

**Chicago-Kent College of Law
Moot Court Honor Society
Summer Candidacy Program 2010**

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

MARSTON DALEY,
Appellant,

-against-

BUZZ MCCOY,
Appellee.

RECORD

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF KILLDARE

_____)	
MARSTON DALEY,)	
Plaintiff,)	
)	COMPLAINT
-against-)	
)	
BUZZ MCCOY,)	
Defendant.)	
_____)	

Plaintiff, Marston Daley (“Daley”), by and through his attorney, Sascha Konietzko, Esq., alleges the following:

PARTIES

1. During all times mentioned in this complaint, Plaintiff Marston Daley, was a resident of Killdare.
2. During all times mentioned in this complaint, Defendant Buzz McCoy was a resident of Killdare.

JURISDICTION AND VENUE

3. This is a civil action under 42 U.S.C. § 1983 against a Killdare County police officer for violation of the Fourth Amendment’s protection against use of excessive force and the Fourteenth Amendment’s guarantee of substantive due process.
4. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331.
5. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1343(a)(3), which creates federal jurisdiction for suits brought under 42 U.S.C. § 1983.
6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b). All events giving rise to the claim occurred within the District of Killdare, Plaintiff resides in the District of Killdare, and Defendant resides in the District of Killdare.

BACKGROUND

7. On September 23, 2009, Daley was driving home from a business meeting along Highway X in Killdare County.

8. During that drive, Daley was pulled over by Frank Nardiello (“Nardiello”), a police officer employed by Defendant Killdare County Police Department.

9. Nardiello, alleging that Daley was driving drunk, insisted that Daley take a breathalyzer test. Daley refused the test and was taken into custody by Nardiello.

10. Nardiello handcuffed Daley’s hands behind his back, and Daley was put into the back seat of Nardiello’s squad car. Nardiello then took Daley to the Killdare Police Station.

11. Upon arrival at the police station, Daley was escorted by Nardiello into the booking room and handed off to Defendant Buzz McCoy (“McCoy”), a police officer employed by the Killdare County Police Department.

12. Nardiello left the booking room and left Daley in the sole custody of McCoy. Daley’s arms were still handcuffed behind his back.

13. Upon Nardiello’s exit, McCoy became verbally abusive, calling Daley “scum” and “white trash,” to which Daley gave no response.

14. Daley’s handcuffs were removed by McCoy for the booking process and, upon completion, were recuffed far too tightly.

15. Daley complained to McCoy that the handcuffs were too tight McCoy did nothing to fix the handcuffs.

16. At this point, Nardiello returned to the booking room. Daley complained to Nardiello that the handcuffs were too tight, and Nardiello checked and then loosened the handcuffs.

17. McCoy escorted Daley from the booking room to a holding cell. This entire time Daley was again in the sole custody of McCoy. In the holding cell, McCoy pushed Daley to the ground and hit Daley in the back with his knee. McCoy told Daley that he “shouldn’t have embarrassed [McCoy].” McCoy threatened that if he had to come back, he would make Daley “regret it.”

18. Hours later, when he was certain that McCoy was off duty, Daley complained about his injuries to one of the officers on duty and was taken to the Killdare County Hospital for examination.

19. Daley sustained bruising around his wrists from the handcuffs placed on him by McCoy, as well as a cut lip and bruising along his jaw from being slammed to the ground while his hands were still handcuffed behind his back.

CAUSE OF ACTION

20. Plaintiff alleges that Defendant's use of excessive force violated his rights under the Fourth Amendment as enforced by 42 U.S.C. § 1983.

21. Plaintiff further alleges that Defendant's use of excessive force violated his rights under the Fourteenth Amendment as enforced by 42 U.S.C. § 1983.

WHEREFORE, Plaintiff respectfully requests the following relief:

- A. Compensatory damages under § 1983;
- B. Any such other and further relief as this Court deems just and proper.

