

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

<b>EMMETT TIMOTHY BROWN,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>TRAVIS SAUNDERS, et al.,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 93-1951</b>

**MEMORANDUM**

**Reed, J.**

**July 31, 1997**

Plaintiff Emmett Timothy Brown brings this action against defendants Pennsylvania Parole Agent Travis Saunders ("Saunders"), Parole Supervisor Anthony DiBernardo ("DiBernardo") and agents working with [them] (collectively referred to as "defendants") pursuant to 42 U.S.C. § 1983, seeking damages and declaratory relief. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331.

Currently before this Court is the motion by defendants for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure (Document No. 21), the response by plaintiff thereto (Document No. 22), and the supplemental motion by defendants for summary judgment (Document No. 35).<sup>1</sup> For the following reasons, the motions by defendants will be granted.

**I. BACKGROUND**

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1. The motion for summary judgment and the supplemental motion for summary judgment will be read and decided together as defendants incorporate their first motion in their papers supporting the supplemental motion. I note that although served with a copy of same (Document No. 35), plaintiff did not file a response to the supplemental motion for summary judgment.

On May 9, 1983, plaintiff was sentenced to four to twelve years in prison under a conviction for robbery and conspiracy. On August 12, 1992, plaintiff was granted parole by the Pennsylvania Board of Probation and Parole ("PBPP"). Saunders had, at one point, been assigned as the parole agent for Brown. As part of the conditions governing his parole, plaintiff expressly consented to searches of his "person, property and residence without a warrant by agents of the Pennsylvania Board of Probation and Parole." Mem. of Defs. Ex. D. He also agreed to abstain from possession, use or sale of narcotics and dangerous drugs, to participate in an anti-drug therapy program which required regular attendance at meetings, and to refrain from any assaultive behavior. The plaintiff was subject to curfew restrictions as well. The PBPP was authorized to recommit plaintiff to prison if he violated the terms of his parole agreement.

Plaintiff does not contest that he violated terms of his parole agreement when he failed to attend his mandatory drug therapy program, tested positive for illegal drug use, and failed to return to his approved residence before curfew. Due to these violations, the PBPP decided to arrest Brown. On January 15, 1993, defendants proceeded to the barber shop where they knew that plaintiff was currently working to arrest him for the violations of his parole agreement. Upon entering the barber shop, defendants learned that plaintiff was in the restroom. They repeatedly ordered him to come out, though plaintiff denies this. In the following moments, the restroom door bursted open and a struggle ensued as the parole officers attempted to gain control of plaintiff.<sup>2</sup> The defendants and plaintiff both reported various injuries resulting from the struggle.

On January 16, 1993, plaintiff was arrested and charged with aggravated assault, reckless endangerment, simple assault and resisting arrest as a result of the events that took place on the previous day. On March 29, 1993, plaintiff was adjudicated not guilty

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2. The parties dispute who actually opened the restroom door and who initiated the struggle. The parties also dispute whether plaintiff made visual contact with his parole agent Saunders and the other defendants before defendants entered the barber shop.

of all charges in Philadelphia Municipal Court by the Honorable Ronald B. Merriweather. On April 21, 1993, plaintiff filed a complaint claiming that defendants failed to identify themselves and used excessive force while making an arrest, and made a false claim of aggravated assault and resisting arrest. In their answer to the complaint, defendants denied all allegations and filed a counterclaim for assault and battery.

On September 28, 1993, defendants filed a motion for summary judgment (Document No. 21). On October 4, 1993, plaintiff filed a response to the motion for summary judgment (Document No. 22). This Court issued an Order dated November 10, 1993 (Document No. 33) directing the parties to further brief the issues.<sup>3</sup> On December 8, 1993, defendants filed a supplemental motion for summary judgment (Document No. 35). Plaintiff subsequently filed motions requesting medical papers to document his alleged injuries stemming from the January 15, 1993 incident (Document Nos. 36, 37) and filed a motion to subpoena transcripts of the March 23, 1993 court proceedings (Document No. 39).<sup>4</sup> However, plaintiff did not file a response to the supplemental motion by defendants for summary judgment. Plaintiff did not submit discovery, affidavits or any admissible evidence contradicting the evidentiary record submitted by the defendants.

## II. LEGAL STANDARD

The standard for a summary judgment motion in federal court is set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) states:

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3. The Order permitted defendants to file a supplemental motion to adequately address claims of the plaintiff that defendants violated his constitutional right under the Fourth Amendment to be free from unreasonable seizure when they failed to identify themselves before arresting him and when they used excessive force while arresting him, as well as the claim that defendants violated his constitutional right to due process under the Fourteenth Amendment when they made false claims against the plaintiff of aggravated assault and resisting arrest. This Court further ordered that if additional discovery was necessary to create an adequate record for the defendants to prosecute a motion for summary judgment on the issues set forth above, or for the plaintiff to defend against any such motion, a motion setting forth the precise discovery required was to be filed.

4. Neither plaintiff nor defendants filed a motion seeking further discovery as permitted in the Court's November 10, 1993 Order. The results of the requests of plaintiff for medical records and a copy of the transcript requested by plaintiff would not effect the decision I reach today.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In addition, a dispute over a material fact must be "genuine," *i.e.*, the evidence must be such "that a reasonable jury could return a verdict in favor of the non-moving party." Id.

The moving party has the initial burden to identify evidence that it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing'--that is, pointing out to the District Court--that there is an absence of evidence to support the non-moving party's case." Id. at 325. If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). The court must consider the evidence of the non-moving party as true, drawing all justifiable inferences arising from the evidence in favor of the non-moving party. Anderson, 477 U.S. at 255. To defeat the motion for summary judgment, the non-moving party must offer specific facts contradicting those set forth by the movant, thereby showing that there is a genuine issue for trial. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990).

The Court interprets motions involving pro se prisoners with special care, mindful to construe complaints liberally and afford pro se litigants all reasonable latitude. "[P]ro se prisoner complaints 'however inartfully pleaded' are held to 'less stringent

standards than formal pleadings drafted by lawyers." Muhammad v. Carlson, 739 F.2d 122, 123 (3d Cir. 1984) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

Plaintiff has demonstrated an assertive, creative and effective talent and ability to prosecute his case. He sought and won a series of motions for discovery. He researched and cited substantive case law on the merits of his claim in support of earlier motions, in defending the initial motion for summary judgment, and in seeking delay in resolution of the motions by defendants for summary judgment. In light of this activity, I draw an inference that plaintiff prosecuted his case reasonably well to a point where he decided not to defend his position further when he did not respond to the supplemental motion by defendants for summary judgment.

### III. DISCUSSION

Plaintiff brings claims pursuant to § 1983 asserting that defendants failed to identify themselves and used excessive force to arrest him in violation of the Fourth Amendment and asserting that defendants made a false claim against him of aggravated assault and resisting arrest in violation of his right to due process under the Fourteenth Amendment. I will consider each claim in seriatim.<sup>5</sup>

#### A. Failure to Identify

Plaintiff alleges that defendants violated his constitutional right under the Fourth Amendment to be free from unreasonable seizure when they failed to identify

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5. In the response of plaintiff to the motion for summary judgment, plaintiff also argues that defendants conducted an unlawful warrantless search and that parole officers are required to obtain a warrant to arrest him at a place other than his "approved work place." Mem. of Pl. ¶¶ 1, 1(A). However, plaintiff did not raise this argument in his complaint. This argument would, nevertheless, fail on its merits. In light of the special needs of the parole system, parole officers are permitted to conduct warrantless searches and seizures of parolees who have expressly consented to such searches, provided they have "reasonable grounds" to believe that the parolee violated conditions of his parole. See United States v. Hill, 967 F.2d 902, 908-10 (3d Cir. 1992) (citing Griffin v. Wisconsin, 483 U.S. 868, 876, 879 (1986)); see also Bey v. Hines, No. CIV.A.92-1595, 1993 WL 5494, at \*2-3 (E.D. Pa. Jan. 5, 1993); Commonwealth v. Gayle, 673 A.2d 927, 930 (Pa. Super. 1996) (quoting Commonwealth v. Rosenfelt, 662 A.2d 1131, 1134 (Pa. Super. 1995)). Violations of parole constitute reasonable grounds for a warrantless search and seizure of a parolee. See Jarvis El v. Pandolfo, 701 F. Supp. 98, 102 (E.D. Pa. 1988). Failure of a parolee to report to a required meeting is a violation of parole. Id. Thus, I find that a factfinder could find that defendants had reasonable grounds to arrest parolee without a warrant and the plaintiff has not refuted this conclusion.

