granillo was aware of additional facts that he should have included in the warrant affidavit, specifically:

- At around the same time Miller called 911, Rivera also called 911.

[2] Colorado defines third-degree assault as "knowingly or recklessly caus[ing] bodily injury to another person," Colo. Rev. Stat. § 18-3-204(1)(a), where bodily injury means, among other things, "physical pain," *id.* § 18-1-901(3)(c). Colorado defines harassment, in this context, as "[s]trik[ing], shov[ing], kick[ing], or otherwise touch[ing] a person or subject[ing] him to physical contact," if done "with intent to harass, annoy, or alarm another person." *Id.* § 18-9-111(1)(a).

Although he "did not want the police to come," he nonetheless reported that Miller was "barging [into his] room and saying she wanted him out." R. vol. 1 at 35.

- Rivera had been "generally cooperative" on the night of October 30, according to Granillo's testimony during Rivera's criminal trial. *Id.* at 68.

These omissions relate entirely to the night of October 30. They are irrelevant to whether Granillo had probable cause to arrest Rivera for actions allegedly taken the previous night (October 29). Thus, they do not affect the probable cause analysis.[3]

Rivera further argues that Granillo failed to emphasize Miller's primary motive: "she called the police so she could have [him] removed from the residence." *Id.* at 36. This is important, says Rivera, because Miller supposedly said nothing about the previous night's assault until after Granillo told Miller that Rivera "had legal standing to be at the residence" (*i.e.*, the police could not remove him as a trespasser). Aplt. Opening Br. at 5. Thus, Miller had a reason to fabricate the assault, as an alternate means of convincing the police to remove Rivera, yet Granillo never pointed this out to the reviewing judge.

[3] Rivera also claims that the warrant affidavit falsely "states that the incident took place on 30 Oct 15." Aplt. Opening Br. at 23. But the warrant affidavit consistently distinguishes between the alleged October 29 fight culminating in a punch to Miller's ribs and the October 30 verbal disagreement that prompted Miller to call 911. *See* R. vol. 1 at 26–27.

This argument fails for lack of evidence. To be sure, Granillo's police report, but not his affidavit, recounts that he "advised [Miller] that [he] was unable to have Mr. Rivera removed from the home because he had been at the residence for approximately 7–9 years," and he "explained to [her] about the protection order and eviction processes." R. vol. 1 at 38. However, the police report places this event as the last thing Granillo says to Miller—well after she describes the assault, after Granillo speaks with Miller's son, and after Granillo contacts Rivera and places him in the police cruiser. *See id.* at 35–38. The only evidence Rivera cites to challenge this timeline is a contentious deposition exchange in which Rivera elicits Granillo's agreement that, according to the police report, Miller first described the previous night's event as a "verbal altercation," with no mention of physical contact. *See* R. vol. 4 at 58–62 (quoting R. vol. 1 at 35). Whatever the value of this concession, the next paragraph of Granillo's police report contains Miller's account of the punch to her ribs. *See* R. vol. 1 at 36. And, again, Granillo says nothing about Rivera's right to remain in the residence until well after this. *Id.* at 38. So Rivera has no evidence that the timeline is any different than what Granillo's police report reflects.

Even if Rivera had evidence of his alternate timeline, Granillo would still have possessed probable cause. Granillo spoke with Miller's son who claimed to have overheard the argument. He generally corroborated her story, including hearing an exclamation of pain consistent with being struck. Rivera nowhere argues that Granillo had reason to doubt the son's account.

"[P]robable cause is a matter of probabilities and common sense conclusions, not certainties." *United States v. Martin*, 613 F.3d 1295, 1302 (10th Cir. 2010) (brackets in original; internal quotation marks omitted). And Granillo needed only "arguable probable cause," given his assertion of qualified immunity. *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) (internal quotation marks omitted). He had at least that much, even if Miller never told her story of the assault until after he told her he could not remove Rivera for trespassing.

In sum, Rivera fails to point us to any falsity within or material omission from the warrant affidavit that would have vitiated probable cause. The district court correctly dismissed Rivera's malicious prosecution claim because it was clear on the face of the pleadings that probable cause existed, thus defeating a necessary element of the claim.

