IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PAXTON LEE FOREMAN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 99-561-JJF
	:	
DETECTIVE TIMOTHY CONAWAY,	:	
	:	
Defendant.	:	

Paxton Lee Foreman, Georgetown, Delaware.
Pro Se Plaintiff.

Rosemary K. Killian, Esquire, Deputy Attorney General, STATE OF DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Defendant.

MEMORANDUM OPINION

September 28, 2001
Wilmington, Delaware

FARNAN, District Judge.

Presently before the Court is Defendant Conaway's Second Motion to Dismiss and Motion for Summary Judgment (D.I. 16). For the reasons stated below, the Court will grant the motion.

BACKGROUND

A. Procedural History

Plaintiff Paxton Lee Foreman filed the instant action pursuant to 42 U.S.C. § 1983 alleging that the State of Delaware and Detective Timothy Conaway ("Defendants") violated his constitutional rights during the course of a seizure on December 2, 1998. In lieu of an Answer, Defendants filed a motion to dismiss and/or for summary judgment on the following grounds: (1) Plaintiff's suit against the State of Delaware is barred under the Eleventh Amendment; (2) the State of Delaware is not a "person" for purposes of Section 1983; (3) Defendant Conaway did not use excessive force as a matter of law; and (4) even if Defendant Conaway used excessive force, he is entitled to qualified immunity.

By an Order (D.I. 13) and accompanying Memorandum Opinion (D.I. 14) dated September 29, 2000 and October 13, 2000, respectively, the Court granted Defendants' motion in all but one respect. Because Plaintiff had not yet responded to Defendants' motion, the Court denied with leave to renew the portion of the motion seeking dismissal of Defendant Conaway in his individual capacity. (D.I. 14 at 9). The Court declared that if Defendant Conaway renewed his motion and Plaintiff again failed to respond in a timely fashion, the Court would resolve the motion without a response from Plaintiff.

Defendant Conaway filed a Motion to Renew his Motion to Dismiss and Motion for Summary

Judgment on January 3, 2001. (D.I. 15). Plaintiff never filed any papers in opposition to this renewed motion. On July 5, 2001, Defendant Conaway filed a Second Motion to Dismiss and Motion for Summary Judgment. (D.I. 16). On July 12, 2001, Plaintiff filed a letter requesting "a little more time" in order to file a response, which would be forthcoming "in just a matter of days." (D.I. 17).

On July 23, 2001, Plaintiff filed an affidavit in opposition to Defendant Conaway's motion. (D.I. 18). Plaintiff explained that he had originally interpreted the Court's September 29, 2000 Order and accompanying Memorandum Opinion dated October 13, 2000 as dismissing all Defendants from the case. (D.I. 18). Plaintiff averred that on July 10, 2001, he realized that Defendant Conaway had not been dismissed in the entirety, and he urged the Court not to do so in the future. (D.I. 18). However, Plaintiff offered no substantive evidence in opposition to Defendant Conaway's motion. Neither party has submitted anything to the Court subsequent to Plaintiff's affidavit; accordingly, the Court concludes that the motion should be resolved on the papers submitted.

B. Factual Background

In his Complaint, Plaintiff alleges that, while driving an unmarked patrol car on December 2, 1998, Defendant Conaway drove into Plaintiff's path at "full throttle" and ran over Plaintiff's left leg. Plaintiff seeks damages for a "crushed injury" to his leg and ankle.

By way of additional factual background, Defendant Conaway, a trooper employed by the Delaware State Police, contends that he and another officer were investigating burglaries in the area of Bethany Beach. (D.I. 11 at A-7). Defendant Conaway received a radio report about shots fired in a nearby wooded area, which involved a State Police helicopter and other State Police ground units.

Defendant Conaway saw the helicopter hovering over the wooded area, and thereafter saw Plaintiff running out of the woods away from the helicopter and across the highway a short distance from Defendant Conaway's vehicle. Defendant Conaway observed Plaintiff, who was carrying a bag in one hand, run into the backyard of a nearby residence. (D.I. 11 at A-7)

Suspecting that Plaintiff was fleeing from the police, Defendant Conaway drove down the driveway of the residence. He observed Plaintiff running along the side of a poultry house, which was perpendicular to the residence. Defendant Conaway pulled behind Plaintiff and called for him to stop. According to Defendant Conaway, Plaintiff slowed down, looked at him, but gestured "no" and resumed running. (D.I. 11 at A-7).

Defendant Conaway pulled the driver's side of his vehicle next to Plaintiff's right side in an attempt to stop Plaintiff from running. Defendant Conaway further observed the pearl handle of a handgun sticking out of the right front pocket of Plaintiff's pants. According to Defendant Conaway, Plaintiff reached toward the gun. (D.I. 11 at A-7). Defendant Conaway then swerved his vehicle in front of Plaintiff, pinning him between the vehicle and the poultry house with the left side of the car. Defendant Conaway quickly backed up and released Plaintiff, who then fell to the ground.

Defendant Conaway further contends that as he approached Plaintiff, Plaintiff looked at him and reached toward his pants pocket. At that point, Defendant Conaway drew his gun and yelled to Plaintiff to show his hands. Plaintiff pulled his hands out from under his body and the pearl handled gun dropped from his right hand. Defendant Conaway ordered Plaintiff to roll away from the gun. Plaintiff complied and was handcuffed. (D.I. 11 at A-1, A-4, A-8).

Thereafter, Defendant Conaway called for medical assistance. A medic from the helicopter involved in the chase attended to Plaintiff until an ambulance arrived. Plaintiff was taken to a nearby hospital and released back into police custody the same day. (D.I. 11 at A-5, A-8). Upon further investigation, the police found four stolen handguns, two of which were loaded and had been taken from a home burglarized that morning, in the bag that Plaintiff had been carrying. (D.I. 11 at A-3, A-5).

On May 3, 1999, Plaintiff pled guilty in Delaware Superior Court to two counts of Possession of a Firearm During the Commission of a Felony, one count of Burglary Second Degree, and two counts of Attempted Robbery First Degree in connection with the events of December 2, 1998. (D.I. 11 at A-10). Plaintiff was sentenced and is currently serving a period of incarceration in the Sussex Correctional Institute.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment if a court determines from its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). However, a court should not make

credibility determinations or weigh the evidence.[1] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). To defeat a motion for summary judgment, Rule 56(c) requires the non-moving party to:

> do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is "no genuine issue for trial."

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Thus, a mere scintilla of evidence in support of the non-moving party is insufficient for a court to deny the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).[2]

DISCUSSION

Claims brought under Section 1983 against a police officer for the use of excessive force in effectuating an arrest are analyzed under the Fourth Amendment's reasonableness standard. Graham v. Connor, 490 U.S. 386, 395 (1989); Tennessee v. Garner, 471 U.S. 1, 7 (1985). The reasonableness of the force used is determined by balancing "the nature and quality of the intrusion on the [plaintiff's]

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[1] To properly consider all of the evidence without making credibility determinations or weighing the evidence, a "court should give credence to the evidence favoring the [non-movant] as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000).

[2] Although Defendant Conway brought his motion under both Rule 56 and Rule 12(b)(6), because evidence outside of the pleadings has been submitted by Defendant Conaway and considered by the Court, the Court concludes that the motion should be treated as one for summary judgment brought under Rule 56.

Fourth Amendment interests" against "the countervailing governmental interests at stake." Graham, 490 U.S. at 396. The test is an objective one, i.e., were the officer's actions "objectionably reasonable" under all the circumstances that existed at the time of the arrest. Id. at 397. The factors to be considered include: (1) the severity of the crime for which the plaintiff is being pursued, (2) whether the plaintiff poses an "immediate threat" to the public's safety or the safety of the arresting officer, and (3) whether the plaintiff is actively resisting or fleeing from the arresting officer. Id. Courts within this circuit have held that all the events leading up to the use of such force must be considered when making a reasonableness determination. Marche v. Parrachak, 2000 WL 1507403, at *4 (E.D. Pa. Oct. 10, 2000)(citing Abraham v. Raso, 183 F.3d 279, 291-92 (3d Cir. 1999)).

In the instant case, the un-rebutted facts adduced by Defendant Conaway indicate that Plaintiff was under suspicion for firing gunshots in a wooded area near a roadway, and at one point, Defendant Conaway observed Plaintiff reach towards his pocket where the handle of a gun was sticking out of his pocket. The Court concludes that this evidence establishes the severity of the crimes that Plaintiff had potentially committed and establishes that Plaintiff presented an "immediate threat" to the public and to Defendant Conaway. In addition, the evidence demonstrates that Plaintiff ignored and fled from Defendant Conaway's repeated efforts to apprehend Plaintiff. Although Defendant Conaway was driving an unmarked automobile at the time, the evidence establishes that Plaintiff was knowingly fleeing from a police helicopter that had been hovering above the wooded area where gunshots were initially heard. In sum, all the factors enumerated in Graham that would warrant the use of force are present in the instant case.

The Court finds that, under these circumstances, Defendant Conaway's actions were objectively reasonable as a matter of law. Defendant Conaway maneuvered his car in front of Plaintiff and pinned Plaintiff between the car and the adjacent poultry house. Defendant Conaway admitted that this appeared to inflict pain on Plaintiff. (D.I. 11 at A-5). Plaintiff contends that the car rolled over his left leg, "causing what the doctor called a crushed injury." (D.I. 2 at 3). However, it is also undisputed that Plaintiff was admitted and released from the hospital the same day. The Court finds that the evidence establishes that no reasonable jury could find Defendant Conaway's conduct to be objectively unreasonable under the circumstances. In fact, Defendant Conaway may even have been justified in using deadly force to apprehend Plaintiff. See Garner, 471 U.S. at 11-12 ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."). See also Boyd v. Baeppler, 215 F.3d 594 (6th Cir. 2000)(granting defendants' motion for summary judgment based on qualified immunity, even though defendants used deadly force, under facts substantially similar to those present here). As a result, the Court concludes that Plaintiff has adduced insufficient evidence to maintain his excessive force claim.

CONCLUSION

For the reasons discussed, the Court concludes that Defendant Conaway's Second Motion to Dismiss and Motion for Summary Judgment (D.I. 16) should be granted.

An appropriate Order will be entered.

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FOR THE DISTRICT OF DELAWARE

PAXTON LEE FOREMAN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 99-561-JJF
	:	
DETECTIVE TIMOTHY CONAWAY,	:	
	:	
Defendant.	:	

FINAL ORDER

At Wilmington this 28 day of September, 2001, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Defendant Conaway's Second Motion to Dismiss and Motion for Summary Judgment (D.I. 16) is **GRANTED**.

2. Defendant Conaway's Motion to Renew his Motion to Dismiss and Motion for Summary Judgment (D.I. 15) is **DENIED AS MOOT**.

3. Judgment is entered in favor of Defendant Conaway and against Plaintiff on all counts.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE