UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Gary Brown,

Plaintiff, Case No. 1:11cv835

v. Judge Michael R. Barrett

Village of Lincoln Heights, *et al.,*

Defendants.

OPINION & ORDER

This matter is before the Court upon Defendant David Asher's Motion for Summary Judgment (Doc. 9) and Defendants Phillip Capps, Laroy Smith and Village of Lincoln Heights' Motion for Summary Judgment (Doc. 17). Both motions have been fully briefed. (Docs. 19, 21, 25, 29.)

I. BACKGROUND

This case arises out of an incident which occurred on the night of January 18, 2011, but there are several different versions of what happened that night.

Plaintiff Gary Brown lives in the Village of Lincoln Heights. At the time of the incident, Plaintiff was the Vice Mayor of Lincoln Heights. Plaintiff lives across the street from William Franklin. On the night of January 18th, Plaintiff's eighteen-year old son woke Plaintiff and told him that Officer Capps was across the street "badgering" Anthony Brown in front of Franklin's house. (Doc. 14-1, Malachi Brown Depo. at 9.) Anthony Brown is Plaintiff's brother.

Officer Capps had attempted to stop Anthony for questioning as he entered Franklin's house. (Doc. 19-1, June 2, 2011 Trial Tr., at 9.) Anthony refused to stop, and went inside Franklin's house. (Id. at 10.) Capps knocked on the door of the house, and Anthony eventually came outside with Franklin and Otis Garner, who is Franklin's friend. (Id.)

According to Plaintiff's deposition testimony, after Plaintiff was awoken by his son, he looked out his window and saw Capps talking to the three men. (Doc. 13-1 Gary Brown Depo. at 17.) Plaintiff decided to go across the street. (Id. at 18.) Plaintiff knew that Franklin and Capps had a strained relationship. (Id.) When Plaintiff arrived at Franklin's house, Capps was standing on the ground in front of the porch, and Anthony, Franklin and Garner were on the porch. (Id. at 21.) At first, the conversation between Capps and the three men was not heated. (Id.) Plaintiff asked what was going on and Capps explained that he was trying to question Anthony. (Id. at 29.) The conversation between Capps and Franklin got louder, and Capps told Anthony he was under arrest. (Id. at 29-30.) Anthony gave Capps his identification. (Id. at 30.) Capps and Franklin continued to argue, and Plaintiff asked Capps to call for backup. (Id.) While the group waited for other officers to arrive, the situation escalated. (Id. at 32.) Plaintiff stayed off the porch, but he put his hands on Anthony and Franklin in order to try to calm them down. (Id. at 35-36.) Capps also remained off the porch. (Id. at 35.)

When Officer Asher arrived, Plaintiff let go of the two men and turned to talk to Asher. (Id. at 42.) Plaintiff put his hands in the air. (Id.) Capps then brushed past Plaintiff and went onto the porch. (Id. at 67.) Asher started walking towards Franklin's house and pulled out his Taser gun. (Id. at 44.) Plaintiff tried to explain to Asher what

was happening and get out of the way. (Id. at 49, 58.) Asher did not ask Plaintiff any questions or say anything to Plaintiff. (Id. at 44, 68.) When Asher was approximately four feet away from Plaintiff, he tased Plaintiff. (Id. at 50.) Capps told Asher that Plaintiff was the Vice Mayor. (Id. at 51.) Asher responded that he did not care. (Id. at 51, 56.) Asher continued to tase Plaintiff multiple times until Plaintiff sat down. (Id. at 54.) Asher then used pepper spray on the people on the porch. (Id. at 55.)

Plaintiff was placed in handcuffs and taken to the Lincoln Heights police station. (Id. at 59, 64.) Plaintiff was charged with Assault on a Police Officer. Asher filed the criminal charge against Plaintiff. (Id. at 60.)[1] Plaintiff was indicted by the Hamilton County Grand Jury for the alleged assault on Asher under Ohio Revised Code § 2903.13(A). (Doc. 17, Ex. E.)

A bench trial was held on Plaintiff's charge in the Hamilton County Court of Common Pleas. Capps and Asher testified at trial. The testimony of Officer Capps tracks the version of events related by Plaintiff in his deposition. (Doc. 19-1, at 13-14.) Capps testified that when Asher arrived, he was only involved in a verbal confrontation with Anthony, Franklin and Garner. (Id. at 47.) Capps also testified that when Asher arrived, Plaintiff was not on the porch. (Id. at 48.) Capps testified that he did not have any physical contact with Plaintiff and Plaintiff did not assault him. (Id. at 13.) Capps testified that he told Asher that Plaintiff was the vice mayor when Asher first arrived and before Asher tased Plaintiff. (Id. at 19.) ("When he came up to the scene, I saw him and I said, oh, that's the Vice-Mayor."). However, Capps testified that did not see what happened between Plaintiff and Asher. (Id. at 16.)

[1]The charges were approved by Sergeant Laroy Smith, who was named as a defendant in this case. However, Plaintiff agrees that the claims against Smith should be dismissed.

Asher's version of the events is that when he arrived on the scene, Capps and all four men were on the porch. (Id. at 23.) Asher stated there was yelling and all four men were wrestling with Capps. (Id. at 23, 24.) Asher testified that he ran up the steps onto the porch and grabbed Plaintiff by the shirt. (Id. at 23, 27.) Asher testified that when he grabbed Plaintiff, Plaintiff was wrestling with Capps. (Id. at 38.) Asher explained that Plaintiff then turned around and shoved Asher in the chest. (Id. at 27.) Asher testified that he responded by tasing Plaintiff. (Id. at 28.) Asher testified that Capps would have seen Plaintiff shoving him in the chest because "he was right there." (Id. at 27, 45.)

The judge presiding over Plaintiff's criminal trial found that there was a "[m]ajor discrepancy" between the version of events related by Capps and the version related by Asher. (Id. at 48.) The judge ruled that Plaintiff was not guilty of Assault on a Police Officer. (Id.)

Plaintiff brings the following claims against all Defendants pursuant to 42 U.S.C. § 1983: (1) arrest without probable cause in violation of the Fourth and Fourteenth Amendments; (2) excessive force in violation of the Fourth Amendment; (3) violation of equal protection under the Fourteenth Amendment; and (4) malicious prosecution. Plaintiff also brings a claim for malicious prosecution under Ohio law against all Defendants. Finally, Plaintiff brings a claim of "inadequate training" against the Village only under 42 U.S.C. § 1983.

Defendants move for summary judgment on all the claims against them. Plaintiff concedes that summary judgment is appropriate for the claims against Laroy Smith. Accordingly, all claims against Smith are DISMISSED.

II. ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(a) provides that summary judgment is proper "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." The moving party has the burden of showing an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden of production, the non-moving party cannot rest on his pleadings, but must present significant probative evidence in support of his complaint to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

B. Section 1983

Section 1983 creates no substantive rights, but merely provides remedies for deprivations of rights established elsewhere. *Tuttle v. Oklahoma City*, 471 U.S. 808 (1985). Section 1983 has two basic requirements: (1) state action that (2) deprived an individual of federal statutory or constitutional rights. *Flint v. Kentucky Dept. of Corrections*, 270 F.3d 340, 351 (6th Cir. 2001) (citing *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998) and *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 33 (6th Cir. 1992)).[1]

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[1] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the

Defendants have not questioned whether Plaintiff has shown state action. Instead, Defendants argue that Plaintiff has not established a constitutional violation.

Defendants Capps and Asher argue that they are entitled to qualified immunity from Plaintiff's Section 1983 claims brought against them in their individual capacity.

The doctrine of qualified immunity protects government officials acting in their official capacities from damages if their actions did not "violate clearly established statutory or constitutional rights of which a reasonable person [in their positions] would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citing *Procunier v. Navarette*, 434 U.S. 555, 565 (1978)). Qualified immunity involves a two-step inquiry: (1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and if so, (2) whether that right was clearly established. *Ciminillo v. Streicher*, 434 F.3d 461, 466 (6th Cir. 2006) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

C. <u>Arrest without probable cause</u>

"[I]t is well established that any arrest without probable cause violates the Fourth Amendment." *Crockett v. Cumberland Coll.*, 316 F.3d 571, 580 (6th Cir. 2003); *see also Gardenhire v. Schubert*, 205 F.3d 303, 313 (6th Cir. 2000) ("There is no question that in 1996 'the law was clearly established that, absent probable cause to believe that an offense had been committed, was being committed, or was about to be committed, officers may not arrest an individual.'") (quoting *Dietrich v. Burrows*, 167 F.3d 1007,

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purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

1012 (6th Cir. 1999)). Therefore, for purposes of qualified immunity, the only question is whether Plaintiff was arrested without probable cause.

Defendants argue that Plaintiff's claim for arrest without probable cause fails because Plaintiff was indicted by the grand jury on the charge that he assaulted Asher.

As the Sixth Circuit has recently reiterated: "Whether probable cause exists to arrest a suspect is a distinct question from whether probable cause exists to prosecute an accused." *Mott v. Mayer*, 11-3853, 2013 WL 1663219, *8 (6th Cir. Apr. 17, 2013) (citing *Sykes v. Anderson*, 625 F.3d 294, 310-11 (6th Cir. 2010) ("In order to distinguish appropriately [the claim of malicious prosecution] from one of false arrest, we must consider not only whether the Defendants had probable cause to arrest the Plaintiffs but also whether probable cause existed to initiate the criminal proceeding against the Plaintiffs.")). Defendants have failed to make this distinction. "[I]t has been long settled that 'the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer.'" *Barnes v. Wright*, 449 F.3d 709, 716 (6th Cir. 2006) (quoting *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002)). However, Plaintiff was not arrested pursuant to a grand jury indictment. A subsequent grand jury indictment cannot be used to establish probable cause for an earlier arrest. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 307 n.13 (6th Cir. 2005) (citing *Garmon v. Lumpkin County*, 878 F.2d 1406, 1409 (11th Cir. 1989) ("A subsequent indictment does not retroactively provide probable cause for an arrest that has already taken place.")).

"For a police officer to have probable cause for arrest, there must be 'facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent

person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense.'" *Crockett v. Cumberland Coll.*, 316 F.3d 571, 580-81 (6th Cir. 2003) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)). "In general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible." *Gardenhire v. Schubert*, 205 F.3d 303, 315 (6th Cir. 2000) (quoting *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995)).

Here, Plaintiff was arrested for assaulting Asher.[2] Ohio Revised Code § 2903.13 provides that "[n]o person shall knowingly cause or attempt to cause physical harm to another . . ." Ohio Revised Code § 2903.13(C)(3) states that if the victim of that assault is a peace officer performing official duties, the assault is a fourth-degree felony.

When the evidence is viewed in the light most favorable to Plaintiff, there are genuine issues of material fact as to whether there was probable cause to arrest Plaintiff for an assault on Asher. Plaintiff testified that when Officer Asher arrived, he turned to talk to Asher and put his hands in the air. Defendants have argued that it was reasonable for Asher to interpret this gesture as threatening. However, Plaintiff testified as follows:

> Q: . . . So then you turn to Asher, and you showed me earlier you had your hands up, correct?
>
> A: Yes.
>
> Q: Now, your hand – what you showed me earlier, your hand were about –
>
> A: Like this (indicating).

[2]Plaintiff was put in handcuffs by Officer Scott Fetters, who is a Woodlawn Village police officer. (Gary Brown Depo. at 59.) However, Asher testified that he took Plaintiff to his cruiser, where he advised him of his rights. (Doc. 19-1, at 31.) The Court assumes, because it has not been raised by any of the parties, that Plaintiff's claim based on his arrest is against Asher only.

Q: -- shoulder height?

A: Yes.

Q: All right. And so your arms are not up above your head, are they?

A: No.

Q: Your hands are shoulder height and actually out in front of you, correct?

A: Right. Like – like this though in a submissive position (indicating).

(Gary Brown Depo. at 48-49.)

Citing the testimony of Plaintiff's son, Defendants have also argued that Plaintiff was walking toward Asher and it was reasonable for Asher to interpret this movement as physically threatening and aggressive. However, the testimony of Plaintiff's son was as follows:

Q: And the officer – your dad said I'm – I'm the vice-mayor, and the officer said I don't give a fuck who you are, get back, correct?

A: Yes, sir.

Q: And that was the officer was walking up to your dad?

A: Yes, sir.

Q: All right. And how soon after the officer said that did your dad get tased?

A: I don't even remember.

Q: Okay. But the officer told your father to get back before he tased him, correct?

A: Yes, sir, but my dad, like he – he wasn't walking towards him like – like full throttle like. He was – like he was walking towards them more like in a reasonable way.

(Malachi Brown Depo. at 37.)

Moreover, Plaintiff testified that Asher was approximately four feet away from Plaintiff when Asher tased him. Asher himself testified that he was five feet away from Plaintiff when he first used his Taser. (Doc. 19-1, at 29.) Therefore, there are genuine issues of material fact as to whether it was reasonable under the circumstances for an officer to believe that Plaintiff knowingly caused or attempted to cause physical harm to Asher. Accordingly, Defendants are not entitled to summary judgment on Plaintiff's claim for arrest without probable cause.

D. Excessive force

Defendants argue that they are entitled to qualified immunity from Plaintiff's claim of excessive force.

In order to hold a police officer liable for the use of excessive force, a plaintiff must prove that the officer "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997).

Excessive force claims "are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 388 (1989). "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." *Id*. at 396. Reasonableness is to be determined with "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*.

Defendants argue that Asher's use of the Taser on Plaintiff was reasonable because Plaintiff was resisting arrest and walking towards Asher with his arms extended at shoulder height. Defendants also point out that this incident took place at night in a dangerous neighborhood.

The Sixth Circuit has held that as of August 23, 2009, it is clearly established that an officer's tasing of a once-disobedient suspect who has stopped resisting constitutes excessive force. *Thomas v. Plummer*, 489 F. App'x 116, 125 (6th Cir. 2012); *see also Cockrell v. City of Cincinnati*, 468 F. App'x 491, 496 (6th Cir. 2012) (citing *Kijowski v. City of Niles*, 372 Fed.Appx. 595, 601 (6th Cir. 2010) (noting that courts have found qualified immunity available where a law-enforcement official tases a plaintiff who has done nothing to resist arrest or is already detained because "the right to be free from physical force when one is not resisting the police is a clearly established right.").

Asher testified that he was at the police station when he received the radio call that Capps needed assistance in conducting his investigation. (Doc. 19-1, at 22.) Asher testified that while he was en route to Capps' location, Capps came over the radio asking for Asher to "step it up" and "get here a little quicker." (Id. at 22.) While there may have been some urgency to the situation, by all accounts, except that of Asher, when Asher arrived on the scene, Capps was only involved in a verbal confrontation with Anthony, Franklin and Garner. By all accounts, except that of Asher, Plaintiff had no physical involvement with Capps at any time. Instead, viewing the facts in a light most favorable to Plaintiff, when Asher arrived on the scene, Plaintiff and Capps were standing off the porch while Anthony, Franklin and Garner were on the porch. Plaintiff turned toward Asher with his arms outstretched and was trying to talk to

Asher. Plaintiff was standing approximately four feet away from Asher. Officer Capps informed Asher that Plaintiff was the vice mayor. According to Plaintiff, without warning or any discussion, Asher then tased Plaintiff multiple times. The Court finds that under this set of facts, there was no immediate threat to the safety of Capps or Asher, and Plaintiff was not actively resisting arrest. Therefore, the Court concludes that there is a genuine issue of material fact as to whether Asher's use of the Taser constituted excessive force under the circumstances.

While this finding leads to the conclusion that Asher is not entitled to qualified immunity from Plaintiff's excessive force claim, the Sixth Circuit has cautioned that "[e]ach defendant's liability must be assessed individually based on his own actions." *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010). Therefore, a separate analysis must be performed to determine if Capps is entitled to qualified immunity from Plaintiff's excessive force claim.

Plaintiff argues that Capps is not entitled to qualified immunity because he failed to prevent Asher from using excessive force. The Sixth Circuit has held that "one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge." *Bruner v. Dunaway*, 684 F.2d 422, 426 (6th Cir. 1982) (quoting *Byrd v. Brishke*, 466 F.2d 6. 11 (7th Cir. 1972)). However, the Sixth Circuit has instructed that "officers cannot be held liable under this theory if they do not have 'a realistic opportunity to intervene and prevent harm.'" *Wells v. City of Dearborn Heights*, 12-1051, 2013 WL 4504759, *7 (6th Cir. Aug. 26, 2013) (quoting *Ontha v. Rutherford Cnty., Tenn*., 222 F. App'x 498, 507 (6th Cir. 2007)).

Plaintiff argues that while there is some dispute as to whether Capps told Asher that Plaintiff was the vice mayor before or after the first use of the Taser, there is evidence that Capps did nothing to prevent Asher's use of the Taser the second and third time. Plaintiff points to the testimony of Franklin, who testified that after Asher tased Plaintiff, Franklin told Capps to get Asher because Asher was "out of control." Franklin explained that instead, Capps "made a mad dash and ran and tackled me almost and grabbed both of my hands and almost knocked me down." (Doc. 16-1, William Franklin Depo. at 57-58.) Plaintiff also relies on the testimony of Otis Garner, who described the scene as follows:

> At that point, he tased Gary, and it was like the whole world just stopped. It was like what just happened? Like Capps looked like (indicating). He ran up on the porch. He pushed me, he slammed me into the door . . . and he grabbed William. . . . It was as if he seen his chance to – you know, to attack as if – well, since Asher started it off, you know, my backup is here, let's go ahead and, I don't know, get this started.

(Doc. 15-1, Otis Garner Depo. at 30-31.) However, according to Capps, he did not see what happened between Asher and Capps. (Doc. 19-1, at 14.)

Viewing the facts in a light most favorable to Plaintiff, the Court concludes that there are genuine issues of material fact as to whether Capps had a realistic opportunity to intervene and prevent the harm Plaintiff suffered from the Taser. The Sixth Circuit has explained that an officer has a duty to intervene and protect against the use of force where there is "a sufficient period of time for a nearby defendant to both perceive what was happening and intercede to stop it." *Ontha v. Rutherford Cnty., Tennessee*, 222 F. App'x 498, 506 (6th Cir. 2007). According to the testimony of Franklin and Garner, Capps had an opportunity to choose between intervening between Asher and Plaintiff, or coming onto the porch. While Capps may not have had a duty to protect Plaintiff

from the first use of the Taser, there is evidence to support Plaintiff's argument that Capps had an opportunity to protect him from the second and third use of the Taser. Therefore, Capps, like Asher, is not entitled to summary judgment on Plaintiff's claim of excessive force.

E. Equal protection

In his third claim for relief, Plaintiff claims that Defendants violated his right to equal protection under the Fourteenth Amendment. Defendants have not moved for summary judgment on this claim.[3]

However, as the Sixth Circuit has explained, in order to establish an equal protection violation, a plaintiff must show that defendants "have burdened a fundamental right, which he was exercising, targeted a suspect class, of which he is a part, or treated him any differently than others similarly situated without any rational basis." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 313 (6th Cir. 2005). Therefore, Plaintiff must do more than merely allege that he was treated unfairly as an individual by Defendants' actions. *Id*. (citing *Bass v. Robinson*, 167 F.3d 1041, 1050 (6th Cir. 1999)).

F. Malicious prosecution under Section 1983

To reiterate: "The 'tort of malicious prosecution' is 'entirely distinct' from that of false arrest, as the malicious-prosecution tort 'remedies detention accompanied not by absence of legal process, but by wrongful institution of legal process.'" *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010) (quoting Wallace v. Kato, 549 U.S. 384, 390 (2007) (internal quotation marks omitted)).

The elements of a malicious prosecution claim under Section 1983 are:

[3]Defendants have not addressed this claim in their motions.

> First, the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute. Second, because a § 1983 claim is premised on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution. Third, the plaintiff must show that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty, as understood in our Fourth Amendment jurisprudence, apart from the initial seizure. Fourth, the criminal proceeding must have been resolved in the plaintiff's favor.

Id. at 308-309 (internal citations and alterations omitted).

Defendants again argue that the grand jury's indictment of Plaintiff is an absolute defense to his malicious prosecution claim because it is evidence of probable cause.

To repeat, under *Barnes v. Wright*, "'the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer.'" 449 F.3d 709, 716 (6th Cir. 2006) (quoting *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002)). However, as the Sixth Circuit has explained:

> An exception to the *Barnes* rule applies where the indictment was obtained wrongfully by defendant police officers who knowingly present false testimony to the grand jury. *Hinchman v. Moore*, 312 F.3d 198, 202-03 (6th Cir. 2002) (noting that a grand jury indictment does not foreclose a subsequent civil action for malicious prosecution where there is evidence of false statements or misrepresentations by law enforcement officials during the criminal proceeding); *see also McClellan v. Smith*, 439 F.3d 137, 145 (2d Cir. 2006) ("If plaintiff is to succeed in his malicious prosecution action after he has been indicted, he must establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith.") (quotation omitted).

Cook v. McPherson, 273 F. App'x 421, 424 (6th Cir. 2008). Plaintiff argues that the grand jury's indictment is based on Asher's false testimony. Yet, Plaintiff only speculates as to who testified before the grand jury. The Sixth Circuit has instructed that the exception to *Barnes* is not applicable where a plaintiff fails to offer evidence

other than his eventual acquittal to support the assertion that false testimony was presented to the grand jury. *Id*. at 424 (citing *Rothstein v. Carriere*, 373 F.3d 275, 283 (2d Cir. 2004) (reversing jury verdict for plaintiff and remanding with instruction to enter judgment for defendant on plaintiff's malicious prosecution claim where plaintiff was indicted and failed to offer evidence that the indictment was obtained by fraud or other police misconduct)). Because Plaintiff has not presented evidence that his Indictment for Assault on a Police Officer was obtained by false testimony to the grand jury, Plaintiff cannot establish a lack of probable cause. Therefore, Defendants are entitled to summary judgment on Plaintiff's claim of malicious prosecution under Section 1983.[4]

G. Malicious prosecution under Ohio law

"To prove a malicious-criminal-prosecution claim under Ohio law, a plaintiff must demonstrate (1) that the government officials instituted or continued criminal proceedings with malice, (2) that they lacked probable cause and (3) that the proceedings were then terminated in favor of the accused." *Harris v. United States*, 422 F.3d 322, 327 (6th Cir. 2005) (citing *Trussell v. Gen. Motors Corp*., 559 N.E.2d 732, 736 (Ohio 1990)).

The Sixth Circuit has noted that "Ohio law defines probable cause in substantially the same way that it is defined under the Fourth Amendment." *Thacker v. City of Columbus*, 328 F.3d 244, 260-61 (6th Cir. 2003). In keeping with federal constitutional law, an indictment "is prima facie evidence of probable cause and a plaintiff must bring forward substantial evidence to rebut this." *Harris*, 422 F.3d at 327 (quoting *Carlton v.*

[4]The Court notes that because Plaintiff has failed to establish a violation of his constitutional right, it is unnecessary to determine whether that right was clearly established. *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009) ("If a plaintiff fails to show either that a constitutional right was violated or that the right was clearly established, [he] will have failed to carry [his] burden.").

Davisson, 662 N.E.2d 1112, 1121 (Ohio Ct. App. 1995)). For example, a plaintiff can show that "the return of the indictment resulted from perjured testimony or that the grand jury proceedings were otherwise significantly irregular." *Id*. (quoting *Deoma v. Shaker Heights*, 587 N.E.2d 425, 428 (Ohio Ct. App. 1990)).

Plaintiff's malicious prosecution claim under Ohio law suffers from the same flaw as Plaintiff's malicious prosecution claim under federal constitutional law. Plaintiff has not presented any evidence that he was indicted for Assault on a Police Officer based on perjured testimony. Therefore, Defendants are entitled to summary judgment on Plaintiff's claim of malicious prosecution under Ohio law.

H. <u>Failure to train</u>

A municipality "cannot be held liable under section 1983 for an injury inflicted solely by its employees or agents." *Gregory v. Shelby County, Tenn*., 220 F.3d 433, 441 (6th Cir. 2000) (citing *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978) (holding that a municipality cannot be sued on a *respondeat superior* basis)). For liability to attach, the plaintiff must establish that the municipality engaged in a "policy or custom" that was the "moving force" behind the deprivation of the plaintiff's rights. *Powers v. Hamilton County Public Defender Com'n*, 501 F.3d 592, 607 (6th Cir. 2007) (citing *Monell*, 436 U.S. at 694; *Doe v. Claiborne County*, 103 F.3d 495, 507 (6th Cir. 1996)). To satisfy this requirement, Plaintiff claims that the Lincoln Heights has inadequately trained its police officers on the use of a Taser.

The Supreme Court has held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of*

Canton v. Harris, 489 U.S. 378, 388 (1989). A municipality is liable for failure to train if the plaintiff can show that: (1) a training program is inadequate to the tasks that the officers must perform; (2) the inadequacy is the result of the municipality's deliberate indifference; and (3) the inadequacy is closely related to or actually caused the plaintiff's injury. *Plinton v. County of Summit*, 540 F.3d 459, 464 (6th Cir. 2008) (citing *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989)). The Sixth Circuit has explained that a plaintiff can show deliberate indifference in one of two ways. First, a plaintiff can present evidence of "prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Plinton*, 540 F.3d at 464 (quoting *Fisher v. Harden*, 398 F.3d 837, 849 (6th Cir. 2005)). In the alternative, a plaintiff can show "a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation." *Id*. (citing *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997)).

Plaintiff points out that Lincoln Heights has a policy in place which states "[a] Taser shall be issued to and used only by officers who have completed the departments [*sic*] mandated Taser Training Program." (Doc. 24-7, at 2.) The policy also provides that "[e]ach Officer is required to under go [*sic*] a training session once a year." (Id. at 3.) However, it is undisputed that Asher last received Taser training on July 23, 2005. (Doc. 24-6.) Plaintiff does not argue that this policy demonstrates deliberate indifference, but instead argues that Lincoln Heights is liable under Section 1983 because it failed to follow its own policy on Taser training.

The Sixth Circuit has instructed: "Deliberate indifference remains distinct from mere negligence. Where a city does create reasonable policies, but negligently administers them, there is no deliberate indifference and therefore no § 1983 liability." *Perez v. Oakland Cnty*., 466 F.3d 416, 430 (6th Cir. 2006) (quoting *Gray v. City of Detroit*, 399 F.3d 612, 618 n. 1 (6th Cir. 2005)). Accordingly, Plaintiff must show that Lincoln Height's failure to follow its Taser policy was more than negligence and amounted to deliberate indifference.

The Supreme Court has adopted an objective "obviousness" standard for training program adequacy. *Miller v. Calhoun Cnty*., 408 F.3d 803, 817 (6th Cir. 2005). The Court has explained that "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). The Court finds that there is a genuine issue of material fact as to whether in light of the duties assigned to Asher, the need for training was so obvious and inadequacy so likely to result in the use of excessive force that Lincoln Heights can be said to have been deliberately indifferent. It is clear that Asher was required to have Taser training before he was issued a Taser, yet his Taser training expired in 2006.

The Court also finds that there is a genuine issue of material fact as to whether the lack of Taser training is closely related to or actually caused Plaintiff's injury. Lincoln Height's Taser policy itself states that "[p]rior to expending the probes, officer(s) will announce "Taser, Taser" so other officers will know the Taser unit is being

deployed." The policy also states "[i]f a second shot does not make contact or is ineffective, end Taser cartridge deployment." A reasonable jury could conclude that following such precautions could have prevented injury to Plaintiff. Therefore, Lincoln Heights is not entitled to summary judgment on Plaintiff's claim for failure to train under Section 1983.

III. CONCLUSION

Based on the foregoing, it is hereby **ORDERED** that:

1. Defendant David Asher's Motion for Summary Judgment (Doc. 9) is **GRANTED in PART and DENIED in PART**;

    a. Defendant's Motion is GRANTED as to Plaintiff's claims for malicious prosecution under Section 1983 and Ohio law;

    b. Defendant's Motion is DENIED in all other respects;

2. Defendants Phillip Capps, Laroy Smith and Village of Lincoln Heights' Motion for Summary Judgment (Doc. 17) is **GRANTED in PART and DENIED in PART**;

    a. Defendants' Motion is GRANTED as to all claims against Laroy Smith and Defendant Laroy Smith is DISMISSED as a party in this matter;

    b. Defendants' Motion is GRANTED as to Plaintiff's claims for malicious prosecution under Section 1983 and Ohio law; and

    c. Defendants' Motion is DENIED in all other respects;

IT IS SO ORDERED.

/s/ Michael R. Barrett
JUDGE MICHAEL R. BARRETT