IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARY JONES, and JOSEPH ALFORD,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.: 1:06cv585-WHA
	)	
THOMAS FLATHMANN, et al.,	)	
	)	(WO)
Defendants.	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This case is before the court on a Joint Motion for Summary Judgment (Doc. # 105) filed by the Defendants, Thomas Flathmann, Tony Turner, and Donovan Arias, on April 29, 2009.

The original complaint in this action was filed on June 30, 2006. Following the court's most recent order on a motion for summary judgment, the Plaintiffs filed their Amended Complaint (Doc. # 13) on May 16, 2008. The Amended Complaint names Flathmann, who was an original party to the case, in addition to Turner and Arias,[1] as defendants in both their official and individual capacities. The Amended Complaint contains one count, a federal claim for violation of the Fourth Amendment by use of excessive force while executing a search warrant, seeking damages for personal injury and property damage.

For the reasons to be discussed, the Motion for Summary Judgment is due to be granted.

[1]The Amended Complaint also included Michael Campbell as a defendant to the action. Campbell, however, was never served with the Amended Complaint, and was dismissed pursuant to Fed. R. Civ. P. 4(m) on May 27, 2009.

II. SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The party asking for summary judgment "always 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. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing, or pointing out to, the district court that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id.* at 322-24.

Once the moving party has met its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. To avoid summary judgment, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). On the other hand, the evidence of the nonmovant must be believed and all justifiable inferences must be drawn in its favor. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

III. FACTS

The submissions of the parties establish the following facts, viewed in a light most favorable to the non-movants:[2]

On January 18, 2006, Houston County Deputy Sheriff Thomas Flathmann received information from a reliable confidential informant that within the previous twenty-four hours the confidential informant ("CI") was with another person who purchased cocaine at 481 Harvey Hicks Road, Pansey, Alabama, from a black male whom the CI referred to as "Josh." The CI told Flathmann that she witnessed the drug sale transaction take place there. The CI also informed him that there were several vicious dogs chained in and around several junk cars and around the storage building in the back yard area of the house. The CI thought that the cocaine might be concealed in the junk cars near the storage building in the back yard. The CI also told him that she believed the black male called Josh drove a white Cadillac automobile.

In addition to the information provided to Flathmann by the CI, the residence located at 481 Harvey Hicks Road was known by him to be a location where known drug activity had been reported. For example, six months earlier, on July 22, 2005, based on information provided by a confidential informant, deputies from the Houston County Sheriff's office had executed a search

[2]The court has based this on the depositions of the Plaintiffs, the exhibits, and to the extent that they are not contradicted by the depositions of the Plaintiffs, the affidavits of the Defendants. The versions of the facts recited by the Plaintiffs are strikingly different from those of the Defendants, but the court has accepted the Plaintiffs' versions where they conflict.

warrant there. At the time of the July 22, 2005 search, the house was searched as well as the yard area around the house. It was reported that, during that search, a white pill bottle with a white substance was found that, when tested, was found to be cocaine. It was also reported that the second item found on July 22, 2005, consisted of three plastic bags of marijuana that were located in one of the bedrooms of the Plaintiffs' house. Reportedly, the next item recovered consisted of two plastic bags of marijuana found under the kitchen table in the Plaintiffs' house. In the yard outside the house, inside one of the vehicles, a Tupperware jar with five plastic bags of marijuana was found along with a set of scales and two firearms. Two individuals present in the house at that time, not the Plaintiffs, were arrested for Possession of Marijuana First and unlawful possession of a controlled substance.

The next month, on August 5, 2005, information again was provided to a Houston County Deputy Sheriff that narcotics-related activity had been observed at 481 Harvey Hicks Road, Pansey, Alabama, which resulted in the issuance and execution of a second search warrant at the residence. According to the report, during that search, numerous methadone pills were found in a small plastic bag. No prescription for methadone was produced. Reportedly one of the individuals in the house, not one of the Plaintiffs, was arrested for possession of a controlled substance at that time.

Based on the information provided by the CI, and upon application from Deputy Flathmann, on January 18, 2005, Circuit Judge Larry K. Anderson issued another search warrant for the search of the premises. At approximately 9:50 p.m., the search warrant was executed. When Flathmann and other deputies arrived at the scene, a white Cadillac was one of the vehicles parked by the house. Outside the side door of the house, they knocked and yelled through the

door "sheriff's department - search warrant." After waiting a few seconds, the outer storm door was opened and a metal door ram was used to gain entry through the locked door. Some deputies had side arms drawn and held at the ready at the time of entry, and some had tazers drawn and held at the ready. Flathmann had his tazer drawn and at the ready at the time of the entry into the house. When they reached the back bedroom, the deputies encountered a male and female, later determined to be the Plaintiffs.

The Plaintiffs did not hear the deputies "knock and announce" before they entered. They had been asleep in their back bedroom, and were awakened by a loud "boom," and the shattering glass from their door. Alford Dep. at pp. 36-37. The Plaintiffs then saw red laser lights beaming from the men's guns, some of which were aimed at their heads and bodies. Jones Dep. at pp. 24-25. Alford retrieved his pistol, pointed it at the men, and the Plaintiffs demanded that the men identify themselves. Jones Dep. at pp. 25-26. They did not identify themselves, and instead responded with racial epithets, and other explicit and insulting language, and instructed the Plaintiffs to "shut up." Alford Dep. at pp. 74-77. Alford was ordered to put the gun down, and he eventually complied.[3]

Jones, prone to panic attacks due to hyperventilation disorder, continued to "holler." Jones Dep. at pp. 29, 33, 60-61. According to Alford, the deputies stated, using racially-charged

[3]It is not clear whether the deputies had to ask Alford multiple times to put the gun down before he complied. Alford states in his deposition that there was a lot of yelling at that point, and that he cannot recall all that was being shouted at him prior to being asked to put the gun down. Jones states in her deposition that she was repeatedly yelling for Alford to put the gun down for fear that the men would shoot him. The Defendants contend that Alford was not initially responsive to requests to put the gun down, but that he eventually complied. It is not clear from the evidence how long it took for these events to transpire.

and explicit language, that if Jones was not quiet, they would put her in the car or arrest her. Alford Dep. at pp. 47, 76-77. Jones was not quiet, and continued to cry, yell and ask the men to identify themselves. Alford Dep. at pp. 122-23; Jones Dep. at pp. 60-61. The men took her by the arms, both arms extended in front of her, and pulled her down the hallway to the kitchen, her legs dragging behind her, while she continued to resist them. Alford Dep. at pp. 49-57; Jones Dep. at pp. 65, 69-70. Part of the way down the hall, Jones hyperventilated, passed out, and fell onto her hip. Alford Dep. at pp. 53-55. The Ashford Rescue Squad was contacted, and they arrived at the Plaintiffs' residence shortly thereafter. Alford Dep. at p. 125. Jones was revived, and did not request further medical attention or transport to a local hospital. Alford Dep. at pp. 133-34.[4]

The officers forced Jones and Alford to stay inside the kitchen while they searched the house. Alford Dep. at p. 159. Neither Jones nor Alford was handcuffed during the execution of the search warrant, nor otherwise physically handled by the Defendants. Alford Dep. at p. 159.

The Plaintiffs contend that the men, besides one man standing at the front door, who was wearing a police officer's uniform, were fully dressed in black clothing and were wearing dark masks that covered their faces, leaving only their mouths and eyes exposed. Alford Dep. at pp. 45-46. Jones states that she believed the men to be members of the Ku Klux Klan at the time of the execution of the warrant. Jones Dep. at pp. 99-101. Alford similarly contends that he was not initially aware that the men were police officers, but admits that "[t]hey were acting like officers . . . but I didn't see . . . badges" and that he assumed they were police officers based on

[4] Later that evening Jones's daughter took Jones to the emergency room because her hip and her back were bothering her. Alford Dep. at pp. 200-01. She was not admitted, and was treated for a bruised hip.

their conduct and orders. Alford Dep. at pp. 78, 188, 192-93. The Plaintiffs claim that despite their repeated attempts to determine the identity of the men, no one would respond to their questions with anything more than explicit and racial language. The Plaintiffs were not told about the warrant or the drugs until after the rescue squad arrived. Alford Dep. at pp. 78-79.

The search yielded one burnt marijuana cigarette, and two cans fashioned into smoking devices with burnt cocaine residue on them. Turner Aff., p. 4. The cigarette and the smoking devices were found in a storage building behind the house. Turner Aff., p. 4.

According to Alford, damage to the cars and other property outside the home resulted from the execution of the 2005 warrant, and not during the events at issue in this case. Alford Dep. at pp. 162, 254. The Plaintiffs' property damage claims include the thirteen doors in their home, and two guns. Alford Dep. at pp. 162, 254.

IV. DISCUSSION

A. Statute of Limitations

In the Joint Motion for Summary Judgment, the Defendants contend that the claims against Turner and Arias are barred by the statute of limitations, and the court agrees. The events described above took place on or about January 18, 2006. The Complaint was filed on June 30, 2006. The First Amended Complaint was filed on March 18, 2007, and named only Flathmann as a defendant to the action. The two year statute of limitations ran on January 18, 2008. *See Owens v. Okure*, 488 U.S. 235, 249-50 (1989) (holding that the statute of limitations for Section 1983 actions is governed by the residual statute of limitations for personal injuries provided by the law of the state in which the federal court hearing the case sits); Ala. Code § 6-2-38 (setting Alabama's residual statute of limitations for personal injury claims at two years). The Second

Amended Complaint, adding Turner and Arias, however, was not filed until May 16, 2008. Therefore, the court concludes that summary judgment is due to be entered in favor of Turner and Arias, based on the statute of limitations.

B. Fourth Amendment Claim

Having determined that Defendants Turner and Arias are due to be dismissed from this action on statute of limitations grounds, the court turns to the matter of Flathmann's motion for summary judgment. The Amended Complaint asserts claims against Flathmann in both his individual and official capacities. The court, however, previously granted summary judgment on all claims against Flathmann in his official capacity. *See* Doc. # 70. Therefore, the claim made against Flathmann in his official capacity is due to be dismissed.[5]

As for the Fourth Amendment claims against Flathmann in his individual capacity, Flathmann asserts that he is entitled to qualified immunity. Under qualified immunity, "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 should have known." *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988). To be eligible for qualified immunity, "the official must first establish that he was performing a 'discretionary function' at the time the alleged violation of federal law occurred." *Crosby v. Monroe County*, 394 F.3d 1328, 1332 (11th Cir. 2004). The court finds that Flathmann was performing a discretionary function at the time of the alleged

[5]Further, had Turner and Arias not been granted summary judgment on statute of limitations grounds, claims against them in their official capacities would similarly be due to be dismissed, because the Plaintiffs, for purposes of this motion, have treated all of the Defendants as being similarly situated.

constitutional violation, as he was executing a valid search warrant at the Plaintiffs' home on the night at issue in this case. *See O'Rourke v. Hayes*, 378 F.3d 1201, 1205 (11th Cir. 2004) (holding that a defendant must show that he was performing a legitimate job-related function through means that were within his power to utilize).

The next step in determining whether an official is entitled to qualified immunity involves a two-part inquiry: whether the officer violated a constitutional right, and, additionally, whether the constitutional right in question was so clearly established that the officer had "notice" or "fair warning" that his conduct was constitutionally prohibited. The court, however, is no longer required, as it once was, to first determine whether the officer violated a constitutional right before to turning to the question of whether that right was clearly established at the time of the alleged violation. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009).

The Fourth Amendment provides the right to be free from excessive force in the course of any seizure of the person. *Beshers v. Harrison*, 495 F.3d 1260, 1265 (11th Cir. 2007). However, not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a constitutional right. *Neal v. Fulton County Bd. of Educ*., 229 F.3d 1069, 1076 (11th Cir. 2000). "In order to determine whether the amount of force used by a police officer was proper, a court must ask whether a reasonable officer would believe that this level of force is necessary in the situation at hand." *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002) (quotation omitted). This must be decided "on a case-by-case basis from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993). The Eleventh Circuit has identified several factors to use in determining whether an officer's use of force was objectively reasonable,

including "(1) the need for the application of force, (2) the relationship between the need and the amount of force used, (3) the extent of the injury inflicted and, (4) whether the force was applied in good faith or maliciously and sadistically." *Hadley v. Gutierrez*, 526 F.3d 1324, 1329 (11th Cir. 2008).

The court previously denied a motion for summary judgment by Flathmann on the basis of qualified immunity. In that opinion, the court acknowledged that the facts, as they were known at that stage of the proceedings, and as taken in the light most favorable to the Plaintiffs, created a close call as to whether qualified immunity applied, but concluded, based on the totality of the circumstances, and on the evidence before it at that time, that summary judgment was not appropriate. The court noted that considering "[the profanity and racial epithets] taken into account along with the deputy sheriffs' crashing into the home at night, in hoods to disguise themselves, the refusal to identify themselves, the alleged dragging of Jones through the hallway, the destruction of unlocked interior doors, and the forced entry into the cars to which Alford was attempting to locate the keys, the reasonableness of the officer's actions diminishes considerably." Doc. # 70, p. 25.

At the time of that order, the only evidence submitted by the Plaintiffs were their affidavits, and the court, due to the lack of specificity in the affidavits, was obligated to accept inferences in the Plaintiffs' favor on matters not squarely addressed in the affidavits.[6] Since that time, the Plaintiffs have been deposed, and several of the facts initially accepted by the court are

[6]For example, with respect to the allegations surrounding Jones being dragged through the hallway, the court noted "Jones' affidavit does not squarely address whether the Plaintiffs were actively resisting or whether they would have followed the sheriffs willingly and peacefully to the kitchen, but the inference in their favor would suggest that they passively resisted." Doc. # 70, p. 22.

no longer among the Plaintiffs' contentions. Most significantly, it is clear that "a docile, obedient and yielding subject of a search warrant" was not dragged through the hallway, as discussed by the court in the previous order. Doc. #70, p. 22. Instead, now both Plaintiffs acknowledge that Jones resisted the officers, and did not respond to numerous requests that she be quiet, or risk being put in the car or in jail. She instead continued to yell and refused to leave the bedroom to allow the officers to conduct their search.

Additionally, prior to depositions of the Plaintiffs being taken, the Plaintiffs contended that the officers were wearing hoods, and, based on the attached affidavits not containing a description of the hoods, and the allegations of strong racial language, the court inferred that the Plaintiffs' alleged that the men were wearing hoods commonly associated with the Ku Klux Klan. Upon review of the depositions in this case, it is now clear that the Plaintiffs claim that the men were wearing darkened masks (denied by Defendants, but accepted for purposes of the motion). While the Plaintiffs' contention that the men's faces were covered has not changed, the court does not find the masks to carry the same bad faith, and racial implications. Further, the Plaintiffs no longer claim that Flathmann broke into their vehicles, and now acknowledge that the external damage to the home was caused during the execution of another warrant in 2005.

Upon review of the different circumstances now before the court in light of the factors set forth above, these differences are enough to satisfy the court that what once appeared to be a very close case, is now one in which the Defendant is due summary judgment on the basis of qualified immunity.

The first factor, the need for the application of force, taken from the perspective of the officers, now weighs in favor of the officers' use of force. The officers made clear their need for

Jones to be quiet, and warned her that if she was not quiet, they would arrest her or put her in the car. Jones was not quiet, and the officers removed her from the bedroom. As discussed in the court's prior opinion with respect the second factor, the relationship between the need for force and the use of force, the force used against Jones was *de minimus*, and the court finds that force was reasonable in light of the need for force. The third factor, the physical harm allegedly caused, as discussed in the previous opinion, was only slight, and, it is now clear that much of the harm caused resulted from the exacerbation of an existing condition unknown to the Defendant, hyperventilation syndrome. With respect to the final factor, while some evidence of bad faith on the part of the officer remains under the Plaintiffs' version of the facts, the refusal to identify, and the officers' language, there is no longer enough to say that the officer applied force maliciously and sadistically, so as to violate a clearly established constitutional right.

Further, the court notes that, while the facts are viewed in the light most favorable to the Plaintiffs, as the nonmoving party, the determination of whether the Defendant acted reasonably is viewed from the perspective of a reasonable officer on the scene. Thus, the court takes as true the Plaintiffs' allegations regarding the events of January 18, 2008, but, in determining whether the Defendants' actions were objectively reasonable, so as to entitle him to qualified immunity, the court cannot consider allegations made by the Plaintiffs regarding facts that could not have been observed by the officer. Specifically, Jones stated that at the time of the execution of the warrant, she believed the officers to be members of the Ku Klux Klan. That fact, however, is not relevant to this inquiry, except as far as whether the actions of the officers were so similar to those of members of the Ku Klux Klan as to make them objectively unreasonable. Similarly,

there is no indication that the officers were aware that Jones suffered from panic attacks, or that their shouting and pulling her down the hallway would cause her to pass out.

An officer on the scene would have been executing a search warrant at a house known to have drug connections, faced with a man pointing a pistol at him and a woman shouting, and a woman refusing to leave the bedroom to allow a search after the man put down the gun. The court finds that the force used to allow a search of the premises was objectively reasonable under the circumstances, and was not conduct that clearly was constitutionally prohibited.

Summary judgment is due to be entered in favor of Defendant Flathmann on the Plaintiffs' excessive force claim on the basis of qualified immunity.[7]

V. CONCLUSION

For the reasons discussed, the Defendants' Motion for Summary Judgment (Doc. # 105) is GRANTED.

Final Judgment will be entered in accordance with this Memorandum Opinion and Order.

Done this 4th day of June, 2009.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
SENIOR UNITED STATES DISTRICT JUDGE

[7]The court has previously determined that Defendants Arias and Turner are due to be dismissed from the action based on expiration of the statute of limitations prior to the filing of the Amended Complaint. If, however, the court had not determined that summary judgment is due to be granted on that basis, Arias and Turner would similarly be due summary judgment in their favor based on qualified immunity.