

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

JABARR ROSSER : CIVIL ACTION
 :
 v. :
 :
 OFFICER LICARDELLO, et al. : NO. 05-514

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: December 14, 2005

I. Introduction

In this action arising under 42 U.S.C. § 1983, plaintiff Jabarr Rosser (“Rosser”), maintained that Philadelphia Police Officers Liciardello and Walker arrested and strip-searched him on March 3, 2003, without probable cause, in retaliation for his cousin Anthony Rosser having filed an Internal Affairs Division (“IAD”) complaint accusing the same officers of wrongfully searching his house in October, 2002. Plaintiff’s Complaint at ¶¶ 7-17. Although the Defendants argue that they arrested Rosser after observing him sell drugs to a confidential informant, Rosser asserts that this was a false story concocted to create probable cause. Rosser maintains that the \$20 in prerecorded “buy money” the Defendants claim to have recovered from him after his arrest was actually planted on him by the Defendants.

This matter was originally assigned to the Honorable Marvin Katz, but was later transferred to me by consent of the parties under 28 U.S.C. § 636(c). On September 19, 20 and 21, 2005, it was heard before me as a bench trial. Having considered the evidence in this case, and reviewed the parties’ post-trial submissions, I will enter judgment in favor of the Defendants. My decision is explained below.

II. The Testimony at Trial

A. Rosser's Testimony

Jabarr Rosser testified that, on March 3, 2003, he visited his cousin, Lyzette Rosser, at her house. 2-203, 204. (All cites are to volume and page of the transcript, unless otherwise noted). He then accepted a ride from an acquaintance, who dropped him off on 40th Street, between Brown and Reno Streets. 2-203. Rosser maintains that he bought bottled water at a shop located at 40th and Brown Streets, and began walking east on Reno Street, toward his home on 35th Street. 2-204, 207. He then stopped to talk for five minutes with the mother of his children, whom he met by chance at the corner of Union and Reno Streets. 2-208.

Rosser testified that, at that time, he had \$240 or \$245 in cash on his person. 2-204. This was money that he had saved from his earnings cutting hair, to be used for buying Easter clothing for his children. 2- 204, 205.

According to Rosser, after he parted from his children's mother and continued for a short distance on Reno Street, he heard a car braking, and then heard a voice behind him say: "Don't move. I'll shoot you in your f—ing head." 2-210. He turned and saw Officer Reynolds (a police officer originally named as a defendant this action, who was dismissed pursuant to Defendants' Motion for Summary Judgment), pointing a gun at him. 2-211. Rosser testified that Officer Reynolds told him he was being arrested for narcotics, and declined his offer to show ID by saying "What the F do I need to see your ID for? You going to jail." 2- 212.

At some point, Officers Liciardello and Walker appeared at the scene of Rosser's arrest. 2-212. According to Rosser, Officer Reynolds searched Rosser's pockets, and saw his personal identification. 2-214. However, Rosser admitted that, even after the officers saw his name on

his ID, they did not mention his cousin Anthony Rosser at the scene of the arrest. 2-214.¹ The Officers then placed Rosser in a Jeep, and drove him around the corner onto Union Street “where that alley entrance is.” 2-212-213. Officer Liciardello searched the alley for “close to an hour”, periodically returning to the Jeep. 2-215. During that time, Officer Walker asked Rosser where the drugs were. Id.

While the other two police officers were still searching the alley, Officer Reynolds drove Rosser to the police station. 2-216. At the police station, Officer Reynolds again went through Rosser’s wallet:

And that’s when he was like, “Oh, this Anthony Rosser, cousin or brother.” He’s like, “He’s definitely going down,” like that. And I said, “Down for what? What did I do?” And he was like “Well, you’ll see, you’ll see.” Like that and telling me he’s not going to get a dime. Little c-----r’s not going to get a dime from this. I said, “Well, I don’t have anything to do with that.”

2-217. Also, Rosser’s driver’s license showed an address which was the same as Anthony Rosser’s. Id.

According to Rosser, Officers Walker, Reynolds and Liciardello took him back to a cell in the police station and asked him to take off all of his clothes except for his undershirt. 2-220. Officer Liciardello took Rosser’s car keys out of the station for about 10 minutes. 2-221. He then came back, threw the keys on the floor and said that he had found nothing:

And that’s when Liciardello and Officer Reynolds started looking at each other, and he threw my pants back on the floor, and he was just like ... they look at each

¹As noted above, Anthony Rosser filed an Internal Affairs Division complaint after his house was searched by Officers Reynolds, Liciardello and Walker. The IAD complaint was found partially justified, in that the Officers had entered a house in order to execute an arrest warrant for an individual (not Anthony or Jabarr Rosser) without the required search warrant for the house. Exhibit P-13. Although the results of the IAD investigation had not been released at the time of Jabarr Rosser’s arrest, the officers were aware of the investigation because all interviews were completed by January 21, 2003. Id.; Transcript at 2-69. In April, 2003, Anthony Rosser filed a civil suit which was settled. Complaint at ¶ 8.

other like there's nothing. Like that's the expression that they had like with their hands. And then Officer Reynolds went in his pocket and brought out a 20-dollar bill, and looked at the cell next to him, and was like, "Yeah, this is the same 20 that we got you with you little c-----," like that. And then he started laughing.

2-221-222. Rosser did not know the man in the other cell. Id.

Rosser was released on bail the evening of the next day, and subsequently tried on drug charges. 2-223. However, all charges were dismissed by the court after the close of testimony.

2-225. Finally, Rosser testified that he never sold drugs, and that, on the day of his arrest, he was never on Union Street. Id.

B. The Defendants' Testimony

1. The Arrest

Defendant Jeffrey Walker is a 16-year member of the Philadelphia police force who, on the day of Rosser's arrest, was assigned to the Narcotics Field Unit South. 1-19. Defendant Thomas Liciardello is another Philadelphia police officer, who was also assigned to the Narcotics Field Unit South at that time. 1-154.

According to the Defendants, Officers Walker, Liciardello, and Reynolds were assigned by their supervisor, Sergeant Chester Malkowski, to investigate complaints of drug sales in the area of the 800 block of North Union Street, on March 3, 2003. 1-63 (Walker) and 1-159 (Liciardello). Officer Walker was working with a confidential informant. Testimony of Officer Walker at 1-34, 35. Officer Reynolds was to act as a back-up for Officer Liciardello, who was the surveillance officer that day. Testimony of Brian Reynolds at 2-30; Officer Liciardello at 1-158-159.

Officer Liciardello testified that at some point in the afternoon he saw Rosser standing on Union Street, next to an alleyway. 1-161. He recognized him from the neighborhood, but did not know his name. 1-169. Rosser was the only person on the block. 1-161. Liciardello testified that he radioed this information to Officer Walker. Id. Shortly afterwards, he saw the confidential informant approach Rosser, speak to him briefly, and then hand him a currency note. 1-172.

According to Officer Liciardello, Rosser then entered the alleyway. 1-172. When he returned, he handed the confidential informant "small items." 1-172,173. Officer Liciardello stated that he then radioed to Officer Reynolds to make the arrest, giving him a description of Rosser's clothing. 1-179. Officer Liciardello then drove slowly after Rosser, who was walking away. 1-177, 180. Officer Reynolds arrested Rosser within the minute. 1-180.

Officer Liciardello also said that he was present at the police station when Rosser was placed in a cell, and that Rosser was not strip searched. 1-183. Lieutenant James Figorski, the Integrity Officer for the Narcotics Unit, testified that had a strip search occurred, it would have violated police policy since such a search must be approved by the highest ranking commander in the building, and documented on a form which is retained for five years. 3-39.

Officer Walker testified that, shortly before Rosser's arrest, he and the confidential informant were together in a car, parked on the street. Transcript at 1-70. The confidential informant had been given a \$20 bill, the serial number of which had been recorded, with which to make a drug purchase. 1-35. Officer Walker said that he received a call from Officer Liciardello, telling him to come to the area of the 800 block of Union Street. 1-73. He parked on Brown Street, just around the corner of the 800 block of Union Street. 1-78.

After getting another call from Officer Liciardello, Officer Walker sent the confidential informant onto Union Street. 1-78. The informant came back four or five minutes later with four purple packets containing what later proved to be crack cocaine. Id.

The testimony of the Defendants was corroborated by that of Officer Reynolds, who stated that he was driving by himself in the area when he got a call from Officer Liciardello, who told him he was viewing the 800 block of Union Street. 2-31. After Officer Liciardello called him again to say that the confidential informant appeared to have made a purchase, Officer Walker called to say “it is a positive” and described the clothes of the seller. 2-54. Officer Reynolds then drove up Reno Street and arrested Rosser. 2-54

Contrary to Rosser’s testimony, Officer Reynolds testified that he approached Rosser from the front, and that he identified himself as police. 2-57. He said he was also identifiable from his vest, and the badge which he wore around his neck. 2-57. He testified that he handcuffed Rosser and searched him, and that he did determine Rosser’s name, but did not connect him mentally with Anthony Rosser. 2-59.

Officer Reynolds then testified that Rosser was searched at the police station, and, while no drugs were found on his person, the prerecorded \$20 bill given to the confidential informant was found in Rosser’s wallet. 2-95. Officer Reynold also testified that he did not conduct or observe a strip search of Rosser. 2-119.

2. The Purchase Money

The parties agreed that the \$20 bill said by the Defendants to have been used by the confidential informant in purchasing drugs from Rosser, was the same \$20 bill that was used earlier in the day by the confidential informant to make a purchase from Eric King, the man in the cell next to Rosser’s. Testimony of Officer Walker, 1-90; Exhibit D-8; Exhibit D-150.

According to the Defendants, this was not a sign of wrongdoing since the money used in a drug purchase by an informant, if recovered, is simply placed back in the store of money carried by the police officer, and returned to the impress fund at the end of the day. Testimony of Officer Liciardello, 1-194. It is not segregated for use as evidence in connection with the arrest. Testimony of Lt. Figorski at 3-89, 96, 97. Instead, it is the subject of testimony by the police officer at any hearing or trial. Testimony of Officer Liciardello at 1-196.

However, according to Defendants, it is not possible to prove, other than by testimony, that the \$20 bill at issue was returned to the impress fund at the end of the day. This is because Sgt. Malkowski, who kept the impress book, did not keep track of the serial notes on bills that went in or out, but only made sure that the correct amount of money was returned or accounted for by the submission of a voucher. Testimony of Officer Liciardello at 1-200; Testimony of Sgt. Malkowski at 2-137, 138.²

III. Findings of Fact

Upon review of the above evidence, I am not able to conclude as a matter of fact that Jabarr Rosser was arrested because he was related to Anthony Rosser. There is a disjuncture between Rosser's testimony and his assertions in his complaint. Paragraph 9 of the Complaint states that "Defendant Reynolds ... threw Plaintiff on the ground Defendant then informed Plaintiff that he knew he was related to Anthony Rosser ... Defendants then began berating Plaintiff informing him that he was going to jail."

²Plaintiff's counsel elicited testimony from the Defendants and Officer Reynolds about other court cases in which they had been involved. Plaintiff asks this Court to consider this testimony under Federal Rules of Evidence 404(b) and 608(b)(2). I will discuss this testimony in a later section in which I explain my ruling that it is inadmissible, for the most part.

However, Rosser's own testimony does not support this claim that the Defendants knew who he was at the time he was arrested. Rosser testified that the earliest any one of the arresting officers appeared to know his name was after his arrest. He did not claim that any officer mentioned Anthony Rosser's name to him until he was already incarcerated at the police station.

I do not discount the possibility that, at the police station, Officer Reynolds said: "this is Anthony Rosser's cousin or brother ... He's definitely going down," as Rosser claims. He may also have taunted Rosser about his cousin's accusations. These remarks, however, made after Rosser's arrest, do not prove that his relationship to Anthony Rosser was even known at the time of his arrest, much less that it was a factor in the decision to arrest. Further, according to uncontradicted defense testimony, the decision to arrest Rosser was made by the Defendants, not by Officer Reynolds.

Further, Rosser has not shown that the Defendants knew at the time of his arrest that he had not sold crack cocaine. Rosser testified that Officers Liciardello and Walker searched the alley on Union Street for almost an hour, and that Officer Walker repeatedly asked him where the drugs were hidden. It is hard to see why they would have done these things if they had invented the story about a drug sale on Union Street, or knew that Rosser had not made the sale.

I am persuaded that Officer Reynolds made a remark in front of Rosser and Eric King at the police station to the effect that the same \$20 bill had been used in both of their arrests. As Rosser's attorney points out, Rosser alleged this in his complaint at a time when he could have had no other way of knowing that this was, indeed, true – as the documentary evidence at trial later proved.

This, however, falls short of showing wrongdoing by the Defendants. Rosser's original theory seems to have been that Officer Reynolds' remark showed the \$20 bill was planted on Rosser, because it otherwise would have been segregated after Eric King's arrest. The testimony at trial, however, indicated that this is not the case. Rather, the use of the \$20 bill in two sequential drug purchases would have been consistent with police department practices. Rosser did not successfully rebut this testimony, or come forth with a cogent alternate theory as to how the history of the \$20 bill supported his case. Therefore, I cannot find as a matter of fact that the \$20 bill at issue was planted on Rosser.

The evidence is equivocal as to the alleged strip search. Rosser testified that it occurred, and the Defendants testified that it did not. Neither side came forward with any other helpful evidence. The testimony of Lt. Figowski shows only that, if the search occurred, police regulations were violated. Officer Reynolds' credibility is somewhat impaired by the fact that he denied making those statements about Eric King that I have concluded were made. However, Rosser's credibility, too, is shaken by the fact that his testimony at trial deviates in material ways from the allegations set forth in his Complaint.

IV. Conclusions of Law

Rosser has alleged a violation of his rights under the Fourth Amendment to the United States Constitution to be free of false arrest and an unreasonable search of his person in the form of a strip search.³

³Defendants, in their post-trial submissions, allude to an excessive force claim. However, Rosser did not assert one in his complaint, or in his post-trial submissions. Since Rosser has not asserted an excessive force claim, I have not made findings of fact as to Rosser's testimony in this regard. I would note that here, again, Rosser's testimony differed materially from the allegations in his Complaint. Rather than testifying that he was thrown on the ground, Rosser said that he was pushed to his knees as he was complying with a command that he "get down." 2-212.

A. The Arrest

A warrantless public arrest satisfies the requirements of the Fourth Amendment “where there is probable cause to believe that a criminal offense has been or is being committed.” Devenpeck v. Alford, 534 U.S. 146 (2004). Thus, to prevail on a § 1983 claim for false arrest, a plaintiff must establish that he was arrested without probable cause.

The concept of probable cause is defined in terms of facts and circumstances sufficient to warrant a prudent individual in believing that the suspect had committed or was committing an offense. Gerstein v. Pugh, 420 U.S. 103, 111 (1975); Sharrar v. Felsing, 128 F.3d 810, 817-818 (3d Cir. 1997). The relevant inquiry is not whether Rosser in fact committed the offenses he was charged with, but whether the arresting officers had probable cause to believe that he had. Dowling v. City of Philadelphia, 855 F.3d 136, 141 (3d Cir. 1988).

Applying this law to the facts of this case, it is clear that if the Defendants believed that they witnessed Rosser engaging in a drug sale, they had probable cause to arrest him. As discussed above, Rosser has not shown that the Defendants believed otherwise. For that reason, I cannot conclude as a matter of law that Rosser’s Fourth Amendment rights were violated by his arrest.

B. The Strip Search

Strip searches of pre-trial detainees were evaluated by the United States Supreme Court under the Fourth Amendment’s reasonableness standard in Bell v. Wolfish, 441 U.S. 520, 558 (1979). The Supreme Court did not require probable cause, however, but held that a strip search is valid where the searching officers have reasonable individualized suspicion that a detainee is carrying or concealing contraband. Id.; Duffy v. County of Bucks, 7 F. Supp.2d 569 (E.D. Pa. 1998).

In this case, Defendants have conceded that they did not have “a compelling reason” to believe that Rosser had drugs on his person after his arrest. Defendants’ Conclusions of Law at ¶ 56. They rely, instead, upon their assertion that no such search took place.

As discussed above, I was not able to find as a matter of fact that Rosser was subjected to a strip search, based on the evidence presented at trial. Rosser, as the plaintiff in this civil suit, bears the burden of proof. I am not able, therefore, to decide this claim in his favor.

V. Evidence As To Other Cases

Rosser, through his attorney, questioned the Defendants about several other civil rights cases in which one or more of the police officers involved in this case were accused of wrongful arrest. He argues that this evidence is admissible under Federal Rule of Evidence 404(b), which provides, in relevant part:

(b) **Other Crimes, Wrongs or Acts.** – Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The only one of the purposes listed in 404(b) which could apply in this case is “plan,” sometimes expansively defined as plan, scheme, practice or *modus operandi*. Becker v. Arco Chemical Co., 207 F.3d 176 (3d Cir. 2000). The Court of Appeals for the Third Circuit has explained that, when seeking to admit 404(b) material, “the proponent must clearly articulate how that evidence fits into a chain of logical inferences” no link of which may be that a bad person is disposed to do bad acts. Id. at 191; Government of the Virgin Islands v. Pinney, 967 F.2d 912, 915 (3d Cir. 1992).

Rosser also argues that the evidence can be considered under FRE 608(b):

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness ... may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character of truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Rosser sought to introduce evidence as to a case involving a plaintiff named Samuel DuPriest. 1-217 to 219. However, as I remarked at trial, because that case was settled, there was no finding of wrongdoing on the part of any defendant or witness in this case. For this reason, the evidence is irrelevant – and thus inadmissible – under FRE 402, as well as Rules 404 and 608(b). See Becker v. Arco, supra, at 189 (one of the requirements for admissibility under FRE 404 is relevance under FRE 402).

Secondly, Rosser's counsel questioned Officer Walker on a civil rights matter which is now in discovery, brought by Andre Blaylock. Officer Walker testified that, in the underlying criminal case, he had submitted an affidavit of probable cause for the arrest of an Omar Blaylock, stating that he had observed Omar Blaylock involved in narcotics activities. 1-130. Although a check of Police department records showed Omar Blaylock to be incarcerated at the time of Officer Walker's surveillance, Officer Walker testified that he believed the records to be mistaken. 1-128. However, the individual arrested was actually Andre Blaylock, who became the plaintiff in the civil rights action. 1-129. Omar Blaylock was, indeed, incarcerated.

Defendants have conceded that the Blaylock case is admissible under FRE 608, as to Officer Walker's credibility. I agree with Defendants, however, that it cannot be considered

under Rule 404. The facts are too dissimilar to create a chain of legal inferences showing a *modus operandi* on the part of Officer Walker. If he is found liable in the Blaylock matter, it may well be on very different grounds than those alleged by Rosser.

Finally, Rosser seeks to admit evidence regarding a civil rights case brought by Arnold Randall. In that case, a jury verdict was obtained against Officer Reynolds, although the case remains open for the disposition of certain legal issues. 1-209. As explained by Rosser's counsel, an individual named Marvin Jenkins, said by Officer Reynolds in an affidavit of probable cause to have been involved in narcotics trafficking, turned out to have been incarcerated at the time. Id.

However, no witness testified at Rosser's trial regarding Marvin Jenkins. Since counsel's statements are obviously not evidence, there is no evidence before me which could be considered under any federal rule. In any event, since Marvin Jenkins was not a party to Arnold Randall's civil rights action, it is unclear whether the jury verdict regarding Randall related to Officer Reynolds actions with respect to Jenkins.

VI. Conclusion

For the reasons set forth above, I now enter the following:

ORDER

AND NOW, this 14th day of December, 2005, following a bench trial held before me on September 19 through 21, 2005, upon consideration of the parties' subsequently filed proposed findings of fact and conclusions of law, and for the reasons set forth in the

above decision, I now ENTER JUDGMENT in favor of DEFENDANTS.

BY THE COURT:

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE