UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DANIEL PERACH,

Plaintiff,

v

CRAIG LEE,

Defendant.
_____/

Case No. 2:08-CV-13754-JAC-MJH
Hon. Julian Abele Cook

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_____/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES DEFENDANT Craig Lee and pursuant to F.R.C.P. 56, hereby moves for summary judgment on all claims made by Plaintiff for the reasons stated in the attached brief.

Defendant requested but could not obtain a concurrence from Plaintiff in this motion.

WHEREFORE, the City requests the Court to grant summary judgment for Defendant Craig Lee.

Respectfully submitted,

Dated June 19, 2009.

/s/Robert W. West
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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2009, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following:

Counsel for All Parties

and I hereby certify that I have mailed by US Mail the document to the following non-ECF participants:

None.

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DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

"ORAL ARGUMENT REQUESTED"

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2. Does Plaintiff's No Contest Plea to the Charge of Resisting Arrest preclude him from arguing that he did not resist the officers' attempt to arrest him and bar his Section 1983 claim of excessive force?

STATEMENT OF CONTROLLING AUTHORITY

The Defense relies on Federal Rule of Civil Procedure 56(c) for the proposition that summary judgment is appropriate because Defendant Craig Lee is protected by qualified immunity. The Defense relies on the cases of *Graham v. Connor,* 490 U.S. 386 (1989) and *Champion v. Outlook Nashville, Inc.,* 380 F.3d 893 (6th Cir. 2004) in support of its claim of qualified immunity on the basis that Defendant Craig Lee's actions were objectively reasonable under the circumstances. The Defense relies on the cases of *Anderson v. Creighton,* 483 U.S. 635 (1987), *Griffith v. Coburn,* 473 F.3d 650 (6th Cir. 2007), *Draper v. Reynolds,* 369 F.3d 1270 (11th Cir. 2004), and *DeVoe v. Rebant,* 2006 WL 334297 (E.D.Mich., 2006) in support of its claim of qualified immunity on the basis that Defendant Craig Lee's actions did not violate a clearly established constitutional right under the circumstances. The Defense relies on the cases of *Heck v. Humphrey,* 512 U.S. 477 (1994) and *Cummings v. City of Akron,* 418 F.3d 676 (6th Cir. 2005) in support of its claim that Plaintiff's no contest plea to a criminal charge of resisting arrest bars his Section 1983 claim of excessive force.

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INTRODUCTION

Plaintiff Daniel Perach filed this action against Craig Lee, a police officer employed by the city of Ann Arbor, alleging that Officer Lee used excessive force in effecting an arrest of Mr. Perach, in violation of the Fourth and Fourteenth Amendments. However, summary judgment is proper here, because Officer Lee's actions at all times were lawful, objectively reasonable, and he is entitled to qualified immunity.

STATEMENT OF FACTS

On September 1, 2005, when the incident that gave rise to this lawsuit occurred, Plaintiff Daniel Perach was a student at the University of Michigan. During the evening hours on that date, Officer Craig Lee, along with several other police officers from the Ann Arbor Police Department, the Washtenaw County Sheriff's Department, and the University of Michigan Department of Public Safety, were on foot patrol in the area of Greenwood and Vaughn streets, which is a student rental neighborhood that is frequently the site of large student parties. On that particular night there were in fact several large parties taking place and several hundred people were out on Greenwood Street. The police were in the area to monitor these parties for possible violations of state and local ordinances regarding consuming alcohol in public and underage drinking.

While on patrol Ann Arbor Officers Kris Leyrer and Rebecca Singer observed Plaintiff walking down Greenwood Street carrying a red plastic cup which, in the officers' experience, is commonly used at student parties to consume alcohol. *See Ex. 1, Police incident report.* When Plaintiff observed the officers he attempted to hide the cup behind his body. Upon seeing this, the officers called Plaintiff over to investigate whether he in fact possessed an open container of alcohol in the street. Officer Leyrer smelled the contents of the cup and confirmed it was a mixture of fruit juice and alcohol. *See Ex. 1; also Ex. 2, Deposition of Daniel Perach, p. 13, l. 22-24.* Plaintiff also

confirmed in his deposition that he was drinking vodka and fruit juice that night. *See Ex. 2, p. 11, l. 15-25.*

Officer Leyrer then asked Plaintiff to produce identification because he was going to issue Plaintiff a ticket for possessing open alcohol in public, a misdemeanor charge under Ann Arbor City Code which is punishable by up to 90 days in jail and a fine up to $500. Plaintiff retrieved a wallet from his back pocket, but instead of handing his ID to the officers, he turned and ran away from them, into a driveway, and disappeared between two houses. A short time later the same officers saw Plaintiff again, further down Greenwood Street. They called to Plaintiff and motioned for him to come over to the officers, but instead Plaintiff took off running again up the middle of Greenwood Street. Officer Leyrer then radioed Plaintiff's description and location to other officers in the area. *See Ex. 1; also see Ex. 2, p. 15, l. 3-18.*

Officer Lee and his partner, Officer Maguire, were further up Greenwood Street when they heard the radio transmission and immediately saw Plaintiff running towards them. Officer Maguire (who, like Officer Leyrer and the other police officers on the street that night was dressed in a full police uniform) verbally ordered Plaintiff to stop. *See Ex. 3, Dep. of Craig Lee, p. 7, l. 7-8; p. 26, l. 1-6; pp. 7-8, l. 21-21 and 1-5.* However, Plaintiff ignored the command and ran up a driveway and into the backyards in the 900 block of Greenwood with Officers Maguire and Lee in pursuit. While cutting through the backyards Plaintiff tripped over an old wire fence and fell to the ground face first. Officer Lee was able to catch up to him at that point, but as the officer grabbed hold of Plaintiff, he too tripped and fell over the fence. *See Ex. 3, p. 8, l. 15-24.* While both were on the ground Officer Lee had his hands on Plaintiff's body and ordered him to stay down, however Plaintiff pulled free, got up, and continued to run away from Officer Lee. *See Ex. 3, p. 9, l. 1-8.*

At that point, based on the suspect running away from numerous officers, his failure to obey their verbal commands, and his active resistance to Officer Lee's attempts to physically control him, Officer Lee deployed his Taser and struck Plaintiff in the back with the Taser darts, causing him to immediately fall to the ground. *See Ex. 3, p. 10, l. 17-21.* Officers Lee and Maguire where then able to catch up to Plaintiff a second time and set about trying to handcuff him behind his back. However, Plaintiff again ignored the officers' verbal commands to stop resisting and instead refused to allow himself to be handcuffed and tried again to struggle to his feet. After Officer Lee warned Plaintiff that he would be Tasered a second time if he did not stop resisting, Officer Lee deployed the Taser for a second time in a five second burst (the standard default setting on the Taser device). *See Ex. 3, p. 25, l. 5-22.* At that point the officers were able to get Plaintiff's hands cuffed and stand him up. Officers Lee and Maguire then turned Plaintiff over to Officers Leyrer and Singer for transport to the police station, and that was their last contact with Plaintiff. *See Ex. 1; also Ex. 3, pp. 11-12. l. 22-25 and 1-4.*

Pursuant to departmental policy in situations where a Taser has been deployed on a suspect, Plaintiff was transported to the hospital for evaluation. Examination at the hospital revealed no injury from the application of the Taser itself. Plaintiff was diagnosed with an avulsion fracture of the hip (defined as the detachment of a bone fragment that results from the pulling away of a ligament, tendon, or joint capsule from its point of attachment on a bone -- called also *sprain fracture*), and a sprain of his right wrist. *See Ex. 4, Hospital records.* It is unclear whether Plaintiff suffered these injuries when he tripped over the fence while running from the police, or whether they occurred when he was Tasered the first time. In any event, both injuries resolved without surgical intervention.

Plaintiff was subsequently charged in a two-count misdemeanor complaint with possession of

open intoxicants in public and resisting arrest. He exercised a first-offender option on the open intoxicants charge and paid $150 in court costs to have that charge dismissed. He pled no contest to the resisting arrest charge and was placed on probation for one year and ordered to pay fines and costs and perform community service. *See Ex. 5, 15th District Court records.* After the successful completion of the terms of his probation, Plaintiff's conviction was set aside pursuant to the court's deferred sentence policy and the charge was ultimately dismissed. However, Plaintiff is not denying in this case that he resisted arrest back on September1, 2005. Plaintiff has admitted in his deposition that he was consuming alcohol on the night of his arrest (*Ex. 2, p. 11*); that he knew it was illegal to consume or possess alcohol on the public street (*Ex. 2, p. 12, l. 21-25*); that he was aware that the police were going to cite him for that violation (*Ex. 2, p. 43, l. 20-25*); and, that he ran from the police, multiple times, in an attempt to avoid capture (*Ex. 2, p. 44, l. 15-20*).

STANDARD OF REVIEW

The issue of whether qualified immunity is applicable to an official's conduct is a question of law. *See Champion v. Outlook Nashville, Inc.,* 380 F.3d 893, 900 (6th Cir. 2004). If the legal question is dependent upon which version of facts one believes, then the jury must determine liability. *Id.* Thus, if there is a disagreement as to the facts, the reviewing court must consider the evidence in the light most favorable to the Plaintiff. *Id.* In this case there is no significant dispute as to the facts: Plaintiff admits he was attempting to avoid arrest by running from the police, and Officer Lee deployed his Taser twice – once to halt the fleeing suspect, and a second time in order to gain control of the still struggling suspect.

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a

jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

Where the non-moving party would have the burden of proof at trial, the moving party "... bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. Once the moving party meets this burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). To demonstrate a genuine issue, the non-moving party must present sufficient evidence upon which a jury could reasonably find for the non-moving party; a "scintilla of evidence" is insufficient. *See Liberty Lobby,* supra at 252. Summary judgment is appropriate here because Officer Lee's conduct was objectively reasonable under the circumstances and he is protected by qualified immunity.

ANALYSIS

A. Qualified Immunity

Qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Champion v. Outlook Nashville, Inc., supra at 900-901 (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982)).

In assessing qualified immunity, the court, viewing the facts in the light most favorable to the plaintiff, determines whether: 1) the violation of a constitutional right has occurred; and 2) the constitutional right at issue "was clearly established at the time of defendant's alleged misconduct." *Saucier* v. *Katz,* 533 U.S. 194,201 (2001); *Dunigan* v. *Noble,* 390 F.3d 486,491 (6th Cir. 2004).

In step one of the qualified immunity analysis, the court determines whether the evidence produced by plaintiff, taken in the light most favorable to plaintiff but viewed from the perspective of a reasonable officer on the scene, establishes a claim of excessive force in violation of the Constitution. The force must be objectively unreasonable such that it could not have been based on a reasonable mistake of law. *Sample v. Bailey,* 409 F.3d 689, at 696 n.3 (6th Cir. 2005). If plaintiff's evidence does not establish an excessive force violation, summary judgment is granted in favor of defendants. If plaintiff satisfies step one of the analysis, plaintiff must still demonstrate step two - that the constitutional right violated was clearly established at the time of the incident.

1. Constitutional Violation

The first inquiry in the qualified immunity analysis is whether a constitutional violation has occurred. *Dunn* v. *Matatall,* 549 F.3d 348, 353 (6th Cir. 2008). The alleged violation in this case is excessive force by Officer Lee in his use of a Taser to halt Plaintiff while he was resisting their efforts to arrest him by fleeing from the officers and by refusing to allow himself to be handcuffed. In determining whether an excessive force constitutional violation occurred, the court must look at the objective reasonableness of the defendant's conduct, "which depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight." *Id.* (quoting *Fox* v. *DeSoto,* 489 F.3d 227, 236 (6th Cir. 2007). That the right

to make an arrest "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it" is well established. *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989). However, the right to be free from excessive force during an arrest or investigatory stop is guaranteed by the Fourth Amendment's prohibition against unreasonable seizures. *Graham v. Connor,* supra at 393-94. Claims of excessive force in the context of arrests or investigatory stops are analyzed under the Fourth Amendment's "objective reasonableness standard," not under substantive due process principles. *Id.* Given that police officers often have to make split-second decisions under tense circumstances, "the reasonableness of an officer's belief as to the appropriate level of force should be judged from that on-scene perspective." *Id.* at 396. In considering the merits of a constitutional excessive force claim, the court must pay "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." *Id*; see also *Smoak v. Hall,* 460 F.3d 768, 783 (6th Cir. 2006); *Livermore* v. *Lubelan,* 476 F.3d 397,404 (6th Cir. 2007).

Applying the three *Graham* factors - severity of the crime, immediate threat to officers or others, and actively resisting arrest or trying to flee – Officer Lee's conduct was objectively reasonable when the facts are viewed in a light most favorable to Plaintiff. Although Plaintiff's crime - consuming alcoholic beverages in public - was relatively minor[1], Plaintiff was clearly

[1] Technically, by fleeing from the police Plaintiff was actually committing a felony crime in Michigan. MCL 750.81d provides that "[a]n individual who ... resists, obstructs, opposes, ... a person who the individual knows or has reason to know is performing his or her duties" is guilty of the felony of resisting or obstructing. MCL 750.81d(7)(a) defines "obstruct" to include "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command."

actively resisting arrest, not once, but on several occasions that evening. He ran initially from Officer Leyrer twice, then he ran from Officer Maguire, then from Officer Lee, then when Officer Lee had grabbed Plaintiff after he fell over the fence Plaintiff was able to get to his feet and continue to flee. Plaintiff's continued resistance by running from the police elevated the risk of injury to both Plaintiff and the officers. Both Plaintiff and Officer Lee tripped and fell over the same wire fence during the pursuit; it is equally as plausible that the injuries of which Plaintiff now complains were caused by his fall over the fence as opposed to falling when he was Tasered. *See Ex. 3, pp. 22-23, l. 20-25 and 1-15.* At another point Plaintiff was running through the middle of Greenwood Street. Keeping in mind that Plaintiff, by his own admission, was intoxicated at that time (*Ex. 2, p. 45, l. 14-21*), the risk that Plaintiff or someone else might have been more seriously injured if the police had allowed him to continue to flee cannot be overlooked.

Officer Lee then was faced with the decision to either continue to chase Plaintiff and resort to some escalated degree of force, such as attempting again to gain physical control - which carries an increased risk to both Officer Lee and to Plaintiff - or to use some other means of non-lethal force to end the pursuit and effect an arrest. Viewing the circumstances of that evening from Officer Lee's perspective, he only resorted to a higher level of force after Plaintiff had refused numerous orders from several officers to stop, and had physically pulled away from Officer Lee's grasp. Officer Lee described the circumstances leading up to the two Taser deployments as follows:

Q: When was the first time you deployed your Taser?

A: It was after Mr. Perach was able to defeat my physical control, ability to control him and took off running again.

Q: How many times did you deploy your Taser that day in connection with the arrest of Mr. Perach?

A: There were two deployments.

Q: You indicated the first deployment was after he broke free from your grasp, correct?

A: Yes.

Ex. 3, p. 9, l. 13-22

A: After the [first] deployment when he was on the ground, I got up to him again, I made physical contact with him, tried to hold him down, then went to handcuff him, and he continued struggling again. At that time, he continued to resist and tried to get up and run again.

Ex. 3, p. 10, l. 17-21

Q: What did you tell him, if anything, during those moments when you were attempting to handcuff him?

A: I was telling him to put his hands behind his back and repeatedly told him to put his hands behind his back. He continued to resist and get back up. I told him to get his hands behind his back and stop or I would Tase him again.

Q: What happened?

A: He refused to comply, continued to struggle, was trying to get back up on his hands and feet and run away again, so I activated the Taser again.

Ex. 3, p. 25, l. 3-13

Indeed, after Officer Lee was finally able to halt Plaintiff with his Taser, Plaintiff continued to resist Officer Lee's efforts to handcuff him which necessitated Officer Lee's second use of the Taser. Under these circumstances, the limited use of the Taser was certainly not a gratuitous use of force. Officer Lee used only as much force as was necessary to subdue Plaintiff, and the use of force in this case was clearly objectively reasonable. *In accord see Wylie v. Overby*, 2006 WL 1007643 at p. 8 (E.D. Mich., 2006) (unpublished case attached as Ex. 6) (finding that plaintiff's assaultive acts in resisting arrest and his attempt to evade arrest by flight are important factors that bring defendants' use of the Taser well within the realm of reasonable use of force) ; *DeVoe v. Rebant,* 2006 WL 334297 at p. 6 (E.D.Mich., 2006) (unpublished case attached as Ex. 7) (finding that the officer's use

of a Taser on a handcuffed but uncooperative suspect who refused to get into the police car was objectively reasonable under the circumstances and thus did not constitute excessive force) (citing *Draper v. Reynolds,* 369 F.3d 1270, 1278 (11th Cir. 2004) (the officer's use of Taser to effectuate the plaintiff's arrest "was reasonably proportionate to the difficult, tense and uncertain situation that [the officer] faced in this traffic stop, and did not constitute excessive force.") *See also Vinyard v. Wilson,* 311 F.3d 1340, 1348 (11th Cir. 2002) ("Courts have consistently concluded that using pepper spray is reasonable ... where the plaintiff was either resisting arrest or refusing police requests, such as requests to enter a patrol car....").

2. Clearly established right.

Even if a plaintiff can establish the violation of a constitutional right by an officer, he must additionally establish that the right was clearly established at the time of violation in order to avoid dismissal on the grounds of immunity. *Griffith v. Coburn,* 473 F.3d 650, 658 (6th Cir. 2007). To satisfy this second prong, "the right must have been 'clearly established' in a particularized sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). However, the official's exact action need not have been previously held to be unlawful but rather, "in light of pre-existing law the unlawfulness must be apparent." *Champion v. Outlook Nashville, Inc.,* supra at 901. Thus, in order to demonstrate that the officers violated a clearly established right, the plaintiff must show "the prior articulation of a prohibition against the type of excess force exerted here." *Id.* at 902. For purposes of determining whether a constitutional right is clearly established, the district court must first look to decisions of the Supreme Court, then decisions of Sixth Circuit and other courts within the circuit, and finally to decisions in other circuits. *See Chappel v. Montgomery Fire Prot. Dist. No. 1,* 131 F.3d 564, 579 (6th Cir. 1997).

The Fourth Amendment guarantees individuals "the right to be free from excessive force during an arrest." *Solomon v. Auburn Hills Police Dep't,* 389 F.3d 167, 173 (6th Cir. 2004). Clearly, Officer Lee should have known that the *gratuitous* or *excessive* use of a Taser would violate a clearly established constitutional right. See *Hickey v. Reeder,* 12 F.3d 754, 757 (8th Cir. 1993); *Williams v. Franklin County, Ohio Sheriff's Dep't,* 84 Ohio App.3d 826, 619 N.E.2d 23 (Ohio Ct. App. 1992). See also *Greene v. Barber,* 310 F.3d 889, 898 (6th Cir. 2002) (holding that it may be excessive force to use pepper spray on suspect who was resisting arrest but "not threatening anyone's safety or attempting to evade arrest by flight"). However, Officer Lee did not use his Taser against an already subdued suspect, or in a gratuitous or excessive manner. He discharged his Taser once to halt Plaintiff, who had already fled from several officers and had already once pulled away from Officer Lee's grasp, and then discharged the Taser a second time while struggling with Plaintiff, who refused to allow himself to be handcuffed.

The District Court for in *DeVoe v. Rebant*, supra, also cited the Eleventh Circuit's decision in *Draper* in considering the issue of whether the use of a Taser under those circumstances violated a clearly established constitutional right. The court in *DeVoe* noted that it could find no Supreme Court or Sixth Circuit precedent establishing whether it is proper for police officers to use a Taser under the circumstances presented in that case. In *Devoe*, although the plaintiff was handcuffed when he was stunned with the Taser, the court found no genuine issue of material fact that he still was resisting the officers' commands to enter the police car and was arguing with them. The *DeVoe* court thus found that not only was the officer's use of the Taser objectively reasonable under the circumstances and thus did not constitute excessive force, it also found that the officer's conduct did not violate clearly established law. *DeVoe v. Rebant*, supra at p. 7.

B. Effect of Plaintiff's No Contest Plea to the Charge of Resisting Arrest

As noted above Plaintiff was charged in the 15th District Court with Possession of Open Intoxicants in Public and Resisting Arrest under Ann Arbor City Code; both are misdemeanor charges. He appeared in court with counsel and exercised a first offender option to have the Open Intoxicants charge dismissed upon payment of court costs. He pled no contest to the Resisting Arrest charge and was placed on 12 months probation under a deferred sentence program. *See Ex. 5.* During those 12 months he stood convicted of resisting arrest. After successfully completing probation the District Court signed an order setting aside the conviction and dismissing the case. However, Plaintiff does not now deny the substance of the criminal charges that he faced as a result of this incident in 2005.

A no contest plea is materially indistinct from a guilty plea under Michigan law. *People v. New,* 427 Mich. 482, 493, 398 N.W.2d 358, 363 (1986). *See also Walker v. Shaffer,* 854 F.2d 138, 142 (6th Cir. 1988) (holding that the plaintiffs' nolo pleas in state court precluded their Fourth Amendment Section 1983 claims). The issue then arises as to whether Plaintiff's no contest plea to a charge of resisting arrest in state court precludes him from arguing that he did not resist the officers' attempt to arrest him. *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) is dispositive of that question:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 486-87; *see also Cummings v. City of Akron,* 418 F.3d 676, 682 -683 (6th Cir. 2005) (holding that *Heck* barred an excessive force claim where "[t]he struggle between Cummings and the officers gave rise to both Cummings' assault conviction and the excessive force claim, and the two [were] inextricably intertwined. Additionally, Cummings could have raised excessive force as a defense to the assault charge, but instead he chose not to contest the charge."); *see also Sandul v. Larion,* No. 94-1233, 1995 WL 216919, at p.6 (6th Cir. April 11, 1995)(unpublished case, attached as Ex. 7) (holding that the plaintiff could not dispute the fact that he had threatened an officer for purposes of a § 1983 claim because he had pleaded no contest to the charge of "attempted" felonious assault under Michigan law). Here, Plaintiff pled no contest to resisting arrest. He cannot now claim that Officer Lee used excessive force by employing his Taser to halt Plaintiff's attempts to escape and to handcuff him, because it was that very behavior that led to the resisting arrest charge.

CONCLUSION

Summary judgment is appropriate here because Officer Lee is protected by qualified immunity. The evidence, taken in the light most favorable to Plaintiff but viewed from the perspective of a reasonable officer on the scene, shows that the force used by Officer Lee to halt Plaintiff's repeated attempts to flee from several officers and his continued resistance to efforts to handcuff him, were objectively reasonable. In addition, not only was Officer Lee's use of the Taser objectively reasonable under the circumstances and thus did not constitute excessive force, Officer Lee's conduct did not violate clearly established law. This clearly was not the gratuitous or excessive use of the Taser; Officer Lee's use of force under these circumstances was not clearly unlawful in light of pre-existing law. Finally, Plaintiff no contest plea to resisting arrest bars him from now claiming that Officer Lee used excessive force by employing his Taser to halt his attempts to escape and to handcuff him, because it was that very behavior that led to the resisting arrest

charge.

WHEREFORE, for all the reasons stated above Defendant Craig Lee respectfully requests that this Court enter summary judgment as to all of the claims made by Plaintiff.

Respectfully submitted:

Office of the City Attorney

Dated: June 19, 2009

/s/ROBERT W. WEST
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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2009, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: None, and I hereby certify that I have mailed by US Mail the document to the following non-ECF participants: Plaintiff.

/s/ Jane Allen
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