

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-00891-RPM

MICHAEL YOUNG,

Plaintiff,

v.

THE CITY OF LOVELAND; DEREK STEPHENS, individually and in his official capacity as a Loveland Police Officer; and CHRISTOPHER BROWN, individually and in his official capacity as a Loveland Police Officer,

Defendants.

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Michael Young claims Defendants violated his constitutional rights by using excessive and unreasonable force in executing search and arrest warrants, and by retaliating against him for his use of constitutionally-protected speech during the arrest. Defendants City of Loveland and Christopher Brown have filed a motion for summary judgment. The motion has been fully briefed and the Court has heard oral argument.

Background

Young alleges that on April 17, 2014, Loveland police officers came to his house to do a welfare check. The visit was prompted by a call from Young's former girlfriend, who had spoken to Young and learned he was having a bad reaction to prescription medication he was taking because of recent surgery. When police knocked on the door, it was dark outside and there were lights on in the house, so they could see inside.

Young says he looked out the window and could see that there were police officers. He picked up a flashlight and answered the door, but the police were then hidden from view. He states that he waved or called that he was okay, and went back inside. He also states that at some point he reached down and adjusted a pain-control ice bag in his waistband because it had slipped down.

The two responding officers reported approaching the house and seeing, through a front window, a dagger-style knife lying on the floor. They reported seeing Young pick up the knife and carry it into another room. One officer stated that her "strong sense of unease and impending danger" prompted the officers to retreat to a position behind a truck parked in the driveway where they could maintain a view inside the house through the window. She reported seeing Young return to the front room with a black semi-automatic handgun, move his hands to his waist, and then raise his hands back up without the gun. She said Young opened the door, looked outside, and then went back in and closed the door and window blinds.

Based on their observations and their discovery that Young had a previous felony conviction, police applied for and were issued a search warrant for the house on the basis that Young was a previous offender in possession of a firearm. They also obtained a warrant for his arrest.

Police executed the search warrant on April 25, 2014. Young alleges that they knew he was not home because they had the house under surveillance, but nevertheless used "full SWAT" force, broke down the door, and ransacked his house, causing extensive damage. No firearm was found.

When Young returned home later the same day and found the mess, he called police to report what he thought was a burglary. They told him the break-in was done by the police and asked him to turn himself in at the police department because a warrant had been issued for his arrest. Because he was on medication, he arranged to have his 82-year-old grandmother, Alice Young, take him to the station. Ms. Young states that she spoke with police by telephone to tell them she would be doing so. She also says she was told that she would need to bring the exact amount of cash needed to post bail for Young because the police could not provide change.

Defendant Officers Derek Stephens and Christopher Brown had Young's house under surveillance when the Youngs left. They saw Ms. Young carry a black bag out of the house and place it in the car, after which she and Young got in and left. Defendants assert the officers were concerned that the bag might contain a firearm, since Young had earlier been observed with one and none had been found in the home search.

The officers followed in an unmarked police SUV. When Ms. Young turned in a direction other than the route the officers expected her to take to the police station, they contacted their supervisor and obtained permission to do a traffic stop to arrest Young. Young states that when his grandmother pulled into an Albertson's parking lot where they intended to get the correct cash needed for Young's bail, the officers in the unmarked SUV pulled Ms. Young's car over, jumped out, pointed assault rifles at him and his grandmother, and shouted orders for him to get out.

Young alleges he was using a cane and moving slowly because he was in severe pain, and attempted to raise his arms as high as he was able, but the officers

kept screaming at him. At that point, he acknowledges saying "Fuck off, I'm following your commands." Then, according to Young's affidavit and interrogatory responses, Officer Stephens grabbed him, slammed him into Ms. Young's car, hit his neck, cuffed him, repeatedly wrenched his arms and shoulders upward, smashed his neck against the car's window, lifted his wrists to the point that he had to walk on his toes to get to the police SUV, slammed him against the SUV, kicked his leg out, twice struck his neck with his forearm, and took the ice pack out of his waistband, saying, "You won't need this where you're going."

According to Young, he repeatedly stated during this encounter that he was in pain, disabled, and had multiple surgeries, and his grandmother also pleaded with the officer to stop and explained that Young was injured and disabled.

While Officer Stephens was arresting Young, Officer Brown allegedly maintained a "cover" position behind the police vehicle, with his assault rifle pointed at Young and/or his grandmother. Officer Brown's affidavit states that he could see Young appeared injured and had a cane. It is undisputed that Officer Brown had little or no physical contact with Young during the arrest, but Young states under oath that Officer Brown watched the arrest, had time to come help him, and did nothing to stop Officer Stephens' use of excessive force. Upon completion of the arrest, police searched the car, finding no firearms and determining that the bag placed there by Ms. Young contained only money. Ms. Young's affidavit corroborates Young's version of the arrest. It is disputed by Defendants.

Young alleges that after he was arrested he was taken to the police station,

released on bond, and then went to the hospital for treatment of his injuries. Young states that as he was leaving the hospital, a different Loveland police officer confronted him outside the hospital and threatened him not to file a complaint or lawsuit, claiming Young had been treated gently and it was all on video. There is no dispute that there is no video of the arrest.

Claims

Based on these allegations, Young's First Amended Complaint states four claims under 42 U.S.C. § 1983: (1) excessive and unreasonable force in executing the search warrant at Young's house, in violation of the Fourth Amendment (against the City, only); (2) excessive force in Young's seizure and arrest, in violation of the Fourth Amendment (against Stephens, Brown, and the City); (3) retaliation for the exercise of protected speech, in violation of the First Amendment (against Stephens and Brown); and (4) depriving Young of his rights through the development and maintenance of deliberately indifferent policies, practices, customs, training and supervision (against the City, only).

The Motion for Partial Summary Judgment

Defendants City of Loveland and Brown, only, move for summary judgment on all claims against them. Defendant Stephens does not move for summary judgment, acknowledging that there are disputed material facts concerning the force used during the arrest.

Analysis

A. City of Loveland

The City seeks summary judgment on the claims against it (the First, Second,

and Fourth Claims¹) on the asserted ground that Young has no evidence of any custom or policy that was the “moving force” behind the alleged constitutional violations, nor any evidence that the City was deliberately indifferent, in connection with the search of Young’s home and his arrest.

A plaintiff suing a municipality under § 1983 for the acts of one of its employees must prove: “(1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation.” *Myers v. Oklahoma County Bd. of County Comm’rs*, 151 F.3d 1313, 1316 (10th Cir. 1998) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978)).

A municipal policy or custom may take the form of (1) “a formal regulation or policy statement”; (2) an informal custom “amounting to ‘a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law’ ”; (3) “the decisions of employees with final policymaking authority”; (4) “the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers’ review and approval”; or (5) the “failure to adequately train or supervise employees, so long as that failure results from ‘deliberate indifference’ to the injuries that may be caused.”

Bryson v. City of Oklahoma, 627 F.3d 784, 788 (10th Cir. 2010) (citing *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189-90 (10th Cir. 2010) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) and *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989))). “The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is

¹ The City’s motion specifically addresses only the First and Second Claims, asserting that that Fourth Claim is duplicative of the other two. Young’s response does not disagree with this assessment.

substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Id.* (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307-08 (10th Cir. 1998)).

Young relies on selected provisions of the City's policy and procedure manual concerning searches, arrests, and the use of force. He focuses in particular on the stated policy that in deciding to use SWAT teams, "[i]nvestigative concerns and priorities shall be taken into account, but **officer safety** will be the overriding concern." Doc. 43-7 at 2 (emphasis in original). Young argues that this policy does not address practices for the care of property during searches and the need for factual development beyond officers' "uneasy feelings and vague suspicions" to support probable cause, and effectively overrides competing concerns about citizen rights and safety. As a result, he argues that the policy for using SWAT procedures inexorably leads to high-risk confrontations and violence that could be avoided if appropriately balanced policies were in place. Young argues further that deliberate indifference is shown by the failure to conduct a thorough investigation before either the house search or the arrest in this case. He argues that informal corroboration by contacting him, rather than the procedures actually used, would have shown without the need for violence that he did not possess a firearm and that neither the search nor the arrest were necessary.

The policies Young relies on do not avoid summary judgment on his municipal liability claims. He has not demonstrated any "affirmative" or "direct causal link" between any regulation, policy, or custom and the allegedly unconstitutional search or the use of excessive force in the arrest. See *Dodds v. Richardson*, 614 F.3d 1185, 1022

(10th Cir. 2010). The “officer safety” provision he relies on provides the procedures for deciding whether the use of a SWAT team is appropriate in a particular situation. It was used in this case because of the perceptions of the officers who observed Young in his home, forming the basis for search and arrest warrants that Young does not challenge as unconstitutional for lack of probable cause. The policy’s emphasis on officer safety does not suggest or condone, either in general or under the circumstances of Young’s case, the use of excessive force in conducting searches or effecting arrests.

Young also has not offered any evidence of an informal custom “amoun[ting] to ‘a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.’” *Bryson*, 627 F.3d at 788. He argues that several officers participated in obtaining and executing the warrants, apparently suggesting that this establishes participation through the chain of command to plan, implement and supervise the warrant, search, and arrest *in this case*. But he offers no evidence that this involved either a widespread practice or decisions or ratification by employees with final policymaking authority, so as to invoke municipal participation and liability. See *id.*

Young’s arguments concerning deliberate indifference do not go beyond suggesting that individual officers may have been indifferent. They do not provide any evidence showing a failure to train or supervise arising from a systemic indifference, which in turn was the moving force behind the alleged constitutional violations by individual officers. See *id.*

In short, the evidence relates only to the incidents involved in this case, not any

facts falling into the defined realm of municipal “policy or custom.” Summary judgment is therefore appropriate on Young’s claims against the City.

B. Officer Brown

Officer Brown seeks summary judgment on the claims against him (the Second and Third Claims) based on qualified immunity.

When a defendant asserts qualified immunity, the plaintiff must demonstrate that (1) defendant’s actions violated a constitutional or statutory right, and (2) the right was clearly established at the time of defendant’s conduct. *Gutierrez v. Cobos*, ___ F.3d. ___, 2016 WL 6694533 *3 (10th Cir. Nov. 15, 2016). To show that a right is clearly established, “the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.” *Id.* (quoting *Callahan v. Unified Gov’t of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015)). If the plaintiff fails to carry either part of his two-part burden, the defendant is entitled to qualified immunity. See *id.*

Defendants recognize that Plaintiff may proceed to trial on the claim of excessive force against Officer Stephens. The issue is whether Officer Brown is entitled to qualified immunity for his participation in drawing and pointing his weapon at Young and his grandmother before and during the seizure and arrest, and in failing to intervene to prevent or mitigate Officer Stephens’ use of force.

Concerning the use of weapons in a case involving pointing firearms at children during an arrest of another person at a residence, the Tenth Circuit stated:

The display of weapons, and the pointing of firearms directly at persons inescapably involves the immediate threat of deadly force. Such a show of force

should be predicated on at least a perceived risk of injury or danger to the officers or others, based upon what the officers know at that time. "These are the very ingredients relevant to an excessive force inquiry." Where a person has submitted to the officers' show of force without resistance, and where an officer has no reasonable cause to believe that person poses a danger to the officer or to others, it may be excessive and unreasonable to continue to aim a loaded firearm directly at that person, in contrast to simply holding the weapon in a fashion ready for immediate use....

Holland ex rel. Overdorff v. Harrington, 268 F.3d 1169, 1192-93 (10th Cir. 2001)

(quoting *McDonald v. Haskins*, 966 F.2d 292, 294 (7th Cir.1992)).

Further explaining the standard for determining excessive force, the court stated in *Maresca v. Bernalillo County*:

A police officer violates an arrestee's clearly established Fourth Amendment right to be free of excessive force during an arrest if the officer's arresting actions were not objectively reasonable in light of the facts and circumstances confronting him. This court assesses the reasonableness of an officer's conduct from the perspective of a reasonable officer on the scene, acknowledging that the officer may be forced to make split-second judgments in certain difficult circumstances. This reasonableness standard—which is "clearly established" for the purposes of § 1983 actions—implores the court to consider factors including the alleged crime's severity, the degree of potential threat that the suspect poses to an officer's safety and to others' safety, and the suspect's efforts to resist or evade arrest. *Because the reasonableness inquiry overlaps with the qualified immunity analysis, a qualified immunity defense is of less value when raised in defense of an excessive force claim.*

Maresca, 804 F.3d 1301, 1313 (10th Cir. 2015) (quoting *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1313–14 (10th Cir.2002) (emphasis added; citations, internal quotation marks, alterations omitted)).² In *Maresca*, the court held that summary judgment on qualified immunity was properly denied where the evidence showed factual disputes about whether officers arresting some members of a family pointed loaded guns at

² Although *Maresca* was decided in October 2015, after the events at issue in this case, *Maresca* relies on pre-2014 case law to support its finding that the law was "clearly established" on these issues.

family members, including children, who were not subject to arrest, and continued to do so even after the arrested members were removed from their vehicle and only the children remained. *Id.* at 1314.

Maresca also held that based on the disputed evidence a jury could find an officer liable for not taking steps to stop others from using excessive force: “[I]t is clearly established ‘that a law enforcement official who fails to intervene to prevent another law enforcement official’s use of excessive force may be liable under § 1983. . . .’” *Id.* (quoting *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir.1996)).

There is disputed evidence on Brown’s own use of force and his failure to intervene. Young and his grandmother state that both officers pointed their guns at them, and continued to do so even after Young made it clear that he was complying with their instructions. Young’s sworn statements describe the alleged use of force against him graphically and in detail. His version of the event creates a genuine factual dispute as to whether Brown stood by, did nothing but point his gun, and watched Stephens use excessive force despite Young’s cooperation and obvious pain and disability. Tenth Circuit law is clearly established that an officer may be liable under § 1983 for failure to intervene against the use of excessive force, and clearly recognizes that the excessive force issue is a fact-intensive determination of reasonableness under all of the circumstances. Given the disputed evidence on the use of force and Brown’s failure to intervene, summary judgment is not appropriate on the Second Claim for Relief.

Young’s Third Claim alleges that Brown’s use of force was in retaliation for

Young's use of speech protected by the First Amendment, when he stated, "Fuck off, I'm following your commands." A plaintiff alleging such retaliation must prove (1) that he was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct. *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). In response to Brown's motion for summary judgment based on qualified immunity, Young has failed to present evidence or law to show that Brown's actions were in violation of a clearly-established First Amendment right, which he must do to overcome Brown's qualified immunity defense. Summary judgment is appropriate on this claim.

Order

Based on the foregoing, it is

ORDERED that Defendant City of Loveland's motion for summary judgment on Plaintiff's First, Second, and Fourth Claims for Relief is granted; it is further

ORDERED that Defendant Brown's motion for summary judgment on Plaintiff's Second Claim for Relief is denied; and it is further

ORDERED that Defendant Brown's motion for summary judgment on Plaintiff's Third Claim for Relief is granted.

Dated: November 30, 2016

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge