IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SCOTT A. WHATCOTT,

Plaintiff,

v.

ERIC LUTHER, individually and
in his official capacity as a police officer,

Defendant.

OPINION AND
ORDER

99-C-264-C

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This is a civil action for money damages brought pursuant to 42 U.S.C. § 1983 and Wisconsin state law arising out of a traffic stop of plaintiff Scott A. Whatcott by defendant Eric E. Luther, a Village of Shorewood Hills police officer. In an order entered May 4, 1999, I granted plaintiff leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, concluding that there was an arguable basis in fact and law for finding that defendant had violated plaintiff's Fourth Amendment rights and committed a battery and a false arrest. In an order entered on August 18, 1999, I granted plaintiff's motion for leave to amend his complaint to add a claim of negligence.

Subject matter jurisdiction is present. See 28 U.S.C. §§ 1331, 1343(a) and 1367(a).

Presently before the court are the parties' cross motions for summary judgment.

As explained in this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was given to each party with the Preliminary Pretrial Conference Order on June 30, 1999, I will take as undisputed defendant's proposed facts that plaintiff does not contest specifically with proposed facts of his own that are based on record evidence. See Procedures, II.C.1 ("Unless the nonmovant properly places a factual proposition of the movant into dispute, the court will conclude that there is no genuine issue as to the finding of fact initially proposed by the movant.") Specifically, plaintiff cites to his amended complaint but fails to cite to record evidence. See Plt.'s Resp. to Defs.' Proposed Findings of Fact # #11 and 13. Such responses are not adequate to put defendant's proposed findings of fact into dispute and will be ignored. Plaintiff also violates the requirement under Rule 56(e) that "[s]upporting 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." Fed. R. Civ. P. 56. In conformity with Rule 56, I cannot consider plaintiff's responses to defendant's proposed findings that fall within the prohibition of "statements outside the affiant's personal knowledge." Stagman v. Ryan, 176 F.3d 986, 995 (7th Cir. 1999). See Plt.'s Resp. to Defs.' Proposed Findings of Fact # # 6 and 7. For purposes of summary judgment, I find the following facts submitted by the parties to be material and

undisputed.

UNDISPUTED FACTS

On the evening of February 12, 1999, defendant stopped plaintiff in the Village of Shorewood Hills because plaintiff failed to stop for a red light while driving a Ford hatchback. Plaintiff stopped his car in response to defendant's police flashers, turned off his headlights and engine and attempted to roll down his window to speak to defendant but his window was frozen shut. Plaintiff got out of his car either immediately before or after defendant walked in front of plaintiff's car to observe the headlights. There was nothing unusual about plaintiff's headlights.

In plain view from the driver's side window, defendant saw a canister of pepper spray in plaintiff's vehicle between the driver's seat and the front passenger's seat. Defendant told plaintiff to step back toward defendant's squad car which was 12-15 feet away. After plaintiff stepped away, defendant opened the driver side door of plaintiff's car in order to retrieve the spray canister. When defendant opened the door, plaintiff protested loudly and stated that defendant was not to enter the car without a search warrant. When defendant reached into plaintiff's car to remove the spray canister, plaintiff approached defendant to repeat his objections. Defendant told plaintiff to "shut up" and to stand back near defendant's squad car but plaintiff failed to do so. At that point, defendant arrested plaintiff, put him in handcuffs,

patted him down for weapons, took his keys and wallet out of his pockets and put him in the squad car. Although the parties dispute what defendant told plaintiff he was under arrest for, plaintiff was arrested for carrying a concealed weapon and running a red light.

After putting plaintiff in the back of defendant's police car, defendant returned to plaintiff's car and searched it for weapons, including the unlocked glove compartment and the storage area behind the backseat. Defendant searched the storage area via the passenger compartment because plaintiff's car is a hatchback with no partition between the passenger compartment and the storage compartment. During the search of the car, defendant opened no containers other than the glove compartment and found no other weapons.

After his search of the car, defendant issued plaintiff citations for running a red light and for driving an unregistered vehicle. Plaintiff protested the citation for running a red light and told defendant that he would forget about the illegal search of his vehicle and false arrest for carrying a concealed weapon if defendant "dropped the whole thing." Defendant told plaintiff to file a complaint with the police department and plaintiff responded that he was going to file a complaint in federal court. Defendant released plaintiff from the police car and unlocked the handcuffs.

Defendant did not request that plaintiff be prosecuted for carrying a concealed weapon. On April 21, 1999, plaintiff was convicted in the Shorewood Hills municipal court for failing

to stop at a red light and driving with an expired registration. Plaintiff did not appeal.

OPINION

A. Section 1983 Claim: Fourth Amendment

Plaintiff contends that defendant's search violated his Fourth Amendment right to be free from unreasonable searches and seizures. Specifically, plaintiff contends that it was unlawful that defendant (1) entered his car to seize the pepper spray prior to arresting him and (2) searched his entire car, including the hatchback, following his arrest. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." To pass constitutional muster under the Fourth Amendment, a search must be reasonable. "Reasonableness" is determined by balancing the intrusiveness of the search on the individual against the legitimate interest of the government in conducting the search. See Delaware v. Prouse, 440 U.S. 648, 654 (1979). The Fourth Amendment creates a presumption of unreasonableness as to any search not made pursuant to a warrant. See, e.g., Mincey v. Arizona, 437 U.S. 385, 390 (1978).

1. Pre-arrest search

"The plain view doctrine is an exception to the warrant requirement. The doctrine allows a police officer to conduct warrantless seizures of private possessions when (1) the officer has not violated the Fourth Amendment in arriving at the place from which the evidence could

be plainly viewed; (2) the incriminating character of the evidence is 'immediately apparent'; and (3) the officer has a lawful right of access to the object itself." United States v. Willis, 37 F.3d 313, 316 (7th Cir. 1994) (citing Horton v. California, 496 U.S. 128, 142 (1990)). See also United States v. Thornton, 197 F.3d 241, 248 (7th Cir. 1999) (citing United States v. Carmany, 901 F.2d 76, 77 (7th Cir. 1990)) ("The plain view doctrine allows the warrantless seizure of evidence if a police officer was lawfully in the place from which he saw the evidence if the discovery of the evidence was inadvertent and if the incriminating nature of the property was immediately apparent to the officer.") Defendant's seizure of plaintiff's can of pepper spray satisfies the three requirements under the plain view doctrine.

First, defendant's stop of plaintiff was legitimate because he had probable cause to believe that a traffic violation had occurred after plaintiff failed to stop at a red light. See Whren v. United States, 517 U.S. 806, 810 (1996) ("the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"). When plaintiff got out of his car during the traffic stop, defendant spotted the canister of pepper spray in plain view from the driver's side window. See Texas v. Brown, 460 U.S. 730, 740 (1983) (no legitimate expectation of privacy of interior of vehicle that may be viewed from the outside by a diligent police officer). Although plaintiff asserts that defendant ordered him out of his car and defendant asserts that plaintiff exited his car voluntarily, this

factual dispute is immaterial. See Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (holding that police can order driver out of car during traffic stop). Second, the incriminating character of the pepper spray was immediately apparent to defendant who recognized the canister of pepper spray because of his experience in law enforcement. In order to protect himself during the traffic stop, defendant removed the pepper spray from plaintiff's car. See Knowles v. Iowa, 525 U.S. 113, 117 (1998) ("concern for officer safety is [plainly not] absent in the case of a routine traffic stop"). Third, defendant had a right to be standing outside plaintiff's car during a traffic stop. Therefore, defendant had the authority to seize plaintiff's canister of pepper spray under the plain view exception to the warrant requirement. See Willis, 37 F.3d at 316.

2. Post-arrest search

Following discovery of the pepper spray, defendant arrested plaintiff, put him in handcuffs, patted him down for weapons and put him in defendant's squad car. Defendant arrested plaintiff for running a red light pursuant to Wis. Stat. § 345.22, which states that "[a] person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation" as well as for carrying a concealed weapon in violation of Wis. Stat. § 941.23.

Plaintiff argues that defendant did not have probable cause to believe that plaintiff was

carrying a concealed weapon because oleoresin capsicum is not a weapon under Wisconsin law and therefore the arrest was invalid. Because defendant had probable cause to believe that plaintiff had violated a traffic law by failing to stop for a red light, plaintiff's arrest was valid under § 345.22. Even if defendant arrested plaintiff because he wrongly believed that plaintiff was carrying a concealed weapon or because plaintiff was objecting to defendant's seizure of the pepper spray, defendant's subjective reasons for arresting plaintiff are irrelevant. In Whren, 517 U.S. at 811, the Supreme Court held that where "police conduct [] is justifiable on the basis of probable cause to believe that a violation of law has occurred," the officer's subjective motive is irrelevant. See id. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); United States v. Rivera, 906 F.2d 319, 321 (7th Cir. 1990) (question is whether officer "could" arrest, not whether he "would" have arrested absent the improper subjective intent).

After the arrest, defendant searched plaintiff's car for weapons, including the unlocked glove compartment and the storage area behind the rear seats. This search was legal because the Supreme Court has established that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." New York v. Belton, 453 U.S. 454, 460 (1981); United States v. Robinson, 414 U.S. 218 (1973) (search incident to arrest is

reasonable search under Fourth Amendment).

