2016 WL 3960374
Only the Westlaw citation is currently available.
United States District Court,
D. Minnesota.

David Tsehai Embaye, Plaintiff,
v.
Minneapolis Police Department; Officer Omar Foulkes, Officer Brandon Kitzerow, and Officer Walter Ivan Alvarado, each in their individual and official capacities, Defendants.

Case No. 14-cv-2896 (PJS/TNL)
|
Signed 06/22/2016

Attorneys and Law Firms

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Timothy S. Skarda, Minneapolis City Attorney's Office, 350 South 5th Street, Room 210 Minneapolis, MN 55415 (for Defendants).

REPORT & RECOMMENDATION

Tony N. Leung, United States Magistrate Judge

***1** This matter comes before the Court, United States Magistrate Judge Tony N. Leung, on Defendants' Motion for Summary Judgment. (ECF No. 64). This motion has been referred to the undersigned for a report and recommendation to the district court, the Honorable Patrick J. Schiltz, District Judge for the United States District Court for the District of Minnesota, under 28 U.S.C § 636 and D. Minn. LR 72.1. Based on all of the files, record, and proceedings herein, **IT IS HEREBY RECOMMENDED** that Defendants' Motion for Summary Judgment, (ECF No. 64), be **GRANTED**.

I. PROCEDURAL HISTORY

Plaintiff David Tsehai Embaye filed his original complaint on July 14, 2014, bringing suit under 42 U.S.C. § 1983 against the State of Minnesota, the Minneapolis Police Department, Officer Omar Foulkes, Officer Brandon Kitzerow, and Officer Walter Ivan Alvarado, alleging these Defendants violated his rights under the Fourth and Eighth Amendments, seeking at least $3.2 million dollars in compensation. (ECF No. 1). Embaye asserts that his rights were violated when Defendants shot him during an "exchange of conflict," resulting in various injuries. (ECF No. 19).

The State of Minnesota moved to dismiss the complaint against it for failure to state a claim and for lack of subject matter jurisdiction. (ECF No. 3). In response, Embaye moved for leave to amend his complaint, substituting the State of Minnesota and Minneapolis Police Department with the City of Minneapolis. (ECF No. 18). The City of Minneapolis, Officer Omar Foulkes, Officer Brandon Kitzerow, and Officer Walter Ivan Alvarado did not object and the Court granted Embaye's motion. (ECF Nos. 21, 23).

On August 12, 2015, Embaye filed another motion for leave to amend his complaint. (ECF No. 43). Embaye sought to sue Officer Omar Foulkes, Officer Brandon Kitzerow, and Officer Walter Ivan Alvarado, and Other Unnamed Officials of the Minneapolis Police Department, each in their individual and official capacities, and the City of Minneapolis. (ECF No. 43). The Court granted in part and denied in part Embaye's motion, permitting the addition of the specifically-named police officers, in their individual and official capacities, but found the addition of "Other Unnamed Officials of the Minneapolis Police Department" and the City of Minneapolis to be futile. (ECF No. 49). In its Order, the Court instructed Embaye to file a Second Amended Complaint. (ECF No. 49, at 7). Embaye attempted to comply by filing a "Second Motion to Amend Complaint," containing an updated case caption, but this filing did not include any of the claims from the operative complaint. (ECF No. 52). To promote efficiency of the judicial process, the Court ordered that Embaye's First Amended Complaint would remain the operative complaint, but that the caption of the operative complaint would be amended to the current caption. (ECF No. 60).[1] The Court also dismissed the State of Minnesota as a Defendant. (ECF Nos. 61, 63).

***2** Defendants then moved for summary judgment on November 19, 2015. (ECF No. 64). Defendants argue there is no material fact in dispute and they are entitled to judgment as a matter of law. Embaye opposes, the parties submitted written arguments, and the matter is ripe for determination.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

Under Rule 56(a), courts "shall grant summary judgment 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." Fed. R. Civ. P. 56(a). The movant "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] ... which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) ("The nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts,' and must come forward with 'specific facts showing that there is a genuine issue for trial.' ") (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)). In considering such a motion, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing Fed. R. Civ. P. 56(c)). But "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587 (quotation and citation omitted). Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp.*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1); *Torgerson*, 643 F.2d at 1043.

B. Procedural and Discovery Issues

Before discussing the factual record, the Court will first address what appear to be discovery or procedural disputes raised in Embaye's memorandum. (Pl. Mem. Opp. Sum. J., at 21–27, ECF No. 81).[2] While the Court does not find it appropriate for a party to raise the majority of such issues in a memorandum opposing summary judgment, it is prudent to address them now so as to provide a complete and final resolution to Embaye's claims, particularly given the liberal construction afforded the filings of pro se litigants.

First, Embaye asserts that certain statements disclosed in discovery by Officer Omar Foulkes, Officer Brandon Kitzerow, and Officer Walter Ivan Alvarado (collectively, "Defendant Officers") were unsigned, preventing these statements from being usable in court proceedings. (Pl. Mem. Opp. Sum. J., at 21–23). Embaye points to statements made by Defendant Officers after their encounter with Embaye, which were included in the overall police report file that includes the Minneapolis Police Department's documentation regarding the November 28, 2012 incident at issue. (Embaye Discovery Filing #2, ECF No. 82-1, at 65–79).[3] These copies of the statements included in the overall police file were unsigned, but Embaye himself submitted the signed, standalone versions at an earlier date. (Embaye Discovery Filing #1, ECF No. 62-1 at 1–10). Moreover, Embaye asserts that the date of these statements by Defendant Officers (November 29 & 30, 2012), somehow prevents Defendant Officers from submitting affidavits (signed and dated at various dates in November 2015) in support of their motion for summary judgment. (Pl. Mem. Opp. Sum. J., at 22–23). But this secondary argument appears to be premised on the main argument that the investigatory statements were unsigned, which is without merit.[4] Therefore, any complaint Embaye has regarding the signing of Defendant Officers' internal statements lacks merit.[5]

***3** Next, Embaye argues that Defendants have not properly provided him with all discovery by the deadline. (Pl. Mem. Opp. Sum. J., at 23–25). The Court set a deadline of November 1, 2015 for all fact discovery. (ECF No. 40). Embaye asserts that Defendants somehow violated this deadline by not filing discovery with the Court. (Pl. Mem. Opp. Sum. J., at 24). Embaye is mistaken. Parties are not required to submit discovery to the Court by the discovery deadline or upon filing a motion for summary judgment. Rather, parties need only use or submit the facts necessary for their motion. Fed. R. Civ. P. 56(c).

Regarding Embaye's assertion that Defendants "refused to give [him]" interrogatories, requests for admission, all tangible evidence, exhibits, and documentation, Federal Rule of Civil Procedure 56(d) provides guidance for when facts are unavailable to the nonmovant. That rule states:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). Looking at Embaye's submissions, the Court finds no support for his argument. Embaye cites Defendants' response to Embaye's requests for documents, (Pl. Mem. Opp. Sum. J., at 24), where Embaye asked Defendants to identify and provide all copies of interrogatories, requests for admission, tangible documentation, affidavits, exhibits, photographs taken on November 28, 2012, and documents Defendants plan on using *at trial*, as well all video and audio recordings, witness statements related to the November 28, 2012 incident, Defendants' statements, and depositions. (Embaye Discovery Filing #2, at 62–64). Defendants answered many of these requests by indicating they have not identified what evidence they would use at trial, but would disclose such information pursuant to any forthcoming pre-trial order. (Embaye Discovery Filing #2, at 62–64). The Court sees nothing inappropriate with this response. Defendants are under no obligation to identify the evidence they intend to use at trial before any trial is scheduled, much less before summary judgment is decided.

Regarding requests for various discovery, Defendants indicated they have supplied Embaye with all squad video, recordings of telephone calls Embaye made while in jail, witness statements, and Defendants' statements. (Embaye Discovery Filing #2, at 62–64). Moreover, Embaye himself has submitted Defendants' responses to his discovery requests. (*See generally* Embaye Discovery Filing #2, at 9–22). The Court does not find the record supports Embaye's assertion that he does not have the discovery essential to justify his opposition to summary judgment. Therefore, this Court declines to take any action under Federal Rule of Civil Procedure 56(d).[6]

Next, Embaye argues that the affidavits submitted by Officer Kitzerow, Officer Alvarado, and Officer Foulkes cannot be used to support their summary judgment motion because the affidavits constitute or contain hearsay. (Pl. Mem. Opp. Sum. J., at 27). Embaye does not cite which portions of the affidavits constitute hearsay or how the rules against hearsay apply. Federal Rule of Civil Procedure 56(c)(4) permits the submission of affidavits to support or oppose a motion for summary judgment, provided such submissions are "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Here, the affidavits presented by Defendants comply with Rule 56(c)(4).

***4** Finally, Embaye asserts Defendants' timing in filing their summary judgment was improper. (Pl. Opp. Sum J., at 23–24). Federal Rule of Civil Procedure 56(b) states, "[u]nless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." In the present case the discovery period closed on November 1, 2015. (ECF No. 40). Defendants' filed their motion for summary judgment on November 19, 2015, within the 30 days permitted by the Federal Rules of Civil Procedure. Embaye's assertion that Defendants' summary judgment timing was improper is without merit.

With these procedural matters disposed of, the Court now turns to the substance of Defendants' motion for summary judgment.

C. Facts

Embaye's claims arise out of events that took place on November 28, 2012. (*See* Am. Compl., ECF No. 19; Pl. Mem. Opp. Sum. J., at 2). Embaye has submitted discovery pertaining to this case on two separate occasions. (*See* Embaye Discovery Filing #1; Embaye Discovery Filing #2). Despite submitting essentially identical documentation to that provided by Defendants, Embaye draws different conclusions from those shown on the face of his submitted discovery, providing little to no support for his particular conclusions. When a party "fails to properly support an assertion of fact or fails to properly address another party's assertion of fact" the Court may "consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials–including the facts considered undisputed–show that the movant is entitled to it." Fed. R. Civ. P. 56(e). Given Embaye is the nonmoving party, the facts will be construed in a light most favorable to him. *Harris*, 550 U.S. at 378. Furthermore, the Court will construe Embaye's pro se filings and arguments liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Per Rule 56(e), however, the Court will consider the majority of the facts submitted by Defendants as undisputed.

1. Embaye's Encounter with Minneapolis Police

On November 28, 2012, Minneapolis Police Officer Brandon Kitzerow was on duty in Minneapolis, Minnesota, in a marked police car and wearing a uniform. (Affidavit of Brandon Kitzerow ¶¶ 2, 4, ECF No. 71;[7] Embaye Discovery Filing #1, ECF No. 62-1 at 7–10, 27–30; Embaye Discovery Filing #2, at 9–12). While on patrol in south Minneapolis, Officer Kitzerow heard

gunshots coming from around 37th Street and Columbus Avenue. (Kitzerow Aff. ¶ 5; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10). Officer Kitzerow and his partner, Sergeant Billy Peterson, drove towards the direction of the gunshots. (Kitzerow Aff. ¶¶ 3, 6; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10). As Officer Kitzerow and Sgt. Peterson approached the intersection of 38th Street and Elliot Avenue, they spotted a Cadillac "with the rear windows rolled down and a passenger slumped down in the backseat." (Kitzerow Aff. ¶ 6; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10). Viewing this, Officer Kitzerow and Sgt. Peterson initiated a suspicious vehicle stop. (Kitzerow Aff. ¶ 6; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10). The Cadillac was slowing down, but before it fully stopped Embaye exited the rear passenger door and began running north on the 3700 block of Columbus Avenue, a residential area, turning to look toward Officer Kitzerow and Sgt. Peterson as he ran. (Kitzerow Aff. ¶¶ 7–8; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10). Officer Kitzerow exited his squad car and followed Embaye on foot. (Kitzerow Aff. ¶ 9; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10).

***5** Embaye ran between two houses located at 3725 and 3727 Columbus Avenue. (Kitzerow Aff. ¶ 9; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10). As Officer Kitzerow chased Embaye, he witnessed Embaye encounter a gate and believed Embaye may have been trying to lure him closer. (Kitzerow Aff. ¶¶ 10, 11; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10). Embaye encountered another gate, turned toward Officer Kitzerow, and began firing a weapon at Officer Kitzerow. (Kitzerow Aff. ¶ 12; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10). Officer Kitzerow returned fire. (Kitzerow Aff. ¶ 13; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10; Am. Compl., at 5 (stating there was an "exchange of conflict" between him and Defendant Officers)). After this exchange, Embaye continued to run away from Officer Kitzerow. (Kitzerow Aff. ¶ 14; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10). Officer Kitzerow then set up a perimeter of the area so that Embaye could not double back. (Kitzerow Aff. ¶ 14; Embaye Discovery Filing #1, ECF No. 62-1 at 7–10). Officer Kitzerow made a dispatch call notifying other officers that gun shots had been fired and that he was chasing the suspect on foot. (Affidavit of Walter Alvarado ¶¶ 6, 8, ECF No. 66;[8] Affidavit of Christopher Bennett ¶¶ 5–7, ECF No. 67; Affidavit of Omar Foulkes ¶¶ 6–7, ECF No. 68;[9] Affidavit of Joseph Haspert ¶¶ 5–6;[10] Embaye Discovery Filing #1, ECF No. 62-1 at 1–3; Embaye Discovery Filing #2, at 1–3).

Minneapolis Police Officer Walter Ivan Alvarado was on duty in south Minneapolis, Minnesota, on November 28, 2012, with his partner, Officer Omar Foulkes. (Alvarado Aff. ¶¶ 1–4; Foulkes Aff. ¶¶ 1–4; Embaye Discovery Filing #1, ECF No. 62-1 at 1–6, 31–40; Embaye Discovery Filing #2, at 1–3, 13–22). Both Officer Alvarado and Officer Foulkes were in uniform and a marked squad car. (Alvarado Aff. ¶ 5, Foulkes Aff. ¶ 5; Embaye Discovery Filing #1, ECF No. 62-1 at 1–6, 31–40; Embaye Discovery Filing #2, at 1–3, 13–22). Officer Alvarado and Officer Foulkes received a dispatch call and ShotSpotter[11] notices that gun shots had been fired in their patrol area, Officer Kitzerow had been shot at by Embaye, Officer Kitzerow was chasing Embaye on foot, and that Embaye was armed with a handgun. (Alvarado Aff. ¶¶ 6, 8; Foulkes Aff. ¶ 7; Embaye Discovery Filing #1, ECF No. 62-1 at 1–6; Embaye Discovery Filing #2, at 1–3).

Officer Alvarado and Officer Foulkes saw Embaye emerge from an alley between Columbus Avenue and Chicago Avenue with a gun in his hand. (Alvarado Aff. ¶¶ 7, 9; Foulkes Aff. ¶ 8; Embaye Discovery Filing #1, ECF No. 62-1 at 1–6; Embaye Discovery Filing #2, at 1–3; *see* Kitzerow Aff. ¶ 15). Officer Alvarado gave verbal commands for Embaye to drop his weapon. (Foulkes Aff. ¶ 8; Kitzerow Aff. ¶ 15). Embaye raised his handgun and pointed it at Officer Alvarado and Officer Foulkes. (Alvarado Aff. ¶ 10; Foulkes Aff. ¶ 9; Embaye Discovery Filing #1, ECF No. 62-1 at 1–6; Embaye Discovery Filing #2, at 1–3). Officer Alvarado and Officer Foulkes each discharged their weapons at Embaye. (Alvarado Aff. ¶ 11; Foulkes Aff. ¶ 10; Kitzerow Aff. ¶ 15; Embaye Discovery Filing #1, ECF No. 62-1 at 1–6; Embaye Discovery Filing #2, at 1–3).[12] Embaye returned gunfire, shooting at both Officer Alvarado and Officer Foulkes. (Alvarado Aff. ¶ 12; Foulkes Aff. ¶ 9; Embaye Discovery Filing #1, ECF No. 62-1 at 1–6; Embaye Discovery Filing #2, at 1–3; Am. Compl., at 5 (stating there was an "exchange of conflict" between him and Defendant Officers)).

***6** After the exchange of gunfire between Embaye and Officer Alvarado and Officer Foulkes, Embaye again ran away, this time around a garage with his gun still pointed at Officer Alvarado and Officer Foulkes. (Alvarado Aff. ¶ 12; *see* Foulkes Aff. ¶ 11). Officer Alvarado chased after Embaye, regaining sight of him between a house and a building, observing that Embaye was still holding a gun. (Alvarado Aff. ¶¶ 13–14; Embaye Discovery Filing #1, ECF No. 62-1 at 1–6; Embaye Discovery Filing #2, at 1–3). Officer Alvarado took cover behind a retaining wall at the corner of 37th Street and Chicago Avenue, and fired at Embaye. (Alvarado Aff. ¶¶ 14–16; Embaye Discovery Filing #1, ECF No. 62-1 at 1–6; Embaye

Discovery Filing #2, at 1–3). Embaye continued to run. (Alvarado Aff. ¶ 16; Embaye Discovery Filing #1, ECF No. 62-1 at 1–6; Embaye Discovery Filing #2, at 1–3).

Officer Alvarado continued to pursue Embaye, taking cover behind another building along the way. (Alvarado Aff. ¶ 17; Embaye Discovery Filing #1, ECF No. 62-1 at 1–3; Embaye Discovery Filing #2, at 1–3). Embaye ran across Chicago Avenue, in front of the squad car of Minneapolis Police Officer Christopher Bennett[13] and his partner, Officer Joseph Haspert. (Bennett Aff. ¶¶ 8–9; Haspert Aff. ¶¶ 7–8). Officer Bennett drove towards Embaye, who had a gun in his hand. (Bennett Aff. ¶¶ 10–11; *see* Haspert Aff. ¶ 8). Embaye stopped in an alley, facing Officer Bennett and Officer Haspert. (Haspert Aff. ¶ 9; Alvarado Aff. ¶ 17). Embaye was still holding a gun. (Haspert Aff. ¶ 9; Alvarado Aff. ¶¶ 17–18; Bennett Aff. ¶¶ 10–11; Embaye Discovery Filing #1, ECF No. 62-1 at 1–3; Embaye Discovery Filing #2, at 1–3). Officer Bennett pointed his weapon at Embaye and attempted to shoot at Embaye, but his gun did not fire. (Bennett Aff. ¶¶ 12–13; Alvarado Aff. ¶¶ 19, 20; Embaye Discovery Filing #1, ECF No. 62-1 at 1–3; Embaye Discovery Filing #2, at 1–3). Embaye then attempted to toss his gun onto the roof of a nearby garage. (Haspert Aff. ¶¶ 11, 16–17; Am. Compl., at 5 (stating he "threw the instrument in hes [sic] hand completly [sic] away from hes [sic] position and area"); *see* Affidavit of Brian Thureson ¶ 7, ECF No. 73).[14]

Officer Bennett exited his squad car and ordered Embaye to get on the ground. (Bennett Aff. ¶¶ 14–15). Once Embaye was on the ground Officer Bennett, Officer Haspert, and Officer Alvarado ran toward Embaye. (Alvarado Aff. ¶¶ 21–22; Haspert Aff. ¶ 12; *see* Bennett Aff. ¶ 16). Officer Alvarado and Officer Bennett ordered Embaye to show his left hand and arm, which was not visible. (Bennett Aff. ¶ 16; Alvarado Aff. ¶¶ 22–23; Embaye Discovery Filing #1, ECF No. 62-1 at 1–3; Embaye Discovery Filing #2, at 1–3). When Embaye did not comply, Officer Bennett struck Embaye multiple times with his knee, Office Haspert struck Embaye in the torso twice with empty-handed strikes and twice with knee strikes, and Officer Alvarado struck Embaye in the torso with his foot to help gain control of Embaye's left arm and place Embaye in handcuffs. (Bennett Aff. ¶ 16; Alvarado Aff. ¶¶ 22–23; Haspert Aff. ¶ 13; Embaye Discovery Filing #1, ECF No. 62-1 at 1–3; Embaye Discovery Filing #2, at 1–3). Officer Foulkes and Officer Kitzerow did not encounter Embaye again until he had already been arrested. (Foulkes Aff. ¶ 11; Kitzerow Aff. ¶¶ 18–19; Embaye Discovery Filing #1, ECF No. 62-1 at 4–10).

2. Embaye's Injuries

***7** After Embaye was arrested he was brought to the hospital and treated for gunshot wounds to his left chest and buttocks, with additional injuries to his head. (Embaye Discovery Filing #1, ECF No. 62-2 at 8–23, ECF No. 62-3 at 15–19; Embaye Discovery Filing #2, at 29–35). Embaye was discharged from the hospital to jail on December 2, 2012. (Am. Compl., at 10–11; Embaye Discovery Filing #2, at 35). As a result of these injuries, Embaye has reported being in pain to health care professionals several times while in prison. (Embaye Discovery Filing #1, ECF No. 62-2 at 24–40, ECF No. 62-3 at 1–14, 24; Embaye Discovery Filing #2, at 36–48; Am. Compl., at 12–17).

3. Embaye's Criminal Plea Agreement and Conviction

As a result of Embaye's actions on November 28, 2012, he was charged in Hennepin County, Minnesota district court with three counts of First Degree Assault in violation of Minn. Stat. § 609.221, subd. 2(a), and one count of Prohibited Person in Possession of a Firearm in violation of Minn. Stat. § 624.713, subd. 1(2). (Affidavit of Lynne Fundingsland, at Ex. C, ECF No. 69). On August 12, 2013, Embaye, represented by counsel, pleaded guilty to one count of First Degree Assault and the charge of Prohibited Person in Possession of a Firearm, under a *Norgaard* plea.[15] (Fundingsland Aff., at Ex. B pp. 2, 10; *see* Fundingsland Aff., at Ex. C). Embaye admitted to reading the complaint against him as well as the police reports in his case. (Fundingsland Aff., at Ex. B pp. 10, 12–13). After indicating he read the complaint and police reports, Embaye asserted he did not recall what happened the night of November 28, 2012 because he was "high and drunk." (Fundingsland Aff., at Ex. B pp. 10, 12–15; *see* Fundingsland Aff., at Exs. H, I, J). Embaye agreed that he was in the backseat of a car at 31st Street and Chicago Avenue in Minneapolis and that the car got pulled over by police. (Fundingsland Aff., at Ex. B p. 11). Embaye agreed that he had no reason to doubt the police officers' accounts of what happened on November 28, 2012. (Fundingsland Aff., at Ex. B pp. 15–16). Embaye made no assertion of innocence and pleaded guilty. (Fundingsland Aff., at Ex. B p. 18). Embaye was sentenced on September 17, 2013 to 120 months imprisonment. (Fundingsland Aff., at Ex. C).

Embaye, through his discovery submissions, asserts that

his previous criminal conviction cannot be used against him in this civil case. (Embaye Discovery Filing #2, at 104), and that he did not, in fact, plead guilty to those crimes. (Embaye Discovery Filing #2, at 97; Fundingsland Aff., at Ex. G). Embaye appears to assert that he entered an *Alford* plea, maintaining his innocence. It is clear from the plea hearing record that Embaye entered a *Norgaard* plea.[16] (Fundingsland Aff., at Ex. B). A *Norgaard* plea is a guilty plea. *Ecker*, 524 N.W.2d at 716; *see Williams v. State*, 760 N.W.2d 8, 12 (Minn. Ct. App. 2009) ("A plea constitutes a *Norgaard* plea if the defendant asserts an absence of memory on the essential elements of the offense but *pleads guilty* because the record establishes, and the defendant reasonably believes, that the state has sufficient evidence to obtain a conviction.") (emphasis added).

***8** As for whether Defendants have provided admissible evidence, Embaye is correct that in opposing a motion for summary judgment he "may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). Defendants, in response, cite Federal Rule of Evidence 801(d)(2), as support for the admissibility of the transcript detailing Embaye's plea hearing. Fed. R. Evid. 801(d)(2) provides an exception to the rule against hearsay when a "statement is offered against an opposing party" and "was made by the party in an individual or representative capacity." The record of Embaye's plea hearing is a transcript of statements made by Embaye himself, making this hearsay exception applicable.

Additionally, Defendants cite Fed. R. Evid. 803(22) as support for the admissibility of Embaye's guilty plea. Evidence Rule 803(22) allows for evidence of final judgment of conviction to be entered in to evidence where:

> (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
>
> (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
>
> (C) the evidence is admitted to prove any fact essential to the judgment; and
>
> (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

As previously established, Embaye entered a guilty plea. The convictions of First Degree Assault and Prohibited Person in Possession of a Firearm are felonies that carry sentences of imprisonment for more than a year. *See* Minn. Stat. § 609.221, subd. 2(a); Minn. Stat. § 624.713, subd. 1(2). Defendants offer the evidence to demonstrate Embaye has no recollection of the events that occurred on November 28, 2012, to show he already agreed to Defendants' version of events, and to demonstrate there is no dispute of fact. Thus, Embaye's past guilty plea and the record of his plea hearing would be admissible evidence and this Court can consider these documents in making its summary judgment determination.

D. Analysis

1. Fourth Amendment Claim

Embaye has brought this suit alleging Defendants violated his Fourth Amendment right to be free from unreasonable searches and seizures. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. "To establish a violation of the Fourth Amendment in a section 1983 action, the claimant must demonstrate a seizure occurred and the seizure was unreasonable." *McCoy v. City of Monticello*, 342 F.3d 842, 846 (8th Cir. 2003) (citation omitted). An officer's use of deadly force constitutes a seizure under the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."). In the present case, neither party disputes that Defendant Officers fired their weapons at Embaye, thereby using deadly force and conducting a seizure under the Fourth Amendment. What remains to be analyzed for purposes of this motion is if there is a genuine dispute as to whether Defendant Officers' use of deadly force was reasonable.

Analyzing "whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Garner*, 471 U.S. at 8). Reasonableness is not a concept that can be articulated with a "precise definition or mechanical application." *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). Rather, it "requires 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." *Graham*, 490 U.S. at 396 (citation omitted); *Loch v. City of Litchfield*, 689 F.3d 961, 965 (8th Cir. 2012) (citing *Graham*, 490 U.S. at 396). "The reasonableness of a use of force turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation." *Loch*, 689 F.3d at 965 (citing *Graham*, 490 U.S. at 397).

a. Severity of the Crime

***9** In the present case, even with the facts construed in a light most favorable to Embaye, there is no dispute Embaye committed a serious crime. The act of shooting at a police officer is a severe crime. *See Garner*, 471 U.S. at 11–12 ("[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm ...."); *see also Ngo v. Storlie*, 495 F.3d 597, 603 (8th Cir. 2007) ("Storlie was responding to a severe crime—a fellow officer had been shot ...") (collecting cases where police shot unarmed suspects). Embaye acknowledges there was an "exchange of conflict" between himself and all three Defendant Officers, and the accounts from all three Defendant Officers state that Embaye fired his weapon at them. Furthermore, Embaye pleaded guilty to crimes charged as a result of his actions on November 28, 2012. Nowhere in Embaye's complaint or his opposition to summary judgment does he deny that he fired his weapon at Defendant Officers. Essentially, Embaye engaged in a running gun battle with law enforcement. There is no dispute that Embaye was engaged in or committed a severe crime when he fled a traffic stop and began shooting at the police officers pursuing him or responding to the scene.

b. Immediate Threat to Safety of Officers or Others

As is clear from the facts of the case, Embaye fired his weapon at Defendant Officers. "[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape." *Garner*, 471 U.S. at 11. Embaye's actions posed an immediate threat to Defendant Officers and their use of deadly force against Embaye was a reasonable response.

Embaye argues that he did not have the weapon in his hand at the time he was shot or at the time he was arrested and that a spotlight was shining on him, creating genuine disputes as to material fact precluding summary judgment.[17] In a motion for summary judgment, however, the court is only concerned with those facts that are considered material. Fed. R. Civ. P. 56(a). To determine which facts are material the court looks to the substantive law governing the claim. *Anderson*, 477 U.S. at 248. While Embaye maintains that the officers were aware he was not an immediate threat, the substantive law governing Fourth Amendment violations under § 1983 requires looking at the totality of the circumstances in order to determine whether Defendant Officers' actions were reasonable. *McCoy*, 342 F.3d at 846.

Whether there was a spotlight on Embaye or whether he was armed at the precise moment he was shot after shooting at police a short time earlier has no bearing on a material fact to determine reasonableness in this case. In *Loch v. City of Litchfield*, the plaintiff argued that a police officer's use of deadly force was unreasonable when the suspect was unarmed. 689 F.3d at 966. In *Loch*, the officer was told by witnesses when he arrived on the scene that the suspect had a gun. *Id.* At some point the suspect tossed the firearm to the side before approaching the officer, but the officer maintained he never saw the suspect dispose of the gun. *Id.* As the suspect approached the officer, other witnesses reported yelling at the officer that the suspect was no longer armed. *Id.* The court in *Loch* determined that there was not a dispute as to material fact where varying accounts of the whether the officer was aware the suspect was unarmed because it was objectively reasonable for the officer to believe the suspect was still armed and that, "even if [the suspect's] motives were innocent, a reasonable officer on the scene could have interpreted [the suspect's] actions as resistance." *Id.*

***10** Similarly, it is undisputed Embaye discharged his weapon and ran away from Defendant Officers. Embaye reports the spotlight was activated at the time Officer Alvarado and Officer Foulkes arrived on scene. It was at this point, however, when Officer Alvarado and Officer Foulkes first arrived on the scene that Embaye failed to respond to commands from Officer Alvarado to drop his weapon. Having knowledge Embaye previously fired his weapon at Officer Kitzerow, Officer Alvarado shot at Embaye and Embaye returned fire. Embaye admits there was an "exchange of conflict" with Officer Alvarado and Officer Foulkes. Therefore, regardless of whether the spotlight was activated, both officers reasonably believed

their lives were in immediate danger and it was reasonable for the officers to use deadly force.

Even if, as he contends in his opposition to summary judgment, Embaye at some point during the exchange of gunfire with Officer Alvarado discarded his weapon, it would not be a material fact affecting the determination of reasonableness.[18] *See Billingsley v. City of Omaha*, 277 F.3d 990, 995 (8th Cir. 2002) (holding that when a police officer never observed a weapon and the suspect was ultimately determined to be unarmed, a "police officer can still employ deadly force if objectively reasonable"); *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001) ("[A]n officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun."). Defendant Officers believed Embaye was an immediate threat because he had previously fired his weapon at Officer Kitzerow. Thus the use of deadly force was reasonable.

