NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 18a0566n.06

Case No. 18-5102

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALEXANDER L. BAXTER,

Plaintiff-Appellee,

v.

BRAD BRACEY; SPENCER R. HARRIS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

OPINION

BEFORE: THAPAR, BUSH, and NALBANDIAN, Circuit Judges.

NALBANDIAN, Circuit Judge.

A neighbor caught Alexander Baxter burglarizing a house and called the police. Soon Baxter heard sirens and saw a helicopter looking for him, so he ran to another house (one he had broken into before) and hid in the basement. But the canine unit arrived and quickly sniffed him out. After giving several warnings, one of the officers released his dog, who apprehended Baxter with a bite to the arm. Baxter says he had already surrendered when the dog was released, and so the two officers violated his constitutional right to be free from excessive force. The case is before us now on an interlocutory appeal after the district court denied the officers' claims of

qualified immunity. We reverse that decision because the officers' conduct, whether constitutional, did not violate any clearly established right.

I.

Officers Spencer Harris and Brad Bracey arrested Alexander Baxter on January 8, 2014 after he committed an aggravated burglary and fled the scene. A neighbor caught Baxter breaking into a home and called the police. He fled once he heard sirens and saw the helicopter—first hiding in a car, and then seeking refuge in the basement of a house he had previously broken into. There, Baxter hid between a chimney and a water heater while he watched and listened to the officers outside.

Harris and Bracey were part of Nashville's canine unit, which is deployed for serious crimes such as aggravated burglary. The two of them entered the house with their dog, Iwo. Bracey announced they would release the canine if Baxter did not surrender. Although Baxter heard the warnings, he stayed quiet. Harris—the dog's handler—repeated the warning. Again, Baxter remained quiet. So Harris released Iwo, who quickly found Baxter downstairs.

The two officers followed Iwo into the basement and—according to Baxter—surrounded him. Baxter claims that he raised his hands in the air when they came downstairs. But he never responded to the officers' warnings or communicated about where he was hiding. Within five to ten seconds of discovering Baxter, Harris again released Iwo—this time to apprehend him. Iwo restrained Baxter with a bite to the arm. The medical records

reveal only one bite on Baxter's underarm, revealing that Iwo followed his training by apprehending Baxter with a single bite. Harris eventually commanded Iwo to release Baxter and placed him under arrest.

Baxter, proceeding pro se, sued Harris and Bracey under 42 U.S.C. § 1983. He asserts an excessive-force claim against Harris and a failure-to-intervene claim against Bracey. Originally, Bracey alone moved to dismiss the suit against him, arguing that qualified immunity shielded him from Baxter's somewhat amorphous claim that he failed to prevent the canine apprehension. Baxter's complaint, we held, pleaded sufficient facts to withstand a motion to dismiss. But those facts must bear out during discovery for Baxter to defeat a motion for summary judgment. And that is where we are today.

After discovery, both officers moved for summary judgment, and the district court rejected both claims. The district court held that summary judgment was inappropriate because Baxter's testimony corroborated the factual assertions in the complaint that this court previously upheld against a motion to dismiss. If those facts were enough to defeat qualified immunity in a complaint, the court reasoned, Baxter's supporting testimony should do the same. Harris and Bracey then filed this interlocutory appeal. *See Plumhoff v. Rickard*, 572 U.S. 765, 771–72 (2014).

II.

Our inquiry here is guided by the interlocutory posture of the case. Because the district court denied summary judgment to the defendants, we must

determine whether "the undisputed facts or the evidence viewed in the light most favorable to the plaintiff fail to establish a *prima facie* violation of clear constitutional law." *Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir. 1998). We will not weigh into credibility issues or try to resolve factual disputes. *See Estate of Carter v. City of Detroit*, 408 F.3d 305, 310 (6th Cir. 2005). Our task is much simpler. We must decide the "neat abstract issue[] of law" regarding whether Baxter's version of the facts amounts to a clear constitutional violation. *See Berryman*, 150 F.3d at 563 (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995)).

The clarity of the constitutional violation is critical. An individual suing under § 1983 must demonstrate two things: First, that the officer violated his constitutional rights. And second, that the violation was "clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). The "clearly established" prong sets up an exacting standard in which the plaintiff must show that "every reasonable official would understand that what he is doing is unlawful." *Id.* (internal citations and quotations omitted). "It is not enough that the rule is *suggested* by then-existing precedent"—it must be "beyond debate" and "settled law." *Id.* at 589–90 (emphasis added) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)). The effect is that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Relevant here, courts can jump straight to the second question and dispose of a claim without

deciding whether the officer's conduct violated the plaintiff's constitutional rights. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). So long as the alleged violation has not been clearly established, the officers receive qualified immunity and the suit can be dismissed. *See id.* Proceeding in this way is often appropriate in "cases in which the briefing of constitutional questions is woefully inadequate." *See Pearson v. Callahan*, 555 U.S. 223, 239 (2009). By resolving the issue on only the second prong, courts avoid "expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case." *Ashcroft*, 563 U.S. at 735 (internal quotations and citations omitted).

That is the case here. The officers are entitled to qualified immunity because Harris's use of the canine to apprehend Baxter did not violate clearly established law. And because this court does not have the benefit of sophisticated adversarial briefing from both parties, we decline to resolve the more complex constitutional question raised by Baxter's claim. *See Pearson*, 555 U.S. at 239.

The Fourth Amendment's prohibition against unreasonable seizures protects individuals from an officer's use of excessive force while making an arrest. *See Graham v. Connor*, 490 U.S. 386, 394–95 (1989). Whether the force was excessive turns on its objective reasonableness under the totality of the circumstances. *Id.* at 395–96; *Kostrzewa v. City of Troy*, 247 F.3d 633, 639 (6th Cir. 2001). And the reasonableness of the officer's force "must be judged from the perspective of a reasonable officer on the

scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

We have demarcated the outer bounds of excessive-force cases involving canine seizures with some degree of clarity. In this circuit, for example, we have held that officers cannot "use[] an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing." C*ampbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2013). But just as clearly, we have upheld the use of a well-trained canine to apprehend a fleeing suspect in a dark and unfamiliar location. S*ee Robinette v. Barnes*, 854 F.2d 909, 913–14 (6th Cir. 1988). These cases and their progeny establish guidance on the ends of the spectrum, but the middle ground between the two proves much hazier.

Baxter's case looks closer to *Robinette* than *Campbell*—but the fit is not perfect. Like the suspect in *Robinette*, Baxter fled the police after committing a serious crime and hid in an unfamiliar location. He also ignored multiple warnings that a canine would be released, choosing to remain silent as he hid. And unlike *Campbell*, the canine here was properly trained with no apparent history of bad behavior. All of these facts would lead a reasonable officer to believe that the use of a canine to apprehend Baxter did not violate the Fourth Amendment. *See Graham*, 490 U.S. at 396; *Robinette*, 854 F.2d at 913–14.

Militating against those facts is Baxter's claim that he surrendered by raising his hands in the air before Harris released the dog. This conduct might show that he did not pose the kind of safety threat justifying a forceful arrest. *See, e.g., Ciminillo v. Streicher*, 434 F.3d 461, 467 (6th Cir. 2006). But

Baxter does not point us to any case law suggesting that raising his hands, on its own, is enough to put Harris on notice that a canine apprehension was unlawful in these circumstances. That's because even with Baxter's hands raised, Harris faced a suspect hiding in an unfamiliar location after fleeing from the police who posed an unknown safety risk—all factors the *Campbell* court identified as significant to determining whether the seizure was lawful. *See Campbell*, 700 F.3d at 788–89.

Given all of this, we cannot say that Harris violated any clearly established law in using Iwo to apprehend Baxter. Even if Baxter raised his hands, the other circumstances—undisputed in the record below—weigh against a finding that "every reasonable official would understand that what [Harris did] is unlawful." *Wesby*, 138 S. Ct. at 589 (internal quotations omitted). For that reason, Harris is entitled to qualified immunity.

We reach this decision mindful of the fact that, on appeal from the prior motion to dismiss, we held that Baxter's right to be free from excessive force was clearly established under *Campbell*. But there, we looked only at the facts as pleaded in the complaint. Baxter alleged that he surrendered before the arrest, and his complaint was understandably silent about whether Iwo had proper training or the time that elapsed before Harris released the dog. The facts revealed during discovery add much-needed color to this case—as they often do. We now know that Iwo was well-trained, that Harris released him within only a few seconds after entering the basement, and that Baxter fled the scene, hid in the basement, was warned twice, and still never communicated with the

officers before being apprehended. All of these facts change the analysis and move the well-pleaded claims to a place where we cannot say that "every reasonable official would understand that what he is doing is unlawful."[1] *Wesby*, 138 S. Ct. at 589 (internal quotation marks omitted).

Finally, it follows from there that Bracey receives the same protection of qualified immunity. Police officers "can be held liable for failure to protect a person from the use of excessive force." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997). Such a claim requires proving that the officer "observed or had reason to know that excessive force would be or was being used" and "the officer had both the opportunity and the means to prevent the harm from occurring." *Id.* While there are numerous reasons to find that Baxter cannot prevail on this claim, the first is the most obvious: If it is not clearly established that Harris used excessive force in apprehending Baxter, it cannot be that Bracey observed or had reason to know that excessive force would be used.

III.

For the above-stated reasons, we **REVERSE** the district court's order denying summary judgment.

---

[1] It also bears mentioning that only Bracey filed the initial motion to dismiss. Harris, who is directly responsible for the canine apprehension, defends his conduct under qualified immunity for the first time.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ALEXANDER L. BAXTER, Plaintiff, vs. SPENCER R. HARRIS AND BRAD BRACEY, Defendants. _____/	Civil Action No. 3:15-CV-00019 HON. BERNARD A. FRIEDMAN

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on defendants' motion for summary judgment [docket entry 99]. The issues have been sufficiently briefed, so the Court will decide the motion without a hearing.

In January 2014, defendants responded to a report of a residential burglary. Plaintiff, a homeless man, had been trying to steal video games, laptops, or computers from unlocked houses. Pl.'s Dep. pp. 15–16. When defendants arrived at the scene, plaintiff fled into the basement of a nearby house. Defendants followed plaintiff to the house. They shouted a warning into the basement that they would release police dog Iwo unless plaintiff surrendered. *Id.* at 30; Harris Aff. ¶¶ 10–11. Plaintiff refused to surrender. Pl.'s Dep. p. 30.

Here the stories diverge. Plaintiff claims that defendants released Iwo into the basement while they remained upstairs. *Id.* Iwo found plaintiff, began barking, and ran back and forth across the basement. *Id.* The defendants came downstairs, and Iwo ran up to Officer Harris, who secured him by the collar. *Id.* at 31, 34. Officer Harris remained in front of plaintiff, ordering him, "show me your hands," while Officer Bracey circled around behind. *Id.* at 32–33, 35. Plaintiff testified that at that moment, he "was sitting on [his] butt with [his] hands up in the air." *Id.* at 32. After elevating his hands he did not move. *Id.* at 35. Suddenly, without warning, Officer Harris released Iwo. *Id.* Iwo bit plaintiff "two or three times," drawing blood. *Id.* at 39.

Officer Harris avers, however, that they released Iwo only because plaintiff never elevated his hands or "communicated that he intended to surrender peacefully." Harris Aff. ¶¶ 13–14. Medical records show that plaintiff suffered a single puncture wound. Defs.' Mot. Ex. 3.

