IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00884-CMA-STV

CHAYCE AARON ANDERSON,

Plaintiff,

v.

JASON SHUTTERS

Defendant.

DEFENDANT JASON SHUTTERS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT PURSANT TO FED. R. CIV. P. 56

Defendant, Jason Shutters, through his Attorneys, Hall & Evans, LLC, submits the following as his Reply in Support of Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56, as follows:

I. ARGUMENT

A. Any force used to arrest Plaintiff Anderson was objectively reasonable under the Fourth Amendment

1. There is no evidence Detective Shutters used any greater force then necessary to place the handcuffs on Plaintiff.

"The Fourth Amendment protects individuals from 'unreasonable . . . seizures,' [citation omitted] and courts have long recognized that the reasonableness of a seizure depends not just on why or when it is made, but also on how it is accomplished." ***Fisher v. City of Las Cruces***, 584 F.3d 888, 894 (10th Cir. 2009) citing ***Graham v. Connor***, 490 U.S. 386, 395 (1989) and U.S. Const. *amend IV*. In particular, "(t)he inquiry focuses not on the officers' particular motivations,

nor on the arrestee's subjective perception of the intrusion, but on 'whether the officers' actions are 'objectively reasonable in light of the facts and circumstances confronting them'" ***Fisher***, 584 F.3d at 894 citing ***Graham***, 490 U.S. at 395.

Based on the circumstances in this matter respecting cooperation when arrested, Plaintiff argues his non-combative presentation did not necessitate the use of an "inappropriate" (ECF No. 133 at 1) and "high-impact" handcuffing method by Detective Shutters (ECF No. 133 at 8). Plaintiff characterizes the "technique" used by Detective Shutters in a manner intended to create a question of fact with respect to the reasonableness of how he was handcuffed. There are no facts, however, to support Plaintiff's notion that the use of any particular method was necessarily more intrusive under the Fourth Amendment than the one actually used by Detective Shutters, or that any such technique caused an injury more than *de minimis* to Plaintiff's wrists.

Plaintiff argues the "lowest level of impact is the twist-and-lock technique," and infers any other method is somehow excessive. But this argument mis-cites the testimony and is not supported by the record. In particular, Detective Shutters' supervisor, Sergeant Cochran, testified there are "multiple schools of training, and each of those has its own forms. Within each of those schools of training, there are a multitude of ways to do handcuffing." (**Movant's Appx. pp. 43 and 44 - Deposition of Sergeant Kim Cochran, 11:16-19).** "(T)here are at least three or four methods for doing handcuffing." (**Movant's Appx. Pp. 44 - Deposition of Sergeant Kim Cochran, 11:20-22**).

The "standing cuff" is one such method and was used by Detective Shutters when he handcuffed the Plaintiff. The standing cuff technique consisted of Plaintiff placing his hands behind his head, interlacing his fingers, and then subsequently placing each hand behind his back

as he was searched by Detective Shutters (**Movant's Appx. pp. 45 and 46 - Deposition of Detective Shutters, 43:15-21**). There is nothing about this method or technique which is considered excessive, nor is there is any testimony from an expert versed in arrest procedures who supports Plaintiff's conclusory argument that one technique is "higher impact" than the other. Furthermore, *from Detective Shutters' perspective*, the standing cuff and the twist and lock, are interchangeable although the standing cuff technique is considered more secure (not more aggressive) based on the circumstances (**Movant's Appx. pp. 47 - Deposition of Detective Shutters, 44:3-10**). It is from Detective Shutters' perspective that we address the reasonableness of a use of force. "A particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." ***Graham***,490 U.S. at 396 citing to ***Terry v. Ohio***, 392 U.S. 1, 22-27 (1968).

There is also nothing presented by the Plaintiff, in the form of admissible evidence, to support the notion Detective Shutters should have utilized a "less intrusive" method because of Plaintiff's presentation as non-combative. Furthermore, even if a different handcuffing method were available, it was not incumbent on Detective Shutters to use any such method. "(W)e are mindful that the Fourth Amendment 'does not require [police] to use the least intrusive means in the course of a detention, only reasonable ones.'" ***Fisher***, 584 F.3d at 894 citing ***Marquez v. City of Albuquerque***, 399 F.3d 1216, 1222 (10th Cir. 2005) (brackets in original). The use of a particular method of handcuffing should not be "second guessed." "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment.'" ***Fisher***, 584 F.3d at 894, citing ***Graham***, 490 U.S. 396.

2. There is no evidence supporting Plaintiff's argument the handcuffs were "squeezed excessively".

Plaintiff also argues Detective Shutters tightened the handcuffs "excessively" after asking the Plaintiff if the handcuffs were too tight. Plaintiff implies the timing of the conversation creates some sort of question respecting Detective Shutters' conduct, but the evidence establishes otherwise:

Q: Do you know what that last set of cranking was - - or what that sound was?

A: So that's me checking the cuffs for tightness. And one was a little bit too loose, so it sounded like there was, what two more clicks in there, as I was asking him if either one of those were too tight.

(**Movant's Appx. pp. 48 - Deposition of Detective Shutters, 47:7-15**).

The fatal point for Plaintiff's argument is the undisputed fact that at no time during this discussion, did he inform Detective Shutters about the handcuffs being "excessively tight". In other words, there is no evidence presented by the Plaintiff that Detective Shutters had any knowledge Plaintiff believed the handcuffs had been tightened excessively. "In this circuit…(t)o trigger liability for unduly tight handcuffs…the plaintiff must show…the officer's knowledge that the handcuffs were too tight." ***Zartner v. Miller***, 760 Fed. Appx. 558, 561 (10th Cir. 2019) (unpublished) (footnotes omitted,) referring to ***Cortez***, 478 F.3d at 1129 and ftnt. 24, and ***Scott v. Hern***, 216 F.3d 897, 911 (10th Cir. 2000). *See also* ***Fisher v. The City of Las Cruces***, 584 F.3d 888, 896 (10th Cir. 2009) referring to ***Rodriguez v. Farrell***, 290 F.3d 1341, 1352-53 (11th Cir. 2002) (concluding officer did not use excessive force when he handcuffed plaintiff's arm behind his back, despite the fact that handcuffing led to eventual amputation of one arm, because officer

did not know of plaintiff's preexisting injury). *See also* ***Silvan W. v. Briggs***, 309 Fed. Appx. 216, 224 (10th Cir. 2009) citing ***Vondrak v. City of Las Cruces***, 535 F.3d 1198, 1208-09 (10th Cir. 2008) ("And because there is no evidence that Cory [Plaintiff]…notified the officers that his handcuffs were painful, he cannot maintain an excessive force claim based on unduly tight handcuffing."). The failure to establish any knowledge on the part of Detective Shutters regarding Plaintiff's complaints, precludes an excessive force claim pursuant to the Fourth Amendment.

In addition, Plaintiff's presentation to the Poudre Valley Hospital ("PVH") emergency department, refutes any notion the force needed to apply the handcuffs was somehow excessive. (*See* **Movant's Appx. p. 13- UC Health Medical Records at Anderson 0016; Movant's Appx. pp. 33 & 35-Deposition of Erin Carnahan, 30:10-12; Movant's Appx. pp. 35 to 36-Deposition of Erin Carnahan, 30:13-25; 31:1-6**; **Movant's Appx. pp. 36 & 37- Deposition of Erin Carnahan, 31:22-25; 32:1-5, and; Movant's Appx. p. 37-Deposition of Erin Carnahan, 32:6-9**). Plaintiff ignores the fact his final diagnosis was "disturbance of skin sensation," or, in other words, a scratch (**Movant's Appx. p. 36-Deposition of Erin Carnahan, 31:7-19**). He also has no explanation for the differential diagnosis of "malingering" (**Movant's Appx. p. 34-Deposition of Erin Carnahan, 17:12-23**). Despite Plaintiff's contention he suffers from "intermittent wrist pain'" he offers no medical testimony contravening Erin Carnahan's testimony that Plaintiff did not suffer *any* injury to his wrists (**Movant's Appx. pp. 38 & 39-Deposition of Erin Carnahan, 36:15-22; 37:2-7**).

Plaintiff relies on ***Krause v. Ferrari***, 2010 U.S. Dist LEXIS 89501 (D. Colo. August 30, 2010, 08-cv-02808), to argue medical testimony is not required to establish the existence of an injury. In ***Krause***, however, the Court noted there was evidence Plaintiff "immediately

complained [to the arresting officer] that the handcuffs were too tight" (***Krause***, 2010 U.S. Dist LEXIS at *17); there was a diagnosis of nerve compression syndrome (***Krause***, 2010 U.S. Dist. LEXIS at *8); and there was eye witness testimony that Plaintiff's injury interfered with his job (***Krause***, 2010 U.S. Dist LEXIS at *17. *See* eg. ***Krause***, 2010 U.S. Dist. LEXIS at *8 ("The owner of the Grease Monkey…observed that Plaintiff wore a sling on his wrist for a few weeks and that he had trouble performing certain tasks…")). None of these factual circumstances are presented in this matter in the form of testimony or medical records.[1, 2]

In addition, it is the lack of any evidentiary support, plus the affirmative conclusions from the only medical care provider in this matter, which support the notion Detective Shutters' actions

---

[1] As set forth in the Motion to Dismiss, Counsel for Detective Shutters acknowledges the Court's Practice Standards requiring identification of the evidentiary record, supporting this factual statement. In this instance, however, the support is the omission of any facts necessary to support Plaintiff's claims. It is, therefore, not possible to provide a pin-point citation. Detective Shutters also suggest it is the Plaintiff's burden to affirmatively establish he received medical treatment for his injury, other than treatment for a *de minimis* concern identified as a scratch. Plaintiff has not met his burden.

[2] Plaintiff also attempts to create a question of fact by presenting a declaration wherein he states it would be difficult to operate heavy equipment (ECF No. 133-11 at 5, para. 30). This statement, however, is conclusory and speculative and should not be given any weight as Plaintiff has been incarcerated since his arrest and has no personal knowledge with respect to the operation of heavy equipment since his alleged injury.

were objectively reasonable (*See* **Movant's Appx. pp. 35 to 36-Deposition of Erin Carnahan, 30:13-25; 31:1-6; pp. 36 & 37- Deposition of Erin Carnahan, 31:22-25;32:1-5; p. 37-Deposition of Erin Carnahan, 32:6-9; p. 36-Deposition of Erin Carnahan, 31:7-19; p. 34-Deposition of Erin Carnahan, 17:12-23; pp. 38 & 39-Deposition of Erin Carnahan, 36:15-22; 37:2-7; p. 40-Deposition of Erin Carnahan, 40:12-16;** and ***see generally*****, pp. 22 to 32-UC Health Medical Records, Anderson 013-0035).**

Accordingly, the evidence in this matter shows Detective Shutters' actions were reasonable given the circumstances and, therefore, no constitutional violation exists.[3]

B. It is Plaintiff's burden to establish any injuries were more than de minimis.

Plaintiff posits two arguments in order to overcome the argument he suffered something more than a *de minimis* injury. First, Plaintiff argues he suffered "nerve damage" (ECF No. 133 at 8). Plaintiff, however, fails to provide any evidence of nerve damage, other than his own self-

[3] Plaintiff also addresses the "other two *Graham* factors" and argues this Court's previous recommendations somehow preclude consideration of this Motion for Summary Judgment. This argument is incorrect, as the Court previously addressed these issues within the context of a motion to dismiss pursuant to Fed R. Civ. P. 12(b) addressing whether Plaintiff properly pled an excessive force claim ("Balancing these three factors, the Court concludes that Plaintiff has ***plausibly pled*** that Defendant Shutters used greater force than reasonably necessary…") (ECF No. 85 at 9) (emphasis added), and not whether a question of fact existed to overcome summary judgment pursuant to Rule 56.

serving declaration which contradicts the medical testimony and evidentiary materials.[4] The only expert disclosed is a medical professional who made a diagnosis there was no nerve damage and, in fact, that Plaintiff suffered nothing more than a scratch. (*See* **Movant's Appx. pp. 35 to 36-Deposition of Erin Carnahan, 30:13-25; 31:1-6; pp. 36 & 37- Deposition of Erin Carnahan, 31:22-25;32:1-5; p. 37-Deposition of Erin Carnahan, 32:6-9; p. 36-Deposition of Erin Carnahan, 31:7-19; p. 34-Deposition of Erin Carnahan, 17:12-23; pp. 38 & 39-Deposition of Erin Carnahan, 36:15-22; 37:2-7; p. 40-Deposition of Erin Carnahan, 40:12-16;** and ***see generally*, pp. 22 to 32-UC Health Medical Records, Anderson 013-0035).**

Plaintiff's second argument - that superficial scratches are more than *de minimis* - relies on ***Vondrak v. Las Cruces***, 535 F.3d 1198 (10th Cir. 2008) (ECF No. 133 at 8). The Plaintiff's reliance is incorrect, as the Court in ***Vondrak*** held there was a question of fact with respect to (1) his complaints to the police officers who handcuffed him; and (2) evidence the Plaintiff suffered an actual injury, based on a diagnosis by a physician. ***Vondrak***, 535 F.3d at 1209. In this matter, neither of those factual distinctions are present. Furthermore, nowhere does ***Vondrak*** stand for the proposition a scratch is more than a *de minimis* injury.

Plaintiff also cites to ***Koch v. City of Del City***, 660 F.3d 1228 (ECF No. 133 at 8). But, ***Koch*** supports the Defendant's position. In ***Koch***, the Court noted the only evidence submitted by the Plaintiff were hospital reports noting her alleged injuries were "superficial abrasions." ***Koch***, 660 F.3d at 1248. No other injuries or concerns were reported, other than subjective "complaints

[4] There is also no indication Plaintiff is qualified to provide an opinion he suffered nerve damage.

of numbness in her wrist and forearm." ***Koch***, 660 F.3d at 1248. The Court held Ms. Koch's injuries were *de minimis* and she could not make out a claim for excessive force. ***Koch***, 660 F.3d at 1248. Here, consistent with ***Koch***, the evidence shows Plaintiff's only "injury" was a scratch (**Movant's Appx. p. 36-Deposition of Erin Carnahan, 31:7-19**). No evidence of trauma, swelling, redness, lacerations, or abrasions were noted, and therefore any such injury is ***de minimis***.

C. It is Plaintiff's burden to establish that Detective Shutters is not entitled to qualified immunity for any actions pertaining to Plaintiff.

To overcome his burden, Plaintiff argues Detective Shutters "opted to use greater force than reasonably necessary when he used a high-impact method of handcuffing…" (ECF No. 133 at 10). As argued above, Plaintiff provides no support for this proposition, or any evidence refuting Detective Shutters or Sergeant Cochran's testimony respecting different handcuffing techniques. Furthermore, Plaintiff inferentially concedes he never complained to Detective Shutters about the handcuffs and, when asked by Detective Shutters, Plaintiff expressly acknowledged the handcuffs were not too tight. Plaintiff cannot overcome either element of his two-part burden. As argued above, the evidence in this matter establishes Detective Shutters' actions were objectively reasonable given the circumstances of the investigation and arrest, the lack of any trauma to Plaintiff's wrists, and Plaintiff's failure to tell Detective Shutters the handcuffs were purportedly too tight. Therefore, the Plaintiff cannot establish the existence of a constitutional violation.

III. CONCLUSION

WHEREFORE, Detective Shutters respectfully requests the Court grant his Motion for Summary Judgment, dismiss the remaining claim against him, enter an order finding Detective Shutters is entitled to qualified immunity, and for any other relief deemed just.

Dated this 7th day of August 2019.

HALL & EVANS, L.L.C.

s/Mark S. Ratner
Mark S. Ratner
1001 17th Street, Suite 300
Denver, CO 80202
Telephone: (303) 628-3300
Facsimile: (303) 382-4325
Email: ratnerm@hallevans.com
ATTORNEYS FOR DEFENDANT JASON SHUTTERS

CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 7th day of August 2019, I electronically filed the foregoing **DEFENDANT JASON SHUTTERS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT PURSANT TO FED. R. CIV. P. 56** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Attorneys for Plaintiff:

Alexandra L. Lakshmanan
Christopher J. Casolaro
FAEGRE BAKER DANIELS LLP-DENVER
allie.lakshmanan@faegrebd.com
christopher.casolaro@faegrebd.com

Heather C. Burgess
FAEGRE BAKER DANIELS LLP-CHICAGO
heather.burgess@faegrebd.com

s/Mary McNichols Legal Assistant to
Mark S. Ratner
of HALL & EVANS, L.L.C.
1001 17th Street, Suite 300
Denver, CO 80202
Telephone: (303) 628-3300
Facsimile: (303) 382-4325
Email: ratnerm@hallevans.com
ATTORNEYS FOR DEFENDANT JASON SHUTTERS