IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

CORY GLENN ROLAND, INDIVIDUAL,	§	
	§	
Plaintiff,	§	
	§	**CIVIL ACTION NO.**
v.	§	
	§	**9:21-CV-00254-MJT**
NACOGDOCHES COUNTY, ET AL.,	§	
	§	
Defendants.	§	

LANDEROS'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

COMES NOW Salomon Landeros, a Defendant in the above-styled and numbered cause, and files these Objections to Magistrate's Report and Recommendation (Doc 54).

Despite ample opportunity, Plaintiff did not respond to Landeros's Motion for Summary Judgment (Doc 54 at 3-4). The Magistrate acknowledged that, in light of his failure to respond, "the undersigned must assume that the facts as claimed and supported by admissible evidence by Defendants, the moving parties, are admitted by Plaintiff to exist without controversy." (Doc 54 at 13). The Magistrate, however, did not consider all the evidence submitted. Instead, she considered only the interview video, which she repeatedly described as "ambiguous." (Doc 54 at 8, 10, 18).

The interview video is not ambiguous. It presents a clear image with no gaps, blurs, or poor lighting. Its only limitation is that it is a recording made by a single, stationary camera that did not simultaneously record multiple perspectives, or both a macro view and a wider view. Similarly, it recorded at real-life speed. The encounter between Plaintiff and Landeros lasted only a few seconds and it is difficult for a person to fully digest all available information contained in

that video when it is viewed at normal speed. This is why Landeros also proffered screen shots of individual frames from that video that are particularly informative.

Based on this alleged ambiguity, the Magistrate denied Landeros's motion "for one reason only: the video footage submitted by Defendants, does not support several of their asserted 'undisputed' material facts." (Doc 54 at 12). That video, however, is *not* the only evidence supporting summary judgment. To the contrary, the motion is also supported by evidence that includes multiple affidavits and officer reports. (*E.g.*, Doc 39 APP 0001-0098). The Magistrate erred in failing to properly consider this additional evidence, which addressed, explained, and resolved any purported ambiguity in the video. The video does not negate the existence or effect of this additional evidence, and when this evidence is considered, that video could not be described as ambiguous.

Landeros's affidavit unequivocally and unambiguously establishes he did not hit any portion of Plaintiff's head (Doc 39 APP 4-5). The screen shots from the video are also consistent with and confirm his sworn statement that he did not hit Plaintiff's head. More specifically, consider Photos 11, 12 and 13 (Doc 39 APP 0068-70). Even if the video viewed at normal speed could be described as "ambiguous," the summary judgment evidence includes more than just that bare video and establishes that there was no head strike.

The evidence also establishes Plaintiff was resisting Landeros. Once again, Landeros's affidavit is unequivocal, and unambiguous (Doc 39 APP 0004). The screen shots are also consistent with and confirm his sworn affidavit. The uncontroverted supplemental report by Investigator Pierce also establishes that Plaintiff was resisting Landeros and appeared to be attempting to erase the evidence on his phone (Doc 39 APP 0086). "The great weight of Texas authority indicates that pulling out of an officer's grasp is sufficient to constitute resisting arrest."

Ramirez v. Martinez, 716 F.3d 369, 376 (5th Cir. 2013). The evidence also substantiates that Landeros was specifically trained in his basic peace officer academy on the compliance strikes he delivered to Plaintiff's arm and shoulder. (Doc 39 at APP 0001-02; APP 0007-17). That training included the fact that these strikes are a safe and effective empty-hand technique to use on a non-compliant or resisting subject. (Doc 39 at APP 0002; APP 0018; APP 0019; APP 0020; APP 0021-26; APP 0027-31).

Further, while the interview video shows the two compliance strikes only last a couple of seconds, that video continued for more than an hour afterwards, during which an observer has ample opportunity to see how Plaintiff acts and speaks. Admittedly, during that time, Plaintiff does make a single comment that "Now my f***ing headache is three times worse." (Doc 39 APP 0057 at approximate time index 23:45). His subsequent actions and appearance, however, establish that any such headache did not rise above the level of *de minimus*. Plaintiff continues to sit for more than an hour in the same posture as he did before the compliance strikes and continues to speak and converse the same as he did before. No cuts, scrapes or blood appear on Plaintiff's face or any other portion of his body during that subsequent hour. The Magistrate appears to assign negative significance to what she cannot see, stating "it is not clear from the video whether and to what extent Plaintiff is injured. . . . It is possible that Plaintiff may have had marks from the punches, but such marks simply are not visible in the video footage." (Doc 54 at 8). Speculation about possible marks that are not visible is not competent summary judgment evidence that would defeat summary judgment.[1] Plaintiff had ample opportunity to submit summary judgment evidence of any alleged injuries. He did not.

[1] Similarly, speculation about why Plaintiff proclaimed "Now my f***ing headache is three times worse" is not competent summary judgment evidence that any increased headache resulted directly and only from a use of force that was clearly excessive. (Doc 54 at 14). As anyone who has ever had a headache can attest, sudden, vigorous exertion (as seen by Plaintiff in the video) is virtually guaranteed to make that headache worse.

The evidence establishes Landeros had sufficient probable cause to seize Plaintiff's phone pending an application for a search warrant. (E.g., Doc 39 APP 0090; APP 0092; APP 0084; APP 0002-03; APP 0032-44; APP 0045-56). Investigator Pierce's report also supports the existence of probable cause to seize the phone (Doc 39 APP 0086). The sworn statements of Investigator Pierce in his Affidavit for Search Warrant also support the existence of probable cause. (Doc 39 APP 0092). Perhaps most conclusively on the issue of probable cause is the fact that Judge Sinz of Nacogdoches County found that probable cause existed and issued a search warrant authorizing a search of the phone that Landeros seized from Plaintiff, holding that Investigator Piece's affidavit established the requisite probably cause. (Doc 39 APP 0095).

The Magistrate states, "the video is ambiguous as to whether Plaintiff was doing anything to suggest that he was likely to destroy evidence." (Doc 54 at 10). The destruction of electronic evidence does not require brute force or violent actions, but instead may be accomplished with mere mouse clicks on a computer or swipes on a phone. This fact, and the significance of Plaintiff's actions, were not lost on the peace officers present. (Doc 39 APP 0003; APP 0004; APP 0086). Again, this evidence was uncontroverted. Further, the risk of and ease with which evidence can be deleted from a cell phone is well-known. *See, Riley v. California*, 573 U.S. 373 (2014). Further, the case law permitting officers to seize potential evidence pending an application for a search warrant does not require the destruction of that evidence to be either occurring or on the verge of occurring as a prerequisite to seizing the item. There only needs to be a risk that the evidence could be destroyed or tampered with before a search warrant can be obtained. *Illinois v. MacArthur*, 531 U.S. 326, 334 (2001) ("this Court has upheld temporary restraints where needed to preserve evidence until police could obtain a warrant"); *City of Los Angeles v. Patel*, 576 U.S. 409, 422 (2015) (if an officer "reasonably suspects that a hotel operator may tamper with the

registry while the motion to quash is pending, he or she can guard the registry until the required hearing can occur"). Particularly with electronic evidence on a mobile device, its destruction would not need to commence "right now" in order to be completed long before a search warrant affidavit could be drafted, submitted to a judge, and a search warrant issued in response.

The Magistrate denied Landeros's motion "for one reason only: the video footage submitted by Defendants, does not support several of their asserted 'undisputed' material facts." (Doc 54 at 12). As addressed above, that is not a proper basis for denying summary judgment, particularly in light of the myriad of supporting evidence proffered by Landeros. Once Landeros asserted his claim of qualified immunity, Plaintiff had the burden to prove that Landeros is not entitled to qualified immunity. "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002). Plaintiff did not respond, or offer any controverting evidence, to Landeros's qualified immunity MSJ. (Doc 54 at 3-4). Rather, the facts established by the summary judgment evidence support the granting of summary judgment.

The video does not defeat Landeros's entitlement to summary judgment, nor is it the only evidence that was presented to support it. Even if the bare video itself did not persuade the Magistrate on all issues in this case, that does not negate or nullify the other evidence submitted. A video that did not show in close-up detail exactly where a compliance strike landed would not contradict the direct, unequivocal, and unambiguous sworn testimony from the officer on that very subject. Nor does two seconds of video viewed at full speed contradict the additional detail that is visible when the video is viewed frame-by-frame, such as in the screen shots adduced by Landeros. Even when a video is ambiguous or incomplete, the only consequence would be that the modified summary judgment rule from *Scott v. Harris*, 550 U.S. 372 (2007) would not be

applicable. Nothing more. *Crane v. City of Arlington*, 2022 U.S. App. LEXIS 27462 *10-11 (5th Cir. 2022). The motion is also supported by affidavits, officer reports, screen shots from the interview video, and a search warrant issued by the judge in Nacogdoches County, which unambiguously supports Landeros's entitlement to summary judgment.

Neither "ambiguity" nor incompleteness is the same as "contradicting." The Magistrate's observation that "[t]he undersigned need not assume facts from the moving party that are contradicted by admissible evidence," is not applicable here, as the video does not contradict the other evidence. Speculation about what may not be seen on the interview video is not competent summary judgment evidence and cannot defeat Landeros's Motion for Summary Judgment.

The Magistrate acknowledges that in order to prevail on his excessive force claim, Plaintiff must show: (1) a cognizable injury; (2) which resulted directly and only from a use of force that was clearly excessive. (Doc 54 at 14). As discussed above, there is no competent summary judgment evidence that Plaintiff suffered a cognizable injury, or that any such injury resulted directly and only from a use of force that was clearly excessive. And even if Plaintiff had produced any evidence on these elements, he would still need to show that Landeros's conduct was objectively unreasonable. This "second prong of the qualified immunity test is better understood as two separate inquiries: whether the allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law." *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998).

The U.S. Supreme Court has repeatedly endorsed seizing potential evidence pending judicial approval of a full search of that evidence. *E.g.*, *Riley v. California*, 573 U.S. 373, 388 (2014); *City of Los Angeles v. Patel*, 576 U.S. 409, (2015), *Segura v. United States*, 468, 796, 806

(1984). The Supreme Court has also repeatedly approved the use of force, even when there is not yet a warrant and probable cause for an arrest does not yet exist. *E.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968); *Illinois v. McArthur*, 531 U.S. 326 (2001). Fifth Circuit precedent also supports the use of force in similar situations, even if they are not identical to the facts in this case. *Surratt v. McClarin*, 851 F.3d 389, 390 (5th Cir. 2017); *Williams v. Bramer*, 180 F.3d 699, 702 (5th Cir. 1999); *Espinoza v. United States*, 278 F.2d 802, 803-04 (5th Cir. 1960). Finally, the force used by Landeros was exactly the force that Texas peace officers are taught to use in this situation in their basic peace officer academy. (Doc 39 APP 0001-0031). The summary judgment evidence and the case law confirm that Landeros's actions were objectively reasonable, and there is no competent summary judgment to the contrary.

Landeros's conduct was also not objectively unreasonable in the light of the then clearly established law. A right is clearly established only if relevant precedent has placed the constitutional question beyond debate. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). This analysis must be performed with specificity and granularity. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id.* "[O]vercoming qualified immunity is especially difficult in excessive-force cases. This is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019).

The Magistrate erroneously concluded Landeros's actions violate clearly established law. None of the cases cited, however, would have given fair notice to Landeros that any of his actions

were unlawful. The first case cited by the Magistrate is *Darden v. City of Fort Worth*. Unlike the very limited and brief application of force in this case, Darden involved officers who tased and beat a subject who "put his hands in the air when the officers entered the residence, complied with the officers' commands, and did not resist arrest." 880 F.3d 722, 731-32 (5th Cir. 2018). The second case referenced by the Magistrate is *Ramirez v. Martinez*. In that case, the force in question occurred when Ramirez "was tased twice, including once after he was handcuffed and subdued while lying face down on the ground, in violation of clearly established law." 716 F.3d 369, 379 (5th Cir. 2013). The third case cited by the Magistrate is *Newman v. Guedry*, involved an officer who repeatedly struck Newman with a baton while another officer was holding Newman onto the trunk of a car. The officer then tased Newman three times, including once after Newman had fallen to the ground. 703 F.3d 757, 760-62 (5th Cir. 2012). The fourth case cited by the Magistrate is *Bush v. Strain*, which involves a claim against an officer who forcefully slammed Bush's face into a vehicle while she was already restrained and subdued. 513 F.3d 492, 502 (5th Cir. 2008). None of the cases, either individually or collectively, are factually similar and clearly establish that Landeros's actions were contrary to the Constitution.

The summary judgment evidence establishes that Plaintiff did not suffer a cognizable injury directly and only from a use of force that was clearly excessive; that Landeros's actions were objectively reasonable; and that Landeros's actions did not violate clearly established law. Landeros respectfully requests that the Court grant summary judgment in his favor on all of Plaintiff's claims against him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on the below-listed counsel of record by way of the Court's Electronic Case Filing system ("ECF") on this the 1st day of November, 2022:

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