IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CRYSTAL CROSS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	**No. 3:14-CV-18 (CAR)**
DAVID LACEY,	:	
	:	
Defendant.	:	
	:	

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Crystal Cross brings excessive force claims pursuant to 42 U.S.C. § 1983 against Defendant Georgia State Trooper David Lacey. Plaintiff contends Defendant violated her Fourth Amendment right to be free from excessive force when, after a traffic stop, Defendant struck her in the face multiple times while she was pinned on the ground and unable to move. Currently before the Court is Defendant's Motion for Summary Judgment. After careful consideration, the Court finds genuine issues of material fact exist as to whether Defendant's actions constitute excessive force, and thus, Defendant is not entitled to qualified immunity. Accordingly, Defendant's Motion for Summary Judgment [Doc. 37] is **DENIED**.

LEGAL STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must

Dockets.Justia.com

be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[1] A genuine issue of material fact only exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."[2] Thus, summary judgment must be granted if there is insufficient evidence for a reasonable jury to return a verdict for the nonmoving party or, in other words, if reasonable minds could not differ as to the verdict.[3] When ruling on a motion for summary judgment, the Court must view the facts in the light most favorable to the party opposing the motion.[4]

The moving party "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" and that entitle it to a judgment as a matter of law.[5] If the moving party discharges this burden, the burden then shifts to the nonmoving party to go beyond the pleadings and present specific evidence showing that there is a genuine issue of

---

[1] Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).
[3] *See id.* at 249-52.
[4] *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992).
[5] *Celotex Corp.*, 477 U.S. at 323 (internal quotation marks omitted).

material fact.[6] This evidence must consist of more than mere conclusory allegations or legal conclusions.[7]

BACKGROUND

This case arises out of a traffic stop and the subsequent arrest of Plaintiff Crystal Cross for obstructing an officer. Plaintiff filed suit for excessive force alleging Defendant continuously punched her in the face and head after she was subdued on the ground. The record in this case contains police dash-cam video evidence. The United States Supreme Court has recognized a "wrinkle" in cases where the record contains video evidence, holding that when facts are disputed, and video evidence is present, a court should "view[] the facts in the light depicted by the videotape."[8] Here, however, the dash-cam video did not film the events giving rise to this action. Defendant's vehicle was perpendicular to the back of Plaintiff's car, and the dash-cam only recorded the audio of what transpired between Plaintiff and Defendant. Thus, the following factual background comes from the dash-cam's audio recording, as well as Plaintiff and Defendant's depositions, witnesses' accounts of that evening, and photographs of Plaintiff and Defendant after the arrest.

---

[6] *See* Fed. R. Civ. P. 56(e); *see also Celotex Corp.*, 477 U.S. at 324-26.
[7] *See Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991).
[8] *Scott v. Harris*, 550 U.S. 372, 381 (2007).

On the evening of February 24, 2012, at approximately 7:30 PM, Plaintiff was driving her car northwest on Glenn Carrie Road in Hull, Georgia. At that time, Defendant David Lacey, a Georgia State Trooper, was on a routine patrol traveling in the opposite direction. As Defendant passed Plaintiff's vehicle, she failed to dim her headlights and appeared to be speeding. Defendant immediately turned around in a driveway and pursued her vehicle. Defendant initiated his emergency lights to effectuate a traffic stop, but Plaintiff did not pull over. Plaintiff continued to drive until she reached her intended location—a friend's house nearby.[9]

After she parked in her friend's driveway, Plaintiff exited her car. Defendant pulled in behind her, blocking her car in the driveway. Defendant then exited his patrol car, drew his gun, and commanded Plaintiff four times to get back in her car. While pointing his gun at Plaintiff, Defendant told her again to get back in the car or he would shoot her. Plaintiff responded to Defendant, but what she said or asked is unintelligible on the audio. Defendant repeated himself five more times in rapid succession for Plaintiff to get back in her car. Plaintiff complied, got back in her car, and locked the doors.[10] At this point, Plaintiff's friends came outside on to the porch of the house.

---

[9] The Court notes Defendant did not initially turn his sirens on, and Plaintiff states she did not immediately pull over because she did not see his emergency lights.

[10] Def. David Lacey's Depo., [Doc. 37-5] at p. 29:24-25, 30:11; DVD Containing Traffic Stop Video, [Doc. 47].

Defendant pointed the gun at them and instructed them to get inside the house. The friends obeyed and went inside to watch through the windows.[11]

Once everyone complied with his orders, Defendant contacted dispatch to run Plaintiff's license plate. Defendant then re-holstered his weapon and approached Plaintiff's vehicle. Defendant told Plaintiff to open the door and step out of the vehicle.[12] Plaintiff partially rolled down her window, asking "what for" and "why," but she did not get out of the car.[13] After quickly warning Plaintiff seven to eight times to get out of the car and threatening to bust her window,[14] Defendant reached through the driver-side window, unlocked the door, and pulled Plaintiff out of the car. Once out of the car, Defendant grabbed Plaintiff's left arm and attempted to escort her toward to the front of his patrol car.[15] In response, Plaintiff admits she "tugged [her] arm back a little bit" and "kind of resisted arrest."[16] Defendant maintained his grip on Plaintiff's arm and forced her to the ground, punching her one to two times in the face and head as they went down.[17] Plaintiff landed on the ground on her right side, and Defendant

---

[11] Def.'s Depo., [Doc. 37-5] at p. 30:12-14, 31:14-25, 32:1-3; Jennifer Bright's Depo., [Doc. 41-2] at p. 11:1-13; Elizabeth Teet's Complaint Form with Ga. Dep't of Public Safety, [Doc. 41-4] at p. 1.
[12] Def.'s Depo., [Doc. 37-5] at p. 33:6-13.
[13] Pl. Crystal Cross's Depo., [Doc. 37-3] at p. 30:16-25; 31:1-22; DVD Containing Traffic Stop Video, [Doc. 47].
[14] Again, Defendant's instructions were given in rapid procession.
[15] Def.'s Depo., [Doc. 37-5] at p. 34:14-25, 35:1-17.
[16] Pl.'s Depo., [Doc. 37-3] at p. 13:24-25, 14:1-16, 16:17.
[17] *Id.* at p. 34:16-25, 35:1-8; Def.'s Depo., [Doc. 37-5] at p. 36:12-23.

landed on top of her in a mounted position with both his legs straddling her waist.[18] The parties vigorously dispute what occurred next.

According to Defendant, Plaintiff continued to resist arrest, and a struggle ensued. Defendant contends when Plaintiff landed on the ground she immediately became violent—she scratched and struck Defendant's face and ripped his uniform. In an effort to stop Plaintiff's assault, Defendant punched her four to six times in the face and head.[19] Plaintiff ceased attacking Defendant, but she still refused to comply with his commands.[20] Defendant ordered her to flip over on her stomach four times before he forcefully turned her over. Once Plaintiff was on her stomach, Defendant secured Plaintiff's left hand in handcuffs and commanded her to give him her other hand. Defendant repeated himself six to seven times and finally used a pain compliance technique to secure her right hand in handcuffs.[21] Defendant contends he never punched her after their initial struggle and stopped using force once Plaintiff was secured in handcuffs.

Conversely, Plaintiff maintains she stopped resisting arrest as soon as Defendant forced her to the ground. According to Plaintiff, Defendant's first punches struck her in the temple and momentarily knocked her unconscious. When Plaintiff regained

---

[18] Def.'s Depo., [Doc. 37-5] at p. 37:20-25, 38:1; Pl.'s Depo., [Doc. 37-3] at p. 37:1-18.
[19] Def.'s Depo., [Doc. 37-5] at p. 38:20-25, 39:19.
[20] DVD Containing Traffic Stop Video, [Doc. 47]; Def.'s Depo., [Doc. 37-5] at p. 38:18-25, 39:20-25, 40:1-3.
[21] *See* DVD Containing Traffic Stop Video, [Doc. 47]; Def.'s Depo., [Doc. 37-5] at p. 39:20-25, 42:4-7.

consciousness a few seconds later, she was laying on the ground on her right side, and Defendant was on top of her using his thighs and legs to pin her arms and hands down to her sides. Plaintiff could not move her arms or hands and was not struggling against Defendant. Defendant, however, punched her again in the face and head six to seven times. Defendant then began yelling at Plaintiff to flip over on her stomach or he would continue hurting her, but Plaintiff maintains she could not move or comply with his orders.[22] Defendant told her to flip over three times, and Plaintiff cried out that her eye was bleeding.[23] Defendant punched her "a couple" more times before flipping her over on her stomach.[24]

Thereafter, Defendant secured Plaintiff's left hand in handcuffs and commanded Plaintiff to give him her other hand.[25] Defendant repeated himself three more times, and Plaintiff screamed, "I'm trying to."[26] Plaintiff's right arm was still pinned to her side, and she could not move her hand. Defendant then punched Plaintiff one to two more times in the head and pushed a pressure point behind her ear.[27] Plaintiff screamed and moaned, as Defendant continued to order Plaintiff to give him her other

---

[22] Pl.'s Depo., [Doc. 37-3] at p. 16: 16-21, 22-24, 17:16, 36:9-10, 37:4-24; Def.'s Depo., [Doc. 35-7] at p. 37:20-25, 38:1, 39:8-23.
[23] DVD Containing Traffic Stop Video, [Doc. 47].
[24] Pl.'s Depo., [Doc. 37-3] at p. 38:23-25, 39:1.
[25] *Id*. at p. 35:1-25, 36:1-16, 38:1-25.
[26] DVD Containing Traffic Stop Video, [Doc. 47].
[27] Pl.'s Depo., [Doc. 37-3] at p. 40:16-18.

hand.[28] Plaintiff then began screaming for her help, and her friends came outside on the porch. Defendant instructed them to get back inside, and they complied. As Plaintiff continued screaming, Defendant used a pain compliance technique of twisting the handcuffs to gain control of her other wrist and secured her right hand in handcuffs.[29] Once Plaintiff was in handcuffs, Defendant told her to stand up. Plaintiff responded, "I can't stand up, I can't see, I can't see!"[30]

At this time, two other officers with the Georgia State Patrol arrived at the scene. Defendant told the other officers "[Plaintiff] clawed the shit out of my eyes," and she "messed up" when she ran from me.[31] Plaintiff repeatedly asked the patrolmen what she did wrong and explained she was not running from Defendant. Plaintiff specifically asked why Defendant "beat [her] in [her] face," and Defendant responded, "[b]ecause you wouldn't turn over and comply."[32] The patrolmen called an ambulance to the scene, and Plaintiff was taken to the hospital and treated for a fractured eye socket, stomach trauma, a concussion, and a broken nose.[33] Plaintiff was subsequently arrested. Defendant went to Athens Regional Medical Center to receive medication for his lacerations and instructions on how to care for his wounds.

---

[28] DVD Containing Traffic Stop Video, [Doc. 47].
[29] Def.'s Depo., [Doc. 37-5] at p. 41:1-20.
[30] DVD Containing Traffic Stop Video, [Doc. 47].
[31] *Id.*
[32] *Id.*
[33] Pl.'s Depo., [Doc. 37-3] at p. 55:6-9.

Plaintiff's friends, Elizabeth Teet and Jennifer Bright, also witnessed these events from the front window of the house. According to Bright, once Plaintiff was on the ground she was unable to move because Defendant was on top of her with her arms and hands pinned to her sides. Bright watched Defendant punch Plaintiff six to eight times in the head and face. Bright never saw Plaintiff attack Defendant, and instead suggested Defendant's scratches came from the privacy bushes along the edge of the driveway. Bright opined that the privacy bushes' sharp thorns must have scratched Defendant's face when he forced Plaintiff to the ground next to the bushes.[34] Bright maintained there was no way Plaintiff caused Defendant's wounds because Plaintiff was pinned on the ground, unable to move her hands. In addition, Teet filed written a complaint with the Georgia Department of Public Safety stating the "cop[] ran into a tree, [Plaintiff] did not scratch him."[35] Teet also wrote that when she looked out the window Plaintiff did everything she was told and did not resisting arrest.[36]

Plaintiff was eventually charged with (1) failure to dim her headlights, in violation of O.C.G.A. § 40-8-31; (2) felony obstruction of a law enforcement officer, in violation of O.C.G.A. § 16-10-24(b); (3) driving under the influence of drugs, in violation of O.C.G.A. § 40-6-391(a)(2); and (4) fleeing or attempting to elude a police officer, in

---

[34] Bright Depo., [Doc. 41-2] at p. 15:2-19, 19:24-25, 20:1-22.
[35] Elizabeth Teet's Complaint Form with Ga. Dep't of Public Safety, [Doc. 41-4] at p. 1-2.
[36] *Id.*

violation of O.C.G.A. § 40-6-395(a). On March 5, 2015, Plaintiff entered a guilty plea to misdemeanor obstruction of a law enforcement officer, in violation of O.C.G.A. § 16-10-24(a), thereby concluding the criminal proceedings. The State dropped all other charges. At the plea hearing, the prosecutor stated the factual basis for the plea was that "[Plaintiff] was stopped for failing to dim her headlights. [Defendant] had to catch up to her at a residence, and during that, a struggle ensued between [Plaintiff] and [Defendant]."[37]

DISCUSSION

Based on these events, Plaintiff filed suit in this Court under 42 U.S.C. § 1983, alleging Defendant violated her Fourth Amendment right to be free from excessive force. Defendant now moves for summary judgment contending first Plaintiff's claim is barred under *Heck v. Humphrey*,[38] and second, qualified immunity shields him from § 1983 liability because his use of force was reasonable and did not violate clearly established law. The Court, however, is unpersuaded by both arguments.

I. *Heck v. Humphrey*

In *Heck*, the Supreme Court held that

> when a [plaintiff] seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of h[er] conviction or sentence; if it would, the

[37] Plea Hearing Trans., [Doc. 15-2] at p. 2:11-14.
[38] 512 U.S. 477 (1994).

> complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.[39]

The Supreme Court, however, was "careful in *Heck* to stress the importance of the term 'necessarily.'"[40] If there is "a construction of the facts that would allow the underlying conviction to stand," the § 1983 claim should be allowed to proceed.[41]

Defendant argues Plaintiff's claim is barred under *Heck* because she was convicted of misdemeanor obstruction, which is defined under O.C.G.A. § 16-10-24(a), as "a person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor."[42] According to Defendant, by pleading guilty to obstruction Plaintiff admitted Defendant's actions were lawful, and a verdict for Plaintiff in this action would tend to demonstrate the invalidity of her conviction. Plaintiff counters that her § 1983 claim only relates to the conduct occurring after her act of misdemeanor obstruction, and thus, allowing her claim to proceed will not contradict her obstruction conviction. The Court agrees.[43]

Plaintiff pled guilty to the misdemeanor obstruction charge based on her initial refusal to comply with Defendant's orders to get out of the car and resistance of arrest

---

[39] *Id.* at 487.
[40] *Nelson v. Campbell*, 541 U.S. 637, 647 (2004).
[41] *Dyer v. Lee*, 488 F.3d 876, 880 (11th Cir. 2007).
[42] O.C.G.A. § 16-10-24(a).
[43] Defendant does not address this argument in his Reply Brief.

when she pulled her arm away. Plaintiff's § 1983 claim, however, only relates to Defendant's actions after she was on the ground and, according to her, stopped resisting arrest. The Court finds Plaintiff's excessive force claim does not undermine her obstruction conviction and, therefore, is not barred by *Heck*.[44] Thus, the Court now turns to Defendant's qualified immunity defense.

II. 1983 Excessive Force

As stated above, Defendant's initial use of force is not at issue. Plaintiff agrees it was reasonable for Defendant to use force to remove her from the car and take her to the ground.[45] Instead, the use of force at issue here is Defendant's strikes to Plaintiff's face and head after she was on the ground, where Plaintiff contends she was unable to move her arms or hands and no longer resisting arrest. Defendant maintains he is shielded by qualified immunity because his actions were legally permissible and reasonable under the circumstances. Specifically, Defendant argues he was dealing with a violent suspect who was not fully subdued, resisting arrest, and refusing to comply with his orders, and thus, it was reasonable for him to use force to defend himself and ensure his safety until both of Plaintiff's hands were secured in handcuffs.

---

[44] *See* Order on Def.'s Mtn to Dismiss for Failure to State a Claim, [Doc. 18] at p. 6-8.

[45] The Court also notes that Plaintiff does not argue Defendant's pain compliance technique constitutes excessive force.

"[Q]ualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known."[46] As the Supreme Court recently reiterated, "[w]hen properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law."[47] "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation."[48] Qualified immunity is immunity from suit and should be resolved as early as possible in the case.[49]

When an officer invokes qualified immunity, the initial burden is on the officer to show that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred."[50] Once the officer satisfies that burden, the burden then shifts to the plaintiff to show that (1) a violation of a constitutional right occurred, and (2) that right was "clearly established" at the time of the violation.[51] "The court may undertake these two inquires in either order."[52]

---

[46] *Lee v. Ferraro*, 284 F.3d 1188, 1193-94 (11th Cir. 2002) (quotation marks omitted).
[47] *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015).
[48] *Lee*, 284 F.3d at 1194.
[49] *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009).
[50] *Lee*, 284 F.3d at 1194.
[51] *Pearson*, 555 U.S. at 232.
[52] *Maddox v. Stephens*, 727 F.3d 1109, 1120 (11th Cir. 2013).

Here, it is clear Defendant was acting within the scope of his discretionary authority. Therefore, the burden shifts to Plaintiff to prove the punches to Plaintiff's face and head after she landed on the ground violated her clearly established Fourth Amendment right.

A. Clearly Established

Plaintiff must establish that the constitutional right was clearly established at the time of the events giving rise to the litigation. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[53] A plaintiff can demonstrate that a right is clearly established by (1) pointing to a "materially similar case [that] has already been decided," (2) referring "to a broader clearly established principle that should control the novel facts of the situation," or (3) showing that "the conduct involved in the case so obviously violate[s] the constitution that prior case law is unnecessary."[54] When determining whether a right is clearly established, "[the Court] look[s] to law as decided by the Supreme Court, the Eleventh Circuit, or the Supreme Court of [Georgia]."[55]

---

[53] *Saucier v. Katz,* 533 U.S. 194, 202 (2001).
[54] *Terrell v. Smith*, 668 F.3d 1244, 1255 (11th Cir. 2012) (internal quotation marks and brackets omitted).
[55] *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1345 (11th Cir. 2013).

"There is substantial case authority in the Supreme Court and this Circuit clearly establishing that harming a suspect after that suspect is compliant, cooperative, under control, or otherwise subdued is gratuitous and, therefore, constitutionally excessive."[56] This principle holds true even in a case, like the one at bar, when "a previously fractious arrestee" ceases all resistance at the time the force is exerted.[57] Accordingly, the law was clearly established at the time of Defendant's conduct that continuously punching a subdued suspect in the face and head constitutes excessive force. Thus, the Court must now consider whether a violation of this right occurred.

B. Constitutional Violation

As stated above, the record in this case contains police dash-cam video evidence. The Supreme Court has held when the facts are disputed and video evidence is in the record, a court should view the facts in the light depicted by the video.[58] Here, however, the dash-cam audio recording does not clearly transcribe what occurred. Ultimately, no independent evidence in this case directly contradicts Plaintiff's contention that she stopped resisting arrest once she was on the ground.

---

[56] *Merricks v. Adkisson*, 785 F.3d 553, 563 (11th Cir. 2015); *see also Saunders*, 766 F.3d at 1267, *Hadley*, 526 F.3d at 1330.

[57] *See Smith v. Maddox*, 127 F.3d 1416, 1418-19 (11th Cir. 1997) (officer was not entitled to qualified immunity when he broke plaintiff's arm as plaintiff voluntarily submitted to arrest, even though plaintiff had previously threatened officers with a baseball bat and fled).

[58] *Scott*, 550 U.S. at 381.

Defendant contends the dash-cam audio reveals Defendant's use of force—the admitted five to six punches—was reasonable because the struggle Plaintiff put up against Defendant can be heard on the recording. However, due to the loud background noise in the recording, the Court cannot as a matter of law determine that Plaintiff struggled with Defendant after she was on the ground. Whether the audio from the dash-cam recorded the sounds of a struggle between the parties or just the sounds of Defendant forcing Plaintiff to the ground and then punching her is a jury question.

Additionally, the photographs submitted into evidence do not resolve the issues in this case. It is clear from the photographs Plaintiff suffered serious trauma to her face and head, as evidenced by her swollen shut black eye and bloody nose and mouth. Likewise, the photographs show Defendant had several scratches on his face and damage to his uniform. However, these photographs cannot depict how Defendant received these scratches. Although Defendant claims Plaintiff scratched him, Plaintiff contends she did not attack Defendant, and there are two witnesses stating Defendant's scratches came from the privacy bushes along the driveway. Moreover, both witnesses say Defendant had Plaintiff's arms and hands pinned to her sides, and thus, there was no way Plaintiff could have attacked Defendant.

Ultimately, it is unclear what exactly transpired between Plaintiff and Defendant that evening. Questions of material fact exist as to whether Plaintiff attacked Defendant and continued to resist arrest once she was on the ground. Thus, the Court must determine whether Defendant's use of force was reasonable.

Because Plaintiff's excessive force claim arises out of a stop and seizure it is governed by the Fourth Amendment's objective reasonableness standard.[59] The Fourth Amendment's prohibition against unreasonable searches and seizures encompasses the right to be free from excessive force.[60] The reasonableness inquiry is objective—the issue is whether the use of force was "objectively reasonable in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation."[61] In making this determination, the Court must presume that the Plaintiff's version of the events is true,[62] but "the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[63] The Court should determine the "objective reasonableness" of the amount of force used by balancing the "nature and quality of the

---

[59] *Graham v. Connor*, 490 U.S. 386, 395 (1989).
[60] *Lee*, 284 F.3d at 1197 (citing *Graham*, 490 U.S. at 394-95)).
[61] *Crosby v. Monroe Cnty.*, 394 F.3d 1328, 1333 (11th Cir. 2004) (quotation marks omitted).
[62] *Hope v. Pelzer*, 536 U.S. 730, 736 (2002).
[63] *Mercado v. City of Orlando*, 407 F.3d 1152, 1157 (11th Cir. 2005).

intrusion" against the "governmental issue at stake."[64]

To aid in the reasonableness analysis, the Court measures the quantum of force employed against the following factors: "the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether the suspect actively resisted arrest or attempted to evade arrest by flight."[65] Though the Court should consider each of these factors, "[t]he Supreme Court has emphasized that there is no precise test or 'magical on/off switch' to determine when an officer is justified in using excessive or deadly force."[66] "[I]n the end we must still slosh our way through the factbound morass of reasonableness."[67] As the Eleventh Circuit instructs:

> [W]e are not to view the matter as judges from the comfort and safety of our chambers, fearful of nothing more threatening than the occasional paper cut as we read a cold record accounting of what turned out to be the facts. We must see the situation through the eyes of the officer on the scene who is hampered by incomplete information and forced to make a split-second decision between action and inaction in circumstances where inaction could prove fatal.[68]

---

[64] *Graham*, 490 U.S. at 396; *Mercado*, 407 F.3d at 1156-57.
[65] *Oliver v. Fiorino*, 586 F.3d 898, 905 (11th Cir. 2009).
[66] *Garczynski v. Bradshaw*, 573 F.3d 1158, 1166 (11th Cir. 2009) (citing *Scott*, 550 U.S. at 382).
[67] *Scott*, 550 U.S. at 383 (quotation marks omitted).
[68] *Crosby*, 394 F.3d at 1333-34.

"Nonetheless, summary judgment for a defendant on qualified immunity grounds should be denied where the evidence taken in the light most favorable to the plaintiff raises a question of fact as to whether an officer's actions constitute excessive force."[69]

Viewing the facts in the light most favorable to Plaintiff, genuine issues of material fact exist as to the reasonableness of Defendant's actions. First, Plaintiff was pulled over for a minor traffic violation for which less force is generally appropriate.[70] Plaintiff initially resisted arrest by refusing to get out of the car and pulling her arm away from Defendant, which resulted in a conviction for misdemeanor obstruction. However, the Eleventh Circuit has held "the crime of misdemeanor obstruction is a crime of minor severity for which less force is generally appropriate."[71] Thus, the first *Graham* factor weighs in Plaintiff's favor.

Second, assuming a jury believes Plaintiff's version, once on the ground, Plaintiff no longer posed a threat to Defendant, herself, or anyone else. Defendant was on top of Plaintiff in a mounted position with his knees straddling her. Plaintiff could not move her hands or arms and had ceased resisting arrest. Though it took Defendant several minutes to get Plaintiff on her stomach and secured in handcuffs, she was subdued at

---

[69] *Phillips v. Irvin*, No. 05-0313-WS-M, 2006 WL 1663677, at * (S.D. Ala. June 14, 2006), *aff. in part, rev. in part on other grounds*, 222 F. App'x 928 (2007) (affirming denial of qualified immunity as to the excessive force claim) (citing *Lee*, 284 F.3d at 1199).
[70] *See Vinyard*, 311 F.3d at 1348-49.
[71] *Reese v. Herbert*, 527 F.3d 1253, 1274 (11th Cir. 2008) (internal quotation marks omitted)).

all times. Accordingly, it does not appear Plaintiff was a threat to Defendant's safety while she was on the ground.

Lastly, the third *Graham* factor also appears to weigh in Plaintiff's favor. Though Plaintiff initially resisted arrest by refusing to get out of the car and pulling her arm away, Plaintiff stopped physically resisting arrest after Defendant forced her to the ground. Plaintiff admits she did not comply with Defendant's orders to roll over and give him her hand, but Plaintiff was not actively resisting or refusing his commands.[72] Instead, Plaintiff was in serious pain, her face was bleeding, she could not see out of one eye, and her arm was pinned to her side by Defendant's knee—all which prevented her from complying with Defendant's orders.[73] Plaintiff informed Defendant she was trying to comply with his orders, but Defendant continued to hit her.

Based on the foregoing, a reasonable jury could conclude Defendant's actions of repeatedly punching Plaintiff in the face and head after she stopped resisting arrest and was subdued on the ground constitute excessive force.[74] On the other hand, a

---

[72] *See Reed v. City of Lavonia*, 390 F.Supp.2d 1347, 1359-60 (M.D. Ga. 2005); *see also Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 721-22 (7th Cir. 2013) (discussing passive non-compliance verse active resistance).

[73] Defendant points to *United States v. Edmond,* No. CRIM. 12-70, 2013 WL 6002234, at *11 (W.D. Pa. Nov. 12, 2013), to support his argument that punching Plaintiff when she refused to offer her hands was a reasonable use of force. However, as previously explained in the Court's Order on Defendant's Motion to Dismiss, this case is easily distinguishable. Moreover, *Edmonds* is not binding precedent.

[74] *See Reeves*, 527 F.3d at 1274 ("In review of the fact that [plaintiff] was lying face down on the ground, was not suspected of having committed a serious crime, did not pose an immediate threat of harm to anyone, and was not actively resisting or evading arrest, the defendants' use of force was a wholly disproportionate response to the situation."); *Wells v. Cramer*, 262 F. App'x 184, 186-88 (11th Cir. 2008)

reasonable jury could just as likely conclude Defendant's use of force was legally permissible if they believed Defendant's version that Plaintiff resisted arrest, violently attacked him, and refused to comply with all of his orders. After viewing the facts in light most favorable to Plaintiff, the Court finds Plaintiff has identified genuine issues of material fact as to whether Defendant's actions constitute excessive force. Accordingly, Defendant is not entitled to qualified immunity at this point, and summary judgment must be denied.

CONCLUSION

Based on the foregoing, Defendant's Motion for Summary Judgment [Doc. 37] is **DENIED**. Additionally, the Court will address Defendant's argument regarding Plaintiff's damages for emotional distress at the Pretrial Conference on September 19, 2017 at 10:00 AM in Macon, Georgia.

SO ORDERED, this 19th day of July, 2017.

S/ C. Ashley Royal
C. ASHLEY ROYAL, SENIOR JUDGE
UNITED STATES DISTRICT COURT

(per curiam) (finding genuine issues of material fact existed as to whether the plaintiff was handcuffed and no longer resisting arrest when he was beaten); *Smith*, 127 F.3d at 1418-19 ("[A]ssuming as we must that [plaintiff] was offering no resistance *at all*, the considerable effort and force inferable from the grunt, [plaintiff's] sensation of a blow, and the broken arm was obviously unnecessary to restrain even a previously fractious arrestee.").