IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEMETRIUS C. MITCHELL	:	CIVIL ACTION
v.	:	
YEADON BOROUGH[1] and POLICE OFFICER ROBERT BOYDEN	:	NO. 01-1203

MEMORANDUM

Dalzell, J. February 22, 2002

This action stems from a confrontation between Police Officer Robert Boyden and plaintiff Demetrius Mitchell in which Boyden squirted pepper spray on Mitchell and arrested him. Mitchell has asserted claims of false arrest, excessive force, and state law torts. Boyden has moved for summary judgment, and for the reasons below, we will grant Boyden's motion in part.

I. Facts[2]

On the afternoon of May 18, 2000, two women, Rosie and Chavante, were in an argument. Evidently, Rosie accused Chavante of stealing her beeper. Mitchell Dep. at 14-15. Mitchell, afraid the argument would escalate into a physical confrontation, repeatedly urged the women to take their fighting to another neighborhood. Id. at 14-17. About ten or twelve people gathered

[1] Mitchell has withdrawn his claims against Yeadon Borough. See Order of July 2, 2001 (Doc. No. 10).

[2] We construe the facts in the light most favorable to Mitchell. See infra note 5. The record before us consists primarily of Mitchell's and Boyden's deposition testimony. Where conflicts exist, we have taken Mitchell's account of the facts.

on the sidewalk. Id. at 16; Boyden Dep. at 13.

Boyden, driving on Wycombe Avenue in a marked car on routine patrol, observed a crowd and immediately recognized that a fight was in progress. He assumed the disagreement was only verbal since he heard screaming and cursing but did not see punches or other violent exchanges. Boyden Dep. at 12-14. He slowed his car to a coast, allowing the crowd to disperse, which it did. Id. at 14, 17; Mitchell Dep. at 15-16. As members of the group walked away, Boyden observed one person, Mitchell, still speaking and gesturing. Boyden Dep. at 14-16.

Minutes later, Boyden received a radio call of "Fight." The address given was only about a block away from the address of the original altercation. Id. at 19, 22. As he drove on Bailey Road, he observed that the group had moved. Id. at 24. Once again, he heard screaming and cursing. He saw Mitchell standing on the sidewalk addressing the group, which was in the street. Id. at 24-26.

Boyden got out of his car and shouted at Mitchell, "You come here. I seen you out here twice now running off at the F'in mouth and I don't want to see you in this neighborhood no more." Mitchell Dep. at 21, 28.

Mitchell replied, "I live in this F'in neighborhood. I live around the corner." Id. at 28-29.

"[Boyden] started yelling and screaming and cursing. [Mitchell] just started yelling and screaming and cursing back."

Id. at 29. Boyden grabbed Mitchell's left arm. Mitchell snatched back his arm, and Boyden squirted Mitchell in the face with pepper spray. Id. at 29-30.

Mitchell started coughing and experienced burning in his skin and eyes. Id. at 32, 36. Boyden placed him in handcuffs and led him to the police car. Id. at 33-34.

At the police station, where Boyden and Mitchell arrived minutes later, Mitchell was immediately given products (decontaminate wipes, water, and a fan) to clean his face and eyes. Id. at 37-40. Boyden charged Mitchell with disorderly conduct, harassment, and resisting arrest. Boyden Dep. at 61-63; Delaware Co. Ct. of Common Pleas, Criminal Division Docket, in, Mem. L. in Supp. of Mot. Summ. J., Ex. D.

Mitchell pleaded guilty to harassment[3] and disorderly conduct.[4] He was assessed a two-hundred dollar fine for the

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[3] Pennsylvania law defines this offense as:

> (a) Harassment.-A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:
> (1) strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same....

18 Pa. C.S.A. § 2709(a).

[4] Pennsylvania defines this as:

> (a) Offense defined.-A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
> (1) engages in fighting or threatening, or

summary offenses. Id.; Tr. of Proceedings, Commonwealth v. Mitchell, No. Cr. 2153-00 (Ct. of Common Pleas, Delaware Co., Oct. 10, 2000).

II. Analysis[5]

As Mitchell makes claims for the federal consequences of what he contends was a false arrest and the use of excessive force in connection with that arrest, we shall consider those two

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> in violent or tumultuous behavior;
> (2) makes unreasonable noise;
> (3) uses obscene language, or makes an obscene gesture; or
> (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

18 Pa. C.S.A. § 5503(a).

[5] Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment we view the facts, and the inferences that can be made from them, in the light most favorable to the party opposing the motion for summary judgment. Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995).

The moving party bears the burden of proving that no genuine issue of material fact is in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party has carried this burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587 (emphasis omitted) (quoting Fed. R. Civ. P. 56(e)). The nonmoving party must present "more than a mere scintilla of evidence." Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989). He must come forward with enough evidence to enable a reasonable jury to find in his favor at trial. Id.; Groman, 47 F.3d at 633.

claims separately.

Mitchell brings his federal constitutional claims of false arrest and excessive force pursuant to 42 U.S.C. § 1983. "A prima facie case under § 1983 requires a plaintiff to demonstrate: (1) a person deprived him of a federal right; and (2) the person who deprived him of that right acted under color of state . . . law." Groman, 47 F.3d at 633 (footnote and citation omitted). Since Boyden does not dispute that, as a uniformed on-duty police officer, he was acting under state law, we turn our attention to the specific constitutional deprivations claimed.

A. False Arrest

Following Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), and Nelson v. Jashurek, 109 F.3d 142, 145 (3d Cir. 1997), plaintiffs may not bring civil damage actions which throw into doubt the validity of lawful convictions. One may challenge an unjust conviction by seeking reversal on direct appeal, expungement by executive order, a declaration of invalidity in a state proceeding, or the issuance of a writ of habeas corpus in a federal court. Heck, 512 U.S. at 486-87; Nelson, 109 F.3d at 146. But unless the conviction is overturned or invalidated by one of these avenues, it is lawful, and one may not commence a civil action complaining of it. One whose conviction is lawful may not file a civil damages action asserting unconstitutional conviction, or a claim which, if successful, "would necessarily

imply that the plaintiff's criminal conviction was wrongful." Heck, 512 U.S. at 486-87 & n.6.

Mitchell's claim of false arrest, if it is successful, will necessarily imply that his convictions were wrongful. Boyden arrested Mitchell for disorderly conduct, harassment, and resisting arrest. Mitchell pleaded guilty to two of these offenses, disorderly conduct and harassment. In Pennsylvania, a guilty plea has the same preclusive effect as a conviction after trial. DiJoseph v. Vuotto, 968 F. Supp. 244, 247 (E.D. Pa. 1997), aff'd, 156 F.3d 1224 (3d Cir. 1998). Having pleaded guilty to harassment and disorderly conduct, Mitchell must accept the consequences, which here means his § 1983 claim predicated on false arrest cannot stand.

B. Excessive Force

Mitchell's next constitutional claim, excessive force, is not foreclosed by the fact of his convictions. While he may not challenge Boyden's right to arrest him, he may challenge the manner the arrest was effected. Nelson, 109 F.3d at 146-47. Mitchell contends that by using pepper spray Boyden effected his arrest by using excessive force. Boyden asserts the affirmative defense of qualified immunity.

We must dispose of the qualified immunity defense as early in the proceedings as possible. Saucier v. Katz, 121 S. Ct. 2151, 2155-56 (2001). "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the

legal constraints on particular police conduct." Id. at 2158. Police officers are subject to immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Wilson v. Layne, 526 U.S. 603, 614 (1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Because qualified immunity is a defense not only from civil liability, but from the burdens associated with litigation, "it is effectively lost if a case is erroneously permitted to go to trial." Saucier, 121 S. Ct. at 2156.

The qualified immunity inquiry consists of two sequential steps. First, we must assess whether the officer violated a constitutional right. Second, if we find he did, or that a reasonable jury could so find, we must assess whether the constitutional right was clearly established; unless it was, the officer is entitled to immunity. Id. at 2155-56.

The Fourth Amendment prohibits officers from using objectively unreasonable force when making stops or arrests. Graham v. Connor, 490 U.S. 386, 389, 396-97 (1989). An officer's "right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Id. at 396. The question in every case is whether the force applied is 'objectively unreasonable.' Id. at 397; accord Sharrar v. Felsing, 128 F.3d 810, 820 (3d Cir. 1997).

We examine the totality of the circumstances, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396. We then judge the use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," making due "allowance for the fact that police officers are often forced to make split-second judgments" in circumstances that are "tense, uncertain, and rapidly evolving". Id. at 396-97.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 121 S. Ct. at 2156.

Thus, under Graham, we must examine all the circumstances, including the severity of the crimes, as to whether the suspect posed an immediate threat to safety, and whether he resisted arrest. 490 U.S. at 396. Against these circumstances, we must balance the level of force imposed. Id. We conclude a jury could not reasonably find that, in applying pepper spray, Boyden used objectively unreasonable force to effect Mitchell's arrest. Id.

To be sure, the crimes for which Mitchell was arrested -- harassment, disorderly conduct, and resisting arrest -- were not especially severe. The situation, however, posed a palpable

threat of harm. Boyden had observed an altercation. Regarding that altercation as only verbal, he at first allowed the group to disperse. Minutes later, he received a radio call of "Fight." Boyden thus had every reason to believe the fight may have become physical. Boyden did not know which members of the group might pose a threat, and who might be armed. He was alone. Mitchell became loud and aggressive. As Mitchell stated, "[Boyden] started yelling and screaming and cursing. And I'm like - I just started yelling and screaming and cursing back." Mitchell Dep. at 29. "I don't know how anybody else would take that but you just don't do anybody in that type of way." Id. at 74. Boyden grabbed Mitchell's arm to restrain or arrest him. Mitchell snatched his arm back.

Boyden was justified in applying force to effectuate a lawful arrest, and to prevent a tense and potentially explosive situation from escalating out of control. The force he imposed, pepper spray, was not particularly intrusive. As defendant has noted, Mitchell admits that he suffered no significant injury, and "[t]he use of pepper spray certainly has lingering effects but Plaintiff was treated immediately upon his return to the police station and never asked for medical treatment." Mem. L. in Supp. Mot. Summ. J. at 9.

Mitchell suggests that Boyden used unreasonable force because he applied the pepper spray for ten seconds. Mem. L. in Opp. to Mot. Summ. J. at 2-4. The duration of the pepper spray's

application is here (unsurprisingly) indeterminate. Boyden testified he applied the pepper spray for one second in accordance with police policy. Boyden Dep. at 39-40; Department Policy, Use of Cap-Stun, No. 92-034, at 63-64. Mitchell testified he was pepper-sprayed "a couple seconds"; "15 or 20 seconds"; and "between five and about ten seconds." Mitchell Dep. at 32. Moreover, he stated, "Once it first hit it started burning so I didn't really pay attention to how long he was spraying me." Id.

The crux of the excessive force inquiry is the quantum of force, which does not necessarily equate to the time Boyden had his finger on the trigger of the pepper spray. Mitchell was unquestionably exposed to a chemical inflammatory agent. He experienced coughing, a burning of the eyes and skin, and blurring vision. Id. at 32-36, 56. These effects abated quickly,[6] and Mitchell at no time requested medical attention. Id. at 55, 75.

Lastly, Mitchell suggests that Boyden unreasonably failed to warn Mitchell that he was under arrest, before grabbing his arm. Pl.'s Mem. of L. in Opp. to Mot. Summ. J. at 3. The argument seems to go that had Boyden given him such warning,

[6] Only residual effects remained after Mitchell cleaned his eyes and face on his arrival at the police station. His face still tingled. Id. at 57. His neck, chest, and shoulder burned, but he nevertheless declined to use the shower. Id. at 57-58. The area underneath his eyes supposedly remained swollen for about a week, but did not hurt. Id. at 72.

Mitchell would not then have snatched back his arm, and Boyden would not have needed to use pepper spray. This may well be true. On the other hand, any command may just as likely have been futile, as was Boyden's earlier directive to leave the neighborhood. There is no doubt that Boyden grabbing Mitchell's arm was reasonable. He applied minimal force to effect an arrest, and indeed Mitchell does not complain about that level of force. We cannot say that, under the circumstances, grabbing Mitchell's arm before telling him he was under arrest was unreasonable. Boyden had made a clear show of authority. He emerged from a marked police car, in uniform, and said, "You come here." Given this unmistakable show of law enforcement authority and the seizure that followed, § 1983 did not require Boyden to use any particular word formula in any particular sequence when Mitchell by his own admission resisted Boyden.

It is worth recalling here that a jury would have to be instructed that Mitchell was convicted of disorderly conduct and harassment and engaged in the relevant elements of those offenses. See Nelson, 109 F.3d at 145-46 (holding that, while a plaintiff's claim of excessive force does not inherently conflict with his conviction, a jury must be instructed on the elements of the crime in question inasmuch as necessary to avoid "the danger" that the jury return a verdict premised on factual findings

inconsistent with plaintiff's conviction)[7]; see also DiJoseph, 968 F. Supp. at 247 (holding that where plaintiff has pleaded guilty, the operative facts of his conviction are "those facts which at a minimum" are necessary to sustain the conviction). As noted, see supra note 3, one commits harassment when "with intent to harass, annoy or alarm another" he "strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same." Even if a jury were to find that Mitchell engaged in a minimum of conduct consistent with harassment -- for instance, threatening Boyden or threatening another -- these facts, combined with the facts we have already discussed in construing the record in Mitchell's favor, leave no serious doubt that a reasonable jury could not find that Boyden engaged in objectively unreasonable force when he applied pepper spray.

Having found no constitutional violation, we need not proceed to the second step of the qualified immunity analysis under Saucier -- i.e., whether the constitutional right was clearly established. In researching plaintiff's claim of excessive force, however, we came across no authority from our Court of Appeals that found a violation of a constitutional right under any circumstances similar to those here. Not surprisingly,

[7] Such a danger could come to pass here, for example, if the jury creditted Mitchell's account, and then found the use of pepper spray unreasonable because Mitchell was neither physically aggressive nor physically threatening.

Mitchell has cited none.

In two district court cases, the Court denied summary judgment to the defendant against plaintiffs' claims of excessive force regarding the use of pepper spray. In McNeil v. Koch, No. 98-4758, 1999 U.S. Dist. LEXIS 1140, at *2, 12 (E.D. Pa. Feb. 8, 1999), the plaintiff was in an altercation with another person, and, after it stopped, police officers sprayed her with pepper spray, without any warning. In Jackson v. Mills, No. 96-3751, 1997 U.S. Dist. LEXIS 14467, at *4-9 (E.D. Pa. Sep. 3, 1997), the police officer had no cause to arrest plaintiff, and therefore no cause to spray her with pepper spray when she resisted arrest. These cases are on their face distinguishable from ours and offer little guidance.

In McNeil, the police officers had no interaction with plaintiff, physical or verbal, hostile or otherwise, before pepper-spraying her. McNeil, 1999 U.S. Dist. LEXIS 1140, at *2. In Jackson, the officers had no basis for suspecting plaintiff of criminal activity. The person standing next to plaintiff, not plaintiff, apparently was engaging in disorderly conduct. Jackson, 1997 U.S. Dist. LEXIS 14467, at *5.

On the other hand, a long line of precedent, before and after this incident, underscores the right of an officer to resort to force in arresting a suspect who is resistant. See, e.g., Modugno v. Pennsylvania State Police, No. 00-3312, 2001 WL 1382279, at *1-2, 7 (E.D. Pa. Nov. 6, 2001) (holding that an

officer was justified in using pepper spray and other force in effecting car stop, where the suspect refused verbal orders and shouted angrily, because he was entitled to believe the suspect might become physically resistant); Brown v. Gilmore, No. 01-1749, 2002 U.S. App. LEXIS 892, at *14-15 (4th Cir. Jan. 23, 2002) (holding that the minimal force of handcuffing plaintiff, dragging her to police car, and pulling her into a cruiser was reasonable to effect her arrest when, during a "crowded scene," she disobeyed the officer's order to move her car); Foster v. Metro. Airports Comm'n, 914 F.2d 1076, 1077-78, 1082 (8th Cir. 1990) (holding that the application of minor force, even after removing the suspect from the car, was reasonable when during a traffic stop the suspect became defiant and refused to leave the car); Britschge v. Harmison, 947 F. Supp. 435, 437-40 (D. Kan. 1996) (finding that slapping plaintiff's face after putting him in handcuffs was reasonable, where plaintiff became "highly upset, uncooperative, and argumentative" in a "potentially volatile group situation"); cf. Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir. 1997) (emphasizing that, in addition to actual physical injury to the officers, "other relevant factors include the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at

one time").

III. State Law Torts

Having disposed of Mitchell's federal claims,[8] we decline to exercise our supplemental jurisdiction to determine the state law consequences of Boyden's use of pepper spray. See 28 U.S.C. § 1367(c).

[8] On June 15, 2001, Mitchell withdrew his Monell claim against Yeadon Borough without prejudice to its reassertion after the close of discovery if the evidence so warranted. Mitchell has not resurrected his Monell claim against the Borough, which we dismissed without prejudice on July 2, 2001.

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POLICE OFFICER ROBERT BOYDEN	:	NO. 01-1203

ORDER

AND NOW, this 22nd day of February, 2002, upon consideration of defendant Robert Boyden's motion for summary judgment and plaintiff Demetrius Mitchell's response thereto, and in accordance with the foregoing Memorandum, it is hereby ORDERED that:

1. Boyden's motion for summary judgment is GRANTED as to Count I ("Federal Civil Rights Violations");

2. JUDGMENT IS ENTERED in favor of defendant Robert Boyden and against plaintiff Demetrius Mitchell on Count I;

3. The Court DECLINES under 28 U.S.C. § 1367(c) to exercise supplemental jurisdiction over the remaining state law claims in Count II, and they are DISMISSED WITHOUT PREJUDICE; and

4. The Clerk shall CLOSE this case statistically.

BY THE COURT:

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Stewart Dalzell, J.