themselves before arresting him. Compl. ¶ IV. The Fourth Amendment requires law enforcement officers to knock and identify themselves, announce their purpose and wait for a reasonable period of time before forcible entry. These principles are codified in Rule 2007 of the Pennsylvania Rules of Criminal Procedure.<sup>6</sup> Pa. R. Crim. P. 2007; Commonwealth v. Bull, 618 A.2d 1019, 1021-22 (Pa. Super. 1993), aff'd, 650 A.2d 874 (Pa. 1994), cert. denied, 115 S. Ct. 2577 (1995). However, this rule is subject to exigent circumstances which excuse compliance with the knock and announce requirement. Id. at 1022 (citing Commonwealth v. Norris, 446 A.2d 246, 248 (Pa. 1982)). Exigent circumstances include where the occupants remain silent after repeated knocking and announcing and where the law enforcement officers are virtually certain that the occupants of the premises already know their purpose. Bull, 618 A.2d at 1022; Commonwealth v. Means, 614 A.2d 220, 222 (Pa. 1992).

It is undisputed that Saunders was, at one point, the parole agent for plaintiff. Supplemental Decl. of DiBernardo ¶ 5; Answer of Pl. to Countercl. ¶ 3. Plaintiff does not deny knowing Saunders and being able to recognize him. Therefore, defendants have presented admissible evidence that plaintiff saw and recognized Saunders on January 15, 1993 before the struggle ensued. Defendants offer sworn testimony that plaintiff saw them in clear view as they approached the place of business of plaintiff. Supplemental Decl. of DiBernardo ¶ 6. Although plaintiff contends this account is mistaken, he presents no admissible evidence by way of sworn testimony, affidavits, accounts of eyewitnesses or other evidence to support his contention. Mem. of Pl. ¶ 1(AA). I find that it makes no material difference to the analysis whether plaintiff recognized Saunders before entering the bathroom or once the bathroom door opened.

I further find that defendants abided by the knock and announce rule.

Assuming that plaintiff did not see defendants before entering the bathroom, defendants

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6. Although Rule 2007 guides law enforcement officers who are executing a search warrant, Pennsylvania law permits parole officers to conduct warrantless arrests of a parolee upon reasonable grounds of parole violations. See Hill, 967 F.2d at 908-10.

offer sworn testimony that they gave plaintiff "repeated orders" to come out. Supplemental Decl. of DiBernardo ¶ 6. Because plaintiff offers no verified, admissible evidence to refute hearing those orders, I find that there is no genuine issue of material fact in dispute that defendants announced and plaintiff heard their orders.

I also find that it is uncontradicted that exigent circumstances warranted forcible entry without announcement. Exigent circumstances permit officers to forcibly enter when they are virtually certain that plaintiff knows their purpose and refused to yield. See Means, 614 A.2d at 222. Defendants submit evidence that they believed plaintiff saw them and recognized Saunders as his parole agent and thus knew their purpose. Plaintiff offers no evidence, such as a curtain blocking the view into the barber shop from the street, to refute the contention of defendants. Therefore, defendants have presented uncontradicted evidence that defendants believed that plaintiff saw them and knew their purpose. Thus, plaintiff raises no genuine issue of material fact that would preclude defendants from forcible entry under an exigent circumstance exception to the knock and announce rule. Having found that there is no genuine issue of material fact, the claim of plaintiff that defendants did not identify themselves fails.

**B. Excessive Force**

In his complaint, plaintiff alleges that defendants violated his constitutional right under the Fourth Amendment to be free from unreasonable seizure when defendants used excessive force while arresting him, allegedly causing an injury to his left wrist and causing damage to his work place. The Supreme Court of the United States has spoken definitively on the standard for evaluating claims of excessive force. "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 and its 'reasonableness' standard . . . ." Graham v. Connor, 490 U.S. 386 (1989); see also Dodson v. Devlin, CIV. A. No. 93-5776, 1995 WL 350270, at \*3 (E.D. Pa. June 6, 1995) (applying same standard to arrest of parolee).

"The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper 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.

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. . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers." violates the Fourth Amendment. 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.

Graham, 490 U.S. at 396-97 (internal quotations omitted). The reasonableness inquiry in excessive force claims applies an "objectively reasonable" standard, in light of the facts and circumstances confronting the officers, without regard to their underlying intent or motivation. Id. at 397.

Defendants submitted medical records in support of their denial of using excessive force. The Court has studied records from both the hospital where plaintiff was treated and from the intake of plaintiff to State Correctional Institution at Graterford on the date that the allegedly excessive force was used. The Court characterizes those records as demonstrating that the medical staff conducted a complete intake physical and laboratory examination. I find that the medical records reveal that plaintiff did not complain about, nor is there demonstrated on his body, any evidence of injury or physical altercation. Given his lack of injury and the fact that a struggle ensued when the plaintiff attempted "to evade arrest by flight," the evidence weighs in favor of defendants. Id. at 396. I find, as a matter

of law, that upon consideration of the record as a whole including the medical records and actions of the plaintiff when he was arrested demonstrate that plaintiff has not and cannot present admissible evidence that the defendants used excessive force under the circumstances to arrest plaintiff and take him into custody.

Plaintiff failed to support his allegation of excessive force. He did not respond to the supplemental motion for summary judgment or provide admissible evidence contradicting the records and affidavits (declarations) of the defendants. In a factually similar case, a parolee claimed that his probation officer used excessive force by allegedly "manhandling" him during an arrest for parole violations. Van Brackle v. Pennsylvania Parole Bd., No. CIV.A.96-2276, 1996 WL 544229, at \*1 (E.D. Pa. Sept. 26, 1996). The Court granted summary judgment for the defendant when plaintiff conceded that he was not "physically beat' and that he did not suffer any physical injuries." Id. at \*3. Although plaintiff does allege to have sustained injuries, unlike Van Brackle, the evidentiary record does not support his claim. Conclusory allegations of injuries are insufficient to survive a motion for summary judgment. See Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). Plaintiff failed to offer specific facts to document his injuries contradicting those set forth by defendants. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990). Having found that there is no evidence to support his claim, plaintiff fails to raise a genuine issue of material fact to support his allegation of excessive force.

**C. False Claim**

Plaintiff alleges that defendants violated his constitutional right to due process under the Fourteenth Amendment when they made false claims of aggravated assault and resisting arrest. Compl. ¶ IV. Plaintiff was subsequently adjudicated not guilty of all charges. Supplemental Mem. of Def. Ex. B. Research conducted by this Court reveals no cause of action for "false claim" in Pennsylvania applicable to the present circumstances. Although plaintiff does not present a specific legal theory to support his allegation of a "false

claim," this Court applies a liberal pleading standard and construes the complaint to allege malicious prosecution.

To state a claim under § 1983 for malicious prosecution in Pennsylvania, the plaintiff must "demonstrate that: (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; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice." Hilferty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996) (citing Haefner v. Burkey, 626 A.2d 519, 521 (Pa. 1993)); Miller v. Philadelphia, 954 F. Supp. 1056, 1066 (E.D. Pa. 1997) (holding that malicious prosecution remains a valid claim under § 1983); Brooks v. Carrion, CIV. A. No. 96-1172, 1996 WL 563897, at \*3 n.2 (E.D. Pa. Sept. 26, 1996). A plaintiff may allege malicious prosecution against both the individual who made the claim and the actual prosecuting agency, in the present case, the office of the Philadelphia District Attorney. See Brooks, 1996 WL 563897, at \*2 (malicious prosecution claim brought against the arresting state trooper who "directed or caused the prosecution of plaintiff").<sup>7</sup> Therefore, the contention of defendants that only the District Attorney, but not the parole officers, are subject to claims of malicious prosecution is incorrect. Although defendants are subject to liability, the Court concludes that plaintiff has failed to produce evidence to raise a genuine issue of material fact to support his claim.

Plaintiff correctly states that being found not guilty in the criminal proceeding is required evidence to support his claim of malicious prosecution, thereby meeting the second element of the test. However, the criminal proceeding resulting in favor of the plaintiff, by itself, is insufficient to support a claim of malicious prosecution. Plaintiff failed

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7. The Supreme Court of the United States called into question the viability of a malicious prosecution cause of action under § 1983 as violative of the substantive due process clause of the Fourteenth Amendment. See Albright v. Oliver, 114 S. Ct. 807, 811 (1994); Brooks, 1996 WL 563897, at \*2. However, the Court of Appeals for the Third Circuit subsequently reinstated the analysis of malicious prosecution that existed prior to Albright. See Hilferty, 91 F.3d at 579; Brooks, 1996 WL 563897, at \*3. Because plaintiff fails to provide evidence of a genuine issue of material fact to support his claim of malicious prosecution, see discussion infra, I will engage in no further analysis regarding the underlying viability of a cause of action for malicious prosecution.

to submit any admissible evidence to prove that the criminal proceeding was initiated without probable cause or that the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice. See Hilfirty, 91 F.3d at 579.

Defendants, in contrast, clearly demonstrated a reasonable basis to bring the charges that plaintiff claims are malicious. Defendants swear under oath on this record that plaintiff resisted arrest and that they sustained injuries from the ensuing struggle.

Supplemental Decl. of DiBernardo ¶ 7. Furthermore, they submitted medical records as evidence to support their claim. Supplemental Mem. of Def. Ex. D. Therefore, a factfinder could reasonably find that defendants acted on probable cause and without malice. Despite having the opportunity to conduct additional discovery, plaintiff has submitted no admissible evidence to refute the contention of defendants. Therefore, I find that plaintiff has not demonstrated that a genuine issue of material fact exists as to the malicious prosecution claim.

**D. Affirmative Defenses**

Defendants present an alternative ground to support their motion for summary judgment on the basis of absolute immunity and qualified immunity. Because there is no genuine issue of material fact as to the plaintiff's claims, for reasons previously stated, the Court does not reach these defenses on their merits.

**IV. CONCLUSION**

In summary, plaintiff failed to submit admissible evidence to support his claims that defendants failed to identify themselves, used excessive force to arrest plaintiff and brought a false claim against plaintiff. Accordingly, summary judgment will be granted in favor of the defendants and against plaintiff.

An appropriate Order follows.

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

<b>EMMETT TIMOTHY BROWN,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>TRAVIS SAUNDERS, et al.,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 93-1951</b>

**ORDER**

**AND NOW**, this 31st day of July, 1997, upon consideration of the motion by defendants Travis Saunders, Anthony DiBernardo and agents working with [them] for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure (Document No. 21), the response of the plaintiff Emmett Timothy Brown thereto (Document No. 22), and the supplemental motion by defendants for summary judgment (Document No. 35), and having found from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, and for the reasons set forth in the foregoing memorandum, that the moving defendants are entitled to judgment as a matter of law, it is hereby **ORDERED** that the motion of the defendants is **GRANTED** and summary judgment is hereby entered in favor of Travis Saunders, Anthony DiBernardo and agents working with [them] and against Emmett Timothy Brown.

This is a final Order.

LOWELL A. REED, JR., J.