B. Excessive Force

"In some circumstances, unduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff's timely complaints (or was otherwise made aware) that the handcuffs were too tight." *Cortez v. McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007) (en banc).

In this regard, the timeline is important. Granillo arrived at the residence shared by Rivera and Miller, heard Miller's accusations and Rivera's response, and Granillo's sergeant directed him to cuff Rivera and place him in the back of the police cruiser. Granillo carried out this directive at 11:43 PM. He checked the

handcuffs for tightness by ensuring there was a finger's width of space between the handcuffs and Rivera's wrists. He then went back inside the residence to continue his interviews, while Rivera sat by himself in the police cruiser.[4] This is when Rivera began to feel pain from the handcuffs.

At 12:15 AM, Granillo returned to the police cruiser and announced that Rivera was under arrest. Around this time, Rivera complained about the handcuff pain, but Granillo chose to drive Rivera to the nearest substation before removing the cuffs. The parties dispute the amount of time it took to reach the substation—we address below whether Rivera raises a genuine dispute. Regardless, not long after arriving at the substation, Granillo removed the handcuffs.[5]

The district court focused on the length of time between Rivera's first complaint to Granillo and the moment Granillo removed the handcuffs. Rivera argues, however, that the court must look at the entire time he was in handcuffs, and

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[4] Granillo says "there was a small amount of water in the deep part of the seat" in which he placed Rivera. R. vol. 1 at 38. Rivera claimed below (and continues to insist on appeal) that this liquid was urine, not water, but he has pointed us to no evidence that the liquid was urine, nor even explained in argument why he believes as much. We therefore disregard the allegation.

[5] In the district court, Rivera claimed that Granillo—just before removing the handcuffs—unnecessarily pulled Rivera's cuffed hands upward, above shoulder level, causing great pain. The district court's summary judgment order does not address this accusation. Although Rivera mentions this incident in his opening brief, *see* Aplt. Opening Br. at 4, 11, he fails to present any argument for reversal based on it. In particular, he fails to demonstrate that the summary judgment record contains enough evidence to establish a genuine dispute of material fact. "Arguments inadequately briefed in the opening brief," like this one, "are waived." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

particularly account for the fact that Granillo checked the handcuffs for tightness in a manner supposedly contrary to his own expert's recommendations. If Rivera means to say that improper handcuffing technique can substitute for being "made aware . . . that the handcuffs were too tight," *Cortez*, 478 F.3d at 1129, he makes no attempt to satisfy his qualified immunity burden of showing that this was clearly established law at the time Granillo acted, *see Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) ("Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." (internal quotation marks omitted)). In any event, Granillo's expert did not opine that Granillo used an improper tightness-checking technique. The expert said that he *could not tell* from Granillo's description of the event whether Granillo used proper technique. *See* R. vol. 4 at 212, ¶ 3. Rivera therefore fails to show an entitlement to a trial on this question.

The remaining question is whether Granillo "ignored [Rivera's] timely complaints . . . that the handcuffs were too tight." *Cortez*, 478 F.3d at 1129. The answer turns on four sub-questions.

First, when did Rivera complain to Granillo? The district court found that he "did not complain . . . until [Granillo] got back into [the] patrol car and put the car into gear to go to the . . . substation." R. vol. 4 at 309. In the district court, Rivera suggested that it happened earlier, but Rivera now says he "concurs with" this

finding. Aplt. Reply Br. at 3–4. The district court therefore correctly identified the starting point of the analysis.

Second, with what words, or in what manner, did Rivera complain? In his summary judgment motion, Granillo asserted that Rivera "complained of wrist pain," and "made his complaint in a conversational manner." R. vol. 2 at 5, ¶ 12.[6] Rivera did not contest this assertion. *See* R. vol. 4 at 12, ¶ 12. Thus, the district court properly found that Granillo's story was undisputed on this point.

Third, what did Granillo do after Rivera complained? Rivera says that Granillo "started going fast when I complained to him." R. vol. 2 at 42. Although there does not appear to be any dispute about this, we will assume it is the version of the facts most favorable to Rivera. We further note that Granillo explained his decision to keep going, rather to stop and re-check the cuffs, as a question of safety, given that it was nighttime and he was unassisted. Rivera offered no evidence or argument that these were improper considerations.

Fourth, how long did the trip to the substation take? In the district court, Granillo said twelve minutes. Rivera responded that "the trip took more than 12 minutes," R. vol. 4 at 11, but went on to argue and cite evidence concerning the *total*

[6] Rivera asserts that Granillo's summary judgment affidavit was a "sham affidavit" as compared to his testimony at Rivera's criminal trial, *see* Aplt. Opening Br. at 25–26, but Rivera never argued as much to the district court. "A federal appellate court, as a general rule, will not reverse a judgment on the basis of issues not presented below." *Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990) (per curiam). Rivera gives us no reason to depart from this general rule, so we do not address his sham affidavit argument.

amount of time he spent in handcuffs. Rivera never supported his assertion that the drive to the substation took longer than twelve minutes. *See* Fed. R. Civ. P. 56(c)(1)(A) ("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 . . . ."). The district court therefore did not err in finding this portion of Granillo's account undisputed.

On the undisputed facts, or those taken in the light most favorable to Rivera, we agree with the district court that Granillo did not "ignore[] a . . . complaint[] . . . that the handcuffs were too tight." *Cortez*, 478 F.3d at 1129. Under the circumstances, moreover, it was reasonable as a matter of law for Granillo to wait the relatively short amount of time it would take to get to the substation—an amount of time compressed by Granillo's choice to drive faster—before removing the cuffs. Summary judgment for Granillo was therefore appropriate.[7]

C. Attorneys' Fees

Rivera argues that the district court erroneously awarded Granillo his attorneys' fees. We find no such award in the record. Rather, the district court

[7] Although Rivera focuses on unduly tight handcuffing, he occasionally inserts language seemingly asserting that handcuffing alone amounted to excessive force under the circumstances. *See* Aplt. Opening Br. at 17, 19–20; Aplt. Reply Br. at 10–11. If Rivera indeed means to argue as much, he fails in his qualified immunity burden to identify case law clearly establishing that handcuffing can be constitutionally excessive even when not painful. *Cf. Mglej v. Gardner*, 974 F.3d 1151, 1166 (10th Cir. 2020) ("Mglej has failed to identify any relevant case law clearly establishing that Deputy Gardner violated the Fourth Amendment just by handcuffing [him]. . . . In fact, relevant case law generally suggests the contrary.").

awarded Granillo his costs. But Rivera's attorneys' fees argument is not a misnamed attack on costs. *See* Aplt. Opening Br. at 28 (invoking the "American Rule" and "Lodestar approach"). Because the district court made no fee award, this argument is moot.

III. CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Joel M. Carson III
Circuit Judge

Appendix B

UNITED STATES COURTS OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 20-1133, (D.C. No. 1:17-CV-01667-KMT)(D.Colo.)
ORDER
DENYING
PETITION FOR REHEARING (En Banc)
(April 5, 2021)

Before
Honorable **MATHESON, BALFOCK**, and **CARSON**, Cir Judges

FILED
United States Court of Appeals
Tenth Circuit

April 5, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RODOLFO RIVERA, JR.,

Plaintiff - Appellant,

v.

OFFICER JOHN GRANILLO, CSPD 3876,

Defendant - Appellee.

No. 20-1133
(D.C. No. 1:17-CV-01667-KMT)
(D. Colo.)

ORDER

Before **MATHESON**, **BALDOCK**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix C

UNITED STATES COURTS OF APPEALS
FOR THE TENTH CIRCUIT

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
ORDER
GRANTING
MOTION FOR SUMMARY JUDGMENT
(March 13, 2020)
(2:21 PM MDT)

Jeffery P. Colwell, Clerk s/K. Senamontry, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Kathleen M. Tafoya

Civil Action No. 17–cv–01667–KMT

RODOLFO RIVERA, JR.,

Plaintiff,

v.

OFFICER JOHN GRANILLO/CSPD 3876,

Defendant.

ORDER

This matter is before the court on Defendant's "Motion for Summary Judgment" (Doc. No. 52 [Mot.], filed March 15, 2019). Plaintiff responded, and Defendant replied. (Doc. No. 55 [Resp.], filed April 5, 2019; Doc. No. 56 [Reply], filed April 19, 2019.)

SUMMARY OF CASE

Plaintiff, proceeding *pro se*, filed his complaint on or about July 10, 2017, alleging Defendant Granillo violated his constitutional rights by arresting him without probable cause, arresting him on the basis of gender, and injuring him with unduly tight handcuffs. (Doc. No. 1 [Compl.].) On April 24, 2018, this court dismissed Plaintiff's lack of probable cause claim and his gender discrimination claim. (Doc. No. 24.) Defendant now seeks summary judgment on the remaining excessive force claim. (Mot.)

UNDISPUTED FACTS

1. On October 30, 2015, Defendant Officer Granillo and Sergeant Fred Walker responded to a call for service at 5740 Pemberton Way. (Compl., Ex. 3 at 11.) The complaining witness alleged Plaintiff had struck her the night prior, and she wanted Officers to remove Plaintiff from her home. (*Id.*)

2. Sergeant Walker instructed Defendant to handcuff Plaintiff and detain him in Defendant's patrol car. (*Id.* at 18.)

3. After placing Plaintiff in handcuffs, Defendant checked them for tightness by ensuring there was a finger's width of space between each handcuff and each of Plaintiff's wrists. (Mot., Ex. B, Aff. of Officer John Granillo, ¶ 5; Compl., Ex. 3 at 19.) Defendant then double-locked the handcuffs, which prevents the handcuffs from becoming tighter. (Mot., Ex. B, ¶ 5; Ex. C, Van Ooyen Report, at 4. ¶ 18.)

4. When Defendant applied the handcuffs, Plaintiff did not complain. (Mot., Ex. A, Aff. of Sergeant Fred Walker, ¶ 6.)

5. Defendant escorted Plaintiff to his patrol car and returned to the house. (Mot., Ex. B, ¶ 6.) Sergeant Walker remained outside in his own vehicle, which was not equipped to transport suspects, to watch Plaintiff. (Mot, Ex. A., ¶¶ 7–8.) After fifteen minutes, Sergeant Walker checked on Plaintiff and asked how he was doing. (*Id.* ¶ 9.) Plaintiff did not complain about the handcuffs at that time. (*Id.*)

6. The handcuffs did not start hurting Plaintiff until he leaned back in his seat and readjusted his hands and then began struggling with the handcuffs. (Mot., Ex. D at 54, ll. 1–12; at 68, ll. 2–22.)

7. At approximately 12:15 am on October 31, 2015, Defendant returned to his patrol car to transport Plaintiff to the Falcon Substation. (Mot., Ex. B, ¶ 11.; Resp., Ex. E at 3.) The trip to the police station took twelve minutes. (Mot., Ex. B, ¶ 11.) Plaintiff described the trip as "pretty quick." (Mot., Ex. D, ll. 7–8.)

8. During the trip to the substation, Plaintiff, for the first time, complained of wrist pain. (Mot., Ex. B, ¶ 8; Ex. D at 60, ll. 2–16.) Plaintiff made his complaint in a conversational manner. (Ex. B, ¶ 8.)

9. After arriving at the Falcon Substation, Defendant again checked the handcuffs for tightness and found again that they had not gotten any tighter. (Mot., Ex. B, ¶ 12; Compl., Ex. 3 at 19.) Defendant then removed the handcuffs. (Ex. B, ¶ 12.)

STANDARD OF REVIEW

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994) (citing *Celotex*, 477 U.S. at 325). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(c). A disputed fact is "material" if "under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir.1998)

(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Thomas v. Metropolitan Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011) (citing *Anderson*, 477 U.S. at 248).

When ruling on a motion for summary judgment, a court may consider only admissible evidence. *See Johnson v. Weld County, Colo.*, 594 F.3d 1202, 1209–10 (10th Cir. 2010). The factual record and reasonable inferences therefrom are viewed in the light most favorable to the party opposing summary judgment. *Concrete Works*, 36 F.3d at 1517. The following axioms have a bearing on summary judgment disposition—*i.e.*, (1) that "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); (2) "the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue" *id.* at 256; and (3) "the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor." *Id.* at 257.

Moreover, because Plaintiff is proceeding *pro se*, the court, "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (holding allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers"). At the summary judgment stage of litigation, a plaintiff's version of the facts must find support in the record. *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir. 2009). "When opposing

parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Thomson*, 584 F.3d at 1312.

ANALYSIS

A. Qualified Immunity

Defendant argues he is entitled to qualified immunity on Plaintiff's excessive force claim asserted against him in his individual capacity. The doctrine of qualified immunity shields government officials from individual 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Saucier v. Katz*, 533 U.S. 194, 121 (2001).

"In resolving a motion . . . based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right, and whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Leverington v. City of Colo. Springs*, 643 F.3d 719, 732 (10th Cir. 2011) (quoting *Pearson*, 555 U.S. at 232) (internal quotations omitted). Once a defendant invokes qualified immunity, the burden to prove both parts of this test rests with the plaintiff, and the court must grant the defendant qualified immunity if the plaintiff fails to satisfy either part. *Dodd v. Richardson*, 614 F.3d 1185, 1191 (10th Cir. 2010). Where no constitutional right has been violated "no further

inquiry is necessary and the defendant is entitled to qualified immunity." *Hesse v. Town of Jackson, Wyo.*, 541 F.3d 1240, 1244 (10th Cir. 2008) (quotations omitted).

1. Excessive Force Claim

Defendant argues he is entitled to summary judgment on Plaintiff's excessive force claim.

"The Fourth Amendment forbids unreasonable seizures, including the use of excessive force in making an arrest." *Casey v. City of Federal Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007). Claims of excessive force are analyzed under the objective reasonableness standard of the Fourth Amendment. *See, e.g., Graham v. Connor*, 490 U.S. 386, 395 (1989); *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1313 (10th Cir. 2009). This standard "requires inquiry into the factual circumstances of every case; relevant factors include the crime's severity, the potential threat posed by the suspect to the officer's and others' safety, and the suspect's attempts to resist or evade arrest." *Medina v. Cram*, 252 F.3d 1124, 1131 (10th Cir. 2001) (citing *Graham*, 490 U.S. at 396). A "court assesses the reasonableness of an officer's conduct from the perspective of a reasonable officer on the scene, acknowledging that the officer may be forced to make split-second judgments in certain difficult circumstances." *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1220 (10th Cir. 2005) (quoting *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1314 (10th Cir. 2002) (further citation omitted)). The objectively unreasonable test considers the totality of the circumstances "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Havens v. Johnson*, 783 F.3d 776, 781–82 (10th Cir. 2015) (quoting *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008) (internal quotation marks omitted)).

"[I]n nearly every situation where an arrest is authorized, . . . handcuffing is appropriate[.]" *Fisher v. City of Las Cruces*, 584 F.3d 888, 896 (10th Cir. 2009). Defendant argues, and the court agrees, that there is no evidence to suggest that Defendant applied the handcuffs incorrectly or in an unreasonable manner. Rather, the undisputed facts show that Plaintiff did not complain when Defendant applied the handcuffs or up to approximately 15 minutes later, when Sergeant Walker checked on Plaintiff. (Mot., Ex. A, ¶¶ 6, 9.) Nevertheless, the question in this case is "whether the failure to *adjust* [Plaintiff's] handcuffs . . . constitutes excessive force." *Fisher*, 584 F.3d at 902 (emphasis added).

"[U]nduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff's timely complaints (or was otherwise made aware) that the handcuffs were too tight." *Cortez v. McCauley*, 478 F.3d 1108, 1129 (10th Cir. 2007). The undisputed evidence shows that the handcuffs did not start hurting Plaintiff until he leaned back in his seat and readjusted his hands and then began struggling with the handcuffs. (Mot., Ex. D at 54, ll. 1–12; at 68, ll. 2–22.) Plaintiff did not complain about the handcuffs being too tight or hurting him until Defendant got back into his patrol car and put the car into gear to go to the Falcon Creek substation. (*Id.* at 60, ll. 2–16.) However, according to Plaintiff's own testimony, Defendant did not ignore Plaintiff's complaints about the handcuffs. Rather, Plaintiff testified that he and Defendant got to the police station "pretty quick, because [Defendant] sped up. He started going fast when I complained to him." (Mot., Ex. D, ll. 7–8.) Moreover, the trip to the police station took only twelve minutes,

and there is no evidence to suggest that Plaintiff complained about the handcuffs more than once on the way to the police station.[1] (Mot., Ex. A, ¶ 15; Ex. B, ¶ 11.)

> [T]he Tenth Circuit has held that no claim for excessive force existed even though a plaintiff was handcuffed behind the back and remained handcuffed for 20 minutes, complained repeatedly that the handcuffs were too tight and of pain, and suffered damage to her shoulder and her radial nerve at the wrist which prevented her from pursuing her professional and recreational piano playing.

Kisskalt v. Fowler, No. 13–CV–01113–WYD–KLM, 2014 WL 6617136, at *8 (D. Colo. Nov. 21, 2014) (citing *Morreale v. City of Cripple Creek*, No. 96–1220, 1997 WL 290976, at *1 (10th Cir. 1997)). *See also, Lewis v. Sandoval*, 428 F. App'x 808, 812 (10th Cir. 2011) (Finding in part that an officer did not use excessive force by waiting ten minutes to remove a pair of handcuffs while at the police station after checking the handcuffs for fit, even though the plaintiff complained of wrist pain). In each of these cases, the courts determined the defendant officers were entitled to qualified immunity because they took steps to ensure the handcuffs were not too tight after applying them. *Kisskalt*, WL 6617136, at *8; *Morreale*, 113 F.3d at *5; *Lewis* 428 F. App'x at 812.

In this case, it is undisputed that after Defendant placed Plaintiff in handcuffs, Defendant checked the handcuffs for tightness by ensuring there was a finger's width of space between each handcuff and each of Plaintiff's wrists. (Mot., Ex. B, ¶ 5; Cpl., Ex. 3 at 19.) Defendant then double-locked the handcuffs, *id.*, which prevents them from becoming tighter.[2] (Mot., Ex. B, ¶

[1] Plaintiff disputes this fact and states that he was placed in handcuffs at 2343 hours and left for the police station at 0015. (*See* Resp. at 9, ¶ 11.) However, because it is undisputed that Plaintiff did not complain about the handcuffs until Defendant got into his patrol car and left for the police station, it is irrelevant that Plaintiff was in handcuffs for approximately thirty-two minutes before that time.

[2] Plaintiff states that Defendant "did not properly check [the] handcuffs for tightness" and cites a portion of Defendant's deposition in support of this contention. (Resp. at 7, ¶ 4.) However,

5.; Ex. C, ¶ 18.) After arriving at the Falcon Substation, Defendant Granillo again checked the handcuffs for tightness and found again that they had not gotten any tighter. (Mot., Ex. B, ¶ 12; Compl., Ex. 3 at 19.) Defendant then removed the handcuffs. (Mot., Ex. B, ¶ 12.)

Accordingly, Plaintiff has failed to satisfy his burden of "demonstrat[ing] a genuine issue for trial" on his excessive force claim. *Concrete Works, Inc.*, 36 F.3d at 1518. The court need not reach Defendant's remaining arguments.

WHEREFORE, it is

ORDERED that Defendant's "Motion for Summary Judgment" (Doc. No. 52) is **GRANTED**; it is further

ORDERED that judgment shall enter in favor of the defendant and against the plaintiff on all claims for relief and causes of action asserted in this case. It is further

ORDERED that the defendant is awarded his costs to be taxed by the Clerk of Court in the time and manner prescribed by Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1. It is further

ORDERED that this case is **CLOSED**.

Dated this 13th day of March, 2020.

BY THE COURT:

Kathleen M. Tafoya
United States Magistrate Judge

Plaintiff fails to explain how or why he believes this testimony shows that the defendant did not check the handcuffs for tightness. Moreover, Defendant indeed testified that he checked for tightness by inserting his finger between the handcuffs and the Plaintiff's wrists. (*See* Resp., Ex. A at 55, ll. 8-14.)

Appendix D

UNITED STATES COURTS OF APPEALS
FOR THE TENTH CIRCUIT

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
ORDER - FINAL JUDGMENT
GRANTING
MOTION FOR SUMMARY JUDGMENT
(March 13, 2020)
(4:40 PM MDT)

Before
Honorable **KATHLEEN M. TAFOYA**, Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 17-cv-01667-KMT

RODOLFO RIVERA, JR,

Plaintiff,

v.

OFFICER JOHN GRANILLO/CSPD 3876,

Defendant.

FINAL JUDGMENT

PURSUANT to and in accordance with Fed. R. Civ. P. 58(a) and the Order entered by the Honorable Magistrate Judge Kathleen M. Tafoya on March 13, 2020, and incorporated herein by reference as if fully set forth, it is

ORDERED that Defendant's Motion for Summary Judgment is GRANTED. It is

FURTHER ORDERED that final judgment is hereby entered in favor of Defendant, Officer John Granillo, and against Plaintiff, Rodolfo Rivera Jr. on all claims for relief and causes of action asserted in this case. It is

FURTHER ORDERED that Defendant, Officer John Granillo, shall have its costs by the filing of a Bill of Costs with the Clerk of this Court within fourteen days of the entry of judgment.

DATED this 13th day of March, 2020

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

s/ K. Senamontry
Deputy Clerk

FILED
United States Court of Appeals
Tenth Circuit

March 3, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RODOLFO RIVERA, JR.,

Plaintiff - Appellant,

v.

OFFICER JOHN GRANILLO, CSPD 3876,

Defendant - Appellee.

No. 20-1133
(D.C. No. 1:17-CV-01667-KMT)
(D. Colo.)

ORDER

This matter is before the court on the appellant's motion for extension of time to file petition for rehearing. The motion is granted. Appellant's petition shall be filed on or before March 19, 2021. No further extensions will be granted under the clerk's authority.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix F

UNITED STATES COURTS OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 20-1133, (D.C. No. 1:17-CV-01667-KMT)(D.Colo.)
ORDER
GRANTING
EXTENSION OF TIME TO FILE REPLY BEIEF
(July 10, 2020)

Christopher M. Wolpert, Clerk

FILED
United States Court of Appeals
Tenth Circuit

July 10, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RODOLFO RIVERA, JR.,

Plaintiff - Appellant,

v.

OFFICER JOHN GRANILLO, CSPD 3876,

Defendant - Appellee.

No. 20-1133
(D.C. No. 1:17-CV-01667-KMT)
(D. Colo.)

ORDER

This matter is before the court on appellant's motion for extension of time to file a reply brief in this appeal. The motion is granted. The reply brief shall be filed and served on or before July 20, 2020.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix G

UNITED STATES COURTS OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 20-1133, (D.C. No. 1:17-CV-01667-KMT)(D.Colo.)
ORDER
DENYING
STAY
BILL OF COST
(July 24, 2020)

Before
Christopher M. Wolpert, Clerk

FILED
United States Court of Appeals
Tenth Circuit

July 24, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RODOLFO RIVERA, JR.,

Plaintiff - Appellant,

v.

OFFICER JOHN GRANILLO, CSPD 3876,

Defendant - Appellee.

No. 20-1133
(D.C. No. 1:17-CV-01667-KMT)
(D. Colo.)

ORDER

Before **HARTZ** and **HOLMES**, Circuit Judges.

Appellant Rodolfo Rivera, Jr., seeks a stay of proceedings in the district court on the defendant-appellee's bill of costs until the conclusion of this appeal. Though ostensibly filed as a "Writ of Mandamus," we construe his filing as a motion for stay pending appeal under Federal Rule of Appellate Procedure 8 because that is the relief he seeks. We therefore consider (1) whether Mr. Rivera has made a strong showing that he will likely succeed on the merits of his appeal; (2) whether he will suffer irreparable injury absent a stay; (3) whether a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Mr. Rivera bears the burden to show that the circumstances justify a stay. *See id.* at 433-34.

Having considered Mr. Rivera's motion, the defendant-appellee's response, and Mr. Rivera's reply, we conclude that he has not made the showing necessary to obtain a stay pending appeal.[1] We therefore deny his motion.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

[1] To the extent he seeks mandamus relief, Mr. Rivera has not shown he is entitled to that relief either. *See United States v. Copar Pumice Co.*, 714 F.3d 1197, 1210 (10th Cir. 2013).

FILED
United States Court of Appeals
Tenth Circuit

April 5, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RODOLFO RIVERA, JR.,

Plaintiff - Appellant,

v.

OFFICER JOHN GRANILLO, CSPD 3876,

Defendant - Appellee.

No. 20-1133
(D.C. No. 1:17-CV-01667-KMT)
(D. Colo.)

ORDER

Before **MATHESON**, **BALDOCK**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk