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

PHILLIP F. POLLARINE	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-CV-5312
	:	
DAVID BOYER, ET AL.	:	

SURRICK, J. **MARCH 22, 2006**

MEMORANDUM & ORDER

Presently before the Court is Defendants' Motion For Summary Judgment (Doc. No. 28). For the following reasons, Defendants' Motion will be granted.

I. BACKGROUND

Initially we note that Plaintiff's response to the Motion for Summary Judgment focuses primarily on Plaintiff's assertion that the motion is premature. Plaintiff suggests that discovery in the matter has not been completed and requests additional time to complete discovery.

This lawsuit was filed on November 15, 2004. It involves an incident that occurred in November 2002. The Initial Pretrial Conference in this case was held on August 30, 2005.[1] At that conference, a discovery schedule was discussed with counsel and counsel mutually agreed that discovery would be completed in five (5) months. Counsel were advised that a Scheduling Order would be entered that provided that all discovery, expert and otherwise, would be completed no later than January 31, 2006. Counsel were also advised that no extensions of the discovery deadline would be granted except for the most compelling reasons. The Scheduling

[1] Defendants filed a Motion To Dismiss Plaintiff's Complaint on January 27, 2005. (Doc. No. 4.) Defendants' Motion was granted in part and denied in part by our Memorandum and Order dated July 29, 2005. (Doc. No. 15.) Between January 27, 2005 and June 8, 2005, Plaintiff requested and was granted at least two extensions of time to file pleadings responsive to the Motion.

Order, which was entered on August 31, 2005, contained these provisions among others. (Doc. No. 21.) We heard nothing from counsel until January 31, 2006, when we received Plaintiff's Motion for Extension of Discovery Deadline (Doc. No. 26). In the Motion, Plaintiff requested an extension of the deadline until March 31, 2006. The Motion advised that Plaintiff had not yet deposed the police officers who allegedly violated his constitutional rights when they arrested him on November 16, 2002, nor had he deposed the District Justice who was responsible for incarcerating him after his arrest and after he violated the terms and conditions of his bail. Plaintiff had also failed to depose the District Justice who accepted Plaintiff's plea of guilty to the reduced charge of disorderly conduct. Plaintiff offered no compelling reason for these failures. On February 2, 2006, we denied this Motion. (Doc. No. 27.)

On February 28, 2006, twenty-eight days after the discovery deadline expired, and fourteen days after Defendant filed the instant Motion for Summary Judgement, Plaintiff filed Plaintiff's Motion Under Fed. R. Civ. Proc. 33(b)(5), 34(b), and 37 to Compel Discovery Responses (Doc. No. 30). This was the first and only motion to compel filed by Plaintiff in this litigation. In this Motion, Plaintiff alleged that Defendants had failed and refused to comply with or respond completely to Plaintiff's discovery requests, thus frustrating Plaintiff's ability to develop and present his case. Plaintiff requested that the Court compel the deposition of the police officers involved in Plaintiff's arrest and requested that the discovery deadline be extended to June 1, 2006.

On March 6, 2006, we entered an Order denying Plaintiff's Motion. (Doc. No. 33.) Appropriate authority was cited in that Order. It is clear that Plaintiff simply disregarded the Scheduling Order entered on August 31, 2005. It is also clear that Plaintiff has failed to provide

the Court with any compelling reason for his failures. The parties requested and were given five months to complete discovery. During that five-month period, the only deposition taken was the deposition of Plaintiff, and that deposition was taken by Defendants. Plaintiff suggests that Defendants are at fault. However, during the entire five-month discovery period Plaintiff never filed a motion to compel or requested that this Court intervene. We reject the assertion that Defendants are at fault. Accordingly, we conclude Defendant's Motion For Summary Judgement is in fact ripe for disposition.

II. FACTS

On November 16, 2002, Plaintiff and his fifteen-year-old son, Nicholas, were involved in a verbal dispute at Plaintiff's residence. During the dispute, Plaintiff hit Nicholas in the face, causing a visible red mark. (Doc. No. 1 ¶ 17; Pollarine Dep. at 31, 36-38, 46.) Nicholas called 911 and told the dispatcher that his father was trying to kill him. (Pollarine Dep. at 33.) While his son was on the line with the dispatcher, Plaintiff picked up another telephone extension and told the dispatcher that his son had mental and emotional issues and indicated that nothing should be done in response to his son's call. The dispatcher proceeded to inform Plaintiff that she was obligated to send a police car to Plaintiff's home and that a car was on its way. Plaintiff told the dispatcher that he would speak with the police when they arrived and hung up. (*Id.* at 33-34.)

The police officers arrived shortly thereafter and Nicholas permitted them to enter the house. (Doc. No. 1 ¶ 20; *id.* at Ex. A; Pollarine Dep. at 56.) Nicholas told Defendant Detective Sergeant David Boyer that his father had just attacked him, punching him in the face, head, and lower back. Boyer observed bruises and scratches on Nicholas's face and arms. Boyer also observed a cut over Nicholas's eye and red marks on Nicholas's back and around his neck. (Doc.

No. 1 at Ex. A; Pollarine Dep. at 59.) Nicholas was not able to speak to the police officers without crying. Nicholas told the police officers that Plaintiff was in the upstairs master bathroom. The officers went upstairs and knocked on the door. When there was no answer, Boyer forced the bathroom door open. (Doc. No. 1 at Ex. A; Pollarine Dep. at 49-52.) Plaintiff testified that the officers kicked open the door. (Pollarine Dep. at 49.) Boyer instructed Plaintiff to come out of the bathroom. Plaintiff refused initially, but came out into the bedroom after a few minutes. When Boyer told Plaintiff that he had to come with Boyer, Plaintiff asked Boyer if he was being arrested and what the charges were. According to Plaintiff, Boyer responded: "How about if I start with resisting arrest . . . [and] aggravated assault?" (*Id.* at 58.) Plaintiff told the officers that he would not come with them voluntarily. (*Id.* at 51-58, 60-61.) Because Plaintiff was not wearing pants at this point, one of the officers threw a pair of pajama pants towards Plaintiff. Plaintiff informed the officers that he would get another pair himself. Boyer again told Plaintiff that he had to come with the police and Plaintiff responded, "I'm not going to go." (*Id.* at 60; Doc. No. 1 at Ex. A.)

When Plaintiff started to walk away from the officers, the officers grabbed him and pushed or threw him down on the bed. (Pollarine Dep. at 63.) They told Plaintiff that they were going to handcuff him, but Plaintiff, who was lying face down on the bed, put his hands under his chest. Plaintiff resisted and refused to be handcuffed. Plaintiff claims that one of the officers knelt on his back. Both of the officers attempted to pull Plaintiff's arms out from under his body so that they could handcuff him. Plaintiff continued to resist. (*Id.* at 61-64, 70.) Plaintiff told

the officers that he was disabled and that he was in pain.[2] Plaintiff testified that Boyer was standing behind him while the other officers were restraining and attempting to handcuff Plaintiff. (*Id.* at 65, 71-72.) Boyer then threatened to pepper spray Plaintiff if he did not calm down. At this point Plaintiff began to calm down, and the officers let go of his arms. Plaintiff rolled over and sat up on the bed. The officers then applied the handcuffs. (Pollarine Dep. at 65-68.) After the officers helped Plaintiff put on a pair of pants, they took him downstairs and outside to wait for a police vehicle.

After processing at the East Norriton Police Department, Plaintiff was arraigned before District Justice Michael Richman. Plaintiff was charged with the simple assault of his son[3] and resisting arrest.[4] (Doc. No. 1 ¶ 35.) Plaintiff was released on unsecured bail and was advised by Justice Richman to stay away from his home for several days. (*Id.* ¶ 36.) A hearing was

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[2] Plaintiff suffers from severe lower lumbar back problems for which he was receiving therapy at Bryn Mawr Rehab Hospital just prior to this incident. He has been certified as disabled by the Social Security Administration. For a number of years, Plaintiff has also suffered from anxiety and depression secondary to post-traumatic stress disorder, and has received therapy for anger management. He is under the care of a psychiatrist and regularly takes the medications Paxil and Xanax for these problems. (Pollarine Dep. at 90-96.)

[3] In Pennsylvania, the crime of simple assault is defined as follows: "A person is guilty of assault if he . . . (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another . . . ." 18 Pa. Cons. Stat. § 2701(a).