/s/ _____
Sascha Konietzko, Esq.
Attorney for Plaintiff
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Dated: February 1, 2010

“seizure that occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers”). Just one circuit allows the Fourth Amendment protection to extend up to the point of arraignment without requiring that the arrestee be in the custody of the arresting officer. *See Barrie v. Grand County*, 119 F.3d 862, 866 (10th Cir. 1997) (reinforcing the court’s decision in *Austin v. Hamilton*, 945 F.2d 1155, 1159 (10th Cir. 1991), that the Fourth Amendment bars the use of excessive force during the period immediately following arrest and before a magistrate judge determines whether the arrest was based on probable cause).

Other circuits have rejected the notion of continuing seizure altogether. *See, e.g., Wilkins v. May*, 872 F.2d 190, 192-95 (7th Cir. 1989) (finding that Fourth Amendment protection ceases and substantive due process begins upon completion of the initial seizure). While *Wilkins* was decided before *Graham*, the Seventh Circuit in *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990), found them to be consistent, holding that “Force during arrest must be reasonable within the meaning of the Fourth Amendment; between arrest and conviction the government may not ‘punish’ the suspect without due process of law.” The court in *Titran* also held that the individual’s “presence in the jail and the completion of the booking marked the line between ‘arrest’ and ‘detention.’” *Id.*

The Fourth, Fifth, and Eleventh Circuits also reject the “continuing seizure” doctrine, each holding that the Fourth Amendment “does not extend to the alleged mistreatment of arrestees or pretrial detainees in custody.” *Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997); *see also Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996); *Brothers v. Klevenhagen*, 28 F.3d 452, 455-56 (5th Cir. 1994).

B. Supreme Court Jurisprudence Supports a Rejection of the “Continuing Seizure” Doctrine.

The Supreme Court has stated that the act of “seizure” is a single act, not a continuous one. *California v. Hodari*, 499 U.S. 621, 625 (1991) (citing *Thompson v. Whitman*, 85 U.S. 457, 471 (1874)). Furthermore, the Supreme Court has refused to extend other Fourth Amendment protections to pretrial detainees. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 556 (1979) (refusing to hold that a pretrial detainee has a privacy interest in his person that is protected by the Fourth Amendment). Furthermore, in *Bell*, the Court held that the “proper inquiry” when evaluating the conditions or restrictions of pretrial detention was under a Fourteenth Amendment Due Process Clause analysis. *Id.* at 535. At least one court has interpreted *Bell* as instructing courts to analyze pretrial detainees’ excessive force claims under the Due Process Clause and not the Fourth Amendment. *See Riley*, 115 F.3d at 1162.

II. EVEN IF THE FOURTH AMENDMENT CONTINUES TO PROTECT BEYOND THE INITIAL SEIZURE, IT CANNOT CONTINUE ONCE THE ARRESTEE IS NO LONGER IN THE CUSTODY OF THE ARRESTING OFFICER.

According to the Supreme Court, a “seizure” occurs not only when an officer arrests an individual, but whenever he restrains the individual's freedom to walk away. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). The Second and Sixth Circuits have concluded that an “arresting officer” rule comes into play when applying Fourth Amendment protection against use of excessive force. *See e.g., Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989); *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir. 1988). The “continuing seizure” doctrine should not

extend beyond the time the arrestee leaves the custody of the arresting officer. Once an arrestee is transferred to the care of another officer, his “seizure” clearly has been completed.

The Fourth Amendment protection against unreasonable seizures should not apply to Marston Daley. At the time of the alleged use of excessive force, not only had Daley completed the booking process, but he was no longer in the custody of the arresting officer. As such, his “seizure” had ended, and his “detention” had begun. His claim, therefore, is properly brought under the Fourteenth Amendment, which prohibits punishment without due process of law. *See* U.S. Const. amend. XIV, § 1. Applying the Fourteenth Amendment to cases such as Daley’s will provide individuals with adequate protection against the use of excessive force by law enforcement officers while not requiring this Court to overextend the application of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant Defendant’s motion to dismiss the Fourth Amendment component of Plaintiff’s § 1983 claim.

/s/ _____
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Dated: February 13, 2010

excessive force. Furthermore, *Riley*, the case most opposed to the “continuing seizure” doctrine, relies upon *Bell v. Wolfish*, 441 U.S. 520 (1979), claiming that *Bell* instructs a court to analyze excessive force claims under the Due Process Clause of the Fourteenth Amendment and not the Fourth Amendment. *Riley*, 115 F.3d at 1162. However, this cannot be the case, as *Graham*, decided ten years after *Bell*, stated that “our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today.” *Graham*, 490 U.S. at 395 n.10.

This Court should follow the trend of its fellow circuit courts and hold that individuals have a Fourth Amendment right to be free from excessive force during the period between arrest and arraignment.

II. THE FOURTH AMENDMENT PROTECTION EXTENDS AT LEAST UNTIL THE ARRESTEE HAS BEEN ARRAIGNED OR FORMALLY CHARGED.

Some circuits have adopted an “arresting officer” rule, under which the arrestee is only protected by the Fourth Amendment until his release from the sole custody of the arresting officer. *See Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989)(stating that the “Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer”); *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir. 1988)(finding that a Fourth Amendment seizure continues while the person remains in the custody of the remaining officers). However, whether the arrestee is in the custody of the arresting officer is not the proper standard for Fourth Amendment protection. Such a standard would cause the Fourth Amendment to “depend on the fortuity of how long an arresting officer happens to remain with a suspect,” a period which can be brought to an “abrupt end” if the arresting officer transfers custody to a back-up officer. *Riley*, 115 F.3d at 1164.

Furthermore, according to the Supreme Court, a “seizure” occurs not only when an officer arrests an individual, but also whenever that officer restrains the individual’s freedom to walk away. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Thus, the more appropriate standard is that embraced by the Ninth and Tenth Circuits, which holds that the Fourth Amendment applies to persons arrested without warrants until a probable cause hearing is held. *See Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996)(holding that the “Fourth Amendment sets the applicable constitutional limits on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest”); *Austin v. Hamilton*, 945 F.2d at 1160 (holding that the Fourth Amendment applies to the treatment of arrestees detained without a warrant). Since at the moment of excessive force Daley had been detained without a warrant and had not yet been arraigned, he was still protected by the Fourth Amendment and, as such, has a cause of action under the Fourth Amendment as enforced by 42 U.S.C. § 1983.

CONCLUSION

For the foregoing reasons, this Court should deny Defendant's motion to dismiss Plaintiff's Fourth Amendment claim.

/s/ _____
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Dated: March 1, 2010

Amendment claim for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

DISCUSSION

In order for a plaintiff to bring a § 1983 claim, he must allege a violation of a constitutional or other legal right, as § 1983 creates no substantive rights itself, instead providing remedies for deprivations of rights established elsewhere. Here, Plaintiff has alleged a violation of his Fourth Amendment right to be free from unreasonable searches and seizures, as well as a violation of his Fourteenth Amendment right to be free from punishment without due process of law.

Defendant has moved to dismiss the Fourth Amendment claim, arguing that the Fourth Amendment does not apply to Plaintiff's claim and that the claim is properly brought under only the Fourteenth Amendment.

We must first determine the extent of the protection created by the Fourth Amendment. Defendant suggests that the Fourth Amendment's protection ends at the time an arrestee is actually seized. Defendant also argues, in the alternative, that even if the Fourth Amendment continues to protect an arrestee, this protection properly ends once the arrestee is released from the custody of the arresting officer. Plaintiff, on the other hand, claims that a violation of the Fourth Amendment occurs with any use of excessive force by any officer until the time that the arrestee is arraigned or appears before a magistrate judge.

The Supreme Court has specifically not defined the point at which the Fourth Amendment protection against use of excessive force by a law enforcement officer ends and the point at which Fourteenth Amendment substantive due process protection begins. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). Defendant suggests that, in accordance with the Fourth Circuit's analysis in *Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997), this question was resolved ten years earlier in *Bell v. Wolfish*, 441 U.S. 520 (1979). However, the *Graham* Court clearly stated that the question was left open, and as such, the Fourth Circuit's reliance upon *Bell* is misplaced. *See Graham*, 490 U.S. at 395.

