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,
THE CITY OF FORT COLLINS
Defendants.

HOPKINS' MOTION TO DISMISS FOURTH AMENDED COMPLAINT [ECF 94]

Defendant, Todd Hopkins (Officer Hopkins), by and through his attorneys at Nathan Dumm & Mayer P.C., hereby submits his Motion to Dismiss with supporting authority:[1]

INTRODUCTION

Because timing is key here, Officer Hopkins will follow the Court's practice standards and provide a timeline of key events. On an evening in December 2016, Sean Slatton (Slatton) had a dispute about a flask with event staff at a sorority formal. [ECF 94, ¶¶ 17, 19]. Slatton admits that one of two scenarios then occurred: (1) the event staff employee signaled Officer Hopkins to remove Slatton, or (2) Officer Hopkins witnessed the confrontation personally and then directed Slatton to leave. [*Id.*, ¶ 20]. Regardless of which scenario occurred, Slatton admitted he was told he "needed to leave the property in its entirety." [*Id.*, ¶ 2]. After receiving that directive, Slatton left the interior of the venue, but remained right outside the front doors-

[1] Prior to filing defense counsel conferred with Slatton's counsel, who indicated they opposed this Motion. Hopkins also filed the preliminary Letter, as required by this Court's Practice Standards, and the filing of this Motion was approved by the Court. [ECF 95].

still on the property. [*Id*., ¶ 24; Ex. A Body Camera Footage]. Observing that Slatton had not in fact complied with the directive to leave the property in its entirety, Officer Hopkins walked outside and contacted Slatton again. [ECF 94, ¶ 25-26]. When the directive was reiterated, Slatton's excuse for not leaving was that he was "waiting for his ride." [ECF 94, ¶ 25]. Instead of actually leaving, he said "ok I will," but made no simultaneous effort to comply. [*Id*.; Ex. A].

In light of Slatton's refusal to comply with the directives, Officer Hopkins demanded to see Slatton's identification and informed him that he was being detained. [ECF 94, ¶¶ 26-29]. Despite five commands to stop and three commands to produce his identification, Slatton did neither and began to walk away from Officer Hopkins. [*Id*., Ex. A]. When informed he was under arrest, Slatton replied snappily that he was not. [Ex. A]. Officer Hopkins attempted to use force to restrain Slatton, but such efforts were unsuccessful, as Slatton continued to move away from him and eventually fled. [ECF 94, ¶ 39]. Slatton was never again in contact with Officer Hopkins. [*Id*., ¶ 42].

Slatton's constitutional claim for excessive force is governed by the Tenth Circuit's decision in *Brooks v. Gaenzle*, 614 F.3d 1213, 1219 (10th Cir. 2010), where the court held that when a law enforcement officer uses force, but does not seize the individual, such force does not implicate the Fourth Amendment. His unlawful seizure claim must fail because probable cause existed to arrest him; a fact confirmed by a state court. Finally, his Fourteenth Amendment claim fails because Officer Hopkins' use of force does not shock the conscience.

STANDARD OF REVIEW

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.

INCORPORATION OF OUTSIDE EVIDENCE INTO MOTION TO DISMISS

It is well settled that 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). A court may also consider documents subject to judicial notice. In this case, all three justifications permit the Court to review both the relevant footage from the interaction at issue and the transcript from Slatton's suppression hearing in state court.

To start, Slatton directly quotes from the relevant body camera footage at least a dozen times in his Fourth Amended Complaint. [ECF 94, ¶¶ 25, 26, 27, 28, 33, 35, 40]. The body camera footage is also central to Slatton's Fourth Amended Complaint, as he uses it to establish the sequence of events (down to the second, no less). [ECF 94, ¶¶ 25-37]. He also refers to the body camera footage when establishing that Officer Hopkins radioed other officers about Slatton. [*Id.*, ¶ 40]. Slatton thus cannot have it both ways. If Slatton relies on quotes from the body camera footage to justify his claims, such video is "central" to his complaint. Indeed, Slatton himself admitted that the body camera footage is an "essential item[] for Slatton to

support his case and disprove qualified immunity." [ECF 45, p. 1]. Finally, the relevant body camera footage is subject to judicial notice because it is a government record and no party has challenged its authenticity. *See Jackson v. Gatto*, 2014 WL 2743130, at *2 (D. Colo. June 17, 2014). And per the attached affidavit, the body camera footage has not been altered or edited since it was recorded on the night of the incident. [Ex. B].

