

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

EARON WHICHARD, : CIVIL ACTION
Plaintiff :
v. :
CHELTENHAM TOWNSHIP, ET AL., :
Defendants : NO. 95-CV-3969

MEMORANDUM & ORDER

J.M. KELLY, J.

SEPTEMBER , 1997

At trial held in this matter from December 2nd through 6th, 1996, the jury found in favor of all Defendants and against Plaintiff on all counts. Plaintiff now seeks to have the Court enter judgment in his favor as a matter of law, or in the alternative, Plaintiff seeks a new trial.

Plaintiff, Earon Whichard ("Whichard"), filed his Complaint arising from an incident on September 13, 1994, where he was shot by Defendant James Howard ("Howard"), an officer of the Cheltenham Township Police Department. Trial proceeded against Howard on a Fourth Amendment claim of excessive use of force under 28 U.S.C. § 1983, as well as state law claims of assault, battery and intentional infliction of emotional distress. Whichard also proceeded at trial against Cheltenham Township ("Cheltenham") and Chief of Police Stephen Ott ("Ott") on a claim that he was injured as the result of a custom, policy or practice of Cheltenham and Ott, as Chief of Police, was responsible for that custom, policy or practice.

I. LEGAL STANDARD

A. NEW TRIAL

The purpose of a motion for a new trial, pursuant to Fed. R. Civ. P. 59, is to allow the court to reevaluate the basis for an earlier decision. Tevelson v. Life and Health Insurance Co. of America, 643 F. Supp. 779, 782 (E.D. Pa. 1986), aff'd, 817 F.2d 753 (3d Cir. 1987). Since granting a motion for a new trial acts to overturn a jury verdict, the court will not set aside the jury's verdict unless "manifest injustice will result if the verdict is allowed to stand." Emigh v. Consolidated Rail Corp., 710 F. Supp. 608, 609 (W.D. Pa. 1989). To grant a motion for a new trial, the court must find "that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." Nebel v. Avichal Enterprises, Inc., 704 F. Supp. 570, 574 (D.N.J. 1989). Therefore, a new trial may be granted even where judgment as a matter of law (JMOL) is inappropriate. Roebuck v. Drexel University, 852 F.2d 715, 735-36 (3d Cir. 1988). Fed. R. Civ. P. 50(b) allows a motion for JMOL to be joined with a motion for a new trial. See Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 250-51 (1940).

B. JUDGMENT AS A MATTER OF LAW

JMOL, pursuant to Fed. R. Civ. P. 50, is appropriate only where, as a matter of law, a jury's verdict was not supported by sufficient evidence to allow a reasonable juror to arrive at the

verdict. Link v. Mercedes-Benz of North America, 788 F.2d 918, 921 (3d Cir. 1986). In making the determination to grant JMOL, the court must find that as a matter of law, "the record is critically deficient of the minimum quantity of evidence from which the jury might reasonably afford relief." Simone v. Golden Nugget Hotel and Casino, 844 F.2d 1031, 1034 (3d Cir. 1988). The party prevailing at trial is entitled to the benefit of all reasonable inferences that can be drawn from the evidence in order to determine that there is any rational basis for the verdict. Bhaya v. Westinghouse Electric Co., 832 F.2d 258, 259 (3d Cir. 1987). JMOL is only appropriate when there is no evidence or reasonable inference that can be drawn supporting the verdict. SCNO Barge Lines, Inc. v. Anderson Clayton & Co., 745 F.2d 1188, 1192-93 (8th Cir. 1984).

II. FACTS

The evidence produced at trial, taken in the light most favorable to the prevailing Defendants, established the following facts.¹ On the evening of September 13, 1994, there was an armed robbery at an Amoco Station on Cheltenham Avenue. Howard received a radio report of the armed robbery and drove to the area of 65th and Mascher Streets, where he observed Cheltenham Police Officer Dinnien struggling with one suspect and another suspect was

¹ Obviously, Whichard could draw a different factual scenario and the efforts of both Plaintiff's counsel and Defense counsel at trial create the possibility of different factual scenarios. To the extent that Whichard argues that there was sufficient evidence for the jury to find in his favor, that argument may be correct. Sufficient evidence, however, is not sufficient to grant JMOL or a new trial.

standing nearby. Officer Dinnien indicated that Howard should apprehend the second suspect. The second suspect, who was Whichard, started running toward Howard and then veered off into a nearby lawn. Howard placed a priority call, drew his gun, and chased Whichard while ordering him to stop. While on the lawn, Howard came within a foot of Whichard, Whichard swung his arm at Howard and Howard ducked and dropped to one knee.