In January 2015, plaintiff filed the instant complaint. In July 2015, Officer Bracey filed a motion to dismiss based on qualified immunity, which the Court denied. Officer Bracey appealed that decision to the Sixth Circuit. In August 2016, the Sixth Circuit upheld this Court's decision, stating:

> In assessing claims of excessive use of force, courts apply an objective reasonableness standard, considering the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the

suspect was actively resisting arrest or attempting to evade arrest by flight. *See Campbell*, 700 F.3d at 786–87. Baxter's complaint alleges that he hid in a basement to avoid arrest but was soon discovered by Harris and Bracey as a canine unit searched the other side of the basement. The canine unit rejoined Harris in front of Baxter, who had surrendered by this point. Bracey was positioned behind Baxter, who sat on the ground with his arms in the air. These facts could support a finding that the officers were in no danger and that Baxter was neither actively resisting nor attempting to flee. Taken in a light most favorable to Baxter, the allegations thus establish that excessive force was being used when the canine attacked, and that Bracey was in a position to observe the use of excessive force.

The complaint also alleges that Harris restrained the canine by its collar prior to releasing it and that Bracey, who stood behind Baxter, did nothing but watch while the canine attacked. Bracey had the opportunity to intervene, given his proximity to Baxter, and the means to prevent the harm from occurring either by instructing Harris not to release the animal or by restraining the animal himself until Harris could command it to stop. The complaint pleads sufficient facts to establish that

> Bracey violated Baxter's constitutional rights by failing to intervene to protect Baxter from the use of excessive force.

Aug. 30, 2016, Order Denying Defendant's Appeal, pp. 2–3. In short, the Sixth Circuit held that the complaint's facts could reasonably support a finding of excessive force.

Under Fed. R. Civ. P. 56(a), summary judgment is appropriate "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." "A material issue of fact exists where a reasonable jury, viewing the evidence in the light most favorable to the non-moving party, could return a verdict for that party." *Vollrath v. Georgia-Pacific Corp.*, 899 F.2d 533, 534 (6th Cir. 1990).

Here, plaintiff's testimony entirely corroborates all of the material facts alleged in his verified complaint, which the Sixth Circuit has already found could support a finding of excessive force. There is a genuine dispute as to the exact circumstances of the arrest. A reasonable jury, viewing the evidence in the light most favorable to plaintiff, could find that defendants used excessive force. And although Officer Harris avers that Iwo would not have responded to Officer Bracey had he intervened, Harris Aff. ¶ 15, this naked averment alone does not dispel genuine dispute as to whether Officer Bracey's intervention would have been futile.

Accordingly,

IT IS ORDERED that defendants' motion for summary judgment is denied.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE
SITTING BY SPECIAL DESIGNATION

Dated: January 19, 2018
Detroit, Michigan

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 15-6412

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALEXANDER L. BAXTER,

Plaintiff-Appellee,

v.

SPENCER HARRIS,

Defendant,

and

BRAD BRACEY,

Defendant-Appellant.

FILED
Aug 30, 2016
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

ORDER

BEFORE: COLE, Chief Judge; SILER and STRANCH, Circuit Judges.

Officer Brad Bracey of the Metropolitan Nashville Police Department (MNPD) filed this interlocutory appeal of the district court's order denying his motion for qualified immunity in a civil rights action filed by Alexander Baxter under 42 U.S.C. § 1983. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Baxter claimed that MNPD Officer Spencer Harris used excessive force in releasing a canine unit after Baxter had already surrendered and that Bracey failed to intervene to prevent the use of excessive force. Bracey filed a motion to dismiss, arguing that Baxter failed to state a claim upon which relief could be granted due to Bracey's qualified immunity. *See* Fed. R. Civ. P. 12(b)(6); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A magistrate judge recommended that Bracey's motion be denied, reasoning that Baxter had raised several issues of material fact that counseled against granting Bracey qualified immunity—whether Baxter had already surrendered when the canine was released, whether Bracey could have intervened, and whether Bracey lied in his report summarizing the events of the arrest. The district court adopted the report and recommendation over Bracey's objections and denied Bracey's motion to dismiss. Bracey filed the instant interlocutory appeal.

On appeal, Bracey limits his arguments to the strictly legal question of whether the facts alleged in the complaint establish a violation of a clearly established Fourth Amendment right to protection against the excessive use of force. Thus, the court has jurisdiction over this interlocutory appeal. *See Phillips v. Roane Cty.*, 534 F.3d 531, 538 (6th Cir. 2008) (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995)).

On appeal from the denial of a motion to dismiss based on qualified immunity, this court "review[s] de novo whether the complaint alleges [a] violation of a clearly established constitutional right." *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d

556, 562 (6th Cir. 2011). "In order to determine whether or not qualified immunity applies in an excessive force claim, the Court must engage in a two-step inquiry, addressing the following questions: (1) whether, considering the allegations in a light most favorable to the injured party, a constitutional right has been violated, and if so, (2) whether that right was clearly established." *Campbell v. City of Springboro*, 700 F.3d 779, 786 (6th Cir. 2012) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

We have held that a police officer may be held liable for failing to intervene to protect a person from the excessive use of force under the Fourth Amendment if: "(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997).

In assessing claims of excessive use of force, courts apply an objective reasonableness standard, considering the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. *See Campbell*, 700 F.3d at 786–87. Baxter's complaint alleges that he hid in a basement to avoid arrest but was soon discovered by Harris and Bracey as a canine unit searched the other side of the basement. The canine unit rejoined Harris in front of Baxter, who had surrendered by this point. Bracey was positioned behind Baxter, who sat on the ground with his arms in the air. These facts could support a finding that the officers were in no danger and that Baxter was neither actively

resisting nor attempting to flee. Taken in a light most favorable to Baxter, the allegations thus establish that excessive force was being used when the canine attacked, and that Bracey was in a position to observe the use of excessive force.

The complaint also alleges that Harris restrained the canine by its collar prior to releasing it and that Bracey, who stood behind Baxter, did nothing but watch while the canine attacked. Bracey had the opportunity to intervene, given his proximity to Baxter, and the means to prevent the harm from occurring either by instructing Harris not to release the animal or by restraining the animal himself until Harris could command it to stop. The complaint pleads sufficient facts to establish that Bracey violated Baxter's constitutional rights by failing to intervene to protect Baxter from the use of excessive force.

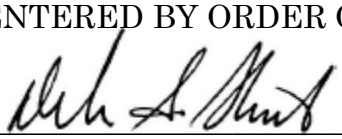
Our next inquiry is whether the right to protection against the use of excessive force was clearly established at the time. "To determine whether a constitutional right is clearly established, 'we must look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.'" *Brown v. Lewis*, 779 F.3d 401, 418–19 (6th Cir. 2015) (quoting *Baker v. City of Hamilton*, 471 F.3d 601, 606 (6th Cir. 2006)). A right is "clearly established" if its contours are "sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Harris v. City of Circleville*, 583 F.3d 356, 366–67 (6th Cir. 2009).

The right to be free from the excessive use of force in the context of police canine units was clearly

established by 2012, when in *Campbell* we held that officers who used an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing, acted contrary to clearly established law. *See* 700 F.3d at 789. The right to intervention to prevent the use of excessive force was also clearly established. *See Turner*, 119 F.3d at 429. The contours of a suspect's right to intervention to prevent a violent canine apprehension where officers were in no danger and the suspect was neither resisting nor fleeing were sufficiently clear that a reasonable officer in Bracey's position would understand that doing nothing but watch a police canine attack would violate the suspect's constitutional rights. Under these circumstances, Bracey is not entitled to qualified immunity.

The district court's order is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ALEXANDER L. BAXTER, Plaintiff, v. SPENCER R. HARRIS, et al., Defendants. _____/	No. 3:15-cv-00019 Judge Sharp/Knowles

ORDER

Plaintiff Alexander L. Baxter, an inmate at the Bledsoe County Correctional Center proceeding pro se, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. He alleges that on January 8, 2014, Officers of the Metropolitan Nashville Police Department, including Defendant Brad Bracey, utilized excessive force when arresting him in violation of his Fourth Amendment rights. Specifically, Plaintiff alleges that after he had surrendered Officers Harris and Bracey released a K-9 dog and watched as the dog attacked Plaintiff, resulting in deep lacerations to his armpits. Plaintiff also alleges that the officers submitted a false police report describing his arrest as a K-9 apprehension despite the fact that the dog was not released until after Plaintiff's surrender.

Magistrate Judge Knowles has issued a Report and Recommendation ("R & R") (Docket No. 48) in

which he recommends that Defendant Bracey's Motion for Judgment on the Pleadings (Docket No. 16) and/or Motion to Dismiss for Failure to State a Claim (Docket No. 37) be denied. Defendant Bracey filed objections to the R & R (Docket No. 54), to which Plaintiff has responded (Docket No. 60). Having considered the matter de novo as required by Rule 72 of the Federal Rules of Civil Procedure, the Court agrees with the recommended disposition.

In deciding to approve the R & R, the Court has considered the objections levied by Defendant Bracey. Defendant Bracey's first objection takes issue with the fact that the magistrate judge did not treat his Motion to Dismiss as unopposed. Although Plaintiff filed a response to the Motion for Judgment on the Pleadings, Plaintiff did not respond to the Motion to Dismiss until after the entry of the R & R (Docket No. 59). In issuing the R & R, the magistrate judge looked to Plaintiff's earlier-filed response to the Motion for Judgment on the Pleadings (Docket No. 21). According to Defendant Bracey, Plaintiff's filing of an Amended Complaint, terminated the Motion for Judgment on the Pleadings and rendered all accompanying filings moot. Defendant argues that therefore magistrate judge could not consider Plaintiff's earlier response and was bound to treat the Motion to Dismiss as unopposed.

Defendant is correct that Plaintiff's Amended Complaint rendered the Motion for Judgment on the Pleadings moot. See Ky. Press Ass'n, Inc. v. Ky., 355 F. Supp. 2d 853, 857 (E.D. Ky. 2005) ("Plaintiff's amended complaint supercedes the original complaint, thus making the motion to dismiss the original complaint moot.") (citing Parry v. Mohawk

Motors of Mich., Inc., 236 F.3d 299, 306 (6th Cir. 2000)), app. dis., 454 F.3d 505 (6th Cir. 2006). In the instant case, however, the only difference between Plaintiff's original and amended complaints was the removal of John Doe as a defendant. (Docket No. 34). "All other pleadings in the original complaint remain the same." (Id. at 1). Moreover, the same standard applies to both motions:

> A Motion for Judgment on the Pleadings under Rule 12(c) of the Federal Rules of Civil Procedure 'is appropriately granted when no material issue of fact exists and the party is entitled to judgment as a matter of law.' In making that determination, the Court utilizes the same standards as those used to determine if the Complaint is subject to dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Foster v. Amarnek, No. 3:13-516, 2014 WL 1961245, at *1 (M.D. Tenn. May 14, 2014) (citations omitted). The arguments and information contained in Plaintiff's response to the Motion for Judgment on the Pleadings therefore apply with equal force to Defendant's Motion to Dismiss. Magistrate Judge Knowles's thorough review of the entire record does not provide grounds for objection.

Defendant next objects on the ground that the magistrate judge "erred by analyzing qualified immunity in only a generalized sense and ignoring the lack of authority regarding when a police officer can be said to have failed to intervene in a use of force involving a K-9." This is not so: Magistrate

Judge Knowles specifically analyzed Plaintiff's excessive force claim as a failure to intervene claim and found that material facts going to that claim remain in dispute. Indeed, Magistrate Judge Knowles lists at least three issues of material fact that go to whether or not Defendant Bracey is liable for failure to intervene. (Docket No. 48 at 4). Magistrate Judge Knowles also relied on clearly established authority from the Sixth Circuit, Turner v. Scott, 119 F.3d 425, (6th Cir. 1997), which sets forth a test for failure to intervene claims. (Docket No. 54 at 4-5). The Court finds that the magistrate judge properly analyzed Plaintiff's claim.

In sum, the Magistrate Judge thoroughly discussed and rejected Defendant's arguments in favor of dismissal and the Court finds no error in that analysis.

Accordingly, the Court hereby rules as follows:

(1) The R & R (Docket No. 48) is ACCEPTED and APPROVED;

(2) Defendant Bracey's Motion to Dismiss (Docket No. 37) is DENIED;

(3) Defendant Bracey's Motion for Judgment on the Pleadings (Docket No. 16) is TERMINATED AS MOOT.

It is SO ORDERED.

Kevin H. Sharp

KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ALEXANDER L. BAXTER, Plaintiff, v. SPENCER HARRIS, et al., Defendants. _____/	Case No. 3:15-cv-00019 Judge Sharp/Knowles

REPORT AND RECOMMENDATION

This matter is before the Court upon two Motions filed by Defendant Brad Bracey: the first, a Motion for Judgment on the Pleadings filed pursuant to Fed. R. Civ. P. 12(c), and the second, a Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6).[1] Docket Nos. 16, 37. Defendant Bracey has contemporaneously filed supporting Memoranda of Law arguing that Plaintiff's claims against him should be dismissed because he is qualifiedly immune. Docket Nos. 17, 38.

Plaintiff has filed a Response to Defendant Bracey's Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(c), but has not responded to his Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). Docket No. 21.

[1] Defendant Bracey is the only Defendant who is a party to the instant Motions.

Plaintiff filed this pro se, in forma pauperis action pursuant to 42 U.S.C. § 1983, arguing that Officers of the Metropolitan Nashville Police Department, including Defendants Harris and Bracey, utilized excessive force when arresting him, in violation of his Fourth Amendment rights. Docket No. 1.[2] Specifically, Plaintiff avers:

> . . . The petitioner admittedly submits that during the course of an arrest he ran and hid in the basement of a house. Officer Harris and Officer Bracey soon entered the basement with a K-9. The petitioner sat close to the window upon which the officers entered with the K-9. The petitioner watched the K-9 running around on the other side of the basement. The officers located the petitioner first, then the K-9 ran up and one of the officers was holding the K-9 by the collar. The petitioner sat on the ground, frozen still, with his hands raised in the air. The K-9 was barking and rearing up trying to get at the petitioner. When the K-9 ran up to the officer, the petitioner had surrendered.

---

[2] Plaintiff has filed an Amended Complaint, which states in its entirety:

> In his original complaint the plaintiff named Spencer Harris, Brad Bracey and John Doe as defendants. The only amendment is that the plaintiff removes John Doe as a defendant. All other pleadings in the original complaint remain the same.

Docket No. 34.

> The petitioner was at gun-point with a flashlight shining on him. It was daylight outside, and there was lots of light shining though the windows. One officer was in front of the petitioner, and the other officer was behind the petitioner. The petitioner was not physically resisting. The petitioner did nothing to provoke any force. The officer in front of the petitioner then released the K-9, and both officers stood and watched as the K-9 attacked. The officer behind had an opportunity to intervene and stop the attack. He didn't. The officer in front eventually stepped in and removed the K-9. The [sic] called it a K-9 apprehension, but there were no bites under/on the petitioner's arms, no bites under/on the petitioner's legs, no bits [sic] on under/on the petitioner's hands, nor were there any other bites on any part of the petitioner's body. The petitioner was transferred to Metro Nashville General Hospital with deep lacerations under the pit of his arms only. . . .

Id., p. 2-3.

Plaintiff seeks compensatory and punitive damages. *Id.*, p. 7.

Defendant Bracey filed the instant Motions arguing that he is qualifiedly immune. Docket Nos. 16, 37. Defendant Bracey argues that he did not know that the K-9 would be used and did not have the opportunity or ability to stop the use of the K-9.

Id.; Docket Nos. 17, 38. He further argues that Plaintiff's Complaint does not allege sufficient facts to show that he failed to intervene during the use of another officer's K-9 police dog or that he violated any clearly established right of Plaintiff. *Id.*

Plaintiff responds that "qualified immunity is not possible when there are disputed facts that must be resolved" and argues that "[f]actual disputes clearly exist" in this case. Docket No. 21. Plaintiff further responds that "[e]ven though Officer Bracey was 'not in control of the K9' and was only 'standing behind plaintiff when the K9 bit plaintiff,' he is still not relieved of culpability." *Id.* Plaintiff continues: "After failing to intervene to stop the attack, as adequately pleaded by the plaintiff, Officer Bracey went on to show malice and deception and an attempt to conceal the attack by filing a false police report in which he stated it was a 'K9 apprehension.'" *Id.* Plaintiff maintains that: (1) Defendant Bracey can be held liable for failing to intervene; (2) he had an "absolute right" to be free from the use of excessive force; and (3) that right was clearly established. *Id.*

In order to hold Defendant Bracey liable for excessive use of force, Plaintiff must prove that he: "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997). Generally, "mere presence . . . , without a showing of direct responsibility for the action, will not subject an officer to liability." *Ghandi v. Police Dep't of City of Detroit*, 747 F.2d 338, 352 (6th Cir. 1984). An individual officer may be held

liable for failure to prevent the excessive use of force, however, where: "(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." *Turner*, 119 F.3d at 429. "Each defendant's liability must be assessed individually based on his own actions." *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010).

As pertains to Defendant Bracey specifically, the allegations of Plaintiff's Complaint are that Defendant Bracey entered the basement with another officer and a K-9; that Defendant Bracey was behind him and stood and watched the other officer release the K-9; and that, despite having "an opportunity to intervene and stop the attack," "[h]e didn't." Docket No. 1. Plaintiff additionally contends that Defendants Bracey and Harris "lied in their police reports." *Id.*

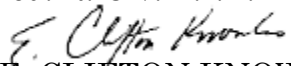
Plaintiff has raised several issues of material fact that counsel against finding Defendant Bracey qualifiedly immune at this juncture of the proceedings. The first issue of material fact is whether Plaintiff had already surrendered at the time the K-9 was released. Plaintiff avers that the release of the K-9 was excessive and unwarranted because he "sat on the ground, frozen still, with his hands raised in the air"; he had surrendered and was at gunpoint with a flashlight shining on him; he was not physically resisting; and he did nothing to provoke any force. Docket No. 1. The second issue of material fact is whether Defendant had an opportunity to intervene against the release and attack of the K-9, and failed to do so. Plaintiff avers

that he did. *Id.* The third issue of material fact is whether Defendant Bracey lied in his police report regarding Plaintiff's arrest. Again, Plaintiff contends that he did. *Id.*

Plaintiff has a clearly established right to be free from the excessive use of force during an arrest, and to have truthful police reports filed regarding said arrest. Accepting Plaintiff's factual allegations as true, Plaintiff has raised genuine issues of fact that go to the heart of Defendant Bracey's qualified immunity defense. Accordingly, it would be inappropriate to grant Defendant Bracey's Motion for Judgment on the Pleadings and/or Motion to Dismiss.

For the reasons discussed above, the undersigned recommends that the instant Motions (Docket Nos. 16, 37) be DENIED.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has fourteen (14) days after service of this Report and Recommendation in which to file any written objections to this Recommendation with the District Court. Any party opposing said objections shall have fourteen (14) days after service of any objections filed to this Report in which to file any response to said objections. Failure to file specific objections within fourteen (14) days of service of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *See Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L. Ed. 2d 435 (1985), *reh'g denied*, 474 U.S. 1111 (1986); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72.



E. CLIFTON KNOWLES
United States Magistrate Judge