[4] In Pennsylvania, the crime of resisting arrest is defined as follows:

> A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

Id. § 5104.

scheduled for November 26, 2002. According to Plaintiff, on November 18, 2002, his wife asked him to return to their home, which he then did. He was observed at the home by the police. On November 21, 2002, Boyer called Plaintiff to inform him that he was coming to Plaintiff's house to pick him up for violating the terms of his bail. (Pollarine Dep. at 105.) Plaintiff then called District Justice Ester Casillo, who told Plaintiff to accompany Boyer to her Court. (*Id.* at 116.) Plaintiff did so, and when he was brought before District Justice Casillo, she told Plaintiff that when he had returned to his residence, he had violated the conditions of the bail set by District Justice Richman. District Justice Casillo then remanded Plaintiff to the Montgomery County Correctional Facility ("MCCF") to await the hearing on November 26, 2002. Although East Norriton police officers took Plaintiff's medications to MCCF, prison officials withheld these items from Plaintiff.[5] (*Id.* at 132-33.)

On November 26, 2002, Plaintiff was brought before District Justice Casillo where he agreed to plead guilty to the reduced charge of disorderly conduct and to pay a fine for that offense. (Doc. No. 1 ¶¶ 57-58; *id.* at Exs. A-D). Thereafter, the plea was entered and the charges of simple assault and resisting arrest were dismissed.

Plaintiff initiated the instant lawsuit on November 15, 2004. Defendants now move for summary judgment.

[5] It is not disputed, however, that Plaintiff was able to talk to a nurse while at MCCF, and that prison officials did administer medicines that were deemed to be the equivalent of Plaintiff's prescription medication. (Doc. No. 1 ¶ 48; Pollarine Dep. at 134.) Plaintiff was also allowed access to his breathing machine after his first day at MCCF. (Pollarine Dep. at 129.)

III. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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 genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the nonmoving party's legal position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (explaining that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). "The nonmoving party . . . 'cannot rely merely upon bare assertions, conclusory allegations or suspicions' to support its claim." *Townes v. City of Phila.*, Civ. A. No. 00-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman's Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v. Carrier*

Express, Inc., 54 F.3d 1125, 1127 (3d Cir. 1995). We do not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

IV. LEGAL ANALYSIS

A. 42 U.S.C. § 1983

Plaintiff brings a claim against Defendants under 42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Section 1983 does not create substantive rights. *Doe v. Delie*, 257 F.3d 309, 314 (3d Cir. 2001). Rather, it provides a remedy "for any person who has been deprived of rights secured by the Constitution or laws of the United States by a person acting under color of law." *Curley v. Klem*, 298 F.3d 271, 277 (3d Cir. 2002) (citing *Gruenke v. Seip*, 225 F.3d 290, 298 (3d Cir. 2000)); *see also Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). A plaintiff must prove an underlying statutory or constitutional violation in order to prevail under 42 U.S.C. § 1983. *See, e.g.*, *Daniels v. Williams*, 474 U.S. 327, 330 (1986) (holding that in order to recover in a § 1983 suit, a "plaintiff must still prove a violation of the underlying constitutional right"); *Doe*, 257 F.3d at 314.

1. § 1983 Claim Against Officer Boyer

In approaching the merits of this § 1983 claim, we begin by identifying "the exact contours of the underlying right said to have been violated" and then determining "whether the

plaintiff has alleged a deprivation of a constitutional right at all." *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000) (internal quotation omitted). Plaintiff's Complaint alleges the following:

> The aforesaid actions of the Defendants were in violation of 42 U.S.C. §1983 and caused the Plaintiff to be deprived of rights, privileges, and immunities secured by the United States and Pennsylvania Constitutions and other laws, including but not limited to:
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> (a) Invasion of privacy;
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> (b) Assault and battery;
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> (c) Use of excessive force;
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> (d) False arrest;
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> (e) Illegal detention;
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> (f) Arrest without probable cause;
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> (g) Arrest and detention without due process of law;
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> (h) False imprisonment;
>
> (i) Reckless disregard of his medical condition.

(Doc. No. 1 ¶ 79.)

Defendants claim that there is no factual support for any of Plaintiff's claims. We agree. After a careful review of the record, and particularly the deposition testimony of Plaintiff himself, we are satisfied that Plaintiff's constitutional rights were not violated in any way.

a. Claim of Excessive Force[6]

As an initial matter, we note that the record before the Court contains no indication that Defendant Boyer ever personally used any force, let alone excessive force, against Plaintiff.

[6] Plaintiff's claim of excessive force includes the claim that he was the victim of assault and battery at the hands of the police.

Indeed, Plaintiff's own testimony indicates that Boyer did not physically touch Plaintiff during his seizure and subsequent arrest. (Pollarine Dep. at 63-72.) Plaintiff stated in his deposition that Boyer stood behind him while the three other officers restrained him on the bed. (*Id.* at 64-65.) Boyer stood in front of Plaintiff while the other officers handcuffed him. (*Id.* at 71.) However, some courts have permitted a plaintiff to establish that an officer violated § 1983 under a theory of bystander liability. Under this theory, an officer is liable if he knows that a fellow officer is violating an individual's constitutional right, has a reasonable opportunity to prevent the harm, but chooses not to act. *See Jackson v. Mills*, No. 96-3751, 1997 WL 570905, at *5 (E.D. Pa. Sept. 4, 1997); *Fernandors v. District of Columbia*, 382 F. Supp. 2d 63, 72 (D.D.C. 2005); *Travis v. Village of Dobbs Ferry*, 355 F. Supp. 2d 740, 752 (S.D.N.Y. 2005); *Nowell v. Acadian Ambulance Servs*., 147 F. Supp. 2d 495, 507 (W.D. La. 2001).

Plaintiff asserts that Defendant Boyer and the other police officers—who are not named as defendants in this action—used excessive force against him in violation of his constitutional rights when they restrained him in his bedroom during the course of his arrest. "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394 (1989). When the alleged violation arises from an arrest, the Fourth Amendment is implicated. *Id.* at 395; *see also Abraham v. Raso*, 183 F.3d 279, 288 (3d Cir. 1999) (noting that "excessive force in the course of an arrest is properly analyzed under the Fourth Amendment, not under substantive due process" (citing *Graham*, 490 U.S. at 393-94)).

"A claim for excessive force under the Fourth Amendment requires a plaintiff to show that a seizure occurred and that it was unreasonable." *Curley*, 298 F.3d at 279 (citing *Abraham*,

183 F.3d at 288). A plaintiff must demonstrate that the use of force "is excessive under objective standards of reasonableness." *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001). "A seizure occurs 'whenever an officer restrains the freedom of a person to walk away.'" *Curley*, 298 F.3d at 279 (quoting *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)). Here, the police officers restrained Plaintiff's freedom when they threw him on the bed in order to place handcuffs on him.

In reviewing whether a seizure was unreasonable, and thus a violation of the plaintiff's constitutional rights, a court must determine whether the officer's "actions were objectively reasonable in light of the facts and circumstances confronting him, regardless of his underlying intent or motivation." *Curley*, 298 F.3d at 279 (internal quotations omitted); *see also Graham*, 490 U.S. at 396 (noting that a court must conduct its inquiry "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"). The amount of permissible force that may be used to effectuate an arrest is based on the totality of the circumstances. *Graham*, 490 U.S. at 396. In this context, "'totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force." *Abraham*, 183 F.3d at 291. In reviewing the totality of the circumstances, a court should consider "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." *Curley*, 298 F.3d at 279 (citing *Abraham*, 183 F.3d at 289).

Here, Boyer and his fellow police officers were dispatched to Plaintiff's residence in response to a 911 telephone call in which Plaintiff's son, Nicholas, stated that his father was hitting him and threatening to kill him. Boyer observed that Nicholas could not talk to the police officers without crying, and that there was a cut on his face and red marks on his body. When

Plaintiff did not come downstairs upon the officers' arrival, the officers went upstairs and found Plaintiff in the bathroom. Plaintiff initially refused to come out of the bathroom. He then refused to go with the police officers, telling them that he would not leave his home voluntarily. He began to move away from the police officers. Plaintiff is 5'11" tall and weighs approximately 365 pounds. When the officers attempted to handcuff Plaintiff, he resisted. The officers threw Plaintiff onto the bed and attempted to pull his arms from under his body so that they could apply the handcuffs. Plaintiff continued to resist until Boyer threatened to use pepper spray. There is no indication that the officers knew that Plaintiff suffered from back problems until he was on the bed with the officers attempting to free his hands to apply the handcuffs. We are satisfied that the amount of force used by the police officers was reasonable and not excessive in light of the circumstances.

To the extent that Plaintiff claims that Boyer used excessive force in threatening to use pepper spray on Plaintiff unless Plaintiff behaved, Plaintiff was resisting arrest. Plaintiff was yelling while lying face down on the bed, with his hands underneath his body to avoid being handcuffed. The officers were attempting to pull his arms out from under his body. (*Id.* at 62-64.) Boyer's threat to use pepper spray was certainly justified under the circumstances. Moreover, it had the desired effect. Plaintiff began to calm down and cooperate with the police. He was then taken down the stairs and out of the house. The threat to use pepper spray on a person who is actively resisting arrest does not constitute the use of excessive force.

b. Claim of False Arrest[7]

Plaintiff asserts that Boyer and the non-defendant officers lacked probable cause to arrest him, in violation of the Fourth Amendment. The Fourth Amendment prevents a police officer from arresting a citizen without probable cause. *Orsatti v. N.J. State Police*, 71 F.3d 480, 482 (3d Cir. 1995). A warrantless public arrest does not violate the Fourth Amendment "where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). Therefore, to prevail on a § 1983 claim for false arrest, a plaintiff must establish that he was arrested without probable cause. *Santiago v. City of Vineland*, 107 F. Supp. 2d 512, 561 (D.N.J. 2000).

A court must review the totality of the circumstances to assess whether an officer had probable cause to arrest an individual. *Sharrar v. Felsing*, 128 F.3d 810, 818 (3d Cir. 1997) (citing *United States v. Glasser*, 750 F.2d 1197, 1205 (3d Cir. 1984)). In determining whether an officer had probable cause for an arrest, a court, in reviewing the totality of the circumstances, must "examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). In a § 1983 action, a jury generally should determine whether an officer had probable cause to make an arrest. *Sharrar*, 128 F.3d at 818. However, "'where no genuine issue as to any material fact exists and where credibility conflicts are absent, summary judgment

[7] Plaintiff's claim of false arrest includes his claims of false imprisonment and illegal or improper detention.

may be appropriate.'" *Id.* (quoting *Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 192 (3d Cir. 1984)); *see also Montgomery v. De Simone*, 159 F.3d 120, 124 (3d Cir. 1998).

In Pennsylvania, 18 Pa. Cons. Stat. § 2711 governs probable cause arrests in domestic violence cases. It provides in pertinent part:

> A police officer shall have the same right of arrest without a warrant as in a felony whenever he has probable cause to believe the defendant has violated section 2504 (relating to involuntary manslaughter), 2701 (relating to simple assault), 2702(a)(3), (4) and (5) (relating to aggravated assault), 2705 (relating to recklessly endangering another person), 2706 (relating to terroristic threats) or 2709.1 (relating to stalking) against a family or household member although the offense did not take place in the presence of the police officer. A police officer may not arrest a person pursuant to this section without first observing recent physical injury to the victim or other corroborative evidence.

18 Pa. Cons. Stat. § 2711. In this case, Boyer and his fellow officers were responding to a 911 call from Plaintiff's son in which the son indicated that Plaintiff was trying to kill him. Plaintiff concedes that he did in fact hit his son and that it left a visible mark on Nicholas's face. When Boyer arrived at Plaintiff's home in response to the call, Nicholas met him at the door. Nicholas was crying, and there were visible signs of injury on his body. Boyer certainly had probable cause to believe that Nicholas was the victim of domestic violence at the hands of his father. The arrest and detention of Plaintiff were perfectly proper.

c. Invasion of Privacy

Plaintiff's claim of invasion of privacy also fails. The police officers were invited into Plaintiff's house by Nicholas, who met them at the door. Moreover, they had probable cause to believe that Plaintiff had committed a crime and was in the home. Under the Pennsylvania domestic violence statutes, they did not need a warrant to make this arrest. *See* 18 Pa. Cons. Stat. § 2711. There was no invasion of privacy. *See Kolender v. Lawson*, 461 U.S. 352, 369 n.7

(1983) ("When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the State and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed, even if charges are dismissed or the individual is acquitted."). Accordingly, we will grant Defendants' summary judgment motion with respect to Plaintiff's invasion of privacy claim.

d. Claim for Reckless Disregard of Medical Condition

Plaintiff provides no legal or factual support for his claim that Boyer's alleged disregard of Plaintiff's medical condition constitutes a constitutional violation. We will treat this claim as a claim for failure to treat a medical condition, a violation of the substantive due process clause of the Fourteenth Amendment.[8] *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *Hogan v. City of Easton*, No. 04-759, 2004 U.S. Dist. LEXIS 16189, at *31 (E.D. Pa. Aug. 15, 2004). "In order to state a claim for unconstitutional deprivation of medical care under the Fourteenth Amendment, a plaintiff must allege (1) a serious medical need and (2) acts or omissions by the police officers that indicate deliberate indifference to that need." *Hogan*, 2004 U.S. Dist. LEXIS 16189, at *31 (citing *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 582 (3d Cir. 2003)). "A medical need is serious if it is 'one that is so obvious that

[8] The courts recognize a claim for deliberate indifference to medical needs by prisoners based on the Eighth Amendment's prohibition on "cruel and unusual punishments." *See, e.g.*, *Andrews v. Camden County*, 95 F. Supp. 2d 217, 227 (D.N.J. 2000). However, to the extent that Plaintiff's claim is based on the failure of the MCCF to attend to his various medical needs, such claims cannot be raised against Defendants Boyer and East Norriton Township Police Department. These named Defendants were not responsible for Plaintiff's care while in the custody of the MCCF. We therefore limit Plaintiff's claim to Boyer's conduct.

a lay person would easily recognize the necessity for a doctor's attention.'" *Id.* (citing *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987)).

Plaintiff's claim appears to be based on the fact that while being arrested, Plaintiff allegedly told the officers that he had just had back surgery. There is nothing in the record to indicate that at the time of the arrest Plaintiff's medical need was so serious or obvious that a lay person would recognize the necessity for a doctor's attention. Once the police officers had Plaintiff in their custody and handcuffed, they ceased to physically restrain him. The entire process of restraining and handcuffing Plaintiff did not take more than a couple of minutes, according to Plaintiff. (Pollarine Dep. at 68.) Afterwards, Plaintiff was able to go down the stairs with the officers' assistance, and then stand outside for approximately twenty minutes while waiting for the police vehicle. (*Id*. at 74-82.) There is no indication that Plaintiff ever asked for medical assistance while in Boyer's custody. (Doc. No. 1 at Ex. A.) If Plaintiff was indeed suffering from a serious medical condition, it was not so obvious so as to meet the aforementioned standard.[9] Furthermore, Boyer and the other officers were not deliberately indifferent towards Plaintiff. When Plaintiff informed the officers that he could not fit into the sedan police vehicle, they requested a larger police vehicle to drive Plaintiff to the police headquarters. Once inside the vehicle, the officers asked Plaintiff if he was okay, and honored his request that they tell him when the vehicle would be turning so that he did not hurt his back during the ride. (Pollarine Dep. at 85-87.)

[9] Indeed, in the days following Plaintiff's arrest and arraignment, he was able to attend a concert with his wife and stay out all night at a recording studio with a friend. (Pollarine Dep. at 103-04.)

Even construing the facts in the light most favorable to Plaintiff, Plaintiff's disregard of medical condition claim cannot survive summary judgment.

2. Qualified Immunity

Even if we were to somehow conclude that Plaintiff's constitutional rights were violated, Defendant Boyer is nevertheless entitled to qualified immunity. (Doc. No. 28 at 17.) Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Under this doctrine, "officers performing discretionary functions are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Curley*, 298 F.3d at 277 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It is preferable for a court to determine whether an official's conduct is subject to qualified immunity at the summary judgment stage of a proceeding. *Carswell v. Borough of Homestead*, 381 F.3d 235, 241 (3d Cir. 2004).

In reviewing the merits of a claim of qualified immunity, a court must conduct a multi-step inquiry. First, it must determine whether "the facts alleged show the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201; *see also Hope v. Pelzer*, 536 U.S. 730, 736 (2002); *Donahue v. Gavin*, 280 F.3d 371, 378 (3d Cir. 2002) (explaining that a court "must 'determine first whether the plaintiff has alleged a deprivation of a constitutional right at all' when a government official raises qualified immunity as a defense to an action under § 1983" (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5 (1998))). If the facts, when viewed in the light most favorable to the plaintiff, do not show that the officer violated a constitutional right, then plaintiff's § 1983 claim fails. *Curley*, 298 F.3d at 277.

Once a court determines that there is sufficient evidence to conclude that the officer did commit a constitutional violation, it must assess whether the right was clearly established at the time he acted. *Saucier*, 535 U.S. at 201; *Curley*, 298 F.3d at 277; *Mellott v. Heemer*, 161 F.3d 117, 121 (3d Cir. 1998). "'Clearly established' for purposes of qualified immunity means that 'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In reviewing whether an officer's conduct violated a clearly established right, a court must determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[10] *Saucier*, 535 U.S. at 201 (citing *Wilson*, 526 U.S. at 615); *see also Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000). As the Supreme Court explained in *Anderson*:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 639. Summary judgment is proper if no reasonable factfinder could conclude that the defendant police officer violated Plaintiff's clearly established rights. *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000). If an officer violated a clearly established

[10] When a plaintiff alleges that an officer exerted excessive force against him, the doctrine of qualified immunity acts "to protect officers from the sometimes hazy border between excessive and acceptable force and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier*, 533 U.S. at 206 (internal quotation omitted); *see also id.* at 202 ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.").

constitutional right, then he may not rely on the defense of qualified immunity. *Curley*, 298 F.3d at 277.

In *Saucier*, the Supreme Court explained why a court must conduct this additional level of analysis to determine whether an officer's conduct is subject to qualified immunity:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the qualified immunity defense.

Saucier, 533 U.S. at 205. If an official did violate a clearly established constitutional right, the court must then decide "whether the officer made a reasonable mistake as to what the law requires." *Carswell*, 381 F.3d at 242. The determinations of whether the right was clearly established and whether the official's conduct was reasonable are questions of law. *Sterling*, 232 F.3d at 193.

As discussed above, it is clear that the officers here did not commit a constitutional violation. In any event, any transgression of Plaintiff's rights that might have occurred could only be characterized as a reasonable mistake. We reject the assertion that Boyer and the other officers violated Plaintiff's clearly established rights. Such an assertion is not supported by the facts or the law.

3. <u>*Monell* Claim Against East Norriton Township Police Department</u>

Again, we note that there was no constitutional violation by the police officers here. Thus, there is no claim under *Monell*. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

Nevertheless, Plaintiff claims that Defendant East Norriton Township Police Department ("Police Department") violated § 1983. We will therefore address this claim.

In a § 1983 case, a municipality cannot be held liable under a theory of respondeat superior. *Id.* at 691. Instead, Plaintiff must identify a specific policy or custom that proximately caused the violation of his constitutional rights.[11] *Berg v. County of Allegheny*, 219 F.3d 261, 275 (3d Cir. 2000); *Fletcher v. O'Donnell*, 867 F.2d 791, 793 (3d Cir. 1989). In order to establish the existence of either a policy or custom, "a plaintiff must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom." *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990). In addition to identifying conduct that is properly attributable to an organization subject to § 1983, the plaintiff "must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997). If the policy or custom is facially valid, a plaintiff must establish causation by demonstrating that the defendant's action "'was taken with deliberate indifference as to its known or obvious consequences. A showing of simple or even heightened negligence will not

[11] A policy is made when a decisionmaker with final authority to establish policy regarding the action "'issues an official proclamation, policy, or edict.'" *Berg v. County of Allegheny*, 219 F.3d 261, 275 (3d Cir. 2000) (quoting *Kneipp*, 95 F.3d at 1212). A custom is a practice that is "so permanent and well settled as to virtually constitute law." *Id.* (quoting *Kneipp*, 95 F.3d at 1212). Custom may be shown through evidence that high-level policymakers knew about and acquiesced to the unconstitutional practice. *Garvin v. City of Phila.*, Civ. A. No. 02-2214, 2003 U.S. Dist. LEXIS 2471, at *5 (E.D. Pa. Feb. 24, 2003) (citing *Fletcher v. O'Donnell*, 867 F.2d 791, 793-94 (3d Cir. 1989)); *Wakshul v. City of Phila.*, 998 F. Supp. 585, 591 (E.D. Pa. 1998)), *aff'd*, 354 F.3d 215 (3d Cir. 2003). Generally, "[p]roof of a single incident by lower level employees acting under color of law does not suffice to establish either an official policy or custom." *Wakshul*, 998 F. Supp. at 591 (citing *City of Okla. v. Tuttle*, 471 U.S. 808, 823 (1985)).

suffice.'" *Berg*, 219 F.3d at 276 (quoting *Brown*, 520 U.S. at 407).

Plaintiff raises a *Monell* claim against Defendant Police Department under § 1983 for their alleged failure to train and supervise their police officers on the use of excessive force and unlawful arrest. (Doc. No. 1 ¶¶ 80-86.) "The scope of failure to train liability is a narrow one." *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 215 (3d Cir. 2001). To establish § 1983 liability based on a failure to train theory, the plaintiff "must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to deliberate indifference." *Id.* at 216 (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). Similarly, "[a] supervising authority may be liable under § 1983 for failing to train police officers when the failure to train demonstrates deliberate indifference to the constitutional rights of those with whom the officers may come into contact." *Gilles v. Davis*, 427 F.3d 197, 207 n.7 (3d Cir. 2005) (citing *City of Canton*, 489 U.S. at 388).

To establish "deliberate indifference" in this context, a plaintiff must show that: (1) policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employee mistakes; and (3) an employee's wrong choice will often cause the deprivation of a person's constitutional rights. *Carter v. City of Phila.*, 181 F.3d 339, 357 (3d Cir. 1999) (citing *Walker v. City of N.Y.*, 974 F.2d 293, 297-98 (2d Cir. 1992)). A defendant's failure to train its employees "can ordinarily be considered deliberate indifference only where the failure has caused a pattern of violations." *Berg*, 219 F.3d at 276 (citing *Brown*, 520 U.S. at 408-09).

In the instant case, Plaintiff fails to satisfy the burden of proving that the municipal Defendants violated § 1983. The only evidence that Plaintiff points to in support of his argument is a performance review in Defendant Boyer's personnel file which states that Boyer "sometimes loses his patience" and is "sometimes agitated and upset easily." (Doc. No. 29 at Ex. 1.) These comments are over ten years old and Plaintiff has taken them out of context. In other parts of the review, Boyer's supervisors state that Boyer "has done an excellent job," "is a very dedicated, organized and competent member of the Police Department," and displays "a hard-working persistence for excellence." (*Id.*) There is no indication that anyone in the Police Department believed that Defendant Boyer or any other police officer was using excessive force or participating in unlawful arrests. The evidence proffered by Plaintiff falls woefully short of demonstrating deliberate indifference on the part of Defendant Police Department.

Plaintiff's *Monell* claim also fails because there is insufficient evidence that a purported lack of training caused a violation of Plaintiff's constitutional rights. In addition to establishing deliberate indifference, a plaintiff "must also demonstrate that the inadequate training caused a constitutional violation." *Carswell*, 381 F.3d at 244 (citing *Grazier v. City of Phila.*, 328 F.3d 120, 124-25 (3d Cir. 2003)). To do this, a plaintiff "must identify a failure to provide specific training that has a causal nexus with their injuries and must demonstrate that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivations occurred." *Reitz v. County of Bucks*, 125 F.3d 139, 145 (3d Cir. 1997). Since there was no underlying constitutional deprivation, there can be no finding of liability against the municipality. Even if Plaintiff could establish an underlying constitutional deprivation, Plaintiff's claim still fails because Plaintiff offers no evidence that it was a lack of

training that caused the deprivation of his federal rights. *See Grazier*, 328 F.3d at 125 (a plaintiff must show that an inadequate training policy was the "moving force" behind his injuries). Because there is insufficient evidence to establish that the Defendant Police Department was deliberately indifferent or that their failure to train caused a violation of Plaintiff's constitutional rights, we will dismiss Plaintiff's *Monell* claim.

B. State Claims

Plaintiff has made state law claims against Defendants for false arrest, false imprisonment, malicious prosecution, and assault and battery. For the reasons discussed above these claims must also be dismissed. Not only was there probable cause to arrest and imprison Plaintiff, the criminal prosecution resulted in Plaintiff entering a guilty plea to disorderly conduct, a disposition not favorable to the Plaintiff. Moreover, there was no excessive force, hence no assault and battery.

An appropriate Order follows.

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

PHILLIP F. POLLARINE	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-CV-5312
	:	
DAVID BOYER, ET AL.	:	

ORDER

AND NOW, this 22nd day of March, 2006, upon consideration of Defendants' Motion For Summary Judgment, it is ORDERED that Defendants' Motion is GRANTED. Judgment is entered in favor of Defendants Detective Sergeant David Boyer and the East Norriton Township Police Department, and against Plaintiff Phillip F. Pollarine.

IT IS SO ORDERED.

BY THE COURT:

S/ R. Barclay Surrick

R. Barclay Surrick, Judge