Embaye also argues it was excessive for Defendant Officers to kick and strike him once he was on the ground. But, "[r]easonableness of force is judged from the perspective of the officer on the scene, taking into consideration the facts known to him, as opposed to one possessing the illuminating power of hindsight." *Billingsley*, 277 F.3d at 993. The record shows law enforcement had made oral commands for Embaye to surrender. Embaye had previously led law enforcement on a chase through a residential area. Officer Alvarado gave commands to Embaye to show his left hand once he was on the ground, and when he did not Officer Alvarado struck Embaye in the torso with his foot in order to get Embaye to comply. It did not matter that Embaye had previously discarded his weapon between two garages because law enforcement could still reasonably conclude Embaye posed a danger to their safety and the safety of others; Embaye's left hand could have held a gun. *Krueger v. Fuhr*, 991 F.2d 435, 439 (8th Cir. 1993) ("An erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectively reasonable."). Again, Embaye had fired his weapon several times at Officer Alvarado, Officer Kitzerow, and Officer Foulkes. It was objectively reasonable for Defendant Officers to believe Embaye was still armed and to use physical force to ensure Embaye was no longer a threat.

c. Actively Fleeing or Resisting Arrest

***11** Embaye asserts he was "not resisting arrest or evad[ing] flight." (Pl. Mem. Opp. Sum. J., at 8). He fails to support this assertion with any evidence in the record. Looking at the transcript of Embaye's plea hearing, Embaye admitted to running from police officers the night of November 28, 2012. Moreover, all three Defendant Officers reported that Embaye fled from them. In sum, looking at the totality of the circumstances Embaye fired his weapon at Defendant Officers, actively fled from Defendant Officers, and did not respond to their commands to stop and drop his weapon. Defendant Officers' use of deadly force against Embaye was objectively reasonable.

d. Reasonableness of Each Officer in their Individual Capacity

Embaye asserts his Fourth Amendment rights were violated by the three Defendant Officers each in their individual capacity. "Liability for damages for a federal constitutional tort is personal, so each defendant's conduct must be independently assessed." *Wilson v. Northcutt*, 441 F.3d 586, 591 (8th Cir. 2006). Thus, the Court looks at the reasonableness of each individual officer's actions independently.

i. Officer Kitzerow

Officer Kitzerow was the first officer to come upon Embaye. Officer Kitzerow was driving in the direction he had heard gunshots fired from when he witnessed Embaye exit a moving vehicle and begin to run. Officer Kitzerow chased after Embaye, then Embaye fired at Officer Kitzerow and continued to run away. In response, Officer Kitzerow fired his own weapon at Embaye. In *Garner* and *Loch* it was determined the use of deadly force by a police officer is objectively reasonable when a suspect threatens an officer with a weapon. It is undisputed Embaye fired his weapon at Officer Kitzerow. Thus, Officer Kitzerow's use of force was reasonable.

ii. Officer Alvarado

Officer Alvarado arrived on scene with knowledge that Embaye was armed and had fired his weapon. Officer Alvarado witnessed Embaye emerge from an alley and orally commanded him to drop his weapon. Embaye raised his handgun and pointed it at Officer Alvarado and

his partner. In response, Officer Alvarado fired at Embaye. Embaye returned fire and then fled. Officer Alvarado chased after Embaye and eventually caught up to him. Due to the fact Embaye fired his weapon at Officer Alvarado just moments before and Officer Alvarado could see Embaye still had a weapon in his hand, Officer Alvarado again fired his weapon at Embaye. Embaye continued to run away from Officer Alvarado. Again, in *Garner* and *Loch* it was determined the use of deadly force is reasonable when the suspect threatens the officer with a weapon. It is undisputed Embaye fired his weapon at Officer Alvarado. Therefore, Officer Alvarado's use of deadly force was reasonable.

When Officer Alvarado saw Embaye was on the ground, in the process of being arrested, he instructed Embaye to show his hands. Embaye did not comply and Officer Alvarado physically struck Embaye in the torso to force him to comply with the oral command. In *Billingsley*, the court held that there was a heightened sense of harm when a suspect failed to respond to commands and it was reasonable for the officer to use deadly force. 277 F.3d at 993–94. Officer Alvarado's use of physical force after Embaye failed to respond to oral commands, immediately after engaging in a foot chase and gun fight, was reasonable.

iii. Officer Foulkes

Officer Foulkes also arrived on scene with knowledge that Embaye was armed and had fired his weapon. Officer Foulkes witnessed Embaye emerge from the alley and heard Officer Alvarado order Embaye to drop his weapon. Officer Foulkes then saw Embaye begin to fire his weapon. Officer Foulkes returned fire. Again, in *Garner* and *Loch* it was determined that when a suspect threatens an officer with a weapon the use of deadly force is reasonable. It is undisputed Embaye fired his weapon at Officer Foulkes. Officer Foulkes' use of deadly force against Embaye was reasonable.

2. Qualified Immunity

***12** Defendant Officers assert they are entitled to qualified immunity. Embaye argues qualified immunity does not apply to Defendant Officers. "Qualified immunity shields police officers from suit in a § 1983 action unless their conduct violated a clearly established right of which a reasonable official would have known." *Ellison v. Lesher*, 796 F.3d 910, 914 (8th Cir. 2015) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "To overcome the defense of qualified immunity the plaintiff must show: '(1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation.' " *Parrish v. Ball*, 594 F.3d 993, 1001 (8th Cir. 2010) (quoting *Howard v. Kansas City Police Dep't*, 570 F.3d 984, 988 (8th Cir. 2009)). This Court has already determined that the actions of Defendant Officers were objectively reasonable and Embaye's Fourth Amendment rights were not violated. Embaye cannot demonstrate that he was deprived of a constitutional or statutory right so as to defeat Defendants' qualified immunity defense.

3. Minneapolis Police Department and City of Minneapolis

Embaye has named at various times the Minneapolis Police Department and the City of Minneapolis as a defendant in this suit. With regard to the City of Minneapolis, the Court has already held that any claims against the City are futile because Embaye's "complaint does not contain a single reference to any training provided by the City of Minneapolis or a custom, practice or policy sufficient to allege a *Monell* claim." (ECF No. 49, at 4–5). Nor did Embaye provide "any factual allegation of a widespread policy, practice or custom that would make plausible a *Monell* claim." (ECF No. 49, at 4–5). Nothing has changed in Embaye's pleading to make such a claim against the City of Minneapolis possible now. Therefore, to the extent Embaye brings suit against the City of Minneapolis, such claims fail as a matter of law.[19]

Regarding the Minneapolis Police Department, any such claims also fail as a matter of law. "Courts in our District have consistently held that, under Minnesota law, County Departments are not entities which may be sued." *Simon v. Anoka Cnty. Soc. Servs.*, Case No. 12-cv-2754 (SRN/JSM), 2014 WL 6633077, at *7 (D. Minn. Nov. 21, 2014) (quoting *Follis v. Minnesota Atty. Gen.*, Case No. 08-cv-1348 (JRT/RLE), 2010 WL 3399674, at *7 (D. Minn. Feb. 16, 2010), *report and recommendation adopted by*, 2010 WL 3399958 (D. Minn. Aug. 26, 2010)). "Absent authority expressly conferred by statute or ordinance, an agency or department of a municipal corporation does not have the capacity to sue or be sued as a separate entity." *Eaton v. Minnesota Atty. Gen.'s Office*, No. 10-cv-1804 (JRT/FLN), 2010 WL 3724398, at

