UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MICHAEL J. VIEZBICKE,
Plaintiff,

v. **Case No. 18-C-1272**

PATRICK KOSMOSKY, *et al*.,
Defendants.

ORDER

Michael Viezbicke, a Wisconsin state prisoner who is representing himself, filed a lawsuit under 42 U.S.C. § 1983, alleging that defendants violated his civil rights. Docket No. 1. Former Magistrate Judge David E. Jones screened the complaint and allowed plaintiff to proceed with two claims: (1) a Fourth Amendment claim that Patrick Kosmosky and Eric Ramthun used greater force than was reasonably necessary to make an arrest when they punched him in the face and used a Taser without justification, and (2) a *Monell* claim that the Village of Saukville failed to properly train their officers regarding the use of Tasers. Docket Nos. 12 and 27. This order resolves defendants' motion for summary judgment. Docket No. 86.

FACTS

On August 2, 2017, Village of Saukville police officers Patrick Kosmosky and Eric Ramthun went to plaintiff's neighborhood in response to a report that someone was kicking around construction barricades, screaming, and cursing on the street. Docket No. 106, ¶¶ 2-5. After speaking to the individual who made the report, the officers went to plaintiff's house and told him that they had received a complaint about his behavior. *Id*., ¶¶ 6-7. Plaintiff was inside his front porch and refused to come outside to talk to the

officers. *Id*., ¶¶ 8, 10-11. According to the officers, plaintiff appeared intoxicated and was belligerent. *Id*., ¶ 9; Kosmosky Aff., Docket No. 89, ¶ 5; Ramthun Aff., Docket No. 90, ¶ 5. Based on the officers' investigation, Kosmosky decided to give plaintiff a municipal citation for disorderly conduct. Docket No. 106, ¶ 14.

Ramthun stayed with plaintiff at his house while Kosmosky went to the squad car to grab some forms. *Id*., ¶¶ 13, 16. Kosmosky filled out the municipal citation form himself; he delivered a "witness statement" form to the individual who initially reported the incident. *Id*., ¶¶ 15-16, 20. Kosmosky then went back to plaintiff's house and said that he was leaving the municipal citation on plaintiff's doorstep. *Id*., ¶ 21. Kosmosky warned plaintiff that if the officers had any more trouble with him, they would arrest him. *Id*., ¶ 22. The officers left. *Id*., ¶ 24. Ramthun went back to the squad car. *Id*. Kosmosky went back to talk to the individual who initially reported the incident. *Id*.

Kosmosky thought the encounter with plaintiff had ended so he turned off his body camera.[1] *Id*., ¶ 25. A short time later, however, plaintiff left his house, walked down the middle of the street, and began yelling at Kosmosky. *Id*., ¶¶ 26-27. Plaintiff

[1] Plaintiff "disputes" this fact, along with several other facts, by asserting that the officers' body camera recording "was manually stopped in a manner that hinders the plaintiff's ability to present facts to justify opposition." *See* Docket No. 105-2, ¶ 1. First, these factual disputes are not material to the issues in this case. During the altercation that forms the basis of this lawsuit, the officers' body cameras were "on." *See* Docket No. 97. Second, plaintiff could have disputed these facts with his own affidavit describing what really happened, but he failed to do so. Third, without establishing "bad faith," plaintiff cannot point to the absence of videotape evidence to create a genuine dispute of fact. See *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008); *see also Bracey v. Grondin*, 712 F.3d 1012, 1020 (7th Cir. 2013). Plaintiff has not established that the officers knew that they should have kept their body cameras on to "preserve evidence," or that the officers' turned off their body camera "for the purpose of hiding adverse information." Accordingly, I consider the facts above undisputed.

crumpled up the municipal citation and threw it on the ground. *Id*., ¶ 28. Plaintiff yelled "Fuck you" and "I know who you are" very loudly. *Id.*, ¶ 29. Kosmosky then turned his body camera back on. *Id*., ¶ 30.

Kosmosky told plaintiff he was under arrest. *Id*., ¶ 31. He said "stop" and "come here" but plaintiff failed to comply. *Id*., ¶¶ 31-32. Instead, plaintiff went back inside his house and said "goodbye" as he slammed the door. *Id*. Kosmosky followed plaintiff into the front porch to take him into custody. *Id*., ¶ 33. Ramthun followed Kosmosky. *Id*., ¶ 34. What happened next is less clear.

According to Kosmosky, plaintiff "moved toward him" as he entered the front porch. *Id*., ¶ 35. Kosmosky attempted to "decentralize [plaintiff] to the ground…to end the struggle quickly and safely" but plaintiff resisted the entire time, clinching his fists and pulling his arms away. *Id*., ¶ 37, 39-40, 42, 47, 49. Kosmosky repeatedly told plaintiff to put his hands behind his back, but plaintiff refused. *Id*., ¶¶ 36, 38-40, 42, 46-47, 49. Kosmosky warned plaintiff that he would be Tased if he didn't put his arms behind his back, but plaintiff still resisted. *Id*., ¶¶ 38-40, 42. Ramthun then issued one five-second Taser cycle, which allowed Kosmosky to turn plaintiff onto his stomach. *Id*., ¶¶ 44-45. Plaintiff continued to resist. *Id*., ¶¶ 47, 49. Kosmosky warned plaintiff again that he would be Tased if he didn't put his arms behind his back, but plaintiff continued to resist. *Id*., ¶¶ 48-49. Ramthun then issued a second five-second Taser cycle, which allowed the officers to place plaintiff in a cuffing position. *Id*., ¶¶ 50-52. Kosmosky states that he never punched plaintiff in the face. *Id*., ¶ 55.

According to plaintiff's complaint, "Officer Kosmosky punched [him] in the face and Officer Ramthun deployed a taser while [he] was completely surrendered." Docket No. 1 at 2. The complaint contains no other facts about defendants' use of force. *See id*.

According to plaintiff's deposition, he only resisted arrest once, when he "walked away" from the officers. Docket No. 85, Viezbicke Dep. at 47:22-25. After that, plaintiff states that he heard the officers tell him to place his hands behind his back, but he was not given the opportunity to comply. *Id*. at 48:1-49:2. Instead, Kosmosky suddenly punched him in the left eye, which caused him to fall to the ground. *Id*. at 49:20-51:23. While on the ground, Ramthun shot him with a stun gun once and with a taser twice, without warning. *Id*. at 46:12-47:1 and 50:16-51:22. The officers then handcuffed plaintiff and took him to the squad car without any other use of force. *Id*. at 52:2-53:5. There was no other use of force. *Id*. at 49:20-22.

According to plaintiff's Affidavit in Opposition of the Defendants' Motion for Summary Judgment, plaintiff "recants any and all previous statements [] esp[ecially] that he was 'completely surrendered.'" Docket No. 105-2, ¶ 2. He "admits that he resisted arrest when he walked away from the officers." *Id*. Plaintiff further states that "Officer Kosmosky punched [him] in the left eye using a *modified* pull in/push down technique." *Id*., ¶ 6. Plaintiff notes that he "did not advance towards Officer Kosmosky under his own power in an aggressive or otherwise threatening manner." *Id*., ¶ 7.

Both parties agree that the officers then took plaintiff to the Ozaukee County Jail. Docket No. 106, ¶¶ 56-57. Plaintiff was charged with disorderly conduct and resisting or obstructing an officer under Wis. Stat. 946.41(1). *Id*., ¶¶ 64-65; *see also* Docket No. 92-

3. Plaintiff pled guilty to the charges and the court entered a judgment of conviction on December 26, 2017. Docket No. 106, ¶¶ 66-69. The relevant portion of the factual basis of the criminal complaint is as follows:

> "[T]he officers decided to place [plaintiff] under arrest and followed him as he went back into his residence. The officers told [plaintiff] that he was under arrest and told him to place his hands behind his back which he refused to do. The officers were dressed in their official police uniforms. [Plaintiff] continued to physically resist the police officers and ultimately had to be tased."

Docket No. 92-3 at 2.

DISCUSSION

Summary judgment is proper where there is "no dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the burden of establishing that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). I grant summary judgment when no reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Defendants first assert that plaintiff cannot procced with an excessive force claim because he pled guilty to resisting arrest under Wis. Stat. 946.41(1). In Wisconsin, "[w]hoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority is guilty of a Class A misdemeanor." Wis. Stat. 946.41(1). "Lawful authority," as that term is used in sub. (1), requires that police conduct be in compliance with both the federal and state constitutions, in addition to any applicable statutes. *State v. Ferguson*, 2009 WI 50, 317 Wis.2d 586, 767 N.W.2d 187.

A plaintiff who has been convicted of a crime cannot maintain a §1983 claim where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence[,]...unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). "As a general proposition, a plaintiff who has been convicted of resisting arrest…is not *per se* Heck-barred from maintaining a §1983 action for excessive force stemming from the same confrontation." *McCann v. Neilsen*, 466 F.3d 619, 621 (7th Cir. 2006) (citing *VanGilder v. Baker,* 435 F.3d 689, 692 (7th Cir. 2006)). "A contrary conclusion ... would 'imply that once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages.'" *Id.* (quoting *VanGilder,* 435 F.3d at 692).

A plaintiff can proceed with a §1983 claim to the extent the facts underlying the excessive force claim are not inconsistent with the essential facts supporting the conviction. *Evans v. Poskon*, 603 F.3d 362, 364 (7th Cir. 2010). A district court must accept facts alleged in the complaint in the light most favorable to plaintiff. *McCann,* 466 F.3d at 622 (citing *Okoro v. Callaghan,* 324 F.3d 488, 490 (7th Cir. 2003)). When an "ambiguously worded paragraph" can be reasonably construed in two ways, the court must construe it in favor of plaintiff. *Id.*

Further, where a plaintiff is "willing to abandon" propositions inconsistent with his convictions, the court must allow him to do so. *Evans*, 603 F.3d at 364; *see also Rotter v. Elk Grove Vill.,* 2017 WL 3478816, at *5 (N.D. Ill. Aug. 14, 2017). For example, the plaintiff in *Evans* made three arguments in support of his excessive force claim "(1) that

he did not resist being taken into custody; (2) that the police used excessive force to effect custody; and (3) that the police beat him severely even after reducing him to custody." *Id*. The Seventh Circuit explained that it did not understand the plaintiff "to assert that he is advancing propositions (2) and (3) if and only if the district court accepts proposition (1)." *Id.* Rather, the plaintiff's briefs informed the Court that he was willing to proceed on proposition (3) alone. *Id.* Thus, the Seventh Circuit held that on remand, the district court should simply disregard proposition (1), which was incompatible with the plaintiff's conviction, and permit the plaintiff to proceed with propositions (2) and (3), which were "entirely consistent with a conviction for resisting arrest." *Id.*

The dispute in this case arises from plaintiff's desire to abandon an ambiguously worded phrase in his complaint (that he was "completely surrendered") in order to proceed with the portions of this excessive force claim that are consistent with his criminal conviction for resisting arrest. Defendants, on the other hand, ask me to Heck-bar his entire excessive force claim under the sham affidavit rule. Because I must construe all reasonable inferences in favor of plaintiff at summary judgment, and because I must disregard propositions inconsistent with plaintiff's criminal conviction, I will not Heck-bar his entire excessive force claim under the sham affidavit rule.

Under plaintiff's theory of the case, Kosmosky and Ramthun were acting lawfully, and in their official capacity, when they initially told him to "stop," "come here," and "place your hands behind you back." Plaintiff admits that he "resisted arrest" when he walked away from the officers, slammed his front door, and refused to place his hands

behind his back. This portion of plaintiff's story is consistent with the essential facts that form the basis of the criminal complaint. *See* Docket No. 92-3 at 2 ("[T]he officers decided to place [plaintiff] under arrest and followed him as he went back into his residence. The officers told [plaintiff] that he was under arrest and told him to place his hands behind his back which he refused to do.")

Plaintiff then states that after he initially resisted arrest, but before he was given the opportunity to comply with other orders to effectuate arrest, Kosmosky punched him in the left eye and Ramthun used a stun gun/taser several times. These allegations, which I accept as true for purposes of summary judgment, state an excessive force claim against Kosmosky and Ramthun that is still consistent with plaintiff's conviction for resisting arrest. *See e.g. McCann*, 466 F.3d at 622–23 (allowing a plaintiff to procced with an excessive force claim because plaintiff was alleging that "regardless of what he may have done [to resist arrest], the deputy's use of deadly force as a response was not reasonable.")

The rest of plaintiff's story, however, can be construed to be inconsistent with the facts in his criminal complaint. Plaintiff's civil complaint states that he was "completely surrendered;" his criminal complaint, on the other hand, states that plaintiff "continued to physically resist the police officers and ultimately had to be tased." *See* Docket No. 92-3 at 2. Defendants ask me to construe plaintiff's ambiguously worded phrase that he was "completely surrendered" to mean that plaintiff never resisted during the entire encounter. While that is one reasonable interpretation of that phrase, an equally reasonable interpretation is that there were *moments* of struggle and *moments* of

complete surrender during the encounter. Plaintiff's version of facts is that he resisted arrest, but his resistance did not warrant a punch in the face and three shots from the stun gun/taser. This theory of the case is consistent with his conviction for resisting arrest. Plaintiff has made it clear in his response brief that he is amenable to disregarding allegations and testimony that are inconsistent with this guilty plea. Therefore, plaintiff's claim is not Heck-Barred.

Next, defendants assert that there are no factual disputes in this case and videotape evidence shows that they used a reasonable amount of force to effectuate arrest. A claim that law enforcement officers used excessive force is analyzed under the Fourth Amendment's objective reasonableness standard. *Avina v. Bohlen*, 882 F.3d 674, 678 (7th Cir. 2018) (citing *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 861 (7th Cir. 2010)). "Whether a police officer used excessive force is analyzed from the perspective of a reasonable officer under the circumstances, rather than examining the officer's actions in hindsight." *Id*. (quoting *Dawson v. Brown*, 803 F.3d 829, 833 (7th Cir. 2015). The reasonableness of an officer's actions must be determined by examining the "specific circumstances of the arrest, 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.'" *Cyrus*, 624 F.3d at 861–62 (quoting *Graham v. Connor*, 490 U.S. 386, 396, (1989)).

