UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

TERRY L. ROOP,	)	
	)	
Plaintiff,	)	Case No.2:02CV00165(Lead)
	)	
v.	)	**OPINION**
	)	
DONALD SCOTT GLENN,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Timothy W. McAfee, The McAfee Law Firm, Norton, Virginia, for Plaintiffs; James W. Hopper, Senior Assistant Attorney General of Virginia, Richmond, Virginia, for Defendant.

The plaintiffs Terry L. Roop and Cheryl S. Roop, husband and wife, were seriously injured in the Jefferson National Forest in this judicial district when their vehicle, driven by Mr. Roop, went over an embankment, rolled over, and struck a tree.

When they were injured, Mr. Roop was attempting to flee from defendant Donald Scott Glenn, an officer of the Virginia State Police. Glenn was in an unmarked vehicle, in plain clothes, and had been assisting in the investigation of a marijuana grower in the national forest. The Roops contend that when Glenn drove up to them after they had stopped at a scenic overlook, he failed to identify himself

as a police officer, "sounded like a man in a rage or in a panic," pointed a handgun at them, and threatened to shoot them if they left. (Terry Roop Aff. ¶¶ 16, 17.) Believing Glenn to be a robber or worse, Mr. Roop started his vehicle, "rapidly accelerate[d]," and after traveling a short distance veered off the road and wrecked. (*Id.* ¶ 17.)

The Roops thereafter filed the present actions against Glenn pursuant to 42 U.S.C.A. § 1983 (West 2003), claiming that he had violated their federal constitutional rights and caused their injuries.[1] The Roops' separate actions were consolidated and following discovery, the defendant Glenn moved for judgment on the pleadings. Matters outside the pleadings were presented and after notice to the parties and opportunity to respond, the motion was treated as a motion for summary judgment. *See* Fed. R. Civ. P. 12(c). The motion has been briefed and argued and is ripe for decision.

Summary judgment is appropriate when there is "no *genuine* issue of *material* fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the

[1] The plaintiffs also asserted pendant state law causes of action for gross negligence and false imprisonment. Jurisdiction of this court exists under 28 U.S.C.A. § 1331 (West 1993) (federal question jurisdiction) and 28 U.S.C.A. § 1367(a) (West 1993 & Supp. 2003) (supplemental jurisdiction).

moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.,* 759 F.2d 355, 364 (4th Cir. 1985).

Glenn contends that he is entitled to qualified immunity.[2] To determine the defense of qualified immunity, the court must engage in a two-step inquiry. The court "must [first] decide 'whether a constitutional right would have been violated on the facts alleged. . . . Next, assuming that the violation of the right is established[,] . . . [it] must consider whether the right was clearly established at the time such that it would be clear to an objectively reasonable officer that his conduct violated that right.'" *Bailey v. Kennedy*, 349 F.3d 731, 739 (4th Cir. 2003) (citations omitted).

The plaintiffs claim that Officer Glenn's actions violated their right against unreasonable seizures as protected by the Fourth Amendment and their right to substantive due process as guaranteed by the Fourteenth Amendment.[3]

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[2] Glenn did not assert qualified immunity in his Answers, although he raised it in the present motion under consideration. Qualified immunity is an affirmative defense that must be pleaded by a defendant, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), but the plaintiffs have not argued that any procedural irregularity bars the assertion of this defense. Thus, I will decide the question on the merits. *See Thurston v. United States*, 810 F.2d 438, 444 (4th Cir. 1987) (holding that plaintiff waived any objection to failure to raise qualified immunity as an affirmative defense).

[3] In their Complaints, the plaintiffs also claimed violations of their rights under the Sixth Amendment and to equal protection of the law under the Fourteenth Amendment, but

The central facts surrounding the events in question in this case are shown by the affidavits filed by the parties. Mr. Roop is a high school librarian and Mrs. Roop is an occupational therapist at a local hospital. On August 28, 2002, shortly before 6:00 P.M., they left their home in Norton, Virginia, to drive to their property on the nearby road of High Knob with their dog. On the way, on a narrow gravel road near the top of the mountain in a remote section of the Jefferson National Forest, they passed defendant Glenn, who they did not know, traveling in the opposite direction in a Blazer.

Unbeknownst to the Roops, Officer Glenn was one of the members of a Virginia State Police tactical team assisting the U.S. Forest Service by staking out a marijuana patch in the national forest in the hope of arresting the marijuana cultivator. Glenn was assigned to a vehicle some distance from the patch. At approximately 6:00 P.M. the agents hiding at the patch saw the suspect, who they believed to be armed and fleeing on foot. The agents notified Glenn by radio and he began to drive towards the "drop point" where he had left the other agents. He passed the Roops' red Jeep and turned around. Glenn asserts that it was his intent to warn the Roops of the danger of the fleeing suspect.

