UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSE GOMEZ,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:18-CV-1224
	§	
CITY OF HOUSTON, TEXAS, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is the Motion for Summary Judgment by Defendants Jacob B. Simmerman, ("Simmerman"), Ron Kloeppel, ("Kloeppel") and Christopher E. Heaven ("Heaven"). (Dkt. 56) Having carefully reviewed the motion, response, reply, applicable law, and the entire record, the motion is **GRANTED in part and DENIED in part.**

I. FACTUAL BACKGROUND

Unless otherwise stated, the following facts are established by the summary judgment record in this case. On the evening of March 29, 2017, Plaintiff Jose Gomez ("Gomez") was driving a pick-up truck when he and his passenger stopped in the left turn lane at the traffic light at the intersection of North Main Street and Hogan Street. Directly behind him in two marked police vehicles were Houston Police Department Officers Simmerman, Heaven, and Kloeppel (collectively, "Officer Defendants"). Simmerman was in the first marked vehicle behind Gomez; Heaven and Kloppel were riding together in the second vehicle. At the time, Kloeppel was a Probationary Patrol Officer and was

being evaluated by Heaven. (Dkt. 58-D at paras. 6–7; Dkt. 58-E at para. 6; Dkt. 58-F at para. 7) When the light turned green, Gomez, did not immediately move. Simmerman blew his horn at Gomez who then turned left onto Hogan Street.

The Officer Defendants allege that Gomez "turned into the far right-hand lane instead of the left lane as required by traffic law . . . then tried to merge into the left lane where Simmerman's vehicle was." (Dkt. 56 at p. 7) Gomez maintains that he "did not commit any traffic violation and was driving legally at all times." (Dkt. 65-4 at para. 5) Further he states, and one of the officers agrees, that Gomez pulled into the far-right hand lane as he turned because the police had just used his horn and Gomez just wanted to let them go by.[1] (Dkt. 65-5 at 35:6-10)

The body cameras worn by Simmerman and Heaven recorded some of what happened next.[2] The Officer Defendants initiated a traffic stop based on Gomez's alleged traffic violations. (Dkt. 56 at p. 8) All three officers exited their vehicles and appeared angry to Gomez. (Dkt. 65-4 at para. 8). Heaven approached the driver-side window and asked Gomez for his driver's license. Gomez handed Heaven his vehicle inspection card. (Dkt. 58-D at para. 9; Dkt. 58-E at para. 7) Heaven said "NO, YOUR LICENSE!", at which point Gomez informed the officers that he did not have his wallet on him. Both Simmerman and Heaven ordered Gomez to get out of his vehicle. As Gomez began to look in the center console of his vehicle for his wallet, Simmerman stated, "I don't need

[1] There is no dash camera footage from the officers' patrol cars of Gomez's vehicle in the summary judgment record.
[2] There is also no sound for the first two minutes of the body camera footage of the traffic stop.

your wallet, you said you don't have your wallet, get out of the car." Gomez complied. (Dkt. 65-2 at 2:05–2:23) Simmerman immediately orders Gomez to turn around and put his hands behind his back, and Gomez again complies. (Dkt. 65-2 at 2:20–2:27)

As Simmerman is handcuffing Gomez, Heaven tells Gomez, "Don't you tense up on me, motherfucker, don't you tense up on me" and grabs Gomez's right arm. (Dkt. 65-2 at 2:25–2:34) Simmerman and Heaven repeatedly order Gomez not to tense up and to stop resisting. (Dkt. 56 at p. 16) As they do so, Gomez keeps repeating "Hey man, what are you doing? I don't do anything man. What are you doing?" The body camera footage is jerky and unclear as to everything that happened next and Heaven's body camera fell off due to a broken magnetic plate. (Dkt. 58-D at para. 20) Simmerman testified that he wrestled Gomez to the ground, forcing him face-down on the pavement. (Dkt. 58-E at para. 11) Simmerman and Heaven forced Gomez's hands behind his back while Heaven has his knee in the center of Gomez's back. (Dkt. 58-D at para. 16; Dkt. 58-H at para. 12) On the video, Gomez can be heard screaming in apparent pain as Simmerman and Heaven handcuff him on the ground. The officers can be heard on the video to repeatedly order Gomez "to stop resisting" to which Gomez repeatedly replies "I don't do anything man, why do you do that to me? Why do you do that?" (Dkt. 65-1 at 2:11–2:20) Less than a minute after the Officer Defendants asked Gomez for his license, Simmerman and Heaven had Gomez on the ground with his arm pulled behind him. (Dkt. 65 at p. 9; dkt. 65-1 at 1:12–2:08)

After patting Gomez down, Heaven placed Gomez in the back of his patrol car. (Dkt. 58-D at para. 21; Dkt. 58-E at para. 13) The Officer Defendants then conducted an

inventory search of the vehicle before it was towed. They did not find drugs or other contraband during the search. (Dkt. 58-D at para. 24; Dkt. 58-E at para. 15)

According to the Officer Defendants, Gomez complained that Heaven and Simmerman broke his arm and was evaluated at the scene by the Houston Fire Department Emergency Medical Service, who determined that Gomez's arm was not broken. (Dkt. 58-D at para. 27) At the jail, medical personnel observed that Gomez's elbow was red and swollen, so they had him transported to Ben Taub Hospital for further evaluation, including various X-rays of his arm and back. (Dkt. 58-H at 1016)

The day after his arrest, Gomez was charged with misdemeanor resisting arrest for unlawfully obstructing "J. SIMMERMAN a person he knows is a peace officer from effecting an arrest of JOSE GOMEZ by using force against J. SIMMERMAN, namely BY PULLING J. SIMMERMAN WITH HIS BODY." (Dkt. 58 at Ex. I) A Harris County magistrate judge found probable cause for the arrest the same day. (Dkt. 58 at Ex. J) The resisting arrest charge was dropped a few months later for reasons that are not clear on the record. (Dkt. 56 at Ex. K)

Two days after his arrest, Gomez submitted a sworn complaint with the Houston Police Department's Internal Affairs Division ("IAD"), complaining about the use of force and profanity during his arrest. (Dkt. 59 at Ex. V) IAD investigated and concluded that the incident occurred, but that it was lawful and proper. (Dkt. 58 at Exs. O & W; Dkt. 59 at Ex. V)

Subsequently Gomez filed this lawsuit under 42 U.S.C. § 1983 alleging that the Heaven and Simmerman violated his rights under the Fourth Amendment to the United

States Constitution by using excessive force during his arrest, unlawfully searching his truck, unlawfully arresting him, and maliciously prosecuting him. (Dkt. 9 at pp. 14–15) Gomez has also sued Kloeppel under the theory of bystander liability alleging that Kloeppel violated his Fourth Amendment rights by failing to intervene and allegedly "look[ing] on" while Simmerman and Heaven used excessive force during Gomez's arrest. (Dkt. 65 at p. 5). Finally, Gomez asserts state law claims against Simmerman and Heaven for assault and battery.

In the pending motion, the Officer Defendants move for summary judgment contending that all of Gomez's claims against them are barred by either qualified or state law official immunity. The Court will address these arguments below.

II. APPLICABLE LAW

A. Summary Judgment Standard

Under Federal Rule of Civil Procedure Rule 56, summary judgment is appropriate "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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Burrell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 136 (5th Cir. 2016) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). A fact is material if "its resolution could affect the outcome of the action." *Nunley v. City of Waco*, 440 F. App'x 275, 277 (5th Cir. 2011). The court must view the facts and draw all reasonable inferences in the light most

favorable to the nonmoving party. *Darden v. City of Fort Worth*, 880 F.3d 722, 727 (5th Cir. 2018).

"Where the non-movant bears the burden of proof at trial, 'the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating . . . that there is an issue of material fact warranting trial." *Kim v. Hospira, Inc.*, 709 F. App'x 287, 288 (5th Cir. 2018) (quoting *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015)). If the movant produces evidence that tends to show that there is no dispute of material fact, the nonmovant must then identify evidence in the record sufficient to establish the dispute of material fact for trial. *Celotex*, 477 U.S. at 321–23. The nonmovant must "go beyond the pleadings and by her own affidavits, or by depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue of material fact for trial." *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 493 (5th Cir. 2001) (citing *Celotex*, 477 U.S. at 324). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertion, or by only a scintilla of evidence.'" *Jurach v. Safety Vision, L.L.C.*, 642 F. App'x 313, 317 (5th Cir. 2016) (quoting *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005)).

B. Qualified Immunity

The doctrine of qualified immunity protects government officers from civil liability in their individual capacities if their conduct does not violate clearly established federal statutory or constitutional law of which a reasonable person would have known. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). Once raised as a defense, the

plaintiff has the burden to demonstrate that qualified immunity should be pierced. *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). This inquiry requires a two-part analysis, in which the court determines (1) whether the official violated a statutory or constitutional right, and (2) whether the unlawfulness of the official's conduct was "clearly established" at that time. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). A right is "clearly established" only where pre-existing law "dictate[s], that is truly compel[s] (not just suggest[s] or allow[s] or raise[s] a question about), the conclusion for every like-situated, reasonable government agent that what the defendant is doing violates federal law in these circumstances." *Sama v. Hannigan*, 669 F.3d 585, 591 (5th Cir. 2012). Even if a defendant's conduct actually violates a plaintiff's constitutional rights, the defendant is entitled to qualified immunity unless "all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the plaintiff's rights." *Carroll v. Ellington*, 800 F. 3d 154, 169 (5th Cir. 2015). In the context of a summary judgment motion like the one here, to avoid summary judgment on the officers' claim of qualified immunity, the plaintiff must demonstrate that there is a genuine issue of material fact regarding whether a constitutional violation took place, and must show that under clearly established law provided that the officer's conduct was objectively unreasonable. *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 408 (5th Cir. 2007).

III. ANALYSIS

A. Simmerman and Heaven Are Not Entitled to Qualified Immunity Regarding the Excessive Use of Force Claim

1. Gomez has stated a claim for excessive use of force against Simmerman and Heaven.

The Fourth Amendment guarantees the right to be free from excessive force during an arrest. Under the first prong of the qualified immunity analysis, to establish a claim for violation of the Fourth Amendment's prohibition on excessive force, Gomez must show (1) he suffered an injury that (2) "resulted directly and only from a use of force that was clearly excessive to the need," (3) the excessiveness of the force was objectively unreasonable. *Westfall v. Luna*, 903 F.3d 534, 547 (5th Cir. 2018) (internal quotation marks and citations omitted).

a. Gomez was injured.

Here, Gomez has established the requisite injury to state a claim against Simmerman and Heaven for use of excessive force. To maintain an excessive force claim, the injury suffered must be more than *de minimis* but the injury need not be "significant." *Hanks v. Rogers*, 853 F.3d 738, 744–45 (5th Cir. 2017). Gomez testified that, as a result of the alleged force used against him by Simmerman and Heaven, he suffered bruising on his face from hitting the asphalt, injuries to his elbow, torn ligaments in his shoulder, and injury to his vertebrae discs. (Dkt. 65-4 at para. 10) His medical records from two weeks after the incident in question support this testimony and establish that he was suffering from elbow joint pain, neck pain, and shoulder pain requiring x-rays. (Dkt. 65-7 at p. 15) Contusions, acute strains, and bruises are sufficient injuries to sustain an excessive force claim and are not considered *de minimis* injuries. *See Hanks*,

853 F.3d at 745. Gomez's testimony, read in light of the contemporaneous medical documentation in the record, establish more than a *de minimis* injury.

