

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

LOUIS ALDINI, JR.,

: Case No. 3:07-cv-183

Plaintiff,

-vs-

: Magistrate Judge Michael R. Merz

DUSTIN L. JOHNSON, et al.,

Defendants.

:

DECISION AND ORDER

This case is before the Court on Motion for Summary Judgment of Defendants Dustin L. Johnson, Troy E. Bodine, Joshua Paul Kaczmarek, and Steven R. Leopold (Doc. No. 31). Plaintiff opposes the Motion (Doc. No. 32), Defendants filed a Reply in support (Doc. No. 35), and the Motion was orally argued on January 6, 2009 (Transcript, Doc. No. 40).

The parties unanimously consented to plenary magistrate judge jurisdiction in this case (Rule 26(f) Report, Doc. No. 9) and the case was referred on that basis (Doc. No. 10). Thus the Motion is to be decided by the Magistrate Judge under 28 U.S.C. § 636(c).

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. On a motion for summary judgment, the movant has the burden of showing that there exists no genuine

issue of material fact, and the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed. R. Civ. P. 50). *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). If, after sufficient time for discovery, the opposing party is unable to demonstrate that he or she can do so under the *Liberty Lobby* criteria, summary judgment is appropriate. *Id.* The opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted). "The mere possibility of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F. 2d 577, 582 (6th Cir. 1992)(quoting *Gregg v. Allen-Bradley Co.*, 801 F. 2d 859, 863 (6th Cir. 1986). Therefore a court must "make a preliminary assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than *de minimis*." *Hartsel v. Keys*, 87 F. 3d 795, 799 (6th Cir. 1996). "On summary judgment," moreover, "the inferences to be drawn from the underlying facts ... must

be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Thus, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249, 106 S. Ct. at 2510.

The moving party

[A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323; *see also*, *Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991). If the moving party meets this burden, the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 587; *Martin v. Ohio Turnpike Comm'n.*, 968 F. 2d 606, (6th Cir. 1992).

In ruling on a motion for summary judgment (in other words, determining whether there is a genuine issue of material fact), "[a] district court is not ... obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990). Thus, in determining whether a genuine issue of material fact exists on a particular issue, a court is entitled to rely only upon those portions of the verified pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

Analysis

The moving Defendants are the sole remaining Defendants in the case. Defendant Chad Jones was dismissed voluntarily with prejudice (Doc. No. 17). Defendant Charles Kilby was dismissed without prejudice for want of prosecution and has not been re-added (Doc. Nos. 7 & 8). The Complaint names John Does 1-5 as employees of the Montgomery County Sheriff's Office involved in violating Plaintiff's rights (Complaint, Doc. No. 1, ¶¶ 10, 16-18). However, the Complaint has never been amended to identify these persons and the time for doing so has passed.

The moving Defendants were sued in both their individual and official capacities and seek summary judgment in both capacities.

Plaintiff purports to state four claims for relief: deprivation of Fourth and Fourteenth Amendment constitutional rights, actionable under 42 U.S.C. § 1983 (First Cause of Action, Complaint, ¶ 24); assault and battery, (Second Cause of Action, *Id.* at ¶ 25); intentional infliction of emotional distress, (Third Cause of Action *Id.* at ¶ 26); and for civil recovery for a criminal offense, (Fourth Cause of Action, *Id.* at ¶ 27).

The incident in suit occurred on May 13, 2006. Plaintiff, a First Lieutenant in the United States Air Force, was celebrating his birthday at Hammerjax, a Dayton bar. Having been asked to leave the bar by one of the bouncers, Plaintiff kicked a glass door hard enough to shatter it. The bouncers then took him to the ground and he was arrested for criminal damaging and disorderly conduct by Dayton Police Officers who were nearby. Those officers, including former Defendant Chad Jones, took Plaintiff to the Montgomery County Jail. It is undisputed that Officer Jones removed his handcuffs from Plaintiff and left before any conduct occurred for which the moving Defendants are sued. However, the standard booking process, which includes photographing persons being booked, had not been completed when the physical contact between Plaintiff and the

jail staff began. Plaintiff was eventually convicted on a no contest plea to a charge of disorderly conduct for his behavior at Hammerjax.

According to Plaintiff's deposition testimony, he cannot identify by name any of the corrections officers with whom he had physical contact. After a corrections officer took his identification and other material, he began asking for a telephone call (Aldini depo. at 65-66). When he persisted in that request, a corrections officer put him in cell 134 with no other inmates and an open door, and began to walk away. *Id.* at 65-68. Standing at the threshold of the cell, Aldini raised his voice in a demanding manner and again asked for a telephone call to contact his friends to let them know where he was so that they could post bail. *Id.* at 80-82. At this, a corrections officer, now known to be Defendant Johnson, came toward him. *Id.* At that, Aldini raised his hands, put them behind his head, and stated he was not resisting. *Id.* At that point, according to Plaintiff, two other corrections officers began coming toward him. *Id.* at 66.

Defendant Johnson then put Plaintiff up against the wall, as two other corrections officers, then an indefinite number more (5, 6, or 7) came into the cell. *Id.* at 66-67, 200. Then Aldini was spun around and his face held toward the ground with one corrections officer on each limb and they began beating him while he continued to say he was not resisting. *Id.* at 68. Aldini remembers being punched and kicked in the upper face area and upper body area and punched in the upper shoulder, head, and neck. *Id.* at 98, 143-44.

After the beating continued for "a little bit," an officer whom we now know was Defendant Sergeant Bodine entered the cell with a taser and tased the Plaintiff "at least three or more times." *Id.* at 96-97, 100. After that Lieutenant Aldini was walked out of the cell to a second cell while he was bleeding profusely and screaming for help. *Id.* at 103-104. Several corrections officers then attempted to put him into a restraint chair, against which he resisted and struggled. *Id.* at 104-105, 115. He asserts he was put into the restraint chair on two different occasions; in between, he was

brought to the desk and asked to sign papers, but responded that he could not see and wanted to make a phone call. *Id.* at 116, 120-21. Eventually, his friends posted bond, he was photographed and released, and his friends took him to Miami Valley Hospital where he was treated and released.¹

According to the Motion, Plaintiff's claims are that the Defendants used excessive force on him in the course of his booking and/or failed to prevent one another from using excessive force and that they kept him restrained for more than an hour after his bond was posted to inflict punishment (Motion, Doc. No. 31, at iii.) Plaintiff does not dispute that characterization; although he largely argues the use of force claim, he also mentions the restraint. (Memorandum in Opposition, Doc. No. 32, at 17.)

Qualified Immunity

The moving Defendants in their individual capacities claim qualified immunity on the constitutional violations asserted against them.²

Government officials performing discretionary functions are afforded a qualified immunity under 42 U.S.C. §1983 as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Christophel v. Kukulinsky*, 61 F.3d 479, 484 (6th Cir. 1995); *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir., 1994); *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994). The

¹Plaintiff relies on the "Phelps Depo." at 41 for details of the bond and release, but no Phelps deposition has been filed with the Court.

²During oral argument, Defendants' counsel repeatedly noted that qualified immunity from actions in 42 U.S.C. § 1983 is immunity from suit, not just from liability. However, Defendants did not seek dismissal at the pleading stage or protection from discovery on that basis. The instant Motion was made after all discovery herein was completed, including depositions of all the moving Defendants.

question is not the subjective good or bad faith of the public official, but the "objective legal reasonableness" of his or her action in light of clearly established law at the time the official acted. *Anderson v. Creighton*, 483, U.S. 635, 639 (1987).

Qualified immunity analysis involves three inquiries: (i) "whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred;" (ii) "whether the violation involved a clearly established constitutional right of which a reasonable person would have known;" and (iii) "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 302 (6th Cir. 2005), quoting *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003). Qualified immunity must be granted if the plaintiff cannot establish each of these elements. *Williams ex rel. Allen v. Cambridge Bd. of Educ.*, 370 F.3d 630, 636 (6th Cir. 2004).

