IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HERBERT J. DOUGLAS, SR., HOLLY DOUGLAS, KRISTI DOUGLAS, and HERBERT DOUGLAS, JR.,	)	
Plaintiffs,	)	C.A. No. 01-419 GMS
v.	)	
PUBLIC SAFETY COMMISSION, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On June 20, 2001, the plaintiffs, Herbert J. Douglas, Sr., Holly Douglas, Herbert Douglas, Jr., and Kristi Douglas filed the above-captioned action pursuant to 42 U.S.C. § 1983. In their complaint, they allege that the defendants violated their Fifth and Fourteenth Amendment rights while executing a search warrant on their trailer.[1] The parties dispute whether the complaint also sufficiently alleges Fourth Amendment violations.

Presently before the court is the defendants' motion for summary judgment. For the reasons that follow, the court will grant this motion in part and deny it in part.

II. STANDARD OF REVIEW

The court may grant summary judgment only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). An issue is "genuine" if, given the evidence, a reasonable jury could return a verdict in favor of the non-moving

[1]Although the complaint lists twenty-seven defendants, the parties stipulated to the dismissal of twenty-one of the defendants on June 25, 2002. The six remaining defendants are Richard Pulling ("Pulling"), Douglas Hudson ("Hudson"), Mark Hawk ("Hawk"), Siobhan Sullivan ("Sullivan"), Patrick Ogden ("Ogden"), and Daniel McColgan ("McColgan").

party. *See*, *e.g.*, *Abraham v. Raso,* 183 F.3d 279, 287 (3d Cir. 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986)); *Lloyd v. Jefferson*, 53 F. Supp. 2d 643, 654 (D. Del. 1999) (citing same). A fact is "material" if it bears on an essential element of the plaintiff's claim. *See, e.g., Abraham*, 183 F.3d at 287; *Lloyd*, 53 F. Supp. 2d at 654. On summary judgment, the court cannot weigh the evidence or make credibility determinations. *See Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."); *International Union, United Auto., Aerospace & Ag. Implement Workers of America, U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 137 (3d Cir. 1999) ("At the summary judgment stage, a court may not weigh the evidence or make credibility determinations; these tasks are left to the fact finder."). Instead, the court can only determine whether there is a genuine issue for trial. *See Abraham*, 183 F.3d at 287. In doing so, the court must look at the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences and resolving all reasonable doubts in favor of that party. *See, e.g., Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). With this standard in mind, the court will now describe the facts leading to the motion presently before the court.

III. BACKGROUND

In June 1999, Brian Humphries ("Humphries") began an eleven day crime spree in New Castle County, Delaware. During this period, he committed numerous crimes, including robbery, carjacking, and fleeing from the police on three occasions. The police obtained arrest warrants for Humphries for the charges of first degree robbery, first degree carjacking, and possession of a deadly weapon during the commission of a felony. Investigators searched records for Humphries' known

associates and obtained Shaun Collins' ("Collins") name. Investigators also learned that Collins had an outstanding arrest warrant as well. Collins' arrest warrants were issued by the New Castle County Police for charges of burglary first degree and assault second degree. Investigators also learned that witnesses had reported seeing Humphries with Collins on three different occasions. Thus, on June 26, 2001, Detectives were actively attempting to locate both Collins and Humphries.

A. Herbert Douglas Jr.'s Questioning

Investigators learned that Collins is Holly Douglas' son. Holly Douglas lived at 3029 Court St. in Claymont, Delaware, with her husband, Herbert Douglas, Sr., and their children Kristi Douglas and Herbert Douglas, Jr. On the morning of June 26, 2001, two detectives arrived at the Douglas' home and asked Herbert Jr. where Collins was. He replied that, although he knew Collins lived in Brookview, he did not know the address. The officers then left.

Later that day, Detectives Hawk, Sullivan, and Thuet came to 3029 Court St.[2] Herbert Douglas, Jr. claims that he heard detectives pounding on the front door. The parties dispute whether he admitted the defendants into his home, or whether they simply walked in. While in the house, the Detectives questioned him about the whereabouts of Collins. Herbert Douglas, Jr. again stated that he did not know where his brother lived. During his deposition, he testified that the Detective Sullivan then called him "stupid" for not knowing where his brother lived. He further alleges that she then "grabbed him and pushed him up against the dresser." Following this, Herbert Douglas,

[2]Detective Thuet is not a defendant in the present case.

Jr. told the police to leave, and they complied.[3]

B. The Search Warrant

The police continued to search for Humphries throughout the day and evening of June 26, 1999. Their investigation revealed that Collins lived at 205 Coral Drive, Claymont, Delaware, with his girlfriend, Heather Thomas ("Thomas"). The police obtained a search warrant for Collins' address to search for Humphries and the small black handgun he had used in the carjacking earlier in the day.

The police placed 205 Coral Drive under surveillance for an extended period, but the officers noted no activity or lights. Since the detectives still needed to eliminate the residence as a potential hideout, they executed the search warrant in the evening. The detectives did not find Humphries or his gun. The detectives did learn, however, that Heather Thomas' parents, James and Kathaleen Weiss, lived at 13 Seminole Avenue, Claymont, Delaware.

Detectives interviewed Ms. Weiss and learned that she had been at 205 Coral Drive at approximately 12:30 p.m. on June 26, 1999. She met with her daughter and Collins. Also present was a white male whose physical description matched Humphries. Ms. Weiss stated that, at approximately 1:30 p.m. Collins and Thomas came to the 14 Seminole Avenue residence and asked Ms. Weiss to watch their two-year-old son while they went on an overnight trip to the beach. Ms. Weiss noted that her daughter owned the vehicle they used, a Ford Thunderbird. She also stated that they were going to stay in a trailer owned by Collins' mother. Mrs. Weiss indicated that this was not a planned trip and seemed to be a spur of the moment opportunity. The detectives then ran a

[3]While these facts are disputed, they are not relevant to the present motion as the plaintiffs appear to base their asserted claims only on the events of the June 27, 1999 search. The court, however, provides this information by way of background.

criminal history and wanted check on Collins**.** This check revealed that Collins was wanted by the New Castle County Police Department for the felonies of Burglary 1st and Assault 2nd, as well as other charges.

A plain clothes detective from Sussex County was asked to check the address. At approximately midnight, he reported that he had located the Ford Thunderbird at 458 Gulls Way. The police established surveillance and saw several subjects matching the descriptions of Humphries, Collins, and Thomas at 458 Gulls Way. This prompted Detective Hudson to apply for a search warrant for that address.

C. The Search Warrant's Execution

Detective Hudson obtained a search warrant from a judge at 3:48 a.m. on June 27, 1999. The judge further authorized a nighttime search. Members of the Delaware State Police Special Operations Response Team ("SORT") were selected to execute the search warrant. The team was briefed and three scout observers were put into position around the trailer. They executed the search warrant between approximately 4:20 a.m. and 4:30 a.m. The team was wearing protective clothing, including ballistic tactical vests equipped with shoulder pads that say "Police" on each of the shoulder pads, "Police" on the front, and a larger "Police" patch on the back.

The SORT team's entry of the trailer is both material to the present motion and factually contested. The plaintiffs' version is as follows. McColgan was the first person into the trailer, followed immediately by Ogden. The outside door was open. McColgan then reached the interior screen door, which he forced open with his arms and upper body. Approximately five seconds passed from the time the officers first touched the door until the time when McColgan went into the trailer. The first thing McColgan noticed was a male and female lying in a bed directly in front of

the door. Upon hearing the police, the male pulled the covers over his head and began kicking and screaming and throwing punches.

The defendants maintain, however, that, as the entry team approached the trailer, Corporal Danny Allan Wright ("Wright") placed one hand in position under the door latch and announced, "State Police search warrant." While he was announcing this, he also knocked on the trailer door at least twice. When he hit the door to knock, however, it popped open, and he then beat on the side of the trailer, "hollering," "State Police search warrant." Wright testified that he "probably hollered six, seven, eight times total." When Wright banged on the door and announced SORT's presence, there was screaming and commotion from inside the trailer. The defendants do not dispute that, when McColgan entered, he saw two people in the trailer and that he made contact with those people.

