

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

<p>JAMES NELSON, III, Plaintiff,</p> <p style="text-align:center">v.</p> <p>CHIEF OF TRANSIT POLICE RICHARD EVANS, et al., Defendants.</p>	<p style="text-align:center">CIVIL ACTION</p> <p style="text-align:center">No. 97-2700</p>
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ORDER & MEMORANDUM

AND NOW, this 15th day of September, 1997, upon consideration of the Defendants' Motion for Summary Judgment, and the response thereto, it is hereby **ORDERED** that the said motion is **GRANTED**.

DISCUSSION

Background

After receiving complaints about auto thefts and break-ins, SEPTA assigned two of its Police Officers, defendants Rubin and Sammons, to surveil the SEPTA parking lot located at 5300 Bustleton Avenue, Philadelphia. Def.'s Mot. Ex. 1 at 95, 108. At approximately 11:00 a.m., Rubin observed a burgundy car suspiciously circling the lot. Id. at 96. Nelson, the driver of the burgundy car, and Clayton, the passenger, exited the automobile. Id. at 97-99. Nelson approached a gray car, and subsequently broke into it. Id. at 99. Nelson and Clayton then got back into their burgundy car. Id. at 102.

The officers radioed defendant Maslin, a Police Lieutenant, and informed him that a car theft was in progress. Id. at 146. Maslin and his partner went into the parking lot; Maslin

approached Nelson's car on foot and his partner followed in a SEPTA police vehicle. Id. at 148. Rubin, Sammons, and Maslin all yelled, "Stop, police." Id.

At that point, Nelson accelerated from a stop in Maslin's direction. Id. at 150. According to Maslin, he believed that his life was in danger, and thus fired two rounds while trying to get out of the way. Id. at 151. Maslin was struck by the vehicle. Id. Maslin sustained a lateral tibial plateau fracture and Nelson was shot in the shoulder. Def.'s Mot. Ex. 2 at 63; Compl. at 4.

Nelson drove out of the parking lot, and Maslin and his partner pursued him on Roosevelt Boulevard. Def.'s Mot. Ex. 1 at 151-52. The SEPTA vehicle headed off Nelson's car, and Maslin got out of the vehicle. Id. at 153. Maslin testified that once again Nelson's car headed towards him and he thought Nelson was going to run him over. Id. Maslin discharged about nine shots, and as he started to fire, Nelson reversed the car down Roosevelt Boulevard at a high rate of speed. Id. at 181. Apparently Nelson was not struck by any of these bullets. See Compl. at 5. Nelson then ran into a restaurant where he was arrested. Id.

On November 25, 1995, in a nonjury criminal trial, Nelson was convicted of aggravated assault, simple assault, recklessly endangering another person, receiving stolen property, and unauthorized use of an automobile. See Def.'s Mot. Ex. 3. The judge read the assault charges as part of an unbroken chain of events, rather than separate incidents (i.e., one at the parking lot and one on Roosevelt Boulevard). See Def.'s Mot. Ex. 1 at 294. Nevertheless, in reaching his verdict, the judge specified that he found Nelson guilty of simple assault for the parking lot incident, aggravated assault for the incident on Roosevelt Boulevard, and reckless endangerment for all of Nelson's conduct. Id. at 295.

Nelson filed this pro se § 1983 claim, alleging that the defendants used excessive force in effectuating his arrest. Defendants have filed for summary judgment, claiming that Maslin's actions were objectively reasonable under the Fourth Amendment.¹ For the reasons stated below, the motion is granted.

Discussion

Summary Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits 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). At the summary judgment stage, the court does not weigh the evidence and determine the truth of the matter. Rather, it determines whether or not there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party has the burden of showing there are no genuine issues of material fact, Gans v. Mundy, 762 F.2d 338, 340-41 (3d Cir. 1985), and, in response, the non-moving party may not rely merely upon bare assertions, conclusory allegations, or suspicions. Fireman's Ins. Co. v. DeFrensne, 676 F.2d 965, 969 (3d Cir. 1982).

Fourth Amendment Standard

Excessive force claims are analyzed under the Fourth Amendment's reasonableness standard. See Graham v. Connor, 490 U.S. 386, 395 (1989). While the reasonableness test "is not capable of precise definition or mechanical application, . . . its proper application requires

¹ Defendants did not raise the qualified immunity defense, and thus, this court will not address the issue.

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. at 396 (citations omitted). The reasonableness of the officer’s actions must be evaluated “from the perspective of the reasonable officer at the scene, rather than with 20/20 vision of hindsight.” Id. This calculus must allow “for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.” Id. at 396-397. As the Sixth Circuit has summarized:

[U]nder Graham, [the court] must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. [The court] must never allow the theoretical sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992).

Officer Maslin’s actions were objectively reasonable. In the parking lot, when Maslin stood in front of plaintiff’s car, plaintiff admits that he “took [his] foot off the brake pedal.” Compl. at 4. Clearly, Maslin’s fear that Nelson might try to hit him with the car was justified in light of the fact that Nelson actually did hit him with the car. Nelson’s conduct clearly threatened Maslin’s life and resulted in a conviction for recklessly endangering another person and simple assault.² Def.’s Mot. Ex. 1 at 295; Ex. 3. Thus, Nelson did pose an immediate threat

² Recklessly endangering another person is defined as “conduct which places or may place another person in danger of death or serious bodily injury.” 18 Pa. C.S. (continued...)

to Maslin and he was attempting to evade arrest. It was reasonable for Maslin to shoot at Nelson under these circumstances.

Maslin also acted reasonably when he fired at Nelson on Roosevelt Boulevard. Once again, Maslin was directly in front of Nelson's car and a reasonable officer would have felt that Nelson posed an immediate threat to his safety. Indeed, based on Nelson's conduct on Roosevelt Boulevard, the state court convicted Nelson of aggravated assault on two separate grounds -- assaulting a police officer and attempting to cause bodily injury with a deadly weapon -- as well as reckless endangerment.³ Def.'s Mot. Ex. 1 at 295; Ex. 3. Thus, the state court determined beyond a reasonable doubt that Nelson either intentionally or knowingly tried to harm Maslin. Thus, Maslin's shooting at Nelson was reasonable. See also Smith, 954 F.2d at 347 (affirming the granting of summary judgment in favor of an officer who used deadly force to apprehend a motorist who led the officer on a high speed chase and struck the officer's car with his own); O'Toole v. Kalmar, No. 85-C-7380, 1990 WL 19542, at * 8 (N.D. Ill. Feb. 23, 1990) (holding the police officer's actions in shooting the plaintiff were reasonable as a matter of law where the plaintiff had a deadly weapon and indicated his intention to use it).⁴

²(...continued)
§ 2705.

³ A person commits aggravated assault if he "attempts to cause or intentionally or knowingly causes bodily injury to [a police officer], in the performance of duty" or "attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon." 18 Pa. C.S. §§ 2702(a)(3), (a)(4).

⁴ While this court does not read plaintiff's complaint as asserting claims for false arrest, false imprisonment, or malicious prosecution, it is clear that those claims are barred by Heck v. Humphrey. See 114 S. Ct. 2364, 2372 (1994).

Nelson's complaint alleges that one SEPTA police officer, the one that he hit with his car, fired at him. See Compl. at 4-5. This officer has been identified as Officer Timothy Maslin. See Def.'s Mot. Exs. 1, 2. As the plaintiff does not allege any conduct on behalf of the other defendants that involves any force, much less excessive force, summary judgment in favor of Chief Evans, Officer Rubin, Officer Samanns (Sammons), and Officer Zarko is appropriate. To the extent that Nelson's argument was that these defendants had a duty to prevent Maslin from shooting him, this claim cannot stand absent a constitutional violation. See O'Toole, 1990 WL 19542, at * 10 (granting summary judgment on plaintiff's claim that officers on the scene had a duty to prevent one officer from shooting the plaintiff after holding that the shooting officer had not employed excessive force).

BY THE COURT:

MARVIN KATZ, J.