

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

AARON HOLBROOK, et al. : CIVIL ACTION
: :
v. : :
: :
CITY OF PHILADELPHIA, et al. : NO. 97-6161

MEMORANDUM AND ORDER

Fullam, Sr. J.

June , 1999

The jury returned a verdict in favor of the defendants in this civil rights action. Plaintiff has filed a Motion for Judgment as a Matter of Law, or for a New Trial. The motion is subject to dismissal under Local Rule 7.1(e), because plaintiff's counsel has failed to order or supply a transcript of the trial testimony, or to seek relief from that requirement. Because plaintiff is incarcerated, and his retained counsel is presumably operating on a contingent-fee basis, I shall nevertheless attempt to address the merits of the post-trial motions.

A local resident telephoned the Philadelphia Police Department to inform them that a group of youths were loitering on a street corner, immediately adjacent to her home, and were smoking marijuana. This had been a recurring problem for the caller.

When the patrol car arrived on the scene, the assembled youths dispersed. Plaintiff, who had been a member of the group, began to leave the scene rapidly, ignoring the police officer's

request for an interview. It is undisputed that plaintiff was (illegally) armed with a handgun, which was stuck in the belt area of his trousers. When pursued by the police officer, plaintiff turned and withdrew the weapon from his belt area. It is undisputed that the weapon was discharged. The defense evidence was to the effect that plaintiff aimed the weapon at the pursuing officer and fired at his pursuer. Plaintiff contended that he dropped the weapon and it discharged accidentally.

Immediately thereafter, the several police officers at the scene subdued plaintiff, took him to a police station and thereafter to a hospital emergency room. Plaintiff was charged with unlawful firearms possession, and with assault on the police officer and resisting arrest. He was convicted in state court, and is now serving a prison sentence for those infractions.

In the present case, plaintiff is suing the arresting officer and the City of Philadelphia for violations of his constitutional rights. Plaintiff alleged that the police officers exerted unreasonable and unnecessary force in subduing him, and that they continued to abuse him physically after he was no longer putting up any resistance, after his arrival at the police station, and even in the emergency room of the hospital.

The police officers testified that they used only that amount of force which was reasonably necessary to overcome plaintiff's resistance. There was eyewitness testimony from

civilians which would support either version.

Plaintiff does not dispute the fact that he struggled with the officers (including kicking at them) but contends that he was only trying to defend himself against their unjustified assaults. The (presumably relatively impartial) hospital records of the emergency room reflect that, after arrival at the emergency room, plaintiff refused to cooperate with hospital personnel, and that they found it necessary to sedate him in order to make it physically possible to treat his injuries. Although plaintiff was kept in the hospital for three or four days, the injuries observed and treated during his stay were more nearly consistent with the police version of the fracas than with the testimony of plaintiff - and, in particular, the exaggerated version espoused by plaintiff's counsel.

In short, this was a purely factual dispute, for resolution by a jury. The jury has spoken.

As he did throughout the trial, in his post-trial submissions counsel for plaintiff seems to disregard the concept that the amount of force which is objectively reasonable for the police to exercise in any given situation varies in accordance with the nature and seriousness of the perceived threat to the safety of the police officers and other persons in the vicinity. A person who, while fleeing from the police, draws a firearm which is discharged in their general direction and in the

immediate presence of large numbers of civilians, undoubtedly provides a reasonable basis for the exercise of a greater degree of force than would be reasonable in less parlous circumstances. In my view, although a reasonable jury could conceivably have resolved this case in favor of the plaintiff, the verdict in favor of the defendants finds ample support in the evidence.

Plaintiff's claims of trial error require little discussion. After one day of testimony, one of the eight jurors originally selected failed to appear for the second day of trial, because severe winter weather interrupted train service and he was unable to reach the courthouse. With the concurrence, or at least acquiescence, of counsel, I directed the trial to proceed with only seven jurors. After the verdict was announced, counsel for plaintiff, for the first time, objected to the absence of the juror in question, and now seeks a new trial on the theory that the Court committed reversible error in proceeding with only seven jurors.

Since no transcript of that portion of the trial has been made available, I do not know whether the excusal of the juror was fully documented in the transcript. But I do distinctly recall, and defense counsel verifies, that both sides were afforded an opportunity to object to the juror being excused, and acquiesced in the decision to proceed with only seven jurors. In any event, the Court had discretion to excuse

the juror, and the circumstances certainly justified that decision.

Plaintiff complains that the Court unduly prejudiced his case by informing the jury that the claims of plaintiff's mother had been dismissed from the case (because she lacked standing to pursue a claim for violation of her son's constitutional rights, and because none of the named defendants was involved in a separate incident of alleged assault and battery upon her person, which had been alleged). But, in view of counsels' opening speeches, and the testimony of plaintiff's mother, it was entirely appropriate to explain the situation so that the jury would not be unduly mystified, or waste time in speculating what the reasons might be. It is inconceivable that this explanation could have prejudiced plaintiff's case in any way.

Plaintiff's counsel may also be asserting that the Court demonstrated hostility to him, in various other ways. The portions of the trial transcript which plaintiff's counsel has supplied do not demonstrate any such hostility. I do recall that plaintiff's counsel did not endear himself to the Court by failing to appear on time, without apology or explanation; and the situation was somewhat exacerbated by the fact that the explanations tendered by counsel's secretary, when my staff tried to ascertain his whereabouts, differed from the explanations he

ultimately provided in response to the Court's demands, after his arrival. But all of these contretemps occurred in the absence of the jury, were not communicated to the jury, and had no impact on the merits of plaintiff's case.

Finally, it bears mention that, through the trial, plaintiff's counsel persistently stressed his own version of the pertinent events, in utter disregard of the actual testimony of the witnesses. This same approach is reflected in his post-trial submissions, (which frequently cite the transcript of the state criminal trial as if that were the testimony which had been presented in this court); the actual evidence, as opposed to the description of the evidence contained in plaintiff's brief, fully justified the verdict which was rendered by the jury. The post-trial motions will be denied.

An Order follows.

