IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CONNER J. POFF, a minor,
by his legal and general guardians,
Tina Poff and Troy Poff,

OPINION AND ORDER

Plaintiff,

11-cv-72-bbc

v.

CITY OF BELOIT and
KERRY DAUGHERTY,

Defendants.

- -

This is a civil action pursuant to 42 U.S.C. § 1983 for redress of the deprivation under color of state law of plaintiff's rights under the Fourth and Fourteenth Amendments of the United States Constitution. Plaintiff Conner J. Poff contends that defendant Kerry Daugherty conducted an unlawful strip search of plaintiff in a public location, that the search was taken pursuant to the policy and custom of defendant City of Beloit and that it violated his constitutional rights under the Fourth Amendment. This court has jurisdiction under 28 U.S.C. § 1331 and 1343(a)(3).

The case is before the court on defendants' motion for partial summary judgment.

Dkt. #18. Defendants argue that summary judgment is appropriate because (1) there is no issue of material fact with regard to whether defendant Daugherty performed a strip search of plaintiff; (2) defendant Daugherty is entitled to qualified immunity because plaintiff's alleged constitutional right to be free from strip searches in public was not clearly established law on January 1, 2010; and (3) it is undisputed that defendant City of Beloit has no practice or custom of conducting strip searches in public that would establish municipal liability. (For the rest of the opinion, all references to "defendant" will be to defendant Daugherty; references to defendant City of Beloit will be to "defendant City.")

I conclude that plaintiff has established a genuine dispute about whether defendant subjected plaintiff to a strip search in public. I conclude also that the law was clear at the time of the incident that strip searches in public violate the Fourth Amendment. Campbell v. Miller, 499 F.3d 711 (7th Cir. 2007). I conclude also that it remains disputed whether the City of Beloit Police Department had a policy or custom of unlawful strip searches at the time of the incident. Therefore, I will deny defendants' motion for partial summary judgment with respect to all three issues.

From plaintiff and defendants' proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

Defendant City of Beloit is a municipality organized under the laws of the state of Wisconsin. Defendant Kerry Daugherty is a a police officer employed by defendant City.

On January 1, 2010, at approximately 1:50 p.m., Officers Ammeson and defendant were dispatched to investigate a red vehicle containing three subjects possibly involved in illegal drug activity. When defendant arrived at the scene, Ammeson's squad car was already parked. Defendant noticed loose tobacco lying on the ground outside the driver's side door of the red vehicle. Ammeson told defendant that he had obtained consent to search the vehicle.

Defendant approached the vehicle and spoke with plaintiff, who was seated in the front passenger seat. Joseph J. Flory, plaintiff's cousin, was also in the vehicle. Defendant observed plaintiff make a quick movement with his hands, but did not see exactly what plaintiff was doing. When asked, plaintiff said he had a lighter and a cell phone.

Defendant asked plaintiff to exit the vehicle and escorted him to the rear of the vehicle, where he patted him down, looking for weapons and contraband. Flory was also removed from the car, searched and told to stand on the sidewalk. Flory was six feet away from plaintiff when plaintiff was being searched.

During plaintiff's patdown, defendant located a bulge in plaintiff's crotch area and asked plaintiff what he had in the front of his pants. Plaintiff said, "It's my dick."

Daugherty Dep., dkt. #23, at 32. Defendant said, "I don't believe you, show me." Id. Plaintiff then pulled his penis out of his pants. As he did so, defendant observed a green, leafy substance in a baggie in the front of plaintiff's pants. Defendant then arrested plaintiff and took him to the police station. The Beloit Police Department did not take any disciplinary action against defendant as a result of this incident.

Flory heard defendant and plaintiff's conversation and saw defendant put his hands in plaintiff's crotch area when he was searching plaintiff. Flory heard plaintiff say, "That's my dick," and defendant say something along the lines of "I don't believe you. I need to verify it." Flory Dep., dkt. #24, at 13. Flory thought that defendant was going to make plaintiff pull out his penis or expose it to some degree. Because he did not want to watch, Flory turned away.

