

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

ANDREW DIJOSEPH, et al.                   :                   Civil Action  
                                          :                   :  
          Plaintiffs,                    :                   :  
                                          :                   :  
          v.                               :                   No. 95-1803  
                                          :                   :  
CARMEN VUOTTO,                         :                   :  
                                          :                   :  
          Defendant.                    :                   :

MEMORANDUM

Anita B. Brody, J.

June \_\_\_\_\_, 1997

Plaintiff Andrew DiJoseph ("DiJoseph") brings this Motion for a New Trial after the jury returned a verdict in favor of defendant Officer Carmen Vuotto ("Vuotto"). DiJoseph alleged violations of the Fourth Amendment for excessive force after suffering injuries when Vuotto shot him on September 22, 1993, during a confrontation between DiJoseph and police officers from the City of Philadelphia. DiJoseph enumerates a myriad of reasons for a new trial. Among them, DiJoseph claims that (1) admission of DiJoseph's state court guilty plea of aggravated assault involving the same incidents as those at trial, (2) admission of evidence of drug possession and paraphernalia, and (3) an improper instruction on the Fourth Amendment's "objective reasonableness" standard caused substantial injustice to DiJoseph's case thereby warranting a new trial. For the reasons outlined below, I find none of the plaintiffs' arguments persuasive. Accordingly, I will deny plaintiffs' Motion for a New Trial.

The facts of this case are clearly set forth in DiJoseph v. City of Philadelphia, 947 F. Supp. 834 (E.D. Pa. 1996) ("DiJoseph I") and DiJoseph v. City of Philadelphia, 953 F. Supp. 602 (E.D. Pa. 1997) ("DiJoseph II").

## **I. Standards of Review**

Rule 59 of the Federal Rules of Civil Procedure provides in pertinent part:

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

Fed. R. Civ. P. 59(a). A new trial is generally warranted only when the district court is persuaded that there has been a miscarriage of justice. Van Scoy v. Powermatic, 810 F. Supp. 131, 134 (M.D. Pa. 1992); see generally 11 Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice and Procedure (hereinafter "Wright & Miller") § 2803 (1995) ("Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done . . .") Such might occur if a verdict is contrary to the great weight of the evidence or because of errors made at trial, such as the admission of improper evidence or errors in the jury charge. Farra v. Stanley-Bostitch, Inc., 838 F. Supp. 1021; Sandrow v. United States, 832 F. Supp. 918 (E.D. Pa. 1993); 11 Wright & Miller § 2805. At the same time, however, courts must "disregard any error or defect in the proceeding which does not affect the substantial

rights of the parties." Fed. R. Civ. P. 61 (harmless error).

## **II. Discussion**

DiJoseph outlines dozens of reasons for why I should grant a new trial. Because Rule 61 instructs me to disregard those possible errors or defects that would not affect DiJoseph's substantial rights, I focus upon the most critical issues he raises to determine whether a new trial should be granted in this case. Plaintiffs' most compelling arguments include (1) DiJoseph's state court guilty plea of aggravated assault should not have been admitted into evidence; (2) evidence of DiJoseph's possible drug use or possession or drug paraphernalia found in his home after the shooting should not have been admitted at trial; and (3) the jury charge improperly instructed the jurors on the Fourth Amendment's "objective reasonableness" standard by not directing them that they must interpret Vuotto's actions based upon "all of the facts and circumstances which were known or reasonably could have been known by the defendant at the time he shot the plaintiff." Pls.' Mot. for New Trial at 13. I will deal with each claim in turn.

### **A. Admissibility of DiJoseph's State Court Guilty Plea of Aggravated Assault**

On November 4, 1994, DiJoseph pled guilty to aggravated assault and possession of a weapon of crime in state court for pointing a gun at Officer Vuotto during the confrontation of September 22, 1993. The facts to which DiJoseph pled guilty read

as follows:

On September 22, 1993, at approximately 1:18 p.m., at 6524 Dorel Street, City and County of Philadelphia, [Andrew DiJoseph] while in possession of a fully loaded .38 pistol, did point it at Police Officer Carmen Vuotto, badge number 5393, of the StakeOut Unit in an attempt to cause serious bodily harm. The police officer in fear of his life shot and injured the defendant.

Tr. DiJoseph Guilty Plea and Sentencing, Nov. 4, 1994, at 11-12.

DiJoseph filed a Motion in Limine seeking to exclude evidence that he pled guilty to aggravated assault in state court. Because I held in DiJoseph I that DiJoseph's state court guilty plea did not collaterally estop the issue of whether Officer Vuotto's use of force was objectively reasonable under the Fourth Amendment, DiJoseph contended that the guilty plea was irrelevant at trial. In addition, DiJoseph argued that submission of the guilty plea was inadmissible under FRE 403 because it would unfairly prejudice the jury against his case or would otherwise confuse the issues of how a man who pleaded guilty to aggravated assault against an officer could later file a civil rights law suit against that same officer. I denied DiJoseph's motion. At the same time, I granted Officer Vuotto's Motion in Limine to preclude DiJoseph from offering evidence to contradict or attack the guilty plea. Specifically, I granted Vuotto's motion to exclude evidence that (1) DiJoseph did not point his fully loaded gun at Vuotto, (2) DiJoseph did not commit the crimes of aggravated assault and possession of an instrument of crime, and (3) DiJoseph pleaded guilty to avoid a prison sentence. Contrary to what DiJoseph now asserts, I did not permit the defense to introduce into evidence the last sentence of

the factual basis underlying the guilty plea stating, "The police officer in fear of his life shot and injured the defendant." See Order, Apr. 4, 1997, at ¶ 1(a).

DiJoseph contends that the Court erred by permitting the defendants to introduce the guilty plea. Alternatively, DiJoseph asserts that he should have been able to explain the circumstances surrounding the guilty plea as documented by the guilty plea colloquy indicating that he pled guilty to avoid prison, he was medically unfit to serve a jail sentence at that time, and he never intended to harm anyone.

As I held in DiJoseph I, the preclusive effect of DiJoseph's state court guilty plea is determined by Pennsylvania law. DiJoseph I, 947 F. Supp. at 840. Under Pennsylvania law, a conviction from a guilty plea is equivalent to a conviction from a trial-by-jury. Commonwealth v. Mitchell, 535 A.2d 581, 585 (Pa. 1987). Operative facts necessary for criminal convictions are admissible as conclusive facts in civil suits arising from the same events and circumstances. Folino v. Young, 568 A.2d 171, 172 (Pa. 1990); Mitchell, 535 A.2d at 585 ("criminal conviction[s] may be used to establish the operative facts in a subsequent civil case based on those same facts.").

DiJoseph pled guilty to aggravated assault in state court. Under Pennsylvania law, a person is guilty of aggravated assault if he or she "attempts to cause or intentionally, knowingly or

recklessly causes serious bodily injury . . ." Pa.C.S.A. § 2702.<sup>1</sup> Under the facts of this case, the operative facts underlying DiJoseph's aggravated assault conviction are those facts which indicate that DiJoseph attempted to cause serious bodily injury to Officer Vuotto. The factual basis to which DiJoseph pled guilty states that DiJoseph's gun was fully loaded and that he pointed that fully loaded gun at Carmen Vuotto. These facts, then, are the operative facts -- the necessary facts -- upon which DiJoseph's guilty plea rests and which I must accept as conclusively established for purposes of this present law suit. As operative facts of criminal convictions arising from the same events and circumstances are admissible in a subsequent civil trial, my ruling to admit DiJoseph's guilty plea (minus the last sentence) was proper.<sup>2</sup>

Along these lines, my ruling granting Vuotto's motion to exclude any evidence that is deemed to attack the validity of DiJoseph's criminal conviction was also proper. If the operative facts of the aggravated assault conviction are conclusively established as a matter of law, then DiJoseph should not have been given the opportunity to challenge the bases of those facts.

A guilty plea is an acknowledgement by a defendant that he participated in the commission of certain acts with a

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<sup>1</sup>There are several definitions of "aggravated assault" in the Pennsylvania Code. None of them were specifically referenced during DiJoseph's guilty plea.

<sup>2</sup>DiJoseph's guilty plea was also properly admitted as an admission of a party opponent under FRE 801(d)(2) and, for impeachment purposes, as a prior inconsistent statement.

criminal intent. He acknowledges the existence of the facts and the intent . . . [During the guilty plea colloquy, the] defendant is before the court to acknowledge facts that he is instructed constitute a crime . . . he will accept their legal meaning and their legal consequence.

Commonwealth v. Anthony, 475 A.2d 1303, 1307-08 (Pa. 1984). Even if DiJoseph negotiated his plea to avoid a prison term, as he contends, he is nevertheless bound by the legal consequences of that guilty plea. Therefore, DiJoseph was properly precluded from introducing evidence that would attack, justify, explain, or rationalize his guilty plea to the jury.

DiJoseph asserts that Haring v. Prosise, 462 U.S. 306 (1983), stands for the proposition that "there can never be a Civil Rights Claim which is affected, in any manner, by a previous guilty conviction or guilty plea." Pls.' Reply to Def.'s Answer to Pls.' Mot. for New Trial at 1. Plaintiffs interpret Haring too broadly. In Haring, the Supreme Court held that Virginia law did not preclude a subsequent § 1983 claim for an alleged constitutional violation that had not been addressed by a previous state court criminal conviction procured by a guilty plea. In Haring, the plaintiff claimed that the police had conducted an unlawful search of his apartment in violation of the Fourth Amendment. Because he had already pled guilty to manufacturing a controlled substance, the plaintiff never had an opportunity to contest or litigate the validity of the search. Furthermore, as there was no motion to suppress evidence on Fourth Amendment grounds raised during the criminal proceedings, this particular issue had never been

addressed. As a result, the Supreme Court held that the plaintiff could proceed with his civil rights suit.

DiJoseph's case survived summary judgment on the rationale of Haring. The issues determined by the state court guilty plea -- aggravated assault and possession of an instrument of crime -- were not the issues addressed in DiJoseph's subsequent § 1983 case, namely whether Vuotto used excessive force in shooting DiJoseph. As a result, collateral estoppel did not bar DiJoseph's civil suit. There is no authority from Haring, however, questioning the conclusiveness of the operative facts that were determined by the state court guilty plea, as DiJoseph suggests. Accordingly, I will deny DiJoseph's Motion for a New Trial on this basis.

**B. Evidence of Drug Use, Possession, and Paraphernalia**

Following the shooting of DiJoseph, the police conducted a search of DiJoseph's house. Among other things, the police found cocaine vials and lighters in DiJoseph's desk. DiJoseph filed a Motion in Limine to exclude any evidence involving drug use, possession, or paraphernalia which was found as a result of the police's search of DiJoseph's home following the shooting. DiJoseph asserted that evidence of this nature was irrelevant and highly prejudicial to his case and should therefore be excluded. I denied DiJoseph's motion without prejudice to revisit the issue at trial, if necessary.

At trial, I permitted defense counsel to impeach DiJoseph

using evidence of drugs and drug paraphernalia found in DiJoseph's home during the search following the shooting.<sup>3</sup> DiJoseph contends that I did so in error as there was no foundation for the defense to impeach on such grounds. In addition, DiJoseph asserts that the defense stated before trial that the evidence concerning drugs would only be used if DiJoseph had difficulty remembering events that took place. Although DiJoseph did not have difficulty recalling the events surrounding the incidents giving rise to this litigation, the defense used evidence of the drugs nonetheless. DiJoseph maintains that he was disadvantaged because he did not inquire on voir dire about the potential jurors' views on drugs and because he objected to the part of a videotaped deposition in which a doctor testified that there were no toxicology records to suggest that DiJoseph had drugs in his bloodstream at the time of the shooting. Pls.' Mot. for New Trial at 26. Had DiJoseph known that evidence concerning his possible drug use would have been admitted, DiJoseph would not have made such an objection to the videotaped deposition.

Notwithstanding DiJoseph's arguments, I properly permitted the defense to question him concerning the issue of drugs and drug paraphernalia on cross-examination. Drug use goes directly to the issue of DiJoseph's credibility and perception of the incidents as they occurred on the date of the shooting. United States v.

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<sup>3</sup>Contrary to what DiJoseph claims, the photographs of the drugs and drug paraphernalia were not admitted into evidence. See Pls.' Mot. for New Trial at 24.

Ramirez, 871 F.2d 582, 584 (6th Cir. 1989) (drug use or addiction is appropriate subject for impeachment on cross-examination); Jarrett v. United States, 822 F.2d 1438, 1446 (7th Cir. 1987) ("A witness's use of drugs may not be used to attack his or her general credibility, but only his or her ability to perceive the underlying events and testify lucidly at the trial."); United States v. Cameron, 814 F.2d 403, 405 (7th Cir. 1986) (evidence of drug use admissible to impeach if memory or mental capacity of witness is legitimately at issue); United States v. Hickey, 596 F.2d 1082, 1090 (1st Cir. 1979) (witness can be asked about drug use that may have affected his or her perception of events as long as the drug use occurred within a reasonable time of the events surrounding the trial). The defense certainly had a proper basis for asking such questions as DiJoseph, himself, admitted that he had experimented with cocaine during the week preceding the shooting during his state court guilty plea colloquy,<sup>4</sup> the police had found drugs in his desk immediately following the shooting, and DiJoseph testified on direct-examination that he heard noises inside his home and

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<sup>4</sup>The guilty plea colloquy reads:

THE COURT: How did the crack vials get in your home?

THE DEFENDANT: After I was carjacked I was having emotional problems dealing with a carjacking and I experimented for a week.

THE COURT: That is the week immediately preceding this case?

THE DEFENDANT: Yes, Sir.

Tr. Andrew DiJoseph Guilty Plea and Sentencing, Nov. 4, 1994, at 20.

thought that a burglar was hiding inside of a hope chest. See Trial Tr., Apr. 9, 1997, at 13, 69 (testimony of Andrew DiJoseph). These facts laid a foundation for the defense that DiJoseph's perception of the events surrounding the events that took place on September 22, 1993, might not be reliable. As DiJoseph's perception of events was critical for the jury to determine whether they believed DiJoseph that he never pointed the gun at Officer Vuotto during the confrontation, the defense was properly permitted to impeach DiJoseph with evidence of drug use, possession, and paraphernalia on cross-examination.

Before trial, I denied without prejudice the plaintiffs' Motion in Limine concerning evidence of the drugs. I could not categorically grant plaintiffs' motion because it was unclear for what purpose the defense might attempt to introduce such evidence. While evidence of drug use, possession, and paraphernalia may not be admissible for some purposes, such as impeaching the general character of a witness or as substantive evidence in this case, it was admissible for other purposes, namely to impeach DiJoseph on his perception of events. I therefore had to reserve judgment on this issue until it was raised at trial. Although DiJoseph argues that this unfairly prejudiced his trial preparation and strategy, the evidence was admissible for the purposes for which the defense introduced it. Thus, I will deny DiJoseph's Motion for a New Trial on this basis as well.

#### **C. Fourth Amendment Objective Reasonableness Standard**

At trial, I presented the following instruction to the jury concerning the Fourth Amendment's "objective reasonableness" standard:

In the present case, Officer Vuotto used deadly force against Andrew DiJoseph. You must determine whether the use of that force was not objectively reasonable. If the use of force was objectively reasonable, then you must find in favor of the defendant. If the use of force was not objectively reasonable, then you must find in favor of the plaintiff. The objective reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene. That is, you must determine whether Officer Vuotto's shooting of Mr. DiJoseph was reasonable based on, and in light of, all the facts and circumstances confronting Officer Vuotto at that time, without any regard to Officer Vuotto's intent, motivation, or subjective beliefs. In doing this, you must determine all of the facts and circumstances that were known by Officer Vuotto at the time he shot Mr. DiJoseph. You should not and must not judge the officer's actions based on the 20/20 vision of hindsight. That is, you must consider whether Officer Vuotto's use of force was reasonable at the time he employed such force. Not every push or shove, even if it may later seem unnecessary violates the Fourth Amendment. In considering the claim of excessive force, you must keep in mind that the reasonable standard makes allowances 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. Therefore, plaintiff must prove by a preponderance of the evidence that Officer Vuotto's actions were not objectively reasonable in light of those facts and circumstances that confronted the officer at that time.

The Fourth Amendment "objective reasonableness" standard does not examine what a reasonable officer would have known or should have known under the circumstances. Rather, the Fourth Amendment scrutinizes the actions of the officer: were the actions of the officer "objectively reasonable" under the circumstances? That is what you must consider when deliberating your verdict: were the actions of Officer Carmen Vuotto objectively reasonable under the circumstances.

Apparently objecting to the second paragraph above, DiJoseph

contends that the proper standard under the Fourth Amendment "objective reasonableness" encompasses "what the defendant could have known and should have known regarding the facts surrounding this incident before he shot the plaintiff." Pls.' Mot. for New Trial at 36. DiJoseph, however, fails to cite any cases supporting his interpretation.

The Supreme Court articulated the Fourth Amendment "objective reasonableness" standard in Graham v. Connor, 490 U.S. 386 (1989), upon which my jury instruction was based. In Graham, the Court explained:

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies . . . 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 . . . [T]he reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

Id. at 396-97. Through its discussion of split-second judgments, rapidly evolving situations, and "reasonableness at the moment," the Graham court delineated an "objective reasonableness" standard that is determined by what the officer knew at the moment the force was applied, not what an officer could have or should have reasonably known. This interpretation is verified by case law. See Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996) (officer's

"actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force. The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force."); Schulz v. Long, 44 F.3d 643, 648 (8th Cir. 1995) (Fourth Amendment scrutinizes only the seizure itself and not the events leading up to the seizure); Fraire v. City of Arlington, 957 F.2d 1268, 1275-76 (5th Cir. 1992) (incidents leading up to shooting irrelevant; Fourth Amendment inquiry examines whether officer's actions are reasonable at the moment of the shooting); Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991) (Graham's objective "'reasonableness' mean[s] the 'standard of reasonableness at the moment.'"); Sherrod v. Berry, 856 F.2d 802, 804-05 (7th Cir. 1988) (en banc) ("When a jury measures the objective reasonableness of an officer's action, it must stand in his shoes and judge the reasonableness of his actions based upon the information he possessed and the judgment he exercised in responding to that situation."). Because the Fourth Amendment inquiry examines the officer's actions at the moment the force is employed, my instruction to the jury was proper. What happened before Officer Vuotto arrived or what other officers may have know is not relevant to whether Vuotto's use of force was constitutionally reasonable. Consequently, I will also deny DiJoseph's Motion for a New Trial on this basis.

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Anita B. Brody, J.

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v.	:	No. 95-1803
	:	
CARMEN VUOTTO,	:	
	:	
Defendant.	:	

O R D E R

AND NOW, this            day of June, 1997, IT IS ORDERED that  
plaintiffs' Motion for a New Trial is hereby **DENIED**.

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Anita B. Brody, J.

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