

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NEWSTELL MARABLE, SR., et al,	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	NO. 03-CV-3738
WEST POTTS GROVE TWP., et al	:	
Defendants.	:	

Diamond, J.

July 8, 2005

MEMORANDUM

Plaintiff Newstell Marable Jr. brings this civil rights action against five police officers and four municipalities for their decision to arrest him after he spat in a police officer's face. I conclude that the undisputed facts confirm the propriety of Defendants' conduct. Accordingly, I grant Defendants' motions for summary judgment.

JURISDICTION AND APPLICABLE LAW

Plaintiff bases his complaint on 42 U.S.C. §§ 1983 and 1985, and Pennsylvania state law. I have jurisdiction over the federal claims pursuant to 28 U.S.C. § 1331, and maintain supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. I must apply state law as established by the Pennsylvania Supreme Court, and predict how that court would resolve open state law questions. See Commissioner v. Bosch's Estate, 387 U.S. 456, 465, 18 L. Ed. 2d 886, 87 S. Ct. 1776 (1967); Borman v. Raymark Indus., Inc., 960 F.2d 327, 331 (3d Cir. 1992). Pennsylvania Superior and Commonwealth Court decisions “should be accorded significant weight in the absence of an indication that the highest state court would rule

otherwise.” Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 304 (3d Cir. 1995).

STANDARD OF REVIEW

Upon motion of any party, summary judgment is appropriate “if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). The moving party must initially show the absence of a material factual dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In reviewing the record, “the court must give the nonmoving party the benefit of all reasonable inferences.” Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir. 1995), cert. denied, 132 L. Ed. 2d 854, 115 S. Ct. 2611 (1995). An issue is material only if it could affect the result of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). If, after viewing all reasonable inferences in favor of the non-moving party, the court determines that there is no genuine issue of material fact, summary judgment is appropriate. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

The party opposing summary judgment may not simply restate the allegations made in its pleadings. Mennen Co. v. Atlantic Mut. Ins. Co., 1999 U.S. Dist. LEXIS 21916, *7-8 (D.N.J. Oct. 26, 1999) (citation omitted). Nor may the opposing party rely upon “self-serving conclusions, unsupported by specific facts in the record.” Id., at *8 (citing Celotex, 477 U.S., at 322-23). Rather, the party must base its opposition on concrete evidence in the record. Celotex, 477 U.S., at 322-23. If the opposing party fails to cite to such evidence, then the moving party is entitled to summary judgment. Mennen Co., at *8; FED. R. CIV. P. 56(e).

FACTUAL BACKGROUND

Although the parties offer vastly different factual accounts, I must consider whether Plaintiff's version of the events, viewed in its most favorable light, is sufficient to defeat Defendants' motions. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985), cert. denied, 474 U.S. 1010, 106 S. Ct. 537, 88 L. Ed. 2d 467 (1985).

On July 7, 2001, Newstell Marable, Sr. with his grandchildren, Newstell Marable III (age 14), and Merritt Marable (age 10), left Marable, Sr.'s home in Douglassville, Pennsylvania to perform yard work for a friend. They stopped at a Wawa gas station in Amity Township, when Marable, Sr. got into a bitter argument with Lewis Mazzerle, Jr. (Plaintiffs' Opposition to Defendants Douglass-Berks Township and John Henry's Motion for Summary Judgment at 10, 11). Plaintiff alleges that Marable, Sr. walked away from Mazzerle without making any threats of violence. Id.

After leaving the gas station, the Marables continued to their friend's home. Id. at 11. At the same time, Mazzerle reported to Amity Township Police Officer Mark Scherer that during the Wawa incident, Marable, Sr. threatened to "get a gun and blow his head off." Id. at 11. Mazzerle also told Officer Scherer that Marable, Sr. did not actually display a gun. Unfortunately, in relaying the information to the Berks County Dispatch, Officer Scherer mistakenly stated that Marable, Sr. had brandished a gun. This information was then relayed to the Montgomery County Dispatch, which issued a "be on the lookout" for Marable, Sr.'s vehicle because its occupant "threatened another man at the Wawa with a handgun." Id. at 23. All the Defendant Officers heard this broadcast. (Defendants West Pottsgrove Township and Officers

Brian Cass and Steven Zieglers' Motion for Summary Judgment at 8-10); (Defendants North Coventry Township and Robert Hollis's Motion for Summary Judgment at 3, 19).

While returning home, Marable, Sr. noticed a police car -- driven by Defendant Officer Robert Hollis of Defendant North Coventry Township -- following him. The car followed for approximately five miles, until the Marable truck pulled into the driveway of Marable, Sr.'s residence. (Plaintiffs' Opposition to Defendants Douglass-Berks Township and John Henry's Motion for Summary Judgment at 11). The Marables left their truck and went to the rear of the vehicle to remove equipment. Id. at 11. As they were unloading the equipment, Defendant Officers Steven Ziegler and Brian Cass of Defendant West Pottsgrove Township arrived at the Marable property. Officer Hollis joined them on the scene moments later. Id. at 11, 13. Believing that one of the Marables was armed and had threatened someone with a gun, the Officers arrested the Marables and placed them in police vehicles. Id. at 11, 13; (Plaintiffs' Pretrial Memorandum at 6).

Defendant Officer John Henry of Defendant Douglass-Berks Township, and Defendant Officer Barry Bertolet of Defendant Upper Pottsgrove Township then arrived at the Marable property. Officer Henry asked Marable, Sr. if he had a gun. (Plaintiffs' Opposition to Defendants Douglass-Berks Township and John Henry's Motion for Summary Judgment at 15). Marable, Sr. responded that he had a gun in the house. Id. at 15.

Plaintiff Newstell Marable Jr. arrived at the scene some minutes later. Id. at 15; (Plaintiffs' Pretrial Memorandum at 7). He demanded that the police release his two children. When the Officers refused, Plaintiff became extremely upset. The scene grew quite tense, with Plaintiff and the Officers "raising their voices." (Plaintiffs' Pretrial Memorandum at 16; Marable,

Jr. Deposition, at 13-14). Plaintiff claims to have told the Officers that "[my] attorney is on his way . . . and he [the attorney] would straighten the problem out." (Plaintiffs' Pretrial Memorandum at 16). Plaintiff denies stating, "I have something for all of you mother f---ers," or threatening to get a gun from the house, although he did not dispute these facts at his plea hearing on criminal charges arising from this incident. Transcript of Court Proceeding, June 3, 2002 at 7. Plaintiff's witness, John Strickler, testified that Marable, Jr. was "shouting generally." (Plaintiffs' Opposition to Defendants Douglass-Berks Township and John Henry's Motion for Summary Judgment at 79).

Plaintiff repeatedly entered and exited his father's house, and grew "loud," telling the police officers, "I have something for you all. He's on his way, my lawyer." (Plaintiffs' Pretrial Memorandum at 16, 18; Marable, Jr. Deposition, October 19, 2004, at 14). The police repeatedly asked Plaintiff to calm down, but he grew more agitated. (Defendants Douglas-Berks Township and John Henry's Motion for Summary Judgment at 12). When the police continued to refuse Plaintiff's demands that they release his children, Marable, Jr. admits that he "unintentionally" spat in Officer Ziegler's face. (Plaintiffs' Opposition to Defendants Douglass-Berks Township and John Henry's Motion for Summary Judgment at 48 n.19); (Plaintiff's Exhibit 46, Transcript of State Court Hearing, July 18, 2001 at 56); (Defendants' Exhibit 56, Steven Ziegler Deposition, October, 20, 2004 at 84) ("[h]e also spit in my face three times . . . I had to go through six months of testing for HIV and other diseases"). Unidentified officers told Marable Jr. to put his hands behind his back. (Plaintiffs' Pretrial Memorandum at 16). As Plaintiff put his hands in the air, the officers took hold of him and "forcefully pushed" him to the ground. (Plaintiffs' Pretrial Memorandum at 16; Amended Complaint ¶ 41). The officers then handcuffed Plaintiff and

placed him in a police vehicle. Marable, Jr. is unsure which officers participated in his arrest.

Having released the Marable children, the police then took Marable, Sr. from a police vehicle. (Plaintiffs' Pretrial Memorandum at 16). Plaintiff alleges that when Marable, Sr. stumbled, officers jumped on him and arrested him for interfering with the arrest of Marable, Jr. (Plaintiffs' Pretrial Memorandum at 16). At Marable, Sr.'s guilty plea hearing for the charges arising from this incident, however, he admitted attacking Officer Bertolet when he tried to arrest Plaintiff. (Transcript of Hearing, Dec. 10, 2002, at 14-15).

As a result of the events at the Marable residence, Marable, Sr. was charged with disorderly conduct, aggravated assault, simple assault, and resisting arrest. (Plaintiffs' Opposition to Defendants Douglass-Berks Township and John Henry's Motion for Summary Judgment at 88). He pled guilty to disorderly conduct, and was sentenced to 12 months probation. (Transcript of Hearing, Dec. 10, 2002, at 15; Defendants' Exhibit 20). Marable, Sr. was also charged with harassment, terroristic threats, and disorderly conduct arising from the Wawa incident. (Transcript of Hearing, Dec. 10, 2002, at 14-16). He pled *nolo contendere* to the harassment charges and was fined \$100.00. (Transcript of Hearing, Dec. 10, 2002, at 16). All other charges were dismissed. *Id.* Officer Bertolet instituted a civil suit against Marable, Sr., and the matter was settled.

Marable, Jr. was charged with resisting arrest and terroristic threats. (Transcript of Hearing, June 3, 2002, 2002, at 3; Defendants' Exhibits 15, 21). On June 3, 2002, he entered a plea of *nolo contendere* to the resisting arrest charge, and was sentenced to one year of supervised probation and a \$100.00 fine. (Transcript of Hearing, June 3, 2002, 2002, at 10).

Plaintiff filed the instant action on June 20, 2003, alleging that the Defendant Townships

violated his constitutional rights by failing properly to train, supervise, and control their officers. (Amended Complaint ¶¶ 58, 59). Plaintiff further alleges that the Defendant Officers violated his constitutional rights by: (1) subjecting him to malicious prosecution; (2) falsely arresting him or unlawfully detaining him; (3) using excessive force in arresting him; (4) committing abuse of process; and (5) conspiring to deprive him of his rights because of race. (Amended Complaint ¶¶ 59, 66). Plaintiff also makes Pennsylvania state law claims against the Defendant Officers for: (1) malicious prosecution; (2) false arrest; (3) intentional infliction of emotional distress; and (4) assault and battery. (Amended Complaint ¶¶ 68, 70, 72, 74). Defendants move for summary judgment.

DISCUSSION

I. Plaintiff's Section 1983 Claims

To make out a violation of § 1983, Plaintiff must show that a person acting under color of state law deprived him of a federal right. Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). The Supreme Court has held that "municipalities and other local governmental bodies are 'persons' within the meaning of § 1983." Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 117 S. Ct. 1382, 1387-1388, 137 L. Ed. 2d 626 (1997); McMahon v. Westtown-East Goshen Police Dep't, No. 98-3919, 1999 U.S. Dist. LEXIS 5551, *17 (E.D. Pa. Apr. 22, 1999). Further, as the Officers concede that they were carrying out their official duties throughout the incidents in question, they were acting under the color of state law. See Russoli v. Salisbury Twp., 126 F. Supp. 2d 821, 839 (E.D. Pa. 2000) ("[a]ctions by an officer in his official capacity are under color of law even if they are not in furtherance of state policy and even if they violate state law") (citing Monroe v. Pape, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S.

Ct. 473 (1961)). Accordingly, I must address whether the conduct of these state actors deprived Plaintiff of a federal right.

A. The Townships' Alleged Derelictions

Plaintiff contends that the Defendant Townships are liable for failing “properly [to] train, supervise, and control their officers regarding false arrests, excessive force and malicious prosecution.” (Amended Complaint at ¶59).

A governmental entity cannot be held liable under a theory of respondeat superior or vicarious liability. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691-692, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1991). Rather, a municipality can be liable under § 1983 "only for acts implementing an official policy, practice or custom of the municipality." Russoli, 126 F. Supp. 2d at 839 (citing Monell v. Dept. of Social Services, 436 U.S. 658, 690-691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)).

A single unconstitutional act by a municipal official is insufficient to establish liability unless the plaintiff can demonstrate that it was caused by an existing unconstitutional policy attributable to a municipal policymaker. Oklahoma City v. Tuttle, 471 U.S. 808, 823-824, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985); Baker v. Monroe Twp., 50 F.3d 1186, 1191 (3d Cir. 1995); Groman, 47 F.2d at 637; Jackson v. Mills, No. 96-3751, 1997 U.S. Dist. LEXIS 14467, *23-24 (E.D. Pa. Sept. 4, 1997). Plaintiff must show that the "municipal policy or custom . . . amounts to deliberate indifference to the rights of people with whom the police come into contact." Carswell v. Borough of Homestead, 381 F.3d 235, 244 (3d Cir. 2004) (citing City of Canton v. Harris, 489 U.S. 378, 388, 103 L. Ed. 2d 412 109 S. Ct. 1197 (1989)). The plaintiff must "identify the challenged policy, attribute it to the municipality, and show that the execution of the

policy caused the injury suffered by the plaintiff." Russoli, 126 F. Supp. at 839 (citing Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984)). The plaintiff must demonstrate "a direct causal link between [the] municipal policy or custom and the alleged constitutional deprivation." Carswell, 381 F.3d at 244 (quoting Brown v. Muhlenberg Township, 269 F.3d 205, 214 (3d Cir. 2001)).

To establish a failure to train claim against a municipality, a plaintiff generally must show that

responsible municipal policymakers had actual or constructive knowledge of incidents or conduct which were so likely to result in future violations of constitutional rights that their failure adequately to train their employees to prevent this reasonably can be said to constitute tacit approval or deliberate indifference to the need to ensure the particular right in question and to represent a policy for which the municipality is responsible.

Jackson, 1997 U.S. Dist. LEXIS 14467, *22-23 (citing City of Canton, 489 U.S. at 390; Simmons v. City of Philadelphia, 947 F.2d 1042, 1059-60 (3d Cir. 1991), cert. denied, 503 U.S. 985, 112 S. Ct. 1671, 118 L. Ed. 2d 391 (1992)). Plaintiff cannot sustain a "failure to train claim merely by showing that a particular officer acted improperly or simply that better training would have enabled an officer to avoid the particular conduct causing injury." Jackson, 1997 U.S. Dist. LEXIS 14467, at *23; Simmons, 947 F.2d at 1060.

Plaintiff's legal memorandum -- over 100 pages long -- is not a model of clarity. Although Plaintiff makes numerous, confusing allegations respecting the unconstitutional acts that purportedly occurred here, he makes no allegations that any *policy* of the Defendant Townships was unconstitutional. See, e.g., (Plaintiff's Opposition to Defendants Douglass-Berks Township and John Henry's Motion for Summary Judgment at 49, 58). Accordingly, he has not

made out an unconstitutional policy claim under § 1983. See Oklahoma City v. Tuttle, 471 U.S. 808; Baker v. Monroe Twp., 50 F.3d 1186 (3d Cir. 1995); see, e.g., Noone v. City of Ocean City, 60 Fed. Appx. 904, 910-911 (3d Cir. 2003) (unpublished opinion) (affirming summary judgment where officer's actions were part of an isolated incident "that was neither officially sanctioned nor ordered by Municipal Defendants"); O'Rourke v. Krapf, No. 01-3065, 2002 U.S. Dist. LEXIS 18358, *31 (E.D. Pa. Sept. 20, 2002) ("[s]howing that [the municipality's officers] arrested [plaintiff] unlawfully would be insufficient, standing alone, to find the [defendant city] liable").

Plaintiff's claims for failure to train appear to be based mainly on a purported lack of training regarding the arrest of juveniles. (Plaintiff's Opposition to Defendants Douglass-Berks Township and John Henry's Motion for Summary Judgment at 37, 99). These allegations do not relate to the Officers' treatment of Plaintiff himself, however, and the claims of the juveniles in this case -- Marable III and Merritt Marable -- have been resolved and are not part of Plaintiff's Complaint. See Dismissal Order pursuant to Local Rule 41(b), May 19, 2005.

Plaintiff has offered no expert testimony to support his claim, nor did he produce any expert evidence to rebut Defendants' expert report that the Townships properly trained and supervised the Officers. (Defendants' Exhibit 36, Expert Report of Joseph Stine); see Russo v. City of Cincinnati, 953 F.2d 1036, 1047 (6th Cir. 1992) (discussing value of expert testimony in failure to train claims). Further, Plaintiff has not alleged a failure to train or deficient policy that could be causally connected to any alleged constitutional deprivation he suffered. Additionally, Plaintiff puts forth no evidence that would suggest that any of the Defendant Officers had a history of making unlawful arrests, using excessive force, or initiating malicious prosecutions. Plaintiff purports to present evidence of two alleged "stalking" incidents and one "harassment"

incident involving Officer Ziegler. In two of the incidents, however, no formal complaint was filed, and in the third, the complainant was arrested for filing a false police report. (Steven Ziegler Deposition, October, 20, 2004, at 131-140). Such evidence is not causally connected to Plaintiff's alleged harm. Nor is it sufficiently significant or widespread that constructive knowledge of incidents likely to result in future constitutional violations may be ascribed to the municipality. See Jackson, 1997 U.S. Dist. LEXIS 14467, at *22-23.

