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

CHARLES FOSTER AND KATHERINE FOSTER,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
DARREN DAVID, et al.	:	NO. 04-4829
Defendants.	:	

MEMORANDUM

I. Introduction

Plaintiffs, pursuant to 42 U.S.C. § 1983, seek damages for alleged violations of constitutional rights stemming from a search of their property in October 2002. Defendants contend that no constitutional rights were violated and that they are entitled to qualified immunity.

Before the Court is Defendant's Motion for Summary Judgment (Doc. No. 25). For the reasons that follow, the Court will grant summary judgment on all claims.

II. Factual Background

The parties' Statements of Undisputed Facts show that most operative facts are not in dispute. However, the Court will consider the facts in the light most favorable to Plaintiffs. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

On October 20, 2002, during his patrol, defendant Matthew Visosky ("Visosky") of the Pennsylvania Fish and Boat Commission[1] discovered a large quantity of trash in the back corner

[1] For the sake of clarity, the Court notes at the outset that the officer Defendants in this case were employed by multiple agencies, including the Pennsylvania Fish and Boat

of an access road. Visosky Dep. at 33-35, 91-92. The trash included an antler-less deer, deer entrails, and mail bearing the addresses of 408A and 408B Seneca Street which was addressed to either "Resident" or "Rose Foster," respectively. Charles Foster Dep. at 38-39; Visosky Dep. at 36. The deer appeared to have just been slaughtered, and it was not properly tagged. Id. After photographing the scene, Visosky called Defendants Darren David ("David") and George Hinkle ("Hinkle") of the Pennsylvania Game Commission, neither of whom were immediately available. Id. at 46, 49-50, 59.

Visosky drove to Plaintiff's residence and spoke with Plaintiff Charles Foster ("Charles"). Id. at 59-60. Visosky noticed a dark stain on Charles' pants that appeared to him to be blood. Charles Foster Dep. at 54. Charles asserted that the stain was grease; Katherine claimed it was mud. Id.; Katherine Foster Dep. at 26-27. Charles denied any knowledge of the trash or the deer. Visosky Dep. at 69. Visosky left the residence to prepare an affidavit of probable cause for a search warrant with David while McCafferty and Hinkle were dispatched to sit outside the residence. Id. at 74-75; David Dep. at 146. David and Visosky prepared the affidavit based upon the information Visosky had collected at the scene. Visosky Dep. at 75. After reviewing the papers, District Judge McKeon signed the search warrant. Id. The warrant authorized seizure of any items with blood stains, including clothing, any firearm or bow and arrows, leaf and yard clippings, and any hunting licenses.

David accompanied Visosky to the residence, where Charles was presented with the warrant. Id. at 79, 83; Charles Foster Dep. at 49. After searching Plaintiffs' van and seeing no signs of blood, the officers entered the house. Visosky Dep. at 85-86. The parties present inside

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Commission, the Pennsylvania Game Commission, and the Tinicum Police Department.

the house, in addition to the officer Defendants, included Plaintiffs Katherine Foster ("Katherine"), Charles Foster, Tara Urban (who is now Tara Foster) ("Tara"), and several children. Id. at 86. David indicated to Charles that the officers needed to examine a stain on his pants and suggested that the two of them go upstairs since several other family members were present. Id. at 93-95; Tara Foster Dep. at 67, 70; Katherine Foster Dep. at 28. Charles requested that he remove the pants while alone. Katherine Foster Dep. at 28, Tara Foster Dep. at 67, 70. David would not let Charles do that. Charles Foster Dep. at 137; Katherine Foster Dep. at 30. In his deposition, David stated that he did not agree because he feared that Charles might destroy evidence or obtain a weapon. David Dep. at 158. Charles refused to cooperate, and David instructed that if he did not he would be handcuffed and assisted. Visosky Dep. at 97. Refusing to leave the presence of family, Charles voluntarily removed his pants, while continuing to wear boxer shorts, socks, and a shirt. Id. at 98, 103; Charles Foster Dep. at 137-38; Tara Foster Dep. at 71. Upon closer examination, the officers agreed the stain was not blood and, according to Tara, the officers returned Charles' pants within roughly fifteen minutes. Charles Foster Dep. at 123; Tara Foster Dep. at 72.

The officers continued their search of the house and did not instruct the plaintiffs that they were either free to leave or needed to stay. Pl's Br. at 8; Tara Foster Dep. at 63; Visosky Dep. at 108-110, 139. David removed a shotgun from the attic; after Tara stated that the weapon was hers, David took it to his vehicle. Charles Foster Dep. at 85. The officers searched for blood-stained clothing, though they did not search clothing drawers. Visosky Dep. at 143. Visosky did find a pair of boots with what he testified appeared to him to be blood and a deer hair. Id. at 112-113. While David and Visosky took this evidence to the vehicle, David looked

through the garage window and saw what appeared to be hunting boots, a compound bow, and a quiver with arrows. Id. at 113, 116-17. However, Katherine insisted that the garage was part of her apartment, 408B, a separate residence for which the officers did not have a warrant. Charles also told the officers that he did not reside at 408B. Charles Foster Dep. At 60; Visosky Dep. at 33, 48, 117.

Based on these assertions from Charles and Katherine, the officers did not enter unit 408B until after they acquired an amended warrant from Judge McKeon to include unit 408B. Id. When David returned with the amended search warrant, Katherine physically blocked the door. Id. at 119, 123. After Officer Fife, who had arrived on the scene, showed her the warrant,[2] David asked her to move and she refused. Id. at 123. She was pushed to the side[3], and David and Hinkle entered the garage and retrieved as evidence the items they had seen through the window, as well as a knife that appeared to have blood on it. Charles Foster Dep. at 94-95. Katherine's actual apartment was not searched, and the Fosters were given receipts for certain

[2] See Statement of Undisputed Fact No. 73. Katherine questions whether she was shown the warrant and, if so, by whom. Charles Foster Dep. at 91. It appears that David did not want to show the amended search warrant to Plaintiffs, but was forced to by Officer Fife, of the Tinicum Police Department, who had become concerned about the conduct of the search and demanded that David display the amended warrant. Visosky Dep. at 119-23. The Court does not find this dispute to be so material as to preclude summary judgment.

[3] There is a dispute over which officer pushed Katherine. Defendants claim it was Officer Fife; Plaintiffs claim it was Officer Visosky. This dispute is immaterial to any of the claims in this case. The Court also notes that although the parties had somewhat consistently used the term "pushed" in various briefing in this case to refer to the action taken against Katherine, Plaintiffs used the term "hit" in their Second Amended Statement of Undisputed Facts. See Statement of Undisputed Facts No. 77; Charles Foster Dep. at 94-95.

seized items.[4] Id. at 188; Charles Foster Dep. at 97.[5] The officers also returned to the location of the deer carcass, where they took samples and discovered more discarded mail. Visosky Dep. at 37-38. The entire search incident lasted approximately one and a half hours. Id. at 143.

Charles later received multiple citations by mail. Charles Foster Dep. at 225-26, 318. Visosky charged Charles with littering, and David cited Charles for unlawful possession of wildlife or game, unlawful retrieval and disposition of killed or wounded game, and unlawfully failing to tag and report a big game kill.[6] Id. at 225-26; Visosky Dep. at 137.

In the course of their original search, the officers found a hunting license belonging to Tara. When the officers asked her about whether she had taken the hunting safety course required by law for the purchase of a hunting license, Tara indicated that she did not know what the officers were talking about. McCafferty Dep. at 87-88. In November 2003, David contacted Defendant Carbon County Wildlife Conservation Officer Merluzzi ("Merluzzi"), requesting that he file a charge against Tara for purchasing a hunting license without completing the safety course. Merluzzi Dec. at ¶ 3. Merluzzi investigated the matter and determined that there was indeed no record that Tara had completed a hunting safety course, and, accordingly, he filed a

[4] These included a bow and quiver, arrows in the quiver that appeared to have blood on them, a pair of boots that appeared to have blood on them, a bag of clothes that was on a table, and a small lock blade knife that appeared to have blood on it. Visosky Dep. at 124.

[5] Charles claims that he was not given a receipt for one additional item that was taken – a "deer stand." Charles Foster Dep. at 97.

[6] All charges were either dismissed or overturned on appeal. Visosky Dep. at 138-39; Charles Foster Dep. at 205.

charge against Tara on March 12, 2004.[7] Id. at ¶ 4.

On April 9, 2004, Charles attended a Pennsylvania Game Commission Public Meeting, at which each person was allowed to comment for five minutes, so long as the comments were related to the published agenda. Charles Foster Dep. at 283-84, 318. After speaking for a period of time[8], Charles was cut off after referring to David as a "terrorist" who was like "Osama bin Laden." Id. Defendant Commissioner Schleiden ("Schleiden") then asked Charles to step down but invited him to discuss his concerns with the Commissioners after the meeting. Schleiden Dec. at ¶¶ 8-9. In response, Charles said "thank you," and stepped down. Id. at ¶ 9. Charles later said "I guess I got a little excited." Id. at ¶ 10. He did not speak with the Commissioners after the meeting. Id. at ¶ 10.

At the time of the search of the Foster residence, David's immediate supervisor was Gordon Couillard. David Dep. at 192-93, 195. Couillard's superior was the Regional Director, Defendant Barry Moore ("Moore"). Id. All Wildlife Conservation Officers were initially trained for fifty weeks, with periodic training continuing throughout their employment. Moore Dec. at ¶ 4. The Game Commission's Training Division, located in Harrisburg, conducts annual training on established search and seizure procedures and any changes in law affecting those procedures. Id. at ¶ 7. Moore was the individual who directed the Regional Supervisors to conduct additional training if he learned or concluded that there was an area of deficiency in the existing training. Id. at ¶ 5. Moore was never notified by Couillard that any officers, including David, were not

[7] Tara was found guilty but the conviction was overturned on appeal. Merluzzi Dec. at ¶ 7.

[8] There is a dispute of fact over exactly how long Charles spoke, but the Court does not find it to be material to the extent that it would preclude summary judgement.

following commission search and seizure procedures or established law. Id. at ¶ 8. The only concern Moore had about David's job performance related to his brusque approach to the public that Moore attributed to his being a former Marine officer. Id. at ¶ 10. There was no history of David violating the rights of individuals. Id. at ¶ 11. Indeed, the only complaint lodged against David through the Game Commission's complaint tracking system involved unlawful possession of a squirrel. Id.

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). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson, 477 U.S. at 248. A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it s believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Fed. R. Civ. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

IV. Discussion

Plaintiffs' claims are brought pursuant to 42 U.S.C. § 1983, which provides a remedy against any person who, under color of law,[9] deprives another of his constitutional rights. Plaintiffs[10] bring numerous claims which all allege, generally speaking, that Defendants violated both Plaintiffs' Fourth Amendment and First Amendment rights.[11] In response, Defendants contend that they are entitled to summary judgment on all claims because (1) as a matter of law, no constitutional rights have been violated by any Defendant and (2) Defendants are entitled to qualified immunity. The specific causes of action still advanced by Plaintiffs encompass the following claims:

(1) Violation of Fourth Amendment rights by illegal and/or unreasonable search (brought by Charles and Katherine against David, Hinkle, Visosky, and McCafferty).

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[9] The parties do not dispute that Defendants at all times were acting under color of state law.

[10] The Court notes that by voluntary agreement of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), the claims of former Plaintiffs Tara Foster and her minor children Jane Doe, Josephine Doe, and John Doe were dismissed with prejudice on March 24, 2006. Only Charles and Katherine remain as Plaintiffs in the this action.

[11] Because Plaintiffs did not file a Pretrial Memorandum, it is not entirely clear to the Court how many of the claims stated in the Complaint that Plaintiffs actually intended to pursue at trial. For this reason, the Court will address all of Plaintiffs' claims in this Memorandum.

(2) Violation of Fourth Amendment rights by use of excessive force (brought by Katherine against David and Visosky).

(3) Violation of Fourth Amendment rights by use of an illegal strip search (brought by Charles against David).

(4) Violation of First Amendment rights by retaliation (brought by Charles against David).

(5) Violation of Fourth Amendment rights by malicious prosecution (brought by Charles against David and Merluzzi).

(6) Violation of Fourth Amendment rights by false arrest and/or violation of right to substantive due process of law (brought by Charles and Katherine against David, Hinkle, Visosky, and McCafferty).

(7) Violation of First Amendment rights by denial of right to speech and petition (brought by Charles against Schleiden).

(8) Failure to implement municipal policies to avoid constitutional deprivations and failure to train and supervise employees under color of state law (brought by Charles and Katherine against Moore).

The Court will address each of Plaintiffs' claims in turn.

A. Defendants did not conduct an illegal or unreasonable search in violation of the Fourth Amendment.

Charles and Katherine, pursuant to 42 U.S.C. § 1983, allege that Defendants David, Hinkle, Visosky, and McCafferty conducted an unreasonable search of their residences in violation of the Fourth Amendment. They allege that (1) there was insufficient probable cause

for the search warrant and amendment, (2) the warrant amendment permitting search of 408B was invalid and (3) the warrant was exercised in an unreasonable manner, by excessive use of force and an illegal strip search of Charles. Defendants contend that the warrant and amendment are both valid and that the search was exercised reasonably under the circumstances.

1. Defendants had probable cause to support the warrant for the search of the Foster residences and for citing Charles for violations of Pennsylvania game and littering laws, and the warrant was properly amended to include unit 408B.

The Fourth Amendment provides in part that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Probable cause must be assessed in light of the "totality of the circumstances" known to the magistrate, not by rigid formulation. United States v. Martiez-Zayas, 658 F. Supp. 79, 82 (E.D. Pa. 1987) (citing Illinois v. Gates, 462 U.S. 213, 230-31 (1983)). The probable cause standard is a "practical, non-technical conception." Martinez, 658 F. Supp. at 82 (citing Gates, 462 U.S. at 231). The issuing magistrate must simply make a practical, common sense decision whether, given the circumstances described in the affidavit, there is a fair probability that contraband or evidence of a crime will be found at that place.[12] Id. The reviewing court should afford the magistrate's

[12] As an initial matter, Plaintiffs' argument that there was no probable cause because the citations were ultimately dismissed or overturned lacks merit. Probable cause does not require that an officer prove guilt beyond a reasonable doubt. Orsatti v. N. J. State Police, 71 F.3d 480, 482-83 (3d Cir. 1995). Rather, probable cause merely requires that a reasonable police officer, under the circumstances, would believe that the accused had committed or was committing an offense. Gerstein v. Pugh, 420 U.S. 103, 111 (1975); Sharrar v. Felsing, 128 F.3d 810, 817 (3d Cir. 1997). In this case, Judge McKeon determined that the deer carcass and mail established sufficient probable cause for the warrant. It is irrelevant that Charles was ultimately found not guilty of the summary offenses.

decision "great deference" rather than reviewing the determination of probable cause de novo. Id. The court must simply ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. Id. (quoting Jones v. United States, 362 U.S. 257, 271 (1960)). "[D]oubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." Id. (citing Gates, 462 U.S. at 237 n.10).[13]

Defendant argues that the discarded deer carcass and mail addressed to Plaintiffs provided sufficient probable cause for the warrant and search. Def.'s Br. 4. Plaintiffs contend that the assertions that formed the basis of the warrant were false. Pl.'s Resp. 6. However, Plaintiffs provide no factual basis for this contention, nor do they dispute that Visosky found deer remains alongside the mail addressed to Plaintiffs. Plaintiffs also argue that the original search warrant for 408A was improperly altered. Plaintiffs appear to suggest that the amendment did not actually have the magistrate's approval, however absolutely no evidentiary basis is offered for such assertion. Pl.'s Resp. 12.

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[13] Even if the magistrate lacked a substantial basis for his decision that there was probable cause for searching the Fosters' property, the officers' good faith reliance on this facially valid warrant is justified. The Third Circuit has only found reliance on a facially valid warrant unreasonable when either (1) the issuing judge issued the warrant in reliance on a deliberately or recklessly false affidavit, (2) the magistrate judge abandoned his judicial role and failed to perform his neutral and detached function, (3) the warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,' or (4) the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized. United States v. Barnes, 2005 WL 1863213, at *5 (E.D. Pa. Aug. 3, 2005) (citing United Sates v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars, 307 F.3d 137, 146 (3d Cir. 2002)).

Plaintiffs have provided no evidence that the Affidavit of Probable Cause was deliberately or recklessly false, that the magistrate judge abandoned his judicial role, that the affidavit was lacking in indicia of probable cause, or that the warrant was facially deficient. In fact, Charles is unable to identify any material falsehood in the affidavit that would vitiate probable cause. Def.'s Br. 6.

The law is clear that where a building is divided into separate apartments, probable cause must be shown for searching each apartment unless the evidence shows the entire building is actually being used as a single unit. Maryland v. Garrison, 480 U.S. 79 (1987); United States v. Ritter, 416 F.3d 256 (3d Cir. 2005) (holding that once officers knew or should have known that there were multiple units, they were obliged to stop the search and could no longer rely on the warrant to justify their search of the entire building); United States v. White, 416 F.3d 634 (7th Cir. 2005) (holding that, first, the defendant needs to establish that the warrant failed to describe the home with particularity, and if that succeeds, then the defendant must show that the police knew or should have known, based on the available information at the time the warrant was issued, that, where there were multiple units, a warrant for a single address was overbroad).

Here, since the material facts are not in dispute and deference is to be afforded to issuing magistrates in determining whether or not there is sufficient probable cause to issue a warrant, there is no persuasive reason for this Court to find fault with the judgment of Judge McKeon in this case. The Court concludes that there was probable cause to justify issuance of a search warrant for both 408A and 408B.

The determinative factor for this claim concerning the allegedly illegal amendment of the search warrant to include unit 408B is Judge McKeon's declaration that he, not Defendant David, personally amended the warrant. Pl.'s Reply 3; Exhibit A. Because Plaintiff has only made unsubstantiated assertions that something different occurred, there is no dispute of material fact concerning the validity of the amendment to search 408B. The Court finds that the officers properly stopped before searching unit 408B and did not rely on the original warrant to justify

their search of the entire property.[14] Rather, they sought and obtained an amended warrant specifically denoted unit 408B. The amendment by Judge McKeon was based on probable cause – i.e., what was observed during the initial search – and, therefore, there was a valid amended warrant authorizing the search of 408B.[15]

Accordingly, the Court will grant summary judgment on the probable cause and illegal search claim.

2. The officers did not use excessive force.

Katherine contends that Defendant David[16] used excessive force in conducting his search, in violation of the Fourth Amendment, by pushing her aside during the search of unit 408B. David argues that (1) it was Officer Fife,[17] rather than David, that moved Katherine from the

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[14] Plaintiffs also argue in passing that the amended search warrant was invalid because it did not adhere to Rule 206 of the Pennsylvania Rules of Criminal Procedure, which requires the magistrate to designate the time and date of issuance, time and date of expiration, whether it is a day or night search, and so forth. However, an alleged violation of state law does not state a claim under Section 1983. Elkin v. Fauver, 969 F.2d 48, 52 (3d Cir. 1992). What matters is whether the amended warrant met the requirements of the Fourth Amendment. Here, it did.

[15] Plaintiffs also argue briefly that Hinkle's alleged search of Charles' van prior to the arrival of the search warrant was unlawful. However, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." Pennsylvania v. Labron, 518 U.S. 938, 940 (1996). Here, Charles' van was readily mobile and, as demonstrated by the warrant and as discussed above, there was probable cause to search the van. Therefore, even prior to the arrival of the warrant, Hinkle's alleged search of the van was reasonable under the Fourth Amendment.

[16] This claim was originally brought by Katherine and Tara against Defendants David and Visosky, alleging that David moved Katherine from the doorway and Visosky physically held back Tara from also blocking the doorway. Def.'s Br. 6-7. Since Tara was dismissed from this case and there is no evidence or allegations by Katherine against Visosky, this claim against Visosky should clearly be dismissed. The Court will therefore grant summary judgment in favor of Defendant Visosky on this claim.

[17] Officer Fife is not a named defendant.

doorway, and (2) even if David did move Katherine, the minimal force used was objectively reasonable, particularly because, at the time, she was physically blocking the unit that the officers were legally authorized to search. At oral argument, Plaintiffs' supplemented their excessive force claim to include the officers' use of their weapons during the search.

Under the Fourth Amendment, the "reasonableness" of force used must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Graham v. Connor, 490 U.S. 386, 396 (1989). "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." Id. at 396-97. The "reasonableness" test is whether, under to totality of the facts and circumstances, the officers' actions are "objectively reasonable," without regard to their underlying intent or motivation. Id. at 397. Although reasonableness under the Fourth Amendment is usually a question for a jury, summary judgment is appropriate if the court concludes, after resolving factual disputes in favor of the plaintiff, that the officer's use of force was objective under the circumstances. Estate of Smith v. Marasco, 318 F.3d 497, 515-16 (3d Cir. 2003).

In assessing the objective reasonableness of the force used, the court must recognize that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. Graham, 490 U.S. at 396. The force used must rise above a de minimis level for a constitutional claim to arise. Ingraham v. Wright, 430 U.S. 651, 674 (1977). Indeed, courts have repeatedly granted summary judgment on Fourth Amendment claims where the force used by officers was de minimis. See, e.g., Nolin v. Isbell, 207 F.3d

1253, 1258 (11th Cir. 2000) (holding that de minimis force does not support a claim for Fourth Amendment excessive force); Nardini v. Hackett, 2001 WL 1175130, at *6 (E.D. Pa. Sept. 19, 2001) (granting summary judgment where only de minimis force was used); Garcia v. County of Bucks, 2001 WL 311253 (E.D. Pa. Mar. 27, 2001) (finding as a matter of law that grabbing plaintiffs coat and arms and handcuffing in the course of arrest constituted de minimis force and did not violate Fourth Amendment); Bensinger v. Mullen, 2000 WL 1100781 (E.D. Pa. Aug 4, 2000) (granting summary judgment and finding as a matter of law that grabbing plaintiff and bringing him to the ground was de minimis force).

Unholstering a gun during a search is not an excessive use of force in and of itself. Indeed, even pointing a gun during a warranted search may be justified under particular circumstances. Torres v. United States, 200 F.3d 179, 185-86 (3d Cir. 1999). Where the officers had reason to believe that there may be firearms in the house, even pointing loaded guns at persons who were not actively resisting would not violate the Fourth Amendment. Mellott v. Heemer, 161 F.3d 117, 122-23 (3d Cir. 1998). This is so even if the crime for which the individuals are being investigated in not severe. Id. The Court can not find any case, and Defendants do not cite to any case, where an officer's act of simply unholstering or drawing his weapon without pointing it at the plaintiff amounted to excessive force.[18]

In this case, there is no dispute that Katherine physically blocked the doorway to the garage, that an officer pushed her out of the way to exercise the valid amended search warrant,[19]

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[18] For this reason alone, Defendants are entitled to qualified immunity on this issue. See qualified immunity discussion, infra.

[19] The parties dispute whether David or Officer Fife pushed Katherine from the doorway to search 408B. However, because this Court finds that the force used against Katherine was de

and that she was not injured as a result. Def.'s Br. 8-9. Emphasizing the triviality of the offenses under investigation, Katherine argues that any use of physical force whatsoever was excessive and unwarranted. Pl.'s Resp. 14-15. Instead, Katherine suggests that the officers should have merely "written the citations . . . and left . . . ." Pl.'s Resp. 15.

Regardless of the triviality of the offense, however, the Court finds that the officers possessed a valid search warrant and took reasonable actions to exercise it. Precedent suggests that removing an individual from a doorway in a manner that does not cause injury in order to conduct a legal search constitutes de minimis force. See Garcia, 2001 WL 311253; Bensinger, 2000 WL 1100781. Despite counsel's descriptive assertions that this incident involved "excessive force" and a "physical assault," nothing in the record suggests that David took any physical action beyond the de minimis action necessary to lawfully exercise the search warrant without interference.[20]

Regarding the unholstering of the officers' weapons, the caselaw described supra dictates that the officers' action here do not amount to excessive force. Despite the argument of Plaintiffs' counsel, nothing in the record suggests that any of the Defendants pointed their weapons at Plaintiffs at any time before, during, or after the search. The record merely reflects that the officer drew their guns, but did not point them. Charles Foster Dep. at 112; Tara Foster Dep. at 83; Katherine Foster Dep. at 29, 36, 75. As the search warrant reflects (authorizing a search for "[a]ny firearm"), the officers had reason to believe there were firearms in the house. Even Charles concedes this fact. See Charles Foster Dep. at 83 ("I'm a hunter, of course I have

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de minimis as a matter of law, this factual dispute is immaterial.

[20] Indeed, it is undisputed that Katherine was not injured. Def.'s Br. 8.

weapons in my house."). The officers conduct in drawing their weapons but not pointing them at anyone was therefore not excessive or objectively unreasonable.

Summary judgment is therefore appropriate on Plaintiffs' excessive force claim.

3. Charles was not subjected to an illegal strip search.

Charles also asserts that Defendant David violated the Fourth Amendment by subjecting him to an illegal "strip-search" when he ordered Foster to "strip" out of his pants. Pl.'s Resp. 7. In response, David contends that examination of Charles' pants was authorized by the warrant and that Foster was not actually "strip-searched." Def.'s Br. 9-10.

While the Third Circuit has not specifically defined what degree of clothing removal is necessary to constitute a "strip-search," this Court finds the Sixth Circuit's explanation to be both obvious and persuasive: "A 'strip search,' though an umbrella term, generally refers to an inspection of a naked individual[.]" Spears v. Sowders, 33 F.3d 576, 581 (6th Cir. 1994). Here, the parties agree that Charles was never examined naked. Def.'s Br. 9; Pl.'s Resp. 7. Indeed, Plaintiff concedes that he was never deprived of his boxer shorts, shirt, or socks. Pl.'s Resp. 7; Def.'s Br. 9. Only Plaintiff's pants – not his body – were examined. Pl.'s Resp. 7; Def.'s Br. 10. As such, the Court finds "strip-search" to be an term that is simply not applicable to the events surrounding the examination of Foster's pants.

The issue, therefore, is whether David's request to examine Charles's pants was unreasonable. Importantly, there is no dispute that the pants were stained. Moreover, the warrant specifically included "any item with blood stains, *including clothing*" (emphasis

added).[21] Pl.'s Resp. 8; Def.'s Br. 10. The Courts finds, therefore, that in these circumstances the request to examine Charles' pants was not objectively unreasonable.

Charles argues further, however, that David's mere *manner* in requesting removal of Charles' pants was unreasonable. Pl.'s Resp. 11-12. In support of this contention, Charles contends that David requested the pants "within ten seconds or [he] would strip them off." Pl.'s Resp. 7. The Court is not persuaded. As discussed, there is no dispute of material fact concerning the circumstances surrounding the pant request. David suggested they go upstairs; Charles wanted to go upstairs unaccompanied by an officer; David refused and suggested handcuffing and assisting him if he did not comply; and Charles then voluntarily removed his pants in the presence of family.[22] Pl.'s Resp. 7; Def.'s Br. 10. Charles provides no legal support for the proposition that David's use of what might be referred to by some as a harsh manner during a legal search is a violation of the Fourth Amendment.

For these reasons, the Court will grant summary judgment for all claims related to the pants search.

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[21] Charles argues that David's pants request was unreasonable because Visosky did not examine the pants during his first visit to the house. Pl.'s Resp. 7, 11-12. However, as David indicates, Visosky did not have a warrant during his initial visit. Def.'s Br. 5.

[22] Charles also suggests that David requested the pants for the sole purpose of embarrassing and harassing him and his family. As support for this point, he cites the fact that Defendants admit they did not search for blood-stained clothing in any clothing drawers. Pl.'s Resp. 8. Defendants indicate, however, that the officers reasonably assumed that only clean clothes would be in the drawers. Regardless, the law requires only that the pants request be "objectively reasonable" without regard to underlying intent or motivation. Graham, 490 U.S. at 397. David's subjective purpose in requesting the pants is therefore irrelevant.

B. Defendant David did not maliciously prosecute or retaliate against Charles Foster.

Charles also claims that in retaliation for his actions, Defendant David maliciously prosecuted him for violations of game laws. Pl.'s Resp. 14.[23] David argues that summary judgment is appropriate on this claim because (1) the officers had probable cause and (2) there is no evidence of a "seizure," as the law requires for a malicious prosecution claim. Def.'s Br. 12-13.

To prevail on a § 1983 malicious prosecution action, a 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 a seizure as a consequence of the legal proceeding. Robinson v. Fetterman, 378 F. Supp. 2d 534, 544 (E.D. Pa. 2005) (citing DiBella v. Borough of Beechwood, 407 F.3d 599, 601 (3d Cir. 2005)).

While it is undisputed that David initiated citations against Charles that ended in Foster's favor, Charles has not provided any basis for fulfillment of the last three requirements of a malicious prosecution claim. Pl.'s Resp. 9. As discussed supra, the dead deer, mail, and bloodstained items retrieved from Charles' residence provided David with probable cause for the state game law citations as a matter of law. Furthermore, there is no evidence in the record that

[23] Initially Tara alleged malicious prosecution against Merluzzi. Since Tara has been dismissed from this case and it is undisputed that Merluzzi did not prosecute Katherine or David Foster, the claim against Merluzzi should clearly be dismissed. The Court will therefore grant summary judgment as to Merluzzi.

David acted maliciously or for any purpose other than bringing Charles to justice.[24] Finally, Charles provides absolutely no evidence that he suffered a deprivation of liberty or seizure as a consequence of the citations. As a matter of law, a summary citation and having to attend one's trial, without more, "is not a government 'seizure' in a 42 U.S.C. § 1983 malicious prosecution action for violation of the Fourth Amendment." Robinson, 378 F. Supp. 2d at 545 (quoting DiBella, 407 F.3d at 603). Application of Robinson alone is dispositive here: it is undisputed that Plaintiff was not arrested, but rather was issued citations in the mail. Pl.'s Resp. 9; Def.'s Br. 12. Since there is no evidence that there was any legally adequate "seizure" as required for a malicious prosecution claim, the fifth requirement is clearly not met.

Accordingly, the Court will grant summary judgment on the malicious prosecution claim.

C. Defendants did not falsely arrest Plaintiffs or violate their substantive due process rights.

Charles and Katherine also claim that Defendants David, Visosky, Hinkle, and McCafferty falsely arrested them and/or violated their substantive due process rights during the search of the Foster residence. Those Defendants argue that both claims fail as a matter of law because Charles and Katherine were not deprived of their liberty to leave the premises. Def.'s Br. 13.

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[24] Charles cites Hartman v. Moore, 126 S. Ct. 1695, 1702 (2006) for the proposition that lack of probable cause often indicates malice or retaliation. Pl.'s Resp. 14. While Charles is correct, he unconvincingly argues that probable cause did not exist by relying solely on events that occurred *after* issuance of the search warrant. Pl.'s Resp. 14. These events, while relevant to other individual claims, are irrelevant to probable cause. As discussed supra, the deer carcass and mail provided probable cause.

In addition, even a determination that Defendants lacked probable cause does not establish malicious prosecution. Charles fails to directly address whether David acted maliciously in issuing the citations (instead, he attempts to infer malice from lack of probable cause) and do not provide evidence of a "seizure."

A successful false arrest claim requires (1) an arrest, and (2) that the arrest was made without probable cause. Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988). An arrest requires some seizure of the person through application of physical force or, where that is absent, submission to the assertion of authority. California v. Hodari, 499 U.S. 621, 624 (1991). "A person is seized for Fourth Amendment purposes only if he is detained by means intentionally applied to terminate his freedom of movement." Berg v. County of Allegheny, 219 F.3d 261, 268 (3d Cir. 2000).

The parties do not dispute that Charles and Katherine were never formally placed under arrest. Def.'s Br. 14; Pl.'s Resp. 8. Instead, Charles and Katherine merely assert that "none of the defendants informed the plaintiffs . . . that they were free to leave or were not under arrest." Pl.'s Resp. 8. However, Charles and Katherine do not assert that they were told they could not leave the residence during the search. Indeed, Tara actually left the residence for fifteen minutes. Def.'s Br. 6. Based on the prevailing law and paltry record support cited by Charles and Katherine, the Court is convinced that (1) their freedom of movement was not restricted by Defendants and (2) their own actions indicate they did not consider their freedom of movement restricted. Accordingly, as a matter of law, Charles and Katherine were not "seized" or "arrested" for Fourth Amendment purposes.[25] In addition, as discussed supra, probable cause existed for the search and citations.

Because Charles and Katherine were in no way arrested and probable cause existed, the Court will grant summary judgment on the false arrest claims.

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[25] Written citations alone do not constitute "arrest" for purposes of a false arrest claim under § 1983. Moyer v. Borough of N. Wales, No. 00-1092, 2001 WL 73428 (E.D. Pa. Jan. 25, 2001).

Alternatively, Charles and Katherine claim that their Fourteenth Amendment substantive due process rights were violated. The Court rejects this claim. In a series of cases, the Supreme Court has articulated the "most precise claim doctrine," wherein "if a constitutional claim is covered by a specific constitutional provision, it must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998). See also Graham, 490 U.S. at 397 (1989) (holding that claims properly analyzed under the Fourth Amendment should not be additionally addressed under substantive due process); Underwood v. Pennsylvania, No. 05-3452, 2006 WL 1147263 (E.D. Pa. Apr. 26, 2006). Courts within the Third Circuit has similarly avoided using substantive due process theories when other specific and identifiable constitutional claims are extant. See Khodara Envtl., Inc. ex. rel. Eagle Envtl., L.P. v. Beckman, 237 F.3d 186, 197-98 (3d Cir. 2001); Walker v. N. Wales Borough, 395 F. Supp. 2d 219, 229 (E.D. Pa. 2005); Assocs. in Obstetrics & Gynecology v. Upper Merion Twp., 2004 U.S. Dist. LEXIS 22098, *12 (E.D. Pa. 2004).

Accordingly, because Charles and Katherine's claims are more precisely characterized as Fourth Amendment claims (which the Court has resolved, supra), the Court will grant summary judgment as to the substantive due process claims.

D. Defendant Schleiden did not restrain Charles Foster's speech or curtail his right to petition in violation of the First Amendment.

Charles claims Defendant Schleiden violated his First Amendment right to free speech by cutting short Charles' public comments before the Pennsylvania Game Commission. Schleiden argues that, as a matter of law, his actions were reasonable under the First Amendment because

Foster exceeded the time, place, and manner restrictions of the public meeting.

The Court finds that there are no disputes of material fact concerning what occurred at the relevant public meeting. It is undisputed that Schleiden cut short Charles' comment after Charles became belligerent and referred to Defendant David as a "terrorist" who was like "Osama bin Laden." Moreover, it is undisputed that Charles was not forcibly removed from the microphone; rather, he was simply asked to stop (which he did, along with thanking the Commissioners).

This disposition of this claim is squarely controlled by Eichenlaub v. Township of Indiana, 385 F.3d 274. The factual situation in Eichenlaub is directly analogous to the instant case: a speaker at the citizen's forum portion of a meeting of a town board of supervisors became "repetitive and truculent" and was removed. Affirming a district court's grant of summary judgment on a First Amendment claim, the Eichenlaub Court stated that:

> Restricting such behavior is the sort of time, place, and manner regulation that passes muster under the most stringent scrutiny for a public forum. Indeed, for the presiding officer of a public meeting to allow a speaker to try to hijack the proceedings, or to filibuster them, would impinge on the First Amendment rights of other would-be participants. We have no difficulty sustaining the decision to remove David Eichenlaub on that basis.... To the extent those restrictions were not strictly content-neutral, the chairman's actions served the function of confining the discussion to the purpose of the meeting. As we have observed, speech at a citizen's forum may be limited according to its germaneness to the purpose of the meeting. At any rate, the overwhelming, and wholly sufficient, motive to eject Eichenlaub from the meeting was the perfectly sustainable and content-neutral desire to prevent his badgering . . . and disregard for the rules of decorum.

Eichenlaub, 385 F.3d at 281.[26]

[26] The Court notes that Plaintiffs completely failed to address Eichenlaub in response to Defendants' brief.

We reach the same conclusion here. Charles was allowed to speak on a matter of public concern (i.e., the behavior of law enforcement officials). He was asked to stop only when he became belligerent and disruptive. The Court finds that Schleiden's actions served the dual – and wholly legitimate – purposes of (1) confining the discussion to germane matters and (2) enforcing the rules of decorum. Like the Eichenlaub Court, this Court does not read the record to indicate that Schleiden attempted to "muzzle" Charles because he disagreed with his particular viewpoint.[27] Schleiden's enforcement of a reasonable time, place and manner restriction simply did not violate Charles' First Amendment rights.

The Court will therefore grant summary judgment on the First Amendment claim brought against Defendant Schleiden.

E. Defendant David did not violate Charles' First Amendment rights by retaliating against him.

Charles claims that Defendant David violated his First Amendment rights by retaliating against him. David argues that (1) Charles has failed to adduce record evidence to support this claim and (2) his actions were taken for a legitimate, non-retaliatory reason.[28]

"Retaliation for the exercise of constitutionally protected rights is itself a violation of rights secured by the Constitution actionable under section 1983." McGrath v. Johnson, 67 F.

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[27] The Court notes that even if there were some record evidence that Schleiden was personally offended by the content of Foster's outbursts, Schleiden would likely still be entitled to summary judgment. Listeners have a right to be free from "unjustifiable annoyance and obstruction which is likely soon to savor of intimidation." Hill v. Colorado, 530 U.S. 703, 716-18 (2000).

[28] Charles fails to address this claim in response to Defendants' motion, and has therefore waived opposition to summary judgment. However, for the sake of clarity, the Court will briefly detail the reasons why summary judgment would be appropriate even if Charles had responded.

Supp. 2d 499, 512 (E.D. Pa. 1999). Therefore, the alleged retaliation need not amount to an independent violation of the plaintiff's constitutional rights in order to maintain a § 1983 action. See Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001). A plaintiff must prove that the conduct which led to the alleged retaliation was constitutionally protected; that the defendant took adverse action against the plaintiff; and that the plaintiff's constitutionally protected conduct was a substantial or motivating factor in the defendant's action. Id. at 333. See also Figueroa v. Regan, 2003 U.S. Dist. LEXIS 6593, *9-*10 (E.D. Pa. 2003).

The Court finds that Charles has not demonstrated the necessary record evidence to support this claim. There are two possible "adverse" actions by David that could provide fodder for Charles' retaliation claim. The first of these is David's execution of the search warrant. However, a retaliation claim predicated upon that action fails the very first prong of the legal test described above, because Charles has not offered the required evidence that he engaged in any protected conduct prior to David's actions.

The second possible adverse action on which this claim could be based is David's subsequent citation of Charles for violation of game laws. However, a retaliation claim based upon that action fails the third prong of the legal test, because there is absolutely no record evidence that Charles' public speeches (the only possible protected conduct cited by Charles) were a substantial or motivating factor in David's decision to charge him with a violation of game laws.

Aside from these fatal deficiencies, David is also entitled to summary judgment because the undisputed facts of record demonstrate that he took both of his actions against Charles (the search and the citation) for a legitimate, non-retaliatory reason. The Third Circuit has made it

clear that David's burden is "relatively light: it is satisfied if the defendant articulates any legitimate reason for the [adverse action]; the defendant need not prove that the articulated reason actually motivated the [action]." Krouse v. American Sterilizer Co., 126 F. 3d 494, 500 (3d Cir. 1997) (quoting Woodson v. Scott Paper Co., 109 F.3d 913, 920 n.2 (3d Cir. 1997)). As the Court has discussed supra, David had probable cause to obtain and execute the search warrant and to cite Charles for violation of game laws. The existence of probable cause was a legitimate, non-retaliatory reason for David's actions, regardless of whether that reason was his actual motivation. Edwards v. Kelly, 2005 WL 1349852, *4 (3d Cir. 2005) (retaliation claim fails given existence of probable cause to arrest plaintiff).

The Court will therefore grant summary judgment on the First Amendment retaliation claim against Defendant David.

F. Defendant Moore is entitled to summary judgment on Plaintiff's failure-to-train claim.

Charles and Katherine also claim that Defendant Moore should be held liable for failure to train his employees. Moore contends he is entitled to summary judgment because Charles and Katherine have not adduced record evidence to demonstrate that Moore, in his capacity as supervisor, was deliberately indifferent.

A municipal supervisor or senior official may be subject to liability pursuant to Section 1983 under a failure-to-train theory. See Foster v. David, 2005 U.S. Dist. LEXIS 18446, *7-*8 (E.D. Pa. 2005) (citing Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989)). However, inadequate training may serve as the basis of a Section 1983 claim only where the inadequacies were so obvious that a supervisor's disregard for modifying the training regimen constituted

deliberate indifference to the constitutional rights of those who would be affected by the employees' behavior. Lewis v. City of Philadelphia, 2004 U.S. Dist. LEXIS 23362, *17-*18 (E.D. Pa. 2004) (citing Board of County Comm. of Bryan County v. Brown, 520 U.S. 397, 407 (1996); City of Canton v. Harris, 489 U.S. 378, 388 (1989). A failure-to-train claim may not rest on the activities of just one employee; the failure of a training program must be evidenced by constitutional violations committed by multiple employees. See Bryan County, 520 U.S. at 408 ("The existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors . . . was the 'moving force' behind the alleged violation"). In addition, in the case of supervision of law enforcement officers, a plaintiff must show (1) that the supervisor had contemporaneous knowledge of the offending incident or knew of a prior pattern of similar incidents and (2) circumstances under which the supervisor's actions or inaction communicated a message of approval to the offending subordinates. Montgomery v. DeSimone, 159 F.3d 120, 127 (3d Cir. 1998).

The Court finds that Charles and Katherine have not offered required evidence of a pattern of violations committed by multiple, inadequately trained employees. In this case, the vast majority of the evidence that Charles and Katherine have put forth is associated with their complaint against one officer – Defendant David. Plaintiffs do not present any evidence that there were repeated complaints against the other officers or that Defendant Moore was aware of any pattern of violations by multiple employees. Indeed, there is not even evidence of any other similar incidents involving Defendant David alone. In short, the record indicates that Moore had no knowledge or reason to believe that David (or any other officer) were systematically

conducting improper searches and seizures.

In addition, nothing in the record suggests that Moore had contemporaneous knowledge of the search of the Fosters' premises, or of the citations. Nor can Charles and Katherine cite to any record evidence that Moore's actions or inaction communicated any message – let alone a message of approval – to David.[29] Finally, undisputed facts of record demonstrate that Wildlife Conservation Officers are trained in how to conduct searches and seizures within the bounds of the law.

For all of these reasons, the Court finds that Defendant Moore is entitled to summary judgment on Plaintiffs' Section 1983 failure-to-train claim.

G. Defendants McCafferty and Hinkle are not liable for any wrongdoing.

Plaintiffs name Deputy Wildlife Officers McCafferty and Hinkle as Defendants in their claims based on theories of illegal or unreasonable search, false arrest, and violation of substantive due process. While it is not disputed that McCafferty and Hinkle were present during the search of the Foster's property, see Def.'s Statement of Facts 5, Defendants contend that there is no evidence that McCafferty and Hinkle participated in – or even acquiesced in – any wrongdoing. Def.'s Br. 25. Charles and Katherine neither respond to this argument nor provide any evidentiary or legal basis for any of the claims against these defendants.

Liability under § 1983 requires personal involvement in the alleged wrongdoing. Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976). Personal involvement can be shown through specific and particular allegations of personal direction or of knowledge and acquiescence. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988).

[29] Moore was not even David's direct supervisor (that person was Gordon Couillard).

Where the defendant lacks supervisory authority, mere inaction usually does not reasonably give rise to the inference that the defendant acquiesced in the wrongdoing. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1294 (3d Cir. 1997). In short, "a person who fails to act to correct the conduct of someone over whom he or she has no supervisory authority cannot fairly be said to have 'acquiesced' in the latter's conduct." Id.

Here, the record does not indicate that McCafferty or Hinkle were personally involved in any wrongdoing. Since it is undisputed that McCafferty and Hinkle had no supervisory authority over David or Visosky, their failure to correct any wrongdoing cannot, as a matter of law, be deemed "acquiescence." Because McCafferty and Hinkle were not personally involved in any wrongdoing, and because they had no obligation to take corrective action (if any were necessary), they cannot be liable under § 1983.

The Court will therefore grant summary judgment on all the claims against Defendants McCafferty and Hinkle.

H. Qualified Immunity

Defendants also contend that they are also entitled to summary judgment on the separate ground of qualified immunity.[30] The Court's analysis in this situation follows the two-step framework established in Saucier v. Katz, 533 U.S. 194 (2001). Douris v. Schweiker, 2003 U.S. Dist. LEXIS 19514, *33-*35 (E.D. Pa. 2003). As a threshold matter, a reviewing court must consider whether the facts -- when viewed favorably toward the apparently harmed party -- demonstrate that an officer violated a constitutional right. Saucier, 533 U.S. at 201. If a

[30] Charles and Katherine do not address qualified immunity in response to Defendants' motion.

constitutional violation occurred, the court then must resolve whether that constitutional right violated is "clearly established." Id. In order to qualify as a "clearly established" right, the constitutional right must be articulated with enough particularity and specificity such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at n.10. Whether the constitutional right is "clearly established" and whether the officer acted unreasonably given the factual situation are questions of law properly decided by the court. See, e.g., Bartholomew v. Pennsylvania, 221 F.3d 425, 428 (3d Cir. 2000).[31]

As discussed, supra, having now considered the evidence thus far produced, the Court finds that Charles and Katherine have not demonstrated that a genuine issue for trial exists regarding the violation of an established constitutional right. In short, no constitutional violations occurred here. This conclusion entitles all Defendants to qualified immunity.

For purposes of thoroughness, however, the Court also notes its finding that even if a constitutional right were violated here, the Defendants would nonetheless be entitled to qualified immunity. In determining whether to grant qualified immunity as a matter of law, this Court must determine the answer to the objective question of whether a reasonably competent officer or commissioner would have reached the same conclusion as to the lawfulness of their actions as the Defendant officers and commissioner did here. Qualified immunity should be denied only if the unlawfulness of a defendant's actions should have been apparent. Anderson v. Creighton, 483 U.S. 635, 640 (1987). Minor asserted factual disputes – i.e., those related to the "fringes" of

[31] Even should Charles and Katherine succeed in demonstrating the violation of a constitutional right, still could qualify for immunity should the officers have "mistakenly but reasonably believed that [their] actions were constitutionally permissible." Hung v. Watford, 2002 U.S. Dist. LEXIS 23064, at *9 (E.D. Pa. Dec. 3, 2002).

the relevant behavior – are not enough to preclude summary judgment. Routinely sending the question of qualified immunity to the jury was squarely rejected by the Supreme Court in Hunter v. Bryant, 502 U.S. 224, 228 (1991). See Cox v. Hackett, Civ. No. 05-2260, July 27, 2006 Memorandum at 17-23 (noting that if these types of "fringe" factual disputes required a jury trial, then the doctrine of qualified immunity will hardly ever allow a trial court to dismiss a Fourth Amendment case on summary judgment, because every plaintiff can dispute the arresting officer's credibility and easily raise some factual issues about every situation).

The Court finds that in this case the actions of the Defendants were at all times objectively reasonable in light of existing law. Reasonable officers would have believed it lawful to search the Fosters' premises pursuant to a facially valid warrant (premised on legitimate probable cause). Reasonable officers would have believed it lawful to use de minimis force towards Katherine given her attempt to impede a lawful search. Reasonable officers would have believed it lawful to, based on probable cause, issue citations to Charles for game law violations. A reasonable commissioner would have believed it lawful to ask Charles to stop speaking when he became belligerent. Finally, a reasonable officer supervisor would have believed it lawful to maintain the Commission's existing search and seizure training program.

In summary, because the Defendants' actions did not violate clearly established law, and, moreover, because the Defendants acted reasonably under the existing law, all Defendants are entitled to qualified immunity as a matter of law.

V. Conclusion

Plaintiffs have not demonstrated the existence of any disputed material facts so as to require a trial on any claim. The Court finds that Defendants are entitled to summary judgment on all claims, based upon both substantive analysis of the claims and the doctrine of qualified immunity. The Court will therefore grant Defendants motion in its entirety.

Despite this result, the Court wishes to note, under any standard, the summary offenses charged against the Plaintiffs are minor at best; however, the amount of law enforcement resources devoted to investigation of those offenses has, in this case, been disproportionately significant. Although the Defendants are entitled to summary judgment as a matter of law, the Court suggests that the Pennsylvania Fish and Boat Commission and the Pennsylvania Game Commission review this entire matter.

BY THE COURT:

/s/ MICHAEL M. BAYLSON

Michael M. Baylson, U.S.D.J.