IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES LONG, Plaintiff, v. DETECTIVE DANNAILE REMENTER, DETECTIVE DALLAS REYNOLDS, and STATE TROOPER JOHN DOE 1-15, Defendants.	)	Civil Action No. 17-217-VAC-CJB

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MEMORANDUM OPINION

August 3, 2018
Wilmington, Delaware

BURKE, United States Magistrate Judge

Plaintiff James Long ("Plaintiff" or "Long") filed this action alleging violations of his rights under the United States Constitution pursuant to 42 U.S.C. § 1983 ("Section 1983"), as well as pendant state law claims. (D.I. 1) More specifically, Plaintiff alleges a Section 1983 claim for illegal search and seizure and for excessive force under the Fourth Amendment and alleges Delaware state law claims for assault, battery, and intentional infliction of emotional distress. (*Id.*) Presently before the Court is Defendants Detective Dannaile Rementer's ("Detective Rementer") and Detective Dallas Reynolds' ("Detective Reynolds") (collectively, "Defendants") motion for summary judgment, filed pursuant to Federal Rule of Civil Procedure 56 (the "Motion"). (D.I. 22) For the reasons that follow, the Court GRANTS Defendants' Motion.

I. BACKGROUND

A. Factual Background

1. The Search of Plaintiff's Residence

At 6:00 a.m. on the morning of March 5, 2015, Plaintiff was asleep at his residence in Georgetown, Delaware when troopers from the Delaware State Police forcibly entered his home. (D.I. 1 at ¶¶ 7-8; D.I. 29 at 1) The troopers were executing a search warrant (the "search warrant"), which was issued on February 27, 2015 by the Justice of the Peace Court of the State of Delaware. (D.I. 24 at A-19-35) The search warrant was supported by an application and affidavit of probable cause (the "Affidavit"); the Affidavit was signed by Defendants.[1] (*Id.*)

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[1] Although Detective Reynolds is a co-affiant on the search warrant, he claims that he had no personal involvement in the investigation of Plaintiff other than "some surveillance[.]" (D.I. 23 at 5; *see also* D.I. 24 at A-86-87; D.I. 29 at 2, 6) At his deposition, Detective Reynolds stated that the purpose of his signing the Affidavit was as a precaution, such that if "Detective Rementer was not available on the day we were going to execute the search warrant, I [Detective Reynolds] could take it over and execute the search warrant for her." (D.I 24 at A-89) Plaintiff does not dispute that Detective Reynolds had nothing to do with the preparation of the Affidavit. (D.I. 29 at 6)

When the troopers entered Plaintiff's residence, they ordered Plaintiff to put his hands up; one trooper then grabbed Plaintiff and violently threw him to the floor. (D.I. 1 at ¶ 11) While Plaintiff was on the floor, a trooper grabbed Plaintiff's right arm and forcibly put the arm behind Plaintiff's back. (*Id.* at ¶ 12) This trooper also grabbed Plaintiff's left arm and dropped his or her knees onto Plaintiff's left shoulder, aggravating an injury to that shoulder (on which Plaintiff had recently had surgery). (*Id.*) Although Plaintiff listed both Detective Rementer and Detective Reynolds as Defendants on his Complaint in this case, he did not know whether it was Detective Rementer, Detective Reynolds, or some other trooper who took the above-referenced actions. (*Id.*)

Detective Rementer testified that she did not participate in the initial entry into Plaintiff's residence; she said that a SORT team of officers made the initial entry, and that she only later entered the residence after those officers had "cleared" the area. (D.I. 24 at A-80) Detective Reynolds testified that he did not take part at all in the execution of the search warrant. (*Id.* at A-87)

2. Asserted Probable Cause for the Search of Plaintiff and His Residence

According to the Affidavit[2] offered in support of the search warrant, in November 2014, Detective Rementer was contacted by a confidential informant ("CI"), who advised that a black male in his late twenties or early thirties named "Jay" was selling heroin from a residence located in Countyseat Mobile Home Park in Georgetown. (*Id.* at A-29) This CI, who is referred to as "CI-1" in the search warrant (and in the parties' briefs here), relayed that "Jay" owned "a gun metal gray BMW[.]" (*Id.*) CI-1 also provided two phone numbers for "Jay," which are listed in the Affidavit. (*Id.*)

Detective Rementer described CI-1 in the Affidavit as a "past proven cooperating individual[.]" (*Id.*) She later testified that this description was meant to reference the fact that

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[2] The information in this section was set out in the Affidavit, unless otherwise indicated.

CI-1 had previously provided her with information about other criminal wrongdoing, which Detective Rementer passed along to another officer. (*Id.* at A-73-75) The other officer later contacted Detective Rementer (prior to the submission of the Affidavit in this case) and confirmed that the information CI-1 provided had led to the arrest of another individual. (*Id.*)

In the Affidavit, Detective Rementer described how she "conducted a tactical inquiry for the [two phone] numbers provided by the CI" and that one of the numbers "revealed a listed user as James E. Long with a provided address of 7 Maple Street, Georgetown, Sussex County, Delaware[.]" (*Id.* at A-29) Detective Rementer was familiar with "Maple Street" and noted that it was located in the Countyseat Mobile Home Park. She next performed a Delaware Criminal Justice Information System ("DELJIS") inquiry for James Long that revealed that he was a black male, born on August 5, 1987, with an address listed at 7 Maple Street, Georgetown, Delaware. (*Id.*) Detective Rementer showed a photograph of Plaintiff, which she obtained from DELJIS, to CI-1; CI-1 identified the person in the photo as "Jay." (*Id.*) Detective Rementer also performed an inquiry on vehicles registered to Plaintiff and found that a gray 2006 BMW 330 was registered to Plaintiff at the 7 Maple Street address. (*Id.*)

Thereafter, CI-1 contacted Detective Rementer in the last weeks of November 2014 and advised that he or she "could conduct a controlled purchase of heroin from James E. Long at the residence located at 7 Maple Street[.]" (*Id.*) Detective Rementer observed the events leading to the controlled buy, during which a "black male exit[ed] the residence located at 7 Maple Street . . . and respond[ed] directly into a shed located on the property." (*Id.* at A-29-30; *see also id.* at A-75-76) CI-1 then "responded into the shed and after a short period exited the shed and departed the area." (*Id.* at A-30) CI-1 then met with Detective Rementer at a predetermined location; there CI-1 provided Detective Rementer with heroin, which CI-1 said he had purchased from Plaintiff in the shed using state-issued currency. (*Id.*) During the last two weeks of February 2015, Detective Rementer had CI-1 perform two more controlled buys of heroin from Plaintiff at Plaintiff's residence on Maple Street; in both, CI-1 reported that Plaintiff exited his residence,

approached CI-1 in CI-1's vehicle, and sold CI-1 heroin. (*Id.* at A-31-32; *see also id.* at A-78-80) After the two additional transactions described above, CI-1 met with Detective Rementer and provided her with the heroin CI-1 had purchased from Plaintiff. (*Id.* at A-29-32)

In addition to the controlled buys involving CI-1, the Affidavit contained other information obtained from either unnamed or anonymous sources.

For example, in December 2014, Detective Rementer was contacted by Sergeant Tyndall of the Georgetown Police Department "regarding information that was received by a concerned citizen" (referred to as "CC-1"). (*Id.* at A-30) CC-1, who wished to remain anonymous, told Sergeant Tyndall that her child was addicted to heroin and had purchased his or her heroin from Plaintiff. (*Id.*) CC-1 further explained that while picking up her child from Plaintiff's 7 Maple Street residence, CC-1 had observed "blue bags" that CC-1 believed contained heroin. (*Id.*)

In January 2015, Sergeant Tyndall again contacted Detective Rementer. Sergeant Tyndall relayed that a CI (referred to as "CI-2") had told him that "James E. Long is selling 'good sized' quantities of heroin at his residence in Countyseat Mobile Home Park" and that CI-2 had purchased heroin from Plaintiff in the past at Plaintiff's residence. (*Id.*)

The Affidavit also notes that in February 2015, a second concerned citizen (referred to as "CC-2") contacted Sergeant Hudson of the Delaware State Police about Plaintiff "selling large amounts of heroin from his residence located at 7 Maple Street[.]" (*Id.*) CC-2 told Sergeant Hudson that, *inter alia*, Plaintiff had numerous cars (including a BMW and a Lexus), that Plaintiff had eight surveillance cameras monitoring his residence, and that he had over $100,000 hidden in the walls of the residence. (*Id.*)

The Affidavit additionally states that in February 2015, Sergeant Dawson of the Delaware State Police was contacted by a "past proven reliable cooperating individual" (referred to as "CI-3"). (*Id.* at A-31) CI-3 told Sergeant Dawson that Plaintiff was "selling heroin from a residence located in Countyseat Gardens Mobile Home Park" and "advised that James Long stores heroin inside the residence inside of an electrical box." (*Id.*)

B. Procedural Background

On March 2, 2017, Plaintiff filed his Complaint. (D.I. 1) The case was referred to the Court on March 8, 2017 for handling through case-dispositive motions. The parties thereafter jointly consented to the Court's jurisdiction to conduct any and all proceedings and enter a final order as to the instant Motion. (D.I. 21)

II. STANDARD OF REVIEW

A grant of summary judgment is appropriate where "the movant shows that there is no genuine 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 moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.10 (1986). If the moving party has sufficiently demonstrated the absence of a genuine dispute of material fact, the nonmovant must then "come forward with specific facts showing that there is a genuine issue for trial." *Id.* at 587 (internal quotation marks, citation and emphasis omitted).

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. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). During this process, the Court will "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

However, in order to defeat a motion for summary judgment, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87; *see also Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005) (party opposing summary judgment "must present more than just bare assertions, conclusory allegations or suspicions to show the existence of a genuine issue") (internal quotation marks and citation omitted). 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). Facts that could alter the outcome are "material," and a factual dispute is "genuine," only where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." *Id.* at 249-50 (internal citations omitted).

A party asserting that a fact cannot be—or, alternatively, is—genuinely disputed must support the assertion either by citing to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials"; or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) & (B).

III. DISCUSSION

Section 1983 provides, in relevant part: "Every person who, under color [of law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983. Section 1983 does not create substantive rights, but instead "merely provides a remedy for deprivations of rights established elsewhere in the Constitution or federal laws." *Estate of Smith v. Marasco*, 318 F.3d 497, 505 (3d Cir. 2003). "To state a claim under [Section] 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988).

Plaintiff asserts a Section 1983 claim alleging that the Defendants violated his Fourth Amendment rights to be free from illegal search and seizure and from the excessive use of force. (D.I. 1 at 7-8; *see* D.I. 29 at 2)[3] The Fourth Amendment protects against "unreasonable searches and seizures" and instructs, *inter alia*, that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation[.]" U.S. Const. amend. IV. Additionally, claims that law enforcement used excessive force in the course of an arrest "should be analyzed under the Fourth Amendment and its 'reasonableness' standard[.]" *Damiani v. Duffy*, 277 F. Supp. 3d 692, 703 (D. Del. 2017) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (certain quotation marks omitted). Below, the Court will address the two asserted bases for Plaintiff's Section 1983 claim in turn.

A. Illegal Search and Seizure

Plaintiff alleges that the Delaware State Police troopers' entry into his residence and subsequent search was an illegal search and seizure because: (1) the police lacked probable cause to enter his home; and (2) the Affidavit submitted in support of the search warrant contained material falsehoods and/or material omissions of fact. (D.I. 1 at ¶¶ 15-17; *see also* D.I. 23 at 5; D.I. 29 at 1-2)

1. Probable Cause

Plaintiff's main argument regarding the asserted lack of probable cause is that the Affidavit was "premised upon information received from unknown confidential individuals." (D.I. 29 at 6) Plaintiff appears to be asserting that because the Affidavit relies so heavily on information provided by unnamed individuals, there was no probable cause to issue the warrant.

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[3] As noted above, Plaintiff also alleged state law causes of action for assault, battery, and the intentional infliction of emotional distress. (D.I. 1 at 9-10) However, in his answering brief, Plaintiff agreed to dismissal of each of the state law claims. (D.I. 29 at 2, 13) The Court therefore will grant Defendants' Motion to the extent it seeks dismissal of those claims, and will not discuss those claims further in this Memorandum Opinion.

To make out a Section 1983 Fourth Amendment claim for illegal search and seizure/false arrest, a plaintiff must allege and then demonstrate, *inter alia*, that there was a lack of probable cause to support the search and seizure/arrest at issue. *See, e.g.*, *Dowling v. City of Philadelphia*, 855 F.2d 136, 141 (3d Cir. 1988); *Martin v. Cordrey*, Civ. No. 16-600-LPS, 2017 WL 3866053, at *3 (D. Del. Sept. 5, 2017). Probable cause "exists to support the issuance of a warrant if, based on a totality of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Sherwood v. Mulvihill*, 113 F.3d 396, 401 (3d Cir. 1997) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)); *see also Dempsey v. Bucknell Univ.*, 834 F.3d 457, 467 (3d Cir. 2016). A determination as to whether or not there was probable cause "is necessarily fact-intensive, and it will usually be appropriate for a jury to determine whether probable cause existed." *Dempsey*, 834 F.3d at 468 (citing *Sherwood*, 113 F.3d at 401). However, "summary judgment may be granted on the question of probable cause if a court concludes that 'the evidence, viewed most favorably to [the nonmoving party], reasonably would not support a contrary factual finding.'" *Id.* (alteration in original) (quoting *Sherwood*, 113 F.3d at 401).

"There is a tension inherent in evaluating probable cause at the summary judgment stage" (wherein the court must view the facts in the light most favorable to the nonmoving party), in that the probable cause standard itself allows for the existence of conflicting and irreconcilable evidence. *Id.* But that does not mean that a reviewing court must "exclude from the probable cause analysis unfavorable facts [to the nonmovant that] an officer otherwise would have been able to consider." *Id.* Instead, the court is to "view *all* such facts [those that are favorable to the nonmovant and those unfavorable to him] and assess whether any reasonable jury could conclude that those facts, considered in their totality in the light most favorable to the nonmoving party, did not demonstrate a 'fair probability' that a crime occurred." *Id.* (emphasis in original).

Here, Plaintiff does not challenge the facial accuracy of nearly all of the relevant statements contained in the Affidavit.[4] That is, Plaintiff does not dispute that: (1) three different CIs provided information to law enforcement regarding the suspected dealing of heroin by Plaintiff; (2) Detective Rementer corroborated parts of the information provided by CI-1; (3) Detective Rementer utilized CI-1 to conduct three controlled buys of heroin from Plaintiff at Plaintiff's residence; and (4) two concerned citizens reported suspected drug dealing by Plaintiff at Plaintiff's residence. (D.I. 23 at 2-4; D.I. 24 at A-29-32)

Instead, Plaintiff attempts to show that some of the information that Detective Rementer (and other law enforcement officers) received from the CIs and the concerned citizens was itself unreliable. (D.I. 29 at 6-11) He cites to the Supreme Court of the United States' decision in *Illinois v. Gates*, 462 U.S. 213 (1983), which provided the approach for determining when an informant's tip is sufficiently reliable to establish probable cause. *Gates*, 462 U.S. at 238-42.

In *Gates*, the search warrant at issue was predicated in part on an anonymous tip sent by letter to Illinois police officers. *Id.* at 225. The letter identified by name two individuals who were alleged to be involved in drug distribution; it also provided information that: (1) on May 3, 1978, one of the individuals (Sue Gates) was going to drive a vehicle to Florida so that it could be loaded with drugs; (2) a "few days" later, the other individual (Lance Gates) would fly to Florida, pick up the car and drive it back to Illinois; (3) over $100,000 worth of drugs would be stored in the car's trunk; and (4) the Gates' were storing over $100,000 worth of drugs in the basement of their house. *Id.* The *Gates* Court explained that, "standing alone, . . . [the tip] would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the [identified individuals'] car and home." *Id.* at 227. However, it stated that a reviewing court should consider the "totality-of-the-circumstances" in considering whether probable cause existed to support a search—including an informant's

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[4] Plaintiff does dispute the Affidavit's assertion that CI-1 was a "past proven" confidential informant. This argument is discussed further below.

"veracity," "reliability," and "basis of knowledge[.]" *Id.* at 230, 233 (internal quotation marks and citation omitted); *see also Alabama v. White*, 496 U.S. 325, 329 (1990) (noting that the opinion in *Gates* "recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity"). The *Gates* Court noted that important to the determination of an informant's "reliability" is whether the informant's statement about asserted illegality had been corroborated by independent police work. *Gates*, 462 U.S. at 241-43; *cf. White*, 496 U.S. at 326-27 (finding that an anonymous tip, "corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop"). The *Gates* Court ultimately found that the police had sufficiently corroborated the tip from the anonymous letter by, *inter alia*, confirming that: (1) Lance Gates had purchased a plane ticket to Florida for May 5, 1978; (2) he flew to Florida on that date; (3) he arrived in Florida; (4) he went to a hotel room registered to Susan Gates; and (5) on May 6, 1978, he drove a car (which bore a license plate registered to Mr. Gates' vehicle) northbound on a highway often used by travelers heading to Illinois. 462 U.S. at 225-26, 243.

Plaintiff's argument here is that: (1) the Affidavit relies on information from various confidential sources but (2) unlike the situation in *Gates*, here there was not "proper corroboration" of the information provided by those sources. (D.I. 29 at 9) But in making this argument, Plaintiff ignores the fact that the statements in the Affidavit from CI-1, CI-2, CI-3, CC-1 and CC-2—all to the effect that Long was distributing heroin from his home—*were* corroborated by independent police work. The Affidavit, after all, details how Delaware State Police troopers coordinated three different controlled buys of heroin from Plaintiff by CI-1. All of these purchases took place at Plaintiff's Georgetown residence in either November 2014 or February 2015. Numerous Third Circuit cases, cited by Defendants in their opening brief, (D.I. 23 at 6-7), stand for the proposition that a search warrant is supported by probable cause when the accompanying affidavit states that a CI provided a tip that the target is distributing drugs, and where law enforcement later corroborates this information by conducting a controlled buy from

the target. *See, e.g.*, *United States v. Rivera*, 524 F. App'x 821, 825 (3d Cir. 2013) (explaining that a search warrant was "amply supported by probable cause" where two CIs "stated that they had purchased cocaine from [defendant] at the apartment, and the two controlled buys from [defendant] completed under the supervision of the task force provided additional corroboration"); *United States v. Stearn*, 597 F.3d 540, 556 (3d Cir. 2010) (finding that the Magistrate Judge had a "'substantial basis for crediting the [informant's] hearsay' tip because the tip was corroborated in significant part by independent police investigation[,]" including where investigating officers observed the informant consummate a controlled buy of cocaine from the target); *see also United States v. Brookins*, 413 F. App'x 509, 512 (3d Cir. 2011); *United States v. Caple*, 403 F. App'x 656, 658-59 (3d Cir. 2010); *United States v. Gallo*, 110 F. App'x 265, 268 (3d Cir. 2004). Plaintiff did not cite to or address these cases in his answering brief. (D.I. 32 at 4)

Instead, Plaintiff devoted multiple pages in his brief to arguing why the word of the three CIs listed in the Affidavit cannot be trusted. (D.I. 29 at 2-4, 7-11) Specifically, Plaintiff takes issue with: (1) Detective Rementer's failure to sufficiently confirm that CI-1 had ever previously provided truthful information that led to a conviction (i.e., that CI-1 did not meet Plaintiff's definition of a "past proven" confidential source) or (2) the detective's failure to confirm that CI-2 and CI-3 had ever previously provided law enforcement with any reliable information at all. (*Id.* at 7-8)

If the search warrant at issue here was based solely on the statements of CI-1 (or CI-2 or CI-3), then Plaintiff's arguments might have more weight. But again, what Plaintiff ignores is that Detective Rementer included other information in the Affidavit that corroborated the statements of these witnesses. As noted above, important corroboration came in the form of three controlled buys. But it also came via Detective Rementer's verification of other facts provided by these sources. This included her confirmation of: (1) the statements by all three sources that Plaintiff lived in Countyseat Mobile Home Park; (2) CI-1's statement that Long was

associated with a gray BMW (the car was registered to Plaintiff);[5] and (3) CI-1's statement that a particular phone number was Plaintiff's number (Plaintiff was listed as the user of that number). No reasonable jury could find that all of this information (in addition to the other information in the Affidavit provided by the two concerned citizens) was insufficient to establish probable cause to issue the search warrant.[6]

2. False Statements and/or Omissions

Plaintiff also argues that the search warrant was invalid because the Affidavit contained false statements and/or omissions. The Third Circuit requires a Section 1983 plaintiff "who challenges the validity of a search warrant by asserting that law enforcement agents submitted a false affidavit to the issuing judicial officer" must satisfy the two-part test developed by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). *Sherwood*, 113 F.3d at 399; *see also Morgan v. Borough of Fanwood*, 680 F. App'x 76, 83-84 (3d Cir. 2017). That two-

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[5] CC-2 also stated that Plaintiff owned a BMW. (D.I. 24 at A-30)

[6] The Court also notes that many of the cases cited by Plaintiff, including *Gates* and *Alabama v. White*, 496 U.S. 325 (1990), concern whether and when the statement of an *anonymous* tipster is sufficiently reliable to support a finding of probable cause to issue a warrant. (D.I. 29 at 9-10) Here, however, there is no dispute that the identity of at least CI-1 was known to Detective Rementer. (D.I. 32 at 1-2; *see also* D.I. 24 at A-76 (Detective Rementer explaining at her deposition that CI-1 was "with [her]" in person before and after the first controlled buy); *cf.* D.I. 29-1 at PA-7 (Detective Rementer denying Plaintiff's request that she admit that she did not do a criminal background check on CI-1)) In a case cited by Plaintiff himself, the United States Court of Appeals for the Second Circuit distinguished between anonymous tipsters, like those in *White* and *Gates*, and informants that have met with the police, explaining that "a face-to-face informant must, as a general matter, be thought more reliable than an anonymous telephone tipster, for the former runs the greater risk that he may be held accountable if his information proves false." *United States v. Salazar*, 945 F.2d 47, 50-51 (2d Cir. 1991) (cited in D.I. 29 at 9). In that case, the Second Circuit also noted that a face-to-face informant should, as a general matter, be seen as being more reliable than an anonymous tipster even if "the informant . . . had not previously been relied on by the officers[.]" *Id.* at 50; *see also United States v. Valentine*, 232 F.3d 350, 354-55 (3d Cir. 2000) (citing *Salazar* approvingly on this point). Here, the fact that CI-1's identity was known to Detective Rementer prior to the events described in the search warrant, and that CI-1 had previously provided the detective with information leading to the arrest of another individual, (*id.* at A-73-75), all further bolsters the showing of probable cause.

part test requires that "the plaintiff must prove, by a preponderance of the evidence, (1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that such statements or omissions are material, or necessary, to the finding of probable cause." *Sherwood*, 113 F.3d at 399. In the case of an omission of fact, such an omission is made with "reckless disregard" for the truth if the fact withheld by the officer is one that any reasonable person would know is the kind of thing a judge would wish to know. *Wilson v. Russo*, 212 F.3d 781, 788 (3d Cir. 2000). A falsehood is "material to the finding of probable cause if the affidavit, 'with the . . . false material set to one side . . . is insufficient to establish probable cause.'" *Sherwood*, 113 F.3d at 399 (alterations in original) (quoting *Franks*, 438 U.S. at 156). Thus, a court must either "excise the false statement from the affidavit" or in the case of a falsehood created by an omission, must "supply[] the omitted information to the original affidavit." *Id.* at 399-400.

Here, Plaintiff argues that the Justice of the Peace who issued the search warrant: (1) "would have wanted to know that none of the individuals who provided the information contained in the Affidavit . . . had been properly investigated for reliability or veracity" and (2) would have wanted to know "that Detective Rementer made false statements when she claimed that CI-1 was a 'past proven cooperating individual.'" (D.I. 29 at 11)

As to the first argument, which asserts that there was a material omission in the Affidavit, the undisputed evidence does demonstrate that Detective Rementer did not independently verify the reliability of CI-2, CI-3, CC-1, and CC-2. But even assuming *arguendo* that this amounts to a reckless omission from the Affidavit that created a "falsehood" (and the Court is not sure that it does), it could not have amounted to a *material* omission. As discussed above, the Affidavit not only references the statements of these witnesses (all of whom said that Plaintiff was dealing heroin from his residence), but also evidence of three controlled buys that CI-1 made from Plaintiff. This ensured that probable cause existed to support the warrant. And so, even if the Court were to add into the Affidavit a notation that Detective Rementer did not do anything to

independently verify the veracity of these four witnesses, this would not have made a difference as to a probable cause finding.[7]

As to the second argument, regarding whether Detective Rementer made an affirmative misrepresentation in the Affidavit, the evidence does not show that she did. Plaintiff argues that the statement identifying CI-1 as "past proven" in the Affidavit was:

> false because[,] by Detective Rementer's own admission[,] she could not identify or provide any information or any other cases where the individual identified as CI-1 has provided information to law enforcement that had resulted in an arrest nor could she identify any documents, records, databases[,] or other information of any sort that she relied upon in determining that CI-1 was a past proven cooperating individual. Further, Rementer was not able to provide information on any cases [where] CI-1 had provided any information to law enforcement that resulted in a conviction nor was she aware of any investigation where CI-1 had provided any information that led to a conviction.

(D.I. 29 at 11) Plaintiff is correct that Detective Rementer could not identify any "documents, records, databases[,] or information of any sort that [she] relied on in determining that the individual identified as CI-1 was a 'past proven' cooperating individual." (D.I. 29-1 at PA-1 (Detective Rementer's negative answer to this interrogatory)) Nor could she identify specific case name(s) in which CI-1 had provided information to law enforcement that resulted in an arrest or a conviction. (*Id.* at PA-1-2) But Detective Rementer did testify that, during the course of the Long investigation (and prior to the submission of the Affidavit), she was told by another Delaware State Police officer that prior information provided by CI-1 had led to an arrest in a drug case. (D.I. 24 at A-73-75; *see also* D.I. 29-1 at PA-2) The fact that Detective Rementer

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[7] *Cf. Morgan*, 680 F. App'x at 84 (finding that the omission in an affidavit supporting a search warrant that a K-9 unit's positive indication for controlled substances in a vehicle was "'not the strongest'" was not material because "an indication of the presence of narcotics need not be the strongest signal possible for there to be probable cause, which requires 'only the probability, and not a prima facie showing, of criminal activity'") (quoting *Gates*, 462 U.S. at 235).

could not identify documents relating to this other case, or that she apparently did not recall the name of that case in her deposition, does not mean that her statement about CI-1 being a "past proven" informant was false.

Moreover, even if the reference in the Affidavit to CI-1 as a "past proven" informant was false, and even were the Court to have excised the statement from the Affidavit, it would not have been material. As explained above, Detective Rementer took numerous steps to confirm CI-1's statements, including by organizing the aforementioned three controlled buys from Plaintiff. No reasonable person could conclude that there was not probable cause for the resulting search.

3. Conclusion

For the above reasons, Defendants should be granted summary judgment on Plaintiff's illegal search and seizure claim.

B. Excessive Force

Plaintiff also asserted in his Complaint that Detectives Rementer and Reynolds (and/or other unnamed Delaware State Police officers) used excessive force against him during the search of his residence. (D.I. 1 at ¶¶ 22, 30, 32) As mentioned above, "'[c]laims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its reasonableness standard.'" *Damiani*, 277 F. Supp. 3d at 703 (certain internal quotation marks omitted) (quoting *Graham*, 490 U.S. at 395); *see also Carswell v. Borough of Homestead*, 381 F.3d 235, 240 (3d Cir. 2004) ("Use of excessive force by a law enforcement officer is considered a 'seizure' under the Fourth Amendment[.]"). The test for whether an officer's use of force was reasonable is an objective one and considers a number of factors, including "'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight[,]'" *Adams v. Selhorst*, 779 F. Supp. 2d 378, 391 (D. Del. 2011) (quoting *Carswell*, 381 F.3d at 240), as well as "'the duration of the

[officer's] action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time[,]'" *id.* (alteration in original) (quoting *Green v. N.J. State Police*, 246 F. App'x 158, 161 (3d Cir. 2007)).

Defendants argue that they cannot be liable for any excessive force used against Plaintiff because neither Defendant "w[as] present inside the house at the time of the initial police entry, and neither had any involvement in the alleged conduct by which [P]laintiff asserts that he was injured inside the house." (D.I. 23 at 9 (citing *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988)))[8]

For his part, Plaintiff candidly agrees "that there is no evidence that the named Defendants in the lawsuit used excessive force." (D.I. 29 at 11; *see also id.* at 12-13) Plaintiff argues, however, that "it is well settled in the Third Circuit that 'victims of unreasonable searches or seizures may recover damages directly related to the invasion of their privacy—including (where appropriate) damages for physical injury, property damage, injury to reputation, etc.'" (*Id.* at 11-12 (quoting *Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000)))[9]

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[8] In *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988), the Third Circuit explained that "[a] defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of *respondeat superior*." *Rode*, 845 F.2d at 1207 (citation omitted).

[9] In the briefing, as to this point, the parties discussed the meaning and impact of the Third Circuit's decision in *Bodine v. Warwick*, 72 F.3d 393 (3d Cir. 1995). In that case, a district court decided not to submit evidence of the use of excessive force to the jury, in light of the fact that the court had granted judgment as a matter of law on plaintiff's companion claim for illegal entry. *Bodine*, 72 F.3d at 394-96. After the district court granted judgment as a matter of law on the illegal entry claim, it reasoned that it was "unnecessary to submit the issue of excessive force to the jury because the troopers were liable for all of the damages that they caused [once they entered plaintiff's home] even if they did not use excessive force." *Id.* at 395-96. The Third Circuit disagreed, explaining that the officers would not be liable for any "but-for" harm as a result of the illegal entry, but rather only for harm that was "'proximately' or 'legally' caused by the illegal entry[.]" *Id.* at 400. Thus, the *Bodine* Court explained that under normal tort principles it would be wrong to hold officers liable for any harm resulting from their illegal search that came about due to a "'superseding cause.'" *Id.* Instead, it would be necessary

Plaintiff's arguments in his answering brief clearly demonstrate that he is not actually seeking to hold Defendants liable for the use of excessive force. Rather, Plaintiff is in effect dropping his excessive force claim against Defendants and arguing that he seeks redress only for any injuries proximately caused by Defendants' illegal search. (*See* D.I. 29 at 12-13; D.I. 32 at 5) For that reason, summary judgment as to Plaintiff's excessive force claim should also be granted. And since there was no illegal search here, as noted above, there can also be no damages recoverable by Plaintiff regarding such a claim.[10]

IV. CONCLUSION

For the reasons set out above, the Court GRANTS Defendants' Motion in its entirety. An appropriate Order follows.

Because this Memorandum Opinion may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly-proposed, redacted version (if necessary) of the order. Any such redacted version shall be submitted no later than **August 8, 2018**, for review by the Court, along with a detailed explanation as to why disclosure of any proposed redacted material would "work a clearly

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to determine how much of the injury to a plaintiff was proximately caused by the illegal entry and, separately, how much of plaintiff's injury was attributable to any use of excessive force. *Id.* at 400-01. The Court further explained that the harm proximately caused by the two torts "may overlap[.]" *Id.* at 401.

[10] The parties both also briefly address whether Defendants are entitled to qualified immunity on Plaintiff's federal constitutional claims. (D.I. 23 at 10-11; D.I. 29 at 13) Qualified immunity applies to government officials engaged in discretionary functions "'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sherwood*, 113 F.3d at 398-99 (citation omitted). When the qualified immunity defense is asserted in a motion for summary judgment, "the plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right." *Id.* at 399. If the plaintiff carries his or her initial burden, only then must the "defendant [] demonstrate that no genuine issue of material fact remains as to the 'objective reasonableness' of the defendant's belief in the lawfulness of his actions." *Id.* "Thus, [a court] begin[s] with the predicate question of whether [p]laintiff's allegations are sufficient to establish 'a violation of a constitutional right at all.'" *Id.* (internal quotation marks and citation omitted) As Plaintiff has failed to establish a violation of a constitutional right, the Court need not further address the qualified immunity issue.

defined and serious injury to the party seeking closure." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly available version of its Memorandum Opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES LONG, Plaintiff, v. DETECTIVE DANNAILE REMENTER, DETECTIVE DALLAS REYNOLDS, and STATE TROOPER JOHN DOE 1-15, Defendants.	)	Civil Action No. 17-217-CJB

ORDER

At Wilmington, Delaware this **3rd** day of **August, 2018**:

For the reasons stated in the Memorandum Opinion issued this same date, IT IS HEREBY ORDERED that:

1. Defendants' Motion for Summary Judgment, (D.I. 22), is GRANTED.

2. Judgment is hereby entered FOR DEFENDANTS and AGAINST PLAINTIFF.

3. The Clerk of the Court is directed to CLOSE this case.

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE