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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

CHARLES F. BARRETT,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 16-cv-2386**
	)	
DEE BURGIN, et al.,	)	
	)	
Defendants.	)	

O R D E R

Before the court is Plaintiff's Motion for Partial Summary Judgment as to Liability (#68). Defendants did not timely respond, and for the reasons detailed in the court's Text Order entered April 15, 2019, this court declined to extend the time for Defendants to respond. Plaintiff's Motion for Partial Summary Judgment as to Liability (#68) is GRANTED in part and DENIED in part.

I. BACKGROUND

A. Overview

Plaintiff claims violations of his Fourth Amendment constitutional rights including unlawful entry, unreasonable seizure, and unreasonable force, and claims retaliation in violation of his First Amendment rights. Plaintiff also raises state law claims for assault, battery, trespass, intentional infliction of emotional distress, and violation of the Illinois Civil Rights Act of 2006. Plaintiff asserts *respondeat superior* liability, for his state law claims, against then-Sheriff Jeff Wood.

B. Undisputed Material Facts

On the morning of December 26, 2015, Defendant Dee Burgin ("Burgin") was employed as an Edgar County, Illinois, deputy sheriff. Burgin was on duty in Hume, Illinois, serving civil process unrelated to this case when he saw Plaintiff driving a vehicle. Burgin knew Plaintiff's driver's license was revoked. Burgin was about fifty feet from Plaintiff when he saw Plaintiff driving.

Burgin decided he would pursue Plaintiff for driving on a revoked license. Due to rain and haze, Burgin took "some extra time" to ensure the road was clear before he entered the road. Burgin then backed out of the driveway of the house where he had been parked.

As Burgin turned south, he saw Plaintiff's vehicle turn east on Route 36. Burgin was seven or eight blocks behind Plaintiff and lost sight of him. Burgin thought Plaintiff was going to Plaintiff's house so Burgin drove in that direction. Burgin did not activate his overhead lights, did not activate his siren, and did not give Plaintiff any kind of notification or command to stop, as Plaintiff drove to his house.

When Burgin arrived at Plaintiff's driveway, Burgin took "a couple" of minutes to run the plate on the vehicle Plaintiff had been driving. Plaintiff had already entered the house when Burgin pulled up, and the doors to the house and garage were closed.

Plaintiff's garage is attached to the house. The house and garage share a wall and are under one roof. There is a walking door between the garage and the house.

The part of the house referred to by Plaintiff as the "breezeway" is connected to the garage on one side and the rest of the house on the other side. The breezeway is an enclosed room containing Plaintiff's washing machine, dryer, furnace, water heater, and a bathroom with a shower.

When Plaintiff arrived at his house, he entered through an exterior door into the breezeway, went into the combined kitchen and dining room, then turned around and went into the garage to open the garage door so he could bring his car in.

Plaintiff used his attached garage to park his vehicle, for storage, to grill food in the winter, and to do science experiments.

Plaintiff stood at the door between the house and garage, with his finger still on the wall-mounted garage door opener button, as the garage door went up.

No officer knocked on any door to Plaintiff's house during the events of December 26, 2015. Burgin was approaching Plaintiff's house and garage, and was at or near the garage door threshold as the door went up.

Burgin testified in his deposition that his understanding was that an officer could enter a person's home without a warrant if invited or if in "pursuit of a felony." Driving on a revoked license is a misdemeanor offense and can be elevated to a felony after several convictions for driving on a revoked license. As Burgin approached Plaintiff's house Burgin did not know if Plaintiff had committed a felony level offense.

As the garage door opened, Burgin could see Plaintiff standing in the garage. Burgin stepped into the garage door opening so that the overhead door could not be closed. Burgin could see that Plaintiff wanted to close the overhead garage door.

Burgin did not ask for consent to enter Plaintiff's garage, and Plaintiff did not invite Burgin in. As Plaintiff stood at the door between the garage and house, and Burgin stood in the threshold to block the overhead door from closing, Plaintiff told Burgin to get out of his garage.

When Burgin failed to leave the garage, Plaintiff approached Burgin, arms outstretched before him in a pushing stance. Plaintiff was not threatening Burgin. Burgin was six feet tall and weighed 240 pounds. Plaintiff was five-foot ten inches tall and weighed 150 pounds.

Plaintiff stopped short of pushing Burgin. Plaintiff knew it would be illegal to touch or push Burgin because Burgin was an officer.

Burgin wore a bodycam during the incident. Burgin does not recall when he turned on the bodycam. Burgin had to unzip his jacket, it was raining, and Burgin was running from his car toward Plaintiff's garage, all while Burgin was turning on the bodycam. The beginning of the bodycam footage is corrupted for approximately the first six seconds of the recording. The first visible footage is timestamped at "11:10:55," and shows the following:

Burgin says "yeah, I looked in there and seen you, so-". Plaintiff is in the garage. Plaintiff says "step- nope- get out of here," and Burgin walks around Plaintiff and into

Plaintiff's garage. After he is in Plaintiff's garage, Burgin says "hold on, don't *touch* me, I was trying to get out of the rain." Plaintiff says "okay." Burgin says "okay sir, I am placing you under arrest." Plaintiff backs up and turns toward the walking door into the house, which was still open.

At bodycam video timestamp 11:11:00, Plaintiff says he would like to shut the door between the house and garage. Burgin tells Plaintiff not to move, then draws and points a Taser at Plaintiff. Burgin activates the laser beam sight on the Taser. Burgin's Taser is first visible at 11:11:02. The red laser dot from the Taser sight is visible on Plaintiff's neck and chest. While pointing the Taser at Plaintiff and shining the laser beam on Plaintiff, Burgin says, "we can do this the easy way or the hard way."

Burgin's Taser is no longer visible after 11:11:26, a snapping or buckling sound consistent with the Taser being re-holstered can be heard between 11:11:27 and 11:11:30, and Burgin begins gesturing with both hands, which are then empty, at 11:11:31. Therefore, Burgin appears to have had his Taser drawn for between 24 and 30 seconds. At 11:11:26, around the time Burgin begins re-holstering his Taser, Burgin again says, "we can do this the easy way or the hard way."

Plaintiff did not know that the weapon Burgin aimed at him was a Taser. Plaintiff testified that he felt terror, that he felt his life was threatened, and that he immediately froze in place. The bodycam video shows Plaintiff stand still momentarily when Burgin first points the Taser at him, then Plaintiff steps closer to Burgin, then, on Burgin's command, Plaintiff steps back away from Burgin.

Plaintiff testified that he still feels terror sometimes and has dreams about police coming into his house and killing him. Plaintiff has sought psychiatric help and has been diagnosed with PTSD. Plaintiff never had dreams about police coming in his house and killing him before December 26, 2015.

Burgin did not provide inform Plaintiff of his constitutional rights, as required by *Miranda v. Arizona*, 384 U.S. 436 (1966), at any time during the December 26, 2015, incident. Another officer who later responded to the scene also did not provide *Miranda* warnings to Plaintiff.

The bodycam video of the next few minutes of Plaintiff and Burgin's interaction shows the following:

Burgin tells Plaintiff that there are two reasons Burgin is there. Burgin says the first reason is that he saw Plaintiff driving and knew Plaintiff's driver's license is revoked. Plaintiff denies that he had been driving and says Burgin must be mistaken. Burgin says that the second reason he is there is because he has information that Plaintiff was "doing drugs again here." Plaintiff denies that assertion as well.

Burgin says, "I am going to place you under arrest for driving while revoked." Plaintiff's demeanor changes, he says, "I was just getting ready to get my license back, Dee, please," and Burgin then states "ok, then here's the deal. You take me through your house and show me you don't have drugs here." Plaintiff says "no." Burgin then says "ok, then you're under arrest because I know you have drugs here. I'm just being

honest with you." Plaintiff then mutters, "I'm just a user, I'm just a user." To which Burgin responds, "I know you are, but you gotta stop." Plaintiff says, "I know I do."

Burgin then says he will also arrest Plaintiff for DUI, adding "I know that you recently just smoked." Plaintiff says, "no I didn't." Burgin says, "okay, well we're gonna find out." Plaintiff then says he just wants to close the door to the house, and that he knows he is under arrest. Plaintiff turns toward the still-open door between house and garage.

Burgin's voice changes tone and takes on a cajoling, wheedling, and pleading timbre. Burgin says, "I thought that you- wanted to not- well I thought you wanted to get your license back." Plaintiff says, "I *do* want to get my license back." Burgin says "here's the deal, here's the deal. I know you have stuff in the house." Plaintiff says, "no I don't." Burgin says, "Let me finish please. I know you have stuff in the house. If you consent to a search I will not arrest you for driving while revoked, and whatever you have in the house I'll do a report, I won't take you to jail." Plaintiff says "nope, take me to jail." Burgin says "okay, turn around," Plaintiff turns around, and Burgin handcuffs Plaintiff.

Burgin begins searching Plaintiff, and Plaintiff says, "I don't consent to a search." Burgin says "you don't have to consent, you're under arrest."

Burgin then continued questioning Plaintiff, while Plaintiff was handcuffed, and without providing *Miranda* warnings. Burgin testified that he continued the

questioning because he had obtained information from other sources that there were drugs in Plaintiff's house, and Burgin wanted Plaintiff to incriminate himself.

Upon the additional questioning, Plaintiff eventually admitted that he had been driving earlier that day, and admitted that a container he had on his person contained "pill powder."

Burgin says "well, you're gonna be under arrest for possession of a controlled substance, now" which causes Plaintiff to plead, "please Dee, I've never had a felony in my entire life." Burgin asks why Plaintiff lied to him about driving revoked, and Plaintiff asks, "what do you want me to do" and says, "I didn't know what to do," and says he was "scared." Upon further interrogation by Burgin, Plaintiff later identified the pill powder as crushed Sudafed, admitted that he had smoked meth earlier that morning, and admitted he was going to try to manufacture meth with the Sudafed powder.

Burgin continues to push Plaintiff to consent to a search of his house, reiterating the "deal" that Burgin will not write up the driving on revoked license ticket as long as Plaintiff consents to the search. Plaintiff says "No." Burgin then says "Okay, then I am going to arrest you for driving while revoked, possession of meth manufacturing materials, which is a class one felony. Taking your money [Plaintiff had $300 which he identified as having received the day before as a Christmas gift] and your cell phone." Plaintiff says, "either way I am screwed though, Dee. Either way I'm screwed Dee."

Burgin attempts to convince Plaintiff that Plaintiff will receive "first offender probation" if he is "cooperative" and that if "you keep your nose clean" the felony will disappear. Plaintiff is skeptical, stating "Dee, I've been through this."

Burgin then says "okay, I am telling you, then- so- ah, you know I, I guess I'm just gonna have to get a search warrant, I, I [unintelligible] don't know what else to do-" Plaintiff says "I don't know what to do either, Dee, I don't, I want out of this." Burgin says, "cooperate; you're not getting out of this unless you cooperate."

A few seconds later, Plaintiff says that he has a problem, and that even his dad does not know about it. Burgin replies "your dad's gonna know about it, unless you cooperate."

Burgin engages his radio and indicates he is going to call for another officer. Burgin again says, "we can do this the easy way or the hard way" to which Plaintiff responds, "okay, then take me to jail, for that charge." Burgin says that Plaintiff has to wait. Plaintiff tells Burgin "you gotta step outta my garage- please" to which Burgin replies "I am standing right here, with you, in the doorway. You need to stop- while you are ahead."

Plaintiff then says "I want a lawyer" to which Burgin replies, "that's fine, you can get one, but you're gonna get charged for everything, and as soon as I get a second car here we're going to have someone stand by and I'm gonna get a search warrant for your house." Plaintiff says "no you're not" to which Burgin replies, in an elevated voice, "yeah, I am. You done told me you-." Plaintiff says that getting a warrant is not

easy to do. Burgin says "well, we'll see. I am getting a search warrant, I'm telling ya." Burgin says, "it's gonna get worse and worse for you."

Burgin continues to ask if Plaintiff will consent to the search. Plaintiff again asks if he can call a lawyer. Burgin says Plaintiff can call a lawyer "if you got one." Plaintiff says he does not have one. Burgin says, "okay, well then if you want a lawyer, I, I'm probably- done-."

Burgin was not done. Burgin continued to interrogate Plaintiff as Plaintiff stood there in handcuffs. Plaintiff then admitted that he had about a gram of meth and paraphernalia including broken pipes in the house. Burgin asks "do you want a lawyer or not," to which Plaintiff replies "[unintelligible] … I can't make any decisions."

Burgin says that he will get another officer on scene, and then "you can take us in there and show us what you got."

A few minutes later, as they wait for the second officer to arrive, Burgin asks Plaintiff "so, do you want to change you mind about an attorney, and sign a consent to search form, you take us in there, and show us what you want, what you got." Plaintiff then agrees to talk and agrees to the search. Shortly thereafter, upon further interrogation by Burgin, Plaintiff admits that he has sold meth.

Plaintiff then repeatedly asks Burgin to stop asking him questions, and Burgin keeps asking him questions, eliciting additional admissions about the meth Plaintiff has recently sold.

Burgin released Plaintiff when Plaintiff finally agreed to sign a form consenting to a search of Plaintiff's house. The consent-to-search form had a line for "Other" printed on it, and an adjacent box was checked. "Miranda Rights" is handwritten on the line next to the box. Burgin never provided Plaintiff *Miranda* warnings throughout the December 26, 2015, interaction, nor did any other officer.

Plaintiff testified that he felt he had no options other than signing the consent form and testified that he did not sign the form voluntarily.

Plaintiff testified he told Burgin self-incriminating lies, because he felt pressure from Burgin. Plaintiff testified he said what he thought Burgin wanted to hear.

II. ANALYSIS

A. Summary Judgment Standard

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." Fed. R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

In ruling on a motion for summary judgment, a district court "has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). In making this determination, the court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Singer v. Raemisch*, 593 F.3d 529, 533 (7th Cir. 2010).

However, a court's favor toward the nonmoving party does not extend to drawing inferences which are only supported by speculation or conjecture. See *Singer*, 593 F.3d at 533. In addition, this court "need not accept as true a plaintiff's *characterization* of the facts or a plaintiff's legal conclusion." *Wozniak v. Adesida*, 368 F. Supp. 3d 1217, 1232 (C.D. Ill. 2018) (emphasis in original), quoting *Nuzzi v. St. George Cmty. Consol. Sch. Dist. No. 258*, 688 F. Supp. 2d 815, 835 (C.D. Ill. 2010).

Summary judgment is the "put up or shut up" moment in a lawsuit, when a party must show what evidence it has that would convince a factfinder to accept its version of events. *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003). Therefore, to successfully oppose a motion for summary judgment, a party must do more than raise a metaphysical doubt as to the material facts. *Michael v. St. Joseph Cty.*, 259 F.3d 842, 845 (7th Cir. 2001). Instead, it must present definite, competent evidence to rebut the motion. *Id.*

Here, Defendants failed to timely respond to Plaintiff's motion, and their request for an extension of time to respond was denied. However,

> "…[A] nonmovant's failure to respond to a summary judgment motion, or failure to comply with [the local rules], does not, of course, automatically result in judgment for the movant." *Raymond* [*v. Ameritech Corp.*], 442 F.3d [600] at 608; *Reales* [*v. Consolidated Rail Corp.*], 84 F.3d [993] at 997. [Plaintiff] must still demonstrate that it is entitled to judgment as a matter of law. *Raymond,* 442 F.3d at 608. Although Keeton has not provided her own version of the facts, we still view all of the facts asserted by Morningstar in the light most favorable to Keeton, the nonmoving party, and we draw all reasonable inferences in her favor. *Adams v. Wal–Mart Stores, Inc.,* 324 F.3d 935, 937 (7th Cir.2003); *Curran v. Kwon,* 153 F.3d 481, 485–86 (7th Cir.1998).

Keeton v. Morningstar, Inc., 667 F.3d 877, 884 (7th Cir. 2012).

B. Plaintiff's Motion for Summary Judgment

1. *Count I - § 1983 Liability Against Defendant Burgin*

Plaintiff argues he is entitled to summary judgment as to liability on Count I of the Complaint, which alleges Burgin violated Plaintiff's constitutional rights.

a. Fourth Amendment Unlawful Entry

Plaintiff argues summary judgment as to liability is appropriate on his Fourth Amendment Unlawful Entry claim because Burgin entered Plaintiff's attached garage without a warrant, without exigent circumstances, and without voluntary consent. The court agrees.

The Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine arrest, even for a felony, and even with probable cause. *Hawkins v. Mitchell*, 756 F.3d 983, 992 (7th Cir. 2014). Warrantless in-home arrests are especially suspect when the underlying offense for which there is probable cause to arrest is relatively minor, typically a misdemeanor. *Id.*, citing *Reardon v. Wroan*, 811 F.2d 1025, 1028 (7th Cir. 1987) (per curiam).

The undisputed facts show that Burgin entered Plaintiff's home, without a warrant, without consent, and without any exception to the warrant requirement.

The court finds that Plaintiff's attached garage is curtilage, so Plaintiff enjoys the same protection there as he does in the rest of his house. Curtilage is "the area outside the home itself but so close to and intimately connected with the home and the activities

that normally go on there that it can reasonably be considered part of the home…." *United States v. French*, 291 F.3d 945, 951 (7th Cir. 2002). The Supreme Court has articulated a four-factor test to determine whether an area could be considered curtilage. "…[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301 (1987).

Here, the proximity of Plaintiff's attached garage couldn't be closer to the rest of his house: the two share a wall, a roof, and a walking door though which one can pass without leaving the combined structure.

The facts do not show whether there is an enclosure, such as a fence, that encompasses the home and the attached garage. But, since the walls and roof of the house are contiguous with those of the attached garage, the second factor also weighs in favor of the attached garage being curtilage.

The nature and uses of Plaintiff's attached garage include storage, cooking, science experiments, and parking. These uses are consistent with the sort of uses in which one would expect to have the same level of privacy as enjoyed in the home.

Finally, Plaintiff took steps to protect the area from observation by people passing by. The attached garage is fully enclosed and has a working overhead door that Plaintiff regularly kept closed.

There is no reasonable dispute that Plaintiff enjoys the same level of privacy in his attached garage as he does in the rest of his home.

Had he timely filed a Response, Burgin may have argued that he had Plaintiff's consent to enter the garage. "It is well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamante*, 412 U.S. 218, 219 (1973). But, consent must be "unequivocal and specific." *United States v. Cole*, 195 F.R.D. 627, 631 (N.D. Ind. 2000).

Here, there is no indication Plaintiff consented to Burgin entering. Plaintiff pulled up in his driveway and went inside the house. He closed the door. He then went through the house and into the garage to open the garage door so he could pull the car inside. As the overhead door went up Burgin stepped in, intentionally blocking Plaintiff from closing the door.

Burgin did not ask if he could come in. Plaintiff told Burgin to get out of his garage. Burgin continued to block Plaintiff from closing the overhead door even as Plaintiff told him to leave. Burgin refused to leave even though he knew that he had no legal basis to stay. "Society would recognize a person's right to choose to close his door on and exclude people he does not want within his home." *Hawkins*, 756 F.3d at 993, citing *United States v. Berkowitz*, 927 F.2d 1376, 1387 (7th Cir. 1991).

In Burgin's deposition, the following exchange took place:

Q: On December 26, 2016,[1] you did not have consent to enter [Plaintiff's] attached garage, did you?

A: I feel I did.

Q: And how do you feel you had consent?

A: When I walked up and the garage door opened and he came out to push me, as we were talking the rain was running down my neck so I stepped to the side, I told him not to touch me, that I was trying to step out of the rain. He, by his demeanor, he said okay. I felt like that was okay to come in.

Q: As a matter of fact, [Plaintiff] told you to get out of his garage, didn't he?

A: I don't recall exactly when he said that. But, yes, he did at one point.

During Burgin's testimony at the Motion to Suppress hearing in Plaintiff's criminal case, held November 29, 2016, Burgin's recollection was clearer. Burgin testified that he first made contact with Plaintiff as the garage door went up. Burgin testified that the very next thing that happened was "[Plaintiff] became aggressive toward me, he told me to get out of his garage. He came walking at me. When he extended his hand like this (indicating) and he was going to push me. And I told him not to touch me."

The bodycam video shows Plaintiff saying, "step- nope- get out of here," and Burgin walking around Plaintiff and into Plaintiff's garage. After he is in Plaintiff's

[1] It appears that Plaintiff's criminal defense counsel simply misspoke in referring to December 26, 2016, rather than December 26, 2015, the latter being the actual date of the incident underlying both Plaintiff's criminal case and this case.

garage, Burgin says "hold on, don't *touch* me, I was trying to get out of the rain." Plaintiff says "okay."

Burgin's testimony shows he knew he lacked consent to enter Plaintiff's garage. Plaintiff told him to leave. Plaintiff walked toward him with his hand or hands up in a pushing stance. Burgin stood in the garage door threshold knowing he was blocking the door from closing. Plaintiff again told Burgin to leave. Notwithstanding his testimony that he felt he had Plaintiff's consent to enter, Burgin's explanation of *why* he believed he had consent is illogical.

Had Burgin filed a Response he also may have contended that he was in hot pursuit, or that there were other exigent circumstances. Neither argument would be persuasive. "…[A]bsent exigent circumstances, a warrantless entry … is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." *Payton v. New York*, 445 U.S. 573, 587–88 (1980).

One kind of exigent circumstance is hot pursuit. "[H]ot pursuit means some sort of a chase." *United States v. Santana*, 427 U.S. 38, 42-43 (1976). In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), officers were called by bystanders after a drunk driver crashed his car. The driver had walked home. The officers went to the driver's home, entered without a warrant, and arrested the driver. The Supreme Court rejected the officers' argument that exigent circumstances authorized the warrantless entry.

The Court held:

> … an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, see [*Payton*], application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.

Welsh, 466 U.S. at 753.

The Court found the officers' claim of hot pursuit unconvincing, "because there was no immediate or continuous pursuit of the petitioner from the scene of a crime. Moreover, because the petitioner had already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to the public safety." *Id.*

Here, Burgin may have been pursuing Plaintiff, but he was clearly not in "hot pursuit." Burgin carefully backed out of a driveway where he was serving civil process, being over a half-mile behind Plaintiff ("seven or eight blocks") when he started driving in the direction Plaintiff was headed. Burgin did not activate his overhead lights or siren. Plaintiff had already returned home and closed his door by the time Burgin reached Plaintiff's house.

Plaintiff's crime of driving on a revoked license had ended. Burgin did not know whether that offense was a misdemeanor or felony. Burgin testified he could have sent a written summons for the driving on revoked license charge. Burgin testified he had some information about drug activity at Plaintiff's house, but there was no testimony that Burgin thought evidence would be destroyed, that there was any risk of imminent

injury to anyone whatsoever, or that any other exigency existed. To the extent Burgin had credible information about drug activity related to Plaintiff, after Plaintiff rebuffed Burgin the constitutionally sound path would have been to pursue a warrant.

Judgment as to liability is entered in favor of Plaintiff and against Burgin on Plaintiff's claim for unlawful entry in violation of the Fourth Amendment.

b. Fourth Amendment Unreasonable Seizure

"A Fourth Amendment seizure of a person occurs whenever a police officer by means of physical force or show of authority in some way restrains the liberty of a citizen." *Hawkins*, 756 F.3d at 992 (quotations omitted). "… [A]n unconstitutional entry into the home will vitiate the legitimacy of any search or seizure effected on that occasion because the privacy and solitude of the home are at the core of the Fourth Amendment's protection." *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1245 (7th Cir. 1994), citing *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 66 n.10 (1992).

Burgin seized Plaintiff when he stated "okay sir I am placing you under arrest," repeatedly commanded Plaintiff not to move, drew and pointed his Taser at Plaintiff, stated "we can do this the easy way or the hard way," and then handcuffed Plaintiff. Burgin's seizure of Plaintiff followed Burgin's unlawful entry into Plaintiff's attached garage as discussed above.

Because Burgin lacked a warrant or consent to enter and no warrant exception existed, Burgin's in-home seizure of Plaintiff was unconstitutional and unreasonable as a matter of law. *Hawkins*, 756 F.3d at 994.

Judgment as to liability is entered in favor of Plaintiff and against Burgin on Plaintiff's claim for unreasonable seizure in violation of the Fourth Amendment.

c. Fourth Amendment Unreasonable Force

Determining whether the force was 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) (internal quotation marks omitted). This reasonableness test "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." *Id.*

…

The test is objective reasonableness. *Graham*, 490 U.S. at 396 []. A plaintiff must show the officer's use of force was objectively excessive from the perspective of a reasonable officer on the scene under the totality of the circumstances. *Id.* at 396–97 []; *Bell v. Irwin*, 321 F.3d 637, 639 (7th Cir. 2003).

We evaluate excessive-force claims for objective reasonableness based on the information the officers had at the time. *Mendez*, 137 S. Ct. at 1546–47. "What is important is the amount and quality of the information known to the officer at the time he fired the weapon when determining whether the officer used an appropriate level of force." *Muhammed v. City of Chi.*, 316 F.3d 680, 683 (7th Cir. 2002) (citation omitted).

The actual officer's subjective beliefs and motivations are irrelevant. *Scott*, 346 F.3d at 756. "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Graham*, 490 U.S. at 397 [].

Also, we must refuse to view the events through hindsight's distorting lens. *Id.* at 396 []. We must consider the totality of the circumstances, including the pressures of time and duress, and the need to make split-second decisions under intense, dangerous, uncertain, and rapidly changing circumstances. *See Ford*, 855 F.2d at 1276.

Horton v. Pobjecky, 883 F.3d 941, 949–50 (7th Cir. 2018).

Here, a reasonable officer on the scene, considering the totality of the circumstances, would not have used *any* force against Plaintiff. As discussed above, Burgin's decisions to enter Plaintiff's house and to seize Plaintiff violated Plaintiff's constitutional rights.

It logically follows that Burgin's subsequent use of force against Plaintiff was also not objectively reasonable under the circumstances.

Plaintiff was legally within his attached garage when Burgin entered in violation of Plaintiff's Fourth Amendment rights, told Plaintiff he was under arrest, pointed his Taser at Plaintiff, aimed the laser sight at Plaintiff, twice stated "we can do this the easy way or the hard way," then handcuffed Plaintiff.

The court is mindful that the amount of force used by Burgin here pales in comparison to the levels of force often seen in unreasonable force claims. However, here, there was no "split second decision making," no rapidly changing circumstances, no evolving threats, no resisting, and indeed no lawful purpose for the use of any force whatsoever. Burgin's testimony makes clear that Burgin wanted to get inside Plaintiff's house because Burgin had information that Plaintiff had drugs in the house. For some unexplainable reason, instead of simply leaving and seeking a warrant after his attempt to gain entry by consent was rebuffed, Burgin entered anyway and proceeded to subdue Plaintiff and place him into custody.

Thus, Burgin's use of force in arresting Plaintiff was not objectively reasonable. See *Griffith-Guerrero v. Spokane Cty.*, 2017 WL 2786472, at *6 (E.D. Wash. June 27, 2017) (ruling that pointing guns at the plaintiff and handcuffing him was objectively unreasonable use of force where officers lacked a warrant and there was no warrant exception, and granting summary judgment as to liability in favor of the plaintiff).

Judgment as to liability is entered in favor of Plaintiff and against Burgin on Plaintiff's claim for unreasonable force in violation of the Fourth Amendment.

d. First Amendment Retaliation for Protected Speech

To make a *prima facie* case of retaliation for engaging in protected speech, "the plaintiff must show that (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation likely to deter such activity; and (3) the First Amendment activity was at least a motivating factor in the decision to impose the deprivation." *Hawkins*, 756 F.3d at 996 (citations omitted).

The "…First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *City of Houston, Tex. V. Hill*, 482 U.S. 451, 471-72 (1987).

Plaintiff contends that his verbal challenge to Burgin, in the form of telling him to "get out" of Plaintiff's garage, was protected speech and that Burgin's unreasonable seizure of Plaintiff was a deprivation likely to deter such activity.

The court finds Plaintiff is correct as a matter of law that far in his argument. Asserting one's right to privacy and solitude in one's own home is protected speech. See *City of Houston*, 482 U.S. at 472. And, arrest is a deprivation likely to deter such activity. *Id.* But the court disagrees with Plaintiff's inferential leap as to the third element of the *prima facie* case. Plaintiff argues that "Under these circumstances, the [c]ourt can find, as a matter of law, that Barrett's verbal orders for Burgin to get out was *at least a motivating factor* in Burgin's decision to draw his taser [sic] and strike [Plaintiff] with the laser beam in his neck/chest. After all, Burgin had an ulterior motive for coming in." (emphasis in original).

The court finds the Seventh Circuit's relevant holding in *Hawkins* applies directly here: "Yet we cannot further infer as a matter of law that the [protected speech] was a motivating factor in the decision to arrest [the plaintiff], so that question must be submitted to a jury." *Hawkins*, 756 F.3d at 997. While a jury could reasonably find that Plaintiff's speech was a motivating factor in his arrest, a jury could just as well find that Burgin was bent on arresting Plaintiff regardless of what Plaintiff said or did not say.

Judgment as to liability is denied on Plaintiff's claim against Burgin for retaliation for engaging in protected speech, in violation of the First Amendment.

2. *Count II – State Law Claims Against Defendant Burgin*

a. Battery

Under Illinois law, "[t]he tort of battery is defined as the unauthorized touching of another's person." *Boyd v. City of Chi.*, 880 N.E.2d 1033, 1043–44 (Ill. App. Ct. 2007); see also *Park v. Hudson*, 2018 WL 8803899, at *10 (C.D. Ill. Jan. 30, 2018), citing *McNeil v. Carter*, 742 N.E.2d 1277, 1281 (Ill. App. Ct. 2001) ("the elements of a battery must include an intentional act on the part of the defendants and a resulting offensive contact with the plaintiff's person.").

Burgin unlawfully entered Plaintiff's house, unlawfully seized Plaintiff, and used unreasonable force against Plaintiff, including handcuffing Plaintiff. The court finds Burgin committed an unauthorized touching of Plaintiff's person which was offensive to Plaintiff.

Judgment as to liability is entered in favor of Plaintiff and against Burgin on Plaintiff's state law claim for battery.

b. Assault

Under Illinois law, an assault is "an intentional, unlawful offer of corporal injury by force, or force unlawfully directed, under such circumstances as to create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented." *Yang v. Hardin*, 37 F.3d 282, 286 (7th Cir. 1994), quoting *Parrish by Bowker v. Donahue*, 443 N.E.2d 786, 788 (Ill. 1982).

Courts, including this court, have articulated the standard more directly: "…[A] common law claim of assault must include an allegation of a reasonable apprehension of an imminent battery, and the elements of a battery must include an intentional act on the part of the defendants and a resulting offensive contact with the plaintiff's person." *Park*, 2018 WL 8803899, at *10, citing *McNeil*, 742 N.E.2d at 1281.

Here, after unlawfully entering Plaintiff's garage, Burgin pointed his Taser at Plaintiff, pointed the laser sight at Plaintiff, and twice stated "we can do this the easy way or the hard way," then a short while later handcuffed Plaintiff, committing a battery in the process. Plaintiff's unrebutted testimony is that when Burgin aimed his Taser at Plaintiff, Plaintiff was terrified and "froze." The video corroborates Plaintiff's testimony that he "froze" at that point. The undisputed facts show that Burgin assaulted Plaintiff.

Judgment as to liability is entered in favor of Plaintiff and against Burgin on Plaintiff's state law claim for assault.

c. Trespass

Under Illinois law, "A trespass is an invasion in the exclusive possession and physical condition of land." *Millers Mut. Ins. Ass'n of Ill. v. Graham Oil Co.*, 668 N.E.2d 223, 230 (Ill. App. Ct. 1996). "One is not liable for an intentional trespass unless his acts pose a high degree of certainty that an intrusion of another's property will result." *Colwell Sys., Inc. v. Henson*, 452 N.E.2d 889, 892 (Ill. App. Ct. 1983) (quotation omitted).

Here, Burgin entered, and remained on, Plaintiff's real property without authorization. Burgin knew that he was not authorized to remain on Plaintiff's property, yet remain he did. The court finds Burgin intentionally invaded Plaintiff's right to exclusive possession of his home.

Judgment as to liability is entered in favor of Plaintiff and against Defendant Burgin on Plaintiff's state law claim for trespass.

d. Intentional Infliction of Emotional Distress

The Seventh Circuit has summarized the elements of intentional infliction of emotional distress as follows:

> Under Illinois law, a plaintiff may recover damages for intentional infliction of emotional distress only if she establishes that (1) the defendant's conduct was truly extreme and outrageous; (2) the defendant intended to inflict severe emotional distress (or knew that there was at least a high probability that its conduct would cause severe emotional distress); and (3) the defendant's conduct did in fact cause severe emotional distress. *Feltmeier v. Feltmeier*, 207 Ill.2d 263, 278 Ill.Dec. 228, 798 N.E.2d 75, 80 (2003). In defining the first element, the Illinois Supreme Court has held that "to qualify as outrageous, the nature of the defendant's conduct must be so extreme as to go beyond all possible bounds of decency and be regarded as intolerable in a civilized society." *Feltmeier*, 278 Ill.Dec. 228, 798 N.E.2d at 83. To avoid imposing liability for the rough and tumble of unpleasant—but not law-breaking—behavior, the case law instructs that " 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities' do not amount to extreme and outrageous conduct, nor does conduct 'characterized by malice or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.' " *Van Stan v. Fancy Colours & Co.*, 125 F.3d 563, 567 (7th Cir. 1997) (quoting *Pub. Fin. Corp. v. Davis*, 66 Ill.2d 85, 4 Ill.Dec. 652, 360 N.E.2d 765, 767 (1976)). And to avoid imposing liability for idiosyncratic and individualized reactions, "[w]hether conduct is extreme and outrageous is judged on an objective standard based on all the facts and circumstances of a particular case." *Franciski v. Univ. of Chi. Hosps.*, 338 F.3d 765, 769 (7th Cir. 2003).

Richards v. U.S. Steel, 869 F.3d 557, 566–67 (7th Cir. 2017).

Burgin's conduct was unlawful, but the court cannot decide, as a matter of law, that Burgin's conduct was "truly extreme and outrageous." And, much like on Plaintiff's First Amendment claim, the court cannot divine Burgin's mental state sufficiently to find that Burgin, as a matter of law, "intended to inflict severe emotional distress (or knew that there was at least a high probability that [his] conduct would cause severe emotional distress)." The severity of any emotional distress Plaintiff suffered is properly assessed by the jury rather than by this court. A reasonable jury could conclude that Burgin's behavior was simply unlawful, causing Plaintiff discomfort or distress below the level of "severe emotional distress."

Judgment as to liability is denied on Plaintiff's claim against Burgin for state law intentional infliction of emotional distress.

e. Illinois Civil Rights Act of 2006 ("ICRA")

"… [On] the face of the Illinois Civil Rights Act of 2006, it creates a civil cause of action where confessions have been compelled through force or threats of force, or where a person has suffered retaliatory action due to opposing an attempt to compel confession." *Hawkins v. City of Champaign, Ill.*, 2011 WL 2446312, at *6 (C.D. Ill. May 25, 2011), report and recommendation adopted, 2011 WL 2456626 (C.D. Ill. June 15, 2011) (citing 740 Ill. Comp. Stat. 24/5 and dismissing ICRA claim for failure to state claim).

Plaintiff points to no caselaw that would guide this court to find liability has been established here as a matter of law. Indeed, aside from the district court's ruling in

Hawkins, the only other case on Westlaw that cites the relevant provision of the ICRA is an Illinois Appellate Court case where the plaintiff voluntarily dismissed his ICRA claim. See *Sams v. Gildea*, 2014 Ill. App. (1st) 123044-U, ¶1.

Plaintiff argues that Burgin pointing his Taser at Plaintiff, twice stating "we can do this the easy way or the hard way," custodial interrogation of Plaintiff without providing Plaintiff *Miranda* warnings, ignoring Plaintiff's repeated requests to be taken to jail, ignoring Plaintiff's requests for a lawyer, and saying "its only gonna get worse for you," all together, are enough to find that Plaintiff's self-incriminating statements were "compelled."

Plaintiff's Fourth Amendment rights were violated, as discussed above. And, when Burgin drew his Taser, pointed the laser sight at Plaintiff, and stated "we can do this the easy way or the hard way," Burgin assaulted Plaintiff.

But, Plaintiff continued to maintain his innocence until after Burgin's threat of force with his Taser had concluded. Between 11:11:34 and 11:11:46 on the bodycam video, after Burgin re-holstered his Taser, Plaintiff repeatedly denies driving on a revoked license, telling Burgin that Burgin "must be mistaken." Further, Plaintiff denies doing drugs at 11:11:57.

Plaintiff begins to plead with Burgin *only after* Burgin tells Plaintiff that Plaintiff will be arrested for driving on a revoked license – a statement that this court does not believe is the kind of "force or threat of imminent bodily harm" contemplated by the ICRA.

Burgin offers not to arrest Plaintiff if Plaintiff will consent to a search of his house, and Plaintiff says "no." Plaintiff then says he is "just a user," and denies that he used any drugs that day. Burgin then tries to cajole Plaintiff into consenting to a search by saying he thought Plaintiff wanted to get his license back, which Plaintiff agrees is true. Nonetheless, Plaintiff again denies having drugs in the house, and in response to Burgin's offered "deal" that Plaintiff consent to a search in exchange for no driving while revoked charge, Plaintiff states "take me to jail." Burgin then handcuffs Plaintiff, searches Plaintiff over Plaintiff's objection, and finds what Plaintiff identifies as "pill powder." Burgin says Plaintiff will be charged with a felony, Plaintiff becomes upset, and then, at 11:15:15, in response to a question from Burgin, admits he *was* driving on a revoked license.

A few seconds later he admits that he had a plan to try to manufacture meth with the pill powder, and shortly after that he admits that he has some methamphetamine and paraphernalia in the house. Plaintiff is handcuffed at the time he makes these admissions. Burgin is not pointing a Taser at him, is not threatening him with physical force, and is not otherwise compelling him to answer by use of force or threat of force.

The "threats" that Burgin makes are threats of various types of criminal charges, including possession of a controlled substance, driving under the influence, and driving on a revoked license. Those threats are a type of coercion, but not the type, i.e. force or threat of imminent bodily harm, contemplated by the ICRA.

Here, though Plaintiff ultimately made self-incriminating statements, the court cannot find as a matter of law that because of Burgin's unlawful acts Plaintiff was "compelled to confess or provide information regarding an offense by force or threat of imminent bodily harm," as required by ICRA. A reasonable jury could find, taking all the circumstances together, that the lingering effects of Burgin's threat of force caused Plaintiff's confession. However, a reasonable jury could just as likely conclude that Plaintiff's fear of being prosecuted for a felony, or his fear of being unable to get his driver's license back due to another charge of driving on a revoked license, caused his self-incriminating statements.

Judgment as to liability is denied on Plaintiff's claim against Burgin for coerced confession in violation of the Illinois Civil Rights Act of 2006.

3. *Count III – Respondeat Superior Liability Against Defendant Jeff Wood*

Plaintiff moves for judgment against Defendant Edgar County Sheriff Jeff D. Wood based on a theory of *respondeat superior*.

> Pursuant to the theory of *respondeat superior,* an employer can be liable for the torts of his employee when those torts are committed within the scope of the employment. *Bagent*[*v. Blessing Care Corp.*], 224 Ill.2d at 163, 308 Ill.Dec. 782, 862 N.E.2d 985 [(Ill. 2007)]. Under *respondeat superior,* an employer's vicarious liability extends to the negligent, willful, malicious or even criminal acts of its employees, when those acts are committed within the scope of employment. *Bagent,* 224 Ill.2d at 163–64, 308 Ill.Dec. 782, 862 N.E.2d 985.
>
> Illinois courts look to the Second Restatement of Agency (the Restatement) for guidance in determining whether an employee's acts are within the scope of employment. *Bagent,* 224 Ill.2d at 164, 308 Ill.Dec. 782, 862 N.E.2d 985. The Restatement identifies three general criteria used in determining whether an employee's acts are within the scope of employment. The Restatement provides:

> "(1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master* * *[.]
>
> * * *
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228 (1958).
>
> This court has held that all three criteria of section 228 must be met in order to conclude that an employee was acting within the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. It is plaintiff's burden to show the contemporaneous relationship between the tortious act and the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985.

Adames v. Sheahan, 909 N.E.2d 742, 754–55 (Ill. 2009).

The court takes judicial notice of the fact that Jeff D. Wood is the Sheriff of Edgar County, and has been since he was first elected to that office in 2014. It is also undisputable that Defendant Burgin was at all times relevant employed by the Edgar County Sheriff's Department. Further, the court finds that the undisputed facts show that Burgin was engaged in the kind of conduct that he was employed to perform, that his tortious conduct occurred while he was on duty, and that his tortious conduct was actuated by a purpose to carry out the scope of his employment.

Judgment as to liability is entered in favor of Plaintiff and against Defendant Wood on Plaintiff's state law claims for assault, battery, and trespass.

IT IS THEREFORE ORDERED THAT:

1) Plaintiff's Motion for Partial Summary Judgment as to Liability (#68) is GRANTED in part and DENIED in part. Judgment is entered in favor of Plaintiff and against Defendant Burgin as to liability on the following claims:

a. Fourth Amendment unlawful entry.

b. Fourth Amendment unreasonable seizure.

c. Fourth Amendment unreasonable force.

d. State law assault.

e. State law battery.

f. State law trespass.

Judgment is further GRANTED in favor of Plaintiff and against Defendant Wood as to *respondeat superior* liability on the following claims:

a. State law assault.

b. State law battery.

c. State law trespass.

Judgment in favor of Plaintiff as to liability is DENIED as to all Defendants on the following claims:

a. First Amendment retaliation.

b. State law intentional infliction of emotional distress.

c. Illinois Civil Rights Act of 2006 coerced confession.

2) This case remains set for a final pretrial conference on February 3, 2020, at 11:30 a.m. and jury selection and jury trial on February 25, 2020, at 9:00 a.m., both in Courtroom A in Urbana.

ENTERED this 26th day of September, 2019.

s/ Colin Stirling Bruce
COLIN S. BRUCE
U.S. DISTRICT JUDGE