UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DEON GENTRY,

Plaintiff,

v.

WAYNE COUNTY, et al.,

Defendants.
_____/

Case No. 10-cv-11714

HONORABLE STEPHEN J. MURPHY, III

ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (docket nos. 17, 67) **AND DENYING GENTRY'S EX PARTE MOTION TO EXTEND PAGE LIMITS AS MOOT** (docket no. 70)

Wayne County Sheriff's Deputy Daniel Carmona shot Deon Gentry in the back during an arrest for suspected domestic violence on April 28, 2007. The bullet completely transected Gentry's spinal cord and paralyzed him. In this 42 U.S.C. § 1983 action brought against Carmona, the other deputies on the scene, Carmona's superiors in the Sheriff's Department, and Wayne County, Gentry claims that Carmona's actions constituted excessive force under the Fourth Amendment, that Carmona is not entitled to qualified immunity, and that Carmona's supervisors provided inadequate monitoring and training. Carmona moved for summary judgment on qualified immunity grounds, and the remaining Defendants requested dismissal if Carmona's motion was granted. The Court held a hearing on the motions on August 24, 2011. It finds that Carmona is not protected by qualified immunity because of genuine disputes in the record over the facts of Gentry's excessive force claim. Accordingly, it will deny the motions.[1]

[1] The Court will also deny the ex parte motion for leave to file excess pages filed May 24, 2011 as moot.

STANDARD OF REVIEW

Summary judgment is warranted "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense. *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir.1984). A dispute over material facts is “genuine” "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In order to show that a fact is, or is not, genuinely disputed, both parties are required to either "cite[ ] to particular parts of materials in the record" or "show[ ] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The Court must take care, in evaluating the motion, not to make judgments on the quality of the evidence, because the purpose of summary judgment is to determine whether a triable claim exists. *Doe v. Metro. Nashville Public Schools*, 133 F.3d 384, 387 (6th Cir. 1998) (“[W]eigh[ing] the evidence . . . is never appropriate at the summary judgment stage.”).

BACKGROUND

In 2007, Gentry lived with his girlfriend, Surphae Thomas, and her two children at an apartment in Highland Park. He is 6'2" tall and weighed nearly 200 pounds at the time of the incident. Late in the evening on April 27, 2007, Gentry and a friend went out to a nightclub in Pontiac to pick up a pair of tickets to a Detroit Pistons basketball game. Gentry Dep. 117. They spent several hours at the club drinking and smoking marijuana. *Id.* at 140. The pair left the club at approximately 2:00 AM on April 28, 2007, and Gentry returned to his apartment at 2:30 AM. *Id.* at 145.

The parties agree that there was a physical altercation between Gentry and Thomas after he arrived at the apartment. They began arguing about why he had arrived home from the nightclub at such a late hour, and at one point, Thomas began "pushing [Gentry] a little bit." *Id.* at 153. Gentry admitted that he shoved Thomas onto the floor, but claims that he had no intent to hurt her and immediately apologized. *Id.* at 153–54. Thomas claims that after the shove, Gentry pinned her down on the bed in the bedroom they shared, where he choked, punched, and headbutted her in a failed attempt to force sexual advances upon her. Thomas Police Statement, Apr. 28, 2007, ECF No. 21-2; Thomas Dep. 14–16. Gentry denies that he did anything violent or forcible to Thomas beyond shoving her to the ground, and further claims that she consented to sexual intercourse with him prior to falling asleep with him in their bed that night. Gentry Dep. 158.