As the Court can view the video itself, Officer Hopkins will limit his own narration to a few key points. First, Slatton received an unequivocal order to "leave the property in its entirety" once he was investigated for possession of a flask. Slatton admits the same in his Fourth Amended Complaint. [ECF 94, ¶¶ 1-2 (again, referring to the exact language from the body camera footage, albeit not in quotations)]. Second, Slatton exited the building but remained within the primary point of ingress/egress. Third, when confronted by Officer Hopkins outside the venue and told again that he needed to leave the property in its entirety, Slatton kept his feet firmly planted and provided the excuse of waiting for a ride. Officer Hopkins and Officer Barnes then jointly asked Slatton to provide his identification on three separate occasions, asked him to stop moving on five separate occasions, and also informed him that he was under arrest. In response to being informed that he was under arrest, Slatton retorted: "no I'm not." As conceded in the Fourth Amended Complaint and confirmed by the video, Slatton then began to move from the officers. [ECF 94, ¶¶ 36-39]. As the video proves, he never stopped moving once asked for his identification. Indeed, after Officer Hopkins was forced to resort to using some minimal force, Slatton broke into a sprint to flee from police. [Ex. A; ECF 94, ¶ 39].

In addition, the transcript and ruling from Slatton's suppression hearing is attached. It is relevant because Slatton specifically challenged probable cause as to his arrest and the state court

judge reviewed the same two videos provided here and held probable cause existed to arrest Slatton for trespassing. [Ex. C]. Court records are subject to judicial notice.

LEGAL ARGUMENT

A. UNLAWFUL SEIZURE

In his Fourth Amended Complaint, Slatton actually alleges two seizures. [*See* ECF 94, ¶¶ 88-89]. Slatton first contends that "[b]y means of physical force or show of authority, Defendant Hopkins restrained Mr. Slatton's liberty and thereby seized him." [*Id.*, ¶ 88]. This clearly refers to the initial encounter immediately outside the venue, as there are no allegations in the Fourth Amended Complaint that Slatton was ever again in the presence of Officer Hopkins. Next, in ¶ 89, Slatton alleges that Officer Hopkins caused him to be unlawfully seized by other officers. As the Tenth Circuit has rejected the theory of "ongoing seizure" when a suspect flees from one officer but is seized by another, each alleged "seizure" must be analyzed independently. *See Farrell v. Montoya*, 878 F.3d 933, 938 (10th Cir. 2017) ("But neither this court, nor any court of which we are aware, has adopted the concept of an ongoing seizure under which once a person is seized, the seizure is deemed to continue even after the individual takes flight. And the concept is contrary to *Hodari D.*"). Officer Hopkins thus takes each alleged seizure in turn.

i. Slatton was never seized because his freedom of movement was never terminated.

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 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. Slatton was never seized, as he neither submitted to Officer Hopkins' show of authority nor was Officer Hopkins successful in chasing after Slatton. Indeed, when informed he was under arrest, Slatton replied confidently "no I'm not" and outpaced Officer Hopkins until he disappeared. The relevant footage confirms Slatton never stopped moving once the officers told him he was being detained. The allegations in ¶ 88 are thus blatantly contradicted by the indisputable video evidence and, thus, must be disregarded. *Thomas v. Durastanti*, 607 F.3d 655, 672-73 (10th Cir. 2010). The allegations contained in ¶ 88 are also contradicted by other allegations in the same pleading, namely those where Slatton admits he "started slowly backing away from Defendant Hopkins," "in fact was hobbling and backing away from them," and "believed he had no choice but to flee." [ECF 94, ¶¶ 36-39].

Slatton may try to quibble about his movements and claim the force used led him to be momentarily stopped before he ran, but not only would such argument be contrary to the video evidence, it would also be legally irrelevant. The Tenth Circuit held in 2017 that "a momentary pause is not submission… a suspect must do more than halt temporarily; he must submit to police authority, for there is no seizure without actual submission." *Farrell*, 878 F.3d at 938.

ii. Officer Hopkins had both reasonable suspicion and probable cause to seize Slatton for trespassing and probable cause to arrest him for obstruction.

As set forth above, Slatton also claims that Officer Hopkins provided information to other officers that ultimately led to his arrest. [ECF 94, ¶ 89]. Yet Officer Hopkins had probable

cause to support Slatton's seizure on suspicion of third-degree criminal trespass and obstruction, thereby eliminating any claim for unlawful seizure.

a. Third-degree criminal trespass

Pursuant to Colorado's criminal trespass statutes, Officer Hopkins had probable cause to detain Slatton before the two ever spoke outside of the venue. The sequence of events is key. Slatton concedes he was told to leave the property "in its entirety" after event staff accused him of having a flask. [ECF 94, ¶¶ 1-2, 20]. He also concedes that this order originated with one of two scenarios: either (1) event staff communicated to Officer Hopkins that Slatton needed to leave, or (2) Officer Hopkins personally observed the discussion between the event staff and Slatton about the flask and was informed he needed to leave. [*Id.*, ¶¶ 1, 20].[2] While Slatton left the building, he admittedly did not leave the property; instead, he stayed outside the front door of the venue, staring at his phone until he was contacted again by Officer Hopkins. Probable cause was established before that second conversation ever took place.

This is so because the definition of "premises" for purposes of Colorado's criminal trespass statutes is not limited to the inside of buildings or infrastructure; but rather, "premises" includes "*real property*, buildings, and *other improvements* thereon…" C.R.S. § 18-4-504.5 (emphasis added). Officer Hopkins personally witnessed Slatton's interactions with the event staff where he was directed to leave the premises or, alternatively, such information was communicated directly to Officer Hopkins when "the employee signaled Defendant Hopkins and indicated for him to remove Mr. Slatton…" [ECF 94, ¶ 20]. By remaining on the pathway

[2] Slatton does not allege that the event staff lacked the authority to remove individuals, much less that Officer Hopkins acted unreasonably in carrying out such directives. Indeed, Slatton's "immediate compli[ance]" is strong evidence that such authority did exist. [ECF 94, ¶ 22].

outside of the point of ingress/egress, Slatton remained on the "premises" of the event center. Or rather quite simply, since he had been ordered to leave the property in its entirety by the event staff or Officer Hopkins (or both), his failure to leave the premises in its entirety constituted third degree criminal trespass under Colorado law. C.R.S. § 18-4-504(1). Under Tenth Circuit precedent, all that was required to establish probable cause was knowledge that Slatton remained on private property unlawfully. *See U.S. v. Griego*, 94 Fed. App'x 781, 784-85 (10th Cir. 2004) (unpublished) (noting probable cause where officers observed suspect on "the concrete entrance area" of private property after being ordered to leave the property).

While Slatton protests that he was waiting for a car service, [*see* ECF 94, ¶ 24], such allegation is immaterial for the simple reason that Colorado's criminal trespass statute affords no affirmative defense of "waiting for transportation." Nor is it a defense that Slatton may not have known that he was in fact trespassing, as Colorado's third-degree criminal trespass statute has no requirement that the trespass be knowingly or intentional. *See* C.R.S. § 18-4-504(1).

Even in the absence of probable cause, Officer Hopkins undoubtedly had the authority to seize Slatton under the lesser standard of reasonable suspicion. The Tenth Circuit considered a similar factual circumstance in *U.S. v. Taylor*, 95 Fed. App'x 957 (10th Cir. 2004) (unpublished), where the court evaluated whether officers had reasonable suspicion to believe a suspect was committing criminal trespass. Like here, the suspect in *Taylor* had received an order to leave the property. *Id.* at 958-59. And also like in this case, the suspect initially complied with the officers' commands, thus signaling to the officers that the suspect had "no legitimate reason to remain on the property." *Id.* at 961. Finally, the suspect (like Slatton) stopped his egress and remained on the property. *Id.* The Tenth Circuit held that such facts would impart officers with reasonable

suspicion to believe that a suspect was unlawfully trespassing. *Id*. Based upon the sequence of events, *Taylor* is persuasive authority demonstrating that Officer Hopkins held reasonable suspicion to believe that Slatton was committing third-degree criminal trespass, especially since he had just personally observed event staff signal or otherwise communicate that Slatton had to leave the event, which he refused to do.

b. Obstruction

Whether the Court finds that Officer Hopkins had probable cause or reasonable suspicion to seize Slatton for trespassing, it is undisputed that he had probable cause supporting an arrest for obstruction.