*5 (D. Minn. Aug. 26, 2010). "Although the actions of a county department or commission 'may subject the county itself to liability, a county department or commission itself is not a proper defendant subject to suit in a section 1983 lawsuit.' " *Simon*, 2014 WL 6633077, at *7 (quoting *Shimer v. Shingobee Island Water and Sewer Comm'n*, Case No. 09–cv–953 (JRT/FLN), 2003 WL 1610788, at *3–4 (D. Minn. Mar. 18, 2003)). The Minneapolis Police Department constitutes such an entity not subject to suit. *See De La Garza v. Kandiyohi Cnty. Jail, Corr. Inst.*, 18 Fed. Appx. 436, 437 (8th Cir. 2001) (per curiam) (holding that Kandiyohi County Sheriff Department was not an entity subject to suit under 42 U.S.C. § 1983). Therefore, Embaye cannot maintain suit against the Minneapolis Police Department and his claims against that defendant fail as a matter of law.

4. Eighth Amendment Claims

***13** Embaye also asserts that Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment because he was shot in the back by police officers. There is no dispute that Embaye was shot in the back and buttocks area by Defendant Officers on November 28, 2012. However, "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Ingraham v. Wright*, 430 U.S. 651, 671 n. 40 (1977); *see City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) ("Because there had been no formal adjudication of guilt against [suspect] at the time he required medical care, the Eighth Amendment has no application."). Embaye was injured as a result of gunshot wounds before he was ever adjudicated of a crime. Thus, Embaye's claim that his Eighth Amendment rights were violated fail as a matter of law.

5. New Claims Presented in Embaye's Memorandum

In Embaye's memorandum, he asserts new claims against Defendants that were never asserted in his various complaints. Embaye appears to contend Officer Kitzerow violated various Minnesota Statutes. Even considering Embaye's pro se status, the addition of these claims at this stage of the proceeding is improper. *McDonald v. City of Saint Paul*, 679 F.3d 698, 709 (8th Cir. 2012) (holding the district court properly declined to address unpleaded claims that were not raised until the party's opposition to defendant's motion for summary judgement); *Dale v. U.S. Steel Corp.*, Case No. 13-cv-1046 (PJS/LIB), 2015 WL 4138869, at *9 (D. Minn. July 2, 2015) (holding that a party's addition of a claim for the first time in his response to summary judgment was not properly before the court). Therefore, to the extent Embaye seeks to assert new claims against Defendants, those claims are not properly before this Court.

III. RECOMMENDATION

Based on the foregoing and all of the files, record, and proceedings herein, **IT IS HEREBY RECOMMENDED** that Defendants' Motion for Summary Judgment, (ECF No. 64), be **GRANTED**, this matter be **DISMISSED WITH PREJUDICE**, and judgment be entered accordingly.

All Citations

Not Reported in F.Supp.3d, 2016 WL 3960374

Footnotes

1 Embaye's allegations and pleadings have remained virtually identical throughout his requested amendments. The proposed amendments have been attempts to replace parties or change the capacity in which parties are sued. Given that Embaye is suing Officer Omar Foulkes, Officer Brandon Kitzerow, and Officer Walter Ivan Alvarado each in their individual and official capacities, the suit would necessarily include analysis of the City of Minneapolis' liability due to its status as the employer of these three defendants, as discussed below.

2 For clarity, the page numbers cited for Embaye's Memorandum in Opposition to Summary Judgment are noted in accordance with their ECF designation, not the page number listed at the bottom of the document.

3 Embaye has submitted discovery pertaining to this case on two separate occasions, with many identical or similar documents between the two submissions or documents identical to those submitted by Defendants. (ECF Nos. 62, 82). "Embaye Discovery

Filing #1" encompasses the packet of discovery Embaye submitted to the Court on October 28, 2015. (ECF No. 62). "Embaye Discovery Filing #2" encompasses the packet of discovery Embaye submitted to the Court on December 8, 2015, in response to Defendants' motion for summary judgment. (ECF No. 82). In both these filings, Embaye labeled each page as an individual exhibit, so rather than referring to exhibit numbers, the Court refers to the corresponding ECF pagination for clarity.

4 Regardless, Federal Rule of Civil Procedure 56(c)(4) permits the submission of affidavits to support or oppose a motion for summary judgment, provided such submissions are "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."

5 Embaye also asserts that the signing or not signing of the investigatory statements raises questions as to the credibility of Defendant Officers and Officer Joseph Haspert. (Pl. Mem. Opp. Sum. J., at 22–23). The Court disagrees; the investigatory statements and affidavits are consistent and do not raise a genuine dispute.

6 Embaye also appears to assert error where Defendants submitted one of Embaye's responses to requests for admission, but not his response to renewed requests for admission. (Pl. Mem. Opp. Sum. J., at 25–26). As already noted by the Court above, parties need only use or submit the facts necessary for their motion. Fed. R. Civ. P. 56(c). Nevertheless, because Embaye submitted what appears to be the entirety of discovery in this case, the Court has the benefit of both documents in analyzing the summary judgment motion.

7 Embaye also submitted a copy of the Kitzerow Affidavit, (Embaye Discovery Filing #2, at 88–90). The Court will cite the original throughout.

8 Embaye also submitted a copy of the Alvarado Affidavit, (Embaye Discovery Filing #2, at 85–87). The Court will cite the original throughout.

9 Embaye also submitted a copy of the Foulkes Affidavit, (Embaye Discovery Filing #2, at 83–84). The Court will cite the original throughout.

10 Embaye also submitted a copy of the Haspert Affidavit, (Embaye Discovery Filing #2, at 80–82). The Court will cite the original throughout.

11 "ShotSpotter is a technology used by the Minneapolis Police Department to automatically recognize and notify police of gunshots fired within the City." (Def. Mem. in Supp. Sum. J., at 5 n. 7, ECF No. 65).

12 There is a dispute as to whether the spotlight of Officer Alvarado and Officer Foulkes' squad car was activated during their interaction with Embaye. Embaye asserts that Officer Alvarado and Officer Foulkes had the spotlight activated on their squad car, "pointing at the Plaintiff whitch [sic] gave Officer's [sic] full knowledge that the Plaintiff was unarmed and hands where [sic] in the air." (Am. Compl., at 5; Pl. Mem. Opp. Sum. J., at 7 (Officer Foulkes and Officer Alvarado "pulled up the scene" with the squad car's spotlight activated)). Officer Foulkes and Officer Alvarado admit that "the spot-light on the squad *may* have been activated," but could not admit it was pointing at Embaye. (Joint Ans. of Defs., ¶ D, ECF No. 22) (emphasis added). In their answers to Embaye's interrogatories, Officer Alvarado and Officer Foulkes deny that the spotlight of their squad car was activated or that their squad car was even pointed at Embaye. (Embaye Discovery Filing #1, ECF No. 62-1 at 32, 37; Embaye Discovery Filing #2, at 14, 19).

This dispute is not material. Whether a spotlight was on Embaye or not, Officer Foulkes and Officer Alvarado had information that Embaye had shot at Officer Kitzerow and had seen Embaye running across the street with a gun in his hand. Moreover, Embaye is unclear as to what time of the incident he is referring to, claiming that Officer Alvarado and Officer Foulkes first came upon Embaye when Embaye threw his gun on the garage. (Pl. Mem. Opp. Sum. J., at 8). Because this dispute of fact, if there is one, is immaterial to the Court's analysis, it does not preclude a finding of summary judgment.

Embaye also notes there was a discrepancy between the number of discharged shell casings listed on a map and the number of discharged shell casings listed by Defendants in their motion. (Pl. Mem. Opp. Sum. J., at 4). While Embaye appears to assert this is a material fact that should prevent a finding of summary judgment for Defendants, the number of shell casings is immaterial to the analysis. The map displays the approximate location of shell casings found around the crime scene from all four weapons that were discharged. (Pl. Mem. Opp. Sum. J., at 4; Embaye Discovery Filing #2, at 55; Fundingsland Aff., at Ex. D). There is no dispute that Defendant Officers shot their weapons at Embaye on November 28, 2012. Moreover, there is no dispute Embaye shot his weapon at Defendant Officers on November 28, 2012. The exact location of each shell casing and the amount fired is not material to determining whether Defendant Officers' actions were reasonable. Therefore, this is not a dispute of material fact that precludes a finding of summary judgment.

13 Officer Bennett was on duty in south Minneapolis, Minnesota on November 28, 2012 with his partner, Officer Joseph Haspert, in a marked squad car. (Bennett Aff. ¶¶ 1–4; Haspert Aff. ¶¶ 1–4). Officer Bennett and Officer Haspert responded to a shots fired call in the area of 38th Street East and Columbus Avenue South, with the suspect running from law enforcement. (Bennett Aff. ¶¶ 5–8; Haspert Aff. ¶¶ 5–6).

14 Embaye's handgun was found between the garages of 3716 Elliott Avenue South and 3720 Elliott Avenue South. (Thureson Aff. ¶ 8; *see* Haspert Aff. ¶¶ 11, 16–17). The handgun was identified as a Smith and Wesson .40 caliber semi-automatic handgun, and contained an empty Smith and Wesson magazine. (Affidavit of Mark Ulrick ¶¶ 8, 10, ECF No. 74; *see* Affidavit of Kristin Reynolds, ECF No. 72). Law enforcement forensics determined that bullets at the scene had been discharged from Embaye's handgun. (Reynolds Aff. ¶¶ 6–7).

15 A *Norgaard* plea is a guilty plea accepted by Minnesota state courts when the defendant claims to not remember what happened, but does not object to the underlying facts of the charge. *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 872 (Minn. 1961); *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994) ("A defendant may also plead guilty even though he or she claims a loss of memory, through amnesia or intoxication, regarding the circumstances of the offense. In such cases, the record must establish that the evidence against the defendant is sufficient to persuade the defendant and his or her counsel that the defendant is guilty or likely to be convicted of the crime charged.") (citations omitted).

16 Embaye asserts his plea was an "Alpha plea" and that he did "not admit[ ] guilt" but recognized "the court ha[d] enough to proceed to trial." (Fundingsland Aff., at Ex. G). Confusingly, Embaye also states "I ... did not enter a plea guilty. I entered Norgaard plea." The Court assumes Embaye is first referring to an *Alford* plea, a plea where the defendant maintains his innocence, but pleads guilty after considering all of the evidence against him or her and determining a judge or jury would likely issue a conviction. *See North Carolina v. Alford*, 400 U.S. 25 (1970). However nowhere in the plea hearing transcript is an *Alford* plea considered or discussed. Rather, Embaye pleaded guilty and when entering a factual basis his attorney stated, "this is a *Norgaard* plea. My client doesn't recall all of the events of that night, so he's a little limited in what he can attest to." (Fundingsland Aff., at Ex. B pp. 9–10).

17 The Court recognizes that Embaye asserted on the record and under oath in his plea hearing that he did not remember the events of the night of November 28, 2012 because he was intoxicated and under the influence of drugs. Embaye's argument that he somehow remembers the night of November 28, 2012 better now as compared to the time of his plea, which was closer chronologically to the original incident, is incredible, without any support, and not a genuine dispute of fact.

18 It is unclear from Embaye's filing *when* he asserts he discarded his weapon. The timeline presented by Defendants indicates Embaye had his weapon when Officer Alvarado and Officer Foulkes first saw him exit an alley. Moreover, in Embaye's complaint he acknowledges he "exchanged conflict" with Officer Alvarado. "[A] district court may grant summary judgment where a party's sudden and unexplained revision of testimony creates an issue of fact where none existed before." *Am. Airlines, Inc. v. KLM Royal Dutch Airlines, Inc.*, 114 F.3d 108, 111 (8th Cir. 1997). Embaye has presented a new timeline of events with no evidence to support this new timeline. Embaye may be confusing Officer Alvarado and Officer Foulkes with Officer Bennett and Officer Haspert, thus muddying the timeline of events.

19 Embaye's claims against Defendant Officers in their official capacities also fail. *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999) ("A suit against a public employee in his or her official capacity is merely a suit against the public employer.") (citing *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)); *see also Uland v. City of Winsted*, 570 F. Supp. 2d 1114, 1119–20 (D. Minn. 2008) ("If no capacity is stated, the claim is deemed to be against the person in an official capacity, which in turn means that the suit is one against the employing municipality.") (citations omitted).

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