

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BENNIE DIXON,)	Civil No. 06-2027-JAH(LSP)
)	
Plaintiff,)	SECOND
)	REPORT AND RECOMMENDATION
v.)	GRANTING DEFENDANTS' MOTION
)	FOR SUMMARY JUDGMENT
CITY OF SAN DIEGO, et al.,)	(DOC. # 59)
)	
Defendants.)	

On December 12, 2006, Plaintiff Bennie Dixon (hereafter "Plaintiff") filed a First Amended Complaint pursuant to 42 U.S.C. §1983 alleging that his civil rights were violated. Plaintiff's First Amended Complaint also contains causes of action for battery, false arrest, negligence and emotional distress. On December 8, 2008, Defendants Mark Taylor (hereafter "Taylor"), Patrick Sullivan (hereafter "Sullivan"), and Brandie Sorbie (hereafter "Sorbie") (hereafter collectively "Defendants") filed a Motion for Summary Judgment (hereafter "Motion"). Plaintiff did not file an Opposition to the Motion. On January 16, 2009, the Court issued a Report and Recommendation Granting Defendants' Motion. Unbeknownst to the undersigned, on January 16, 2009, Plaintiff attempted to file an

1 Opposition to the Motion. On January 22, 2009, the District Judge
2 assigned to this case allowed Plaintiff to file a Motion for Denied
3 Access To The Courts, which presents arguments and evidence in
4 opposition to the Motion (hereafter "Opposition"). On February 2,
5 2009, the District Judge assigned to this case denied Plaintiff's
6 Motion for Denied Access To The Courts and declined to adopt the
7 January 16, 2009 Report and Recommendation so that the undersigned
8 could consider the arguments and evidence in opposition to the
9 Motion, as presented by Plaintiff. On February 11, 2009, Defendants
10 filed a Reply to Plaintiff's Opposition.

11 The Court, having reviewed the First Amended Complaint, the
12 Motion, Plaintiff's Opposition, Defendants' Reply and the exhibits
13 attached thereto and GOOD CAUSE APPEARING, HEREBY RECOMMENDS that
14 the Motion for Summary Judgment be GRANTED.

15 I

16 STATEMENT OF FACTS

17 In the early morning of March 9, 2005, uniformed San Diego
18 Police Officer Sullivan received a radio call to investigate a
19 battery with a deadly weapon at Elizabeth Freese Elementary School
20 located at 8140 Greenlawn Drive. (Declaration of Patrick Sullivan at
21 2, ll. 3-7)(hereafter "Sullivan Dec.")

22 A school custodian, Manuel Hernandez (hereafter "Hernandez"),
23 had been attacked earlier that morning by a man with a three-foot
24 stick, causing bruising to Hernandez' back. As the suspect was
25 walking out of the school, he also threatened with the stick Julia
26 Pacheco (hereafter "Pacheco"), another school employee. The suspect
27 was described as a black male with a bald head, clean shaven and
28 wearing a black jumpsuit with a white stripe running down the sides.

1 (Sullivan Dec. at 2, ll. 3-7, Declaration of Brandie Sorbie at 2,
2 ll. 3-6, hereafter "Sorbie Dec.")

3 Plaintiff alleges that prior going to the school, he was
4 being chased by a group of Hispanic gang members. He alleges that
5 he "ran lost" into the school's parking lot with a small piece of
6 lumber in his hand. (Opposition at 1a) Plaintiff alleges that he
7 feared for his life when he encountered Hernandez, who spit on him
8 and exposed a box cutter with which he believed Hernandez would hurt
9 him. Thereafter, he asserts that he hit Hernandez in self-defense.
10 (Opposition at 1a-2)

11 Soon thereafter, a black male fitting the suspect's descrip-
12 tion was spotted walking on Imperial Avenue, a short distance from
13 Freese Elementary School. The male, later identified as Plaintiff,
14 was walking in the direction of a park carrying a stick and striking
15 at weeds with the stick. [Sullivan Dec. at 2, ll. 9-14, Report of
16 Johnson (hereafter "Johnson Rpt.")]

17 Uniformed San Diego Police Officer Michelle Johnson (hereaf-
18 ter "Johnson") approached Plaintiff first as Plaintiff was sitting
19 on the ground barefoot, leaning against a building with his shoes
20 and socks lying on the ground next to him. A large stick was also
21 lying next to Plaintiff. Johnson commanded Plaintiff to put his
22 hands in the air in order to see if he had anything in them, but
23 Plaintiff said "What for?" and then tried to reach for the stick.
24 (Sorbie Dec. at 2, ll. 13-18, Johnson Rpt., attached to the
25 Declaration of Sergeant Paul Salas)¹ [Plaintiff's First Amended
26 Complaint at 4, 5(ii)-(iv)]

27
28 ¹ Johnson is no longer a San Diego Police Officer and was not served
with this lawsuit. She has not been located to provide a
declaration. Sergeant Paul Salas approved Johnson's Rpt.

1 Johnson kicked the stick out of Plaintiff's reach and then
2 grabbed onto his arm and ordered him to stand up. Plaintiff stood
3 up quickly with his feet braced apart and his hands clenched into
4 fists. He swung his clenched left fist at Johnson's face. Johnson
5 dodged Plaintiff's fist and took out her expandable baton, which she
6 then used to strike Plaintiff on his arms. (Johnson Rpt., Sorbie
7 Dec. at 2, ll. 17-18)

8 Uniformed Officer Sorbie arrived just before the struggle
9 between Plaintiff and Johnson ensued. Sorbie saw Plaintiff stand up
10 and attempt to strike Johnson with his clenched fist. Sorbie joined
11 in the effort to take Plaintiff into custody. Plaintiff continued
12 to swing his arms at Johnson as Sorbie assisted in gaining control
13 of him. (Sorbie Dec. at 2, ll. 13-21, Johnson Rpt.)

14 Subsequently, Uniformed Officer Taylor arrived and tried to
15 take Plaintiff into custody as Plaintiff continued to resist, kick
16 and flail. [Declaration of Mark Taylor at 2, ll. 13-20, (hereafter
17 "Taylor Dec."), Sorbie Dec. at 2, ll. 21-26, Sullivan Dec. at 2, ll.
18 11-14]

19 Sullivan arrived at the scene and the four Officers were
20 finally able to handcuff Plaintiff after striking several blows of
21 their batons to Plaintiff's thighs. (Taylor Dec. at 2, ll. 16-20,
22 Sullivan Dec. at 2, ll. 16-20, Sorbie Dec. at 2, ll. 24-26, Johnson
23 Rpt.)

24 After Plaintiff calmed down, he identified himself. At a
25 curbside line-up, Pacheco identified Plaintiff as the man who had
26 threatened her with a stick earlier that day. She positively
27 identified Plaintiff's stick as the weapon Plaintiff had used to
28 threaten her. (Sorbie Dec. at 2, ll. 1-6, Sullivan Dec. at 2, ll.

1 21-24, Johnson Rpt.)

2 After Plaintiff was taken into custody, he began making
3 strange statements about snakes around his ankles. Also, he behaved
4 oddly by making sudden and jerky movements. Johnson transported
5 Plaintiff to County Mental Health for a psychiatric evaluation and
6 learned that Plaintiff had recently been released from a 24 or 26
7 day incarceration at the County Jail. (Johnson Rpt., Sorbie Dec. at
8 3, ll. 1-6, Sullivan Dec. at 2, ll. 21-24)

9 Plaintiff's First Amended Complaint, viewed as an affidavit
10 in support of an opposition to the motion (see discussion below) and
11 Opposition do not contain facts that materially differ from
12 Defendants' account of Plaintiff's arrest, other than he alleges
13 (albeit without the required factual specificity) that Defendants'
14 actions amounted to unprovoked excessive force against him, that
15 Sullivan delivered blows to him that are not mentioned above, that
16 Defendants were not competently trained and lacked experience, that
17 Defendants did not provide him with a "Force Effectiveness" form of
18 Johnson, and that the San Diego Police Department is, in some way,
19 corrupt. Plaintiff does not state facts showing that he resisted
20 arrest. Nor does he state facts showing that Defendants' acts were
21 unprovoked nor unjustified under the circumstances.

22 On September 21, 2007, the Court of Appeal, in affirming
23 Plaintiff's convictions arising from the incident described above,
24 essentially found the same facts as does this Court. (Opposition at
25 Appendix A)

26

27

28

1 II

2 STANDARD FOR SUMMARY JUDGMENT

3 Fed.R.Civ.P. 56(c) authorizes the granting of summary
4 judgment "if the pleadings, depositions, answers to interrogatories,
5 and admissions on file, together with the affidavits, if any, show
6 that there is no genuine issue as to any material fact and that the
7 moving party is entitled to judgment as a matter of law." The
8 standard for granting a motion for summary judgment is essentially
9 the same as for the granting of a directed verdict. Judgment must
10 be entered "if, under the governing law, there can be but one
11 reasonable conclusion as to the verdict." Anderson v. Liberty
12 Lobby, Inc., 477 U.S. 242, 250-51 (1986). However, "[i]f reasonable
13 minds could differ," judgment should not be entered in favor of the
14 moving party. Id.; see also Blankenhorn v. City of Orange, 485 F.3d
15 463, 470 (9th Cir. 2007) ("If a rational trier of fact might resolve
16 the issue in favor of the nonmoving party, summary judgment must be
17 denied.") (alteration omitted).

18 The parties bear the same substantive burden of proof as
19 would apply at a trial on the merits, including plaintiff's burden
20 to establish any element essential to his case. Liberty Lobby, 477
21 U.S. at 252; Celotex v. Catrett, 477 U.S. 317, 322 (1986); Taylor v.
22 List, 880 F.2d 1040, 1045 (9th Cir. 1989).

23 The moving party bears the initial burden of identifying the
24 elements of the claim in the pleadings, or other evidence, which the
25 moving party "believes demonstrates the absence of a genuine issue
26 of material fact." Celotex, 477 U.S. at 323; Adickes v. S. H. Kress
27 & Co., 398 U.S. 144 (1970); Zoslaw v. MCA Distrib. Corp., 693 F.2d
28 870, 883 (9th Cir. 1982). "A material issue of fact is one that

1 affects the outcome of the litigation and requires a trial to
2 resolve the parties' differing versions of the truth." S.E.C. v.
3 Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). More than
4 a "metaphysical doubt" is required to establish a genuine issue of
5 material fact. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio
6 Corp., 475 U.S. 574, 586 (1986).

7 The burden then shifts to the nonmoving party to establish,
8 beyond the pleadings, that there is a genuine issue for trial.
9 Celotex, 477 U.S. at 324. To successfully rebut a properly
10 supported motion for summary judgment, the nonmoving party "must
11 point to some facts in the record that demonstrate a genuine issue
12 of material fact and, with all reasonable inferences made in the
13 plaintiff[]'s favor, could convince a reasonable jury to find for
14 the plaintiff[]." Reese v. Jefferson School Dist. No. 14J, 208 F.3d
15 736, 738 (9th Cir. 2000) (citing FED.R.CIV.P. 56; Celotex, 477 U.S.
16 at 323; Anderson, 477 U.S. at 249); see also Galen v. County of Los
17 Angeles, 477 F.3d 652, 658 (9th Cir. 2007) (noting that the
18 non-moving party may defeat summary judgment if she makes a showing
19 sufficient to establish a question of material fact requiring a
20 trial to resolve)

21 Here, Plaintiff has filed a verified First Amended Complaint
22 and an Opposition to the Motion. A verified complaint or motion may
23 be used as an opposing affidavit under FED.R.CIV.P. 56. Schroeder
24 v. McDonald, 55 F.3d 454, 460 (9th Cir. 1995 (complaint); McElyea v.
25 Babbitt, 833 F.2d 196, 197-98 (9th Cir. 1987) (complaint); Johnson
26 v. Meltzer, 134 F.3d 1393, 1399-1400 (9th Cir. 1998) (motion).
27 Plaintiff's First Amended Complaint is based on personal knowledge
28 and sets forth some facts that may be admissible in evidence.

1 Fed.R.Civ.P. 56(e); Schroeder, 55 F.3d at 460. Thus, the Court may
2 consider it as an opposing affidavit under Fed.R.Civ.P. 56.

3 However, "a verified complaint may serve as an affidavit for
4 purposes of summary judgment [only] if [1] it is based on personal
5 knowledge and if [2] it sets forth the requisite facts with
6 specificity.'" California Pro-Life Council v. Randolph, 507 F.3d
7 1172 (9th Cir. 2007) [quoting Moran v. Selig, 447 F.3d 748, 760 n.16
8 (9th Cir. 2006) (citation omitted)] (emphasis added).

9 III

10 DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT

11 1. Qualified Immunity

12 Defendants contend that summary judgment is proper because
13 they are entitled to Qualified Immunity in that they did not violate
14 Plaintiff's constitutional rights. Plaintiff does not oppose
15 Defendants' contention.

16 Qualified immunity shields government officials performing
17 discretionary functions from liability for civil damages unless
18 their conduct violates clearly established statutory or constitu-
19 tional rights of which a reasonable person would have known.
20 Anderson v. Creighton, 483 U.S. 635, 640 (1987)

21 "In a suit against an officer for an alleged violation of a
22 constitutional right, the requisites of a qualified immunity defense
23 must be considered in proper sequence. Where the defendant seeks
24 qualified immunity, a ruling on that issue should be made early in
25 the proceedings so that the costs and expenses of trial are avoided
26 where the defense is dispositive." Saucier v. Katz, 533 U.S. 194
27 (2001).

28 "Qualified immunity is 'an entitlement not to stand trial or

1 face the other burdens of litigation.'" Saucier, 121 S.Ct. at 2156
2 [quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)] The
3 privilege is "an immunity from suit rather than a mere defense to
4 liability; and like an absolute immunity, it is effectively lost if
5 a case is erroneously permitted to go to trial." Mitchell, 472 U.S.
6 at 526. Thus, the Supreme Court has "repeatedly... stressed the
7 importance of resolving immunity questions at the earliest possible
8 stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227 (1991)
9 (per curiam).²

10 "A court required to rule upon the qualified immunity issue
11 must consider, then, this threshold question: Taken in the light
12 most favorable to the party asserting the injury, do the facts
13 alleged show the office's conduct violated a constitutional right?
14 This must be the initial inquiry." Saucier, 121 S.Ct. at 2156
15 [citing Siegert v. Gilley, 500 U.S. 226, 232 (1991)] "If no
16 constitutional right would have been violated were the allegations
17 established, there is no necessity for further inquiries concerning
18 qualified immunity." Id.

19 "On the other hand, if a violation could be made out on a
20 favorable view of the parties' submissions, the next, sequential
21 step is to ask whether the right was clearly established. This
22 inquiry, it is vital to note, must be undertaken in light of the
23 specific context of the case, not as a broad general proposition."
24 Id. Thus, "the right the official is alleged to have violated must

25
26 ² "[Q]uite aside from the special concerns regarding the need for
27 early resolution of matters concerning immunity, litigants are
28 ordinarily entitled to resolution of their summary judgment motions
through a determination whether there are material facts in dispute
regarding the elements necessary to establish liability." Paine v.
City of Lompoc, 265 F.3d 975, 984 (9th Cir. 2001) (citation
omitted).

1 have been 'clearly established' in a more particularized, and hence
2 more relevant, sense: The contours of the right must be suffi-
3 ciently clear that a reasonable official would understand that what
4 he is doing violates that right." Id. (citing Anderson, 483 U.S. at
5 640). "The relevant, dispositive inquiry in determining whether a
6 right is clearly established is whether it would be clear to a
7 reasonable officer that his conduct was unlawful in the situation he
8 confronted." Id. (citing Wilson v. Layne, 526 U.S. 603, 615 (1999)
9 ["(A)s ... explained in Anderson, the right allegedly violated must
10 be defined at the appropriate level of specificity before a court
11 can determine if it was clearly established"). "If the law did not
12 put the officer on notice that his conduct would be clearly
13 unlawful, summary judgment based on qualified immunity is appropri-
14 ate." Id. at 2156-57 [citing Malley v. Briggs, 475 U.S. 335, 341
15 (1986) (qualified immunity protects "all but the plainly incompetent
16 or those who knowingly violate the law.")]

17 42 U.S.C. §1983 permits a person to maintain a cause of
18 action against a person acting under color of state law who violates
19 that person's constitutional rights. An arrest triggering the
20 protection of the Fourth Amendment occurs when the arrest is
21 "without probable cause or other justification." Dubner v. City &
22 County of San Francisco 266 F.3d 959, 964 (9th Cir. 2001) A showing
23 of probable cause is a defense to a claim for false arrest. Arpin v.
24 Santa Clara Valley Trans. Agcy. 261 F.23d 912, 920 (9th Cir. 2001)

25 To state a claim of excessive force under §1983, Plaintiff
26 bears the burden of establishing that the defendant acting under
27 color of state law violated his rights under the Fourth Amendment by
28 using unreasonably excessive force during the arrest. Graham v.

1 O'Connor 490 U.S. 386, 396 (1989) Plaintiff's constitutional rights
2 are not violated if the amount of force used in the arrest is
3 "objectively reasonable." That is, if the force used was necessary
4 "in light of the facts and circumstances confronting the police
5 officers," without regard to their intent of motivation. Id. at 397
6 Since the reasonableness test "is not capable of precise definition
7 or mechanical application," it must be applied carefully considering
8 "the facts and circumstances of each particular case," taking into
9 account several factors such as (1) the severity of the crime at
10 issue; (2) whether the suspect poses an immediate threat to the
11 safety of the officers or others; and (3) whether the suspect is
12 actively resisting arrest or attempting to evade arrest by flight.
13 Id. at 396

14 (a) Defendants' Arrest of Plaintiff was Factually and
15 Objectively Reasonable

16 Here, the evidence possessed by Defendants at the time of the
17 arrest support a finding that Defendants had probable cause to
18 arrest Plaintiff. Plaintiff fit the description of the assailant at
19 Freese Elementary School that Defendants had been given. Plaintiff
20 was contacted a short distance from the school. He was observed
21 carrying a stick that fit the description of the weapon used to
22 attack Hernandez and threaten Pacheco. Therefore, based on the
23 victims' descriptions, Plaintiff's possession of a stick and
24 Plaintiff's proximity to where the battery occurred at the time he
25 was contacted, it was objectively reasonable for Defendants to
26 detain Plaintiff.

27 After Defendants contacted Plaintiff, he refused to comply
28 with their orders to stand up and raise his arms. Instead, he

1 became violent by trying to strike Johnson. Plaintiff's violent
2 attempts to assault Johnson constituted Plaintiff's willful
3 resisting arrest and obstructing a police officer in the performance
4 of her duties.

5 Plaintiff does not dispute these facts, other than to allege
6 that the radio dispatches to the officers regarding the description
7 of the assailant were inaccurate, "were just stirring up trouble,"
8 [First Amended Complaint at 5(i)] and that the actions of Defendants
9 amounted to excessive force. Plaintiff does not explain how the
10 radio dispatches were inaccurate, or how such inaccuracy affect his
11 claims. Nor does Plaintiff present specific facts to conclude
12 anything other than that Defendants' arrest of him was objectively
13 reasonable.

14 (b) Defendants' Use of Force Was Factually and Objectively
15 Reasonable

16 In order to determine whether the force used to arrest was
17 reasonable under the circumstances, courts balance the "nature and
18 quality of the intrusion of the individual's Fourth Amendment
19 interests against the countervailing governmental interests at
20 stake." Graham 490 U.S. at 396.

21 In the context of qualified immunity and subsequent to
22 Saucier, supra, the Ninth Circuit found no violation of a constitu-
23 tional right and no excessive force used in the arrest of a
24 plaintiff who was sprayed with a chemical irritant, pushed to the
25 ground to handcuff her, roughly pulled up to her feet and placed in
26 a police car with the windows rolled up in 90 degree heat. Even
27 though the plaintiff's finger was broken during her handcuffing, the
28 court found that the "nature and quality of the alleged intrusions

1 were minimal" under the circumstances of the arrest. Jackson v. City
2 of Bremerton 268 F.3d 646, 652 (9th Cir. 2001) Since the court did
3 not find a violation of a constitutional right, it did not proceed
4 to the second step of the qualified immunity inquiry.

5 Here, after an analysis of the circumstances present at the
6 time of Plaintiff's arrest and the factors stated in Graham, the
7 Court concludes that Defendants were justified in using force on
8 Plaintiff to arrest him. Plaintiff fit the description of a suspect
9 who had allegedly hit and threatened with a stick two people at
10 Freese Elementary School, and was found carrying a stick that
11 matched the description of the stick used in the assaults. After
12 Plaintiff was contacted by Defendants, he refused to comply with
13 their orders and became violent. He posed an immediate threat to
14 Defendants' safety by attempting to reach for the stick after one of
15 the officers asked him to put his hands up, and then by attempting
16 to strike the officers with his fists and feet as they were trying
17 to take him into custody. By acting the way Plaintiff did, he
18 actively resisted and tried to evade arrest. Therefore, all of the
19 Graham factors were met. As a result, the force used on Plaintiff
20 to arrest him was objectively reasonable.

21 Since the Court has found that Defendants' actions in
22 arresting Plaintiff were objectively reasonable, there is no
23 necessity for further inquiries regarding qualified immunity.
24 Saucier 121 S.Ct. at 2156, Jackson 268 F.3d at 652, fn. 5. Defen-
25 dants are entitled to qualified immunity and did not violate
26 Plaintiff's constitutional rights. As a result, the Court RECOM-
27 MENDS that Defendants' Motion for Summary Judgment be GRANTED.

28 IV

1 When a court dismisses federal claims before trial, it should
2 dismiss ancillary state law claims as well. United Mineworkers v.
3 Gibbs 383 U.S. 715, 726 (1966).

4 Plaintiff filed this action in this Court on the basis of
5 allegations of violations of his civil rights under 42 U.S.C. §1983.
6 Since the Court has found that Defendants did not violate Plain-
7 tiff's constitutional rights and are entitled to qualified immunity,
8 the Court RECOMMENDS that the remaining state law claims for
9 battery, false arrest, negligence, emotional distress and violation
10 of Cal. Civ. Code §52.1 be DISMISSED.

11
12 V

13 CONCLUSION AND RECOMMENDATION

14 The Court, having reviewed Plaintiff's First Amended
15 Complaint, Defendants' Motion for Summary Judgment and the declara-
16 tions filed in support thereof, and GOOD CAUSE APPEARING, HEREBY
17 RECOMMENDS that:

- 18 1. Defendants' Motion for Summary Judgment be GRANTED;
19 2. Plaintiff's remaining state law claims be DISMISSED.

20 This Report and Recommendation of the undersigned Magis-
21 trate Judge is submitted to the United States District Judge
22 assigned to this case, pursuant to the provision of 28 U.S.C. §
23 636(b)(1).

24 **IT IS ORDERED** that no later than March 17, 2009, any party to
25 this action may file written objections with the Court and serve a
26 copy on all parties. The document should be captioned "Objections
27 to Report and Recommendation."

28 **IT IS FURTHER ORDERED** that any reply to the objections shall

1 be filed with the Court and served on all parties no later than
2 April 17, 2009. The parties are advised that failure to file
3 objections within the specified time may waive the right to raise
4 those objections on appeal of the Court's order. Martinez v. Ylst,
5 951 F.2d 1153 (9th Cir. 1991).

6

7

8

9

10

11 DATED: February 17, 2009

12

13

14



Hon. Leo S. Papas
U.S. Magistrate Judge

15

16

17

18

19

20

21

22

23

24

25

26

27

28