Much like trespassing, establishing probable cause for obstruction under Colorado law requires a minimal number of facts. A person commits obstruction when he "intentionally obstructs, impairs, or hinders the performance of a governmental function by a public servant, by using or threatening to use violence, force, or physical interference or obstacle." C.R.S. § 18-8-102(1). For this statute, "government function" is defined as any activity which a public servant is "legally authorized to undertake on behalf of government." C.R.S. § 18-1-901(j).

Under Colorado law, once an officer has reasonable suspicion that a suspect is committing a crime, the officer is statutorily afforded the right to seize the suspect and demand his identification. C.R.S. § 16-3-103(1). Based upon Slatton's refusal to leave the property when ordered to do so (thus generating at least reasonable suspicion to investigate him for trespassing), Officer Hopkins was within his right to demand production of Slatton's identification. When Slatton chose to ignore lawful directives and instead to run away, an action he admits was done intentionally to flee from Officer Hopkins [ECF 94, ¶ 39], he interfered with Officer Hopkins'

ability to perform an activity that he was legally authorized to undertake on behalf of the City of Fort Collins, *i.e.*, demand production of his identification. Such actions constitute probable cause for obstruction under Colorado law.

c. Issue preclusion bars relitigation of whether probable cause existed to arrest.

Issue preclusion applies when:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Park Lake Resources Ltd. Liability v. U.S. Dept. of Agr., 378 F.3d 1132, 1136 (10th Cir. 2004).

All four elements are met here because Slatton specifically challenged probable cause in a suppression hearing during his criminal case, the state court ruled against him, and he had a full and fair opportunity to litigate the issue.

The transcript of the suppression hearing reveals that the state court reviewed the exact two body camera videos that the Court currently has in its possession. [Ex. C, p. 11:19 – 12:11]. Although Slatton may argue that review of the videos alone was insufficient to afford him a "full and fair opportunity," such argument is without merit because the officers were available in the courthouse for cross-examination on the issue of probable cause and Slatton's counsel voluntarily chose to release them. [*Id.*, 9:16 – 10:1]. The court ruled that probable cause existed to arrest Slatton for trespassing based upon "the requisite review of the materials presented…" [*Id.*, p. 36:1-23]. Because Slatton had a full and fair opportunity to litigate probable cause at his hearing and he did so, he is precluded from relitigating the issue with this Court. *See McNally v.*

Colo. State Patrol, 122 Fed. App'x 899, 903 (10th Cir. 2004) (affirming that "McNally was estopped from arguing a lack of probable cause because he had already raised and lost the issue in his state-court suppression hearing.") (unpublished).

d. Officer Hopkins is entitled to qualified immunity on Slatton's seizure claim.

When an officer raises qualified immunity in a motion to dismiss, "the court must dismiss the action unless the plaintiff shows that (1) the defendant violated a statutory or constitutional right, and (2) the right was clearly established at the time of the violation." *A.N. by and through Ponder v. Syling*, 928 F.3d 1191, 1196 (10th Cir. 2019). "The law is clearly established when a Supreme Court or Tenth Circuit precedent is on point or the alleged right is clearly established from case law in other circuits. The precedent is considered on point if it involves *materially similar conduct* or applies with *obvious clarity* to the conduct at issue." *Lowe v. Raemisch*, 864 F.3d 1205, 1208 (10th Cir. 2017) (emphasis in original).

Slatton can point to no case law that would have put Officer Hopkins on notice that he lacked probable cause to detain (or radio other officers about) a suspect who stands near the entrance of a property and stares at his phone after being directed to leave the property in its entirety. Indeed, other circuit courts that have considered similar issues have sided with the officer. *See, e.g., Bodzin v. City of Dallas*, 768 F.2d 722, 724-25 (5th Cir. 1985) (holding that officers had probable cause to arrest suspect for trespassing where staff informed officers that suspect had been told to leave but remained on private property). Because Slatton cannot show that the law was clearly established such that Officer Hopkins would have known he did not have probable cause to detain Slatton, his first claim must be dismissed.

B. EXCESSIVE FORCE

In his second claim for relief, Slatton alleges that Officer Hopkins engaged in excessive force when he "used more force than is reasonably necessary to arrest or gain control of the victim." [ECF 91, ¶ 103]. But therein lies the rub. Officer Hopkins did not, in fact, arrest Slatton when using his baton or pepper spray, nor did he even gain control of 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* and *Farrell*. *See Brooks*, 614 F.3d at 1219 ("Instead, it is clear restraint of freedom of movement must occur."); *Farrell*, 878 F.3d at 937-39.

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

Officer Hopkins was attempting to detain Slatton for trespassing, a minor offense. For purposes of this Motion only, Officer Hopkins assumes that Slatton did not pose an immediate threat to the safety of the officers present. Under *Graham*, that leaves the third factor for consideration: whether Slatton was actively resisting arrest or attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Slatton does indeed admit that he was attempting to move away from and ultimately flee Officer Hopkins. [ECF 94, ¶¶ 36-39].

Disposition of Slatton's excessive force case thus turns on Tenth Circuit precedent analyzing what level of force is appropriate when the third *Graham* factor does not support the plaintiff. 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 under the third *Graham* factor 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 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 Slatton disobeyed at least a half dozen commands to stop and/or show his identification and stated affirmatively 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 pepper spray was, as a matter of law, not constitutionally excessive. *See Mecham v. Frazier*, 500 F.3d 1200, 1205 (10th Cir. 2007) (holding pepper spray on driver not unconstitutional given plaintiff's verbal resistance to arrest).

And even if it were, 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). Absent precedent placing the constitutional question beyond debate under the *specific* circumstances of this case, Officer Hopkins is entitled to qualified immunity. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

C. SUBSTANTIVE DUE PROCESS

Perhaps recognizing the vulnerabilities in his Fourth Amendment claim (*i.e.*, the lack of a seizure), after multiple amendments to his complaint, both pro se and through legal counsel, Slatton has now pled a new constitutional claim that does not require a seizure. Yet Slatton does

not plead, nor can he support, the correct standard for a Fourteenth Amendment due process claim. As set forth cogently in *Perez v. Unified Gov. of Wyandotte Cnty.*, 432 F.3d 1163, 1166-68 (10th Cir. 2005), in a rapidly-unfolding situation involving a state actor, a Fourteenth Amendment claim will present itself only where the plaintiff can show that the actor had "an intent to harm" and that his actions further "shocked the conscience." Slatton fails to state a cognizable claim because he sets forth no facts plausibly demonstrating Officer Hopkins intended to harm him, as opposed to the more benign and obvious reason of gaining compliance from a fleeing suspect. While Slatton will surely point to his allegation that "Defendant Hopkins acted for the purpose of causing harm unrelated and unnecessary to the goal of apprehending Slatton," [ECF 94, ¶ 130], such allegation is conclusory and contrary to the remaining allegations in the Complaint. As the video confirms, and Slatton concedes, Officer Hopkins had issued nearly a dozen verbal commands that he was detaining Slatton, that he needed to stop, and that he was under arrest. [*Id*., ¶ 33, Ex. A]. Officer Hopkins' use of force comes only after those commands were ignored and Slatton began to *flee the scene*. The force was thus clearly meant to aid in the apprehension of Slatton, not the intentional or sadistic infliction of harm upon a bystander. The presence of probable cause, *see supra*, only further removes this case from those where the Tenth Circuit has found a deliberate "intent to harm."

And even assuming Slatton can meet the intent to harm standard, he presents no case law to show that a single baton strike and use of pepper spray in a rapidly-evolving situation rises to the level of "conscience shocking." Officer Hopkins is thus entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, Officer Hopkins respectfully requests that the Court dismiss all claims against him, with prejudice, and award him his reasonable costs.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2020, I electronically filed the foregoing **MOTION TO DISMISS OFFICER HOPKINSMOTION 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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