Neighborhood resident Janie Wigley observed the encounter between plaintiff and defendant from the foyer of her house. She saw plaintiff undo his pants and pull out his penis.

Plaintiff was not free to leave during the entire encounter with the police. Although defendant suspected that plaintiff had drugs in his crotch, at no point did defendant ask plaintiff for the baggie of contraband he believed plaintiff possessed. Defendant did not take plaintiff to the police station to do a strip search. When asked at his deposition why he did not, defendant said, "It's just not the way we operate. We continue the investigation on the

street where we were." Daugherty Dep., dkt. #23, at 56.

OPINION

A. Standard of Review

Under Fed. R. Civ. P. 56, summary judgment is appropriate "when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Goldstein v. Fidelity & Guaranty Ins. Underwriters, Inc., 86 F.3d 749, 750 (7th Cir. 1996) (citing Fed. R. Civ. P. 56); see also Celotex v. Catrett, 477 U.S. 317, 323 (1986). All reasonable inferences from undisputed facts should be drawn in favor of the nonmoving party. Baron v. City of Highland Park, 195 F.3d 333, 338 (7th Cir. 1999); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the nonmoving party cannot simply rest upon the pleadings once the moving party has made a properly supported motion for summary judgment; instead, the nonmoving party must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

B. Strip Search Claim

Defendants have the initial burden of showing that there is no genuine issue of material fact because they are the moving parties. They contend that plaintiff's

constitutional rights were not violated because the encounter was not a strip search.

The Fourth Amendment incorporates the constitutional right "to be secure . . . against unreasonable searches and seizures." Unreasonable searches and seizures include searches performed in ways that are unnecessarily embarrassing or humiliating. Campbell v. Miller, 499 F.3d 711, 719 (7th Cir. 2007). The Court of Appeals for the Seventh Circuit has stated that strip searches involving the visual inspection of the anal and genital areas are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983) (internal citations omitted).

In this case, the initial issue is not whether the search was unreasonable but, rather, whether what occurred amounted to a strip search. Plaintiff says it did because defendant forced him to expose himself in public by saying, "Show me." On the other hand, defendants contend that no strip search occurred because plaintiff chose voluntarily to expose his penis in public. Defendant says he did not expect plaintiff to expose his genitalia, but to expose the contraband. However, defendants concede that defendant "could have more clearly articulated what he wanted Poff to 'show him.'" Dfts.' Br., dkt. #18, at 6.

The test for determining whether an unlawful strip search occurred is not dependent upon the subjective intent of the officer giving the order. Such intent is generally "irrelevant in determining whether that officer's actions violate the Fourth Amendment." Bond v.

United States, 529 U.S. 334, 338 (2000). Rather, if an order is ambiguous, it becomes a factual dispute that the jury must consider. Plaintiff interpreted defendant's words as an order to expose himself. It is unclear from the undisputed facts what defendant's words "show me" actually meant. It will be up to a jury to decide whether plaintiff's response to defendant's words was a reasonable response to defendant's directive. I note, however, that Flory, who was standing six feet away at the time of the incident, looked away because he believed that defendant had ordered plaintiff to pull out his genitalia. Viewing the facts and inferences in the light most favorable to the nonmoving party, I conclude that a reasonable jury could find that defendant ordered plaintiff to expose himself while conducting a search and thus violated plaintiff's Fourth Amendment right. Therefore, I will deny summary judgment with regard to this first issue.

C. Qualified Immunity Defense

As a general rule, government officials are shielded from liability for civil damages if their conduct did not violate clearly established constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Narducci v. Moore, 572 F.3d 313, 318 (7th Cir. 2009). Defendants contend that they are entitled to qualified immunity on plaintiff's claim because it was not clearly established that defendant's treatment of plaintiff amounted to a constitutional violation.

A motion for summary judgment based on qualified immunity requires a two-step inquiry: (1) whether the alleged conduct violated the plaintiff's constitutional rights; and (2) whether it was a right that was clearly established at the time of the incident. Sherman v. Four County Counseling Center, 987 F.2d 397, 401 (7th Cir. 1993). Not that I have determined that a reasonable jury could find that the alleged conduct violated plaintiff's Fourth Amendment right, the only remaining question is whether it was clearly established at the time of the incident, January 1, 2010, that plaintiff had a right to be free from strip searches in public.

Courts evaluate the constitutionality of a given search by "balancing . . . the need for the particular search against the invasion of personal rights that the search entails." Campbell, 499 F.3d at 719 (citing Bell v. Wolfish, 441 U.S. 520, 559 (1979)). The test articulated by the Supreme Court in Bell v. Wolfish, 441 U.S. 520, 559 (1979) takes into account "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." "Courts across the country are uniform in their condemnation of intrusive searches performed in public." Campbell, 499 F.3d at 719.

In Campbell, the court of appeals held that a search "involving . . . public nudity and exposure of intimate body parts" is unreasonable in the absence of exigent circumstances. Id. at 718-19. In Campbell, a police officer arrested Campbell in his friend's front yard on

suspicion of marijuana possession. The officer saw Campbell drop a bag of marijuana and then observed Campbell ignore the officer's repeated commands to stop moving away. Id. at 718. Two officers then conducted an initial patdown search of Campbell, but found no weapons or contraband. The officers then took Campbell into the open backyard of the friend's house and conducted a strip search involving a visual inspection of Campbell's anal cavity. The search was visible from the friend's house and the neighboring houses. Campbell's friend was able to see the search from his kitchen window. The officers did not make an effort to conduct their search in a private place.

The court of appeals found the search was justified, but held that the manner in which it was conducted was unreasonable because the officers should have "afforded Campbell the dignity of doing it in a private place." Id. "'Police conduct that would be impractical or unreasonable – or embarrassingly intrusive – on the street can more readily – and privately – be performed at the station.'" Id. (quoting Illinois v. Lafayette, 462 U.S. 640, 645 (1983)).

In Campbell, the factors most important to the court of appeals were that the search was conducted in an area where Campbell's friend and other neighbors were able to watch; and that there was no "conceivable exigency that could be met only by strip-searching Campbell in public, on the spot." Id. at 719. Relying on the Wolfish factors, the court balanced the need for the particular search against the invasion of personal rights that the

search entailed and found that "those factors conclusively tip the balance under Wolfish in Campbell's favor." Id.

In the present case, searching plaintiff may have been reasonable; however, the manner in which the search was conducted was unreasonable under Campbell because it was conducted in a public area in the absence of any apparent exigency. First, plaintiff was searched outside his vehicle in the daytime in an area visible to others. Flory was a mere six feet away from the plaintiff during the search. If not for the fact that Flory turned his head, he would have seen plaintiff expose himself in public view. Additionally, plaintiff was in view of neighboring houses. Janie Wigley stated in her affidavit that she observed the encounter on the street from the foyer of her house.

Second, there did not appear to be any exigency that would justify an on-the-spot search. Exigent circumstances have been found to exist when "the police have an objective and reasonable fear that evidence is about to be destroyed." United States v. Napue, 834 F.2d 1311, 1326 (7th Cir. 1987). Defendants assert that plaintiff's attempt to "conceal or destroy the contraband created exigent circumstances," Dfts.' Reply Br., dkt. #29, at 3, but they do not indicate how plaintiff may have destroyed the contraband, especially when it was hidden inside his pants. Additionally, defendant did not actually see the contraband until after plaintiff unzipped his pants. If Campbell's actual dropping of marijuana on the ground does not rise to the level of "exigent circumstances" for a public strip search, then

plaintiff's situation does not. At this point, defendants have produced no evidence of a need for a public strip search to stop plaintiff from destroying contraband.

A constitutional right to be free from unreasonable searches in public was established at the time of the incident. Therefore, defendants cannot assert a qualified immunity defense.

D. Municipal Liability Claim

Plaintiff's claim against defendant City is that through its police department, it has a policy, practice or custom of conducting strip searches in public. To survive a motion for summary judgment on municipal liability, plaintiff must provide evidence that defendant's public strip search was (1) carried out as part of an express policy of the City or (2) a widespread practice that is so permanent and well settled as to constitute a custom or usage with the force of law. Alternately, plaintiff would have to show that defendant is a person with final policymaking authority. Latuszkin v. City of Chicago, 250 F.3d 502, 504 (7th Cir. 2001).

It is well established that a single isolated incident of wrongdoing by a non-policymaker is generally insufficient to establish municipal acquiescence in unconstitutional conduct. Oklahoma City v. Tuttle, 471 U.S. 808, 823-24; Jones v. City of Chicago, 787 F.2d 200, 204 (7th Cir. 1986). A city cannot be held liable for the actions

of its agents through a theory of respondeat superior. Monell v. Department of Social Services, 436 U.S. 658, 691 (1978). Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. at 694. Further, a plaintiff must demonstrate that the enforcement of the city's policy was the "moving force" behind the constitutional violation. Tuttle, 471 U.S. at 823 ("At the very least, there must be an affirmative link between the policy and the particular constitutional violation alleged."). Municipal customs have the force of law if the customs are themselves unconstitutional. Board of County Commissioners v. Brown, 520 U.S. 397, 406-07 (1997).

Defendants contend that plaintiff has failed to establish a basis for finding defendant City liable under Monell, 436 U.S. 658. This would be true if the strip search were an isolated incident but not if the decision to strip search plaintiff in public was influenced by a policy or practice of defendant City. Gable v. City of Chicago, 296 F.3d 531, 539 (7th Cir. 2002).

Plaintiff has the burden of showing that defendant City maintained some form of policy or custom of engaging in public strip searches. On that issue, plaintiff relies on defendant's deposition testimony. When he was asked why he did not take plaintiff to the police station once he suspected plaintiff possessed contraband, defendant said, "It's just not

the way we operate. We continue the investigation on the street where we were." This statement could imply that defendant City has a custom or practice of conducting public strip searches, depending on to whom defendant was referring by using the word "we." This is sparse evidence but it is enough to require that a jury determine whether defendant was following department policy when he searched plaintiff or whether he was operating on his own.

Defendants emphasize plaintiff's failure to cite any evidence that defendant City has a custom of condoning illegal strip searches. Dfts.' Reply Br., dkt. #29, at 8. Plaintiff is not required to show evidence of a written policy; he can meet his burden by showing evidence of a widespread practice or custom. Monell, 436 U.S. 658. Plaintiff produced sufficient evidence to raises a dispute of material fact about the existence of a custom or policy of defendant City.

Further, defendants did not show that conducting a strip search in public is prohibited by the customs and practices of the Beloit Police Department. The only information that defendants produced on this issue were ambiguous statements made by the Chief of Police for the City of Beloit, Norman Jacobs, at his deposition. Jacobs never responded directly to plaintiff's question whether defendant City has a policy or custom of public strip searches. If anything, Jacobs's testimony confused the issue by not adequately articulating the official policy of the Beloit Police Department. Within the span of a few

pages of deposition transcript, Jacobs stated that defendant's conduct did not qualify as a strip search, that his conduct was a search but not a violation of the strip search policy and that his statement "Show me" was an unlawful order. Jacobs Dep., dkt. #25, at 74-78.

Jacobs's deposition does not clarify the policies of the Beloit Police Department. His answers were often inconsistent and evasive. The only concrete evidence presented to this court on the municipal liability issue is defendant Daugherty's statement "it's just not the way we operate."

Because any doubt as to the existence of a genuine issue of material fact is resolved against the moving party and because there is sufficient evidence from which a reasonable jury could find that defendant City has a policy or custom of conducting strip searches in public, defendants' motion for summary judgment on the issue of municipal liability must be denied.

ORDER

IT IS ORDERED that the motion for partial summary judgment filed by defendants

City of Beloit, Wisconsin and Kerry Daugherty is DENIED.

Entered this 17th day of February, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge