UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOHN AMEGAVLUIE,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 91-210 P***
	)	
ANDREW KENNEDY, et al.,	)	
	)	
Defendants	)	

MEMORANDUM DECISION [1]

I. INTRODUCTION

This action, asserting state-law assault and section 1983 civil rights claims against two South Portland police officers, the chief of police and the city itself, was originally filed in state court and subsequently removed. Summary judgment was granted in favor of the chief of police and the city on May 13, 1992. A bench trial was held on July 7 and 8, 1992 on all claims against the two officers. At the close of the plaintiff's case, the plaintiff's oral motion to dismiss all claims against officer Steven Green was granted. Remaining for decision are the claims asserted against officer Andrew Kennedy.

II. FINDINGS OF FACT

[1] Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

I find the following facts. On February 15, 1991 the plaintiff, then a student at Southern Maine Technical College and a resident mate aboard the college's training vessel Aqualab III, performed various student chores aboard the vessel until approximately 6 p.m. Nearabout 8 p.m., after having had some dinner and a shower, he drove alone to the Old Port area of Portland where he visited two establishments that serve intoxicating liquors. At the first of these establishments, the Tropical Penguin, he consumed at least two beers. He then spent almost two hours at The Moon where he claims not to have had anything to drink. Soon after midnight he left the Old Port to return to the Aqualab III.

As the plaintiff proceeded easterly along Broadway in South Portland, past its intersection with Cottage Road, officer Andrew Kennedy, who was on routine patrol, observed the plaintiff swerve across the center line four times and, on the last cross-over, appear almost to strike an on-coming vehicle. Kennedy activated his blue lights and, in response, the plaintiff pulled over stopping just short of the intersection of Broadway and Spring Street. The officer pulled up behind the plaintiff, left on his blue lights and headlights and activated his ``take down" lights which are located on the light bar atop the cruiser and serve to help illuminate the area in front of the cruiser.

After communicating by radio that he had pulled a vehicle over and reading off the vehicle registration number, Kennedy exited his cruiser and observed that the plaintiff had

stepped out of his vehicle as well. Upon meeting in the roadway the plaintiff immediately asked why he had been pulled over. Kennedy told the plaintiff that he would talk to him next to the plaintiff's vehicle off the traveled portion of the roadway. While standing at the front of the plaintiff's car, the defendant explained to the plaintiff why he had stopped him. Kennedy then asked the plaintiff how much he had had to drink and where he had been. The plaintiff acknowledged that he had consumed a ``couple" or a ``few" drinks in the Old Port.

Detecting a strong odor of alcohol on the plaintiff's breath, the defendant asked the plaintiff if he would submit to some field sobriety tests. He agreed. Three tests were administered. The plaintiff failed at least two of them.[2]

Upon completion of the tests, Kennedy told the plaintiff that he was under arrest for operating under the influence and radioed for a backup. The defendant then asked the plaintiff to place his hands on the hood of his car so that he could handcuff him. When the defendant attempted to cuff him, the plaintiff brushed him aside and started to walk away in the direction of the corner of Spring Street and Broadway, which was also the direction of the Aqualab III, explaining that he was only going up the street. Kennedy caught up with the plaintiff, grabbed his right arm, brought him back to his car after some scuffling in the roadway and bent him backward over the hood by pressing an arm and

[2] One of the tests the plaintiff failed was an alphabet test. Although officer Kennedy appears not to have noticed the plaintiff's distinct accent -- the plaintiff is a native of Nigeria --, I am satisfied that Kennedy accurately perceived the plaintiff to have omitted three blocks of letters in his recitation.

shoulder against his chest in order to handcuff him. The plaintiff, however, kept his hands in a raised position behind his head frustrating the defendant's efforts. The plaintiff then managed to raise himself up to a standing position causing Kennedy to push him back onto the hood by leveraging himself against the plaintiff a second time, again in the hope of being able to cuff him. The plaintiff continued to offer resistance until an individual named Mark Usinger, who had pulled up across the street, apparently startled both parties when he shouted to Kennedy to stop what he was doing.[3] Almost at the same moment, Kennedy managed to cuff the plaintiff's right hand and his backup, officer Steven Green, arrived. Green immediately assisted Kennedy by using both of his hands to

[3] Usinger testified that when he first drove past the stop scene he observed the parties talking in what appeared to be a peaceful manner, but that when he glanced in his rear view mirror just before making a planned right turn onto Preble Street, which is approximately 600 feet distant from the stop scene, he saw Kennedy slamming the plaintiff into the hood of the plaintiff's car prompting him to make a U-turn and return to the scene. He further testified that in the 15 or 20 seconds it took him to drive back to the scene he continued to observe the defendant pushing the plaintiff onto the hood of the plaintiff's car and that Kennedy stopped what he was doing only when Usinger yelled to him to stop. He also stated that the plaintiff was not hitting back or resisting, as far as he could tell. By contrast, Renaldo Aspiras, an entirely credible eyewitness to all that transpired during the stop, substantially corroborated Kennedy's account of the plaintiff's resistance to arrest and handcuffing, as well as Kennedy's own use of measured force in dealing with that resistance. After evaluating all of the evidence and having in mind that Usinger witnessed, initially from a substantial distance, only an isolated portion of the entire event, I conclude that Usinger's characterization of Kennedy's conduct is an overstatement, however honestly arrived at, of what actually occurred.

force the plaintiff to bend his left elbow, which, as part of his resistance, the plaintiff was holding in a rigid position, with the result that Green was able to bring the plaintiff's left arm down and behind his back where the defendant was then able to attach the other

cuff. The plaintiff was taken to police headquarters where he continued to act in an uncooperative manner leading the police to transport him to the Cumberland County Jail.

The plaintiff suffered some injury to his right shoulder during the scuffling which preceded his handcuffing at the stop scene, as a consequence of which he experienced some discomfort of unknown duration. He also claims to have suffered emotional distress. A school nurse gave him some pain killers, but the plaintiff never sought any other medical attention or emotional counseling.

III. CONCLUSIONS OF LAW

A. ' 1983

The plaintiff seeks compensatory and punitive damages under 42 U.S.C. ' 1983 for officer Kennedy's asserted use of excessive force against him during the investigatory stop and ensuing arrest. Such claims are to be analyzed under the Fourth Amendment's ``objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386 (1989). The Court of Appeals for the First Circuit has explained the standard as follows:

> The pertinent question is whether the force used was ``objectively reasonable" under all the circumstances; that is, whether it was consistent with the amount of force that a reasonable police officer would think necessary to bring the arrestee into custody. Proper application of the test of ``objective reasonableness" requires the courts to pay careful attention to the facts and circumstances of the particular case at hand, including the severity of the crime, whether the suspect posed an immediate threat to the safety of the officers or others, and whether he was actively resisting arrest or attempting to evade arrest by flight. We must keep in mind that not every push or shove rises to the level of a constitutional violation, and that police officers making arrests are often forced to make split-second decisions about the amount of force needed to effect an arrest while operating under tense, dangerous and rapidly-changing circumstances.

Gaudreault v. Municipality of Salem, Mass., 923 F.2d 203, 205 (1st Cir. 1990) (citing *Graham*, 490 U.S. at 396-97, and *Martin v. Gentile*, 849 F.2d 863, 869 (4th Cir. 1988), *cert. denied*, 111 S. Ct. 2266 (1991)).

At the outset it is important to make clear what this case is not about. Contrary to the characterization of Mark Usinger, officer Kennedy did not repeatedly slam the plaintiff against his car. The plaintiff himself explained through his counsel at the close of the evidence that in his view the defendant used excessive force not by slamming him but by sequentially pressing him backwards against the hood of his car in an inhumane manner and without provocation. He argues that what officer Kennedy did made no sense given Kennedy's avowed purpose of handcuffing him and the unlikelihood of the defendant's being able to accomplish that result by so positioning him.

Whether or to what extent officer Kennedy might have facilitated the handcuffing of the plaintiff had he positioned him otherwise is not the issue. The conduct of police officers is to be judged in the context of the circumstances as they actually presented themselves, not antiseptically with the benefit of hindsight. The fact is the plaintiff actively resisted Kennedy's efforts to arrest and handcuff him, first by walking away and then by persistently holding his arms in a manner which frustrated Kennedy's attempts to join his hands together and affix the cuffs and by raising himself, through the application

of counterforce, to an erect standing position after having been purposefully placed in a bent position against the car. Despite Kennedy's clearly communicated announcement to the plaintiff that he was under arrest and request that the plaintiff place his hands on the hood of the car so he could be handcuffed, the plaintiff persisted in a course of conduct that led Kennedy to conclude, justifiably, that some amount of force was necessary to effect the plaintiff's arrest. The amount of force used by Kennedy was proportionate to the degree of resistance offered by the plaintiff and was consistent with that which a reasonable police officer would have thought necessary to bring the plaintiff into custody.

In sum, I conclude that the amount of force used by the defendant was ``objectively reasonable" in the circumstances.

B. ASSAULT

The findings I have made regarding the amount and manner of force used by officer Kennedy in effecting the plaintiff's arrest largely determine the outcome of the plaintiff's state-law assault charge against officer Kennedy.

Police officers enjoy absolute immunity from personal civil liability under the Maine State Tort Claims Act, 14 M.R.S.A. '' 8101-18, for discretionary functions.[4] *Id.* at ' 8111(1)(C). The only

[4] The Maine State Tort Claims Act reads, in relevant part, as follows:

> **1. Immunity**. Notwithstanding any liability that may have existed at common law, employees of governmental entities shall be absolutely immune from personal civil liability for the following:
>
> . . .
>
> **C.** Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is

exception to this discretionary-act immunity is if an intentional act is performed in bad faith. *Id.* at ' 8111(1)(E). There is no dispute that the conduct complained of involves a discretionary act. *See* Plaintiff's Trial Brief at 2; *see also Leach v. Betters*, 599 A.2d 424, 426 (Me. 1991) (``The parties agree that a police officer performs a discretionary function within the meaning of ' 8111(1)(C) when making a warrantless arrest."). Officer Kennedy has met his burden of proof that he did not act in bad faith. ``Bad faith" has been interpreted by the Maine Supreme Judicial Court as involving wanton or oppressive conduct. *Leach*, 599 A.2d at 426. Far from being wanton or oppressive, officer Kennedy's conduct was an appropriately measured response to the amount of resistance offered by the plaintiff. In any event, the amount of force used by the defendant was no more than he reasonably thought to be necessary and, as in *Leach*, there is no suggestion of ill will, bad faith or improper motive. *Id.*

IV. ORDER

> performed is valid;
> . . . or
> **E.** Any intentional act or omission within the course and scope of employment; provided that such immunity shall not exist in any case in which an employee's actions are found to have been in bad faith.
>
> The absolute immunity provided by paragraph C shall be applicable whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question, regardless of whether the exercise of discretion is specifically authorized by statute, charter, ordinance, order, resolution, rule or resolve and shall be available to all governmental employees, including police officers and governmental employees involved in child welfare cases, who are required to exercise judgment or discretion in performing their official duties.

14 M.R.S.A. ' 8111(1).

For the foregoing reasons, it is ***ORDERED*** that judgment is ***GRANTED*** in favor of the remaining defendant, Andrew Kennedy.

Dated at Portland, Maine this 14th day of July, 1992.

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David M. Cohen
United States Magistrate Judge