Simmerman and Heaven argue that absent expert testimony on medical causation, Gomez cannot sustain his burden to prove that his alleged injuries resulted directly from the alleged use of excessive force during Gomez' arrest, as opposed to his "20-plus years of work as a furniture mover." (Dkt. 56 at p. 24) The Court disagrees. Considering the summary judgment evidence in the light most favorable to Gomez, a jury could reasonably conclude that Gomez' injuries were caused by the Officer Defendants and were not the result of his job.

b. A reasonable jury could find that the force used against Gomez was excessive and unreasonable.

The Court finds that there are fact issues regarding whether the force used against Gomez was excessive and unreasonable. "Excessive force claims are necessarily fact-intensive; whether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances of each particular case.'" *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (quoting *Graham v.* Connor, 490 U.S. 386, 396 (1989)). The court must evaluate the use of force by these officers "from the perspective of a reasonable officer on the scene," and not "with the 20/20 vision of hindsight." *Griggs v. Brewer*, 841 F.3d 308, 312 (5th Cir. 2016). In *Graham v. Connor*, the Supreme Court identified three factors—the "*Graham* factors"—that courts should consider when assessing whether a particular use of force was reasonable: (1) the severity of the crime at hand, (2) whether

the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to flee. 490 U.S. at 389.

Considering the instant case under the *Graham* factors, a jury could reasonably conclude the force used was excessive and thus constituted a violation of Gomez's constitutional rights. Examining the first *Graham* factor, Simmerman and Heaven assert that they arrested Gomez because they witnessed Gomez fail to maintain his lane, a traffic violation, and because he failed to produce his driver's license when asked by Simmerman. These sort of crimes— Class C misdemeanors that are only punishable by a fine—militates against the use of force. *See Reyes v. Bridgwater*, 362 F. App'x 403, 407 n.5 (5th Cir. 2010) (finding the "severity" factor from *Graham* militated against a use of force where the alleged crime was a misdemeanor). Thus, the first factor weighs against granting Simmerman and Heaven qualified immunity.

Under the second *Graham* factor, the summary judgment evidence establishes that Gomez did not pose an immediate threat to the safety of the officers. Simmerman and Heaven assert that they considered Gomez a threat because as he was being handcuffed they could feel him "tense up", prompting them to think that he was getting ready "to either flee or fight." In support of this testimony, the officers point to the body camera

footage which appears to show that, as Gomez is being handcuffed, he is "clenching" one hand into a fist—a fact that they did not notice at the time of the arrest.[3] (Dkt. 56 at p. 16)

However, viewing all of the facts in the light most favorable to Gomez, the Court cannot say that a reasonable officer would have perceived Gomez as an immediate threat to anyone warranting a physical takedown. Certainly, there is at least a fact question on this issue. Gomez has testified that he did not attempt to flee or fight the officers. The body camera video shows that prior to the officers taking Gomez to the ground, Gomez had not been violent or aggressive, was not verbally threatening the officers and had not made any sudden movements towards the officers. The record establishes that after leaving his vehicle, Gomez immediately complied with the officers' commands to turn around and place his hands behind his back. While one of Gomez' hands was briefly clenched into a fist before the officers took him to the ground, at the time Gomez was standing with his back to the officers. Gomez never took a swing at the officers nor did the officers testify that he tried to do so before they took him to the ground. In fact, while being arrested, Gomez continued to state to the officers that he was not resisting and kept asking why they were treating him this way. *See Ramirez v. Martinez*, 716 F.3d 369, 378 (5th Cir. 2013) (holding that no reasonable officer could have concluded that the plaintiff posed a safety threat to the officers when the plaintiff questioned the officers' commands, did not comply with verbal orders, and then pulled away from an officer's grasp).