Plaintiff contends that defendant's search exceeded the permissible scope when defendant searched the hatchback area because the storage area is not within the passenger compartment of his car. Plaintiff's argument that the back seat serves as a partition that separates the trunk area from the passenger area is disingenuous. The back seat serves as a seat for passengers in the back of the car; nothing more. That there was no additional partition separating the storage area from the back seat and that defendant searched the storage area from inside the car supports the conclusion that the storage area was within the bounds of the passenger compartment subject to search. "Courts have interpreted the 'passenger compartment' requirement broadly in order to effectuate its purpose of protecting police officers and citizens from defendants reaching for a weapon or destroying evidence." United States v. Veras, 51 F.3d 1365, 1371 (7th Cir. 1995) (citing in footnote United States v. Russell, 670 F.2d 323, 327 (D.C. Cir. 1982)) (finding hatchback of a car within passenger compartment). See also United States v. Olguin-Rivera, 168 F.3d 1203, 1205 (10th Cir. 1999) (holding that where vehicle subject to search incident to arrest contains no trunk, the entire inside of the vehicle constitutes the passenger compartment even if there is an easily retractable covering over cargo area).

Although plaintiff contends that the storage area was not accessible to plaintiff in that

he could not "gain immediate control of weapons" from that area, "[t]he rule [in Belton] . . . does not require the arresting officer to undergo a detailed analysis, at the time of arrest, of whether the arrestee, handcuffed or not, could reach into the car to seize some item within it, either as a weapon or to destroy evidence, or for some altogether different reason." United States v. Sholola, 124 F.3d 803, 817 (7th Cir. 1997) (quoting United States v. Karlin, 852 F.2d 968, 971 (7th Cir. 1988)).

Plaintiff argues that the search was unjustified because under Michigan v. Long, 463 U.S. 1032, 1049 (1983), a search is justified only "if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)). Plaintiff also argues that defendant was unjustified because in Knowles, 525 U.S. 113, the Supreme Court held that a police officer could not conduct a full search of a car incident to the issuance of a traffic ticket that did not involve a custodial arrest. Plaintiff's arguments are mistaken. Defendant did not conduct a protective "search of the passenger compartment of [plaintiff's] automobile, limited to those areas in which a weapon may be placed or hidden" pursuant to Michigan v. Long or a search incident to citation prohibited under Knowles; rather, defendant conducted a lawful search incident to arrest authorized under Belton, 453 U.S. at

460.

B. State Law Claims

1. False arrest

A false arrest is an arrest made without legal authority. See Stern v. Thompson & Coates, Ltd., 185 Wis. 2d 220, 243, 517 N.W.2d 658, 666 (1994). Because defendant had probable cause to believe plaintiff violated a traffic law, he had legal authority under Wis. Stat. § 345.22 to arrest plaintiff for that violation; therefore, defendant's motion for summary judgment on this claim will be granted.

2. Battery

In Wisconsin, although a police officer is privileged to use necessary force when making an arrest, the use of more force than necessary is battery. See Wirsing v. Krzeminski, 61 Wis. 2d 513, 213 N.W.2d 37 (1973); Schulze v. Kleeber 10 Wis. 2d 540, 545, 103 N.W.2d 560, 564 (1960). See also State v. Mendoza, 80 Wis. 2d 122, 154, 258 N.W.2d 260, 273-74 (1977) ("An officer may be guilty of assault and battery if he uses unnecessary and excessive force or acts wantonly and maliciously.") Plaintiff's claim of battery rests on the mistaken assumption that his arrest was invalid. Because defendant had the authority to arrest plaintiff and because defendant did not use more force than was necessary in handcuffing plaintiff, patting him down for weapons and putting him in the squad car, defendant's motion for

summary judgment on this claim will be granted.

3. Negligence

In Wisconsin, the elements of a negligence claim are: "(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." Antwaun A. v. Heritage Mutual Insurance Co., 228 Wis. 2d 44, 55, 596 N.W.2d 456, 461 (1999). Plaintiff contends that defendant was negligent in failing to know the elements of the charge of carrying a concealed weapon when he arrested plaintiff. Defendant was within his legal authority when he arrested plaintiff because he had probable cause to believe plaintiff violated a traffic law; therefore, he did not breach any duty owed to plaintiff. Accordingly, defendant's motion for summary judgment on this claim will be granted.

ORDER

IT IS ORDERED that the motion of plaintiff Scott A. Whatcott for summary judgment is DENIED and that the motion of defendant Eric E. Luther for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant and

to close this case.

Entered this _____ day of February, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge