

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

DIANE DAVIS, Administratrix : CIVIL ACTION
of the Estate of JERMAINE DAVIS, :
Plaintiff, :
 :
v. :
 :
SOUTHEASTERN PENNSYLVANIA :
TRANSPORTATION AUTHORITY, et al, :
Defendants. : No. 00-5076

MEMORANDUM AND ORDER

J. M. KELLY, J. DECEMBER , 2001

Presently before the Court is a Motion For Summary Judgment filed by the Defendants, Southeastern Pennsylvania Transportation Authority ("SEPTA"), SEPTA Police officer Thomas Ellingsworth ("Ellingsworth") and SEPTA Police officer Joaquim Ramos ("Ramos"). Plaintiff, administratrix of the estate of the deceased, Jermaine Davis ("Davis"), sued Defendants under federal and state laws, alleging violations of the Fourth and Fourteenth Amendments of the U.S. Constitution under 42 U.S.C. § 1983 (1994) and assault and battery, seeking compensatory and punitive damages as well as fees and costs. For the following reasons, Defendants' Motion is granted.

I. BACKGROUND

This lawsuit arises out of a fatal shooting that occurred on June 20, 1999. The basic events which lead to Davis' unfortunate death as a result of being shot by SEPTA Police officer

Ellingsworth are as follows.

On June 20, 1999, SEPTA Police officers Ellingsworth and Ramos were on special detail in Northeast Philadelphia. They were assigned to follow buses running between the "WOW" Skating Rink and SEPTA terminals at FernRock and Bridge and Pratt Streets. Sometime around 11 p.m., they heard on the Philadelphia Police J-Band that a robbery was in progress at Shear Pleasure, a barber shop at 10th Street and Olney Avenue. They were one and a half blocks away, so they drove there after hearing a call for assistance. From what the victims and the witnesses reported, the Philadelphia Police officer on the scene described the robbers as two black males with a shotgun. He also described what the robbers were wearing.¹ Ellingsworth and Ramos were told that the robbers had just left the robbery scene on foot, going northbound on 11th Street towards Fernrock.

The Defendant SEPTA Police Officers subsequently left the scene of the robbery to continue with their detail. They proceeded towards Fernrock, keeping an eye out for two men fitting the description of the robbers. As they were driving, they were flagged down by a man named Johnny Whaley who had just been robbed of his car keys by two black men with a shotgun or a rifle. He informed the Defendant SEPTA Police officers that the

¹In their respective oral depositions, neither Ellingsworth nor Ramos could remember what the Philadelphia police officer told them regarding the robbers' clothes.

two men were driving in a "gray Chevy Monte Carlo or Impala cop car type" and that furthermore, the Defendant SEPTA Police officers had just passed it. Believing it was the same men who had just robbed the Shear Pleasure, Defendant SEPTA Police officers turned around to see if they could find the robbers.

After a few blocks, at a stop sign, the Defendant SEPTA Police officers saw a car fitting the description given to them by the second robbery victim. After following the car for about five to ten minutes, the Defendant SEPTA Police officers turned on their emergency lights and pulled the car over. After turning on the spotlight, the officers exited their car. They saw that the windows of the car were tinted.

Ellingsworth approached the driver's side while Ramos approached the passenger's side. The driver's window was already down when Ellingsworth walked up to tell the driver to turn off the engine. The driver, who was later identified as Davis, had already turned off the car engine and had put the keys on the top of the car. Ellingsworth told Davis to keep his hands on the steering wheel but Davis kept moving his hands. The passenger had his hands on the dashboard. At this point, there was some conversation between Ellingsworth and Davis about the tags being in the back window. The Defendant SEPTA Police officers did not tell the suspects they were being stopped on suspicion of robbery. The Defendant SEPTA Police officers testified they did

this to keep the suspects calm and to make sure they had the correct suspects. Neither officers had their revolvers drawn at this time.

Meanwhile, Ramos, who was standing at the mid-point of the passenger's side, had his flashlight out. He flashed the light into the car, both front and back, and saw items in the back seat of the car which fit the description of the stolen items. Specifically, Ramos noticed a Gucci and Cherokee watch. He said to Ellingsworth, "Check the watches, check the watches." When Ellingsworth opened the back door to look, Davis reached up and grabbed the car keys. In response, Ellingsworth slammed the back door shut and began to struggle with Davis over the car keys. Ramos could not see clearly but what he could see was that Davis and Ellingsworth were soon struggling over the gear. Ellingsworth then shouted "gun," and began firing into the car.

According to Ramos, he did not see any gun from where he was positioned. He testified that as soon as Ellingsworth shouted "gun," he retreated to the back of the car and ducked. With regard to the gun, Ellingsworth testified as follows:

he began like reaching towards like underneath the seat of the front² bench seat. And I grabbed his arm for my

²Plaintiffs allege that both Ellingsworth and Ramos told inconsistent stories to the SEPTA internal affairs and Philadelphia police. Plaintiff, however, failed to submit any evidence to the Court. In fact, the only evidence Plaintiff has submitted are portions of Ellingsworth, Ramos and Chief Evans oral depositions.

own personal safety. I kept on telling him to keep his hands on the car, on the steering wheel, turn it off. He just wouldn't listen. And we got into a sort of like physical confrontation. The he reached and pulled out the shotgun. I didn't have my revolver out and had no cover . . . And he swung around and pointed the gun at me.

Ellingsworth further testified that he shouted "gun" when he saw the handle of the shotgun. He then quickly back-pedaled and went for his semi-automatic service revolver. By the time he began firing his weapon, the barrel of the shotgun was pointing outside the window.

Ellingsworth struck Davis with several bullets in the chest and left arm. Davis, however, somehow managed to drive off and Ellingsworth fired some more shots at the moving vehicle.

Ellingsworth then radioed for assistance and the two officers drove off to try to find Davis' car. They lost sight of it and returned to the scene of the shooting. Several Philadelphia and SEPTA police officers subsequently arrived on the scene.

The car, with Davis in it, was found nearby. The passenger had already fled. No gun³ was found in the car or on the body of Davis. Davis was taken to the Albert Einstein Medical Center in an ambulance.⁴ He later died from the bullet wounds.

³The Philadelphia Police found a shotgun at a property near the shooting. The gun, however, was never submitted for a forensic examination or fingerprinting.

⁴Several of the victims identified Davis as one of the robbers as he lay in the ambulance.

Defendants admit that Ellingsworth and Ramos did not conduct the felony stop in accordance with established police procedure. First, they should not have approached the vehicle without first drawing their own firearms. In addition, before conducting the search, they should have taken the car keys out of reach, ordered the occupant suspects out of the car and handcuffed the occupant suspects. Despite Defendants' concession regarding the failure to follow proper procedure, Defendants move for summary judgment, arguing that: (1) there is no evidence from which a reasonable fact-finder could conclude that the shooting of Davis was unreasonable under the Fourth Amendment; (2) the officers are protected from suit by qualified immunity; (3) there is no evidence upon which a fact finder could conclude that the acts of the officers constituted battery under state law; (4) even if there was enough evidence, Defendants are protected by sovereign immunity; (5) there is no SEPTA policy, custom or practice which amounts to a § 1983 violation; and (6) there is no evidence that Defendant SEPTA Police officer Ramos shot Davis.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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). This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

III. DISCUSSION

A. § 1983 - Objectively Reasonable Use of Deadly Force

To bring a § 1983 claim, Plaintiff must allege that a person, while acting under the color of law, deprived him of some constitutional right. 42 U.S.C. § 1983. At issue here is whether the SEPTA Police officers, by using deadly force,

violated Davis' constitutional right to be free from unreasonable seizure. In bringing a § 1983 claim, plaintiff has the burden to prove, by a preponderance of the evidence, that the police officer's use of deadly force was objectively unreasonable under the Fourth Amendment. See Edwards v. City of Philadelphia, 860 F.2d 568, 572 (3d Cir. 1988).

The use of deadly force is to be analyzed under the reasonableness standard of the Fourth Amendment, not the substantive due process standard. Graham v. Connor, 490 U.S. 386, 393-94 (1989). In Tennessee v. Garner, 471 U.S. 1, 11-12 (1985), the Supreme Court explained when the use of deadly force is permissible under the Constitution.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Furthermore, the determination of whether a police officer's use of deadly force was objectively reasonable must be made "from the perspective of a reasonable officer on the scene." Graham, 490 U.S. at 396. "The calculus of reasonableness must embody allowance 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 396-97.

The Third Circuit articulated the Garner/Graham standard as follows:

Giving due regard to the pressures faced by the police, was it objectively reasonable for the officer to believe, in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect's escape, and that the suspect posed a significant threat of death or serious physical injury to the officers or others?

Abraham v. Raso, 183 F.3d 279, 289 (3d Cir. 1999). In viewing the totality of the circumstances, the following factors are to be considered: (1) severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officer or others; and (3) whether the suspect is actively trying to resist arrest or attempting to evade arrest by flight. Id. (citing Graham, 490 U.S. at 396).

The Third Circuit cautioned that courts facing summary judgment motions should keep in mind that "sensitivity to context suggests that . . . reasonableness under the Fourth Amendment

should frequently remain a question for the jury . . . to help ensure that the ultimate legal judgment of 'reasonableness' is itself reasonable and widely shared." Id. at 289-90. The Third Circuit further noted, however, that "if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances," summary judgment may be appropriate. Id. at 290 (citing Scott v. Heinrich, 39 F.3d 912, 915 (9th Cir. 1994)).

1. GUN - Immediacy Of The Threat Imposed By Suspect

The only material factual dispute in this case is whether Davis had a gun at the time he was shot. This fact goes to the immediacy of the threat imposed by the suspect to the safety of the officer or others. Plaintiff argues there was no gun, offering the following facts as evidence: (1) Ramos never saw a gun; (2) no gun was found in the car or on the body of Davis; (3) the gun found nearby was never submitted for testing and therefore not connected to the crime; and (4) Ellingsworth's testimony is unreliable and inconsistent. As this Court is not in the position to make factual determinations, the issue of the gun will be resolved in favor of the Plaintiff, the nonmovant, for the purpose of this Motion. Assuming there was no gun, if Ellingsworth's use of deadly force was still objectively reasonable considering the totality of the circumstances, then

the Defendants are entitled to summary judgment as a matter of law. See Abraham, 183 F.3d at 289-290.

As an initial matter, the Court notes that the fact that Davis may not have had a gun at the time of the shooting does not automatically mean there was a violation of the Fourth Amendment. On this issue, courts vary in their interpretation of the Garner standard. For example, the Eleventh Circuit has suggested that under Garner, there is a "possible implication that probable cause to believe that the suspect poses a serious physical threat to the person of the police officer exists only where the officer is threatened with a weapon. Pruitt v. City of Montgomery, Ala., 771 F.2d 1475, 1483 n. 14 (11th Cir. 1985).

On the other hand, the Tenth Circuit rejects such an implication, stating,

There might be numerous situations that would justify a police officer's belief that a suspect was armed and that he posed an immediate threat to the officer, even though the suspect was not in fact armed. Certainly, whether a suspect is armed is a relevant factor in determining whether the suspect poses an immediate danger. A per se rule, however, that a police officer may never employ deadly force unless attacked by a suspect possessing a deadly weapon would place a police officer in a dangerous and unreasonable situation. Therefore, we conclude that whether a particular seizure is reasonable is dependent on the "totality of the circumstances, and not simply on whether the suspect was actually armed.

Ryder v. City of Topeka, 814 F.2d 1412, 1419 n. 16 (10th Cir. 1987).

In Thompson v. Hubbard, 257 F.3d 896 (8th Cir. 2001), the 8th Circuit affirmed a district court's summary judgment for the defendant where the suspect was later found to have no gun. The police officer, responding to reports of shots fired and armed robbery, chased after a man fitting the description of the suspects. Id. at 898. According to the defendant police officer, the sole surviving witness to the shooting, after the suspect climbed over a short fence, the suspect got up from the ground and moved his arms as though reaching for a weapon at the waist level. At this point, the suspect's back was towards the police officer so he could not see the suspect's hands. The police officer shouted stop but the suspect continued to move his hands and the police officer fired a single shot and the suspect died. Id. The Court held that although no weapon was found on the body,⁵ the shooting was objectively reasonable. Id. at 899. "An officer is not constitutionally required to wait until he sets his eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun." Id.

Here, proceeding under the assumption that Davis did not have a gun when Ellingsworth fired his revolver, no reasonable

⁵The Court additionally rejected the plaintiff's argument that the police officer should have considered the fact that the waistband of the sweat pants worn by the deceased may not have been strong enough to hold a gun.

jury could find that it was objectively unreasonable for Ellingsworth to believe the suspect imposed an immediate threat to his safety and to others. Considering the totality of the circumstances, it was objectively reasonable for Ellingsworth to believe the suspects were armed and dangerous. The undisputed facts are, the Defendant SEPTA Police officers were under a reasonable belief that the suspects in the car were armed and had recently committed at least two back to back armed robberies. The car and the occupants in the car fit the description of the robbers. Even the Plaintiff's own expert opined that there was probable cause for the Defendant SEPTA Police officers to make a felony stop and that it was reasonable for the Defendant SEPTA Police officers to believe the suspects were armed.

Moreover, after the stop, the Defendant SEPTA Police officers saw items in the back seat which fit the descriptions of items taken from the barber shop, further confirming their suspicion. Both Defendant SEPTA Police officers testified that Ellingsworth shouted, "gun" before he began to shoot at Davis, a fact which Plaintiff makes no attempt to repudiate. This fact indicates at minimum that Ellingsworth believed he saw a gun, regardless of whether he actually did. The plaintiff makes no allegations nor provide any evidence that Ellingsworth intentionally or maliciously shouted "gun" in order to have an excuse to fire his gun. Although Ellingsworth may have been

mistaken in his belief, so long as his mistaken belief was objectively reasonable, his use of deadly force was also objectively reasonable under these circumstances. Considering that Davis was physically struggling with Ellingsworth and that Ellingsworth was under a reasonable belief that Davis was armed and trying flee after committing two armed robberies, it was reasonable for Ellingsworth to believe Davis was an immediate threat to his safety as well as others.

The other factors under Graham also militate strongly in favor of summary judgment for the Defendants. The severity of the crime is high. Davis was suspected of being involved in at least two back to back armed robberies. In addition, Davis, who had at first voluntarily turned off the car engine and put the keys on top of the car, grabbed the keys and tried to turn on the engine and drive off when he realized the officers saw the items taken during the robbery in the back seat of his car. He also engaged in a physical struggle with Ellingsworth. As such, at the time of the shooting,⁶ Davis was actively resisting arrest and attempting to flee. Considering the severity of the crime, the immediacy of the threat to the safety of the officers and to

⁶Although witnesses later identified Davis as one of the men who committed armed robbery, this fact is irrelevant in the determination of whether Ellingsworth's action was objectively reasonable at the time of the shooting. Here, Ellingsworth had enough reasonable suspicion that the occupants of the car were involved in the armed robbery at the time of the shooting even without the confirmation of the eyewitnesses.

others and the fact that Davis was attempting to flee, the Court finds that SEPTA Police officer Ellingsworth acted within the bounds of the Fourth Amendment.

1. Failure To Follow Police Procedure

Plaintiff also relies on the fact that the Defendant SEPTA Police officers failed to follow police procedure in making the felony stop. Plaintiff's expert opined that failure to follow police procedure created a dangerous situation. In fact, the Defendants concede there was a failure to follow police procedure, and Chief Evans, the man in charge of SEPTA police, testified that the approach to the felony stop was careless. Again, however, as with the gun issue, the Court must look to the totality of the circumstances because there is no per se rule that a violation of police procedure equals a Fourth Amendment violation. See Grazier v. City of Philadelphia, No. Civ. A. 98-CV-6063, 2001 WL 1168093, at *14-15 (E.D. Pa. July 26, 2001).

As discussed in Grazier, the Third circuit briefly touched on the subject in Raso:

We note that a number of courts have refused to find officers liable based on their lapses in following police department procedures, even though those lapses may have contributed to the use of force. By contrast, where an officer's conduct amounted to more than a minor departure from internal departmental policy, and in particular where the officer engaged in intentional misconduct, courts have found that the officer's acts creating the need for force are important in evaluating the reasonableness of the officer's eventual use of force.

Raso, 183 F.3d at 295 (citations omitted). The Third Circuit, however, explicitly left these cases to be reconciled "for another day." Id. If and when the failure to follow procedure is a factor, the question seems to be whether the police officer intentionally created the need for the use of deadly force. Grazier, 2001 WL 1168093 at *15.

Here, there was no intentional creation for the need to use deadly force. While it may not have been prudent for the Defendant SEPTA Police officers to approach a felony stop in the manner they did, they did not intentionally create a situation where they would have been forced to use deadly force. Neither officer threatened Davis with bodily harm necessitating violent reaction from him. While the violation of the police procedure is an important factor in deciding whether the police officer created a dangerous situation, this fact is not enough to overcome the Graham factors which compel summary judgment for the Defendants. As such, summary judgment is granted as to all § 1983 claims against both Defendant SEPTA Police officers Ellingsworth and Ramos.

B. Section 1983 Claims Against SEPTA

A municipal agency such as SEPTA may not be sued under § 1983 on a theory of respondeat superior liability. See Monell v. Dep't of Soc. Serv., 436 U.S. 658, 691 (1978). SEPTA may be liable for the constitutional violations of its officers if the

Plaintiff could show that the custom or policy of SEPTA, including the failure to train properly, lead to the constitutional violation. Id.; see also City of Canton v. Ohio, 489 U.S. 378, 388 (1989); Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996); Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990). The threshold issue, however, is whether there was a constitutional violation. If there is no underlying constitutional violation, then SEPTA cannot be sued under § 1983. Kneipp v. Tedder, 95 F.3d 1199, 1212 n.26 (3d Cir. 1996). Having ruled above that there was no Fourth Amendment violation, all § 1983 claims against SEPTA must be dismissed.

Nonetheless, the Court is disturbed by Defendant SEPTA's careless attitude towards the training of its officers. Chief Evans testified that although the shooting was justified, he felt that the Defendant SEPTA Police officers needed additional training. Despite this, in the aftermath of the fatal shooting, Ramos was not retrained. Chief Evans' response was "I wonder if he slipped through the cracks on me." Although SEPTA may not be sued under § 1983 in this instant case, SEPTA should not wait until the next fatal shooting to better train its police force.

C. State Law Claims

As the federal anchor claims have been dismissed against all Defendants, the state law claims must be dismissed for lack of subject matter jurisdiction.

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

DIANE DAVIS, Administratrix : CIVIL ACTION
of the Estate of JERMAINE DAVIS, :
Plaintiff, :
v. :
SOUTHEASTERN PENNSYLVANIA :
TRANSPORTATION AUTHORITY, et al, :
Defendants. : No. 00-5076

O R D E R

AND NOW, this day of December, 2001, in
consideration of the Motion For Summary Judgment filed by the
Defendants, Southeastern Pennsylvania Transportation Authority,
SEPTA Police officer Thomas Ellingsworth and SEPTA Police officer
Joaquim Ramos (Doc. No. 8) and the Response of the Plaintiff,
Diane Davis, Administratrix of the Estate of Jermaine Davis,
deceased, it is **ORDERED**:

1. Defendants' Motion For Summary Judgment as to Counts I and
II is **GRANTED**. Judgment is entered in favor of Defendants,
Southeastern Pennsylvania Transportation Authority, SEPTA
Police officer Thomas Ellingsworth and SEPTA Police officer
Joaquim Ramos and against Plaintiff, Diane Davis,
Administratrix of the Estate of Jermaine Davis, on Counts I
and II.

2. Plaintiff's pendent state law claims under Counts III and IV are **DISMISSED** for lack of subject matter jurisdiction.

BY THE COURT:

JAMES MCGIRR KELLY, J.