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,
CITY OF FORT COLLINS
Defendants.

OFFICER HOPKINS' REPLY IN SUPPORT OF MOTION TO DISMISS [ECF 96]

Officer Hopkins, by and through his attorneys at Nathan Dumm & Mayer P.C., hereby submits his reply in support of his Motion to Dismiss [ECF 96]:

i. Slatton's theory of a continuous seizure has been repeatedly rejected.

The most interesting portion of Slatton's Response is actually his second footnote, wherein he hedges his position on whether his arrest constitutes one seizure or two separate seizures. [ECF 109, p. 8, n. 2]. This is a good launching point for the reply.

Initially, while the footnote hedges, the rest of the Response is an argument that it is one seizure. Slatton's entire theory is Officer Hopkin's use of pepper spray set in motion a series of events that ultimately resulted in his arrest. [ECF 109, pp. 6-8]. None the cases he cited support a theory of two separate seizures. Also, it is undisputed Slatton successfully fled Hopkins, so any argument he was "seized" when running away from Hopkins is an absurd and ultimately barred theory of how the Fourth Amendment is interpreted.

So if it's one seizure, when does it begin? Slatton urges the Court to disregard Tenth Circuit precedent and follow two district court opinions from Alabama and Georgia that held a

seizure involving pepper spray may be a continuous one. [ECF 109, p. 6]. But Alabama and Georgia federal courts follow the Eleventh Circuit, which in turn reached a holding directly contrary to the precedent the Tenth Circuit announced in *Brooks* and *Farrell*. [ECF 96, pp. 5-6].

Perhaps sensitive to the issue of binding circuit precedent, Slatton attempts to distinguish *Brooks* and *Farrell* by making irrelevant factual distinctions, like noting that the suspect in *Brooks* escaped for three days and *Farrell* involved "separate seizures and an unsuccessful use of force." [ECF 109, p. 7]. But *Farrell* and Slatton are not factually distinguishable. The plaintiff in *Farrell* conceded she pulled over and surrendered to police mere minutes after being shot at by an officer *because* she feared being shot at again. 878 F.3d 933, 936 (10th Cir. 2017). In other words, there was a direct causal link between an officer's use of force and her ultimate submission to authority. That's the same argument Slatton makes, *i.e.*, he wasn't seized at the time force was used but it led to his seizure in the future. Since that theory was rejected in *Farrell*, neither reference to Eleventh Circuit cases nor fact-splitting minutiae changes the outcome here.

In many respects litigation has made this issue more complicated than it needs to be. Slatton escaped and was running loose on the streets of Fort Collins for several minutes. He nonetheless claims that for the entire time he was free and running around, he was "seized" under the Fourth Amendment. Yet the U.S. Supreme Court has cautioned lower courts not to accept this strained interpretation of the Fourth Amendment. Indeed, in *Hodari D.* the Court said exactly that: "[t]he narrow question before us is whether, with respect to a show of authority as with *respect to application of physical force*, a seizure occurs even though the subject does not yield. We hold that it does not." 499 U.S. at 626 (emphasis added).

And what about Slatton's theory of a causal connection between the pepper spray and his ultimate arrest by other officers? The applicable law requires that the use of force lead directly to a person's restraint *without* an intervening period of fugitivity. *Id.* In that instance, the seizure constitutes a "single act" where force and seizure are accomplished in the same motion. *See id*. at 625 ("A seizure is a single act, not a continuous fact."). But that's where Slatton's case diverges from U.S. Supreme Court precedent: the body camera footage undisputedly shows he never paused in his escape from Hopkins and remained free for several minutes. To accept Slatton's theory of a seizure is to disregard *Hodari D.'s* holding.

Slatton's construction of the Fourth Amendment would also lead to absurd results. Imagine instead of being alone, Slatton was accompanied by a fellow attendee who had a similar encounter. As the two of them run away, both toss out incriminating evidence, a flask for instance. Slatton is captured for the same reason alleged in his operative Complaint: he stops because of the pepper spray and is encountered by a new set of officers. His friend, however, continues running and is tackled by an officer who catches him. Under Slatton's "causation" theory, Slatton would be protected by the Fourth Amendment during the entire course of his fugitivity because Hopkins' force eventually led to his capture. His friend, however, would not gain the benefit of Slatton's theory because there would be no causal connection between the pepper spray and ultimately being tackled. Such theory thus leads to arbitrary and inconsistent conclusions.

The theory is unworkable in many other respects, but most certainly because it requires subjective evaluation of the suspect's reasons for ultimately stopping and submitting to police after a period of fugitivity (*i.e.*, did a suspect stop because the prior use of force caused him to stop or did he recognize fleeing is dangerous to both the officers and the public and gave himself

up voluntarily?). Evaluation of a suspect's subjective intent invites gamesmanship in federal court pleadings, Slatton's case being a prime example. In his Third Amended Complaint, Slatton alleged that shortly after his interaction with Hopkins, he "was contacted by other FCPS officers, who detained him without any issues." [ECF 81, ¶ 41]. Perhaps after reading Hopkins's Letter [ECF 82] and recognizing the defects caused by this statement, the same allegation in Slatton's Fourth Amended Complaint was modified to state: "Mr. Slatton stopped running *because* he was struggling to breath and in intense pain from the pepper spray." [ECF 94, ¶ 41 (emphasis added)]. Injecting his subjective opinion into a causal analysis to change the outcome under the Fourth Amendment is just the type of uncertainty the U.S. Supreme Court has continually sought to avoid in Fourth Amendment jurisprudence. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 737 (2011) ("we have almost uniformly rejected invitations to probe subjective intent."). Instead, this Court should continue to apply an objective analysis with the answer being simple: Slatton was not seized when he ran away from Hopkins and therefore cannot sustain a claim of excessive force.

ii. Slatton's theory of trespass does not demonstrate any clearly established law.

Slatton's unlawful seizure claim falters on one specific argument: he asserts a person told to leave a property is entitled to "a reasonable amount of time" to leave before becoming a trespasser, citing *Martin v. Union Pac. R.R. Co.*, 186 P.3d 61 (Colo. App. 2007). [ECF 109, p. 10]. Slatton's argument is once consent to remain at the sorority party had been revoked, Hopkins "should have afforded him a reasonable amount of time and manner in which to leave. *Martin*, 186 P.3d at 70." [ECF 109 p. 11]. But Slatton cannot use *Martin* to demonstrate the law was clearly established, most notably because *Martin* considered the *Restatement of Torts* and Colorado's Premises Liability Act; the case never discusses trespass under Colorado's criminal statutes. Slatton's argument would require Hopkins to interpret *Martin* in a specific statutory

context (premises liability) and extrapolate its potential value, if any, in a criminal setting. That is not a requirement courts impose on officers when evaluating clearly established law. *See A.M. v. Holmes*, 830 F.3d 1123, 1153 (10th Cir. 2016) (refusing to impute awareness of hypothetical exception to state law where no state court had in fact found such an exception).[1]

Slatton's qualified immunity argument falls apart from there. He never cites to a specific case demonstrating "beyond debate" that Hopkins had to afford Slatton more time to leave the property before detaining him on grounds of reasonable suspicion for trespassing. Instead, Slatton just cites cases regarding general principles of seizure. [ECF 109, pp. 14-15]. Because it wasn't clearly established that Hopkins had to allow Slatton to look at his phone for a period time before detaining him, Hopkins is entitled to qualified immunity for any seizure.[2]

s/Nick Poppe
Marni Nathan Kloster
Nicholas C. Poppe
NATHAN DUMM & MAYER P.C.
7900 E. Union Avenue, Suite 600
Denver, CO 80237-2776
Phone Number: (303) 691-3737; Fax: (303) 757-5106
Attorneys for Defendant Todd Hopkins

CERTIFICATE OF SERVICE

I certify that on this 23rd day of March, 2020, I electronically filed the foregoing **OFFICER HOPKINS' REPLY IN SUPPORT OF MOTION TO DISMISS [ECF 96] REPLY BRIEF** which will send notification the following at their e-mail addresses:.

David A. Lane Mark Ratner

s/Nick Poppe

[1] Indeed, the exception Slatton seeks to impose could easily have been an affirmative defense set forth in Title 18 of Colorado's criminal code. Its absence is notable.

[2] Hopkins does not set forth a separate section regarding Slatton's Fourteenth Amendment claim. But the analysis rises and falls with Slatton's seizure claim. If Hopkins' held a reasonable belief that he had reasonable suspicion to detain Slatton, then he also had reasonable suspicion or probable cause that Slatton committed obstruction when he fled. No court, to Hopkin's knowledge, has held the use of pepper spray on a fleeing suspect to be "conscience shocking."