[3] The Officer Defendants allege that they were unaware at the time of the clinched fist and did not notice this until after they later reviewed the body camera footage.

Finally, under the third *Graham* factor, there is a fact question as to whether the force used was excessive to the need. Here, there is a clear fact question regarding whether Gomez was resisting arrest or attempting to flee. Under Gomez's account of the events, he attempted to comply with all of the officers' commands. He testified that he was not resisting arrest or attempting to flee when Heaven forcefully grabbed his arm, told him "[d]on't you tense up on me, motherfucker," nor was he resisting when Simmerman and Heaven shoved him around and "grabbed [his] arms and threw [him] to the hard pavement causing [his] face to hit the asphalt, twisting and wrenching [his] arm that was held by Simmerman and Heaven putting his knees into his spine" allegedly causing him significant injury. (Dkt. 65-4 at para. 10)

On the other hand, Simmerman and Heaven testify that Gomez was "immediately" resistant from the start of the encounter, initially not complying with the officers' orders to exit the vehicle, tensing up and clenching one hand in a fist while being handcuffed and trying to get away. As noted, at this stage of the case, the Court must view the evidence in the light most favorable to Gomez, and the Court may not make credibility determinations. *Reeves v. Sanderson Pluming Prods., Inc.*, 530 U.S. 133, 150 (2000). The incomplete videos of the arrest are not dispositive of either parties' recollections of the incident; thus, they do not disprove Gomez's version of events and a reasonable jury could accept his version. *See Ramirez*, 716 F.3d at 374. For example, the video does not establish whether Gomez's movements while he was being handcuffed were an attempt to flee as claimed by the officers or whether instead they were the result of how Gomez

was being pushed and shoved around by the officers. Considering the video evidence, a jury could conclude that no reasonable officer would have perceived that Gomez was either actively resisting arrest, or attempting to flee, at least one of which would have been necessary to justify the level of force Simmerman and Heaven used against Gomez. *Trammell v. Fruge*, 868 F.3d 332, 341 (5th Cir. 2017) ("[W]here an individual's conduct amounts to mere 'passive resistance,' use of force is not justified.").

Furthermore, the alleged angry appearance of Simmerman and Heaven as they approached the car and the speed with which they went from discussing the situation with Gomez to using force also suggests summary judgment is inappropriate with respect to whether excessive force was used against Gomez. The summary judgment evidence establishes that, during this traffic stop for a suspected lane change violation, less than a minute elapsed from when the officers approach Gomez's window and when they had him on the ground with a knee in his back and cursing at him. The Fifth Circuit has noted that "several times [it has] found that the speed with which an officer resorts to force is relevant in determining whether that force was excessive to the need." *Trammell*, 868 F.3d at 342; *Brothers v. Zoss*, 837 F.3d 513, 520 (5th Cir. 2016). Accordingly, having considered the *Graham* factors, the Court concludes that there are fact questions precluding summary judgment regarding whether Simmerman and Heaven violated Gomez's constitutional rights by excessive use of force in effecting the arrest.

2. Heaven and Simmerman' Conduct Violated Clearly Established Law

Under the second prong of the qualified immunity analysis, the Court must determine whether the unlawfulness of Simmerman and Heaven's conduct was "clearly established" at that time. *Wesby*, 138 S. Ct. at 589. This requires determining whether, based on controlling case law at the time of the incident, these defendants had fair notice that their actions were objectively unreasonable, based on the evidence viewed in the light most favorable to Gomez. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *see also Tolan v. Cotton*, 572 U.S. 650 (2014) (holding that at the summary judgment stage, a court cannot resolve fact disputes pertaining to either prong of qualified immunity in favor of the moving party).

The Court finds that in the Fifth Circuit "the law [at least as of January 2013] clearly established that it was objectively unreasonable for several officers to tackle an individual who was not fleeing, not violent, not aggressive," and only passively resisting arrest. *Trammell*, 868 F.3d at 341. Other cases from the Fifth Circuit bolster this conclusion. For example, in *Hanks v. Rogers*, in addressing an arrest that took place in February 2013, the court held that an officer "violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation." *Hanks*, 853 F.3d at 747; *Ramirez*, 716 F.3d 369; *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000); *See also Jackson v. City of Austin*, No. 1:17-CV-1098-AWA, 2019 WL 5102575 (W.D. Tex. Oct. 11, 2019) (holding that officers

were on notice that using force on a non-violent, non-fleeing plaintiff who demonstrated merely passive resistance was objectively unreasonable); *Garcia v. City of Buda*, No. 1:17-CV-377-RP, 2018 WL 6682419, at *5 (W.D. Tex. Dec. 19, 2018). Accordingly, if Gomez' allegations are taken as true, Simmerman and Heaven should have known that their conduct was unconstitutional. Gomez has satisfied the second prong of the qualified immunity analysis.

In sum, there are fact questions precluding summary judgment on Gomez' excessive force claims against Simmerman and Heaven. Gomez has demonstrated the existence of disputed facts regarding whether these defendants violated his Fourth Amendment rights and has established that viewing those disputed facts in the light most favorable to Gomez, these defendants were on notice that the force they used was excessive. Accordingly, Heaven and Simmerman are not entitled to qualified immunity on Gomez's excessive force claims.

B. Kloeppel is Entitled to Qualified Immunity Regarding the Excessive Use of Force—Bystander Liability Claim

To establish a claim for bystander liability and satisfy the first prong of the qualified immunity analysis, the plaintiff must establish that the law enforcement officer "(1) [knew] that a fellow officer [was] violating an individual's constitutional rights; (2) [had] a reasonable opportunity to prevent the harm; and (3) [chose] not to act." *Whitley v. Hanna*, 726 F.3d 631, 646 (5th Cir. 2013) (internal quotation omitted) *cert. denied*, 134

S. Ct. 1935 (U.S. 2014). Mere presence at the scene of the alleged use of excessive force, without more, does not give rise to bystander liability. *Drumm v. Valdez*, No. 3:16-CV-3482-M-BH, 2019 WL 7494443, at *5 (N.D. Tex. Dec. 3, 2019).

Viewing the facts in the light most favorable to Gomez, the Court finds that Gomez cannot establish the second requisite element of an excessive force—bystander claim against Kloeppel. The primary focus of the Court's analysis of the second element is whether the bystander officer has "a reasonable opportunity to realize the excessive nature of the force and to intervene to stop it." *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995). "[T]hat determination involves consideration of both the duration of the alleged use of force and the location of the suspect relative to the allegedly bystanding officers." *See Malone v. City of Fort Worth, Tex.*, No. 4:09-cv-634-Y, 2014 WL 5781001, at *16 (N.D. Tex. Nov. 6, 2014).

Here, even if Kloeppel witnessed an unconstitutional use of force by Simmerman and Heaven, there is no indication that Kloeppel had any time to act to prevent this from occurring. The alleged excessive force against Gomez's arrest happened very quickly. Gomez claims that only thirty-three seconds elapsed from when he exited his vehicle and was then on the ground with Simmerman and Heaven. (Dkt. 65 at p. 9) As a matter of law, under the circumstances presented, this is an insufficient amount of time for Kloeppel to appreciate and react to a possible use of excessive force. *See Gilbert v. French*, No. H-06-3986, 2008 WL 394222, at *8 (S.D. Tex. Feb. 12, 2008). Accordingly, the Court finds Kloeppel did not violate Gomez's constitutional rights and

Kloeppel is entitled to qualified immunity on the excessive use of force—bystander liability claim.

