

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ALBERT BROWN, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civ. No. 03-404-SLR  
 )  
 RANDOLPH PFAFF, )  
 POLICE DEPT. of DELAWARE, and )  
 THOMAS P. LOONEY, )  
 )  
 Defendants. )  
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Albert Brown, Wilmington, Delaware. Plaintiff, pro se.

Rosemaria Tassone, Assistant City Solicitor, City of Wilmington,  
Wilmington, Delaware. Counsel for Defendants.

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MEMORANDUM OPINION

Dated: March 3, 2004  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

Plaintiff, a pro se litigant proceeding in forma pauperis, filed the present action on April 18, 2003, pursuant to 42 U.S.C. § 1983, alleging violations of his civil rights stemming from a May 23, 2002 arrest. (D.I. 1) Presently before the court is the motion of defendants to dismiss for failure to state a claim upon which relief can be granted (D.I. 16-1), or in the alternative for summary judgment (D.I. 16-2), and plaintiff's motion for appointment of counsel. (D.I. 22)

**II. BACKGROUND**

Pursuant to a valid search warrant, defendant Detective Randolph Pfaff executed a search of a house located at 709 North Jefferson Street, Wilmington, Delaware. Plaintiff, who was located in the house, was apprehended while attempting to flee the premises. On January 31, 2003, following a trial in the Superior Court of New Castle County, plaintiff was found guilty of resisting arrest and possession of marijuana. Plaintiff also pled guilty to possession of drug paraphernalia.

In his complaint, plaintiff asserts that:

Det. Randolph Pfaff, came running up to me and slammed me to the ground. As I layed on the ground I was brutally beaten in a malicious way. Det. Randolph Pfaff and Thomas Looney and other started kicking me all over my lower body. Then dragged me across the ground, placed me face to the ground and was told, Nigger don't move are the

dog will bite me. It has caused me to become  
permanently disfigured to my right leg.

(D.I. 1) Plaintiff claims that after being taken into custody, he was denied medical attention. (D.I. 23 at 30) Plaintiff also asserts that medical records at Gander Hill Correctional Facility will show that he "has a disfigured [muscle] over the femur bone that was also injured, [broken] blood vessels, [bruises] to the right leg, and constantly headaches from hitting the ground with head." (Id. at 32)

Defendants dispute plaintiff's characterization of the events surrounding his arrest. Defendant Pfaff states that "[i]n an effort to apprehend Plaintiff, I, along with several other officers, tackled Plaintiff to the ground." (D.I. 17, ex. 2) Pfaff states that he believed that plaintiff was armed and, therefore, he "attempted to gain control of Plaintiff's hands and arms." (Id.) Plaintiff was subsequently placed in handcuffs and held by K-9 officers with no further incident. (Id.)

Defendant Looney, by affidavit, states that although his name appears on the warrant, he was not present for the actual search. (Id., ex. 1) Looney asserts that he was on vacation at the time the actual search was to be conducted, but that he appeared before the Justice of the Peace to sign and swear the statement supporting the issuance of the search warrant. (Id.) Looney's statement is supported by police department records. (D.I. 25, ex. 4) Plaintiff contends that an unidentified witness

"states that Thomas Looney also was one of the officer on top of plaintiff when he was slammed to the ground and kicked on by several officers." (D.I. 23 at 24)

### **III. STANDARD OF REVIEW**

Because the parties have referred to matters outside the pleadings, defendants' motion to dismiss shall be treated as a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6). A court shall grant summary judgment only 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 that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R.

Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

#### **IV. DISCUSSION**

As plaintiff alleges a claim predicated upon the use of excessive force in his arrest, his claims must be analyzed under Fourth Amendment reasonableness standards. See Graham v. Connor, 490 U.S. 386, 395 (1989).

As an initial matter, the court finds that plaintiff has failed to allege any facts, other than the appearance of defendant Looney's name on the search warrant, to substantiate his claim that Looney was present for the search. In plaintiff's response to defendants' motion, plaintiff barely makes mention of defendant Looney, other than to question whether Looney would

have returned from vacation to appear before a magistrate. (D.I. 23 at 32) Consequently, the court finds that there is not a genuine issue of material fact with respect to defendant Looney, and that entry of summary judgment as to this party is appropriate.

The court will also grant the motion with respect to the Wilmington Police Department. In his response to defendants' motion to dismiss, plaintiff asserts that the Wilmington Police Department is "responsible for these acts as well." (D.I. 23 at 32) A municipal police department, however, is not a "person" within the meaning of § 1983. See Martinez v. Winner, 771 F.2d 424, 444 (10th Cir. 1985); PBA Local No. 38 v. Woodbridge Police Dept. 832 F. Supp. 808, 825-26 (D.N.J. 1993); Timberlake v. Benton, 786 F. Supp. 676, 682 (M.D. Tenn. 1992); Stump v. Gates, 777 F. Supp. 808, 815 (D. Colo. 1991). See also Curtis v. Everette, 489 F.2d 516, 521 (3d Cir. 1973). Further, it is well settled that a municipality may not be liable under a theory of respondeat superior. See Monell v. Dept. of Social Services of City of New York, 436 U.S. 658, 694 (1978). Consequently, the Wilmington Police Department is entitled to summary judgment as a matter of law.

The Fourth Amendment's reasonableness standard is "not capable of precise definition or mechanical application." Id. at 396 (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)). The

reasonableness test requires careful analysis of the "facts and circumstances of each particular case, including . . . whether the suspect poses an immediate threat to officer safety and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. (citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)). Police officers are permitted to use a reasonable amount of force to effect an arrest; the degree of force is dictated by the suspect's behavior. See id. The reasonableness of force used "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. (citing Terry v. Ohio, 392 U.S. 1, 20-22 (1968)). The question to be answered is "whether the officers' actions were 'objectively reasonable' in light of the specific facts and circumstances confronting them [at that particular moment, regardless] of their underlying intent or motivation." Id. at 397 (citing Scott v. United States, 436 U.S. 128, 137-139 (1978)); see also Terry, 392 U.S. at 21. "An officer with evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." Id.

In considering the reasonableness of force used, it is proper to consider exigencies of the circumstances including the following factors: the severity of the crime; the risk of

immediate threat the suspect poses to both the safety of the arresting officers and public; the suspect's efforts to resist or evade arrest; the possibility the suspect is armed. See Estate of Smith v. Marasco, 318 F.3d 497, 515 (3d Cir. 2003).

As plaintiff was found guilty of resisting arrest, defendants contend that a § 1983 action cannot be maintained as it would imply that plaintiff's conviction was invalid. (D.I. 24 at 2) In Heck v. Humphrey, the Supreme Court held that § 1983 does not permit a claim for money damages which calls into question the lawfulness of the conviction. 512 U.S. 477, 483 (1994). In Heck, the plaintiffs brought a § 1983 action seeking money damages alleging that defendants, consisting of police and state prosecutors, had committed an unlawful and unreasonable search, destroyed exculpatory evidence, and used an unlawful voice detection procedure to be used at his trial. Id. at 479. The court noted that where a successful § 1983 action would require plaintiff to "negate an element of the offense of which he has been convicted . . . the § 1983 action will not lie." Id. at 487 n.6.

In the present case, however, a successful § 1983 action would not negate an element of plaintiff's conviction. Plaintiff was found guilty of resisting arrest in violation of 11 Del. C. §

1257.<sup>1</sup> Under Delaware law, the reasonableness of the arresting officer's use of force is not an element of the crime. Instead, Delaware law mandates that under all circumstances, a citizen may not resist arrest, even if the arrest is unlawful. See Ellison v. State, 410 A.2d 519, 522 (Del. Super. 1979). Consequently, the court finds that the case sub judice is controlled by the Third Circuit case, Nelson v. Jashurek, 109 F.3d 142 (3d. Cir. 1997). In that case, the Third Circuit Court of Appeals concluded that a conviction for resisting arrest did not preclude a suit for civil damages predicated on a claim of excessive force. Id. at 145-46. Nelson instructs that a lawful arrest may nonetheless be effectuated by use of an unlawful amount of force. Finding defendants liable in tort of the latter, does not necessarily impugn the validity of the plaintiff's criminal conviction.

Returning to plaintiff's allegations, plaintiff asserts that he was beaten, kicked and dragged across the ground by the arresting officers in such a way as to cause permanent disfigurement to his right leg and reoccurring headaches. (D.I. 1 at 2) Plaintiff asserts that his medical records at Gander Hill Correctional Facility and a witness support his version of

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<sup>1</sup>11 Del. C. § 1257 provides: "A person is guilty of resisting arrest when the person intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of the person or another person or intentionally flees from a peace officer who is effecting an arrest."

events. In the absence of discovery, the court must assume such evidence exists in support of plaintiff's claim that defendant Pfaff used excessive force in performing the arrest. These facts also would bear on whether defendant Pfaff is entitled to qualified immunity. See Saucier v. Katz, 533 U.S. 194, 201 (2001). Consequently, the court finds that there is a genuine issue of material fact and that summary judgment as to defendant Pfaff is not proper at this time.<sup>2</sup>

#### **V. APPOINTMENT OF COUNSEL**

Plaintiff, a pro se litigant proceeding in forma pauperis, has no constitutional or statutory right to representation by counsel. See Ray v. Robinson, 640 F.2d 474, 477 (3d Cir. 1981). It is within the court's discretion, however, to seek representation by counsel for plaintiff, but this effort is made only "upon a showing of special circumstances indicating the likelihood of substantial prejudice to [plaintiff] resulting . . . from [plaintiff's] probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984). Having reviewed plaintiff's complaint,

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<sup>2</sup>The court notes that the only issues before the court relate to whether the use of force was excessive. Pursuant to Heck v. Humphrey, this § 1983 action may not be used to attack the lawfulness of plaintiff's arrest or the validity of plaintiff's conviction. Consequently, the court directs plaintiff to focus his discovery and arguments solely on the issues in this proceeding.

the court finds that plaintiff's allegations are not of such a complex nature that representation by counsel is warranted at this time.

## **VI. CONCLUSION**

For the reasons stated above, the court will grant in part and deny in part defendants' motion for summary judgment, and deny plaintiff's motion for appointment of counsel at this time. An order consistent with this opinion shall issue.

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 Defendants. )

**O R D E R**

At Wilmington, this 3rd day of March, 2004, having reviewed the motions of the parties and the memoranda submitted thereto;

IT IS ORDERED that:

1. Defendants' motion to dismiss is **denied**. (D.I. 16-1)
2. Defendants' motion for summary judgment is **granted** with respect to defendants Looney and Wilmington Police Department, but **denied** with respect to defendant Pfaff. (D.I. 16-2)
3. Plaintiff's motion for appointment of counsel is **denied without prejudice to renew**. (D.I. 22)

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Sue L. Robinson  
United States District Judge