This Court is in agreement with the majority of the circuit courts that have decided this issue, finding that the Fourth Amendment continues to protect arrestees beyond their initial seizure. *See, e.g., Wilson v. Spain*, 209 F.3d 713, 716 (8th Cir. 2000) (holding that the Fourth Amendment protects an arrestee from excessive force used when he is restrained in a cell in the police station); *United States v. Johnstone*, 107 F.3d 200, 207 (3d Cir. 1997) (holding that a "seizure" is a continuum that can extend beyond the initial restraint); *Barrie v. Grand County*, 119 F.3d 862, 866 (10th Cir. 1997) (holding that the Fourth Amendment protection extends from the period immediately following arrest to the moment at which a magistrate judge determines whether the arrest was based on probable cause); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989) (holding that the Fourth Amendment applies when the arrestee has not been formally charged or arraigned and remains in the custody of the arresting officer); *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir. 1988) (holding that a seizure continues throughout the time that the arrestee remains in the custody of the arresting officers).

It is not enough that this Court has decided that the Fourth Amendment protection continues beyond the initial seizure. The next issue is whether the protection of the

Fourth Amendment continues until the point at which the arrestee is no longer in custody of the arresting officer, but has not yet appeared before a magistrate judge. This Court agrees with Defendant that it does not.

This Court, like the Second and Sixth Circuits, finds that it is proper to extend the Fourth Amendment protection only while the arrestee remains in the custody of the arresting officer. Defining the point at which a seizure is completed for Fourth Amendment purposes is a difficult question, and as such, this Court opts to set a bright line at which all parties are on notice as to the constitutional standards applicable to their actions. Because the Fourth Amendment does not apply to Plaintiff's allegations, his claim is properly brought under the Fourteenth Amendment and not the Fourth Amendment.

CONCLUSION

Defendant's motion to dismiss the Fourth Amendment component of Plaintiff's 42 U.S.C. § 1983 claim is GRANTED. Judgment shall be entered accordingly.

CERTIFICATION OF INTERLOCUTORY APPEAL

This Order does not address the viability of Plaintiff's claim under the Fourteenth Amendment. Accordingly, the litigation will proceed on that claim. It appears, though, that Plaintiff must satisfy a considerably more stringent standard to recover in an excessive force claim under so-called Substantive Due Process component of the Fourteenth Amendment. *See, e.g., Wilson v. Spain*, 209 F.3d 713, 716 (8th Cir. 2000) (calling the Fourteenth Amendment standard "seemingly more burdensome, and clearly no less burdensome" than the Fourth Amendment's "objective reasonableness" standard).

This order involves a controlling question of law as to which there is substantial ground for difference of opinion. And an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly, I certify the order under 28 U.S.C. § 1292(b) for interlocutory appeal.

IT IS SO ORDERED.

/s/ _____
Hon. Skip Towne
District Court Judge
United States District Court
Southern District of Killdare

Dated: May 12, 2010

UNITED STATES COURT OF APPEALS FOR THE
THIRTEENTH CIRCUIT

_____)	
MARSTON DALEY,)	
Appellant,)	
)	
-against-)	ORDER GRANTING
)	INTERLOCUTORY APPEAL
)	
BUZZ MCCOY,)	
Appellee.)	
_____)	

Bond, J.

A petition for appeal having been made from the Order entered by the United States District Court for the Southern District of Killdare, dated May 12, 2010, and that order having been properly certified by the District Court for interlocutory appeal under 28 U.S.C. § 1292(b), it is hereby:

ORDERED, that said appeal be GRANTED and that the appeal be set down for argument. Said appeal shall address the following question:

Whether the Fourth Amendment protection against unreasonable seizures extends to an arrestee who is no longer in the custody of the arresting officer but has yet to be arraigned or formally charged.

/s/ _____
Hon. Rhonda Bond
Circuit Court Chief Judge
United States Court of Appeals
Thirteenth Circuit

Dated: July 20, 2010