In order for the violated right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right; in light of pre-existing law, the unlawfulness of the official's action must be apparent. *Anderson v. Creighton*, 483 U.S. at 640. The right must be defined at the appropriate level of specificity to determine whether it was clearly established at the time the defendants acted. *Wilson v. Layne*, 526 U.S. 603, 615 (1999), citing *Anderson v. Creighton*. The test is whether the law was clear in relation to the specific facts confronting the public official when he acted; the constitutional right must not be characterized too broadly without considering the specific facts of the case. *Guercio v. Brody*, 911 F.2d 1179 (6th Cir. 1990). The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992). Although the very action in question need not have previously been held unlawful, its unlawfulness must be apparent in light of pre-existing

law. *Id.* An action's unlawfulness can be apparent from direct holdings, specific examples described as prohibited, or from the general reasoning that a court employs. *Burchett v. Kiefer*, 310 F.3d 937 (6th Cir. 2002), citing *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 2516-17, 153 L.Ed.2d 666 (2002).

The burden is on a defendant to plead qualified immunity. *Wolfel v. Sanborn*, 666 F.2d 1005 (6th Cir. 1981), *vacated on other grounds*, 458 U.S. 1102 (1982); on remand, 691 F.2d 270 (6th Cir. 1982). To overcome this defense, the plaintiff must allege a violation of a clearly established constitutional right and that a reasonable official would have known that his or her conduct violated this right. *Jackson v. Leighton*, 168 F.3d 903, 909 (6th Cir. 1999). The ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity. *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006); *Wegener v. Covington*, 933 F.2d 392 (6th Cir. 1991). When a defendant moves for summary judgment based on qualified immunity, the plaintiff must (1) identify a clearly established right alleged to have been violated; and (2) establish that a reasonable officer in the defendant's position should have known that the conduct at issue was undertaken in violation of that right. *Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995).

In determining whether a government employee is shielded from civil liability due to qualified immunity, this court typically employs a two-step analysis: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established." *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310-11 (6th Cir. 2005) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)).

Hills v. Commonwealth of Kentucky, 457 F.3d 583, 587 (6th Cir. 2006). As the Supreme Court made clear earlier this month, both questions remain critical to qualified immunity analysis, but a district court need not consider them in the order mandated by *Saucier*. *Pearson v. Callahan*, ___ U.S. ___, 2009 U.S. LEXIS 591 (Jan. 21, 2009).

When a qualified immunity defense is presented on motion for summary judgment, the court

must determine the circumstances with which defendants were confronted and the information they possessed. To make this determination, the Court must consider all the undisputed evidence produced in discovery, read in the light most favorable to the plaintiff. *Poe v. Haydon*, 853 F.2d 418, 425 (6th Cir. 1988), following *Green v. Carlson*, 826 F.2d 647, 650-52 (7th Cir. 1987). Application of the doctrine of qualified immunity to a particular defendant is a question of law. *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988).

When the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability. *Sova v. Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998); *Buckner v. Kilgore*, 36 F.3d 536 (6th Cir. 1994); *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994); *Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir., 1993); *Washington v. Newsom*, 977 F.2d 991 (6th Cir. 1992); *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991).

Fourth, Eighth, or Fourteenth Amendment?

All parties agree the Supreme Court has explicitly left undecided the question “whether the Fourth Amendment continues to provide protection against deliberate use of excessive force beyond the point at which arrest ends and pretrial detainment begins.” *Graham v. Connor*, 490 U.S. 386, 395, n. 10 (1989). Defendants contend that their use of force must be measured under Eighth rather than Fourth Amendment standards because, they assert, the Sixth Circuit has held that the Fourth Amendment protections extend throughout the time the person remains in the custody of the arresting officers, citing *McDowell v. Rogers*, 863 F.2d 1302 (6th Cir. 1988); and *Phelps v. Coy*, 286 F.3d 295 (6th Cir. 2002). (Motion, Doc. No. 31, at 21.) Plaintiff reads *Phelps* for the opposite conclusion and also relies on *Harris v. City of Circleville*, 2008 WL 211363 at *6 (S.D. Ohio Jan. 23, 2008); *Boyer v. City of Mansfield*, 3 F. Supp. 2d 843 (N.D. Ohio 1998), and *Bucherl v. Miller*,

2006 WL 2850460 (N. D. Ohio Oct. 2, 2006).

The Eighth Amendment does not apply to this incident because Aldini was not at that point a convicted prisoner. *Phelps*, 286 F.3d at 299-300, citing *Graham, supra* and *Cornwell v. Dahlberg*, 963 F.2d 912, 915-16 (6th Cir. 1992).

In *Phelps*, the Sixth Circuit upheld applying the Fourth Amendment to an excessive force claim where the allegedly excessive force was used during the booking process by the arresting officers. The court noted

We have explicitly held that the Fourth Amendment reasonableness standard governs throughout the seizure of a person: “[T]he seizure that occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers.” *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir.1988). In *Cox v. Treadway*, 75 F.3d 230, 241 (6th Cir.1996), Judge Ryan, writing for the court, stated that the constitutional analysis does not instantly change the moment a suspect is subdued by the police and that “creating a different Fourth Amendment standard applicable to the use of force in a post-arrest situation than is applicable to pre-arrest conduct [would introduce] a distinction in meaning of the Fourth Amendment that is found nowhere in its language.” While the continuing seizure rule is not universally accepted in other circuits, *see Fontana v. Haskin*, 262 F.3d 871, 879-80 & n. 5 (9th Cir.2001) (detailing circuit split on this issue), it is the law in this circuit and has been since *McDowell*.

Phelps, 286 F.3d at 300.³ Thus *Phelps* holds that an arrest, with the attendant Fourth Amendment protections, continues **until** the arresting officers surrender custody to the jailers. It does not hold, contrary to Defendants’ contention, that Fourth Amendment protection continues **only until** the arresting officers surrender custody. Nor does *Phelps* hold, as Plaintiff contends, the Fourth Amendment protection continues until booking is complete, regardless of who has custody.

In *Harris v. City of Circleville*, 2008 WL 211363 (S.D. Ohio 2008)(Holschuh, J.), the plaintiff had been arrested by the Ohio Highway Patrol for operating a motor vehicle under the influence of

³The *Phelps* decision was rendered on appeal from a decision of Judge Walter Rice of this Court, applying the Fourth Amendment and denying summary judgment.

alcohol. The arresting state troopers took him to the Circleville City Jail and surrendered physical custody of him to Circleville police officers. However, the court found that the Fourth Amendment continued to apply because the troopers' handcuffs had not yet been removed and they stayed at the Circleville Jail to complete paperwork incident to the arrest until the paramedics removed plaintiff to the hospital, even though the troopers did not participate in the application of force which injured the plaintiff. *Harris* does not govern this case because here Officer Jones retrieved his handcuffs when he surrendered physical custody and left the Montgomery County Jail.⁴ *Harris* is presently pending on appeal to the Sixth Circuit in its Case No. 08-3252.

In *Harris*, Judge Holschuh cited favorably *Boyer v. City of Mansfield*, 3 F. Supp. 2d 843 (N.D. Ohio 1998), and *Bucherl v. Miller*, 2006 WL 2850460 (N. D. Ohio Oct. 2, 2006).⁵ *Boyer* is not helpful because, although it involved use of force during the booking process, Judge Gwin found the moving defendants entitled to qualified immunity under Fourth Amendment standards without discussing when the arrest might have ended; significantly, the transporting and booking officer did not move for summary judgment and had been convicted of assault and removed from the police force. *Bucherl* is also not helpful because the court assumed without discussing the applicability of the Fourth Amendment to conduct of a booking corrections officer and sustained the qualified immunity claim.

This Court declines to extend the temporal sequence of "arrest" beyond the point where the

⁴The exact point at which he left the Jail during the booking process is not clear, but all concede he left well before booking was complete.

⁵He also noted *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir.1996), where the Ninth Circuit held the arrest is not complete and the Fourth Amendment continues to apply "up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest," *Id.* at 1043, and *Hill v. Algor*, 85 F.Supp.2d 391, 404 (D.N.J.2000) (holding that because officers' use of force occurred in a holding cell before the plaintiff was "formally charged or taken before a judicial officer," the Fourth Amendment's "objective reasonableness" standard applied).

arresting officer surrenders physical control of the arrestee to those who will maintain that custody pending bail or further judicial order. The Fourth Amendment speaks to the seizure of persons and requires that it not be done without probable cause to believe the person has committed a criminal offense, whether the probable cause has been determined by the arresting officer or in advance by a judge who has issued an arrest warrant. We have an elaborate Fourth Amendment jurisprudence directed to governing the conduct of the arresting officer – how she determines probable cause, where she may enter to effect an arrest, how much force she may use in doing so. Once the arrest has been effected, the Fifth Amendment requires that an arrestee be brought promptly before an independent judicial officer who then takes responsibility for whether the person shall be released or detained. Because arresting is a 24-hours-a-day business and initial appearances before a judge are not,⁶ jails are universally used to maintain custody pending an initial court appearance or the posting of bond to secure such an appearance. Jail employees do not make independent decisions about whether the arresting officer did the right thing in making the arrest; at least to that extent they do not participate in the arrest.

Cutting off Fourth Amendment applicability when the arresting officer surrenders physical custody keeps the constitutional standards aligned with the functions being performed by the governmental officers involved. While it certainly can be said that “booking” is incidental to the arrest, it is more incidental to the temporary custody which will follow: the facility which takes custody of arrestees must know the identity of who is there, must remove weapons from them to protect other prisoners and guards, and so forth.

Conversely, extending the “arrest” through the booking process may well mean that the end of the arrest happens long after the arresting officer has left the scene. Should the arresting officer

⁶The Court is aware that in some large cities, initial appearance courts operate around the clock, but that is hardly common and not yet constitutionally mandated.

remain responsible under the Fourth Amendment for what happens with his prisoner after he has surrendered custody? Why not, so long as the arrest is still “in progress”? The point reached by the Ninth Circuit in *Pierce, supra*, of extending the arrest all the way to the initial appearance seems completely unmoored from the text and history of the Fourth Amendment. But at what point as a matter of constitutional logic are we to stop before that? It makes both functional and constitutional sense to draw the line where the arresting officer surrenders custody to some other government official authorized by law to maintain that custody pending court order.

Although not compelled to do so by precedent, this Court decides that the Fourth Amendment protection continues only until the arresting officer completely and finally surrenders physical custody to a jailer. There is no factual dispute in this case that Dayton Police Officer Chad Jones had done that before the use of force complained. Therefore the Fourth Amendment does not apply to this case.

Analysis of Plaintiff’s Constitutional Claims under the Fourteenth Amendment

Instead, Defendants’ conduct is to be measured under the substantive component of the Fourteenth Amendment Due Process Clause. *Darrah v. City of Oak Park*, 253 F.3d 301, 305 (6th Cir. 2001), citing *County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998); *see also Phelps*, 286 F.3d at 299-300; *Harris*, 2008 WL 211363 at *5. “The Fourteenth Amendment is the source of a pretrial detainee’s excessive force claim because when a plaintiff is not in a situation where his rights are governed by the particular provisions of the Fourth or Eighth Amendments, the more generally applicable Due Process Clause of the Fourteenth Amendment provides the individual with protection against physical abuse by officials.” *Lanman v. Hinson*, 529 F.3d 673, 680-81 (6th Cir. 2008), *citing Phelps*.

In explaining the standard for judging excessive force claims under the Fourteenth Amendment, the *Darrah* court held:

A substantially higher hurdle must be surpassed to make a showing of excessive force under the Fourteenth Amendment than under the “objective reasonableness” test of *Graham*, in which excessive force can be found if the officer's actions, in light of the totality of the circumstances, were not objectively reasonable. *Graham*, 490 U.S. at 396-97, 109 S.Ct. 1865; *Lewis*, 523 U.S. at 845-46, 118 S.Ct. 1708. The substantive due process rights of the Fourteenth Amendment protect citizens from the arbitrary exercise of governmental power. *Lewis*, 523 U.S. at 845, 118 S.Ct. 1708. The test applied by the Supreme Court to determine when governmental conduct reaches this threshold is to ask whether the alleged conduct “shocks the conscience.” *Id.* at 846, 118 S.Ct. 1708. In *Lewis*, the Supreme Court explained that whether governmental conduct shocks the conscience depends on the factual circumstances of the case. *Id.* at 851-53, 118 S.Ct. 1708. More specifically, in situations where the implicated government actors

are afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action ..., their actions will be deemed conscience-shocking if they were taken with “deliberate indifference” towards the plaintiff's federally protected rights. In contradistinction, in a rapidly evolving, fluid, and dangerous predicament which precludes the luxury of calm and reflective pre-response deliberation ..., public servants' reflexive actions “shock the conscience” only if they involved force employed “maliciously and sadistically for the very purpose of causing harm” rather than “in a good faith effort to maintain or restore discipline.”

Claybrook v. Birchwell, 199 F.3d 350, 359 (6th Cir.2000) (quoting [*County of Sacramento v.*] *Lewis*, 523 U.S. at 852-53, 118 S.Ct. 1708).

Darrah, 255 F.3d at 306. See also *Lewis v. Downs*, 774 F.2d 711 (6th Cir. 1985), and *Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985)(en banc).

In order to avoid qualified immunity, then, Plaintiff must show that the conduct of each Defendant shocks the conscience and that its ability to do so was clearly established at the time of

the booking, May 13, 2006. As Defendants note, the Court must analyze separately the actions of each Defendant. *Lanman v. Hinson*, 529 F.3d 673 (6th Cir. 2008). Plaintiff admitted in his deposition that he did not know the names or specific actions of any particular individual. (Aldini Depo. at 198-99) In particular, he did not know which corrections officer kicked him. *Id.* at 143-44. He did, however, learn the identity of Defendant Johnson from the corrections officers' statements. *Id.* at 198-99.

Because of his position that the Fourth Amendment governs this case, Plaintiff did not cite cases showing that the force used on him was such as to shock the conscience under the Fourteenth Amendment. He does, however, cite Eighth Amendment cases which apply a heavier burden of proof than is required under the Fourteenth. *See Phelps, supra.*

The Court concludes that there is a genuine issue of material fact as to whether Defendant Johnson violated Plaintiff's right to be free from use of force by government agents which shocks the conscience. Taking Plaintiff's direct testimony about events as true, as the Court is bound to do in a summary judgment situation, Correction Officer Johnson's use of force was unnecessary: he could simply have closed the door to cell 134 rather than going in and taking Lieutenant Aldini to the floor.

It is more difficult to evaluate the conduct of Corrections Officers Leopold and Kaczmarek. They were responding to an apparently much more fluid situation than Johnson: Aldini and Johnson were already struggling when they became involved. Also, Aldini admits that he struggled and resisted being put into the restraint chair and the use of force identifiable to Officers Leopold and Kaczmarek is limited to what would reasonably appear to have been necessary to get Plaintiff restrained in the restraint chair. The record does not permit the conclusion that it was clearly established that confining a person behaving as Aldini was in such a restraint chair is shocking to the conscience. Corrections Officers Leopold and Kaczmarek are therefore entitled to qualified immunity under § 1983 for their conduct in this incident.

The force which Plaintiff testifies was applied to him before he was ordered into the restraint chair - kicking, beating, and the taunting which he testifies went with it and evinces a punishing frame of mind by those administering the beating – is plainly conduct which shocks the conscience. But neither Plaintiff nor anyone else whose testimony is before the Court attributes that conduct to any one of the individual Defendants except Johnson. The law does not permit the Court to sum the injuries and the collective identity of the five, six, or seven corrections officers present and deny summary judgment so that the jury can sort it out among them.

As the Court reads the testimony, Defendant Sergeant Bodine entered the scene as the supervisor and the only officer armed with a taser. There is clearly a dispute of fact about how many times and for what length of time Aldini was tased. Sgt. Bodine says he used the taser twice, at 2:51 a.m. for 9 seconds and at 2:55 for five seconds. Aldini claims he was tased “more than three times in ten minutes” (Aldini Depo. at 100-102), and that the hospital photograph shows “at least a half dozen twin taser marks.”

Certainly the use of the taser is not per se shocking to the conscience. As Plaintiff’s counsel are aware from involvement in the case and as is shown by the public record in *In re Cincinnati Policing*, Case No. 1:99-cv-3170, appropriate use of the taser by police reduces injuries to citizens, injuries to the police, and most surprisingly, complaints by citizens that excessive force has been used on them. On the other hand, repeated applications of the taser when not necessary to control a pretrial detainee are scarcely less shocking to the conscience than would be repeated applications of a baton. The record before the Court on the instant Motion does not conclusively establish how many times the taser was applied and that is a question for the jury. Sgt. Bodine’s qualified immunity defense must await adjudication at trial.

In deciding the qualified immunity question, the Court has not relied in any way on the arguments Plaintiff makes about the credibility of the Defendants. The credibility of witnesses is not

at issue on a summary judgment motion. The Court strongly doubts that the disciplinary histories of Defendants Johnson, Leopold, and Kaczmarek would even be admissible at trial.

The record also does not establish that Aldini was detained after his bail was posted any longer than is usual in processing detainees who have posted bail at the Montgomery County Jail. All Defendants are entitled to immunity from liability for any claim about the length of detention after bail was posted.

Official Capacity Claims

Municipalities and other bodies of local government are "persons" within the meaning of §1983 and may therefore be sued directly if they are alleged to have caused a constitutional tort through a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978). official policy cannot be inferred from the single unauthorized act of a subordinate government agent, e.g., an unauthorized shooting by a police officer. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005) ("By itself, 'the wrongful conduct of a single officer without any policy-making authority did not establish municipal policy.'" quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992)). To recover, a plaintiff must identify the policy, connect the policy to the political subdivision itself, and show that the particular injury was incurred because of the execution of that policy. *Board of County Comm'r of Bryan County, Okl., v. Brown*, 520 U.S. 397, 405 (1997); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364 (6th Cir. 1993). There must be a direct causal link between the policy and the alleged constitutional violation such that the governmental entity's deliberate conduct can be deemed the moving force behind the constitutional violation. *Graham v. County of Washtenaw*, 358 F.3d 377 (6th Cir. 2004),

citing *Waters v. City of Morristown*, 242 F.3d 353, 362 (6th Cir. 2001)(citing *Board of County Comm'r of Bryan County, Okl., v. Brown*, 520 U.S. 397, 404 (1997)).

Plaintiff has submitted insufficient evidence from which a reasonable jury could conclude that the actions of Officer Johnson and Sergeant Bodine were caused by official policy of the Montgomery County Sheriff. Defendants are therefore entitled to summary judgment on Plaintiff's official capacity claims under § 1983.

Claims for Assault, Battery, and Intentional Infliction of Emotional Distress

These claims are made under state law and the Court has subject matter jurisdiction over them under 28 U.S.C. § 1367. Ohio substantive law determines the contours of liability. 28 U.S.C. § 1652; *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Ohio Revised Code § 2744.03(A)(6) provides Defendants with immunity under state law unless they were acting outside the scope of their employment or with improper purpose as defined in that section. Although they were not outside the scope of their employment, a jury could find, depending upon its antecedent fact finding, that Officer Johnson and/or Sgt. Bodine were acting with an improper motive. Their summary judgment motion is denied as to these three state law claims. For the reasons set forth above in analyzing the Fourteenth Amendment claims against Defendants Leopold and Kaczmarek, they are entitled to summary judgment.

Claims Under Ohio Revised Code § 2307.60

In his Fourth Cause of Action, Plaintiff seeks to recover civil damages for criminal conduct, relying on Ohio Revised Code § 2307.60. Defendants seek summary judgment on this claim on two

alternative grounds: (1) the statute requires a criminal conviction as a predicate for liability or (2) the statute creates no cause of action at all.

For the first alternative, Defendants rely on *Hite v. Brown*, 100 Ohio App. 3d 606 (Ohio App. 8th Dist., 1995). In that case the court held

Plaintiffs also maintain that a separate cause of action exists under R.C. 2307.60, which states in relevant part:

"Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law * * *."

We have construed this section to require a criminal violation before civil liability may arise. See *Ivancic v. Cleveland Elec. Illum. Co.* (Sept. 16, 1993), Cuyahoga App. No. 63372, unreported, 1993 WL 367092. Plaintiffs have not alleged, nor does the record show, any criminal violation by Pauline Brown. As a result, R.C. 2307.60 does not provide a basis for relief.

Id. at 611 n. 1. In *Tri-State Computer Exch., Inc. v. Burt*, 2003 Ohio App. LEXIS 2869 (Ohio App. 1st Dist. June 20, 2003), a claim under Ohio Revised Code § 2307.60 was dismissed for failure to plead a prior conviction on authority of *Ivancic v. Cleveland Elect. Illum Co.*, 1993 Ohio App. LEXIS 4434 (Ohio App. 8th Dist. Sept. 16, 1993) and *Hite, supra*.

Plaintiff responds that the statute does not require a criminal conviction but only a criminal act, whether or not the person has been convicted. That interpretation is supported by *Red Ferris Chevrolet, Inc., v. Aylsworth*, 2008 WL 4377549 (Ohio App. 9th Dist. Sept. 29, 2008), and *Gonzalez v. Spofford*, 2005 WL 1541016 (Ohio App. 8th Dist. June 30, 2005). Thus there is inconsistent Ohio case law on the first alternative, including inconsistent case law within the same appellate district.

As to the second alternative, Defendants rely on *Thompson v. Bagley*, 2005 Ohio App. LEXIS 1831 (Ohio App. 3d Dist. Apr. 25, 2005), but the Court can find no discussion in that case of the proposition of law for which it is cited. In *Edwards v. Madison Twp.*, 1997 Ohio App. LEXIS 5397 (Ohio App. 10th Dist. Nov. 25, 1997), the court held

R.C. 2307.60 does not create a separate cause of action. Instead, R.C. 2307.60 (formerly R.C. 1.16) is merely a codification of the common

law that a civil action is not merged in a criminal prosecution. *Schmidt v. Statistics, Inc.* (1978), 62 Ohio App. 2d 48, 49, 403 N.E.2d 1026, citing *Story v. Hammond* (1831), 4 Ohio 376, 378; *Peterson v. Scott Constr. Co.* (1982), 5 Ohio App. 3d 203, 204, 451 N.E.2d 1236.

Id. at *17-18. *Peterson* is a per curiam reported opinion of the Sixth District Court of Appeals in which Judge Andrew Douglas, later a justice of the Ohio Supreme Court, concurred.

The Court concludes that the cases cited by Defendant on this point accurately state the Ohio law: Ohio Revised Code § 2307.60 does not create a separate cause of action. In any event, the alleged criminal actions on which Plaintiff seeks to recover, assault and battery, are separately actionable under Ohio common law and Plaintiff could not recover twice for the same acts. Defendants motion for summary judgment on the Fourth Cause of Action is granted.

Conclusion

Defendants' summary judgment motion is **DENIED** as to Plaintiff's claims under 42 U.S.C. § 1983 (construed as substantive due process claims), for assault and battery, and for intentional infliction of emotional distress against Defendants Johnson and Bodine. In all other respects, Defendants summary judgment motion is **GRANTED**.

January 27, 2009.

s/ **Michael R. Merz**
United States Magistrate Judge