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they have not persisted in those claims.

Glenn caught up with the Roops just as they stopped at the scenic overlook in order to exercise their dog. He claims that he displayed his badge, holding it in front of him, and did not pull his handgun from its holster. Glenn claims that before he could walk to the Roops' vehicle, they drove off suddenly, spraying gravel. The Roops, on the other hand, contend that Glenn threatened them with his gun and did not display a badge.

The Roops claim that after they wrecked, Glenn appeared at the top of the embankment and continued to threaten them with his gun. They assert that Glenn still refused to identify himself, and that he told Mr. Roop to turn off his engine and throw his keys up to him. According to Roop, Glenn acted "irrationally," pacing back and forth on top of the embankment. (Terry Roop Aff. ¶ 18.) After "several minutes," and after Mr. Roop asked Glenn to come down the embarkment to get his driver's license, Glenn finally identified himself and came down to the wrecked Jeep. (*Id.* ¶ 20.) He then radioed for medical assistance.

Even accepting the Roops' version of the events, as I am required to do at this stage, *see Saucier v. Katz*, 533 U.S. 194, 201 (2001), I do not find a violation of their Fourth Amendment rights.

A seizure within the meaning of the Fourth Amendment "requires an intentional acquisition of physical control" by a police officer. *Brower v. County of*

Inyo, 489 U.S. 593, 596 (1989). The fact that the police officer *desires* to terminate the suspect's freedom of movement by a show of authority is insufficient. *See id.* 596-97. Even assuming that prior to the wreck Officer Glenn did point a gun at the Roops and threatened to shoot them if they left, they clearly did not submit to his demand and thus there was no seizure in a constitutional sense. *See Cal. v. Hodari D.*, 499 U.S. 621, 628-29 (1991) (holding that no seizure occurred when officer attempted to stop suspect but the suspect did not comply).

The Roops also contend that the officer's actions violated their right to substantive due process. When judging a police officer's conduct under this constitutional protection, the test is whether the action was so egregious as to shock the conscience. *See County of Sacramento v. Lewis*, 523 U.S. 833, 853-54 (1998) (finding no violation of right where officer attempted to stop suspect in a high-speed chase resulting in the suspect's death). Moreover, under circumstances where the police officer has little time for reflection, the plaintiff must prove that the officer acted with the purpose of causing harm, and not merely recklessly. *See id.*

Applying these tests, I cannot find that Glenn violated the Roops' right to substantive due process. Accepting the Roops' version of the events, a jury might very well find that Glenn acted improperly in threatening them with his gun on a remote road in the national forest and by failing to identify himself or explain his

purpose. Indeed, such conduct might amount to gross negligence, as claimed by the plaintiffs. However, there is no evidence that Glenn intended to cause the Roops harm. There is no question but that Glenn reasonably believed that the Roops were about to become involved in a potentially dangerous situation. Glenn was duty-bound to contact the Roops, not only to protect them, but to insure that they themselves were not accomplices of the fleeing, armed suspect. This was an unexpected situation, without time for careful reflection, and if Glenn handled it badly, as the Roops claim but which he denies, he may be liable under traditional tort legal theories, but not for violation of a constitutional right.

Following the Roops' wreck, there is no question but that Glenn "seized" them through his show of authority. However, the injuries suffered by the Roops in the wreck had already occurred by then. Moreover, I find that at that point, after the Roops had sped off, Glenn had sufficient cause to detain them. *See Terry v. Ohio*, 392 U.S. 1, 26-27 (1968) (holding that police officer may make intrusions short of arrest where there is reasonable apprehension of danger).

For these reasons, I find that no constitutional right has been violated on the facts alleged and accordingly the defendant is entitled to qualified immunity. As to the pendant state law causes of action, I find it appropriate to dismiss those claims without adjudicating them and without prejudice to refiling them in state court. *See*

28 U.S.C.A. § 1367(b)(3) (West 1993) (providing that district court may decline to exercise supplemental jurisdiction when it dismisses all claims over which it has original jurisdiction). "To say that due process is not offended by the police conduct described here is not, of course, to imply anything about its appropriate treatment under state law." *Lewis v. County of Sacramento*, 523 U.S. at 854 n.14.[4]

An appropriate final judgment will be entered herewith.

DATED: March 2, 2004

/s/ JAMES P. JONES
United States District Judge

[4] Neither side has requested that I retain jurisdiction over the state law claims. The state statute of limitations is tolled during the pendency of the federal action and for a time thereafter. *See* 28 U.S.C.A. § 1367(d) (West 1993).