In these circumstances, the undisputed facts do not make out the § 1983 claims brought against the Defendant Townships. Accordingly, I grant their summary judgment motion.

B. § 1983 Claims Against the Defendant Officers

Malicious Prosecution

Plaintiff has alleged that he was “falsely accused of and prosecuted for disorderly conduct, resisting arrest, and other charges.” (Amended Complaint ¶ 54). To establish a malicious prosecution claim under § 1983, Plaintiff must show:

- (1) the defendants initiated a criminal proceeding;
- (2) the criminal proceeding ended in the plaintiff's favor;
- (3) the proceeding was initiated without probable cause;
- (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and
- (5) the plaintiff suffered a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.

DiBella v. Borough of Beechwood, 407 F.3d 599 (citing Estate of Smith v. Marasco, 318 F.3d 497, 521 (3d Cir. 2003)); Wyatt v. Keating, 2005 U.S. App. LEXIS 6110, *14.

Plaintiff's *nolo contendere* plea to resisting arrest and the facts he admitted during the *nolo* plea proceeding bar his malicious prosecution claim. The Supreme Court has held that a plaintiff may not base a § 1983 action on events leading to a conviction that has not been

reversed or impaired if a judgment for the plaintiff in the § 1983 case would imply that the conviction was invalid. Heck v. Humphrey, 512 U.S. 477, 487, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994); Douglas v. Public Safety Comm., No. 01-419, 2002 U.S. Dist. LEXIS 17293, *25-26 (D. Del. Sept. 13, 2002). I believe Heck controls here. Under Pennsylvania law, the only difference between a guilty plea and *nolo* plea is that the latter would not be admissible in a civil trial. See Eisenberg v. Commonwealth, Dep't of Public Welfare, 512 Pa. 181 (citing Commonwealth v. Ferguson, 44 Pa. Superior Ct. 626 (1910)). Otherwise “a criminal defendant who offers a plea of *nolo contendere* to a given charge stands in the same shoes as one who has been convicted of the charged offenses.” Moser v. Bascelli, 879 F. Supp. 489, 493 (E.D. Pa. 1995) (citing Commonwealth v. Perrillo, 426 Pa. Super. 1, 626 A.2d 163, 166, appeals denied, 535 Pa. 674, 636 A.2d 633 (1993)). Plaintiff has presented no evidence to suggest that his state court criminal conviction has been “invalidated.” Heck, 114 S. Ct. at 2372. Indeed, at the *nolo* proceeding, Plaintiff did not dispute facts on which the Defendant Officers based their arrest:

[T]he defendant [Marable, Jr.] pulled up in a white vehicle, exited the vehicle, and started interfering with the officers, and in a loud voice, the defendant stated: I have something for all you mother f---ers. And went into the father's house [where Marable, Sr. had previously told the Officers he kept a gun].

Transcript of Court Proceeding, June 3, 2002 at 7. Plaintiff's theory underlying his § 1983 action -- including his malicious prosecution and unlawful arrest claims -- is that he neither interfered with the Officers, nor threatened them. A verdict for Plaintiff on these claims would necessarily contradict the facts he did not contest in state court and imply the invalidity of the resulting criminal conviction. In these circumstances, Heck bars these claims. See Douglas, 2002 U.S. Dist. LEXIS 17293, *25-26; Fritz v. City of Corrigan, 163 F. Supp. 2d 639, 641 (E.D. Tex. 2001)

(Heck bars § 1983 action where plaintiff contested the factual basis of his *nolo contendere* plea).

Plaintiff's malicious prosecution claim also fails on other grounds. First, as discussed below, there was probable cause to arrest Plaintiff. Accordingly, Plaintiff cannot make out malicious prosecution. See, e.g., Wright v. City of Philadelphia, 2005 U.S. App. LEXIS 10370, *25 (3d Cir. 2005).

Further, the Third Circuit has held that a plaintiff alleging malicious prosecution must prove *actual* innocence to satisfy the favorable termination requirement. See Hector v. Watt, 235 F.3d 154, 156 (3d Cir. 2000); Steele v. City of Erie, 113 Fed. Appx. 456, *9 (3d Cir. 2004) (unpublished opinion); Taylor v. Winters, 115 Fed. Appx. 549 (3d Cir. 2004) (unpublished opinion); Backof v. N.J. State Police, 92 Fed. Appx. 852, 856 (3d Cir. 2004) (unpublished opinion). "If the prosecutor drops the charges as part of a compromise with the accused, the accused will fail the favorable termination prong necessary to maintain a malicious prosecution claim under § 1983." Taylor, 115 Fed. Appx. 456, *9 (citing Hilferty, 91 F.3d at 580; Alianell v. Hoffman, 317 Pa. 148, 176 A.2d 207 (1935)); see also, Donahue v. Gavin, 280 F.3d 371, 383 (3d Cir. 2002). Here, Plaintiff pled *nolo contendere* to resisting arrest as part of a prearranged agreement with the Commonwealth, as the transcript of the plea proceeding demonstrates:

Defense Counsel: Mr. Marable will be entering a nolo contendere to the charges brought by the Commonwealth.

The Court: To both terroristic threats and resisting arrest?

Defense Counsel: It is an offer for Your Honor to be presented by the Commonwealth.

The Court: What is it to, Mr. McDonnell?

Prosecutor: Count 2, resisting arrest.

The Court: *Is there a plea agreement?*

Defense Counsel: *There is Your Honor; one year probation.*

The Court: Is that what you are here to do?

Mr. Marable: Yes, it is.

See Transcript of Hearing, June 3, 2002, at 3 (emphases added). In light of this plea agreement and the Third Circuit's holdings in Taylor and Hilfirty, Plaintiff is unable to satisfy the favorable termination requirement. See Steele, 113 F.3d 456, *10 ("the revelation that a plea agreement has been reached does not demonstrate the actual innocence that is required under Hector"); Donahue v. Gavin, 280 F.3d 371, 384 (3d Cir. 2002).

Moreover, although a “grant of nolle prosequi can be sufficient to satisfy the favorable termination requirement,” this is only true where the dismissal “indicat[es] the innocence of the accused.” Donahue, 280 F.3d at 383-384. Here, there is no such indication. The prosecutor at Plaintiff’s plea hearing indicated -- without contradiction from Plaintiff -- that the Commonwealth was prepared to prove that Plaintiff told the Officers “I have something for all you mother f---ers and went into the father's house . . . [Marable, Jr.’s] father stated that there were guns in the house . . .” Transcript of Court Proceeding, June 3, 2002 at 7. At a minimum, such uncontested facts preclude Plaintiff’s attempt to show that the Commonwealth withdrew the terroristic threat charge because he was actually innocent, as required under Hector. See, e.g., Donahue, 280 F.3d at 384.

For all these reasons, I am obligated to dismiss Plaintiff’s malicious prosecution claim.

False Arrest

Plaintiff claims that the Defendant Officers violated the Fourth Amendment by arresting

him without probable cause. Once again, Plaintiff's *nolo* plea likely bars this claim. See Heck, 114 S. Ct. at 2372; Douglas, 2002 U.S. Dist. LEXIS 17293, *25-26; Fritz, 163 F. Supp. 2d at 641. In any event, it is clear that the police had ample basis to arrest Plaintiff. Accordingly, this claim must fail for this reason as well.

To make out false arrest under § 1983, Plaintiff must show that Defendants unlawfully detained him. See, e.g., Dowling v. City of Pennsylvania, 855 F.2d 136, 141 (3d Cir. 1988); Renk v. City of Pittsburgh, 537 Pa. 68, A.2d 289, 293 (Pa. 1994); Taylor v. City of Philadelphia, No. 03-3068, 2004 U.S. Dist. LEXIS 9422, *44-45 (E.D. Pa. May 20, 2004). "The existence of probable cause to arrest a plaintiff is fatal to a § 1983 claim based on false arrest." Morley v. Phila. Police Dep't., No. 03-880, 2004 U.S. Dist. LEXIS 12771, *32 n.14 (E.D. Pa. July 7, 2004); Tarlecki v. Mercy Fitzgerald Hospital, No. 01-1347, 2002 U.S. Dist. LEXIS 12937 (E.D. Pa. July 15, 2002) (probable cause will defeat a claim for false arrest). The Third Circuit has held that probable cause to arrest exists:

when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested.

Rogers v. Powell, 120 F.3d 446, 453 (3d Cir. 1997) (citations omitted); O'Rourke v. Krapf, No. 01-3065, 2002 U.S. Dist. LEXIS 18358, *21 (E.D. Pa. Sept. 20, 2002).

I may conclude that probable cause exists as a matter of law if the evidence, viewed in a light most favorable to Plaintiff, "reasonably would not support a contrary factual finding." Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997); Cherry v. Garner, 2004 U.S. Dist. LEXIS 26060, *34 (E.D. Pa. Dec. 30, 2004). "Probable cause is not needed on each and every offense that could be charged; probable cause is only needed for one of the offenses that may be

charged under the circumstances." Ankele v. Hambrick, No. 02-4004, 2003 U.S. Dist. LEXIS 8817, *16 (citing Barna v. City of Perth Amboy, 42 F.3d 809, 819 (3d Cir. 1994)); see also Wright v. City of Philadelphia, 2005 U.S. App. LEXIS 10370, *20 (3d Cir. 2005) ("[i]t is irrelevant to the probable cause analysis what crime a suspect is eventually charged with"); United States v. Bookhardt, 77 F.3d 558, 565 n.10 (D.C. Cir. 2002).

In the circumstances presented here, the decision to arrest Plaintiff was constitutional; no reasonable factfinder could disagree. See Sherwood, 113 F.3d at 401; Cherry, 2004 U.S. Dist. LEXIS 26060, *34. When Marable, Jr. spat in Officer Ziegler's face, he afforded the police more than ample basis to arrest him for assault, resisting arrest, and other crimes. See 18 Pa. Cons. Stat. §§ 2701 (assault), 5104 (resisting arrest), 5503 (disorderly conduct). Plaintiff may not proceed with his false arrest allegations as long as the police reasonably *could have* charged him with these crimes. Barna, 42 F.3d at 819 ("probable cause need only exist as to any offense that could be charged under the circumstances"); Ankele, 2003 U.S. Dist. LEXIS 8817, *16. Plaintiff's decision not to contest the resisting arrest charge confirms the propriety of Defendants' decision to arrest him for that crime. Nicholson v. City of Westlake, 20 Fed. Appx. 400 (6th Cir. 2001) (unpublished opinion).

Although Plaintiff admits that he spat in Officer Ziegler's face, he contends this did not create lawful grounds for his arrest:

Maybe if Ziegler and Bertolet had not confronted Marable, Jr. on his parent's property where he was only verbally protesting the officers' detention of his children, Junior would not have "unintentionally spat on his face" from his protestations, which he had a right to do. A jury can certainly find that unintentional spitting on the efface [sic] of a police officer, who confronts a protester on his own property does not rise to a reasonable basis for detention . . .

(Plaintiff's Opposition to Defendants Douglass-Berks Township and John Henry's Motion for Summary Judgment at 48 fn.19). I disagree with Plaintiff's remarkable analysis. Having received a report of Marable, Sr. threatening another with a gun, the Defendant Officers acted reasonably in investigating the incident. See e.g., Gilmore v. City of Atlanta, 774 F.2d 1495, 1509 (11th Cir. 1985) (en banc). Plaintiff cannot seriously contend that his frustration at the Officers having detained his sons created a lawful basis for his "unintentionally" spitting in Officer Zielger's face.

Finally, it is undisputed that the police believed that they were confronting at least one suspect with a gun who had threatened to "blow the head off" Mazzerle. Marable, Sr. told the police that he kept a gun in the house, and Plaintiff repeatedly entered and exited the house, telling police officers, "I have something for you." (Plaintiffs' Pretrial Memorandum at 16, 18). Although Plaintiff alleges he was referring to his lawyer, in the totality of the circumstances presented here, the decision to arrest him was also reasonable. See 18 Pa. Cons.Stat. § 2706; United States v. William, No. 03-315, 2004 U.S. Dist. LEXIS 1164, *10-11 (E.D. Pa. Jan.13, 2004) ("the offense of terroristic threats may arise from the totality of the [defendants' [conduct]] and does not depend upon the particular words uttered.") (quoting Commonwealth v. White, 232 Pa. Super. 176, 335 A.2d 436, 439 (Pa. Super. 1975)).

The police had more than reasonable basis to arrest Marable, Jr. Accordingly, I grant summary judgment as to Plaintiff's unlawful arrest claim.

Excessive Force

Marable, Jr. alleges that unidentified officers violated his Fourth Amendment rights when, in the process of arresting him, they "forcefully pushed [him] to the ground." (Amended

Complaint ¶ 41). Plaintiff offers no medical evidence that he sustained any resulting injury, nor has he offered any expert evidence that the force used was excessive or unnecessary.

The Supreme Court has held that “all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment reasonableness standard.”

Graham v. Connor, 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1965 (1989). The Graham

Court further stated:

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers violates the Fourth Amendment.

. . . [T]he reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to the their underlying intent or motivation.

Id. at 396-397 (internal cites and quotes omitted).

In assessing whether the force used was excessive, I must employ a totality of the circumstances test, including an analysis of “whether the suspect posed an immediate threat to the safety of the officer or others, whether the suspect was actively resisting arrest, and the severity of the crime at issue.” Hung v. Watford, No. 01-3580, 2002 U.S. Dist. LEXIS 23064, at *5 (citing Curley v. Klem, 298 F.3d 271, 279 (3d Cir. 2002); see Ankele v. Hambrick, 2003 U.S. Dist. LEXIS 8817, *32 (E.D. Pa. May 7, 2003) (court is obligated to afford police latitude in their use of force when they are confronted by an uncertain situation).

Given Plaintiff's conduct and the tense situation facing the Officers, a reasonable jury would necessarily conclude that the force used in arresting Plaintiff was reasonable. See, e.g.,

Ankele, 2003 U.S. Dist. LEXIS 8817, *32 (“[t]he law cannot condemn such conduct in ‘circumstances that are tense, uncertain, and rapidly evolving.’”) (quoting Graham, 490 U.S. at 397). Plaintiff, by his own admission, was extremely upset, to the point that he was shouting at the Officers and “unintentionally” spitting in Officer Ziegler's face. Plaintiff admits that he entered and exited Marable, Sr.'s house numerous times after Marable, Sr. had told the Officers the house contained a gun. See, e.g., Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir. 1997) (a relevant factor in assessing an excessive force claim is the possibility that the suspect may be armed). Particularly in light of Plaintiff’s *nolo contendere* plea to resisting arrest, the force used here -- "forcefully" pushing Plaintiff to the ground and handcuffing him -- was not excessive. (Marable, Jr. Deposition, October 19, 2004, at 39); see Hannah v. City of Dover, No. 01-312, 2005 U.S. Dist. LEXIS 1629 (D. Del. Mar. 30, 2005) (dismissing excessive force claim where police officers struggled to handcuff plaintiff and sprayed him with Capstun); Birdine v. City of Coatesville, 347 F. Supp. 2d 182, 185 (E.D. Pa. Nov. 30, 2004) (dismissing excessive force claim where police officer seized plaintiff's wrists to effect an arrest); Pahle v. Colebrookdale, 227 F. Supp. 2d 361, 373 (E.D. Pa. 2002) (what is “reasonable” is measured, in part, by “whether the subject is actively resisting arrest”) (citing Tennessee v. Garner, 471 U.S. 1, 8-9 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)); Mitchell v. Borough, No. 01-1203, 2002 U.S. Dist. LEXIS 3041, *14-15 (E.D. Pa. Feb. 22, 2002); Modugno v. Pennsylvania State Police, No. 00-3312, 2001 U.S. Dist. LEXIS 18148, *15 (E.D. Pa. Nov. 6, 2001) (holding that an officer was justified in using physical force and pepper spray, where the suspect shouted angrily and refused verbal orders).

Significantly, Marable, Jr. has failed to put forth any evidence of physical injuries suffered as a result of the alleged excessive force. See Ankele v. Hambrick, 2003 U.S. Dist.

LEXIS 8817, *32 (E.D. Pa. May 7, 2003). Plaintiff has offered no expert evidence that the force used was excessive. Nor has Plaintiff offered any expert evidence to rebut Defendants' expert report that the Officers' use of force was reasonable. (Motion for Summary Judgment by Upper Pottsgrove Township at 2); (Defendants' Exhibit 36, Expert Report of Joseph Stine); see, e.g., Gibson v. Borough of W. Chester, 2004 U.S. Dist. LEXIS 1166, *18 (E.D. Pa. Jan. 13, 2004) (dismissing excessive force claim where plaintiff offered no expert testimony that the defendant officer's actions were improper); c.f. Vak La v. Hayducka, 122 Fed. Appx. 557, 558 (3d Cir. 2004) (unpublished opinion) (affirming District Court's holding that "the dispute, generated by [d]efendant [officer's] testimony and [plaintiff's] expert opinion . . . creates a material issue of fact that must be presented to a jury").

In these circumstances, no reasonable jury could conclude that the Officers used objectively unreasonable force. See Mitchell, at *15. Accordingly, I grant summary judgment as to Plaintiff's excessive force claim.

Abuse of Process

A § 1983 abuse of process claim "lies where prosecution is initiated legitimately and thereafter is used for a purpose other than that intended by the law." Rose v. Bartle, 871 F.2d 331, 350 (3d Cir. 1989). The Pennsylvania Supreme Court has explained the difference between a claim for malicious prosecution and one for abuse of process: a malicious prosecution claim involves the wrongful initiation of criminal process; abuse of process involves perversion of process "for some unlawful object" *after* it has issued. McGee v. Feege, 517 Pa. 247, 253, 535 A.2d 1020, 1023 (Pa. 1987) (citations omitted) (quoting Publix Drug Co. v. Breyer Ice Cream Co., 347 Pa. 346, 32 A.2d 413 (1943)); Jennings v. Shuman, 567 F.2d 1213, 1217 (3d Cir. 1977);

Williams v. Fedor, 69 F. Supp. 2d 649, 673 (M.D. Pa. 1999); Russoli, 126 F. Supp. 2d at 858.

Examples of claims for abuse of process include "extortion by means of attachment, execution or garnishment, and blackmail by means of arrest or criminal prosecution." Russoli, 126 F. Supp. 2d at 858 (citing Bristow, 80 F. Supp. 2d at 431 (collecting cases)). Significantly, there is no liability "where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Russoli, 126 F. Supp. 2d at 858 (citing Cameron v. Graphic Management Assoc., Inc., 817 F. Supp. 19, 21 (E.D. Pa. 1992); DiSante v. Russ Financial Co., 251 Pa. Super. 184, 380 A.2d 439, 441 (Pa. Super. Ct. 1977)).

Here, there is no evidence that the Officers "perverted" a properly initiated criminal action, or that they sought anything other than Plaintiff's criminal conviction. See Russoli, 126 F. Supp. 2d at 858. Indeed, Plaintiff's decision not to contest the resisting arrest charges tends to confirm this. Accordingly, I grant summary judgment as to Plaintiff's abuse of process claim.

Section 1985 Claim against the Defendant Officers

Plaintiff, an African-American, also alleges under 42 U.S.C. § 1985(3) that the Defendant Officers conspired to deprive him of his constitutional rights based on his race. Such a claim is limited to private conspiracies based on "racial, or perhaps otherwise class-based, invidiously discriminatory animus." Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997) (citing Griffin v. Breckenridge, 403 U.S. 88, 102, 29 L. Ed.2d 338, 91 S. Ct. 1790 (1971)). To establish a § 1985(3) violation, Plaintiff must show: (1) a conspiracy; (2) motivated by a racial animus designed to deprive any persons or class of person of the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to the person or property or the deprivation of any right or privilege of a citizen of the United States. See United Bhd. of Carpenters and

Joiners of America v. Scott, 463 U.S. 825, 829, 77 L. Ed. 2d 1049, 103 S. Ct. 3352 (1983)); Arnold, 112 F.3d at 685; Turner v. City of Philadelphia, 22 F. Supp. 2d 434, 440 (E.D. Pa. 1998). Such a conspiracy claim "requires a clear showing of invidious, purposeful and intentional discrimination between classes or individuals." Robinson v. McCorkle, 462 F.2d 111, 113 (3d Cir. 1972); Crawford v. Pennsylvania, No. 03-693, 2003 U.S. Dist. LEXIS 16358 (E.D. Pa. Sept. 12, 2003).

Significantly, Marable, Jr. admitted that other than his "personal feelings," he had no evidence that the Officers' actions were racially motivated. (Marable, Jr. Deposition, October 19, 2004 at 43-44). Further, Marable, Sr. stated that none of the Officers used derogatory racial terms toward him or members of his family. (Marable, Sr. Deposition, October 19, 2004 at 75). Indeed, the only race-related comment from any of the Officers was a *denial* of racist motivation. In response to a suggestion made by Plaintiff's mother that Plaintiff's arrest was racially motivated, Officer Henry purportedly responded, "I have black friends." (Plaintiffs' Opposition to Defendants Douglass-Berks Township and John Henry's Motion for Summary Judgment at 21).

In these circumstances, Plaintiff has presented no evidence to support his claim of a racially motivated conspiracy to violate his civil rights. Gonzalez v. Feiner, 2005 U.S. App. LEXIS 8370 (3d Cir. 2005) (unpublished opinion); Vak La v. Hayducka, 269 F. Supp. 2d 566 (D. Del. 2003); Jackson, 1997 U.S. Dist. LEXIS 14467; Wichard v. Cheltenham Twp., 1996 U.S. Dist. LEXIS 12660, *30 (E.D. Pa. Aug 29, 1996). On the contrary, the undisputed facts confirm that Defendants arrested Plaintiff because they believed he broke the law. Plaintiff's *nolo* plea confirms the reasonableness of that belief. Accordingly, I grant summary judgment as to

Plaintiff's § 1985(3) claim.

State Law Claims against the Defendant Officers

Malicious Prosecution

To establish malicious prosecution under Pennsylvania state law, Plaintiff must demonstrate that (1) Defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the Plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) Defendants acted maliciously or for a purpose other than bringing Plaintiff to justice. Bristow v. Clevenger, 80 F. Supp. 2d 421, 432 (E.D. Pa. 2000) (citing Haefner v. Burkey, 626 A.2d 519, 521 (Pa. 1993)); Griffiths v. CIGNA Corp., 988 F.2d 457, 463 (3d Cir. 1993).

As discussed previously, Plaintiff is neither able to show that the criminal proceeding ended in his favor, or that the proceeding was initiated without probable cause. Accordingly, I grant summary judgment as to this claim.

False Arrest

The Pennsylvania Supreme Court has held that the elements of false arrest are: (1) the detention of another person; and (2) the unlawfulness of the detention. Vazquez v. Rosnagle, 163 F. Supp. 2d 494, 501 (E.D. Pa. 2001) (citing Fagan v. Pittsburgh Terminal Coal, 299 Pa. 109, 149 A.2d 159 (1930)); see also McGriff v. Vidovich, 699 A.2d 797, 799 (Pa. Cmwlth. 1997). As under § 1983, the proper inquiry is whether the arresting officers had probable cause to believe the person arrested had committed the offense. An arrest "based upon probable cause is justified, regardless of whether the individual arrested was guilty or not." Renk, 537 Pa. 68, 641 A.2d at 293 (citing Fagan v. Pittsburgh Terminal Coal Corp., 299 Pa. 109, 149 A.2d 159 (1930)).

Because I have already ruled that the Officers had probable cause to arrest Plaintiff, the false arrest claim must fail.

Assault and Battery

Plaintiff alleges that in violation of state law, unidentified police officers assaulted him during his arrest. In Pennsylvania, an “assault is an intentional attempt by force to do an injury to the person of another, and a battery is committed whenever to violence menaced in an assault is actually done, though in ever so small a degree, upon the person.” Renk v. City of Pittsburgh, 537 Pa. 68, 76, 641 A.2d 289 (1994); Pahle v. Colebrookdale, 227 F. Supp. 2d 361, 376 (E.D. Pa. 2002). In a case alleging assault and battery by a police officer, the Pennsylvania Supreme Court explained:

A police officer may use reasonable force to prevent interference with the exercise of his authority or the performance of his duty. In making a lawful arrest, a police officer may use such force as is necessary under the circumstances to effectuate the arrest. The reasonableness of the force used in making the arrest determines whether the police officer’s conduct constitutes an assault and battery.

Renk, 537 Pa. at 76; 18 Pa. Cons. Stat. § 508.

Because I have determined that the force used to arrest Plaintiff was reasonable in the circumstances, the Defendant Officers' conduct does not constitute assault and battery under Pennsylvania state law. See Graham, 490 U.S. at 396 (an officer's "right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it").

Intentional Infliction of Emotional Distress

The Third Circuit has predicted that the Pennsylvania Supreme Court would adopt the "evolving tort" of intentional infliction of emotional distress as articulated by Section 46 of the

Restatement (Second) of Torts. Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273-1275 (3d Cir. 1979) (en banc); Williams v. Guzzardi, 875 F.2d 46, 50-52 (3d Cir. 1989) ("absent a clearer statement from Pennsylvania's Supreme Court, we remain bound by Chuy"); Clark v. Falls, 890 F.2d 611, 623 (3d Cir. 1989).

To establish a claim for intentional infliction of emotional distress, Plaintiff must show that the "conduct [is] so outrageous in character, and extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Hoy v. Angelone, 554 Pa. 134, 151, 720 A.2d 745, 754 (Pa. 1998) (quoting Buczek v. First National Bank of Miffltown, 366 Pa. Super. 551, 558, 531 A.2d 1122, 1125 (1987)). "[I]t has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort." Hoy, 554 Pa. at 151 (quoting Restatement (Second) of Torts § 46, comment d)); Daughen v. Fox, 372 Pa. Super. 405, 412, 539 A.2d 858, 861 (1988)).

It is for the court "to determine, as a preliminary matter, if the defendant's conduct is so extreme and outrageous as to permit recovery." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988); Mansmann v. Tuman, 970 F. Supp. 389, 402-403 (E.D. Pa. 1997); see also Restatement (Second) of Torts § 46, comment h. A claim for intentional infliction of emotional distress "must be supported by competent medical evidence." McMahon v. Westtown-East Goshen Police Dep't, 1999 U.S. Dist. LEXIS 5551, *17 (E.D. Pa. Apr. 22, 1999) (quoting Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 527 A.2d 988, 995 (Pa. 1987)).

Here, the Defendant Officers' conduct was neither "outrageous" nor "atrocious." As

described by Plaintiff, the Officers were faced with a tense and potentially explosive situation with guns at or near the scene. Further, Plaintiff was extremely angry, shouting at the Officers and "unintentionally" spitting in Officer Ziegler's face. To arrest Plaintiff "forcefully" in such circumstances is not "utterly intolerable in a civilized society." See, e.g., Sanders v. City of Philadelphia, 209 F. Supp. 2d 439 (E.D. Pa. 2002) (granting summary judgment on intentional infliction of emotional distress where police officer allegedly arrested plaintiff without probable cause and used handcuffs that were too tight); Atkinson v. City of Philadelphia, No. 99-1541, 2000 U.S. Dist. LEXIS 8500 (E.D. Pa. Jun. 20, 2000); Williams v. Fedor, 69 F. Supp. 2d 649 (M.D. Pa. 1999).

Finally, Plaintiff has offered no supporting medical evidence. This also warrants dismissal of his emotional distress claim. See McMahon, 1999 U.S. Dist. LEXIS 5551, *17 (dismissing claim where Plaintiff failed to put forth medical evidence of his emotional distress).

Because Plaintiff has not made out intentional infliction of emotional distress, I will dismiss the claim.

CONCLUSION

Pursuant to FED. R. CIV. P. 56, I dismiss Plaintiff's Amended Complaint with prejudice. In light of this decision, I need not address Defendants' remaining arguments in support of summary judgment.

Paul S. Diamond, J.