

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

**DUANE MCGOWAN,**  
**Plaintiff**

v.

**TIMOTHY WADE and CITY OF  
PHILADELPHIA,**  
**Defendants**

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:  
: **CIVIL ACTION**  
: **NO. 02-8396**  
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**MEMORANDUM OPINION AND ORDER**

**RUFE, J.**

**September 20, 2004**

On November 8, 2002, Plaintiff Duane McGowan filed the instant lawsuit, alleging that Defendant Philadelphia Police Officer Timothy Wade used unreasonable force when he shot Plaintiff on November 13, 2000. The case went to trial before a jury on January 26, 2004.<sup>1</sup> After a week-long trial, the jury found in favor of Defendant Wade, and the Court entered judgment accordingly.<sup>2</sup> Presently before the Court is Plaintiff's Motion for New Trial. For the following reasons, Plaintiff's Motion is denied.

**I. FACTUAL BACKGROUND**

In setting forth the following factual background, the Court draws all reasonable inferences in favor of Defendant, the verdict winner.<sup>3</sup>

On the afternoon of November 13, 2000, Defendant and his partner, Officer Chris

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<sup>1</sup> The jury deliberated on two counts: 1) a cause of action under 42 U.S.C. § 1983 for the use of unreasonable force while acting under the color of state law; and 2) a cause of action for malicious prosecution based on the criminal charges filed against Plaintiff after the shooting.

<sup>2</sup> Plaintiff did not proceed against Defendant The City of Philadelphia at trial, so Wade is the only remaining defendant.

<sup>3</sup> Cf. Blum v. Witco Chem. Corp., 829 F.2d 367, 372 (3d Cir. 1987) ("Because a jury determined the issue, our scope of review is limited to examining whether there is sufficient evidence to support the verdict, drawing all reasonable inferences in favor of the verdict winner.").

Tancredi, were in police uniform on patrol in a marked police vehicle. At approximately 3:00 p.m., Officers Wade and Tancredi received a radio call about a disturbance between an adult female and an adult male in the vicinity of Bridge Street and Torresdale Avenue in Philadelphia, Pennsylvania. En route to the location of the disturbance, the officers received a second radio call informing them that the male was armed with a knife.

Upon arrival at the scene, Defendant observed Plaintiff holding a knife in his right hand while using his left hand to hold a woman against a wall.<sup>4</sup> The blade of the knife was visible as Plaintiff held it down by his side. Plaintiff also appeared to have dried blood on his face. Officer Tancredi, who was driving, pulled the police vehicle onto the sidewalk, with the driver's side door so close to Plaintiff that Tancredi remained in the car out of concern for his own safety.

Defendant then stepped out of the passenger side of the vehicle, keeping the vehicle between himself and Plaintiff, and yelled at Plaintiff to stop what he was doing. At this time, the woman, who was screaming for help, freed her arm from Plaintiff's grip and ran around the police vehicle to the passenger side where Defendant was standing. Defendant then walked to the back of the police vehicle, and with his hand on his holstered gun told Plaintiff to drop the knife and not to run. In response, Plaintiff stared blankly at Defendant, giving Defendant the impression that Plaintiff was intoxicated or on narcotics.<sup>5</sup> A few seconds later, Plaintiff began running down Torresdale Avenue holding the knife at his side.

Defendant chased after Plaintiff on foot while yelling at him to stop running and to

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<sup>4</sup> Plaintiff testified that the woman was his ex-girlfriend and the mother of his daughter. 1/27/04 N.T. at 60.

<sup>5</sup> Plaintiff admitted to having ingested 40-70 Xanax pills at approximately 4:00 p.m. the day before the incident. 1/27/04 N.T. at 74.

drop the knife. During the chase, Defendant drew his gun out of its holster and ran with it by his side. Eventually, Plaintiff turned into an alley, and Defendant followed. After running approximately thirty yards down the alley, Defendant, who had been gaining on Plaintiff during the chase, was immediately behind Plaintiff. According to Defendant, Plaintiff then took a stutter step, slowing suddenly, and swung the knife back toward Defendant's chest. In response, Defendant raised his gun and fired one shot into Plaintiff's torso.<sup>6</sup> Plaintiff ran a few more steps and then fell to the ground where Defendant handcuffed him.<sup>7</sup>

After restraining Plaintiff, Defendant ran to find a phone or radio to call for back-up and medical assistance for Plaintiff because Officer Tancredi, who had remained with the police vehicle and had yet to arrive in the alley, had their only police radio. Defendant called 9-1-1 using the cordless phone of a man who had come into the alley after the shooting. He then returned to where Plaintiff was lying on the ground and attempted to secure the area because a number of bystanders had gathered. In doing so, Defendant picked up the knife, which was lying next to Plaintiff, to prevent any of the on-lookers from taking it. According to Defendant, the first officers to arrive at the scene were Officers Frank Pavgouzas and Frank Tepper, with Officer Tancredi arriving shortly thereafter. A few minutes later, Sergeant Andrew Smith arrived and told Defendant to return the knife to where he had found it. After enough officers had arrived to secure the scene, Defendant left.

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<sup>6</sup> Defendant testified that at the time, he believed that he had shot Plaintiff in the stomach. 1/27/04 N.T. at 167. However, Plaintiff presented uncontradicted expert medical testimony that the bullet had entered through Plaintiff's back.

<sup>7</sup> Plaintiff's testimony differed substantially from Defendant's. In particular, Plaintiff testified that he took the knife out of his pocket and threw it to the ground while he was running in the alley. 1/27/04 N.T. at 68. He denied swinging the knife at Defendant.

Plaintiff was subsequently charged with aggravated assault, possession of an instrument of crime, simple assault, and recklessly endangering another person, all relating to the incident in the alley on November 13, 2000.<sup>8</sup> Defendant was the complainant and testified at both the preliminary hearing and the trial in the Court of Common Pleas for Philadelphia County. On January 16, 2003, Plaintiff was acquitted of all charges.

## **II. STANDARD OF REVIEW**

“A new trial may be granted to all or any of the parties and on all or part of the issues . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.”<sup>9</sup> A court should grant a new trial “to prevent a miscarriage of justice only when the jury’s ‘verdict is contrary to the great weight of the evidence,’ or when a ‘court commits an error of law which prejudices a substantial right of a party.’”<sup>10</sup>

## **III. DISCUSSION**

### **A. The Evidence in Support of the Verdict**

Because only the parties witnessed the actual shooting, this trial came down to a credibility contest between Plaintiff and Defendant, with Plaintiff alleging that Defendant shot him in the back unprovoked, and Defendant alleging that he shot Plaintiff in response to Plaintiff’s swinging a knife at him from three feet away.<sup>11</sup> Although other fact witnesses testified, none of them

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<sup>8</sup> 1/27/04 N.T. at 111.

<sup>9</sup> Fed. R. Civ. Proc. 59(a).

<sup>10</sup> Ellis v. Nat’l R.R. Passenger Corp., No. Civ.A.02-8059, 2004 U.S. Dist. LEXIS 10207, at \*3-4 (E.D. Pa. June 3, 2004) (quoting Roebuck v. Drexel Univ., 852 F.2d 715, 736 (3d Cir. 1988) and Paul Morelli Design, Inc. v. Tiffany & Co., 200 F. Supp. 2d 482, 484 (E.D. Pa. 2002), respectively).

<sup>11</sup> As Plaintiff’s counsel informed the jury at the outset of his closing argument, “you’re going to have to evaluate credibility, because I don’t have to tell you, either it happened the way that Bernie Newton, Jr. and Duane McGowan said it happened or it happened the way Officer Timothy Wade said it happened. There’s not a way to

witnessed the actual shooting, so their testimony was helpful only insofar as it corroborated or contradicted the parties' testimony about what occurred before and after the shooting. Nevertheless, Plaintiff argues that a new trial is warranted because the jury's verdict was against the great weight of the evidence.

The majority of Plaintiff's argument is focused on attacking the credibility of Defendant and Officer Pavgouzas. Plaintiff's counsel voiced many of the same credibility arguments to the jury in his closing statements, providing the jury with Plaintiff's version of the facts to consider in its deliberations.<sup>12</sup> Plaintiff now essentially asks the Court to rule that the jury's credibility determinations were incorrect. The Court declines to engage in such an exercise. The Court properly charged the jury with the responsibility of sifting through the contradictory evidence, and the jury fulfilled its duty. Despite the alleged inconsistencies between Defendant's testimony and other evidence, the jury was perfectly within its rights to find in favor of Defendant.<sup>13</sup> As it is not within the province of this Court to upset the credibility determinations of a jury, Plaintiff's Motion for a New Trial is denied on this ground.

## **B. The Crime Scene Log and Officer Tancredi**

At trial, both Defendant and Officer Pavgouzas testified that Pavgouzas was the first

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reconcile those two versions, so you're going to have to consider that and decide what the truth was in this situation." 1/28/04 N.T. at 145. At the time of the incident, Bernie Newton, Jr. was in his bedroom which had a window overlooking the alley. Mr. Newton testified that he saw Defendant chasing Plaintiff down the alley. However, Mr. Newton was not looking when the shot was fired.

<sup>12</sup> See, e.g., 1/28/04 N.T. at 153-54.

<sup>13</sup> See United States v. Rockwell, 781 F.2d 985 (3d Cir. 1986) ("It is well settled that where there is a conflict or contradiction of evidence, the question should be submitted to the jury under proper instructions from the court. 'It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts.' The law will not countenance a usurpation by the court of the function of the jury to decide the facts and to assess the credibility of the witnesses.") (quoting Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 35 (1944)).

officer to arrive at the scene after the shooting. Plaintiff contends that this testimony contradicted the testimony of Officer Tancredi at Plaintiff's criminal trial, where Officer Tancredi testified that he was the first officer on the scene. Plaintiff's counsel attempted to impeach Defendant and Officer Pavgouzas using a document entitled "Crime Scene Log," which contained a list of officers and the times they allegedly arrived on the scene of the shooting. According to the Crime Scene Log, Officer Tancredi arrived at 3:00 p.m. and Officer Pavgouzas arrived at 3:15 p.m. However, both Defendant and Officer Pavgouzas testified similarly that they had never seen the log, nor the police form used for the log, and had no idea who had drafted the log. Accordingly, based on the defense's objections to the lack of foundation for the log, the Court did not allow it to be admitted into evidence.<sup>14</sup>

After the defense presented the testimony of Defendant and Officer Pavgouzas, Plaintiff's counsel first informed the Court of his desire to call Officer Tancredi as a rebuttal witness to lay a foundation for the admission of the Crime Scene Log.<sup>15</sup> However, because Officer Tancredi was no longer a Philadelphia police officer, neither Plaintiff's counsel nor Defense counsel were able to locate him in time for him to testify on the following day of trial. The next morning, Plaintiff's counsel expressed willingness to call Sergeant Smith, who was still a Philadelphia police officer,

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<sup>14</sup> The Court takes issue with Plaintiff's allegation that the following objection from Defense counsel somehow impugned Plaintiff's counsel's credibility by insinuating that Plaintiff's counsel fabricated the Crime Scene Log: "I object to [Plaintiff's counsel] testifying as to where this document came from. The witness hasn't been able to identify it, and I'm - - I am not willing to accept the - - [Plaintiff's counsel's] representation as to where it came from." 1/27/04 N.T. at 141. Following this objection, the Court spoke with counsel at sidebar out of the hearing of the jury. The Court fails to see how Defense counsel's proper objection to Plaintiff's counsel's attempt to question a witness about the contents of a document for which counsel had not laid a foundation could be construed as implying that Plaintiff's counsel fabricated the document. Had Defense counsel truly made such an implication, the Court would have taken immediate action, possibly even declaring a mistrial if the infraction was especially egregious. However, in this instance, no such action was necessary or appropriate.

<sup>15</sup> Plaintiff's counsel told the Court that his main desire was to get the Crime Scene Log into evidence, and that he believed Officer Tancredi would be able to lay a foundation for the log's admission as a business record. See 1/28/04 N.T. at 80.

instead of Officer Tancredi as a witness to lay the proper foundation for admission of the log.<sup>16</sup> However, the parties were also unable to locate Sergeant Smith to have him testify that day. At this point, understanding that Plaintiff's main goal was to present evidence to the jury contradicting Defendant and Officer Pavgouzas' testimony that Officer Pavgouzas was first on the scene, the Court offered Plaintiff the alternative of reading into evidence the relevant portions of Officer Tancredi's testimony at the criminal trial. Plaintiff's counsel accepted the Court's suggestion and read two pages of the transcript of Officer Tancredi's testimony to the jury.<sup>17</sup>

Plaintiff now contends that he was prejudiced because Defendant and Officer Pavgouzas manufactured their testimony with the knowledge that they could not be impeached by either Officer Tancredi or the Crime Scene Log. This argument fails because Plaintiff waived his right to call Officer Tancredi to testify about the Crime Scene Log when he accepted the Court's alternative of reading Officer Tancredi's testimony from the criminal trial to the jury. Having agreed to this solution, Plaintiff cannot now contend that his case was prejudiced by his inability to call Officer Tancredi as a rebuttal witness. As such, Plaintiff is not entitled to a new trial on this ground.

Even if Plaintiff did not waive his right to call Officer Tancredi to testify, the error was harmless. Plaintiff wanted to present Officer Tancredi and/or Sergeant Smith solely for the purpose of admitting the Crime Scene Log,<sup>18</sup> which Plaintiff contends proves that Defendant and Officer Pavgouzas falsely testified that Pavgouzas was the first officer to arrive at the scene. Plaintiff argues that the Crime Scene Log provides conclusive proof that Officer Tancredi was the

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<sup>16</sup> 1/28/04 N.T. at 86-90.

<sup>17</sup> The portion of Officer Tancredi's testimony that Plaintiff's counsel read to the jury included the following statement: "It was only me and Officer Wade that were there to secure the scene." 1/28/04 N.T. at 143.

<sup>18</sup> See 1/28/04 N.T. at 80.

first to arrive at the scene.<sup>19</sup> However, even if Plaintiff is correct, whether Officer Tancredi or Officer Pavgouzas was first to arrive in the alley is secondary to the main issue of this case—whether Plaintiff swung the knife at Defendant before Defendant shot him. Defendant testified that Plaintiff swung the knife at him, and the jury found this testimony credible. The Crime Scene Log, if it had been admitted, would not have contradicted this testimony. Thus, any error the Court made in failing to allow the Crime Scene Log into evidence was harmless and did not result in a miscarriage of justice. Accordingly, Plaintiff is not entitled to a new trial.

#### **IV. CONCLUSION**

For the foregoing reasons, the jury’s verdict did not result in a miscarriage of justice, and Plaintiff is not entitled to a new trial. An appropriate Order follows.

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<sup>19</sup> On its face, the Crime Scene Log is ambiguous as to the arrival times of the officers. In addition to containing corrections and crossouts in the column listing what time each officer arrived, the log states that “Wade/Tancredi” arrived at 3:00 p.m. In all likelihood, this entry refers to when Officers Tancredi and Wade arrived on the sidewalk where they first confronted Plaintiff. It does not reveal when Officer Tancredi arrived in the alley after the shooting, since the officers did not arrive in the alley at the same time, as the log states.

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**ORDER**

**AND NOW**, this 20th day of September, 2004, upon consideration of Plaintiff Duane McGowan's Motion for New Trial [Doc. #42], Defendant Timothy Wade's Response in Opposition thereto [Doc. #57], Plaintiff's Reply [Doc. #58], Defendant's Sur-Reply and Motion to Strike Plaintiff's Reply Exhibits 1, 2, 3, and 5 [Doc. #59], and Plaintiff's Sur-Reply [Doc. #60], after review of the trial transcripts [Docs. ## 51-56], and for the reasons set forth in the attached memorandum opinion, it is hereby **ORDERED** as follows:

1. Plaintiff's Motion for New Trial [Doc. #42] is **DENIED**;
2. Defendant's Motion to Strike Exhibits [Doc. #59] is **DISMISSED AS MOOT**;
3. The Clerk of Court shall mark this case **CLOSED**.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**