

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:12-cv-80648-KAM

ANTHONY GEORGE EVANS,

Plaintiff,

vs.

DAVID STEED and MICHAEL
MOSCHETTE,

Defendants.

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
PURSUANT TO FED. R CIV. P. 56(C)**

The Defendants, David Steed and Michael Moschette, individually, by and through undersigned, counsel, pursuant to Rule 56 of the Federal Rules of Civil Procedure, files this, their Motion for Summary Judgment and Memorandum of law, and as grounds therefore, would state as follows:

1. By way of pertinent history, this matter was instituted by the incarcerated pro se Plaintiff on June 15, 2012, with the filing of a Complaint which named the Defendants who are Officers with the Delray Beach Police Department (DE #1). Thereafter, on June 27, 2012, the Magistrate issued a Report and Recommendation that permitted the matter to proceed as to the individual Defendants, Officer David Steed and Lt. Michael Moschette for excessive force upon arrest and for retaliation against Officer Steed. The report and recommendation of the Magistrate Judge dismissed the claim of unlawful search and seizure. The Court entered an Order Adopting the Report and Recommendations of the Magistrate Judge on June 27, 2012 (DE#2).

2. At issue here for purposes of this Motion are the Plaintiff's remaining claims of alleged excessive force which are brought against the Defendants in their individual capacities only and retaliation against Officer Steed in his individual capacity.

3. Based upon the pleadings in the file, the record evidence, and the exhibits attached hereto, the undisputed facts establish that the Defendants are entitled to summary judgment in their favor as a matter of law for the following reasons:

a) In the criminal proceedings brought as a result of the subject arrest, the Plaintiff Evans was subsequently convicted following a plea to possession of cocaine and is currently serving 80 months in State prison for this crime. The Plaintiff's convictions remain valid and have never been reversed on appeal, expunged, declared invalid by a State tribunal, or called into question by a Federal Court's issuance of a writ of habeas corpus. Pursuant to *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), the Plaintiff may not bring a §1983 lawsuit which, if successful, would undermine his criminal conviction and sentence.

b) These Defendants are entitled to qualified immunity as they at no time violated the Plaintiff's clearly established constitutional rights.

WHEREFORE, it is respectfully requested that this Honorable Court grant the Defendants Steed and Moschette's Motion for Summary Judgment.

Respectfully submitted this 8th day of May, 2013.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
CITY OF DELRAY BEACH, FLORIDA

By: /s/ Catherine M. Kozol

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by United States first class mail to: Anthony George Evans, 187491, Lawtey Correctional Institution, B21225, 7819 N.W. 228 Street, Raiford, FL 32026 on this 8th day of May, 2013.

/s/ Catherine M. Kozol

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ANTHONY GEORGE EVANS,

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Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment “shall be rendered ... if ... there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ. P. 56(c). The Court should view the evidence and any inferences that may be drawn in the light most favorable to the non-movant. *Adickes v. S.H. Kress And Co.*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact exists. *Avirgan v. Hull*, 937 F.2d 1572, 1577 (11th Cir.), *cert. denied*, 112 S.Ct. 913 (1992); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). It is the non-moving party’s burden to come forward with evidence on each essential element of his claim sufficient to sustain a jury verdict. *See Earley v. Champion International Corp.*, 907 F.2d 1077,

1080 (11th. Cir. 1990). *See also Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (Plaintiff must produce specific facts showing that there is a genuine issue for trial).

**UNCONTESTED FACTS OR FACTS TAKEN IN THE
LIGHT MOST FAVORABLE TO THE PLAINTIFF
FOR THE PURPOSES OF THIS MOTION**

Facts

On January 26, 2012 at approximately 12:30 a.m., Officer David Steed observed Mr. Evans in the area of the BP Gas Station (See Exhibits A, B, and C, Officer Steed, Officer Griffith and Lt. Moschette's Affidavits). Mr. Evans was known to Officers Steed, Griffith and Lt. Moschette to have two active probable cause affidavits for his arrest charging him with sale of cocaine within 1000 feet of a church.^{1 2} (See Exhibits A, B and C, Officer Steed, Officer Griffith and Lt. Moschette's Affidavits).

Upon seeing Mr. Evans, Officer Steed made contact with him. (See Exhibits A, B and C, Officer Steed, Officer Griffith and Lt. Moschette's Affidavits and Exhibit D, Evans Deposition p. 14). At the time of the initial contact with Officer Steed, Mr. Evans was wearing an Ipod listening to music. (See Exhibit D, Evans Deposition p. 14).

Officer Steed approached Mr. Evans and told him he was under arrest for the sale of cocaine and attempted to place him in custody. (See Exhibits A, B and C.) As Officer Steed was approaching, Mr. Evans asked what was the problem. (See Exhibit D, Evans' Deposition p. 19.) Mr. Evans began to back away and jerked his arm away from Officer Steed. (See Exhibits A, B

¹ It should be noted that Mr. Evans had an active trespass warning issued against him, as well as four prior convictions for trespass at the B P Gas Station. (See Exhibit C, Griffith Affidavit and Exhibit D, Evans' Deposition p. 10-11).

² Mr. Evans pled to and was convicted to both the sales charges that was the basis of this stop and sentenced to 80 months in the Department of Corrections. (See Exhibit D, Evans Deposition p. 19 and 21.) See also Exhibit J, Certified copies of convictions.

and C.) Officer Steed was yelling stop resisting, stop resisting. (See Exhibits A, B, C and D, Evans Deposition p. 19.)

Officer Steed then grabbed Mr. Evan's arm and applied an arm bar takedown, taking Mr. Evans to the ground. (See Exhibits A, B, C and D, Evans Deposition p. 19-21.) Mr. Evans landed on his right shoulder and his face hit the ground, scratching it. (See Exhibit D, Evans' Deposition p. 21 and 32.) Mr. Evans placed his arms underneath his body and his hands were near his waistband, causing great officer safety concerns. (See Exhibits A, B, C.) Officer Steed gave numerous verbal commands to stop resisting and for Mr. Evans to place his hands behind his back. (See Exhibits A, B and C, and Exhibit D, Evans' Deposition, p. 24.) Mr. Evans did not know where Sgt. Griffith was, but Lt. Moschette was nearby. (Exhibit D, Evans' Deposition, p. 22.) Officer Steed straddled his back with his knees on the pavement while he was attempting to handcuff Mr. Evans. (See Exhibit D, Evans' Deposition p. 31 and 34.)

While Officer Steed was straddling Mr. Evans on the ground, Mr. Evans was trying to maneuver back and forth as well as maneuvering his head back and forth. (See Exhibit D, Evans' Deposition p. 38 and Exhibits A, B and C).

As the Officers were attempting to handcuff Mr. Evans, he was able to grab a cigarette pack with a Krazy Glue container came out of his pocket. (See Exhibits A, B, C and D, Evans' Deposition p. 41-42.) Mr. Evans managed to grab the cap and pull it off of the Krazy Glue container. (See Exhibits A, B and C.) Sgt. Griffith wrestled the pack of cigarettes from Mr. Evans but not before several pieces of cocaine spilled out of the container and landed on the ground. (See Exhibits A, B and C, and D, Evans' Deposition p. 41-42.)

Lt. Moschette gave Mr. Evans loud commands to stop resisting. (See Exhibits A, B and C.) There were several people beside the officers outside in the area. (Evans' Deposition, p. 39.)

Lt. Moschette sprayed Mr. Evans with OC spray. (See Exhibits A, B and C and Evans' Deposition, p.37). The OC spray had little effect on Mr. Evans. (See Exhibits A, B and C.)

Mr. Evans alleged that Officer Steed punched him on the sides of his face several times and tried to stick a night stick in Mr. Evans mouth. (Evans' Deposition p. 33 and 35)

Mr. Evans refused to stand up on his own and had to be physically picked up off the ground and placed in the patrol vehicle and taken to the station. (See Exhibits A, B, C and D, Evans' Deposition p. 42.)

At the station, the paramedics examined Mr. Evans and transported him to the hospital. (Evans Deposition p. 46 and 49.) At the hospital, the Doctor found no concussions, just abrasions. (Evans Deposition p. 55). Mr. Evans was medically cleared at the hospital and transported to the Palm Beach County Jail. (See Exhibit C.)

Officer Steed suffered abrasions to his knees and right wrist. (See Exhibit A and D, Evans' Deposition p. 34.) Lt. Moschette suffered abrasions to both his knees and right hand. (See Exhibit B.)

Mr. Evans was convicted on a charge of possession of cocaine stemming from this incident, as well as the two sales of cocaine charges within 1000 feet of a church that were the basis for this stop. (See Exhibit I, certified copy of conviction and Evans Deposition p. 9-10). He was sentenced to 80 months at the Department of Corrections and is currently serving his sentence. (See Exhibit I.) To date, the convictions have not been reversed, overturned, expunged or declared invalid.

The Plaintiff also alleges that Officer Steed used excessive force against him due to a prior filing of a grievance against him. (See DE #s 9 and 12.) Mr. Evans made two Internal Affairs complaints against Officer Steed for excessive force for alleged incidents occurring

September 13, 2010 and March 15, 2011 respectively. Mr. Evans was afforded the opportunity to speak to the duty lieutenant and give sworn statements to Lt. Edward Flynn regarding the incident in question. (Evans' Deposition, p. 64-65 and 68-69). After the Internal Affairs Investigation, Officer Steed was exonerated as to the case occurring on September 13, 2010.³ (See Exhibit E, Internal Affairs Investigation Final Resolution for 9/13/2010). In addition, the Internal Affairs Investigation on the March 15, 2011 returned a ruling of unfounded against Officer Steed. (See Exhibit F, Internal Affairs Investigation Final Resolution for March 15, 2011).

Mr. Evans was convicted for trespass after warning, resisting an officer without violence, carrying a concealed weapon for the September 13, 2010 arrest. (See Exhibit G.) Mr. Evans was issued a trespass warning for the March 15, 2011 incident. (See Exhibit H.)

Mr. Evans also applied for an injunction for protection to the Court against Officer Steed on February 28, 2011. (See Exhibit I.) The Court denied the petition for an injunction on the same date. (See Exhibit I.)

Argument

The plaintiff alleges in his complaint a violation of 42 U.S.C. §1983 by way of excessive force and retaliation. (See Order from the Court accepting the Magistrate Judge's Report and Recommendations, DE #9 and 12). The plaintiff is barred by *Heck v. Humphrey* and is collaterally estopped from asserting anything that would undermine his criminal convictions and sentence. Further, Officer Steed and Lt. Moschette have qualified immunity for their actions.

1. Pursuant to the dictates of *Heck v. Humphrey*, Plaintiff may not be collaterally attack his criminal convictions and may not assert facts which are inconsistent with the facts upon which his criminal convictions are based.

In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), the Supreme Court considered the viability of § 1983 claims brought by a prisoner seeking monetary damages

³ See Exhibit K, General Order 915 for the definitions of exonerated and unfounded rulings.

against a police investigator and prosecutors for allegedly: conducting an “unlawful, unreasonable, and arbitrary investigation” which led to his arrest for the killing of his wife; destroying exculpatory evidence that could have proved his innocence; and causing an “illegal and unlawful voice identification procedure” to be used at his trial. *See Heck*, 512 U.S. at 479. The plaintiff-prisoner in *Heck* had previously lost a direct appeal of his murder conviction and had lost two petitions for a writ of habeas corpus to a federal court. *Id.* Thus, his conviction had not been overturned, expunged, or questioned by a court.

In *Heck*, the Supreme Court held that the plaintiff-prisoner could not bring his § 1983 claims for money damages against the police investigator and prosecutors because, even though the relief requested in the plaintiff’s § 1983 claims was limited to monetary relief and did not seek release from prison, the § 1983 claims nonetheless “attacked the fact or length of [his] confinement.” *See Heck*, 512 U.S. at 482. Concerning the issue of whether convicts may be permitted to bring § 1983 civil rights claims which would undermine their state court conviction and sentence, the Supreme Court stated:

We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution....We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

See Heck, 512 U.S. at 486-87.

Often times, plaintiffs' claims are completely barred by the *Heck* principle. *See Okoro v. Callaghan*, 324 F.3d 488 (7th Cir. 2003)(prisoner could not bring civil action without first successfully challenging his federal narcotics conviction); *Cook v. Pasco County Bd. of County Comm'rs*, 2005 W.L. 2129913 (M.D. Fla. 2005)(pro se prisoner's complaint dismissed pursuant to *Heck*); *Miller v. Johnson*, 2011 W.L. 2174361 (M.D. Fla. 2011)(pro se prisoner's claim barred by *Heck*; plaintiff contending disciplinary charges he had been convicted of were bogus). When a plaintiff "voluntarily steer[s] the action into *Heck* territory by making specific factual allegations in the complaint that were inconsistent with the facts upon which his criminal conviction[] [was] based" *Hayward v. Kile*, 2009 W.L. 2045923 (S.D. Ga. 2009), *citing McCann v. Neilsen*, 466 F.3d 619, 621 (7th Cir. 2006)(internal citations omitted), it is barred by *Heck*.

Furthermore, a criminal defendant, as a plaintiff, may not re-litigate the same issue which has been litigated in prior criminal proceedings. *See Zeidwig v. Ward*, 548 So.2d 209 (Fla. 1989).⁴ There are three prerequisites to a determination of collateral estoppel: "(1) ... the issue at stake [must] be identical to the one involved in the prior litigation; (2)...the issue [must] have been actually litigated; and (3)...the determination of this issue in the prior litigation [must] have been a critical and necessary part of the judgment in that earlier decision." *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101, 1107 (11th Cir. 1992)(internal citations omitted).

Plaintiff Evans, following a plea, was convicted of several crimes arising out of the charges that were brought as a result of the subject incident/arrest, specifically, two counts of sale of cocaine within 1000 feet of a church and possession of cocaine and is currently serving eighty months in state prison for these crimes. (See Exhibit J, Certified Copies of Convictions.). These convictions remain valid and have not been overturned, expunged or questioned by a

⁴ When federal courts consider whether to give preclusive effect to a state court judgment, the federal court must apply state law concerning collateral estoppel. *See Vazquez v. Metropolitan Dade County*, 968 F.2d 1101, 1106 (11th Cir. 1992).

court. As a result he is foreclosed from asserting facts which are contrary to those which form the basis of his convictions. To allow Plaintiff to do so in this case would run afoul of the principles of *Heck*. See *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994)(criminal conviction forecloses Plaintiff from collaterally attacking the legality of that arrest in a civil action); see also *Ojegba v. Murphy*, 2006 WL 1117867 (11th Cir. 2006) (*Alford* plea [which is a guilty plea accompanied by an assertion of innocence] barred §1983 excessive force claim under *Heck v. Humphrey* principles) as well as the concept of collateral estoppel. See *Vazquez, supra*.

In this lawsuit, the Plaintiff seeks monetary and punitive damages as well as declaratory relief for alleged excessive force. (See Complaint - pg. 4). Applying the rule of *Heck*, if the Plaintiff's claims would "necessarily imply the invalidity of his conviction," then they must be dismissed unless the Plaintiff proves his conviction or sentence has been reversed, expunged, declared invalid, or called into question by a federal court's issuance of a writ of habeas corpus. See *Heck*, 512 U.S. 486-87.

In the case at bar, the Plaintiff claims that the basis for the stop was invalid. The Plaintiff pled to and was sentenced to the two counts of felony sale of cocaine that was the basis of the stop and arrest. Since the convictions have not been overturned, the Plaintiff cannot argue the invalidity of the stop or arrest. Further, the Plaintiff cannot argue that he had not resisted arrest as he admits he was maneuvering his body and head after being taken to the ground. Further, it was due to his movements on the ground of trying to remove the container from his pocket and destroy the cocaine that the additional charge of possession of cocaine was added. The Plaintiff also pled to his charge and was sentenced. The conviction has not been overturned. Thus, the Plaintiff should be estopped from arguing in a civil case that the police officers cannot use force

to effectuate the arrest of a resisting felon as this could call into question his criminal convictions, which convictions have never been overturned and remain valid.

II. Statement of Law Regarding Qualified Immunity

“Qualified immunity shields government officials executing discretionary responsibilities from civil damages ‘insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). See also, *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed. 2d 818 (1999). See also, *McElligott v. Foley*, 182 F.3d 1248, 1254 (11th Cir. 1999). Qualified immunity is a question of law to be decided by the Court. *Id.* The test for qualified immunity is one of “objective-reasonableness” in evaluating the conduct of the government official claiming its protection. *Id.* “[A]ll but the plainly incompetent or those who knowingly violate the law” find protection in qualified immunity. *Id.*, citing *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed. 2d 271 (1986). See also, *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990); *Tillman v. Coley*, 886 F.2d 317 (11th Cir. 1989).

In *Rich v. Dollar*, 841 F.2d 1558, (11th Cir. 1988), the Eleventh Circuit adopted a two-part analysis for assessing the qualified immunity defense. First, the defendant public official must prove that he acted within the scope of his discretionary authority when the challenged conduct occurred. *Id.* If the defendant satisfies this part, the burden shifts to the plaintiff to show that the defendant public official’s conduct violated clearly established law. *Id.* See also, *Brosseau v. Haugen*, 543 U.S. 194 (2004). “That qualified immunity protects government actors is the usual role; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities.” *Lassiter v. Alabama A & M Univ. Bd. of*

Trustees, 28 F.2d 1146, 1149 (11th Cir. 1994) (*en banc*) (citations and emphasis omitted), *Redd v. City of Enterprise*, 140 F.3d 1378, 1382 (11th Cir. 1998).

A. The Defendants acted within the scope of their discretionary authority.

The Defendants agree that their actions were related to the performance of their police duties and were carried out pursuant to authority confirmed by the State. All of the Officers were on duty as Delray Beach Police Department officers at the time of the alleged incidents. (See Exhibits A, B and C.) All the Officers were in uniform and in a marked patrol vehicle, with the exception of Lt. Moschette who was in an unmarked police vehicle. (See Exhibits A, B and C.) All of the Officers wore/displayed the Delray Beach Police Department marked insignia police badges. Further, as police officers with the City of Delray Beach, all the Officers were performing their police functions in patrolling an area within the City, fostering an arrest for active probable cause affidavits and apprehending the Defendant for the charges. *See, Bouye v. Marshall*, 102 F.Supp. 2d, 357, 1362 (2000). (See also Exhibits A, B and C.) Moreover, the officers used their authority as a police officer to stop, detain and arrest the Plaintiff. *See, Id.* Thus, their actions were not those of a purely private citizen. Therefore, Officer Steed and Lt. Moschette were acting within their discretionary authority granted under State law when they effectuated the seizure of the plaintiff. When the initial burden of the defendant public official has been met, it is then incumbent upon the plaintiff to demonstrate that the Defendant public official acted in bad faith, i.e., “violated clearly established constitutional law.” *See Brosseau v. Haugen*, 543 U.S. 194 (2004).

B. There was no violation of Mr. Evans’ Fourth Amendment rights since the force used was reasonable under the circumstances and there was no failure to intervene. Thus, the Officers are entitled to qualified immunity.

The United States Supreme Court has held that an excessive force claim against a law enforcement officer must be analyzed under the Fourth Amendment and its reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989). The reasonableness inquiry in a Fourth Amendment excessive force case is an objective one. *Id.* The question is whether the officer's actions are objectively reasonable in light of the facts confronting the officer, regardless of the officer's underlying intent or motivation. *Id.* at 397. The Court must consider such factors as the need for force, the relationship between the need and the amount of force used, and the extent of the injury inflicted. Not every push or shove amounts to a violation under Title 42 U.S.C. §1983. *Graham*, 490 U.S. at 396 (citations omitted). Furthermore, reasonableness must account for the fact that police officers are sometimes forced to make split-second judgments under circumstances that are tense and rapidly evolving. *Graham*, 490 U.S. at 397. Additionally, "it is well settled that the right to make an arrest 'necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'" *Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004) quoting *Graham*, *supra* at 396; see also *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002).

Moreover, an officer can be liable for failing to intervene when another officer uses excessive force. *Priester v. City of Riviera Beach, Florida*, 208 F.3d 919 (11th Cir. 2000); *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985). However, liability can only arise when the officer is in a position to intervene and fails to do so. See *Priester*, *supra* at 924-925; see also *Ensley v. Soper*, 142 F.3d 1402 (11th Cir. 1998).

There is no bright-line standard regarding the use of force. Therefore, qualified immunity applies unless the circumstances would inevitably lead a reasonable officer in the defendant's position to conclude that the force used was unlawful. *Gold v. City of Miami*, 121

F.3d 1442 (11th Cir. 1997), *cert. denied*, 119 S.Ct. 165 (1998); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993). Furthermore, the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, not by hindsight. *Rodriguez v. Farrell*, 280 F.3d 1341 (11th Cir. 2002), *cert. denied*, 123 S.Ct. 1482 (2003).

In our case, the actions of the Officers were objectively reasonable as they were done for officer safety, safety of the patrons in the area, to effectuate an arrest and to prevent the destruction of evidence. The Officers were clearly able to detain and arrest Mr. Evans as there was active probable cause for two sales of cocaine for which he was later convicted. (See Exhibit J.) Mr. Evans was not free to leave and the officers were able to use the force necessary to effectuate the arrest, which included an arm bar take down to the ground.

Once on the ground, Mr. Evans, who was non-compliant even with continued requests to stop resisting by the Officers, kept maneuvering his body and head and further reached his hands under his body causing officer safety concerns and concerns for bystanders in the area of possibly having a weapon as well as a concern for the destruction of evidence that he had on his person. (See Evans Deposition p. 38-39 and Exhibits A, B and C.)

The Officers fears were then realized when Mr. Evans tried to remove a cigarette pack with a Krazy Glue container of crack cocaine that spilled in the area where the incident occurred. It was unknown if Mr. Evans might have ingested it if able to and now created a safety concern for Mr. Evans as well. Further, the use of the OC spray, a lesser application of force, had no effect on the Plaintiff . It then took three officers to handcuff Mr. Evans and to effectuate his arrest. (See Exhibit A, B and C.) .

Mr. Evans alleges that Officer Steed punched him several times and tried to place a nightstick in his mouth. Although Officer Steed vehemently denies this, for the sake of

argument and this motion, not every punch and shove amounts to excessive force. *See Graham v. Connor*, 490 U.S. 386, 396. Further, an officer may use a nightstick or chokehold to gain compliance or to prevent destruction of evidence. *See, Post v. City of Ft. Lauderdale*, 7 F.3d 1552, 1557 (Qualified immunity protected police officer from liability in use of excessive force where reasonable officer would have concluded that a chokehold and pushing was necessary to stop manager from becoming violent after he raised his hands); *Rudolf v. Lowndes County Board of Education, et al*, 242 F.Supp. 2nd 1107, 1123 (where law enforcement officers did not use excessive force for purpose of 1983 claim, when they allegedly choked a high school student while trying to stop student from swallowing evidence or potentially harmful substances that the officer had retrieved from his vehicle during a drug sweep of a school parking lot). In our case, it took three Officers to take Mr. Evans into custody as well as the OC spray having no effect on Mr. Evans when introduced on him. In this situation, a reasonable officer may have resorted to punches to gain compliance as opposed to using something such as deadly force.

Looking at the totality of the circumstances, the force used upon the Plaintiff to take him into custody by Officers Steed, Moschette and Griffith, was objectively reasonable in light of the facts known to each of them. (See Exhibits A, B and C.) It was late at night, approximately 12:30 a.m. The officers had active probable cause affidavits for two counts of felony sale of cocaine on Mr. Evans. At the time of the stop, the officers did not know the suspect's intentions. Further, there were other bystanders in the area which immediately would cause safety concerns for the people. (Evans deposition p. 39.) During their contact, Mr. Evans was non-compliant with their commands.

Further, while on the ground, Mr. Evans kept placing his hands by his waistband. At this point, the Officers did not know what the suspect's intentions were or if he was armed. This heightened the safety concerns for everyone in the area as well as their own.

Mr. Evans, while on the ground, kept maneuvering back and forth. To exacerbate matters, he was then able to grab a cigarette packet and Krazy Glue container out of his pocket and manage to empty several pieces of cocaine onto the ground in the area where the officers were trying to place him in custody, thereby destroying evidence.

When Lt. Moschette applied the OC spray, a lesser use of force, the Plaintiff was not affected. It then took three officers to place the Plaintiff into custody.⁵

Based on the totality of the circumstances, the officers had the right to use the force necessary, up to and including deadly force, to effectuate the arrest of a felon, protect themselves and others in the area and prevent the destruction of evidence. Therefore, the officers are entitled to qualified immunity as a reasonable officer in the Defendant's position would not inevitably conclude that the force used in this case was unlawful. *See Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997), *cert. denied*, 119 S.Ct. 165 (1998); *Rodriguez v. Farrell*, 280 F.3d 1341 (11th Cir. 2002), *cert. denied*, 123 S.Ct. 1482 (2003); *see also, Crenshaw v. Lister*, 556 F.3d 1283 (11th Cir. 2009)(deputies entitled to qualified immunity; objectively reasonable for deputies to use canine to locate and apprehend plaintiff who was suspected of committed armed robbery, fled from police); *McCullough v. Antolini*, 559 F.3d 1201 (11th Cir. 2009)(deadly force was not excessive upon suspect fleeing late at night, repeatedly refused to show hands, used vehicle in dangerous and aggressive manner); *Pace v. City of Palmetto*, 489 F.Supp.2d 1325 (M.D. Fla. 2007)(use of police dog to apprehend suspect who had fled at high speeds in stolen car, fled into

⁵ It should be noted that the Plaintiff only suffered minor injuries. (See Evans Deposition p. 55). He was medically cleared by the hospital and released to the jail that night. (See Exhibit C.). (See Evans deposition p. 53-54.)

dark swamp); *Hoyt v. Cooks*, 672 F.3d 972 (11th Cir. 2012)(qualified immunity granted; multiple uses of taser upon dangerous non-compliant suspect).

Mr. Evans also alleges that Lt. Moschette failed to intervene when Officer Steed was trying to effectuate the arrest. Because of the tumultuous situation discussed above, the split second actions and decisions of the officers during the arrest of Mr. Evans, while also being concerned for their own safety and the safety of bystanders in the area, Lt. Moschette could not anticipate what Officer Steed was going to do to prevent any actions from occurring. *See, Hadley v. Gutierrez*, 526 F.3d 1324, 1330-31 (11th Cir. 2008). Therefore, Lt. Moschette should be entitled to qualified immunity.

C. There was no retaliatory conduct by Officer Steed since there was no causal connection between the retaliatory actions and the adverse effect on speech.

“To state a retaliatory claim, ... a plaintiff must establish first, that his speech or act was constitutionally protected, second, that the defendant’s retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech.” *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005). As to the second prong, “[a] plaintiff suffers adverse action if the defendant’s allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights.” *Id* at 1254. As to the third prong, “If a defendant can show that he would have taken the same action in the absence of the protected activity, he is entitled to prevail on summary judgment.” *Smith v. Mosley*, 532 F.3d 1270, 1278 (11th Cir. 2008).

In our case, the elements of the third prong have not been met by the Plaintiff in that there was no causal connection between the retaliatory actions and the adverse effect on speech since Officer Steed would have taken the same action in the absence of the filed Internal Affairs Complaints. Officer Steed had probable cause for the arrest of Mr. Evans on January 26, 2012

for two counts of the sale of cocaine within 1000 feet of a church. When Officer Steed went to effectuate the arrest, Mr. Evans resisted, drew officer safety concerns, concerns for the safety of the bystanders in the area, and tried to destroy evidence that would create an additional charge of possession of cocaine. He was convicted on all three counts. (See Exhibit J.) It took three officers to effect the arrest of Mr. Evans and prevent Mr. Evans from destroying illegal contraband. (See Exhibits A, B and C.) During the entire incident, there was also concern of officer safety since Mr. Evans keep reaching underneath his body toward his waistband. Thus, the actions taken by the Officers were necessary to complete their duties.

Further, Officer Steed was exonerated on one of the Internal Affairs complaints filed by Mr. Evans with the other complaint being ruled unfounded after an investigation on each. (See Exhibits E and F.) Thus, no action was taken against Officer Steed for the complaint by Mr. Evans.

Therefore, the causal connection has not been met by the Plaintiff and summary judgment should be granted to the Defendant Officer Steed.

Conclusion

The Plaintiff is barred from asserting this claim by *Heck v. Humphrey* and is collaterally estopped from asserting claims that would undermine his criminal convictions and sentence. Further, all the Officers were on duty and working in their capacity as law enforcement officers so they acted within their discretionary authority. There was no deprivation of an actual constitutional right since the officers' actions in light of the facts confronting them, were objectively reasonable under the circumstances. Further, there was no retaliatory conduct by Officers Steed since Officer Steed would have taken the actions absent any complaints by Mr. Evans. Therefore, summary judgment should be granted for the Officers.

Respectfully submitted this 8th day of May, 2013.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
CITY OF DELRAY BEACH, FLORIDA

By: /s/ Catherine M. Kozol

Catherine M. Kozol, Esq. (831433)

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Asst. City Attorney/Police Legal Advisor

300 W. Atlantic Avenue

Delray Beach, FL 33444

Telephone: 561-243-7823

Facsimile: 561-243-7815 and

Terrill C. Pyburn, Esq. (524646)

Attorney email: pyburn@mydelraybeach.com

Assistant City Attorney

200 N. W. 1st Avenue

Delray Beach, FL 33444

Telephone: 561-243-7090

Facsimile: 561-278-4755

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by United States first class mail to: Anthony George Evans, 187491, Lawtey Correctional Institution, B21225, 7819 N.W. 228 Street, Raiford, FL 32026 on this 8th day of May, 2013.

/s/ Catherine M. Kozol

Catherine M. Kozol, Esq.

ARREST / NOTICE TO APPEAR

1. Arrest 2. N.T.A. 3. Request for Warrant 4. Request for Capias

1

JUVENILE

A D M I N I S T R A T I O N	Agency ORI Number 0500400		Agency Name Delray Beach Police Department		Agency Report Number (N.T.A.'s only) 4 0 12-001148		
	Charge Type: Check as many as apply: <input checked="" type="checkbox"/> 1. Felony <input type="checkbox"/> 2. Traffic Felony		<input type="checkbox"/> 3. Misdemeanor <input type="checkbox"/> 4. Traffic Misdemeanor		<input type="checkbox"/> 5. Ordinance <input type="checkbox"/> 6. Other		
	Location of Arrest (Including Name of Business) 725 W. ATLANTIC AVE. DELRAY BEACH, FL 3				Location of Offense (Business Name, Address) 725 W ATLANTIC AVE, DELRAY BEACH, FL 33444		
	Date of Arrest 01/26/2012	Time of Arrest 00:36	Booking Date 01/26/2012	Booking Time 00:46	Jail Date	Jail Time	Location of Vehicle
	Name (Last, First, Middle) EVANS, ANTHONY GEORGE			Alias:			
	Race W - White B - Black			Sex M	Date of Birth 03/14/1968	Height 6'03	Weight 170
	Eye Color BROWN		Hair Color BLACK		Complexion DARK	Build THIN	
	Scars, Marks, Tattoos, Unique Physical Features (Location, Type, Description)			Marital Status S	Religion	Indication of Alcohol Influence Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Unit: <input type="checkbox"/>	
	Local Address (Street, Apt. Number) 16 NW 8TH AVE, DELRAY BEACH, FL 33444			(City)	(State)	(Zip)	Phone
	Permanent Address (Street, Apt. Number) 16 NW 8TH AVE, DELRAY BEACH, FL 33444			(City)	(State)	(Zip)	Phone
Business Address (Name, Street)			(City)	(State)	(Zip)	Phone	
DIL Number, State E152-000-68-094-0 /		Sec. Sec. Number 264-49-1216		INS Number		Place of Birth (City, State)	
Citizenship US							
C O D E F	Co-Defendant Name (Last, First, Middle)			Race	Sex	Date of Birth	
	Co-Defendant Name (Last, First, Middle)			Race	Sex	Date of Birth	
J U V E N I L E	Name (Last, First, Middle)					Residence Phone	
	Address (Street, Apt. Number)					Business Phone	
	Notified by: (Name)			Date	Time	JUVENILE DISPOSITION 1. Handled/Processed within Department and Released 2. TOT JAC 3. Incarcerated	
	Released To: (Name)			Relationship	Date	Time	
C O D E	The above address was provided by <input type="checkbox"/> defendant and/or <input type="checkbox"/> defendant's parents. The child and/or parent was told to keep the Juvenile Court Clerk's Office (Phone 355-2526) informed of any change of address.					School Attended	
	Property Crime? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No					Description of Property	
	Value of Property						
C H A R G E	Drug Activity S. Sell N. N/A P. Possess		R. Struggle D. Deliver E. Use	K. Dispense/ Distribute	M. Manufacture/ Produce/ Cultivate	Z. Other	
	Drug Type C		Amount / Unit 5.00 / GM	Offense # 12-001148	Counts 1	Domestic Violence <input type="checkbox"/> Y <input checked="" type="checkbox"/> N	Warrant / Capias Number
C H A R G E	Charge Description CONTROLLED SUBSTANCE WT 1000 OF WORSHIP SCH I, II					Statute Violation Number 893.13(1E1)	
	Charge Description RESIST OFFICER WITH VIOLENCE					Statute Violation Number 843.01	
C H A R G E	Charge Description					Statute Violation Number	
	Charge Description					Statute Violation Number	
I N T A K E	Health / Apparent Physical Condition of Defendant					Any knowledge of the following: Explain: <input type="checkbox"/> Mental <input type="checkbox"/> Escape Risk <input type="checkbox"/> Medication <input type="checkbox"/> Deformities <input type="checkbox"/> Injuries	
	Check which applies: <input type="checkbox"/> Released O.R. <input type="checkbox"/> Posted Bond			<input type="checkbox"/> Released to Parent/Guardian <input type="checkbox"/> South County Mental Health		<input type="checkbox"/> T.O.T. County Jail	
	Transported By			Date Transported // : : :	Time Transported	Other	
N O T I C E T O A P P E A R	<input checked="" type="checkbox"/> INSTRUCTION NO. 1 - Mandatory appearance in court <input type="checkbox"/> INSTRUCTION NO. 2 - You need not appear in Court but must comply with instructions on Page 2.				Location (Court, Room)		
					Court Date and Time		
I AGREE TO APPEAR AT THE TIME AND PLACE DESIGNATED TO ANSWER THE OFFENSE CHARGED OR TO PAY THE FINE SUBSCRIBED. I UNDERSTAND THAT SHOULD I WILLFULLY FAIL TO APPEAR BEFORE THE COURT AS REQUIRED BY THIS NOTICE TO APPEAR, THAT I MAY BE HELD IN COMTEMPT OF COURT AND A WARRANT FOR MY ARREST SHALL BE ISSUED.							
Signature of Defendant (or Juvenile and Parent/Custodian)					Date Signed		
A D M I N	HOLD for Other Agency		Signature of Arresting Officer 		Name Verification (Printed by Arrestee)		
	<input type="checkbox"/> Dangerous <input type="checkbox"/> Suicidal		Name of Arresting Officer (Print) STEED, DAVID		L.D. # 0944		
	L.D. #		Fouch #		Agency DELRA		
Witness here if subject signed with an "X".					PAGE 1 OF 1		



EXHIBIT A

PROBABLE CAUSE AFFIDAVIT

1. Arrest
2. N.T.A.
3. Request for Warrant
4. Request for Copies

1 JUVENILE

OBTS Number	Agency ORI Number FL 0500400		Agency Name DELRAY BEACH POLICE DEPARTMENT	Agency Report Number 4 0 12-001148
Charge Type: Check as many as apply.	<input checked="" type="checkbox"/> 1. Felony <input type="checkbox"/> 2. Traffic Felony	<input type="checkbox"/> 3. Misdemeanor <input type="checkbox"/> 4. Traffic Misdemeanor	<input type="checkbox"/> 5. Ordinance <input type="checkbox"/> 6. Other	Special Notes:

Name (Last, First, Middle) EVANS, ANTHONY GEORGE	Alias	Race B	Sex M	Date of Birth 03/14/1968
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Charge Description 893.13(1E1) CONTROLLED SUBSTANCE WI 1000` OF WORSH	Charge Description 843.01 RESIST OFFICER WITH VIOLENCE
---------------------------------------------------------------------------------	------------------------------------------------------------------

Victim's Name (Last, First, Middle) State Of Florida	Race	Sex	Date of Birth
Local Address (Street, Apt. Number) (City) (State) (Zip)	Phone	Address Source	
Business Address (Name, Street) (City) (State) (Zip)	Phone	Occupation	

The undersigned certifies and swears that he/she has just and reasonable grounds to believe, and does believe that the above named Defendant committed the following violation of law.
 The Person taken into custody...
 committed the below acts in my presence. was observed by _____ who told _____ that he/she saw the arrested person commit the below acts.
 confessed to _____ admitting to the below facts. was found to have committed the below acts, resulting from my (described) investigation.
 On the 26 day of January, 2012 at 00:46 (Specifically include facts constituting cause for arrest.)

The following incident occurred in the city of Delray Beach, Palm Beach County, Florida. While on Special Duty Assignment in my marked patrol car, I observed a black male subject previously known to me as Anthony George Evans. Evans is known to me to have two active Probable Cause Affidavits for his arrest, charging him with Sale of Cocaine within 1000 ft of a Church. (Case numbers 11-024727 and 12-00346). Lt. Moschette, Sgt. Griffith and I were on scene and made contact with Evans at the BP Gas Station located at 725 W. Atlantic Avenue. I approached Evans and told him that he was under arrest for Sale of Cocaine. He immediately began to back away from me and jerked his arm out of my grasp. I then yelled at him, "Stop Resisting" and again he jerked out of my grasp. I then applied a straight arm bar and took him to the ground. As he landed on the ground he placed his arms under his body and continued to disregard my commands to place his hands behind his back. Evans then began to reach for his right front pants pocket with his right hand. I grabbed his right arm and I attempted to pull his hand behind his back. As I pulled on his arm, I observed a pack of NewPort cigarettes sticking out of his right front pants pocket. The pack of cigarette had a red cap sticking out of it. Evans managed to grab the red cap and pull it off of the Krazy Glue container that was stuffed inside the pack of NewPorts. Sgt. Griffith wrestled the pack of New Port cigarettes from Evans but not before several pieces of what appeared to be cocaine spilled out of the opened container and landed on the ground. During the violent struggle with Evans, I sustained abrasions on both knees and right wrist. After several seconds of wrestling with Evans, we were able to get him under control. He was subsequently arrested. I gathered up the suspect cocaine and transported him and the evidence to the Delray Beach Holding Facility for processing. Once at the Delray Beach Holding Facility, I field tested the white rock-like substance that was inside the Krazy Glue Container. The substance tested positive for Cocaine. Base on the amount and the way the Cocaine was packaged, I know this is to be consistent with street level sale of Narcotics. Evans was arrested approximately 25 ft. from the BP Gas Station on the southwest corner of the Business. Based on the above facts, I find Probable Cause to Charge, Anthony G. Evans with FSS

SWORN AND SUBSCRIBED BEFORE ME <i>Sgt. David Steed</i> NOTARY PUBLIC / CLERK OF COURT / OFFICER (F.S.S. 117.10) <u>01/26/12</u> DATE	SIGNATURE OF ARRESTING / INVESTIGATING OFFICER <i>David Steed</i> STEED, DAVID (0944) NAME OF OFFICER (PLEASE PRINT) <u>01/26/2012</u> DATE	PAGE 1 of 2
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PROBABLE CAUSE AFFIDAVIT
SUPPLEMENT

1. Arrest
2. N.T.A.
3. Request for Warrant
4. Request for Captives

1

JUVENILE

A D M I N I S T R A T I V E	Agency ORI Number FL 0500400		Agency Name DELRAY BEACH POLICE DEPARTMENT		Agency Report Number 4 0 12-001148	
	Charge Type: Check as many as apply. <input checked="" type="checkbox"/> 1. Felony <input type="checkbox"/> 3. Misdemeanor <input type="checkbox"/> 5. Ordinance <input type="checkbox"/> 2. Traffic Felony <input type="checkbox"/> 4. Traffic Misdemeanor <input type="checkbox"/> 6. Other					

Name (Last, First, Middle) EVANS, ANTHONY GEORGE	Aliases	Race B	Sex M	Date of Birth 03/14/1968
------------------------------------------------------------	---------	------------------	-----------------	------------------------------------

893.13(1)(e)(1), Possession of Cocaine with intent to sale within 1000 ft. of a Convenience Business and FSS. 843.01, Resisting with Violence.

A D M I N I S T R A T I V E	SWORN AND SUBSCRIBED BEFORE ME	SIGNATURE OF ARRESTING / INVESTIGATING OFFICER
	NOTARY PUBLIC / CLERK OF COURT / OFFICER (F.S.S. 117.10) <i>[Signature]</i> 01/26/12 DATE	STEED, DAVID (0944) NAME OF OFFICER (PLEASE PRINT) 01/26/2012 DATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:12-cv-80648-KAM

ANTHONY GEORGE EVANS,

Plaintiff,

vs.

DAVID STEED and MICHAEL
MOSCHETTE,

Defendants.

_____/
STATE OF FLORIDA)
COUNTY OF PALM BEACH)

MICHAEL A. MOSCHETTE, being duly sworn, deposes and says:

I am a Lieutenant with the Delray Beach Police Department. I have been with the Police Department for 18 years.

On January 26, 2012, I was on duty at approximately 0036 hours in uniform and driving an unmarked Police vehicle.

On January 26, 2012, at approximately 0036 hours, I responded to 725 West Atlantic Avenue, Delray Beach, FL.

Officer David Steed saw Anthony Evans in the area and probable cause existed for two counts of sale of cocaine within 1000 feet of a church. Mr. Evans was observed walking on the sidewalk in front of the business (B P Gas Station) when Officer Steed approached him. Officer Steed attempted to place Mr. Evans into custody. Mr. Evans immediately began jerking away from Officer Steed in an attempt to get away. Officer Steed utilized an armbar technique to gain

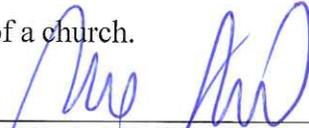
EXHIBIT B

control of Mr. Evans and take him to the ground. Officer Steed constantly told Mr. Evans to stop resisting that he was under arrest.

Mr. Evans was verbally abusive and continually tried to get up. Officer Steed gave Mr. Evans several commands to stop resisting and to place his hands behind his back. Mr. Evans did not comply. Mr. Evans began kicking his feet and arched his back in an attempt to throw Officer Steed off his back. Sgt. Griffith grabbed Mr. Evans right arm and began physically trying to pull his hand behind his back. Mr. Evans placed his right hand into his right pants pocket and pulled out a pack of cigarettes. He began manipulating the cigarette pack in an attempt to destroy its' contents. Sgt. Griffith was able to get Mr. Evans' right hand into a handcuff but not before Mr. Evans pulled the cap off a Krazy Glue container that was inside the cigarette pack. Several pieces of crack cocaine spilled out onto the pavement. We continually told Mr. Evans to stop resisting and he continued to resist violently.

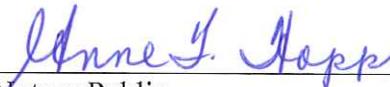
I utilized my department issued OC spray and gave Mr. Evans two bursts to his facial area. The OC spray had no effect on Mr. Evans. He continued to try to overpower the officers by kicking his feet and bridging his back. I grabbed his left arm with both of my hands and had to forcefully pull his hand behind his back. We were finally able to get his left hand into the handcuff. Once in handcuffs, Mr. Evans still would not follow commands and continually tried to pull away from us. We had to physically lift Mr. Evans up from the ground and walk him to Officer Steed's vehicle. We had to physically put Mr. Evans into the vehicle. While at the Delray Beach Police Department, Mr. Evans complained of injury and was transported to the hospital.

He was subsequently charged with resisting arrest with violence, possession of cocaine with intent to sell within 1000 feet of a convenience store, and the two active probable cause affidavits for the sales of cocaine within 1000 feet of a church.


MICHAEL A. MOSCHETTE, ID #642

Sworn to before me this
8th day of May, 2013.

Personally known or
produced identification.


Notary Public



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:12-cv-80648-KAM

ANTHONY GEORGE EVANS,

Plaintiff,

vs.

DAVID STEED and MICHAEL
MOSCHETTE,

Defendants.

_____/

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

BRIAN GRIFFITH, being duly sworn, deposes and says:

I am a Sergeant with the Delray Beach Police Department. I have been with the Police Department for 12 years.

On January 26, 2012, at approximately 0036 hours, I was on duty in uniform and driving a marked Police vehicle.

On January 26, 2012, at approximately 0036 hours, I responded to 725 West Atlantic Avenue, Delray Beach, FL as a back-up unit.

Anthony Evans was reportedly seen walking in the area and was known to have probable cause for his arrest for two counts of sale of cocaine within 1000 feet of a church. Lt. Moschette and Officer Steed also responded to the area in an attempt to locate Mr. Evans. Officer Steed located Mr. Evans at 725 West Atlantic Avenue, walking in the area and attempted to place him under arrest. It should also be noted that Mr. Evans has an active "trespass warning" issued for 725 West Atlantic Avenue (the B P Gas Station) and is prohibited from being on this property.

EXHIBIT C

Officer Steed advised Mr. Evans that he was under arrest and attempted to place Mr. Evans into custody. Mr. Evans immediately tried to flee as he jerked his arm away from Officer Steed. Officer Steed utilized an armbar technique to regain control of Mr. Evans and take him to the ground. Officer Steed repeatedly yelled for Mr. Evans to stop resisting that he was under arrest.

Mr. Evans was verbally abusive and repeatedly tried to get up. Mr. Evans also placed his arms underneath his body and his hands were near his waist band, causing a great officer safety concern. Officer Steed gave Mr. Evans numerous verbal commands to stop resisting and to place his hands behind his back. Mr. Evans was non-compliant and continued to resist by not obeying Officer Steed's verbal commands. Mr. Evans then began to violently kick his feet and legs and arched his back in an attempt to throw Officer Steed off balance and stand up. I had a grasp on Evans' right arm and was attempting to pull it behind his back in order to handcuff him. Mr. Evans was able to place his right hand in his right trouser pocket and grab a cigarette pack. He began to manipulate the cigarette pack violently as if he were trying to destroy its contents. I observed a "krazy glue" container inside the cigarette pack which had a red cap. Mr. Evans continued to violently kick his legs and feet and arch his back. During this struggle, Mr. Evans was able to pull the red cap from the "krazy glue" container with his right hand. I was able to place his right wrist in handcuffs and take control of the cigarette pack but not before the contents in the "krazy glue" container spilled out onto the ground. Several pieces of suspected crack cocaine spilled out of the "krazy glue" container onto the ground along with several cigarettes. Lt. Moschette, Officer Steed and I were all giving Mr. Evans verbal commands to stop resisting throughout this encounter, but Mr. Evans continued to resist arrest violently.