C. Simmerman and Heaven Are Entitled to Qualified Immunity Regarding the False Arrest Claim

Whether a plaintiff has established a claim for false arrest and satisfied the first prong of the qualified immunity analysis turns on whether "a reasonable officer could have believed the arrest to be lawful, in light of clearly established law and the information the officer possessed." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). An officer violates the Fourth Amendment if an arrest is made without a proper arrest warrant or probable cause. *Johnston v. City of Houston*, 14 F.3d 1056, 1059 (5th Cir. 1994) (citations omitted); *see also Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994). Here, it is undisputed that Simmerman and Heaven were acting without the benefit of a warrant. Thus, the Court's inquiry focuses on the existence of probable cause to support the arrest.

"Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Resendiz v. Miller*, 203 F.3d 902, 903 (5th Cir. 2000). "If there was probable cause for any of the charges made . . . then the arrest was supported by probable cause, and the claim for false arrest fails." *Wells v. Bonner*, 45 F.3d 90, 95 (5th Cir. 1995).

"An officer may conduct a warrantless arrest based on probable cause that an individual has committed even a minor offense, including misdemeanors." *Deville*, 567 F.3d at 165 (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)). Moreover, "evidence that the arrestee was innocent of the crime is not necessarily dispositive of whether the officer had probable cause to conduct the arrest because probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* Accordingly, an officer's own testimony regarding the occurrence of an arrestable violation can by itself support a finding of probable cause, even in the face of the plaintiff's denial of that violation. *Id.*

Here, it is undisputed that Gomez violated the Texas Transportation Code when he failed to produce his driver's license as ordered by the officers during the traffic stop. Texas Transportation Code § 521.025 requires drivers to possess a license and display it on demand to peace officers. Violating § 521.025 is grounds for arrest. TEX. TRANSP. CODE § 543.001 ("Any peace officer may arrest without warrant a person found committing a violation of this subtitle."). Regardless of whether Simmerman and Heaven had probable cause to arrest Gomez for other possible offenses, once Gomez failed to produce his driver's license, the officers had probable cause to take him into custody without a warrant. *Dew v. State*, 214 S.W.3d 459, 462 (Tex.App.—Eastland 2005, no pet.) As the courts have consistently held an "arrest does not violate the Fourth Amendment if the officer making the arrest has probable cause to arrest the defendant for any crime, regardless of whether the defendant can be lawfully arrested for the crime

which the officer states or believes he is making the arrest." *U.S. v. Bain*, 135 F. App'x 695, 696 (5th Cir. 2005) (citing *Devenpeck v. Alford*, 543 U.S. 146 (2004)). Accordingly, the Court finds that Gomez cannot establish a claim for false arrest and Simmerman and Heaven are entitled to qualified immunity.

D. Heaven and Simmerman Are Entitled to Qualified Immunity Regarding the Illegal Search Claim

Under the first prong of the qualified immunity analysis, Gomez also cannot establish a claim that the search of his vehicle by Simmerman and Heaven violated his rights against unreasonable searches protected by the Fourth Amendment. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Warrantless searches and seizures are per se unreasonable unless they fall within a few narrowly defined exceptions." *United States v. Kelly*, 302 F.3d 291, 293 (5th Cir. 2002). There is an exception to the warrant requirement when a law enforcement officer conducts an inventory of seized property if that inventory is part of a bona fide police "routine administrative caretaking function." *United States v. Skillern*, 947 F.2d 1268, 1275 (5th Cir. 1991). The Fourth Amendment requires that an inventory search not be a "ruse for a general rummaging in order to discover incriminating evidence." *United States v. Walker*, 931 F.2d 1066, 1068 (5th Cir. 1991). "In order to prevent inventory searches from concealing such unguided rummaging, [the] Supreme Court has directed that a single familiar standard is essential to guide police officers, who have only limited

time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* (internal quotation marks omitted).

"Thus, an inventory search of a seized vehicle is reasonable and not violative of the Fourth Amendment if it is conducted pursuant to standardized regulations and procedures that are consistent with (1) protecting the property of the vehicle's owner, (2) protecting the police against claims or disputes over lost or stolen property, and (3) protecting the police from danger." *United States v. Lage*, 183 F.3d 374 (5th Cir. 1999).

Defendants claim, and Gomez does not dispute, that the search of Gomez's vehicle was conducted in accordance with HPD General Order (G.O.) 600-10: Towing. (Dkt. 58-D at paras. 24–25; Dkt. 58-G at para. 37; Dkt. 58 at Ex. P) The Fifth Circuit has previously examined HPD G.O. 600-10 and found that the policy is "constitutionally adequate." *United States v. McKinnon*, 681 F.3d 203, 210 (5th Cir. 2012). Accordingly, the Officer Defendants are entitled to qualified immunity on the illegal search claim.

E. Simmerman and Heaven Are Entitled to Qualified Immunity Regarding the Malicious Prosecution Claim

Gomez alleges that these defendants violated his constitutional rights against malicious prosecution by filing criminal charges against him that were ultimately dismissed. (Dkt. 9 at p. 14) However it is clearly established that the Fifth Circuit does not recognize a federal claim for malicious prosecution. In general, there is no freestanding constitutional right to be free from malicious prosecution. *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir.) Like all claims brought under Section 1983, a claim for malicious prosecution must be grounded in a specific federal right guaranteed

by the constitution or statute. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Although "the initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protections" such as the Fourth Amendment if the accused is wrongfully seized, such claims "are not claims for malicious prosecution and labeling them as such only invites confusion." *Id*. at 953–54. Accordingly, under the first prong of the qualified immunity analysis, Gomez cannot establish this claim as a matter of law and Simmerman and Heaven are entitled to qualified immunity.

F. Simmerman and Heaven Are Not Entitled to Official Immunity Regarding the State Law Claims for Assault and Battery

Finally, in response to Gomez' state law claims for assault and battery against them, Simmerman and Heaven assert that these claims are barred by official immunity. "Texas law of official immunity is substantially the same as federal qualified immunity." *Wren v. Towe*, 130 F.3d 1154, 1160 (5th Cir. 1997). "A governmental employee is entitled to official immunity for (1) the performance of discretionary duties (2) that are within the scope of the employee's authority, (3) provided that the employee acts in good faith." *Telthorster v. Tennell*, 92 S.W.3d 457, 461 (Tex. 2002). The burden is on the defendant government official to conclusively establish each element of official immunity. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

"Good faith" is an essential element that must be established for official immunity. "When a suspect sues for injuries sustained during an arrest, official immunity's good faith element requires the defendant to show that a reasonably prudent officer, under the same or similar circumstances, could have believed that the disputed conduct was

justified based on the information the officer possessed when the conduct occurred." *Id.* at 460.

Although the Court agrees with the Simmerman and Heaven that the first two essential elements of official immunity are satisfied here the Court finds that there is a genuine dispute of material fact as to whether Heaven and Simmerman acted in good faith. As discussed above, given the relatively minor traffic violation of which Gomez was suspected and the amount of force that Heaven and Simmerman used to effect the arrest, a reasonable jury could find that no reasonably prudent officer under the same or similar circumstances could have believed that the conduct in question was justified. Accordingly, Simmerman and Heaven are not entitled to official immunity from the assault and battery claims.

CONCLUSION

For the reasons discussed above, the Officer Defendants' motion for summary judgment is **DENIED** with respect to Gomez' federal claims against Heaven and Simmerman for excessive force and state law claims against these defendants for assault and battery. The motion is **GRANTED** with respect to Gomez' excessive force – bystander liability claims against Kloeppel and he is dismissed from this action. Summary judgment is also **GRANTED** with respect to Gomez' remaining claims against Heaven and Simmerman for false arrest, illegal search, and malicious prosecution.

SIGNED at Houston, Texas this 25th day of February, 2021.

George C. Hanks Jr

GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE