

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

MARCUS JAMES COPENY,)	
)	
Plaintiff,)	
)	
v.)	Case No. 5:16-cv-00865-KOB-SGC
)	
OFFICER BRIAN PROSSER, et al.,)	
)	
Defendants.)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The plaintiff filed a *pro se* complaint seeking monetary damages or injunctive relief pursuant to 42 U.S.C. § 1983 for violations of his civil rights. (Doc. 1). The plaintiff names the following defendants in the complaint: Officer Brian Prosser, Officer Rutherford, and Sergeant Letson. (*Id.* at 1). In accordance with the usual practices of this court and 28 U.S.C. § 636(b)(1), the complaint was referred to the undersigned magistrate judge for a preliminary report and recommendation. *See McCarthy v. Bronson*, 500 U.S. 136 (1991).

I. Procedural History

On September 18, 2017, the undersigned entered an Order for Special Report directing the Clerk to forward copies of the complaint to each of the named defendants and directing the defendants to file a special report addressing the plaintiff's factual allegations. (Doc. 19). The undersigned advised the defendants the special report could be submitted under oath or accompanied by affidavits and, if appropriate, the court would construe it as a motion for summary judgment filed pursuant to Rule 56 of the *Federal Rules of Civil Procedure*. (*Id.*).

On November 14, 2017, the defendants filed a special report, supplemented by affidavits and other evidence. (Doc. 27). On November 16, 2017, the undersigned notified the parties the court would construe the special report as a motion for summary judgment and ordered the

plaintiff to file any response within twenty-one (21) days. (Doc. 29). The undersigned also advised the plaintiff of the consequences of any default or failure to comply with Rule 56. (*Id.*); see *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985). On December 15, 2017, the plaintiff filed a "Notice of Individual Acknowledgement," an affidavit, and "Notice of Conventional Filing of Evidence." (Docs. 31-33). Accordingly, the defendants' motion for summary judgment is ripe for adjudication.

II. Standard of Review

Because the court has construed the defendants' special report as a motion for summary judgment, Rule 56 governs the resolution of the motion. Under Rule 56(a), summary judgment is proper "if 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." In making that assessment, the court must view the evidence in a light most favorable to the non-moving party and must draw all reasonable inferences against the moving party. *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000). The burden of proof is upon the moving party to establish his prima facie entitlement to summary judgment by showing the absence of genuine issues of material fact and that he is due to prevail as a matter of law. See *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Unless the plaintiff, who carries the ultimate burden of proving his action, is able to show some evidence with respect to each element of his claim, all other issues of fact become immaterial, and the moving party is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Bennett v. Parker*, 898 F.2d 1530, 1532-33 (11th Cir. 1990). As the Eleventh Circuit has explained:

Facts in dispute cease to be "material" facts when the plaintiff fails to establish a prima facie case. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."

[citations omitted]. Thus, under such circumstances, the public official is entitled to judgment as a matter of law, because the plaintiff has failed to carry the burden of proof. This rule facilitates the dismissal of factually unsupported claims prior to trial.

Bennett, 898 F.2d at 1532.

When determining whether genuine and material factual disputes exist, the court must consider the parties' respective memoranda and exhibits and construe all facts, and all reasonable inferences drawn therefrom, in the light most favorable to the non-movant. *Nolen v. Paul Revere Life Ins.*, 32 F. Supp. 2d 211, 213 (E.D. Pa. 1998). Thus, any "specific facts" pled in a *pro se* plaintiff's sworn complaint must be considered in opposition to summary judgment. *See Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1098 (11th Cir. 2014) (citing *Perry v. Thompson*, 786 F.2d 1093, 1095 (11th Cir. 1986)). Additionally, because the plaintiff is *pro se*, the court must construe the complaint more liberally than it would pleadings drafted by lawyers. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). "*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Boxer X v. Harris*, 437 F.3d 1107, 1110 (11th Cir. 2006).

Still, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). As applicable to the present action, the plaintiff alleges the defendants subjected him to excessive force. (Doc. 1). The defendants dispute the plaintiff's allegations and have submitted video and audio tape recordings of the incident. (Doc. 28).¹ Indeed, almost the entire series of events giving rise to the plaintiff's claim was recorded on the

¹ Citations to the video evidence will refer to the name of the officer from whom the camera footage was recorded, as well as the time-stamp embedded in the video evidence.

officers body cameras. When a "video obviously contradicts [a party's] version of the facts," this court must "accept the video's depiction instead of [the party's] account." *Pourmoghani-Esfahani v. Gee*, 625 F.3d 1313, 1315 (11th Cir. 2010). When "the video is . . . not obviously contradictory because it fails to convey spoken words or tone and because it sometimes fails to provide an unobstructed view of the events," the party's version of the record evidence will be credited. *Id.*

III. Summary Judgment Facts

According to the plaintiff, on April 11, 2015, Officer Prosser stopped him for a traffic violation as he was transporting a friend with "life threatening injuries" to the Decatur General Hospital emergency room. (Doc. 1 at 3). The plaintiff identified himself and informed Prosser his "passenger had been a victim of a violent crime and that he was in need of immediate medical attention." (*Id.*). Then, "[i]n an attempt to allow Officer Prosser a full view" of his injured friend and with his "hands in plain view," the plaintiff "exited the vehicle." (*Id.*).

The plaintiff alleges Prosser "escalated" the situation and yelled that he knew who the plaintiff was. (*Id.*). The plaintiff "replied, 'Sir, my friend may be dying,' and motioned for Prosser to look in the car." (*Id.*). In response, Prosser tased the plaintiff in the back of his neck, causing him to fall to the ground, face-down. (*Id.* at 3-4). Together, Rutherford and Prosser held the plaintiff to the ground and tased him in the back of his neck and head while poking and kicking his "scrotum." (*Id.* at 4). The plaintiff further alleges the officers placed him on the hood of a patrol car, where Letson assaulted his "genitals." (*Id.*). EMS personnel transported the plaintiff by ambulance to the Decatur General Hospital emergency room, where the doctor and nurses treated him with "bias." (Doc. 1 at 4).

The defendants deny the plaintiff's allegations. (Doc. 27-1; Doc. 27-2; Doc. 27-3). The undersigned carefully reviewed the available dashboard and body camera video footage. (*See* Doc. 28). The defendants' version of events, as supported by the video recordings, follows.

Due to the plaintiff's history of criminal offenses and contact with local law enforcement, all of the defendants had known the plaintiff for at least seven (7) years prior to the traffic stop at issue here; the defendants also knew the plaintiff had been arrested on December 13, 2014, for attempted robbery. (Doc. 27-1 at 2-3; Doc. 27-2 at 2-3; Doc. 27-3 at 3). During the December 13, 2014 arrest, officers discovered synthetic marijuana in the plaintiff's possession. (*Id.*). From recent contacts with the plaintiff, Prosser also knew his driver's license was suspended. (Doc. 27-1 at 3).

At approximately 8:30 p.m. on April 11, 2015, the Decatur Police Department dispatched Prosser and Rutherford to address a domestic violence incident involving non-party Gregory Harris and a woman in a Decatur neighborhood well known for "criminal activity" from which officers made a "great number of arrests." (Doc. 27-1 at 3; Doc. 27-2 at 3). After investigating at the 11th Avenue Northwest residence, the officers discovered no injuries and were unable to determine which party was the predominant aggressor. (*Id.*). Prosser "decided to provide extra patrol to the area" in the event of another disturbance at the residence. (*Id.*).

While patrolling at approximately 10:30 p.m., Prosser observed a group of people standing outside the 11th Avenue residence near a white Ford Explorer. (Doc. 27-1 at 3). One of the individuals standing in the yard ran westward when he saw Prosser's patrol car approach. (*Id.*). Prosser "drove around looking for him" without success before observing the white Ford Explorer driving eastbound on 4th Street Northwest "at a higher rate of speed than normal traffic." (*Id.*). Prosser could see the 11th Avenue residence and, after confirming the Explorer

was no longer parked there, he "sped up" to catch the vehicle, which "appeared to be actively trying to evade" him. (*Id.* at 3-4). The Explorer ran a stop sign at the intersection of 6th Avenue and 3rd Street Northwest, and Prosser informed dispatch he intended to stop the vehicle. (*Id.* at 4).

Prosser shined his spotlight on the back window of the Explorer and saw the driver, later determined to be the plaintiff, lifting himself up in the driver's seat as if handling something beneath him. (*Id.*). Prosser also saw the driver's hands moving around the center console. (*Id.*). Based on these observations and the plaintiff's "erratic driving," Prosser requested additional assistance and activated his lights and siren; the plaintiff continued driving. (*Id.*). Eventually, the plaintiff gradually slowed down and came to a stop on the left side of the road; as he decelerated, the plaintiff continued "making movements toward the center console and lifting his body off the driver's seat." (*Id.* at 4-5).

After the plaintiff stopped, Prosser got out his vehicle, approached the driver's side door, and "asked the driver to put his hands out of the window." (Doc. 27-1 at 5; Prosser 22:27). The driver did not comply, and Prosser ordered him several times to put his hands outside the window. (*Id.*). Finally, the driver put his left hand out of the window. (*Id.*). Prosser could see the driver's right hand through the back window. Prosser could also see Gregory Harris—one of the parties involved in the earlier domestic violence incident—sitting in the passenger seat. (Doc. 27-1 at 5). Prosser "immediately recognized the driver as Marcus Copeny." (*Id.*). The plaintiff also recognized Prosser. (*Id.*). Both occupants of the vehicle greeted Prosser as a familiar acquaintance. (Prosser 22:27). The plaintiff and Harris began "talking at the same time to explain themselves," making it difficult for Prosser to understand them. (*Id.* at 22:27-22:28; *see* Doc. 27-1 at 5).

Prosser asked the plaintiff if he had any weapons. (Prosser 22:28). In response, the plaintiff laughed, denied having weapons, and stated Prosser knew he was "on a million dollar bond." (*Id.*). The plaintiff explained he had just left a party to pick up Harris because of a domestic disturbance at Harris' house; Harris interjected, saying a woman had stabbed him. (Doc. 27-1 at 5; Prosser 22:28). When Harris attempted to exit the vehicle, Prosser instructed him to stay inside until Rutherford arrived. (*Id.*). Prosser noticed the plaintiff's "eyes were glassy and blood shot." (Doc. 27-1 at 5-6). Prosser also smelled a "strong odor" of alcohol and "detected the odor of a sweet burnt substance" he recognized as consistent with Synthetic Marijuana. (*Id.* at 6).

Rutherford, who arrived on-scene within minutes, approached the passenger side of the vehicle, and Harris exited the vehicle. (Prosser 22:28). Prosser told Rutherford to help Harris because he was bleeding and said "77 smell" to advise Rutherford he could smell drugs. (*Id.*). Harris sat on the front hood of Prosser's vehicle as Rutherford attended to him near the right rear passenger side of the plaintiff's vehicle. (Rutherford 22:36).

Concerned the plaintiff might have a weapon, Prosser told the plaintiff to exit the vehicle to be patted down. (Doc. 27-1 at 6; Prosser 22:29). The plaintiff complied and turned to face his vehicle with his hands on it as Prosser began to pat him down. (*Id.*). During this time, the plaintiff complained Harris was "bleeding like a hog" and that, while bystanders thought the situation was funny, the plaintiff did not. (*Id.*). After feeling several hard objects in the plaintiff's jacket pockets, Prosser asked if he could check, and the plaintiff consented. (*Id.*). The items turned out to be a cell phone and prescription bottles with the plaintiff's name on them. (*Id.*). Prosser asked the plaintiff if he had been smoking marijuana; the plaintiff denied it. (*Id.*). When Prosser began patting down the plaintiff's pants pockets, he lowered his hands and Prosser

told him to place them back on the vehicle. (Doc. 27-1 at 6; Prosser 22:30). The plaintiff repeated he did not have anything and was subject to a million dollar bond. (Prosser 22:30). Prosser asked, "For what, robbery?"; the plaintiff turned to his left while bending forward, laughing loudly, and saying "that was crazy man." (*Id.*).

On two occasions Prosser "patted near" the plaintiff's groin, and the plaintiff "moved his hands down and placed them near his waist." (Doc. 27-1 at 6). On both occasions, Prosser grabbed the plaintiff's "wrists and placed them back on the vehicle." (*Id.* at 7). Prosser could not determine what the plaintiff was reaching for along his waist and stated he would handcuff the plaintiff if he didn't keep his hands on the vehicle. (Doc. 27-1 at 7). The plaintiff insisted the object Prosser felt was merely his zipper, repeatedly requested Prosser to "wait a minute" and "listen" to him, and stated he would "show" Prosser and "prove it." (Prosser at 22:30-31). Prosser ran his right hand up the plaintiff's "right leg with an open hand into his groin area" and immediately felt hard plastic he "recognized as packaging for illegal drugs." (Doc. 27-1 at 7). As soon as Prosser "touched the packet," the plaintiff "put his hands down to his waist band as if he was trying to get into them." (*Id.*). Prosser asked, "What's this right here?" and told the plaintiff to put his hands back up. (Prosser 22:31; Rutherford 22:37). Prosser tried to place the plaintiff's left hand back on the vehicle, but he resisted and "continued to attempt to move his left hand to his groin area." (Doc. 27-1 at 7).

Hearing Prosser's tone, Rutherford surmised the plaintiff "was being uncooperative and the situation was escalating," so he so he "stepped over to the driver's side" to assist. (Doc. 27-2 at 4). Harris remained standing in front of Prosser's patrol vehicle. (Doc. 27-1 at 7). Prosser again asked, "What's this right here?"; the plaintiff responded by telling Prosser to "wait a minute," saying "no, no," and repeating he did not have anything because of the million dollar

bond, it was his zipper, and he would show Prosser. (Prosser 22:31-32; Rutherford 22:38). Rutherford saw the plaintiff "reaching into the waistband of his pants with his right hand," and Prosser grabbed his hand and placed it on the vehicle. (Doc. 27-2 at 4). The plaintiff then attempted the same action with his left hand, and Prosser again placed his hands on the vehicle. (*Id.*).²

Prosser attests that he told the plaintiff to "place his hands behind his back," he feared for his safety, and the plaintiff "began using both hands in an attempt to get to his waist and groin area." (Doc. 27-1 at 7). Prosser told the plaintiff he was going to get the item, but the plaintiff continued to repeat his protests, and Rutherford saw him reach again "into his waist with his right hand." (Doc. 27-2 at 2; Prosser 22:31).

Rutherford removed the plaintiff's right hand from his waistband, and Prosser held his left arm as he removed his handcuffs from his belt. (Doc. 27-1 at 8; Doc. 27-2 at 4). The plaintiff began pulling away and then repeatedly yelled, "I've been shot." (Prosser 22:32-33; Rutherford 22:37-42). Neither Prosser nor Rutherford knew what the plaintiff was talking about. (Doc. 27-1 at 8). By this time, bystanders had gathered to observe the situation. (*Id.*). Rutherford could smell alcohol on the plaintiff's breath, observed him breathing rapidly, and opined he was "extremely nervous" and "easily agitated." (Doc. 27-2 at 5). Rutherford believed the plaintiff was under the influence of alcohol and possibly synthetic marijuana as well (*Id.*).

The plaintiff continued protesting and refused to follow Prosser's repeated commands to "put his hands behind his back and to stop pulling away and resisting." (Doc. 27-1 at 8; Prosser 22:32-33). The plaintiff "continued to yell that he had been shot," and Prosser and Rutherford struggled as the plaintiff "began to thrash around and attempt to twist away from" them while

² The video is unclear on this point due to the dark conditions.

reaching for his waistband. (Doc. 27-1 at 8; Doc. 27-2 at 5). As the struggle intensified, the officers took the plaintiff "to the ground in a grassy area near the vehicle." (*Id.*). The plaintiff insisted he was not resisting or pulling away and did not have anything, but the officers attest he "continued to pull his hands under his body, toward his waist and groin area." (Doc. 27-1 at 8, Doc. 27-2 at 5; Prosser 22:32-34; Rutherford 22:37-40). During this time, Prosser's bodycam was in close proximity to the plaintiff; the plaintiff continued arguing and screaming, the officers were breathing heavily, and Prosser radioed for "more back-up." (*Id.*).

As the plaintiff resisted, Rutherford attempted to use the mandibular angle pressure point to gain compliance, to "no effect." (Doc. 27-2 at 5). Fearing the plaintiff might have a weapon, Rutherford drew his Taser and advised the plaintiff he would use it unless the plaintiff quit resisting. (Doc. 27-2 at 5; Prosser 22:33-34). After the plaintiff did not comply with Rutherford's commands, he tased the plaintiff "in the back of the lower neck area with a drive stun."³ (*Id.* at 5-6). Both officers continued to loudly command the plaintiff to put his hands behind his back, but "he continued to resist by pulling his hands under his body near his waist." (*Id.*). The plaintiff continued to ignore the officers' commands, so Rutherford tased him again "in an effort to incapacitate him" and gain control. (*Id.*). The plaintiff continued to resist, yelling: "He's killing me!" (Doc. 27-1 at 9).

After Rutherford tased the plaintiff a third time, the officers were able to secure his hands behind his back with two sets of handcuffs. (*Id.*). Bystanders yelled at the plaintiff to put his hands behind his back, and the plaintiff repeatedly yelled that the officers were killing him. (Doc. 27-1 at 9; Prosser 22:34-35). "It took almost two full minutes to gain full control of" the plaintiff, by which time both Prosser and Rutherford were out of breath. (Doc. 27-1 at 9). The

³ "A drive stun is direct application of the taser to the skin and is not a deployment of the prongs of the Taser." (Doc. 27-2 at 5-6).

plaintiff continued to yell that he had been shot and that the officers were killing him. (Prosser 22:34-35). In response, Greg Harris said, "Ain't nobody trying to kill you," and told the officers he didn't know why the plaintiff was "acting like that." (Rutherford 22:41-42).

Shortly after the plaintiff was handcuffed, Sergeant Letson and three other non-party officers—Sergeant Joe Renshaw, Officer Joshua Heflin, and Officer Michael Ferguson—arrived. (Doc. 21-7 at 9). When the plaintiff was rolled onto his side, he began to yell that he was not a U.S. citizen and did not consent to be searched. (Doc. 21-7 at 9; Prosser 22:34). Rutherford tried to continue the search but it was difficult because the plaintiff was lying on the ground. (*Id.*). The plaintiff also yelled about being tased, claimed to be paralyzed, and "refused to stand up." (*Id.*). Sergeant Renshaw and Prosser assisted the plaintiff to his feet and, together with Rutherford, carried him to Sergeant Renshaw's vehicle. (Doc. 27-1 at 9; Rutherford 22:42).

Officer Heflin's body camera footage begins as the plaintiff was screaming that he was not a U.S. citizen. (Heflin 22:41). Heflin and Greg Harris stood together behind Prosser's vehicle, close to Sergeant Renshaw's vehicle. (*Id.*). Their conversation was pleasant and congenial. (*Id.*). Harris explained to Heflin that his "old lady" stabbed him because he was cheating on her, and they laughed. (*Id.* at 22:42-43). For the next ten minutes Harris intermittently encouraged the plaintiff to stop resisting and inquired why he was making such a spectacle of himself. (*Id.* at 22:46-55). The crowd gathered around to witness the scene appeared calm. (*Id.*). One gentleman filming the incident with his phone laughed while agreeing with Officer Heflin that he didn't want to take whatever drug the plaintiff was on. (*Id.* at 22:52). Harris refused medical treatment but eventually allowed paramedics to bandage his stab wound. (*Id.* at 22:52-55).

Officers lifted the plaintiff to the hood of Sergeant Renshaw's patrol vehicle. (Rutherford 22:42). Prosser had the plaintiff's left arm, and Sergeant Letson had his right arm. (Doc. 27-1 at 10). Sergeant Renshaw removed items from the plaintiff's pockets and put them on the hood of his vehicle. (*Id.*). Rutherford continued the pat-down and confirmed there was a hard object under the plaintiff's waist band; Sergeant Renshaw told Rutherford to remove the item. (*Id.*).

Prosser accurately attests:

As Officer Rutherford tried to get the item out from the waist band of his pants, Copeny began screaming and stated that we were paralyzing him by stabbing him in the scrotum.⁴ Copeny was kicking Officer Rutherford and Sergeant Letson. Copeny yelled something to the effect that this wasn't Ferguson and then continued to yell that he was not a U.S. citizen and did not consent to be searched. Officer Rutherford was able to get the object out of the waist band area of Copeny's pants. Officer Rutherford sat a black "Smelly Proof" Ziploc bag containing Synthetic Marijuana, on the top of Renshaw's patrol vehicle. Copeny was so violent that it took 4 of us to control Copeny so that Rutherford could remove the item from Copeny's pants and keep him from hurting himself.

Copeny began trying to head butt the hood of the patrol vehicle. Sergeant Letson and I each placed one of our arms under Copeny's chin to stop him from head butting the hood. Copeny continued to scream and stated we assaulted him. Sergeant Letson told Copeny that an ambulance was on the way to check on his injuries. While waiting for medical personnel to arrive, I told Copeny he was under arrest. Members of Decatur Fire and Rescue arrived to assess both Copeny and Harris.

Copeny continued to refuse to stand on his own and said we stabbed him in the scrotum. We assisted Copeny to the ground so medical personnel who had responded to the scene could check his groin area, as requested by the medical staff. Medical was unable to accurately check Copeny because of his uncooperative nature. Sergeant Letson told me and the medical staff that Copeny needed to be transported to the emergency room due to his strange behavior and injuries he claimed.

⁴ At one point, the plaintiff claimed he previously had been shot in the hand. Later, the plaintiff stated he been shot with a "223 assault rifle" a "long time ago." (Prosser 1:27).

(Doc. 27-1 at 10-12; Rutherford 22:43-48; Renshaw 22:43-54).

While the plaintiff was on the hood of Renshaw's unit, Heflin and Harris spoke to each other and watched the crowd as the plaintiff struggled and screamed that the police officers were raping him and cutting off his genitals. (Heflin 22:51-52; Renshaw 22:47-49). One bystander leaned over the police car and told the plaintiff to stop acting up and to allow the officers to search him and do their job. (*Id.*). In response to the plaintiff's claim that officers were trying to cut off his genitals, the bystander said, "Man ain't nobody cut your d—k off," eliciting laughter from the crowd. (*Id.*).

After EMS officials transported the plaintiff to the hospital, Sgt. Renshaw found a white Ziploc bag of synthetic marijuana "on the ground near the opened passenger door of the Explorer." (Doc. 27-1 at 11). Prosser and Rutherford searched the vehicle and discovered a white Ziploc bag containing synthetic marijuana on the ground near the opened passenger door, a small cigar roach containing synthetic marijuana in the center console, three cigars on the front seat in casings consistent with the synthetic marijuana roach, a cold, open can of Bud Light in the backseat, and twenty-one (21) packets of synthetic marijuana "between the battery and the driver side fender" in a white plastic bag, and weighing approximately 127.4 grams. (Doc. 27-1 at 11-12; Doc. 27-2 at 8). Ultimately, Prosser charged the plaintiff with traffic offenses, possession of drug paraphernalia, DUI, open container, and drug trafficking. (Doc. 27-1 at 14).

Prosser, Letson, and Renshaw accompanied the plaintiff to the hospital and sat with him. (*Id.* at 13). While placing him in a hospital gown, officers discovered an additional package containing synthetic marijuana in the vicinity of the plaintiff's groin area. (*Id.*). For approximately two hours—beginning at 12:52 a.m.—Prosser's body camera recorded the plaintiff handcuffed to the hospital bed. (Prosser 12:52-1:47). During most of this time, the

plaintiff alternated between sitting up, reclining, rolling from side to side, moving his feet, bending his knees, and waving his hands animatedly while speaking. (*Id.*). The footage does not show the plaintiff having difficulty or exhibiting real expressions of pain. (*Id.*). He talked to the officers and medical personnel in an intelligent and lucid manner. (*Id.*).

In his nearly continual speech, the plaintiff expressed his negative opinion of Decatur law enforcement personnel and police in general and his insistence the officers had no jurisdiction over him under "Admiral law." (Prosser at 12:47-54, 1:08-09, 1:12-13, 1:18-21; 1:37). He appears amused with himself as he periodically insults the officers by calling them offensive names or yelling "shut-up" and impressed with himself as he engaged in mild flirtation with the nurses, though he lashed out with insults when they did not respond positively or when they told him he was not injured. (*Id.* at 12:56-57; 1:02-03). At one point the plaintiff urinated on the floor. (*Id.* at 1:00-01). The nurses and treating physician repeatedly informed the plaintiff he had no injuries. (*Id.* at 12:56, 1:16-17; 1:39-43). The Decatur Morgan Hospital records show the staff performed chest and abdominal X-rays, a CT scan, blood work, and a physical examination; all yielded normal results. (Doc. 27-7). In particular, a musculoskeletal exam revealed normal range of motion and no tenderness. (*Id.* at 28).

As personnel were preparing to discharge the plaintiff for transport to the jail, he began moaning, crying out, and cursing that his shoulder, hand, and wrist were broken and that he was paralyzed. (Prosser 1:25-42). While being dressed for transport, the plaintiff complained of extreme pain and claimed he had not been afforded medical attention for his broken shoulder, broken hand, and scrotum. (*Id.*). One nurse commented she had "never seen a grown man be so dramatic." (*Id.* at 1:36). The officers and nurses escorted the plaintiff to the police car in a wheelchair as he continued to complain about his injuries, pain, and paralysis. (*Id.* at 1:42-47).

The plaintiff was quiet and calm during the ride to the jail, although on arrival he again insisted he was paralyzed. (*Id.* at 2:01-2:15). The plaintiff was calm and yawned as officers confiscated and inventoried his property and notified him of the charges against him. (*Id.* at 2:01-04). The plaintiff became more animated and began cursing when informed the narcotics investigating officer would set his bond at a later time. (*Id.* at 2:04-06). Due to his protests of paralysis and pain, officers dressed the plaintiff in jail garb as he cursed them and declared he would not go to a segregation cell. (*Id.* at 2:07-15). When officers rolled his wheelchair to the segregation cell door, the plaintiff immediately stood up and raised his hands above his head. (*Id.* at 2:15-16). The plaintiff used his body weight as resistance—with no pain complaints—against Prosser, who pushed against the plaintiff's arms to back him into the cell. (*Id.*).

The plaintiff attests that, after posting bail on April 18, 2015, he went to Crestwood Hospital in Huntsville, Alabama, where emergency room staff determined he had fractured his left hand as a result of falling when tased. (Doc. 1 at 4). The Crestwood records show the plaintiff complained to the triage nurse that he fell after being tased and he reported lightheadedness, dizziness, numbness, and nausea since his arrest. (Doc. 34 at 11-12). The examination findings note swelling to the plaintiff's left hand and that he appeared "uncomfortable." (*Id.* at 12). The plaintiff claimed to have been suffering from "aching, sharp, throbbing" pain in his left hand at "10 out of 10" for the previous week. (*Id.* at 12).

The triage nurse assessed the plaintiff as suffering no distress, noting his only observable injury was a bruise on his left hand. (*Id.*). The plaintiff underwent a CT scan and a hand x-ray, which a radiologist interpreted as "normal." (*Id.* at 16). The plaintiff complained to the examining doctor of dizziness and lightheadedness, but she found no signs or symptoms to support these complaints. (*Id.*). Dr. Frierson's examination findings were normal and revealed

no injuries, except for swelling and an abrasion on his left hand. (*Id.* at 14-15). Dr. Frierson noted a "small step off" on the hand "x-ray that in conference with radiologist may be" a "healed growth plate." (*Id.* at 15). Dr. Frierson applied an "ulnar gutter splint for comfort due to swelling locally" in the plaintiff's left hand. (*Id.*). The plaintiff was prescribed a five-day course of antibiotics and six Norco tablets, to be taken every six hours for pain as needed. (*Id.* at 16).

On August 23, 2017, the plaintiff pleaded guilty to "unlawful possession of a controlled substance [synthetic cannabinoid], a lesser included offense" of Trafficking in Synthetic Cannabinoid. *See State of Alabama v. Marcus James Copeny*, CC-2015-1072.00, Docs. 59, 62. The plaintiff received a two-year sentence, split to "time served." *Id.* at 62.

IV. Analysis

"A citizen's Fourth Amendment right to be free from unreasonable searches and seizures includes 'the right to be free from the use of excessive force in the course of an arrest.'" *Weiland v. Palm Beach Co. Sheriff's Office*, 792 F.3d 1313, 1326 (11th Cir. 2015) (quoting *Saunders v. Duke*, 766 F.3d 1262, 1266-67 (11th Cir. 2014)). "A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen[.]'" *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

"[C]laims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham*, 490 U.S. at 395. Under this reasonableness standard, the inquiry involves "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. "[P]roper application requires careful attention to

the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. There is no excessive force "if a reasonable officer in the same situation would have believed that the force used was not excessive." *Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998) (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)).

In examining this claim, the undersigned has conducted an exhaustive review of the complaint and the parties' affidavits, reports, medical records, and video footage. Based on this review, the evidence clearly contradicts the plaintiff's version of the facts regarding the purported use of excessive force by defendants Prosser, Rutherford, and Letson on April 11, 2015. *See Vicks v. Knight*, 380 F. App'x 847, 852 (11th Cir. 2010) (when resolving factual disputes in summary judgment motions, a district court may ignore the plaintiff's version of the facts when it is clearly contradicted by the other evidence of record, including the defendants' affidavits, incident reports, and medical records).

On April 11, 2015, the parties in this case had known each other for quite some time due to the plaintiff's history of criminal activity and placements in the Decatur City Jail. (Docs. 27-1 at 2-3; Doc. 27-2 at 2-3; Doc. 27-3 at 2-3). All parties also knew the plaintiff had pending charges stemming from a December 2014 robbery and drug possession arrest, and defendant Prosser knew the plaintiff's license had been suspended. (*Id.*).

There is no dispute that Officers Prosser and Rutherford patrolled a Decatur neighborhood known for its criminal activity around 10:30 p.m. because of a domestic violence incident involving the plaintiff's passenger some two hours earlier. (Doc. 27-1 at 3). Nor is there any dispute that Officer Prosser began following the plaintiff's vehicle around 10:30 p.m.

because he had just seen it parked at the same residence from which an individual had run upon seeing Prosser's patrol vehicle approaching. (*Id.*). The plaintiff does not deny he was driving erratically with a suspended license or that he ran a stop sign; nor does he deny handling items underneath him and in his console immediately before he stopped. (*Id.* at 3-5). Neither does the plaintiff deny—and the video affirmatively shows—he did not place both hands out of his car window as ordered by Prosser. (Prosser 22:27). Instead, the plaintiff placed only his left hand out of the window. (*Id.*). Under the circumstances, an objectively reasonable police officer would exercise extreme caution in addressing the individuals in the vehicle. That caution would be intensified by the smell of alcohol and illegal drugs, two people speaking simultaneously about a recent stabbing event, and the revelation that the passenger had been stabbed. (Doc. 27-1 at 5-6; Prosser 22:27-28).

Because Officer Rutherford was assisting Harris on the passenger side of the vehicle, Officer Prosser was alone on the driver's side when he told the plaintiff to get out of the truck to be patted down for weapons. (Doc. 27-1 at 5-6; Doc. 27-2 at 4). The plaintiff initially complied with Prosser's instruction while talking about Harris' wound and his "million dollar bond" but soon began to lower his hands. (Doc. 27-1 at 6; Prosser 22:30). When Prosser ordered him to put his hands back on the vehicle, Prosser let the plaintiff know that he was aware of the pending robbery charge. (*Id.*).

The plaintiff remained cooperative until Prosser neared and/or felt the packet of synthetic marijuana secured next to his groin. He created distractions to stop the search by repeatedly telling Prosser "listen," "wait a minute," and he would "show" and "prove" that the zipper on the front of his pants was the item Prosser felt. (Doc. 27-1 at 6-7; Prosser 22:30-31). As he spoke, and still with his back turned to Prosser, the plaintiff repeatedly lowered his hands to his waist,

forcing Prosser to place them back on the vehicle and warn him that he would be handcuffed if he did not comply. (Doc. 27-1 at 7). Rutherford heard the exchange and came over to assist Prosser as he became concerned the situation was escalating. (Doc. 27-2 at 4). Still, the plaintiff did not comply and maintained his verbal and physical resistance. (Prosser 22:30-31; Doc. 27-2 at 4).

"Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Lee v. Ferrero*, 284 F.3d 1188, 1197 (11th Cir. 2002) (citing *Graham*, 490 U.S. at 396) (in turn citing *Terry v. Ohio*, 392 U.S. at 22–27)).

For even minor offenses, permissible force includes physical restraint, use of handcuffs, and pushing into walls. *See Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000) ("[T]his Circuit has established the principle that the application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment."); *Lee*, 284 F.3d at 1200 (citing cases permitting use of handcuffs); *Jones v. City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997) (no constitutional violation to slam plaintiff against wall, kick plaintiff's legs apart, and require plaintiff to raise arms above his head)[.]

Brown v. City of Huntsville, Ala., 608 F.3d 724, 740 (11th Cir. 2010).

When both officers took hold of each of the plaintiff's arms and Prosser retrieved his handcuffs, the plaintiff escalated his verbal and physical resistance. (Doc. 27-1 at 8; Doc. 27-2 at 4-4; Prosser at 22:32-34; Rutherford at 22:37-42). The plaintiff began yelling that he was shot and tried to pull away from the officers, which prompted them to take him to the ground. (*Id.*). The plaintiff continued yelling that he was shot and insisted he was not resisting while on the ground, but the video and audio recordings support the defendants' testimony that he kept trying to pull his hands under him rather than be handcuffed. (*Id.*). Under these circumstances, a reasonable jury would not believe the plaintiff's version of events even if the unclear portions of the video and the plaintiff's verbal protests are taken in a light most favorable to him.

Despite applying mandibular pressure, Rutherford could not gain the plaintiff's acquiescence. Accordingly, Rutherford warned the plaintiff he would be tased if he did not submit to be handcuffed. (Doc. 27-2 at 5-6; Prosser 22:33-34). The plaintiff still refused to comply. His resistance and bizarre behavior would lead any objectively reasonable officer to utilize stronger threats and greater physical coercion to gain compliance. The plaintiff did not concede when Rutherford shouted "taser" as a warning; nor did he concede until Rutherford had tased him no less than three times. (*Id.*). It took the officers a full two minutes to get the plaintiff under control. (Doc. 27-1 at 9). A reasonable jury would conclude the plaintiff alone created and escalated the situation to a level any objectively reasonable officer would interpret as extremely dangerous and which required increasingly strong verbal commands and physical coercion to effectuate the arrest.

Once secured with two sets of handcuffs, the plaintiff began and persisted in a number of other tactics to thwart the search and prevent discovery of the drugs in his pants: (1) pretending to be paralyzed and shot; (2) shouting that he could not be searched because he was not a U.S. citizen; (3) vociferously stating his refusal to consent to the search; (4) screaming that he was being killed, raped, and mutilated; (4) kicking officers; (5) trying to head-butt the police car on which he had been placed; and (6) yelling for help, a doctor, and medical attention. (Doc. 27-1 at 9-12; Prosser 22:34-35; Rutherford 22:42-48; Renshaw 22:43-54). Ultimately, it took four police officers to retrieve one of two packages of synthetic marijuana from the plaintiff's groin area. (*Id.*). The video recordings show they did so while trying to secure the plaintiff so that he did not hurt himself or others and by taking breaks to try to calm the plaintiff down, speak rationally to him, and discern his expressed need for medical attention. (Rutherford 22:42-48;

Renshaw 22:43-54). No objectively reasonable officer would interpret the defendants' participation in the continued, post-handcuffing use of force as unnecessary or unreasonable.

Tellingly, during the plaintiff's tantrum, his passenger Greg Harris and the bystanders remain calm and supportive of the actions of the police. (Heflin 22:42-55; Rutherford 22:42-48; Renshaw 22:43-54). Harris repeatedly stated he did not understand why the plaintiff was carrying on and told the plaintiff to calm down. (Heflin 22:46-55). One bystander voluntarily leaned over the police car, chided the plaintiff, and told him to submit to the search. (Renshaw 22:47-49). Several bystanders laughed at the plaintiff for making such a spectacle. (*Id.*).

The video footage taken during the plaintiff's hospitalization also directly contradicts the plaintiff's testimony that the defendants fractured his hand and injured his genitals. The doctor and nurses repeatedly inform him that examinations of his hand and genitals—as well as other areas—revealed no injuries. (Doc. 27-7 at 28; Prosser 12:56, 1:16-17; 1:39-43). The plaintiff's frequent movement of his body and limbs, virtually without complaint, also belies his testimony that the officers fractured his hand, injured his genitals, or caused any other injury. (Prosser 12:52-1:47). From the time his hospital discharge began to the time he stood up and resisted Prosser's effort to place him in the segregation cell, the plaintiff engaged in yet another contrived and fraudulent display of injuries and pain. (*Id.* at 2:01-16).

Seven days later, the Crestwood Hospital triage nurse and Dr. Frierson observed bruising and/or an abrasion and swelling to the plaintiff's left hand, which he untruthfully claimed was the result of falling after being tased. (Doc. 34 at 11-12). A radiologist read the plaintiff's hand x-ray as normal, but after additional discussion with Dr. Frierson, a "small step off" that could be "a healed growth plate" was noted. Frierson applied a splint and prescribed the plaintiff a small amount of pain medicine. (*Id.* at 15-16). Because the medical record does not indicate the

healed growth plate is recent, and because the plaintiff also stated he previously had been shot in the hand, the Crestwood medical record does not create a genuine issue of material fact as to whether the plaintiff fractured his hand on April 11, 2015. Moreover, even if the plaintiff broke his hand during the April 11, 2015 arrest, the fracture occurred because of the plaintiff's own actions, not because the defendants engaged in an objectively unreasonable use of force.

For all of the foregoing reasons, the totality of the circumstances shows the objective reasonableness of the defendants' actions. *See Graham*, 490 U.S. at 397 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."). Therefore, to the extent the defendants used force to effectuate the plaintiff's lawful arrest and used continued force to complete the search of his pants at the scene of his arrest, summary judgment is due to be granted in their favor.

V. Recommendation

For the reasons stated above, the undersigned **RECOMMENDS** the motion for summary judgment (Doc. 30) be **GRANTED** and all claims asserted in this action be **DISMISSED WITH PREJUDICE**.

VI. Notice of Right to Object

Any party may file specific written objections to this report and recommendation. Any objections must be filed with the Clerk of Court within fourteen (14) calendar days from the date the report and recommendation is entered. Objections should specifically identify all factual findings and legal conclusions to which objection is made and the specific basis for objection. Failure to object to a factual finding or legal conclusion will result in a waiver of the right to

challenge the factual finding or legal conclusion on appeal. 11th Cir. R. 3-1; *Mitchell v. United States*, 612 F. App'x 542, 545 (11th Cir. 2015). However, in the absence of an objection, the United States Court of Appeals for the Eleventh Circuit may review a factual finding or legal conclusion for plain error, if necessary in the interests of justice. 11th Cir. R. 3-1; *Mitchell*, 612 F. App'x at 545.

Objections also should specifically identify all claims contained in the petition that the report and recommendation fails to address. Objections should not contain new allegations, present additional evidence, or repeat legal arguments. An objecting party must serve a copy of its objections on each other party to this action.

On receipt of objections, a United States District Judge will make a *de novo* determination of those portions of the report and recommendation to which specific objection is made and may accept, reject, or modify in whole or in part, the findings of fact and recommendations made by the magistrate judge. The district judge must conduct a hearing if required by law. Otherwise, the district judge may exercise discretion to conduct a hearing or otherwise receive additional evidence. Alternately, the district judge may consider the record developed before the magistrate judge, making an independent determination on the basis of that record. The district judge also may refer this action back to the magistrate judge with instructions for further proceedings.

A party may not appeal the magistrate judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. A party may only appeal from a final judgment entered by a district judge.

DONE this 10th day of August, 2018.


STACI G. CORNELIUS
U.S. MAGISTRATE JUDGE