In an attempt to gain compliance from Mr. Evans, Lt. Moschette sprayed Mr. Evans with his department issued OC spray. The OC spray had no effect on Mr. Evans. Mr. Evans continued his attempts to overpower the officers and stand up. Lt. Moschette was able to gain control of Mr. Evans' left arm and place the left handcuff on Mr. Evans. Mr. Evans was still non-compliant and physically resisted arrest after being handcuffed. Mr. Evans refused to stand up at this point and had to be physically picked up off the ground and placed into Officer Steed's patrol vehicle. Officer Steed collected the suspected crack cocaine and other property, entering it into the Delray Beach Police Department Evidence Section.

Mr. Evans was transported to the Delray Beach Police Department Temporary Holding facility for booking. While at the Temporary Holding Facility, Mr. Evans complained of medical problems. Delray Beach Fire Rescue transported Mr. Evans to Bethesda Hospital where he was medically cleared by a doctor to be transported to the Palm Beach County jail.

Mr. Evans was subsequently charged with resisting arrest with violence, possession of cocaine with intent to sell within 1000 feet of a convenience store in addition to the active probable cause affidavits charging him with two counts for the sale of cocaine within 1000 feet of a church.


BRIAN K. GRIFFITH, ID #679

Sworn to before me this
8th day of May, 2013.

Personally known or
produced identification.


Notary Public



DEPOSITION OF ANTHONY G. EVANS 03/14/13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ANTHONY GEORGE EVANS,

Plaintiff,

vs.

CASE NO.: 9:12-cv-80648-KAM

DAVID STEED and MICHAEL
MOSCHETTE,

Defendants.

DEPOSITION OF ANTHONY G. EVANS

Taken on Behalf of the Defendant

DATE TAKEN: Thursday, March 14, 2013
TIME: 10:16 a.m. - 11:36 a.m.
PLACE: Century Correctional Institution
400 Tedder Road
Century, Florida 32535

Examination of the Witness reported by:

Kimberly Rodgers, Florida Professional Reporter
Notary Public, State of Florida

ANCHOR COURT REPORTING
229 South Baylen Street
Pensacola, Florida 32502

 ORIGINAL

EXHIBIT D

DEPOSITION OF ANTHONY G. EVANS 03/14/13

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A P P E A R A N C E S

FOR THE PLAINTIFF:

ANTHONY GEORGE EVANS

FOR THE DEFENDANTS:

CATHERINE M. KOZOL, ESQUIRE
Assistant City Attorney
Police Legal Advisor
300 West Atlantic Avenue
Delray Beach, Florida 33444

COURT REPORTER:

KIMBERLY A. RODGERS, FPR
ANCHOR COURT REPORTING
229 South Baylen Street
Pensacola, Florida 32502
(850) 432-2511
1-800-563-6409
FAX: (850) 432-2302
www.anchorreporters.com

DEPOSITION OF ANTHONY G. EVANS 03/14/13

1 Q. How many times?

2 A. Several.

3 Q. Okay. I've got your certified copies of your
4 convictions here and I'm showing ten. I don't have two
5 that were in storage that I have to get, but does that
6 sound fair?

7 A. (Witness nodding head.)

8 Q. Is that a yes?

9 A. Yes.

10 Q. I need it for the record. Thank you. Have
11 you ever been convicted of a federal felony?

12 A. No.

13 Q. Now, the incident that we talked about on
14 January 26th of 2012, which we're going to talk about,
15 excuse me, were you convicted of the charges stemming
16 from that incident?

17 A. Not at the time.

18 Q. But you were eventually convicted of those
19 charges?

20 A. Yes.

21 Q. Okay.

22 A. Except the resisting arrest with violence.

23 Q. Okay. So they dropped that?

24 A. Yes.

25 Q. Okay. So I'm going to show here and I'm going

DEPOSITION OF ANTHONY G. EVANS 03/14/13

10

1 to mark this. Okay. I have here a certified copy of
2 your conviction of the possession of cocaine that you
3 pled to that day from the January 26th incident. Okay.
4 Do you want to see it?

5 A. I have that.

6 Q. It's just a certified copy. Okay. We will
7 mark that as Defense Exhibit 1. Okay. And on that
8 charge it looks like you were sentenced on that charge
9 to five years in prison; is that correct?

10 (Defense Exhibit No. 1 was marked for
11 identification.)

12 A. Yes.

13 Q. Okay. Now, you're familiar with the BP gas
14 station at 725 West Atlantic Avenue?

15 A. Yes.

16 Q. How far away is that from where you lived?

17 A. Right across the street.

18 Q. Oh, you lived across the street. Okay.

19 A. 15-yards.

20 Q. Okay. All right. Now, have you ever been
21 trespassed from that property?

22 A. Because of David Steed I was.

23 Q. Okay.

24 A. He influenced the clerk. He influenced the
25 clerk that day that -- that I was a nuisance to that

DEPOSITION OF ANTHONY G. EVANS 03/14/13

1 point?

2 A. I'm across the street in the yard.

3 Q. Okay.

4 A. I'm smoking a cigarette. I see them
5 congregating.

6 Q. Okay.

7 A. I didn't think -- because they be over there
8 all the time.

9 Q. Okay.

10 A. So as I exited the yard --

11 Q. Okay.

12 A. -- I cross the roadway. I got on the sidewalk
13 and I went down the sidewalk heading east towards
14 Checkers, that's when David Steed jumped in his patrol
15 car and cut me off.

16 Q. Okay.

17 A. At that time, I had an iPod on.

18 Q. Okay.

19 A. So I took the iPod off. The next thing I know
20 --

21 Q. An iPod meaning you were listening to either
22 music or something?

23 A. Right, I was listening to music.

24 Q. Okay.

25 A. So when he cut me off, I cut the music off and

DEPOSITION OF ANTHONY G. EVANS 03/14/13

19

1 me. He grabbed me in some kind of armbar tactical move,
2 slammed me to the ground on my right shoulder.

3 Q. Okay. Now, let me ask you, if he had the gun
4 in his hand, how did he do that?

5 A. As he approached me he put his gun up.

6 Q. He put his gun where; back in his holster?

7 A. Back in his holster, yeah.

8 Q. How far away were you when he jumped out of
9 the car?

10 A. Maybe about from here to the back of that
11 cabinet.

12 Q. Okay. So it probably was -- you were that
13 close to the car?

14 A. (Witness nodding head.)

15 Q. All right. So let the record reflect it's
16 about, what five feet?

17 A. Yeah.

18 Q. Is that fair?

19 A. Somewhere in that range.

20 Q. Okay. All right. Okay. So as he was coming
21 up to you, he put his gun back in his pocket?

22 A. Yeah, and as soon as he approached me, I asked
23 him, what's the problem? He didn't say anything. He
24 just hollering, Stop resisting, stop resisting and I
25 never -- as soon as he approached me he just hollered,

DEPOSITION OF ANTHONY G. EVANS 03/14/13

1 Stop resisting, stop resisting when I wasn't resisting
2 at all.

3 Q. Okay.

4 A. And he grabbed me in some type of armbar
5 tactical move.

6 Q. And how do you know it's an armbar?

7 A. Because --

8 Q. What did he do?

9 A. He grabbed my arm and (indicating) flipped me.

10 Q. And you landed on the ground?

11 A. I landed on my shoulder, on my right shoulder.

12 Q. Okay. On the ground?

13 A. Yes, once I was on the ground he straddled my
14 back and immediately handcuffed me.

15 Q. Okay. Let's go back a little bit. All right.
16 So he yelled, Stop resisting, stop resisting. At that
17 point when he grabbed your arm, how far away were you
18 when he was walking to you?

19 A. He was right up on me when he grabbed me.

20 Q. Okay. Were you standing there, did -- were
21 you walking; did you walk away from him?

22 A. I didn't try to run.

23 Q. Okay. Did you walk; did you stay?

24 A. No, I just asked him -- I stood there and
25 asked him, What is the problem, sir? And he never said

1 anything.

2 Q. Okay. Except, Stop resisting?

3 A. That's all he was saying, Stop resisting.

4 Q. Okay. Okay. So he does an arm bar, what
5 you're saying, and you end up on the ground?

6 A. Yes, ma'am.

7 Q. On your right shoulder?

8 A. Yes, ma'am.

9 Q. Okay. Were you facing the ground at that
10 point?

11 A. Yes.

12 Q. Okay. When you said --

13 A. That's how my face -- that's how my face got
14 scarred up.

15 Q. When you went down, so it hit your shoulder
16 and then your head or your face?

17 A. Yeah, my face. If you had seen them
18 photographs.

19 Q. Okay.

20 A. Did you see the photographs of me?

21 Q. No, I didn't. They were gone.

22 A. So you --

23 Q. They were destroyed under Florida Public
24 Records Law.

25 A. So even the disk was destroyed, too?

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1 Q. The disk?

2 A. I was told that the photographs was
3 transferred to a disk, too.

4 Q. Everything was destroyed under Florida Public
5 Records Law if the evidence was no longer needed.

6 A. Okay.

7 Q. All right. Let's go back. So you hit your
8 face when you went down?

9 A. (Witness nodding head.)

10 Q. Okay. All right. Okay. Where were the other
11 officers? You said Officer Griffith and Officer --

12 A. I don't know where Officer Griffin (sic) was
13 at, but I know Officer Moschette was right there and --

14 Q. Was Officer Moschette's patrol car there, as
15 well?

16 A. Yeah, a little black car.

17 Q. So it wasn't a marked car?

18 A. No. He was in that little black unmarked car
19 that he slides around in.

20 Q. Okay. Did you see Officer Moschette when you
21 went down on the ground?

22 A. Yes.

23 Q. Where was he?

24 A. He was right up on us.

25 Q. Okay.

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1 A. He grabs one of my arms and puts it behind my
2 back and then he puts the other one behind my back. I'm
3 not resisting at all.

4 Q. Okay. Was Officer Steed or any of the
5 officers saying anything at that point?

6 A. Oh, yes.

7 Q. What were they saying?

8 A. Cursing me out. Telling me that, Now, I told
9 you what would happen to you the next time I catch you
10 for filing complaints against me. You're going to learn
11 by disrespecting officers and all this and that, yeah.

12 Q. Okay. Did they continue to say, Stop
13 resisting?

14 A. Yeah, Officer Steed. That was his favorite
15 phrase, Stop resisting, stop resisting, when I wasn't.

16 Q. Okay. When he first grabbed your hands, did
17 you have your hands underneath you when you fell?

18 A. No. My hands was to the side with my iPod in
19 my hand.

20 Q. You had your iPod in your hand?

21 A. When he first grabbed me. Once he grabbed me
22 and slammed me to the ground, my iPod went flying one
23 way and my head phones went flying the other way.

24 Q. Okay. Do you smoke, Mr. Evans?

25 A. Yes.

1 affidavit and this would be from the January 8th sale of
2 cocaine. Okay. Which was the other probable cause for
3 the arrest on January 26th, and I'm giving Mr. Evans a
4 copy and I'll go ahead and enter that as Defense Exhibit
5 Number 6 and, Mr. Evans, were you convicted of that, the
6 one on -- the charge of the sale on January 8th?

7 (Defense Exhibit No. 6 was marked for
8 identification.)

9 A. Yes, ma'am.

10 Q. Okay. And I believe on both of those charges
11 you were given 80 months and that was concurrent to the
12 charge for January the 26th charge; is that correct?

13 A. Yes.

14 Q. Do you want a copy of that, too, as well?
15 It's a certified copy of your convictions that would be
16 for the January 8th. Okay. So that will be -- okay.
17 So you're on the ground and you said Officer Steed
18 handcuffed you?

19 A. And he straddled my back.

20 Q. And he straddled your back while he was
21 handcuffing you?

22 A. After he handcuffed me, he straddled my --
23 while he's handcuffing me he straddled my back.

24 Q. Okay. Okay.

25 A. Officer Steed weighs almost 300-pounds.

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1 Q. Okay. And how tall are you, Mr. Evans?

2 A. I'm six three.

3 Q. And how much do you weigh?

4 A. One-eighty.

5 Q. Where was Officer Griffith, did you see him at
6 this point?

7 A. I don't know where Sergeant Griffin (sic) --

8 Q. Sergeant Griffith, sorry.

9 A. -- was at the time.

10 Q. Okay.

11 A. I'm face down on the ground. I'm steady
12 asking Steed, What is the problem. I don't even know
13 why I got warrants and no one is telling me nothing.
14 All I'm steady receiving is closed fists blows from
15 Officer Steed.

16 Q. Okay. Now, you said you're on the ground.
17 He's straddling you. His gun, at this point, is back in
18 his holster?

19 A. His gun was in his holster before he slammed
20 me to the ground.

21 Q. Okay. You said that. Okay. Now, when you're
22 on the ground and you're face down, that's when you
23 scratched your face?

24 A. My face was all scratched up.

25 Q. Okay. Okay. And Officer Steed straddled you.

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1 He then handcuffed you?

2 A. (Witness nodding head.)

3 Q. Is that correct? I need a yes for the record.

4 A. Yes.

5 Q. Okay. Then at that point, what happened?

6 A. After he handcuffed me -- he handcuffed me so
7 tight that my fingers was getting numb.

8 Q. Okay.

9 A. My arm started to get numb. I'm telling him.
10 He said, I don't give a shit. He started assaulting me
11 with his closed fists.

12 Q. Okay. Where did he hit you with his closed
13 fists?

14 A. He hit me all in the side of my face. My
15 whole -- my whole left eye was completely swollen.

16 Q. Okay. But at this point you're face down?

17 A. Yeah, but he steady hitting me in the side, in
18 the side. I'm turning my face to avoid his blows.

19 Q. Okay. When he handcuffed you and you said the
20 handcuffs were tight, did you try to --

21 A. No.

22 Q. -- maneuver that or anything?

23 A. No, I did not. I'm steady telling him, Could
24 you please take the cuffs off me and stop hitting me.

25 Q. Did he try to -- strike that. At that point,

1 did you try to get Officer Steed off of your back?

2 A. No.

3 Q. Did you kick at all?

4 A. No.

5 Q. Okay.

6 A. That's how his knees got scratched up, by him
7 straddling my back and his knees on the pavement.

8 Q. So his knees were not on you. They were on
9 the pavement?

10 A. That's right.

11 Q. Okay. So he was like almost in an inverted V
12 on your back?

13 A. Yeah.

14 Q. Okay.

15 A. That's how his knees got scratched up. Not
16 because of me.

17 Q. Okay. All right. Then what happened after
18 that?

19 A. He steady beating me. He steady beating me.
20 At some --

21 Q. How many times did he punch you?

22 A. More than ten. And at some point he tried to
23 stick his night stick in my mouth.

24 Q. When did he take out his night stick?

25 A. He had his night stick out. I don't know. I

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1 don't know at which point when he was beating me that he
2 pulled his night stick out off his belt, but at some
3 point he tried to stick it in my mouth.

4 Q. Okay. Well, he's straddling you. He's
5 handcuffing you?

6 A. Ma'am.

7 Q. When did he pull the night stick out?

8 A. He already done handcuffed me. Once he
9 slammed me to the ground he handcuffed me. I'm
10 handcuffed.

11 Q. Okay.

12 A. He's on my back.

13 Q. After you're on the ground he handcuffed you?

14 A. After I'm on the ground he handcuffs me.

15 Q. Okay.

16 A. He straddled my back. Now, I'm receiving
17 blows from him.

18 Q. Okay.

19 A. I'm handcuffed on the ground.

20 Q. And you're face down?

21 A. Faced down handcuffed.

22 Q. And you're receiving blows on your face?

23 A. And I'm receiving blows from him and then at
24 some point he takes out his stick and he tried to stick
25 it in my mouth.