There are several factual disputes in this case including whether plaintiff lunged towards Kosmosky (which plaintiff denies), whether Kosmosky punched plaintiff in the left eye (which Kosmosky denies), and whether it was reasonable for Ramthun to use

more than one stun gun/taser shot to effectuate arrest. The videotape evidence shows a struggle but the video very dark, shaky, and unclear. Kosmosky and Ramthun ask me to construe the shaky and unclear video in their favor, which I cannot do at summary judgment. The parties each have their own explanation of what happened that night. It is for a jury to decide who to believe.

Further, in considering qualified immunity, courts look to whether the officer's conduct violated a constitutional right and whether that right was clearly established, the first prong requiring an assessment of the totality of the facts and circumstances. *Strand v. Minchuk*, 910 F.3d 909, 914 (7th Cir. 2018). But a material dispute of fact will preclude a grant of qualified immunity at summary judgment. *See id.* at 916 (upholding district court denial of qualified immunity where "genuine issue of material fact prevented a resolution of the merits of [plaintiff's] claim."). And, regardless, it is well established law that police officers can't punch individuals in the face and/or unnecessarily tase them to effectuate arrest. *See Alicea v. Thomas*, 815 F.3d 283, 291–92 (7th Cir. 2016). Therefore, I will deny defendants' motion for summary judgment as to Kosmosky and Ramthun.

I will, however, grant defendants' motion for summary judgment as to the Village of Saukville. A municipality cannot be held liable under 42 U.S.C. § 1983 based solely on *respondeat superior* (failure to supervise). *Monell v. City of New York Department of Social Services*, 436 U.S. 658, 691 (1978). Instead, a plaintiff must allege that the municipality had a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by officers" that violated an individual's constitutional rights. *Id*. at 690.

In the "failure to train" context, municipal liability attaches "where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by [] policymakers." *City of Canton v. Harris,* 489 U.S. 378, 388-89 (1989). "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality…can [the municipality] be liable for such a failure under § 1983." *Id.* at 389. Without evidence of a deliberate or conscious choice, a municipality's failure to train is not properly thought of as a "policy or custom" that is actionable under § 1983. *Id*.

Plaintiff alleges that the Village of Saukville does not properly train their officers on how to use stun guns/tasers. Docket No. 27. Plaintiff acknowledges that the Village of Saukville has "Policies and Procedures" regarding the use of less lethal weapons, but he states that the policies and procedures are too vague. Docket No. 105 at 16. He notes that they do not include a "finite" cap on how many times an officer can use a stun gun/taser. *Id*. He also notes that an officer can "tase a subject indefinitely as long as [the officer] 'reassesses the situation.'" *Id*.

I have reviewed the Village of Saukville's policies and procedures regarding the use of less lethal weapons, *see* Docket No. 105-8 at 3-10, and disagree with plaintiff's characterization of it. First, the policies and procedures specifically require officers to complete an "EDC certification training course" before they can carry or use stun guns/tasers. *Id*. at 3. The policies and procedures then provide a detailed description of when it is and is not appropriate to use stun guns/tasers. *Id*. at 4. The subsection called "restrictions" specifically addresses plaintiff's concerns regarding the unjustified use of force and the possibility of substantial/severe injury. *Id*. at 5-7.

Plaintiff appears to suggest that police officers should have no discretion at all on how to use stun guns/tasers; that there should be a specific, limited, number of "shots" an officer can use to effectuate arrest. Plaintiff provides no evidentiary basis or legal support for this suggestion, apart from his own musings. Though the Village of Saukville gives their officers some discretion on how and when to use stun guns/tasers, nothing in the record shows that their policies and procedures are so vague or incomplete as to amount to a failure to train.

Plaintiff also mentions a new *Monell* claim that he wants to proceed with, that there was no supervisor on staff at the time of his arrest. Docket No. 105 at 15. I will not allow plaintiff to identify new factual allegations and new legal theories at summary judgment. See *Abuelyaman v. Ill. State Univ.*, 667 F.3d 800, 813–14 (7th Cir. 2011) (affirming the district court's refusal to consider a new theory of discrimination raised for the first time in opposition to summary judgment and explaining that "[i]t is well settled that a plaintiff may not advance a new argument in response to a summary judgment motion."). Therefore, I will grant defendants' motion for summary judgment as to the Village of Saukville.

CONCLUSION

For the reasons discussed above, **IT IS ORDERED** that defendants' motion for summary judgment (Docket No. 86) is **DENIED** as to Kosmosky and Ramthun and **GRANTED** as to the Village of Saukville. The court will attempt to recruit pro bono counsel for trial.

Dated at Milwaukee, Wisconsin, this 13th day of January, 2019.

s/Lynn Adelman_____
LYNN ADELMAN
District Judge