IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-CV-03112-RBJ-STV

SEAN SLATTON,
Plaintiff,

v.

TODD HOPKINS,
BRANDON BARNES,
JOHN HUTTO,
AND FORT COLLINS POLICE DEPARTMENT
Defendants.

MOTION TO DISMISS OFFICER HOPKINS

Defendant Todd Hopkins, appearing separately from the other named Defendants, by and through his attorneys, Marni Nathan Kloster and Nicholas Poppe, hereby submits his Motion to Dismiss all claims asserted against him, and in support of said Motion alleges the following:

CONFERRAL

Counsel for Defendant Hopkins has conferred with Plaintiff regarding the filing of this Motion and Plaintiff opposes.

INTRODUCTION

On the evening of December 3, 2016, Mr. Sean Slatton was advised nine times by law enforcement that he either needed to show his identification, that he needed to stop, and/or that he was under arrest. Those commands by law enforcement went unheeded (contrary to Mr. Slatton's assertion that he calmly and immediately complied), and in fact, Mr. Slatton instead headed away from the officers. In an effort to stop Mr. Slatton, Officer Todd Hopkins utilized a

single baton strike to his lower leg and one use of oc spray (akin to pepper spray). Both efforts failed to stop Mr. Slatton and he instead quickened his pace, breaking into a sprint to continue his attempts to flee.

To dispense with Mr. Slatton's lawsuit under 42 U.S.C. § 1983, the Court need only consider three major issues.

First, the Court is permitted to view the body camera footage in the context of a motion to dismiss because Mr. Slatton specifically incorporated the video by reference in his most recent Amended Complaint.

Second, under *Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010), Mr. Slatton has no Fourth Amendment claim against Officer Hopkins because his movement was never terminated by Officer Hopkins' use of force.

Third, and in the alternative, if Mr. Slatton was "seized" at the time Officer Hopkins used force, such force was objectively reasonable as Mr. Slatton was actively evading arrest. At the very least, it was not clearly established that such minimal force under the circumstances was unreasonable, therefore entitling Officer Hopkins to qualified immunity as a matter of law.

Thus, Officer Hopkins, respectfully requests that the Court dismiss, with prejudice, the claims against him.

STANDARD OF REVIEW

While Mr. Slatton is *pro se,* the Tenth Circuit has also specifically held that *pro se* parties must nonetheless "follow the same rules of procedure that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal citations and quotations omitted). As such, courts cannot take on the responsibility of serving as a *pro se*

litigant's attorney in constructing the litigant's arguments. *Id.* (citing *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994)). It is also not a court's duty to craft a litigant's arguments or complete the necessary research associated with bringing a claim. *See id.* ("[W]hen a pro se litigant fails to comply with that rule, we cannot fill the void by crafting arguments and performing the necessary legal research."). Put another way, the court "must avoid becoming the plaintiff's advocate" and the court "may not rewrite a [complaint] to include claims that were never presented." *Firstenberg. v. City of Santa Fe***,** 696 F.3d 1018, 1024 (10th Cir. 2012) (alteration in original).

A court considering a motion to dismiss under F.R.C.P. 12(b)(6) "must accept the allegations of the complaint as true…." *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). However, pursuant to *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), courts must also "look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." *Kay*, 500 F.3d at 1218 (internal citations and quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Plaintiff's legal conclusions couched as factual allegations need not be considered. *Iqbal*, 556 U.S. at 678–79.

When multiple defendants have been named, "the burden rests on the plaintiffs to provide fair notice of the grounds for the claims made against each of the defendants." *Robbins v. Okla.*, 519 F.3d 1242, 1250 (10th Cir. 2008). It is insufficient to refer collectively to multiple defendants, without specifying the individual activities of each. *Id*. A plaintiff must explain "what each defendant did to him…; when the defendant did it; how the defendant's action

harmed him…; and what specific legal right the defendant violated." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007).

Moreover, a court may consider documents or evidence outside the four corners of a complaint where a party incorporates it by reference or where it "is central to the plaintiff's claim." *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

RELEVANT FACTUAL INFORMATION

In justifying his claims, Mr. Slatton refers to "[v]ideo footage from the Defendants' body cameras," which he claims shows that "Plaintiff was absolutely compliant and non-threatening." [ECF 17, p. 5]. Setting aside his own subjective description of his behavior, Mr. Slatton's direct reference to the body camera footage in support his federal claims makes such footage relevant to a motion to dismiss. *GFF Corp.*, 130 F.3d at 1384; see also *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 (10th Cir. 2017) (court considering items, such as a video recording, attached to or referenced in the complaint was deemed appropriate as to motion to dismiss).

As the Court can view the video itself, which is filed as Exhibit A, Officer Hopkins will limit his own narration to highlighting only a few key points.[1] First, Officer Hopkins and Officer Barnes collectively requested that Mr. Slatton provide his identification on three separate occasions, asked him to stop moving on five separate occasions, and also informed him that he

[1] As with most body-worn cameras, Officer Hopkins' camera captured and stored thirty seconds of video (but no audio) prior to its activation. Thus, the Court will not hear audio until the thirty-second mark. Further, while there is other body camera footage of Mr. Slatton and his contact with law enforcement, as this Motion is solely on behalf of Officer Hopkins, only his body worn video has been attached. Moreover, the video attached is the segment involving Officer Hopkins' physical contact with Mr. Slatton.

was under arrest. In response to being informed that he was under arrest, Mr. Slatton retorted: "no I'm not." Second, Mr. Slatton never stopped moving once asked for his identification. Indeed, after Officer Hopkins was forced to resort to using some minimal force, Mr. Slatton broke into a sprint. Finally, Mr. Slatton's efforts to escape Officer Hopkins were successful, as Officer Hopkins discontinued pursuit once the line of sight was lost.

Turning to the Amended Complaint, Mr. Slatton provides few details in support of his claims. As an example of such lack of details, Mr. Slatton never actually alleges that he was arrested, and if he was, who accomplished such arrest.

LEGAL ARGUMENT

i. Mr. Slatton cannot sue Officer Hopkins for false arrest because he was never seized according to Fourth Amendment jurisprudence.

Mr. Slatton's first claim describes an excessive force claim but under the title of "False Arrest."[2]

In *California v. Hodari*, 499 U.S. 621, 629 (1991), the U.S. Supreme Court held that the Fourth Amendment is not implicated unless and until a suspect's movement is terminated. In *Brooks v. Gaenzle*, the Tenth Circuit applied this instruction in the context of a § 1983 suit, holding that a plaintiff had no claim under the Fourth Amendment because he continued to run away after the officer's use of force. 614 F.3d at 1224. The Court held that even though the officer intended and succeeded in shooting the plaintiff, "it clearly did not terminate his

[2] The exact nature of his claim is unclear. In any event, a determination of the particular basis for this claim is not necessary for dismissal to be appropriate.

movement or otherwise cause the government to have physical control over him." *Id*. Absent the latter, no "seizure" occurred under the Fourth Amendment. *Id*.

The same rationale applies here. Even assuming for the moment that Officer Hopkins lacked the constitutional authority to detain Mr. Slatton (an assumption he strongly denies), Mr. Slatton was never seized, as he neither submitted to Officer Hopkins' show of authority nor was Officer Hopkins' successful in chasing after Mr. Slatton. Indeed, when informed that he was under arrest, Mr. Slatton confidently replied "no I'm not" and outpaced Officer Hopkins until he disappeared. Neither action is consistent with being seized under the Fourth Amendment.

In his Amended Complaint, Mr. Slatton intimates that he was eventually caught and taken to jail. Yet, Mr. Slatton fails to allege *who* arrested him later that evening, much less what force, if any, was used to accomplish that arrest. As the Tenth Circuit has made equally clear, claims against government actors are subject to dismissal unless the "complaint make[s] clear exactly *who* is alleged to have done *what to whom*…" *Robbins*, 519 F.3d at 1250 (emphasis in original). Because Mr. Slatton failed to identify the manner in which he was arrested, much less allege that Officer Hopkins was the arresting officer, his Amended Complaint fails to state a claim for excessive force during a false arrest. And even accepting that Mr. Slatton was eventually found and arrested, such facts do not alter the analysis above: when Officer Hopkins engaged in force, he did so prior to Mr. Slatton ever being seized. *See Hodari*, 499 U.S. at 629 (suspect was not seized for purposes of the Fourth Amendment until actually tackled by the officer).

As the Fourth Amendment was not implicated at the time Officer Hopkins utilized his baton and oc spray, Mr. Slatton's first claim must fail.

ii. Mr. Slatton's excessive force claim fails under the same analysis, as well as under Graham v. Connor.

Mr. Slatton's second claim appears to be a more traditional claim of excessive force, *i.e.*, Officer Hopkins "used more force than is reasonably necessary to arrest or gain control of the victim." [ECF 17, p.4].[3] But therein lies the rub. Officer Hopkins did not, in fact, arrest Mr. Slatton when using his baton or oc spray, nor did he even gain control of Mr. Slatton. Much like his first claim, the Fourth Amendment is not implicated in the absence of an actual seizure. This claim thus fails under *Brooks* in the same manner as Mr. Slatton's first claim.

But even if the Court were to assume that the Fourth Amendment was implicated, Officer Hopkins would nonetheless be entitled to qualified immunity.

Claims of excessive are evaluated under the three factors set forth in *Graham v. Connor*: (1) "the severity of the crime at issue, (2) "whether the suspect posed an immediate threat to the safety of the officers or others," and" (3) "whether the suspect was actively resisting arrest or attempting to evade arrest by flight." 490 U.S 386, 396 (1989).

As the Amended Complaint suggests, and the body camera audio confirms, Officer Hopkins was attempting to detain Mr. Slatton for trespassing. For purposes of this Motion only, Officer Hopkins assumes that Mr. Slatton did not pose an immediate threat to the safety of the

[3] Mr. Slatton titles his claim "Excessive Force/Physical Assault." The description following the title makes clear that the claim is solely one of excessive force under *Graham v. Connor*. To the extent that "physical assault" was meant to raise some other type of claim, it is not one that is cognizable under § 1983.

officers present.[4] Under *Graham*, that leaves the third factor for consideration: whether Mr. Slatton was actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. While Mr. Slatton implies he engaged in no wrongdoing, the video, which must be considered undisputed evidence, makes it clear that he was evading the officers, which manifested itself both in his physical retreat from Officer Hopkins and his verbal statement that he was not under arrest. Thus, the Court should disregard any conclusory statements by Mr. Slatton to the contrary. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that court may disregard one party's version of events if "blatantly contradicted by the record").

Disposition of Mr. Slatton's excessive force case thus turns on Tenth Circuit precedent analyzing what level of force is appropriate when the first two *Graham* factors support the plaintiff, but the third does not. The starting point is *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993). In *Hinton*, while conceding that the first two *Graham* factors well supported the plaintiff, the court nonetheless found that a two-officer takedown aided by a stun gun was reasonable because the plaintiff was actively resisting arrest. *Id*. at 781. The Tenth Circuit reached the same conclusion in *Hawker v. Sandy City Corp.*, 591 Fed. App'x 669 (10th Cir. 2014) (unpublished), where a twist lock resulted in a fracture of a nine-year old's clavicle. The court based its holding on the fact that the child was resisting arrest at the time the twist lock was performed. *Id*. at 675-76. This Court too has noted the Tenth Circuit's emphasis on the third *Graham* factor in evaluating an officer's level of force, whereby a greater level of force may be

[4] That said, should this matter proceed Officer Hopkins believes he can show that Mr. Slatton's actions toward the officers were of heightened concern in light of the environment and Mr. Slatton's prior actions.

necessary to secure a suspect who is evading or resisting arrest. *Whitney v. MacGregor*, 2015 WL 4055465, at *6 n.7 (D. Colo. July 2, 2015) (unpublished).

Applied here, it is undisputed that Mr. Slatton disobeyed at least a half dozen commands to stop and/or show his identification and stated affirmatively that he was not complying with officers' attempts to arrest him. In light of the use of force approved in *Hinton* and its progeny, a single strike with a baton to a lower limb and one use of oc spray was, as a matter of law, not constitutionally excessive. *See Mecham v. Frazier*, 500 F.3d 1200, 1205 (10th Cir. 2007) (holding that pepper spray on seated driver was not unconstitutional given plaintiff's verbal resistance to arrest). And even if it were, Mr. Slatton has the burden to establish that the law was clearly established at the time Officer Hopkins employed such force. *See, e.g., Doe v. Woodard*, 912 F.3d 1278, 1289 (10th Cir. 2019); *Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010)(holding the plaintiff bears the burden of showing with particularity that the law was clearly established). Absent precedent placing the constitutional question beyond debate under the *specific* circumstances of this case, Officer Hopkins is entitled to qualified immunity.[5] *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'") (emphasis in original) (internal citations omitted); see also *Dodds v. Richardson*, 614 F.3d 1185, 1206 (10th Cir. 2010) (citing *Harman v. Pollock*, 586 F.3d 1254, 1261 (10th Cir. 2009))(holding that as for proof of a clearly established

[5] Mr. Slatton indicates he had a large cyst in the back of his brain. Even accepting this as true and relevant for purposes of Officer Hopkins' use of force, Mr. Slatton fails to allege that any of the officers were aware of such cyst, nor that it was reasonably obvious to the average officer. As such, it cannot factor into any Fourth Amendment analysis. *See Fisher v. City of Las Cruces*, 584 F.3d 888, 901 (10th Cir. 2009) (holding that pre-existing injuries should be considered, but only to the extent such injuries were known to the officer.).

right, "[t]he law is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other Courts shows that the right must be as plaintiff maintains."); *Brosseau v. Haugen*, 543 U.S. 194, 199-200 (2004) (holding that while general tests can guide, there must be clear law to guide in the specific factual situation at hand).

iii. Mr. Slatton's false imprisonment claim does not survive Robbins v. Oklahoma.

In his third claim, Mr. Slatton alleges that unnamed Defendants falsely imprisoned him. Again, Mr. Slatton cannot be referring to the initial encounter with Officer Hopkins, as he fled sufficiently fast to escape detention from Officer Hopkins. That leaves some unpled event, whereby Mr. Slatton was taken into custody. Yet, Mr. Slatton fails to mentions if or how Officer Hopkins was involved in such arrest and imprisonment. Thus, even assuming (for purpose of this Motion only) that Mr. Slatton was arrested without probable cause, he fails to allege in his Amended Complaint that Officer Hopkins personally participated in such conduct. *See Robbins*, 519 F.3d at 1250. Under *Robbins* and *Iqbal*, Mr. Slatton's third claim for relief must fail.

iv. Mr. Slatton cannot sustain private causes of action under criminal statutes.

Officer Hopkins considers claims four and five together as they both suffer from the same fatal flaw: they are premised upon criminal statutes. Mr. Slatton alleges that unnamed officers engaged in obstruction of justice and "police misconduct" under 18 U.S.C. §§ 1503 and 242, respectively. The Tenth Circuit has held that a private party cannot sustain a civil cause of action under these statutes. *See Shaw v. Neece*, 727 F.2d 947, 949 (10th Cir. 1984) (holding no private cause of action exists under 18 U.S.C. § 242); *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123, 127 (10th Cir. 1953) (holding no private cause of action exists under 18 U.S.C. § 1503).

v. Mr. Slatton's failure to intervene claim is not directed at Officer Hopkins.

While Mr. Slatton does not articulate in the Amended Complaint which officer he is suing under a failure to intervene theory, it is logical to assume that it is not Officer Hopkins and during conferral regarding this Motion Mr. Slatton seemed to acknowledge this claim was not directed at Officer Hopkins. As the body camera confirms, Officer Hopkins is the officer who utilized his baton and oc spray. No other uses of force are described in the Amended Complaint. It thus stands to reason that Officer Hopkins could not have witnessed another use of force, much less failed to intervene in an excessive use of force. *See Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008) (holding that officer must have "realistic opportunity" to intervene during another officer's use of force).

To the extent this claim is directed at Officer Hopkins, it fails under *Iqbal* as Mr. Slatton has pled no facts that support a plausible claim for relief against Officer Hopkins.

CONCLUSION

For the foregoing reasons, Officer Todd Hopkins respectfully requests that the Court dismiss all claims against him, with prejudice, and award him his reasonable costs, along with any such other relief the court deems appropriate.

Respectfully submitted this 14th day of June, 2019.

/s/ *Marni Nathan Kloster*
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2019, I electronically filed the foregoing **MOTION TO DISMISS OFFICER HOPKINS** with the Clerk of Court using the CM/ECF with the Clerk of Court using the CM/ECF system and mailed to the following at their addresses:

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