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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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PHU SU,
Plaintiff,
v.

NO. CIV. 2:09-1826 WBS GGH
MEMORANDUM AND ORDER RE:
MOTION FOR PARTIAL SUMMARY
JUDGMENT

COUNTY OF SACRAMENTO; Deputy
Sheriff JAMES PETRONIVICH,
individually and in his
official capacity (Badge #
856); and Sheriff JOHN
MCGINNESS, in his official
capacity,
Defendants.

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Plaintiff Phu Su filed this civil rights action under
42 U.S.C. § 1983 after he was allegedly subjected to excessive
force by defendant Sacramento County Deputy Sheriff James
Petronivich during a traffic stop. Presently before the court is
plaintiff's motion for partial summary judgment as to Deputy

1 Petronivich's liability pursuant to Federal Rule of Civil
2 Procedure 56.

3 I. Factual and Procedural Background

4 On November 28, 2008, defendant Deputy Petronivich and
5 Deputy Michelle Ball were on regular patrol driving northbound on
6 Sampson Avenue in Sacramento when they observed a vehicle
7 traveling in the opposite direction without a front license plate
8 in violation of California Vehicle Code section 5200. (Butts
9 Decl. Ex. 2 ("Petrinovich Depo.") at 20:2-17.) Petrinovich was
10 driving the patrol vehicle and Ball was riding in the front
11 passenger seat. (Id. at 20:2-6.) Petrinovich made a u-turn and
12 positioned himself behind the vehicle, a black 2006 Chrysler 300
13 being driven by plaintiff. (Id. at 20:2-17.) The officers ran a
14 search on the car's rear plate, finding that it was registered to
15 a 300 Chrysler, but could not confirm that the plates were
16 properly attached to the vehicle in front of them. (Id. at
17 33:19-34:9)

18 As Petrinovich caught up to plaintiff's vehicle, he
19 observed it make a right hand turn onto the westbound left lane
20 on 47th Avenue without coming to a complete stop behind the limit
21 line of the intersection's stop sign in violation of California
22 Vehicle Code section 22450. (Id. at 20:2-17.) Petrinovich
23 followed plaintiff's car onto 47th Avenue and activated the
24 patrol car's red light and siren to signal plaintiff to pull to
25 the side of the road. (Id. at 22:2-6.) Plaintiff became aware
26 that the patrol car wanted him to stop while he was making the
27 right turn on 47th Avenue. (Butts Decl. Ex. 10 ("Su Depo.") at
28 38:1-3.)

1 Plaintiff moved from the left lane to the right lane,
2 but continued to drive at approximately thirty-five miles per
3 hour down 47th Avenue. (Petrinovich Depo. at 22:2-12.)
4 Plaintiff continued driving down 47th Avenue without braking,
5 signaling his intention to turn, or slowing down. (Id. at 23:2-
6 8.) Petrinovich believed that the vehicle could have stopped
7 safely on the right hand side of the road, but that plaintiff
8 failed to either pull over or turn down one of the first four
9 side streets he passed. (Id. at 22:9-12, 23:2-8; Su Depo. at
10 42:5-9.)

11 After traveling approximately two-tenths (.2) of a mile
12 at thirty-five miles per hour for forty-three seconds, plaintiff
13 slowed down and turned right onto 45th Street. (Petrinovich
14 Depo. at 25:10-23.) Plaintiff then pulled his car to the right
15 hand side of the street but continued to idle forward in the
16 gutter at approximately ten miles per hour. (Id. at 28:25-29:3.)
17 Petrinovich followed, stopped his patrol car behind plaintiff's
18 vehicle, and yelled to plaintiff to stop the car. (Id. at 29:14-
19 17.) Deputy Ball exited the patrol car and immediately
20 approached plaintiff's vehicle on the passenger side with her gun
21 drawn while Petrinovich stood next to the patrol car with his
22 weapon drawn. (Id. at 30:10-20.) At the time, Petrinovich states
23 that he was conducting the stop as a pursuit due to the extended
24 amount of time plaintiff took to stop the car. (Id. at 37:16-
25 18.)

26 Once the car came to a complete stop, Petrinovich
27 ordered plaintiff to turn off his car and place his hands out the
28 window; plaintiff complied. (Id. at 29:18-23, 30:16-17; 42:18-

1 20.) Ball stood next to the passenger side of plaintiff's
2 vehicle with her gun pointing at the vehicle's passengers. (Id.
3 at 30:18-20.) Once plaintiff's hands were outside his vehicle,
4 Petrinovich approached the vehicle with his gun drawn and looked
5 into the vehicle. (Id. at 42:22-24.) While approaching
6 plaintiff's vehicle, Petrinovich detected the smell of marijuana.
7 (Id. at 44:6-10.) Upon arriving at the vehicle, Petrinovich
8 holstered his gun and opened the driver's side front door. (Id.
9 at 43:1-2.) Petrinovich then grabbed plaintiff's wrists, one in
10 each hand, while he was still sitting in the driver's seat and
11 ordered plaintiff out of the vehicle. (Id. at 43:1-3; Butts
12 Decl. Ex. 1, ("In-Car Camera DVD") at 11/28/2008 21:51:13.)
13 Petrinovich contends that he held plaintiff's wrists so that he
14 could control plaintiff's hands in the event plaintiff attempted
15 to harm Petrinovich or go for a weapon. (Petrinovich Depo. at
16 49:9-14, 50:22-25.) Petrinovich intended to detain plaintiff and
17 place him in handcuffs. (Id. at 47:4-10.)

18 While plaintiff was exiting the vehicle, Petrinovich
19 allegedly told him to face the vehicle and attempted to guide his
20 wrists so that plaintiff was facing the vehicle. (Id. at 43:3-
21 6.) Petrinovich alleges that plaintiff refused to comply and
22 argued with Petrinovich over why he was pulled over and why he
23 had to face the vehicle. (Id. at 49:6-9.) Plaintiff claims he
24 did not make any such statements. (Su Depo. at 48:14-16.)
25 Petrinovich also alleges that plaintiff was attempting to pull
26 his right arm free from Petrinovich's grasp. (Petrinovich Depo.
27 at 49:6-9.)

28 Petrinovich released his hold on plaintiff's left wrist

1 and grabbed plaintiff's right hand with his right hand, twisted
2 it down to put it behind plaintiff's back, and moved plaintiff's
3 body to face the vehicle. (Id. at 44:18-21, 45:1-4, 52:3-5; In-
4 Car Camera DVD at 11/28/2008 21:51:18.) Petrinovich kept
5 plaintiff's right hand in a rear wrist lock and attempted to put
6 plaintiff's left hand on the back of his head. (Petrinovich
7 Depo. at 45:1-4, 53:1-5.) During this time, plaintiff's left
8 hand remained free near his waistband. (Id. at 53:1-4.)
9 Plaintiff's right elbow was then lifted upward behind his back,
10 after which, in what appears to be one continuous motion,
11 Petrinovich turned plaintiff away from the car and took him to
12 the ground. (Id. at 53:1-5, 53:7-14, 54:6-10, 54:13-20; In-Car
13 Camera DVD at 11/28/2008 21:51:26.) Once plaintiff was taken to
14 the ground, Ball moved from the passenger's side of the car to
15 the driver's side, keeping her gun drawn and pointed at the two
16 passengers in the vehicle. (In-Car Camera DVD at 11/28/2008
17 21:51:31.)

18 Once on the ground, plaintiff was face-down with both
19 his hands underneath him, allegedly near his waistband.
20 (Petrinovich Depo. at 55:21-25, 56:4-5.) Petrinovich placed his
21 knee on plaintiff's back after plaintiff allegedly tried to push
22 up off the ground. (Id. at 55:21-25, 56:4-6, 57:3-16, 58:8-9,
23 58:12-17.) Petrinovich states that he instructed plaintiff to
24 put his hands behind his back and that plaintiff did not comply.
25 (Id.) While they were on the ground, an unknown male individual
26 with a dog approached. (Id. at 59:15-19.) Petrinovich was
27 unsure of the man's intentions as he moved toward Petrinovich and
28 plaintiff. (Id. at 59:15-60:9.) Petrinovich then struck

1 plaintiff approximately nine times in his upper back and rear
2 portion of his head while allegedly instructing plaintiff to
3 comply. (Id. at 55:21-25, 56:4-6, 57:3-16, 58:8-9, 58:12-17.)
4 Plaintiff eventually put his hands behind his back, at which
5 point Petrinovich handcuffed him and took him to the patrol car.
6 (Id. at 58:22-24, 59:10-12.) Plaintiff denies that he failed to
7 comply with any orders from Petrinovich or or that he resisted or
8 attempted to resist Petrovich at any time. (Su Depo. at 52:18-
9 53:2.)

10 Additional officers then arrived on scene and conducted
11 a search of plaintiff's car. (Butts Decl. Ex. 3 ("Petrinovich
12 Decl.") ¶¶ 102, 105.) The search of the vehicle uncovered a
13 plastic bag in the glove box containing 3.7 grams of marijuana
14 and that one of the passengers was carrying hashish. (Id. ¶¶
15 106, 108.) Plaintiff and the passenger were arrested and taken
16 to Sacramento County Main Jail. (Id. ¶ 109.) Plaintiff was
17 charged with failure to comply with the lawful order of a police
18 officer, Cal. Vehicle Code § 2800(a), driving while in the
19 possession of marijuana, Cal. Vehicle Code § 23222(b), and
20 resisting a police officer, Cal. Penal Code § 148(a)(1).

21 Plaintiff initiated this § 1983 civil rights action
22 against the County of Sacramento, Petrinovich, and Sacramento
23 County Sheriff John McGinness on July 2, 2009. Plaintiff now
24 moves for partial summary judgment as to Petrinovich's liability
25 under § 1983 based on the video of the incident recorded by the
26 in-car camera in Petrinovich's patrol car.

27 II. Discussion

28 Summary judgment is proper "if the pleadings, the

1 discovery and disclosure materials on file, and any affidavits
2 show that there is no genuine issue as to any material fact and
3 that the movant is entitled to judgment as a matter of law."
4 Fed. R. Civ. P. 56(c); see also id. R. 56(a) ("A party claiming
5 relief may move, with or without supporting affidavits, for
6 summary judgment on all or part of the claim."). A material fact
7 is one that could affect the outcome of the suit, and a genuine
8 issue is one that could permit a reasonable jury to enter a
9 verdict in the non-moving party's favor. Scott v. Harris, 550
10 U.S. 372, 380 (2007); Anderson v. Liberty Lobby, Inc., 477 U.S.
11 242, 248 (1986).

12 The party moving for summary judgment bears the initial
13 burden of establishing the absence of a genuine issue of material
14 fact and can satisfy this burden by presenting evidence that
15 negates an essential element of the non-moving party's case.
16 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

17 Alternatively, the movant can demonstrate that the non-moving
18 party cannot provide evidence to support an essential element
19 upon which it will bear the burden of proof at trial. Id. Where
20 the moving party bears the burden of proof at trial, it must come
21 forward with evidence which would entitle it to a directed
22 verdict if the evidence were uncontroverted at trial. Houghton
23 v. South, 965 F.2d 1532, 1536 (9th Cir. 1992).

24 Once the moving party meets its initial burden, the
25 non-moving party "may not rely merely on allegations or denials
26 in its own pleading," but must go beyond the pleadings and, "by
27 affidavits or as otherwise provided in [Rule 56,] set out
28 specific facts showing a genuine issue for trial." Fed. R. Civ.

1 P. 56(e); Celotex Corp., 477 at 324; Valandingham v. Bojorquez,
2 866 F.2d 1135, 1137 (9th Cir. 1989). In its inquiry, the court
3 must view any inferences drawn from the underlying facts in the
4 light most favorable to the nonmoving party, but may not engage
5 in credibility determinations or weigh the evidence. Anderson,
6 477 U.S. at 255; Matsushita Elec. Indus. Co., Ltd. v. Zenith
7 Radio Corp., 475 U.S. 574, 587 (1986).

8 In relevant part, § 1983 provides,

9 Every person who, under color of any statute, ordinance,
10 regulation, custom, or usage, of any State . . . ,
11 subjects, or causes to be subjected, any citizen of the
12 United States . . . to the deprivation of any rights,
13 privileges, or immunities secured by the Constitution and
14 laws, shall be liable to the party injured in an action
15 at law, suit in equity or other proper proceeding for
16 redress

17 While § 1983 is not itself a source of substantive rights, it
18 provides a cause of action against any person who, under color of
19 state law, deprives an individual of federal constitutional
20 rights or limited federal statutory rights. 42 U.S.C. § 1983;
21 Graham v. Connor, 490 U.S. 386, 393-94 (1989).

22 Plaintiff contends that Petrinovich violated his Fourth
23 Amendment rights by using excessive force against him during his
24 arrest. Under the Fourth Amendment, police may use only such
25 force during an arrest as is objectively reasonable under the
26 circumstances. Graham, 490 U.S. at 397. This analysis requires
27 "balancing the 'nature and quality of the intrusion' on a
28 person's liberty with the 'countervailing governmental interests
at stake' to determine whether the use of force was objectively
reasonable under the circumstances." Smith v. City of Hemet, 394
F.3d 689, 701 (9th Cir. 2005) (quoting Graham, 490 U.S. at 396).

1 "The 'reasonableness' of a particular use of force must be judged
2 from the perspective of a reasonable officer on the scene, rather
3 than with the 20/20 vision of hindsight." Graham, 490 U.S. at
4 396 (citing Terry v. Ohio, 392 U.S. 1, 22-27 (1968)). A
5 determination of whether the force an officer used was reasonable
6 "requires careful attention to the facts and circumstances of
7 each particular case, including the severity of the crime at
8 issue, whether the suspect poses an immediate threat to the
9 safety of the officers or others, and whether he is actively
10 resisting arrest or attempting to evade arrest by flight." Id.
11 at 397 (citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)).

12 Plaintiff argues that the video taken of his arrest by
13 the camera inside of Petrinovich's parol car proves unequivocally
14 that the force used against him was objectively unreasonable.
15 The Supreme Court has recognized that video evidence can be
16 sufficient to defeat a party's version of the facts at summary
17 judgment when it shows that a party's testimony is "blatantly
18 contradicted by the record, so that no reasonable jury would
19 believe it." Scott, 550 U.S. at 380.

20 Simply viewing the video, the force used by Petrinovich
21 would appear to be excessive under the circumstances. However,
22 this a question for the jury to decide. See Liston v. County of
23 Riverside, 120 F.3d 965, 976 n.10 (9th Cir. 1997) (as amended)
24 ("We have held repeatedly that the reasonableness of force used
25 is ordinarily a question of fact for the jury."); see also Smith,
26 394 F.3d at 701 ("Because [the excessive force inquiry] nearly
27 always requires a jury to sift through disputed factual
28 contentions, and to draw inferences therefrom, [the Ninth Circuit

1 has] held on many occasions that summary judgment or judgment as
2 a matter of law in excessive force cases should be granted
3 sparingly.'" (quoting Santos v. Gates, 287 F.3d 846, 853 (9th
4 Cir. 2002))). Given the evidence and declarations submitted by
5 Petrinovich, this court cannot conclude that no reasonable juror
6 could find that the force used was reasonable. To properly
7 decide this case the court would need to weigh the credibility of
8 the testimony of the officers on scene against the video footage
9 and plaintiff's testimony. Such weighing of the evidence and
10 credibility determinations are improper on summary judgment and
11 are properly left to the jury. See Smith, 394 F.3d at 701.

12 IT IS THEREFORE ORDERED that plaintiff's motion for
13 partial summary judgment be, and the same hereby is, DENIED.

14 DATED: August 12, 2010

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16 WILLIAM B. SHUBB
17 UNITED STATES DISTRICT JUDGE
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