

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEAN BENTER,

Plaintiff,

MEMORANDUM and ORDER
06-C-128-S

v.

M. JAHR,

Defendant.

Plaintiff Benter was allowed to proceed on his Fourth Amendment excessive force claim against defendant M. Jahr. In his complaint plaintiff alleges that the defendant used excessive force when arresting him on February 13, 2006.

Defendant moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavit and brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in

evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds there is no genuine dispute as to any of the following material facts.

Plaintiff Dean Benter is an adult resident of Wisconsin. Defendant Matthew E. Jahr is a police officer with the City of Onalaska, Wisconsin.

On February 12, 2006 around 4:00 p.m. Officer Jahr was dispatched to the area of the WalMart store at 3107 Market Place. The dispatch operator told Jahr that they had received a 911 call by a male caller on a cell phone who reported he had a check stolen at the WalMart. The dispatcher advised that the caller was

uncooperative, swore, spoke with a speech impediment and was walking from WalMart toward Sears. Police officers have an obligation to investigate 911 phone calls for help even though they might be false or baseless.

Jahr drove toward the Walmart store and saw a male walking southbound who he believed was the person who had made the 911 call. Jahr activated his overhead and blue flashers. He exited his squad car and approached the man who was later identified as Dean Benter. Jahr asked to speak with Benter who did not respond. Jahr walked with Benter repeating his request. Benter then spoke to Jahr in an aggressive manner. Because Benter had a speech impediment, Jahr concluded that he might have made the 911 call.

Benter continued to walk southbound. Jahr asked him to stop so he could speak with him. Jahr put his left hand on Benter's shoulder to get his attention. Benter raised his arm and swung in Jahr's direction. He almost struck Jahr in the left side of Jahr's face with his right elbow and told him to "fuck off".

Jahr contacted dispatch and requested assistance. Then Jahr walked toward Benter and grabbed the upper right shoulder area of his coat telling him to stop. Benter told him to "fuck off". Jahr continued to explain to Benter that he needed to speak to him and Benter continued to pull away.

Jahr grabbed both of Benter's shoulders in an attempt to stop him. Benter refused to stop. Jahr decentralized plaintiff to the

ground in the grass area of the boulevard. Benter was face down in the grass and had his hands beneath his body. Jahr was lying across Benter's back at an angle. Jahr ordered Benter to place his arms alongside his body so that Jahr could see them. Benter refused. Jahr ordered him a second time to which Benter responded, "Fuck you, this is bullshit."

Jahr requested Benter to place his arms alongside his body three times. Jahr told Benter he would use pepper spray if Benter did not comply. Benter began to get on his knees and elbows. Jahr told Benter again he would use pepper spray if he did not comply. Benter refused. Jahr removed Benter's glasses and sprayed two quick bursts of pepper spray directly into Benter's face.

Jahr was eventually able to secure Benter's right arm. Officers Page and Pataska arrived and assisted Jahr in handcuffing Benter. The officers searched Benter and found a folding knife on his person. Benter was still on the ground.

Emergency medical personnel arrived on the scene and flushed Benter's eyes because of the pepper spray. Officer Page then transported Benter to county jail where he was booked on counts of disorderly conduct, resisting arrest, carrying a concealed weapon and making false 911 calls.

Jahr suffered an abrasion on his knee cap which was treated at Gunderson Lutheran Urgent Care. Benter's glasses were broken.

MEMORANDUM

Plaintiff claims that defendant violated his Fourth Amendment rights by using excessive force during his arrest. There is no genuine issue of material fact, and this case can be decided on summary judgment as a matter of law.

To prevail on his Fourth Amendment claim plaintiff must prove that the force used during his arrest was unreasonable. Graham v. Connor, 490 U.S. 386 (1989). Determining whether the force used is reasonable requires a careful balancing of "the nature and quality of the intrusion on an individual's Fourth Amendment interests" against the government's countervailing interests. Id., at 396.

The question is whether the officer's actions are objectively reasonable in the light of the facts and circumstances confronting him. Id., at 397. This question must be answered from the perspective of a reasonable officer on the scene rather than hindsight. Id. This determination requires consideration of 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. Saucier v. Katz, 533 U.S. 194 (2001).

It is undisputed that initially Benter failed to comply with Jahr's request to stop. When Jahr placed his hand on Benter's shoulder, Benter swung at him. Jahr continued to attempt to stop

Benter so he could speak to him. Jahr finally placed plaintiff on the ground because he refused to stop. After Benter was on the ground, he refused Jahr's orders to place his hands alongside his body. When Benter continued to resist by raising his body, Jahr ordered him to stop. When he refused Jahr sprayed him with pepper spray. Jahr used the force necessary to gain compliance from Benter.

The defendant's actions were objectively reasonable in the light of the facts and circumstances confronting him. As a matter of law defendant did not violate plaintiff's Fourth Amendment right to be free from excessive force during an arrest. Defendant's motion for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claims must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 10th day of January, 2007.

BY THE COURT:

S/ _____

JOHN C. SHABAZ
District Judge