At approximately 10:45 AM, Thomas called 911 and asked the police to remove Gentry from the apartment, alleging domestic violence. Call Log 1, May 3, 2007, ECF No. 21-3. Four Wayne County Sheriff's Deputies responded to the call — Carmona, Richard Merrow, Sylvester Evans, and William Thompson. Thompson Rep. 1, Apr. 28, 2007, ECF No. 38-1. The deputies arrived on the scene approximately eight minutes later. Call Log at 1. Thomas met them at the front door of the apartment complex and gave her account of what happened the night before. Merrow Dep. 18; Thompson Dep. 15. She also told the officers that Gentry was asleep in her apartment, had no clothing on, and was not carrying a weapon. While Thomas did not recall that she had been bruised or had any physical markings on her as a result of what Gentry did, some of the deputies observed swelling on her forehead and marks left by hands around her neck. Merrow Dep. 18–19; Supp. Rep. 1, Apr. 29, 2007, ECF No. 50-1. Thomas then led the deputies up to her apartment, let them in, and went into another room where her children were staying.

The deputies entered the bedroom, where Gentry was asleep. They claim they loudly announced their presence in the bedroom once they opened the door. Carmona Dep. 125; Marrow Dep. 24–25. Gentry could not recall such an announcement. Gentry Dep. 164. Carmona pulled the covers off the bed with the intent of placing Gentry, who was naked and unarmed, in handcuffs. Carmona Dep. 129–30. The parties agree that at that moment, Gentry awoke and suddenly jumped up from the bed. Gentry Dep. 168–69. This is consistent with Gentry's first recollection after waking up of someone grabbing his hands, as if to place him in handcuffs. *Id.*

Although a precise account of what happened next does not exist, it is undisputed that Gentry attempted to escape the police in a violent manner. The deputies testified that Gentry immediately started throwing punches and shoving the officers, and he succeeded in fighting his way out of the bedroom. Carmona Dep. 134–36; Thompson Dep. 33; Police Rep. 1, Apr. 28, 2007, ECF No. 38-1. The deputies were able to tackle him to the ground in the living room of the apartment. Gentry Dep. 170–71, 175–76; Thompson Dep. 37–39. They repeatedly yelled at Gentry to stop resisting arrest, but to no avail. Police Rep. 1; Police Supp. Rep. 1. Gentry managed to elude the deputies' grasp and dash out of the apartment, entering the common hallway upon which the apartment opened. The police tackled and pepper-sprayed Gentry in the hallway, but he broke free a second time and ran to the door of the back stairwell before the deputies could catch him again. Carmona Dep. 140, 143–44; Merrow Dep. 46–48; Thompson Dep. 35–36, 40; Police Rep. 1. All the while, Gentry "was kicking, thrusting, throwing punches, doing everything he could to get us off of him," according to the deputies. Merrow Dep. 55. For the most part, Gentry agrees with this summary. Gentry Dep. 170–73, 175–76, 182–84, 195–96.

Merrow caught Gentry as he reached the stairwell, and the two of them fell down into the stairwell landing. The parties dispute whether Gentry landed on top of Merrow, or whether the two landed side-by-side, with Merrow in a marginally better position. *Compare* Merrow Dep. 68 ("I ended up being the person on the very bottom of the pile.") *with* Gentry Dep. 201 ("[W]e was basically on side by side. . . . More so him over me though, tackled me like."). Merrow testified that as he tried to push himself up from underneath Gentry, he felt a hand grab his gun. Merrow Dep. 74–82. He jerked to the right in an effort to seize control of the gun, and yelled to the other deputies several times, "he's got my gun!" *Id.* at 80. Carmona, Thompson, and Thomas all testified that they heard Merrow yell these words. Thomas Dep. 41–43; Thompson Dep. 62. The deputies, including Carmona, drew weapons and pointed them at Gentry. Carmona is the only deputy who testified that he saw Gentry place his hands on Merrow's gun. Carmona Dep. 182. Gentry, on the other hand, claims he was simply trying to push himself off of the floor, with his palms flat on the ground, and denies attempting to grab at the gun in any manner. Gentry Dep. 214–15, 276–77. He also denies hearing Merrow yell to the officers about the gun. *Id.* at 184.

Carmona fired a single round into Gentry's back to diffuse what he perceived as a very serious threat to the other officers. Carmona Dep. 184 ("Q. Why didn't you try to secure the gun? A. At this point, everything we were doing was not — the threat level escalated to the highest it could get. I was in fear of my life when he said he had the gun, and I responded."). The bullet transected Gentry's spinal cord at the T5-T6 vertabrae, rendering him paralyzed. Gentry remains confined to a wheelchair. All four of the deputies involved in the incident were treated for relatively minor injuries resulting from the incident at a local hospital.

DISCUSSION

I. Qualified Immunity for Deputy Carmona

Carmona argues that he is entitled to summary judgment on qualified immunity grounds. Because qualified immunity is an affirmative defense, the plaintiff has the burden of showing a defendant is not entitled to it. *Armstrong v. City of Melvindale*, 432 F.3d 695, 699 (6th Cir. 2006). This inquiry is generally broken down into two questions. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled on other grounds*, *Pearson v. Callahan*, 555 U.S. 223 (2009). First, taking the facts in the light most favorable to the injured party, do the facts alleged show that the officer's conduct violated a constitutional right? Second, was that right "clearly established" at the time of the injury, such that a reasonable person would understand the complained-of conduct was unlawful? The Court may address these questions in any order it sees fit. *Pearson*, 555 U.S. at 236. If either is answered in the negative, summary judgment is appropriate. In this case, the Court takes up the question of whether or not there was a constitutional violation first.

A. Was There a Constitutional Violation?

The use of deadly force by state officers when effecting an arrest is subject to review for reasonableness under the Fourth Amendment. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985). The Court must engage in "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Garner*, 417 U.S. at 8). Because deadly force, such as the discharge of a firearm, places the suspect's "'fundamental interest in his own life'" on one side of the Fourth Amendment ledger, "the countervailing governmental interests must be weighty indeed" to justify its use. *Davenport v. Causey*, 521 F.3d 544, 551 (6th Cir. 2008) (quoting *Garner*, 471 U.S. at 9).

The Court must give "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* In particular, the Court has to be sensitive to "the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 395–97.

The struggle in the stairwell is at the crux of this case. Unlike typical excessive force cases, where an officer like Carmona might be "the only surviving eyewitness," the Court has the benefit of testimony from both Gentry and the deputies about this incident. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). Their testimony leads to two very different accounts about what took place in the stairwell:

(1) *Deputies' Account*: Gentry was straddling Marrow in the stairwell, and grabbed his gun holster. Marrow, rightly panicked, shouted to the other officers that Gentry was trying to take the gun. Carmona saw Gentry's hand on the gun and shot Gentry to prevent an already dangerous situation involving a resisting, noncompliant suspect from evolving into a deadly one.

(2) *Gentry's Account:* Marrow was lying next to Gentry, with Marrow perhaps slightly on top of him, after tackling a now-largely subdued Gentry in the stairwell. Gentry began to push himself up, palms flat on the ground, in order to shake off Marrow. At that moment, without a warning by the deputies and without further provocation, Gentry was shot in the back by Carmona.

If the record indisputably established that the deputies' account was correct, the Court would likely be required to enter summary judgment against Gentry on qualified immunity grounds. But the record in this case is not so straightforward. The Court lacks the authority to dismiss a case on qualified immunity grounds when "there is some evidence — more than a mere scintilla of evidence — that [the victim], through his conduct, judged from the perspective of reasonable officers on the scene, did not give the officers probable cause to believe that he posed a serious threat of harm." *Chappel v. City of Cleveland*, 585

F.3d 901, 909 (6th Cir. 2009). Gentry's deposition directly contradicts the deputies' account and easily overcomes the "mere scintilla of evidence" barrier.

Defendants focus on the "genuine" nature of the factual dispute in this case, rather than on its "materiality," in their arguments supporting summary judgment. Gentry, they claim, "offers nothing but metaphysical doubt, hypothetical plausibility, and an alleged lack of evidence rather than specific facts and affidavits demonstrating a jury submissible issue." Defs.' Rep. 3, July 1, 2011, ECF No. 75 (emphasis removed). They characterize his deposition testimony as "a pure denial of fact supported by nothing in the record and directly contradicted by the testimony and reports of the four deputies." *Id.* (emphasis added). This argument is a tacit request to grant summary judgment because the four sworn law enforcement officers are more trustworthy than Gentry, who stands accused of resisting arrest, illegal drug use, and domestic violence. These credibility concerns may be relevant in the future, but the Court is prohibited from considering them now.

Nor is this an appropriate setting for reliance upon *Scott v. Harris*, 550 U.S. 372 (2007). In *Scott*, the Supreme Court found that a plaintiff did not create a "material" factual dispute by making allegations that flagrantly contradicted an unedited video of the relevant events. *Scott*, 550 U.S. at 380 ("When opposing stories tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). But in this case, the record is not so sharply defined. Gentry's testimony about his own behavior during the incident cannot yet be discounted. Moreover, Carmona is the only deputy to testify that he saw Gentry reach for Marrow's gun, which precipitated the need for lethal force. Finally, the situation was tumultuous, and each

witness has a motivation to skew the story in his favor.[2] Therefore, the record does not provide the Court with the degree of confidence in Defendants' version of the story that it would need to completely ignore Gentry's deposition.

The cases Defendants rely upon for their argument inadvertently serve as confirmation of the position the Court adopts here. In those cases, the record either unanimously confirmed the account of the law enforcement officers, or confirmed their stories in all but insignificant details. *See Chappell*, 585 F.3d at 915–16 (finding no genuine factual dispute that suspect had come out of a closet wielding a knife and was rapidly approaching officers when they opened fire upon him); *Davenport*, 521 F.3d at 552–54 (granting qualified immunity based on videotape evidence and officer testimony which confirmed defendant had cause to shoot a suspect that was violently beating another officer with closed fists, despite disagreement on certain insignificant aspects of the incident); *Untalan v. City of Lorain*, 430 F.3d 312, 313–14 (6th Cir. 2005) (conferring qualified immunity on officer who fatally shot a schizophrenic criminal suspect after the suspect successfully stabbed an officer with a knife and was observed preparing to renew his attack); *Parks v. Pomeroy*, 387 F.3d 949, 957–58 (8th Cir. 2004) (recognizing there was no dispute that defendant officer could have reasonably believed a suspect was reaching for a gun in a dangerous situation when he used lethal force to neutralize the situation); *Billington v. Smith*, 292 F.3d 1177, 1185 (9th Cir. 2002) (concluding that officer was entitled to qualified immunity when he shot a suspect who was successfully resisting

[2] The objectivity of a video recording, *vis a vis* other forms of evidence, was an important factor in the *Scott* Court's decision to grant summary judgment. *Scott*, 550 U.S. at 378 (noting that the video was an "added wrinkle" in a situation that would normally require adopting "plaintiff's version of the facts," and that "[t]here are no allegations or indications that [the] videotape was doctored or altered in any way"). None of the record evidence in this case has similar guarantees of objectivity.

arrest and attempting to take his gun, despite disagreement on irrelevant details of the incident). None of these cases featured a record where key witnesses disagreed on facts crucial to the plaintiff's claims and no objective, and no independent, objective evidence was available to confirm or deny the accounts.

A case that the *Chappell* court discussed, but chose not to follow, *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), provides more pertinent guidance. In *Yates*, a police officer shot and paralyzed a young man while he was responding to a disturbance at a residence. *Yates*, 941 F.2d at 445. The officer entered the dimly-lit house without identifying himself. *Id.* He claimed that four brothers — one of whom was the shooting victim — rushed down the stairs towards him and "knocked him back through" a door, compelling him to fire because he believed he was vulnerable to attack. *Id.* By contrast, one of the brothers testified that the four of them "froze on the steps" when they saw the officer, that the brother who was shot had tripped on the floor while moving backwards away from the officer, and that he held his hands up and said "don't shoot" before being shot. *Id.* The Sixth Circuit affirmed the trial court's denial of qualified immunity because, among other reasons, there was "a factual dispute surrounded the shooting" and "the reasonableness of the shooting was a jury question." *Id.* at 447. Similarly, in this case, the Court is confronted with the contradictory testimony of officers and criminal suspects, and it has no authority to make the credibility determination necessary to favor one account over another.

Taking the facts in the light most favorable to the non-moving party, the Court must conclude that it was constitutionally unreasonable for Carmona to shoot Gentry. Prior to reaching the stairwell, the deputies were justified in using force to restrain Gentry, who, though unarmed, was strenuously resisting arrest. *See Bouggess v. Mattingly*, 482 F.3d

886, 891 (6th Cir. 2007) ("Merely resisiting arrest by wrestling oneself free from officers and running away would justify the use of *some* force to restrain the suspect."). But as the Sixth Circuit held in *Bouggess*, "[i]t cannot reasonably be contended that physically resisting arrest, without evidence of the employment or drawing of a deadly weapon, and without evidence of any intention on the suspect's part to seriously harm the officer," is sufficient to justify the use of lethal force. *Id.* (holding that a police officer defendant who shot a fleeing criminal suspect in the back "without evidence of the employment or drawing of a deadly weapon" was an unreasonable use of lethal force, and officer was not entitled to qualified immunity).

This is a closer case than *Bouggess* or *Yates*, because Gentry's flight appeared to involve some physical abuse to the officers. But Gentry was unclothed, unarmed, and suffering from the effects of the pepper spray by the time he reached the stairwell. He did not pose a serious threat of escape. If, as he claims, he did not attempt to escalate the situation by snatching Merrow's gun from its holster, Carmona was not justified in shooting him. Accordingly, the Court must answer the question of whether or not there was a constitutional violation in this case, viewing the evidence in the light most favorable to Gentry, in the affirmative.

B. Did Carmona Violate Clearly Established Constitutional Standards?

To defeat Carmona's qualified immunity defense, Gentry must show not only that Carmona violated the Constitution, but that he violated "clearly established" constitutional norms. In order to be "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

This is the easier of the two inquiries in this case. Well before April 28, 2007, the Supreme Court and the Sixth Circuit were unanimous in holding that criminal suspects have "'a right not to be shot unless [they are] perceived to pose a threat to the pursuing officers or to others.'" *Yates*, 941 F.2d at 447 (quoting *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988)); *see also Garner*, 471 U.S. at 11 ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."). The Court concludes that if this incident took place in the way Gentry described it, Carmona violated a "clearly established" constitutional rule and cannot avoid trial on qualified immunity grounds.

II. Constitutional Claims Against Remaining Defendants

The argument of the remaining Defendants is simple: presuming that Carmona prevails on his qualified immunity defense, those who supervised him are entitled to summary judgment as well. *See Mattox v. City of Forest Park*, 183 F.3d 515 (6th Cir. 1999) ("If the plaintiffs have failed to state a claim for violation of a constitutional right at all then [the governmental unit] cannot be held liable for violating that right any more than the individual defendants can."). Because the Court concludes that Gentry has a triable claim of excessive force against Carmona, it must hold that summary judgment in favor of the remaining Defendants is inappropriate.

ORDER

WHEREFORE, it is hereby **ORDERED** that the motions for summary judgment (docket nos. 17 & 67) are **DENIED**.

IT IS FURTHER ORDERED that Gentry's motion for leave to file excess pages (docket no. 70) is **DENIED AS MOOT**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: September 16, 2011

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on September 16, 2011, by electronic and/or ordinary mail.

Carol Cohron
Case Manager