The chase continued across the street where Whichard tried to climb the fence into the yard of Cardinal Dougherty High School. As Whichard tried to climb the fence, he told Howard he would shoot him. Howard ordered Whichard to stop or he would shoot. Howard grabbed Whichard with one hand at the back of the trousers. Whichard kicked at Howard and then either fell upon or jumped upon Howard. Howard fell to the ground and Whichard fell on top of him. Howard dropped his gun, then grabbed the gun and shot Whichard, aiming at his white shirt which was about ten feet away.

Cheltenham's Police Department conducts internal investigations of incidents that involve the discharge of a weapon by a police officer. There is no "Internal Affairs Division," per se, within the Department, however, the command staff of the Department conducts these internal investigations. In this case, the Department investigated the shooting of Plaintiff by Howard, and the command staff concluded that Howard's use of force was consistent with Cheltenham's policies.

Howard has received extensive training and fully complied with certification requirements. Howard has also met the yearly,

state mandated training update requirements and has received regular in-service training regarding the use of force.

III. DISCUSSION

Whichard presents 21 separate bases in support of his motion for a new trial or JMOL, but in a Memorandum of Law subsequently filed with the Court, Whichard distills his arguments to five reasons he argues require the Court to interfere with the jury's verdict. The reasons argued in the Memorandum of Law are: 1) Defendants used peremptory challenges to strike jurors because of their race, 2) the evidence presented at trial does not support the jury's verdict that Whichard was not injured as a result of a custom, policy or practice of Cheltenham, 3) Cheltenham does not have a specific disciplinary procedure for officers who misuse excessive deadly force, thereby creating an atmosphere that tolerates unconstitutional conduct, 4) the evidence presented at trial does not support the jury's verdict that Whichard was not injured as a result of Cheltenham's failure to train its police officers and 5) the Court improperly allowed evidence to be admitted concerning Whichard's involvement in the underlying robbery of the Amoco station.

A. RACE-BASED PEREMPTORY CHALLENGES

Whichard alleges here, for the first time, that Defendants exercised race-based peremptory challenges, causing the trial to take place before a jury panel that was all-white. It is undisputed that Whichard did not object to Defendants' peremptory challenges during jury selection. Whichard argues that race-based

peremptory challenges create such a fundamental, constitutional flaw within his trial that his failure to contemporaneously object to Defendant's use of peremptory challenges must be excused, in essence meeting a "plain error" standard of review.

The unconstitutionality of the use of race-based peremptory challenges in a criminal trial was set forth in Batson v. Kentucky, 476 U.S. 79 (1986). Under Batson, a criminal defendant who believes the prosecutor is using race-based peremptory challenges must, during jury selection, request that the prosecutor articulate a race-neutral explanation for peremptory strikes. The trial court may then determine whether the prosecutor's proffered reason for excluding jurors is in fact a pretext for race-based use of peremptory strikes. Id. at 96-98. Batson has been extended to include civil litigants. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

In Virgin Islands v. Forte, 806 F.2d 73 (3d Cir. 1986), the court held that a criminal defendant who failed to raise a Batson claim until appeal had waived the issue. The requirement of a contemporaneous objection allows the court and the parties to reconsider and possibly change their course of action while there is still time. Virgin Islands v. Forte, 806 F.3d at 75. Further, a contemporaneous objection assures that there is a full record on the Batson issue. Virgin Islands v. Forte, 806 F.3d at 76. Further, failure to raise an issue of race-based peremptory challenges did not constitute plain error since the trial court carefully examined the venire members to determine if any members

harbored racial prejudices, thereby otherwise insuring that the jury was free from racial prejudices. Id at 76-77.

In the present case, it is clear that Whichard has waived his Batson claim by failing to raise it until the present post-trial motions. The Court also exercised an abundance of caution by conducting the voir dire in this case in order to insure that Whichard's claim would be reviewed by a jury that would not be biased by Whichard's race, as well as factors such as Whichard's status as a convicted criminal and Howard's status as a police officer. Accordingly, coupled with Whichard's failure to raise a Batson objection contemporaneous with voir dire, there were sufficient safeguards to ensure that Whichard's claim was not tried before a biased jury, thereby precluding overturning the jury's verdict based upon plain error.

B. CLAIMS AGAINST CHELTENHAM & OTT

Whichard's arguments that Cheltenham and Ott should be held liable as a matter of law, or in the alternative that Whichard's claims against them should be re-tried require little discussion. There was more than sufficient evidence for the jury to determine that Whichard was not injured as a result of a custom, policy or practice of Cheltenham. The jury could properly find that even though Cheltenham does not have a specific disciplinary procedure for officers who misuse excessive deadly force, the lack of such a procedure was not a cause of Whichard's injuries. Also, there was sufficient evidence presented at trial for the jury to determine that Cheltenham adequately trained its police officers.

C. WHICHARD'S INVOLVEMENT IN THE UNDERLYING ROBBERY

Whichard argues that Defendants and the Court precluded Whichard from receiving a fair trial by telling the jury that Whichard was convicted of the underlying robbery of the Amoco station. The question of whether an officer acted reasonably in an excessive use of force case requires an analysis of "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." Graham v. Connor, 490 U.S. 386, 397 (1989). "Reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the vision of 20/20 hindsight." Graham v. Connor, 490 U.S. 386, 396 (1989).

During voir dire, the Court informed the venire that Whichard had been convicted of the robbery of the Amoco station, in order to determine whether any of the potential jurors would be unduly influenced by that fact or had knowledge of the robbery. Review of the transcript of the trial of this matter reveals that the first evidence presented of Whichard's conviction of the robbery at the Amoco station was presented upon direct examination. Whichard v. Cheltenham Twp., Trial Transcript, 13:16-14:1 (Dec. 3, 1996). During cross-examination of Whichard, the Court took great care to prevent Defendants from presenting evidence that a gun had been used in the robbery and had later been found by the police.

In opening as well as closing instructions by the Court, the jury was instructed that even though Whichard had § 1983 claims against Cheltenham, Ott and Howard, the jury was required to judge

the different defendants under different standards. The jury was further warned that some evidence that may be relevant to one or more defendants may not be relevant to all defendants and for this reason, it was extremely important for them to wait until the end of the case before they decide upon the liability of the defendants. The reasonableness of Officer Howard's conduct was to be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Because the test is one of "objective" reasonableness, the jury was instructed to focus their inquiry on the facts and circumstances that confronted Officer Howard at the time of the shooting.

Given that the jury was twice instructed how to view the § 1983 claim against Howard, the jury was aware that it must determine Whichard's claim against Howard based upon what Howard knew at the time of the chase and shooting. The jury's verdict is supported by the evidence since there was evidence presented that Howard responded to a radio report of an armed robbery, identified Whichard as a suspect, chased Whichard, had two altercations with Whichard, was threatened by Whichard, temporarily lost control of his gun and believed that he was either in danger of being harmed by Whichard or that Whichard would escape. The relevant evidence available to the jury concerning what Howard knew at the time of the shooting, coupled with the explicit instructions that the jury should only consider facts and circumstances available at the time of the shooting, show that the jury's verdict was consistent with the evidence presented and supported by the law as instructed.

Further, Whichard made a tactical decision to raise his conviction in the underlying robbery during Whichard's direct examination. Since the matter was, probably wisely, raised first through Whichard's testimony, it would have been improper for the Court to preclude Defendants from cross-examination upon the subject.

IV. CONCLUSION

While there was contradictory evidence presented at trial concerning the facts surrounding Howard shooting Whichard, the evidence presented provides a rational basis for the jury verdict on all counts. Further, Whichard failed to follow the technical requirements of a Batson challenge that would have allowed the Court to evaluate the reason for the alleged race-based peremptory challenges. The Batson challenge has therefore been waived. Steps taken by the Court to ensure an impartial jury, however, demonstrate that even if the jury was improperly constituted, it was still a fairly constituted jury. Finally, the jury was well instructed on the factors that it should consider concerning Whichard's § 1983 claim against Howard and the verdict in favor of Howard was a reasonable result from the evidence presented.