Shortly after entering the trailer, it is undisputed that Officers McColgan and Ogden fatally shot the Douglas family pit bull six times.[4] During the shooting, Herbert and Holly Douglas were sleeping in a bedroom off the main room. Upon waking, Holly Douglas remembers hearing screaming, then gunshots, and then somebody opening the door to the bedroom. She testified that the men who entered her bedroom were all dressed in black, and she couldn't see their faces. The door slid open before she was able to sit up. She testified that, as her husband, clad only in his underwear, sat up and scooted to the foot of the bed, he shouted, "[o]h my God they shot the dog." At that point she recalls one of the men who had come in told her husband to "shut the fuck up," and as he did so, he withdrew a black object from his right side.

---

[4]While the parties go into great detail as to the position of the dog's body and whether it had actually attacked McColgan, such detail is unnecessary for purposes of the present motion and will, therefore, be omitted from the court's opinion.

At her deposition, Holly Douglas testified that one of the men, later identified as Ogden, swung his flashlight at Herbert Douglas, Sr. Ogden then struck him in the head. The blow to Herbert's head caused blood to splatter on Holly's t-shirt. As the other men entered the bedroom, Holly testified that they kept yelling, "where the fuck is Brian?" The men then grabbed and handcuffed her.

As a result of the events at his trailer, Herbert Douglas Sr. was charged with offensive touching and resisting arrest. The Sussex County Court of Common Pleas subsequently accepted a "nolo contendere" plea as a result of a plea bargain between the state and Herbert Douglas, Sr. The negotiated plea included dropping the "offensive touching" charge in exchange for a "nolo contendere" plea to the "resisting arrest" charge.

IV. DISCUSSION

A. Sovereign Immunity

The defendants assert that the Eleventh Amendment deprives the court of jurisdiction to adjudicate the plaintiffs' civil rights claims against them in their official capacities for monetary damages pursuant to 42 U.S.C. §1983. The court agrees.

The plaintiffs' complaint alleges that the defendants, in both their official and individual capacities, "deprived [them] of the right to equal protection of the laws and impeded the due course of justice, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and 42 U.S.C. § 1983." *See e.g.* Complaint at ¶¶ 35, 37, 41. As a result, they request monetary relief. However, under the Eleventh Amendment, private parties cannot sue states in federal court for monetary damages. *See Board of Trustees of University of Alabama v. Garrett*, 121 S.Ct. 955, 962 (2001). A state is not entitled to this immunity if it has waived its

immunity or if Congress has abrogated the state's immunity through a valid exercise of its power. *See Lavia v. Comm. of Pennsylvania*, 224 F.3d 190, 195 (3d Cir. 2000).

Neither of the above two conditions are met here. First, the state has not waived its Eleventh Amendment immunity. A waiver will be found only where it has been stated "by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Space Age Products, Inc. v. Gilliam*, 488 F.Supp. 775, 780 (D. Del. 1980) (citing *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Such an express waiver may be made through clear constitutional or statutory language. *See Lavia*, 224 F.3d at 195 Neither the constitution nor the code of Delaware expressly waives Delaware's Eleventh Amendment sovereign immunity. *See Ospina v. Department of Corrections*, 749 F. Supp. 572, 579 (D. Del. 1990). Therefore, Delaware has not clearly waived its immunity.

Moreover, Congress has not abrogated the states' immunity for claims under Section 1983. *See Quern v. Jordan*, 440 U.S. 332, 345 (1979). Since Delaware's immunity has not been waived or abrogated, the plaintiffs cannot sue the state officers for money damages.

Accordingly, the court will dismiss each of the claims against the defendants in their official capacities.

B. The Plaintiffs' Fourth, Fifth, and Fourteenth Amendment Claims

In their complaint, the plaintiffs repeatedly assert violations of their Fifth and Fourteenth Amendment rights. *See* Complaint at ¶¶ 35, 37, 41, 44, 46, 49, 50, 52 and 53. With regard to the Fifth Amendment, neither the complaint, nor the record, contains any facts in connection with the incidents that raises an issue under the Fifth Amendment. Specifically, there is no claim of self-incrimination, double jeopardy, or of a public taking that implicates the protections of the

Fifth Amendment as it applies to the states. Accordingly, the court will grant summary judgment in favor of the defendants in their individual capacities as to the Fifth Amendment claims.

The plaintiffs' equal protection claim under the Fourteenth Amendment must also fail. To assert such a claim, the plaintiffs must establish that they are members of a suspect class or that a fundamental right is implicated. *See Abdul-Akbar v. McKelvie*, 239 F.3d 307, 317 (3d Cir. 2001). The complaint and record are devoid of any allegation or evidence of the plaintiffs' membership in a suspect class or the implication of the violation of a fundamental right under the Fourteenth Amendment. Accordingly, to the extent that the plaintiffs are alleging equal protection violations, such a claim must be dismissed as to each defendant in his or her individual capacity.

The plaintiffs also make general Fourteenth Amendment claims. However, the Supreme Court has instructed that, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). Whether the complaint in the present case actually alleges such an underpinning, namely the Fourth Amendment, is a question of significant dispute between the parties.

While the defendants agree that the complaint alleges incidents which, by their nature, involved searches and the use of force, they maintain that the plaintiffs have failed to actually assert any claims under the Fourth Amendment in their complaint. In their responsive papers, the plaintiffs fail to address this possible inadequacy, instead choosing to assume that their complaint is sufficient. The court must thus determine whether the complaint adequately pleads

Fourth Amendment violations without the benefit of counsel for the plaintiffs' advocacy.

According to the plaintiffs' responsive papers, they appear to believe that their Fourth Amendment rights were violated in the following three ways: (1) the nighttime search of the Douglas' trailer was not based on probable cause and occurred without exigent circumstances warranting such a search; (2) the defendants failed to properly announce their presence before entering the trailer; and (3) the defendants utilized excessive force against Herbert Douglas Sr. The court will address whether each alleged contention is adequately pled in turn.

In their responsive papers, the plaintiffs first argue that the defendants did not have probable cause to obtain the search warrant. Specifically, they contend that the affidavit constituting the application for a search warrant lacked any showing of probable cause. Furthermore, because the warrant was for a nighttime search, there must have been a showing that such a search was necessary to prevent the escape or removal of a person or tangible evidence to be searched for. Because the face of the affidavit allegedly addressed none of these issues, the plaintiffs maintain that the search warrant was deficient.

The court is without the power to reach the merits of these claims, however, as the complaint is devoid of any indication whatsoever that the plaintiffs intended to allege such violations. Indeed, the complaint makes no mention of the procedure the defendants used in obtaining the search warrant, the allegedly deficient affidavit itself, or the fact that the search warrant was allegedly invalid for nighttime searches.[5] Thus, although the Federal Rules of Civil

[5]Although the plaintiffs do state in their complaint that the police did not have any search or arrest warrants for them, that is an entirely different issue from the search warrant they now claim was constitutionally infirm. Likewise, the statement in the background section of the complaint to the effect that the defendants lacked a search warrant for an incident that occurred on the day prior to the trailer incident is not at issue.

Procedure require only a "short and plain statement of the claim," such a statement must nevertheless "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *See* FED. R. CIV. P. 8.; *see also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). Because the complaint has failed to do so in this instance, this claim must be dismissed.

Next, the plaintiffs argue that detectives Ogden and McColgan failed to properly announce their presence before entering the Douglas trailer. While the defendants maintain that this claim must also fail as not having been properly pled in the complaint, here the court must disagree. Specifically, the complaint alleges that the plaintiffs had no warning that the men were police and that the men did not announce themselves as such before they entered the trailer. *See* Complaint at ¶¶ 15, 16, 18. The court concludes that such allegations are sufficient to have adequately pled a knock and announce violation of the Fourth Amendment.

Finally, the plaintiffs maintain that, by striking Herbert Douglas, Sr. on the head with a flashlight, the police utilized excessive force in violation of the Fourth Amendment. The defendants again contend that the plaintiffs have failed to plead such a claim in their complaint. The court must again disagree with the defendants. Indeed, the complaint explicitly states that, "[d]efendant Patrick A. Ogden assaulted and beat [p]laintiff Herbert J. Douglas, Sr. without provocation, need, or explanation . . ." Complaint at ¶ 20; *see also* Complaint at ¶ 21 (stating that Holly Douglas witnessed her husband being "brutally attacked by the defendants"). The court concludes that such allegations are sufficient to plead an excessive force claim. Accordingly, the court will now turn to the merits of the alleged knock and announce and excessive force violations.

1. Knock and Announce

Notwithstanding the court's determination that a claim concerning the validity of the search warrant is not properly before it, the plaintiffs may nonetheless challenge the reasonableness of the search in light of an alleged knock and announce violation. The Supreme Court afforded Fourth Amendment protection to knock and announce entries in its 1995 opinion *Wilson v. Arkansas*. 514 U.S. 927, 931 (1995). Specifically, the Court noted that there was "[n]o doubt that the reasonableness of a search of a dwelling may depend in part on whether the law enforcement officers announce their presence and authority prior to entering." *Id*. It further examined its jurisprudence and recognized that there was a common law principal of announcing an officer's presence "embedded in Anglo-American law." *Id*. at 934. Finally, the Court held that the principle of an officer announcing his presence was an element of the reasonableness required under a Fourth Amendment analysis. *See id*. at 933.

The knock and announce rule is not, however, absolute. Indeed, in *Wilson*, the Supreme Court recognized that the police officers could have "reasonably believed that a prior announcement would have placed them in peril, given their knowledge that petitioner had threatened a government informant with a semi-automatic weapon and that [he] had previously been convicted of arson and firebombing." 514 U.S. at 936. Two years later, in *Richards v. Wisconsin*, the Supreme Court further clarified the exceptions to the knock and announce rule. 520 U.S. 385 (1997). Pursuant to that opinion, the knock and announce requirement may be dispensed with in the following four situations: (1) the individual inside was aware of the officers' identity and thus the announcement would have been a useless gesture; (2) the announcement might lead to the sought individual's escape; (3) the announcement might place

the officers in physical peril; and (4) the announcement might lead to the destruction of evidence. *See Richards*, 520 U.S. at 385. In so holding, the Court recognized that the "Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id*. at 394.

In the present case, the defendants maintain that the officers did knock and announce their presence. The plaintiffs testified at their depositions, however, that they heard no such knock or announcement and were not apprized of who the individuals entering their trailer in the dark were. Thus, given the conflicting testimony, whether the police knocked or otherwise announced their presence is a contested issue. This conflict will not, however, preclude the court from granting the defendants' motion for summary judgment because the uncontested evidence demonstrates the circumstances fall within two of the four exceptions to the knock and announce rule.

The officers believed that Humphries was a threat to them and would not hesitate to escape.[6] The officers knew that, within the last forty-eight hours, he had carjacked a woman at gunpoint, endangered the lives of two Wilmington police officers by driving his vehicle directly at them to effect an escape from their custody, and escaped police arrest three times by fleeing. In light of this information, it was reasonable for the officers to believe that an announcement might place them in physical risk and/or that an announcement might lead to Humphries' escape. In either situation, the Supreme Court has made it clear that no announcement is necessary. *See*

[6]Although the plaintiffs argue that the police did not have probable cause to believe that Humphries was actually at the trailer at that time, the court has already determined that such an argument is not properly before it. Accordingly, for purposes of this motion, the court must assume that the officers had probable cause to assume that Humphries was in the trailer.

Wilson, 514 U.S. 936. Furthermore, with the exception of the plaintiffs' previously rejected argument that the police had no probable cause to believe Humphries was in the trailer, they have failed to provide any countervailing evidence that a reasonable jury could use to find that these two exceptions did not apply in this case. In light of the uncontested evidence, the court will grant the defendants' motion for summary judgment on this claim.

2. Excessive Force

Herbert Douglas, Sr. also brings a claim against Ogden for striking him in the forehead, between the eyes, with Ogden's flashlight. He contends that Ogden hit him with such force that his blood splattered onto his wife's shirt. He claims to have later required stitches, although at the time of the incident, he refused medical treatment. Ogden does not dispute that he hit Herbert Douglas, Sr. on the head with his flashlight. He maintains, however, that such force was necessary to prevent Herbert Douglas, Sr. from assaulting him.

The threshold issue the court must address is the extent to which the defendants may rely on Herbert Douglas, Sr.'s nolo contendere plea to the resisting arrest charge.[7] The plaintiffs contend that this plea cannot be used against Herbert Douglas, Sr. in this subsequent civil proceeding because it was not a guilty plea. The specific charge of which he was convicted in the Delaware Court of Common Pleas stated: "Herbert Douglas, on or about the 27th day of June, 1999 in the County of Sussex, State of Delaware, did intentionally attempt to prevent Sgt. Patrick Ogden of the Troop 4 State Police from effecting an arrest of himself, by KICKING AT THE VICTIM OGDEN AND REFUSING TO PLACE HIS HANDS IN PLAIN VIEW."

[7]In the context of a criminal proceeding, a nolo contendere plea results in a conviction equivalent to that of a guilty plea. *See Kelly v. State of Delaware*, 520 A.2d 1044, 1044 (Del. 1986).

(emphasis in original). Herbert Douglas, Sr. was represented by an attorney when he entered his plea.

The court must first address the plaintiff's argument that his nolo contendere plea cannot be "used against him" in this subsequent civil litigation. In concluding that the plaintiff's argument must fail, the court finds the Sixth Circuit's opinion in *Walker v. Schaeffer* to be instructive and persuasive. 854 F.2d 138 (6th Cir. 1988). There, like the case presently before the court, the persons who entered prior nolo contendere pleas were the plaintiffs in the subsequent civil action. The Sixth Circuit determined that the nolo contendere pleas were not being impermissibly used against the plaintiffs in contravention to Federal Rule of Evidence 410. In so holding, the Sixth Circuit determined that the Rule contemplates a situation where the nolo contendere plea is being used against the pleader in a subsequent civil or criminal action in which he is the *defendant*. *See Walker*, 854 F.2d at 143. Thus, the court found that Rule 410 was designed to protect a criminal defendant's ability to use the nolo contendere plea to defend himself or herself from future civil liability. *See id*. The court further concluded that it would not interpret the Rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate the lack of civil liability on the part of the arresting officers. *See id*. Adopting this view, the court concludes that, in the current posture of the case, Herbert Douglas, Sr.'s nolo contendere plea is not being improperly used against him.

Furthermore, in *Heck v. Humphrey*, the Supreme Court made it clear that a Section 1983 action could not be maintained on the basis of events leading to a conviction which has not been reversed or impaired by other proceedings if a judgment in favor of the plaintiff in the civil case

would imply that the conviction was invalid. *See Heck*, 512 U.S. 477, 487 (1994). The court concludes that the present case is controlled by *Heck*, regardless of the fact that this case concerns a nolo contendere plea. This is so because the plaintiff's responsive papers indicate that his theory of the case includes testimony that, immediately proceeding being hit with the flashlight, he did not kick Ogden, and that he did not resist arrest. These assertions directly undermine conduct which the plaintiff acknowledged he committed during his plea. Thus, under these circumstances, a verdict for the plaintiff would necessarily imply the invalidity of the state court conviction for resisting arrest. *See e.g., Fritz v. City of Corrigan*, 163 F. Supp. 2d 639, 641 (E.D. Tex. 2001) (holding that the plaintiff's claim contested the factual basis of his nolo contendere plea and was therefore barred under *Heck*.); *Ramirez v. Dennis*, 2002 U.S. Dist. LEXIS 10436, at *11 (W.D. Mich. June 6, 2002). However, to the extent that the plaintiff intends to argue that he was, in fact, resisting arrest, but that Ogden's use of force was nevertheless excessive, such a claim would not be barred by *Heck*. Because it is unclear whether the plaintiff intends to alternatively argue that, even assuming he resisted arrest, Ogden's use of force was excessive, the court will assume, out of an abundance of caution, that the plaintiff so intends.

Claims of excessive force against law enforcement officers which occur during the course of an arrest or other "seizure" are analyzed under the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). While such an analysis must be done on an "objectively unreasonable" basis, an officer's claimed good faith intention does not make an "objectively unreasonable" use of force constitutional. *See id*. at 396. Finally, the Third Circuit has instructed that:

> [r]easonableness under the Fourth Amendment should remain a question for the jury. To put the matter more directly, since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to be sure that the ultimate legal judgment of 'reasonableness' is itself reasonable and widely shared.

Abraham v. Raso, 183 F.3d 279, 290 (3d Cir. 1999).

The use of force by the Delaware State Police is governed by an internal policy. The use of deadly force is severely limited by that same policy. In addition, there are training policies for the use of flashlights as "impact weapons" as part of academy training. Those policies specifically instruct officers to avoid striking persons in the head. The same policy states that, if in a defensive stance, an officer must strike and defend himself with a flashlight against a kick, as Ogden claims, he is to strike the individual in the thigh.

In the present case, the court has already determined that Herbert Douglas, Sr. is precluded from arguing that he did not resist arrest. Thus, the remaining issue is whether Ogden nevertheless used excessive force. Ogden argues that Herbert Douglas, Sr. kicked him. He further contends that his options at that time were limited because he had a handgun in one hand and a flashlight in the other, neither of which he could drop in the darkened trailer. Furthermore, he could see that there was another unknown person in the room behind Douglas. Finally, Ogden contends that he needed to act quickly because Douglas was very close to him and a person willing to kick an officer could easily lunge for the handgun he was holding.

The court is unable to grant summary judgment, however, given the following evidence. First, the plaintiff submits that internal police procedure instructs officers to avoid hitting

suspects in the head.[8] The plaintiff further points to the testimony of the State's 30(b)(6) witness, Alfred Parton, Jr., that Ogden was not justified in using such force against the plaintiff, even if he was hiding his hands. Further, there is testimony that Ogden hit the plaintiff with such force that blood splattered onto Holly Douglas' t-shirt. Finally, on the record before it, the court is unable to determine the specific circumstances surrounding Douglas' and Ogden's actions. The court thus concludes that a determination of the reasonableness of Ogden's actions is more appropriately in the province of the jury.

In light of the above unresolved facts, the court is also unable to grant Ogden the qualified immunity he seeks. "Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). The Supreme Court recently affirmed the two part test for qualified immunity. First, the court must determine whether the facts alleged, taken in the light most favorable to the plaintiff, are sufficient to show that the defendant violated a constitutional right. *See Saucier* 533 U.S. at 201. Second, if a constitutional violation can be demonstrated on the facts alleged, the court must next consider whether the right was clearly established at the time of the alleged violation. *See id*. In *Saucier*, the court further clarified that the right must be established in a "particularized" sense, meaning that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *See id.* Additionally, the court noted that although the court must decide whether the facts alleged - not proved - by the plaintiff amount to

[8]The defendant is correct that, even had Ogden violated an internal policy, such a violation alone would not necessarily demonstrate the use of excessive force. Nevertheless, this evidence is a relevant consideration in the final calculus of whether Ogden's actions were reasonable.

a constitutional violation, even where there may be a material issue of fact, if the law did not put the officer on notice that his conduct was unlawful, summary judgment may be permissible. *See id.* at 202.

With regard to the first *Saucier* prong, the parties do not, and cannot, dispute that Herbert Douglas, Sr. possessed a clearly established right to be free from the use of excessive force. *See House v. New Castle Cty.*, 824 F. Supp. 477, 490-491 (D. Del. 1993). However, as stated above, the second prong of the *Saucier* analysis requires that the court determine whether Ogden's actions were objectively reasonable. As indicated by the court's earlier discussion regarding Herbert Douglas, Sr.'s Fourth Amendment claim, the record in this case establishes the existence of a clear dispute regarding historical facts material to a determination regarding Ogden's conduct in the trailer. Given this state of the record, the court is not prepared to say that Ogden's conduct was objectively reasonable, or that his conduct was objectively unreasonable. In other words, the court is unable to conclude that Ogden should enjoy the protection of qualified immunity. Nor is the court in a position to conclude that the shield of qualified immunity should be removed from Ogden. Thus, until a jury resolves the disputed issues concerning what occurred in the trailer that night, the court cannot determine as a matter of law the reasonableness of Ogden's use of force or his good faith belief, or lack thereof, in the reasonableness of his conduct. *See Karnes v. Skrutski*, 62 F.3d 485, 491-492 (3d Cir. 1995). Consequently, Ogden's motion for summary judgment wherein he asserts his entitlement to be shielded by the defense of qualified immunity as to the plaintiff's Fourth Amendment excessive force claim is denied.

V. CONCLUSION

For the forgoing reasons, IT IS HEREBY ORDERED that:

1. The Defendants' Motion for Summary Judgment (D.I. 110) is DENIED with respect to Herbert Douglas, Sr.'s excessive force claim against Patrick Ogden. It is GRANTED as to all other claims and defendants.

2. Judgment BE AND IS HEREBY ENTERED in favor of the Defendants Richard Pulling, Douglas Hudson, Mark Hawk, Siobhan Sullivan, and Daniel McColgan, and against the Plaintiffs, Holly Douglas, Kristi Douglas, and Herbert Douglas, Jr.

Dated: September 13, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE