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

DAVID VASQUEZ	:	CIVIL ACTION
	:	
v.	:	No. 98-2655
	:	
SALISBURY TOWNSHIP	:	
POLICE DEPT., et al.	:	

O'Neill, J. August , 1999

MEMORANDUM

Plaintiff David Vasquez alleges that he was subjected to an unreasonable seizure in violation of his rights under the Fourth Amendment when he was detained by police officers who were searching for the perpetrator of a brutal mugging nearby. Defendants are the Fountain Hill Police Department, the Salisbury Township Police Department, and Officer Thomas Anderson of the Salisbury Township Police Department. Officer Anderson and the Salisbury Township Police Department now move for summary judgment and Officer Anderson moves in the alternative for qualified immunity. For the reasons set forth below, the motion will be denied as to Officer Anderson and granted as to the Salisbury Township Police Department.

STANDARD

Summary judgment must be entered against a party "who fails to make a 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 Corp. V. Catrett, 477 U.S. 317, 322 (1986). To defeat defendants' motion for summary judgment, plaintiff must produce evidence of material facts sufficient to allow a reasonable jury to return a verdict in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). In deciding the motion, I view the evidence and any reasonable inferences to be drawn therefrom in the light most favorable to plaintiff as the non-moving party. Baker v. Monroe Township, 50 F.3d 1186, 1191 (3rd Cir. 1995), citing Spain v. Gallegos, 26 F.3d 439, 446 (3rd Cir. 1994).

BACKGROUND

In the early evening of December 26, 1996, Fountain Hill police officer Jay Vasilik, who is not a party to this suit, responded to the scene of a reported mugging at Seneca Street in Fountain Hill. There he found an elderly woman who had been beaten and was covered with blood "from head to toe" being attended by neighbors. A witness had seen the assailant fleeing south on foot from the scene of the crime and described him as 5'8" to 5'10" tall, of medium build, and wearing "dark clothes." The victim later reported that the assailant was wearing a mask. According to Vasilik, nothing was known then or ever discovered about the assailant's race or his hair or facial hair. (Vasilik Dep. at 17-30.)

In response to Vasilik's call for assistance, Officer Thomas Anderson of the Salisbury

Township Police Department came to the victim's residence. There, Anderson conferred with Vasilik and another Fountain Hill officer and obtained a description of the assailant from Vasilik. Contrary to Vasilik's testimony, Anderson has testified that he was told that the assailant was a white, heavy-set male with dark, shoulder-length hair and facial hair, wearing jeans and a green, possibly Eagles-type sweatshirt or jacket. (Anderson Dep. at 22-23, 28, 31). Anderson then left and began driving up and down nearby streets and alleys looking for the assailant with a search light mounted on his cruiser.

At about the same time, around 7 p.m., plaintiff was returning to his home at the corner of Clewell and Pawnee Streets with his wife and daughter after a visit with his mother. He parked the family's van on the street by the side of his home. Plaintiff's wife and daughter preceded him up the sidewalk and to the porch of their house while plaintiff dallied behind, examining the van and throwing away some trash. Plaintiff was walking up the sidewalk to his house when he was spotted by Officer Anderson, who hailed plaintiff from his cruiser. According to Anderson, plaintiff precisely fit the description of the assailant. There is no evidence in the summary judgment record as to how close plaintiff's home at Pawnee and Clewell Streets was to the scene of the mugging at 1031 Seneca Street. Nor is there any evidence as to the lapse of time between the mugging and when Anderson encountered plaintiff.

The parties dispute what happened next. I begin with Anderson's deposition account because it is more detailed than plaintiff's. According to Anderson, when he hailed plaintiff

and asked to speak with him, plaintiff replied by demanding that Anderson "get the fucking alley light off of him" and, motioning to the corner of Clewell and Pawnee, said he would talk to Anderson there. (Anderson Dep. at 37.) Anderson pulled over at the corner and got out of his cruiser. As he waited for plaintiff to walk up to him at the corner, Anderson called for back-up. He also saw a woman, who turned out to be Mrs. Vasquez, on the porch of the house at that corner. Anderson observed that plaintiff was walking, did not appear to be perspiring or intoxicated, did not appear to be armed or have anything in his hands, and did not have any blood on him (Anderson Dep. at 43-44, 57-59.)

According to Anderson, when plaintiff arrived at the corner he "said something to the effect that, 'You're a long way from Salisbury, asshole. You don't pay your taxes here.'" Anderson told plaintiff that he was looking for the assailant in a nearby assault and asked plaintiff were he was coming from, to which plaintiff replied that he did not have to answer. At some point during this conversation, plaintiff called out to the woman on the porch to "get the dog out," to which the woman replied that she would not and went into the house. (Id. at 65-68). Anderson saw a Doberman Pincher in the door barking.

Thereafter, according to Anderson, plaintiff began to walk up to the porch of the corner house and said he was going to let the dog out. (Id. at 45-48, 69.) When he walked up the steps and placed his hand on the door, Anderson told him "if you open up that door, we're going to have a problem." (Id. at 69-70.) At this point, Anderson was apparently at the bottom of the porch stairs and a Fountain Hill police officer had just pulled up in

response to his call for back-up. Anderson asked plaintiff to come down and talk to him. Plaintiff replied "the only way I'm going to talk to you is if you arrest me" and stuck his hands out. (Id. at 72.) Anderson responded by handcuffing plaintiff, grasping him, and directing him down the stairs to the street toward his cruiser. Plaintiff did not put up any resistance, but as he was being led down the stairs screamed out that his teeth and neck were being hurt. (Id. at 75-78.) Anderson then handed plaintiff over to another Fountain Hill officer who had just pulled up and plaintiff was placed in a Fountain Hill cruiser.

After plaintiff was placed in the cruiser, the police discussed the situation among themselves and asked plaintiff's wife why plaintiff was screaming, and she told them he had bad teeth. After some 10 to 15 minutes, plaintiff was let free, apparently without explanation or apology, and the police officers left after refusing plaintiff's request that he be taken to the hospital.

At his deposition, Anderson testified that he was suspicious of plaintiff because of plaintiff's precise fit with the description of the mugging assailant and his proximity to the crime, and became more suspicious because of plaintiff's "obnoxiousness" in refusing to answer Anderson's questions. When asked why he placed handcuffs on plaintiff, Anderson replied, "Because at that point he was becoming belligerent and he was starting to get the dog out and he was being obnoxious and using profanity. At that point it heightened my awareness that he was becoming a problem." (Id. at 73.) Anderson never frisked plaintiff or asked him for identification. When asked about the nature of plaintiff's detention,

Anderson testified that he thought that plaintiff "was under investigative detention until we figured out what was going on and why he wasn't cooperating with us." (Id. at 80-81.)

For his part, plaintiff argues that Anderson has fabricated the description of the assailant that purportedly fit plaintiff so precisely. Plaintiff also disputes Anderson's version of the circumstances of their encounter. Plaintiff has testified that when he met Anderson at the street corner he asked the officer why he wanted to speak with him, but Anderson refused to say. Plaintiff also denies having cursed at the officer, and maintains that he merely called out to his wife to take care of the dog, not to let it out of the house. He maintains that Anderson directed him to put his hands out and handcuffed him when he did. When plaintiff then protested that the officer should call the Fountain Hill police to straighten things out, Anderson instead grabbed him by his shirt and the skin of his neck and directed him down the porch and toward's Anderson's cruiser, hurting his bad teeth by bumping into him on the way down. Plaintiff also contends that a pre-existing back injury was re-aggravated when he was twisted and pushed into the Fountain Hill cruiser. (Vasquez Dep. at 18-23.)

DISCUSSION

I. Officer Anderson

Defendants do not dispute that plaintiff was "seized" within the meaning of the Fourth

Amendment when he was handcuffed by Anderson. See Terry v. Ohio, 392 U.S. 1, 16 (1968) ("whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person"); see also United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (person is "seized" when a reasonable person would believe that he or she was not free to leave). Defendants also tacitly concede that Anderson did not have probable cause to arrest plaintiff. They argue, however, that Officer Anderson's detention of plaintiff was a reasonable investigative stop authorized by Terry v. Ohio and its progeny.

Traditionally, seizures were exclusively analyzed as arrests requiring probable cause. See United States v. Acosta-Colon, 157 F.3d 9, 15 (1st Cir. 1998). In Terry and subsequent cases, however, the Supreme Court has authorized a "narrow" exception to the probable cause requirement which allows police to detain persons for investigative purposes on less than probable cause. While generally supposed less intrusive in nature than an arrest, investigative stops are still "seizures" and are assessed pursuant to the objective reasonableness standard of the Fourth Amendment. Terry, 392 U.S. at 19-22; see also, e.g., United States v. Hensley, 469 U.S. 221, 228; United States v. Sharpe, 470 U.S. 675, 682 (1985). The central issue under this standard is the "reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Terry, 392 U.S. at 19. "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'" Id. at 21, quoting Camera v. Municipal Court, 387 U.S. 523, 534-35 (1967). The inquiry is a "dual

one" that examines both whether there was sufficient cause for the intrusion and whether the intrusion was reasonably limited in scope commensurate with the circumstances. See id. at 19-20.

Defendants would have me find as a matter of law that Anderson reasonably suspected plaintiff may have been the mugging assailant and undertook reasonable detention measures in handcuffing plaintiff and moving him from his porch to sit in a police cruiser for fifteen minutes or so. In the alternative, defendants argue that Anderson is entitled to qualified immunity because a reasonable officer could have believed that detaining plaintiff was lawful. See, e.g., Sharrar v. Felsing, 128 F.3d 810, 826 (3rd Cir. 1997) (police officers "who 'reasonably but mistakenly' conclude that their conduct comports with the requirements of the Fourth Amendment are entitled to immunity"), quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam). Finally, defendants argue that there is no evidence from which a reasonable juror could conclude that Anderson used excessive force against plaintiff. In my view, these contentions lack merit in light of the disputed circumstances of plaintiff's detention.

A. Did Anderson have Reasonable Suspicion that Plaintiff was the Mugging Assailant?

To justify an investigative detention in the first instance, a police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. This is an objective

test: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." Id. at 22.

If the evidence is viewed in plaintiff's favor, the only information Anderson had when he stopped plaintiff was a description of an assailant 5'8" to 5'10" tall, of medium build, and wearing dark clothing, but of unknown race and hair type. Such a description would likely have fit a great number of adult males in the neighborhood and likely could not, of itself, have given Anderson objectively reasonable suspicion to believe that plaintiff was the assailant. See Karnes v. Skrutski, 62 F.3d 485, 492-93 (3d Cir. 1995) ("the types of articulable facts that can provide reasonable suspicion cannot include 'circumstances [which] describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures' were the circumstances accepted as reasons for the investigation"), quoting Reid v. Georgia, 448 U.S. 438, 441 (1980). It may even be inferred from the record that plaintiff was too large to be considered of "medium build" and therefore did not even fit the very general description of the assailant that Vasilik had given Anderson.

Moreover, Anderson has admitted making additional observations upon viewing plaintiff that a jury might conclude could only have lessened the suspicions of a reasonable police officer. He observed plaintiff speaking and being spoken to by a woman at the door of the house with regards to the dog inside, which would seem to suggest rather strongly that plaintiff "belonged" to the house in some fashion and that his presence there was natural and

legitimate. He also observed that plaintiff was not sweating, running, short of breath, bloody, or evasive. And while Anderson apparently found it suspicious that (according to Anderson's version of events) plaintiff was obnoxious and uncooperative, common sense might suggest to the contrary that such boorish behavior would hardly be expected of a fleeing felon attempting to escape notice and elude police. At any rate, a citizen's refusal to voluntarily cooperate in an officer's investigation cannot of itself give rise to reasonable suspicion. Cf. Karnes, 62 F.3d at 495-96 ("The fact that Karnes granted consent to Skrutski to search some items and then refused to give consent to additional searches cannot support a finding of reasonable suspicion. . . . Karnes's exercise of [his right to refuse to consent to certain searches of his car] cannot be penalized by adding his refusal to consent as a factor in this inquiry [of reasonable suspicion], even if, as defendants testified, Karnes became argumentative and difficult.")

In sum, even if Anderson's version of events were credited over plaintiff's, at the time that he handcuffed plaintiff it is not obvious that a reasonable police officer could have reasonably suspected that plaintiff was the mugging assailant. (Indeed, Anderson's deposition testimony is unclear as to whether he even purported to base the detention on such suspicions.) And if plaintiff's version of events was believed, a jury could easily conclude that Anderson did not have reasonable suspicion that plaintiff was the sought-after mugging assailant. Accordingly, Anderson is not entitled to summary judgment.

B. Was the Detention Reasonable in Scope or a De Facto Arrest?

Assuming arguendo that Anderson had reasonable suspicion that plaintiff was the mugging assailant, the next question is whether the manner in which he detained plaintiff was reasonable in scope and manner. An investigatory detention must be carried out in a manner that is commensurate with the law enforcement purposes that gave rise to it. The Terry Court's analysis of searches applies equally to seizures: "[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. . . . The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Id. at 17-18 (citations omitted).

Generally, a police officer may ask the detainee questions in an attempt to confirm or dispel his suspicions, and if the officer reasonably believes the detainee may be armed he may conduct a frisk for his own safety. But the detainee is not required to respond to the questions, and if the officer's inquiry or other diligent investigation does not result in probable cause for arrest, the detainee must be released. Berkemer v. McCarty, 468 U.S. 420, 439-440 (1984).

The line between a proper Terry stop and an improper de facto arrest is not always easily drawn. See United States v. Sharpe, 470 U.S. at 685. In considering whether a stop is "'so minimally intrusive as to be justifiable on reasonable suspicion,'" Id. at 685, quoting United States v. Place, 462 U.S. 696, 709 (1983), courts consider the duration and intensity of the stop, the law enforcement purposes justifying the stop, whether the police diligently

sought to carry out those purposes, and alternative means by which the police could have served their purposes. See Sharpe, 470 U.S. at 684-87. The extent of protective measures or force that may properly be used in effecting an investigative stop without exceeding its proper bounds depends heavily on the circumstances, "requir[ing] a fact-specific inquiry into whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course." United States v. Acosta-Colon, 157 F.3d 9, 15 (1st Cir. 1998). If the suspect is reasonably believed to be armed and dangerous or attempts to resist or evade the detention, then more intrusive or forceful measures may be warranted without turning the detention into an arrest. Thus, "[t]here is no per se rule that pointing guns at people, or handcuffing them, constitutes an arrest," Baker v. Monroe Township, 50 F.3d 1186, 1193 (3rd Cir. 1995), and many courts in other federal circuits have held that suspects were merely detained rather than arrested despite being handcuffed and/or placed in police cruisers. Such cases always involve specific extenuating circumstances justifying such measures, however: the suspects are believed to be armed and dangerous, or resist or attempt to escape, or otherwise act in some fashion or under such circumstances as to justify the intrusiveness of such measures. See id. (citing cases); Investigation and Police Practices, 86 Geo. L.J. 1214, 1221-23 at n. 132 (citing cases).

In the absence of such circumstances, on the other hand, intrusive or arrest-like measures such as handcuffing and or placing a suspect in a police vehicle or small room may unreasonably exceed the proper scope of the detention, turning it into a de facto arrest. See,

e.g., Acosta-Colon, 157 F.3d 9 (1st Cir. 1998) (holding that defendant, who was suspected of smuggling drugs but officers had no reason to believed armed, was subject to de facto arrest when he was stopped on jetway, causing him to miss his flight, handcuffed, and led to small room some distance away and confined for 30 minutes without being told whether or not he was under arrest or how long he was to be detained); Peterson v. City of Plymouth, 945 F.2d 1416, 1418-1420 (8th Cir. 1991) (holding that plaintiff landlord, who refused to answer police officers' questions about former tenant's accusation of theft and told them to leave his property unless they had a warrant, was subject to de facto arrest when police officers blocked his way back into his house, seized his arms, and locked him in a squad car for twenty minutes); United States v. Richardson, 949 F.2d 851, 856-58 (6th Cir. 1991) (holding that suspect had been subjected to de fact arrest when he was placed in a police cruiser after refusing to consent to search of his vehicle and storage locker); cf. United States v. Ortiz, 835 F. Supp. 824, 827-28 (E.D. Pa. 1993) (observing that government had not identified any precedent in the Third Circuit in which a suspect who had been handcuffed was found to have merely been detained rather than arrested and holding that suspect handcuffed upon disembarking from airplane had been subjected to de facto arrest).

1.

According to plaintiff's version of events, Anderson made no attempt to ascertain plaintiff's identity or reason for being out before handcuffing plaintiff and forcefully leading

him off his own porch stairs and placing him in a police cruiser. If this were true, then even if Anderson did have reasonable suspicion to conduct a Terry stop he immediately proceeded beyond the legitimate bounds of such a stop by handcuffing plaintiff before making even the slightest investigative inquiry of him. Moreover, even according to Anderson's version of events, plaintiff was handcuffed only after saying he would not continue to talk with the officer unless he were arrested. Together with the handcuffing, and plaintiff's confinement in the police car, this fact might well support a finding that plaintiff was effectively arrested. Compare Peterson, supra; see also Acosta-Colon, 157 F.3d at 14 ("It is often said that an investigatory stop constitutes a de facto arrest 'when a reasonable man in the suspect's position would have understood his situation . . . to be tantamount to being under arrest.'") (inner quotation omitted), quoting United States v. Zapata, 18 F.3d 971, 975 (1st Cir. 1994).

2.

Even if Anderson did undertake a proper inquiry and develop reasonable suspicion that plaintiff might be the mugging assailant, it is not clear to me that he would have been justified in seizing plaintiff as he did. While broadened over the years, the Terry doctrine is still an exception to the general rule requiring probable cause, and a Terry detention must be supported by some particularized governmental interest that justifies the intrusion upon the detainee's person. In light of the particular circumstances here, in which police were investigating an already-completed crime and plaintiff was detained at his residence rather

than in a car or attempting to flee, it is not clear that there was any such interest justifying the significant intrusion upon plaintiff.

Terry itself involved a situation in which the police officer suspected that the detainees were armed and planning an imminent armed robbery, and the Court clearly found it significant, if not crucial, that the officer had to act immediately. See 392 U.S. at 20 ("[W]e deal here with an entire rubric of police conduct – necessarily swift action predicated upon the on-the-spot observations of the officer on the beat – which historically has not been, and as a practical matter could not be, subjected to the warrant procedure."). In United States v. Hensley, 469 U.S. 221 (1985), the Court for the first time addressed a case in which the police stopped a suspect to investigate his involvement in a past crime.[1] Id. at 227. The Court rejected any per se rule against investigative stops to investigate past crimes; as with others, the Court held, such stops were subject to the reasonableness requirement of the Fourth Amendment. Id. at 228. However, the Court recognized that the interests of the government in investigating past crimes were different, and frequently less pressing, than those involved in investigating ongoing or imminent crime. Id. at 228-29. For example, the government's interests in deterring crime and preserving public safety, and the necessity to

[1] In Hensley, police had issued a flyer seeking the defendant, Hensley, for questioning in several robberies. The flyer asked other police departments to hold Hensley for questioning and warned that he was to be considered armed and dangerous. Police in a neighboring town spotted Hensley driving a car and, after requesting a dispatcher to check on whether an arrest warrant had been issued (it had not, they later found out), stopped Hensley's car. After the stop, officers saw one gun in plain view and recovered others from the car, and Hensley was arrested. At trial for possession of the weapons, Hensley moved to suppress the guns on grounds that the stop was illegal. The district court denied the motion, but the Court of Appeals for the Sixth Circuit reversed, finding that the Terry exception to the probable cause requirement only applied to allow investigative stops concerning ongoing or imminent crimes, not past crimes.

act immediately, may be reduced or even nonexistent. Id. In Hensley's case, however, the Court determined that a minimally-intrusive automobile stop was warranted by the police' reasonable suspicion based on a flyer from another police department, their reasonable belief that a warrant may have been issued for Hensley's arrest, the previous inability of police to locate Hensley, and the risk that if he was not detained he would elude the police again. Id. at 229, 234-35; see also id. at 236 (Brennan, J., concurring).

The detention of plaintiff here was much more intrusive than the automobile stop at issue in Hensley, yet it is not apparent that any similar government interests were served. Plaintiff was suspected at most of a past crime and, according to Anderson himself, did not appear to be armed and did not attempt to resist Anderson or give any indication that he might have been inclined to flee from his home to evade justice. In addition, the stop here was not of a suspect in his own automobile (who quite obviously could easily flee if not stopped), but a citizen restrained from going into his own home.

Defendants have not even proposed a legitimate investigative purpose for the detention. Anderson testified that he wanted to figure out why plaintiff was not being cooperative. But clearly, of itself, this is not an interest which can justify an intrusion such as this. Ordinarily, as in Hensley, a detention to investigate past crime might be justified on grounds that police need to identify a possible suspect who would otherwise elude them. Yet Anderson has admitted never asking plaintiff for identification and, in any event, there is no apparent reason why he could not have asked plaintiff's wife or neighbors or, as plaintiff

proposed, the Fountain Hill police. Nor is it apparent why, if plaintiff really was under suspicion, police could not have kept watch on the house to make sure he did not leave until they could identify him and/or pursue ordinary warrant procedures. Cf. Sharrar v. Felsing, 128 F.3d 810, 820 (3d cir. 1997) (holding that officers had failed to establish as a matter of law that there were sufficient exigent circumstances to justify warrantless arrest of men surrounded by SWAT team in their house where there was no evidence to "support a theory of 'hot pursuit,' a fear that the suspects would flee, or a fear that evidence would be destroyed").

3.

There is some indication in the record that Anderson claims plaintiff implicitly threatened him with the dog. Indeed, while Anderson argues in his brief that he detained plaintiff based on reasonable suspicion, it is equally if not more consistent with his deposition testimony that he reacted as he did believing plaintiff posed a threat or in response to plaintiff's uncooperative and "belligerent" behavior.

Obviously, police officers are entitled take necessary measures to deal with a threat of physical danger to themselves or others. It is conceivable, therefore, that evidence at trial might establish that handcuffing plaintiff was warranted as a security measure wholly aside from whether Anderson had reasonable suspicion that plaintiff was the mugging assailant. On the other hand, plaintiff has testified that he did not threaten Anderson. Anderson's

testimony appears to be ambiguous as to whether and to what extent plaintiff was threatening, and it appears that a Fountain Hill officer had arrived on the scene at the time of the handcuffing. A jury could therefore reasonably conclude that Anderson's actions were unreasonable under the circumstances.

If plaintiff was not threatening Anderson's safety, but was merely being verbally obnoxious and uncooperative, Anderson had no right to seize him. A police officer may not detain or arrest someone simply for being obnoxious or uncooperative, without more. Cf. City of Houston v. Hill, 482 U.S. 451 (1987) (invalidating on First Amendment grounds city ordinance which made it a crime to verbally criticize or challenge police officers); Commonwealth v. Hock, 728 A.2d 943 (Pa. 1999) (reversing defendant's conviction for disorderly conduct for directing a curse in a normal tone of voice at a police officer with no one else around); Commonwealth v. Biagini, 655 A.2d 492 (Pa. 1995) (affirming reversal of defendant's conviction for disorderly conduct for shouting vulgarities at police from his own house); Commonwealth v. Gilbert, 674 A.2d 284 (Pa. Super. Ct. 1996) (reversing conviction for disorderly conduct based on defendant's yelling to his neighbor to express his agreement with the neighbor's opposition to the police's attempt to tow his car). Nor may an officer arrest a citizen for lawfully refusing to answer questions, or fashion out of such a refusal reasonable suspicion to detain. See Karnes, 62 F.3d at 495-96.

In sum, a jury will have to determine whether Anderson's seizure of plaintiff amounted to an unlawful de facto arrest, a proper investigative detention based on reasonable

suspicion, or a reasonable response to a threat to the officer's safety.

C. Was Plaintiff Subjected to Excessive Force?

Claims that excessive force was used in effecting a seizure are ordinarily similar if not identical to claims that the seizure was carried out in a manner unreasonable in scope or intrusiveness, and are similarly subject to the Fourth Amendment's objective reasonableness standards. Graham v. Connor, 490 U.S. 386, 394-97 (1989). A police officer who has sufficient cause to conduct an investigatory stop or arrest is also entitled to use force reasonably necessary under the circumstances to effectuate that stop or arrest. Id. at 396 ("the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it"). On the other hand, if an officer has no right to detain or arrest a citizen, then he ordinarily also has no right to use force. See Atkins v. New York City, 143 F.3d 100, 103 (2d Cir. 1998) ("the force used in connection with the arrest was unlawful because the arrest was found to be unlawful"). The objective reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue , whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396; see also Sharrar v. Felsing, 128 F.3d at 821-22. Force is generally only permitted to the extent reasonably necessary to overcome resistance or the threat of force; the "'use of any force by officers

simply because a suspect is argumentative, contentious, or vituperative' is not to be condoned." Bauer v. Norris, 713 F.2d 408, 412 (8th Cir. 1983), quoting Agee v. Hickman, 490 F.2d 210, 212 (8th Cir. 1974).

In light of the foregoing principles, plaintiff's excessive force claim raises two questions: first, whether there was adequate cause to justify Anderson in seizing plaintiff's person at all, and, if so, whether the force used was objectively reasonable under the circumstances. As already explained, a reasonable jury viewing the evidence in plaintiff's favor could find that Anderson did not have reasonable suspicion or a reasonable belief that plaintiff posed a threat to his security. If it so found, the jury would also be compelled to find that any touching of plaintiff was unreasonable and "excessive."[2] Alternatively, a reasonable jury could find that even if Anderson did have reasonable suspicion or a reasonable belief that plaintiff was threatening him, the force used was unreasonable under the circumstances. In either event, it is clear on the present record that Anderson is not entitled to summary judgment on the claim of excessive force.

D. Qualified Immunity

"'[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal

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[2] Defendants argue that plaintiff did not suffer any serious enough injury to state a claim for excessive force. I disagree. Plaintiff has offered evidence that he suffered reaggravation of a back injury and significant back pain for a long period as well as a visible welt on his neck from his treatment on the night in question. These are sufficiently significant injuries to support an excessive force claim.

reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken.'" Wilson v. Layne, 119 S. Ct. 1692, 1699 (1999), quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987). In light of pre-existing law, the unlawfulness of the officer's action "must be apparent" or he will be entitled to immunity. Id., quoting Anderson, 483 U.S. at 640. See also Sharrar v. Felsing, 128 F.3d at 826-28.

Defendants do not argue that the rights Anderson is alleged to have violated were not "clearly established" as of the time of his encounter with plaintiff. Rather, they argue that a reasonable officer would have believed that plaintiff's detention was objectively reasonable. As already set forth, however, a jury viewing the evidence in plaintiff's favor could easily conclude that Anderson did not have, and could not reasonably have believed that he had, either reasonable suspicion to think plaintiff the mugging assailant or a reasonable belief that he had to restrain plaintiff in the manner that he did for his own safety. If a jury came to this conclusion, it would also likely be compelled to conclude that a reasonably officer could not reasonably have believed that the force used by Anderson was objectively reasonable.

This is not to say that Anderson could not establish at trial that he is entitled to immunity or to a jury charge on the matter. In particular, if the jury found that Anderson had sufficient cause to justify restraining plaintiff for his own safety, Anderson might well be entitled to qualified immunity on the excessive force claim. I conclude only that the present record manifests genuine disputes of fact crucial to the objective reasonableness of

Anderson's actions and therefore precludes any grant of immunity at this time.[3]

II. The Salisbury Township Police Department

Defendant Salisbury Township Police Department moves for summary judgment on grounds that plaintiff has failed to present any evidence that it had a custom or policy of allowing its officers to engage in unreasonable searches. See Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) (holding that a municipality can only be held liable under § 1983 for a constitutional deprivation caused by one of its agents if it is shown to have had a custom or policy which itself caused or directly contributed to the alleged deprivation). Plaintiff has failed to respond to defendant's contention and has not pointed to any specific evidence of any such custom or policy. Accordingly, plaintiff's claims against the Police Department will be dismissed.

III. The Fountain Hill Police Department

Although the Fountain Hill Police Department has not moved for summary judgment, I will require plaintiff to show cause why it should not be dismissed from this case. The facts set forth above appear to establish that Officer Anderson alone was responsible for seizing

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[3] I recognize that an official's entitlement to qualified immunity should be decided as a matter of law whenever possible. See Sharrar v. Felsing, 128 F.3d at 826-828 (holding courts should determine as a matter of law not only what was "clearly established" law, but also the reasonableness of the official's belief in the lawfulness of his or her acts). Nonetheless, on the present record I believe this is clearly one of those cases in which disputes of fact preclude any such determination at this time.

plaintiff. Although he subsequently turned plaintiff over to a Fountain Hill police officer, he appears to have done so with at least tacit direction that plaintiff be put in a cruiser. In any event, it seems any officer arriving late on the scene would have been entitled to presume that Anderson had learned facts during his encounter with plaintiff establishing sufficient cause to justify his detention. Compare, e.g., United States v. Hensley, 469 U.S. 221, 231-32 (holding that police officers could rely on flyer issued by another police department requesting detention of a suspect without themselves knowing the facts supporting the flyer); United States v. Sharpe, 470 U.S. at 687 n. 5 (suggesting state trooper properly detained suspect on behalf of narcotics agent despite not having sufficient information himself to justify the detention). Since it does not appear that any Fountain Hill police officer could be held liable for any violation of plaintiff's rights, it is very hard to conceive how the Fountain Hill Police Department could possibly be held liable.

CONCLUSION

To summarize, I will deny defendant Anderson's motion for summary judgment or qualified immunity because I find genuine disputes of fact material to the questions of whether his actions in detaining plaintiff were objectively reasonable and whether he could have reasonably believed his actions were objectively reasonable within the meaning of the Fourth Amendment. I will grant summary judgment to Salisbury Township Police Department because plaintiff has failed to identify for the Court any evidence showing that

the Department had a practice or policy that caused the alleged violations of plaintiff's rights. Finally, I will require plaintiff to show cause why the Fountain Hill Police Department should not be dismissed from this case.

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

DAVID VASQUEZ	:	CIVIL ACTION
	:	
v.	:	No. 98-2655
	:	
SALISBURY TOWNSHIP	:	
POLICE DEPT., et al.	:	

<u>O R D E R</u>

AND NOW, this day of August 1999, upon consideration of the motion for summary judgment and for qualified immunity of defendants Officer Thomas Anderson and the Salisbury Township Police Department and the parties' filings related thereto, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that the motion is DENIED as to Officer Thomas Anderson and GRANTED as to the Salisbury Township Police Department and plaintiff's claims against the Salisbury Township Police Department are DISMISSED.

It is further ORDERED that plaintiff shall show cause by or before September 9, 1999 why the Fountain Hill Police Department should not be dismissed from this case. The Fountain Hill Police Department may then file a response by or before September 23, 1999.

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THOMAS N. O'NEILL, JR. J.