

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

S.S.W. and A.A.W., by and through
their parent JACK P. WILKE and
JACK P. WILKE,

Plaintiffs,

v.

CITY OF REEDSBURG, THE
REEDSBURG POLICE AND
FIRE COMMISSION, OFFICER
ANDREW T. FOESCH,
INVESTIGATOR BERNARD
JERNANDER, DETECTIVE
JOHN W. TRAGO, and DALE
MEYER,

Defendants.

OPINION AND
ORDER

01-C-0492-C

This is a civil suit for money damages. Plaintiffs are the surviving children and husband of Valerie Wilke, who killed herself on May 27, 2000. They contend that their constitutional rights were violated when defendants failed to act promptly to protect Valerie Wilke from herself, failed to obtain immediate medical help for her and placed plaintiff Jack Wilke in a squad car, preventing him from going to his wife's assistance, although they had

no probable cause to believe he had committed a crime. Plaintiffs may be alleging state law claims of negligence, although it is difficult to be sure from a reading of their complaint. (In their first claim, they use negligence terms and in their fifth claim, they make no reference to any provision of federal constitutional or statutory law alleged to have been violated.)

I conclude that plaintiffs have failed to adduce sufficient evidence from which a jury could find that defendants violated any of their federal constitutional rights and that there is no good reason to exercise supplemental jurisdiction over their state law claims. Accordingly, defendants' motion for summary judgment will be granted.

From the facts proposed by the parties, I find that the following are not disputed and relevant to the issues to be decided.

UNDISPUTED FACTS

Plaintiff Jack Wilke is an adult resident of Reedsburg, Wisconsin. He and his wife Valerie had two children, plaintiffs A.A.W. and S.S.W. Defendants Andrew Foesch and Bernard Jernander are police officers with the City of Reedsburg Police Department. Defendant John W. Trago is a police detective with the same police department. Defendant Dale Meyer is a retired Sauk County sheriff's department detective.

On May 27, 2000, plaintiff Jack Wilke telephoned the Reedsburg police department about 6:20 p.m. to tell them that his wife was suicidal, armed with a gun and locked in the

bathroom of their home at the Maple Aire Trailer Court Complex in the city of Reedsburg. Defendant Foesch arrived at the trailer court about 6:39 p.m.; defendant Jernander arrived shortly thereafter.

When defendant Foesch arrived, he saw a man later identified as plaintiff standing in the roadway pointing frantically at the trailer home located at 112 Scarlet Court. Defendant Foesch approached him and asked him what the problem was. Plaintiff screamed, "My wife is in the house, I don't know if she has a gun but I heard three shots go off. We have to go in there to see if she is OK." Defendant Foesch radioed the police dispatch to tell them that plaintiff had heard three shots go off. He then told plaintiff to come with him to the intersection for his own protection.

Defendant Jernander arrived, met defendant Foesch after contacting him by radio to determine his location and began to gather information from plaintiff. Plaintiff told defendant Jernander that his wife was in the trailer, that she had locked herself in, that she had a Marlin .22 rifle, that she had threatened to kill herself and that just before the officers had arrived, he had heard three shots from inside the trailer. He told the officer that his two children were with their maternal grandparents in Portage and nobody else was in the trailer. In response to questions from defendant Jernander, plaintiff said that he and Valerie had not been getting along well and that he had just told her he wanted a divorce. He added that they had money problems because Valerie refused to work and that he had been seeing another

woman for about a month.

Plaintiff told defendant Jernander more about the events of the day leading up to Valerie's threats. He said that he had run across the road to use his mother's telephone to call the police because he and Valerie did not have a telephone, that Valerie had appeared in the doorway of his mother's trailer while he was using the phone, that he had hung up quickly and tried to catch her but that she had outrun him and locked the porch door of their trailer before he could get there. He had pushed out the screen and climbed through the porch window to get into the porch area but discovered that his wife had locked the inner trailer door as well. He then broke a window of the trailer and climbed through the opening to get into the living room; as he did so, he heard three shots coming from the direction of the hall. He started to go in that direction but stopped, unsure whether he would find his wife with bullet wounds or whether she was shooting at him, and then ran outside to wait for the police. The first squad car pulled up just as he got to the road.

Plaintiff told defendant Jernander that the rifle was a semi-automatic, that it had been stored in a closet and that the ammunition had been stored in a cabinet in the living room. He said that he did not think that his wife knew how to use the rifle. Defendant Jernander advised dispatch that a supervisor should be called to the scene and an ambulance called to stand by at the trailer park.

For a number of reasons, defendant Jernander was suspicious that plaintiff was not

being honest with him and may have committed a homicide. He thought plaintiff's statements indicated that he knew his wife had shot herself, although he had said he did not know whether his wife might have been shooting at him. Plaintiff seemed very athletic, leaving defendant to wonder why he had not been able to catch his wife when she ran from his mother's trailer. In addition, defendant Jernander thought plaintiff's emotions and hand gestures seemed exaggerated and fake. At the time, defendant Jernander had about 19 years of experience as a police officer and had responded to numerous incidents in which citizens believed they had lost family members and were in a state of panic. He thought plaintiff's behavior was inconsistent with behavior he had observed in similar situations. From this, he concluded that plaintiff should be held in custody until the officers gathered more information.

Plaintiff was subjected to a pat down search by defendant Jernander and was then detained in the rear of defendant Foesch's squad car. Defendant Jernander told plaintiff he was being detained until the officers could figure out what had happened. Defendant Foesch told plaintiff he had to be detained until the incident could be resolved. Defendant Foesch did another pat down of plaintiff and handcuffed him before putting him into the squad car.

Defendant Jernander radioed for additional backup officers from the Sauk County Sheriff's Department and then asked the trailer court manager to evacuate the occupants of the surrounding trailer homes. Defendant Foesch took out an AR-15 firearm and he and

defendant Jernander started to observe the trailer for any sign of movement. Foesch tried to do a perimeter search but could not do so without coming into full view of anyone in the trailer. Defendant Jernander instructed defendant Foesch to take up a position from which he could observe the front door of the trailer. Foesch noticed what appeared to be light coming from a bathroom and informed the other officers on his radio frequency.

While defendant Foesch waited for other officers to respond, he took cover behind the trailer at 102 Scarlet Court, which put him directly opposite the front side of plaintiff's trailer at 112 Scarlet Court. Defendant Jernander approached the trailer from a position of cover and took up a position at the rear of trailer lot S114, which was located southwest of plaintiff's trailer. This gave him a view of the rear of the trailer, including the back door area. Defendant Jernander called out "Valerie" several times but received no response.

At that point several sheriff's deputies began arriving on the scene. Defendant Jernander directed them to his location and briefed them on what was happening, then left to go out to Silver Drive where he could brief the arriving officers. He met the ambulance and told the driver to stay in a position of cover on Silver Drive and remain on standby. At frequent intervals, he checked on plaintiff.

Defendant Trago arrived on the scene and was briefed by defendant Jernander. Defendant Trago had worked as a hostage negotiator with the Sauk County Critical Incident Negotiator team since 1993 or 1994. He had received extensive training in hostage and

barricaded subject negotiations, including entry into barricaded homes, from the FBI, the Chicago Hostage Barricade Team, Blackhawk Technical College and other technical schools. He had handled numerous incidents involving armed and barricaded suspects and had negotiated with armed persons threatening suicide.

Defendant Meyer arrived at about the same time as defendant Trago. Defendant Meyer worked as a hostage negotiator for the same Critical Incident Negotiator team from about 1993 to 2000. For about 13 years before that, he had been the critical incident negotiator for Sauk County.

Defendant Trago asked for more negotiators and the police department sent out Officer Kay Howver. Defendant Jernander briefed all the negotiators, telling them what he had learned from plaintiff and that there had been no response from the trailer since the officers had arrived. He told them that plaintiff was being detained in defendant Foesch's squad car.

Sgt. Gary Zellmer of the Reedsburg police department came to the scene in response to defendant Jernander's request for a supervisor. He took command of the scene, instructing the officers to set up a perimeter around the trailer to contain the area. He called defendants Trago and Meyer to his location and briefed them. He yelled at the trailer, hoping to get a response from Valerie but received none. Officer Howyer and Sgt. Fults, a sheriff's department deputy, arrived with a hostage negotiation telephone, which they set up. Because

the trailer had no telephone, the officers went to the back of the trailer, broke a window and threw the phone into the trailer. The officers tried to reach Valerie with the special phone, which has a built-in listening device, but there was no response. Defendant Trago tried yelling but got no answer.

Sgt. Zellmer decided the officers should make an entry into the trailer while it was still daylight. He wanted to wait until they could get a ballistic shield from the Sauk County Emergency Response Team, but the team chose not to. Instead they made entry through the trailer's front door, forced open the locked bathroom door and found Valerie's body slumped over the toilet stool, covered with blood.

Defendants Foesch, Jernander, Trago, Meyer and Sgt. Zellmer did not hear any gunfire or other noise coming from the Wilke trailer from the time they arrived at the scene until the officers entered the trailer and found the body. After the officers reported the discovery of the body, Reedsburg Police Chief Wilbur Abel responded to the scene and authorized the officers to call the Wisconsin State Crime Laboratory to go through the trailer for evidence. He asked defendant Trago to interview plaintiff and obtain his consent to search the trailer. Defendants Trago and Meyer asked plaintiff for his consent, which he gave, and asked him whether he would go to the Reedsburg Police Department for an interview. He agreed and was taken to the police station.

At the station, the detectives told plaintiff he was not under arrest and was free to

leave at any time. Plaintiff stated that he understood he was not in custody and was free to leave. He spoke voluntarily about the incident for about an hour and then asked for a break, which he took outside the department, after confirming his understanding that he was not under arrest. After his break, he returned to defendant Trago's office, spoke to Trago briefly and then left with his mother, Sharon Waefel.

Meanwhile, Wisconsin State Crime lab employees processed the scene and took evidence into custody. The officers noted two small caliber gunshot wounds in Valerie Wilke's chest area and one small caliber wound under her chin. A fourth bullet hole was found in the upper wall to the left of the body. The body was taken to the Sauk County morgue to await an autopsy, which was conducted by Dr. Robert Huntington, III, a forensic pathologist.

In Dr. Huntington's opinion, Valerie Wilke committed suicide by shooting herself three times, twice in the chest and once under the chin. One of the shots to the chest penetrated her left lung upper lobe and one penetrated her heart and left lung lower lobe. The shot to the chin exited her forehead without penetrating her brain. It is likely that the three shots that penetrated her body were fired at approximately the same time; it is extremely unlikely that she could have shot herself twice and then shot herself again several hours later. Once she had sustained two of the three wounds, it is unlikely she could have lost consciousness and then regained it with the ability to locate her rifle and shoot again.

She would have lived only a matter of minutes between the time she shot herself the first time and the time her heart stopped beating. It is unlikely that medical attention could have saved her.

In June, plaintiff called defendant Trago, asking for the return of his rifle, as well as the sweatshirt his wife had been wearing when she killed herself. Defendant Trago told plaintiff the sweatshirt was bloody; plaintiff said he wanted it anyway. On July 6, 2000, plaintiff was told that the investigation into his wife's death was closed and that the items taken as evidence would be returned to the Reedsburg police department. Plaintiff arranged for his mother to pick up the items. Defendant Trago gave her the rifle and asked her whether her son wanted the body tissue and other samples taken at the autopsy. She said that she thought he wanted everything; defendant Trago gave it to her and told her the department would dispose of any of the items if her son did not want them. Sharon Waefel signed property cards for all the property she took.

The City of Reedsburg Police Department has a written policy entitled "Hostage/Barricaded Subjects," Section 050, Number 050.13, which was in effect on May 27, 2000. All city police officers are trained in this policy and in other police procedures and policies that apply to individuals that are armed and may be contemplating suicide. Defendants Foesch, Jernander and Trago followed the policies and procedures on May 27, 2000, when responding to plaintiff's call for help.

OPINION

In the third amended complaint, which is the operative complaint in the case, plaintiffs alleged violations of the Fourteenth Amendment based on (1) the failure of the Reedsburg police department to use such care as a reasonable and prudent police officer would have used under similar circumstances involving a suicidal individual, adding that the police officers acted recklessly and with callous indifference to the rights of the victim and plaintiffs; (2) the department's release to plaintiff Jack Wilke of portions of his wife's internal organs, an act that "shocks the conscience" of the community; and (3) the failure of defendants Police and Fire Commission and City of Reedsburg to train and instruct their police officers adequately in responding to suicidal persons. Also, plaintiffs alleged that plaintiff Jack Wilke's false imprisonment and illegal detention violated the Fourth Amendment. Plaintiffs added a claim of "wrongful death" based on defendant police officers' delay in responding to plaintiff's concerns, thus preventing the victim from receiving necessary medical attention for over three hours. Presumably, this claim arises under state law because plaintiffs do not tie it to any provision of the United States Constitution. Plaintiffs may be bringing it under Wis. Stat. § 895.03, which creates a cause of action for death caused by a wrongful act, neglect or default.

Plaintiffs did not address their "shocks the conscience" claim in their brief. This may constitute waiver of the claim, *see Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 810 (7th Cir.

2001). In the event that it does not, see Nabozny v. Podlesny, 92 F.3d 446, 454 (7th Cir. 1996) (court has obligation to consider all claims of complaint on motion for summary judgment, even if non-moving party fails to argue them or to submit any opposition at all), the undisputed facts show that Valerie Wilke's body parts were returned to plaintiff only after careful explanation of what they were and a concerted effort by defendant Trago to insure that plaintiff wanted them returned. Under these circumstances, no reasonable jury could find any conscience-shocking behavior by defendants.

With respect to the first and third claims, plaintiffs have failed to show either that defendants had a constitutional duty to protect Valerie Wilke or that, if they did, they failed to carry out that duty. (Although plaintiffs use negligence terms in their first claim, such as "failing to use such care as a reasonable and prudent officer would have used under similar circumstances," they also talk of callous disregard, which connotes the same culpable state of mind as "deliberate indifference," see Wilson v. Seiter, 501 U.S. 294 (1991), required to state a federal claim.) Governments have no positive duty to protect citizens, except in the unusual situation in which they have taken persons into their custody and assumed direct responsibility for them. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195, 196 (1989). The government assumes special duties to an individual only if it takes the person into custody, by incarcerating or institutionalizing him or by affirmatively placing the individual in a position of danger he would not have faced otherwise; it has no

similar duty to provide protection for ordinary citizens. Id. at 199-202. See also Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988) (no due process violation when city dispatcher failed to send ambulance to dying woman).

Plaintiffs argue that this case is like DeShaney because defendants took control of an emergency situation, failed to render aid to Valerie Wilke and at the same time prevented Jack Wilke from going to his wife's assistance. Citing Ross v. United States, 910 F.2d 1422, 1433 (7th Cir. 1990), they argue that "the state cannot arbitrarily assert its power so as to cut short a person's life," as it did in this case. The parties dispute plaintiffs' assertion that Jack Wilke pleaded with defendants to let him go back into the trailer to help his wife. For the purpose of this opinion, I will assume that he did. This does not mean that it was arbitrary or otherwise improper for defendants to hold him back. They could not discharge any duty they had to protect and assist Valerie Wilke by rendering Jack Wilke more vulnerable. He was the one who called for help from the police, who left the trailer because he thought Valerie might be shooting at him and who stayed out until the police came. Once defendants were on the scene and until they had sorted out the situation, they had a responsibility not to put plaintiff into danger by letting him back into the trailer, knowing that he was the source and subject of his wife's fury. (It is irrelevant that Valerie was already dead when plaintiff asked to go back into the trailer; neither he nor the officers knew what the situation was inside the trailer at that time.). The situation defendants faced was not like

that in Ross, in which a sheriff's deputy prevented trained city police officers from attempting a rescue of a twelve-year-old boy who had fallen into Lake Michigan. Defendants were preventing an untrained and unarmed civilian from attempting entry into a residence in which a suicidal woman was barricaded with a rifle.

Moreover, in order to prevail on this claim, plaintiffs would have to show that Jack Wilke could have saved his wife had he been allowed to enter the trailer when he asked to. Plaintiffs have not adduced any evidence that it would have made any difference. They argue that Dr. Huntington has said only that it is unlikely that Valerie would have lived more than a few minutes at most once she had shot herself in the head or in the chest, not that it is impossible that she lived longer and fired a fourth shot an hour or more later. At trial, however, plaintiffs would have to show that it was more likely than not that she would have lived long enough that she could have been saved if Jack Wilke had been allowed to go to her assistance. They could not rely for this showing on Huntington's testimony that it was *unlikely* that Valerie Wilke could have been saved. Plaintiffs would have to have expert testimony of their own to prove the *likelihood* that she could have been saved. They have given no indication that they have any such testimony, although this is the time for them to do so. Without the testimony, they have failed to raise a genuine dispute on this claim.

Although plaintiffs contend that defendants acted recklessly and with callous disregard to plaintiffs' rights and that defendants City of Reedsburg and the Reedsburg Police and Fire

Commission failed to train the city's police officers adequately to respond to incidents involving suicidal persons, they have adduced no expert evidence to support these claims. Without such evidence, lay jurors would be unable to assess the adequacy of defendants' handling of the incident scene. The proper police response to a situation involving barricaded, suicidal persons is not a matter within the common knowledge of lay persons.

It is undisputed that defendants responded promptly and that they took a number of steps to deal with the situation. If the Constitution requires something more of defendants in responding to plaintiff's call for help, plaintiffs have not suggested what it might be. They have said only that defendants should not have left Valerie Wilke unattended as long as they did, but that is an argument from hindsight. Defendants' actions must be evaluated from the standpoint of what they reasonably knew at the time.

Because nothing in the undisputed facts shows conduct so obviously inept or unresponsive that even a lay person could find it deliberate indifference, plaintiffs cannot put into dispute their allegation that defendants' actions demonstrated deliberate indifference to plaintiff's call for help or that defendant City of Reedsburg had known of a need to train its officers in the handling of barricaded suicidal persons and deliberately ignored its responsibility for providing the needed training. Plaintiffs have not shown that defendant City of Reedsburg Police and Fire Commission had any responsibility for the day-to-day operations of the police department or the training of the officers. Summary judgment will

be granted to defendants on plaintiffs' first and third claims.

Plaintiffs' fourth claim concerns the restraint of plaintiff Jack Wilke at the incident scene. Defendants do not justify the restraint by arguing that they had probable cause for an arrest. Rather, they contend that they had reasonable suspicion to detain plaintiff briefly for their own safety until they could sort out what had happened. I agree with plaintiffs that it is a little odd for defendants to say they had reason to believe that plaintiff had killed his wife when they were concentrated on responding to the potential threat his wife posed. It is odd, also, that defendant Jernander would say both that he thought plaintiff might have killed his wife *and* that he thought plaintiff knew his wife had shot herself. On the other hand, the confusion in defendant Jernander's mind about just what plaintiff knew or had done works in defendants' favor. Jernander was facing a volatile and dangerous situation about which he knew little. He was on the scene with only one other officer. A woman had been shooting a rifle inside her trailer, which was in close proximity to other trailers. He did not have the luxury of questioning plaintiff sufficiently to sort out his role in the situation. He needed to protect plaintiff from further gun shots if his wife had been shooting at him and he did not know what plaintiff might do as the situation progressed. If, as plaintiff contends now, he would have tried to enter the trailer, defendant Jernander had good cause to prevent him from doing it, for plaintiff's safety, for his wife's, if she was still alive, and for the officers'. Moreover, he had to be concerned about protecting the potential crime scene from any

attempt by plaintiff to destroy evidence.

The information defendant Jernander had about plaintiff met the requirement for an investigative stop that an officer have “some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.” United States v. Morrison, 254 F.3d 679 (7th Cir. 2002) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). He had facts sufficient “to warrant a [person] of reasonable caution in the belief that the action taken was appropriate.” Terry v. Ohio, 392 U.S. 1, 21-22 (1968). Not only was plaintiff acting suspiciously in Jernander’s opinion, but, as Valerie Wilke’s spouse, he would be the prime suspect if she had been murdered. It was obvious that a serious incident of some kind had occurred; plaintiff’s role in that incident was still to be determined. The situation was highly volatile; defendant Jernander could not depend on plaintiff’s good judgment to stay out of danger when he was emotionally distraught and concerned about his wife. For their own safety and everyone else’s, defendants did not need any surprises while they were trying to respond to a potentially dangerous situation.

The reasonableness of a stop depends on the extent of the intrusion into the rights of the individual, which in turns depends on the totality of the circumstances of the stop. United States v. Tilmon, 19 F.3d 1221, 1224 (7th Cir. 1994) (law enforcement officers justified in requiring suspect to lie face down on ground at gunpoint while they investigated his involvement in recent bank robbery); see also United States v. Yang, 286 F.3d 940 (7th

Cir. 2002) (suspect handcuffed for placement in squad car to be taken to different area in airport; restraint was justified because trip took officers through highly restricted area on tarmac where planes were taxiing). Plaintiff's detention was tailored to the needs of law enforcement. Illinois v. McArthur, 531 U.S. 326, 331 (2001). It was no longer than necessary. Defendants released plaintiff as soon as they concluded there was no evidence of homicide, as they were required to do. United States v. Childs, 277 F.3d 947 (7th Cir. 2002) (person stopped on reasonable suspicion must be released as soon as possible once officers assure themselves that no criminal activity is involved). I conclude that plaintiff's detention was reasonable under the Fourth Amendment.

Having found that plaintiffs have stated no viable constitutional claim, I need not reach the question of qualified immunity, which defendants did not raise until they filed their reply brief. If, in future cases, defendants wish to rely on this defense, they should raise it in their initial brief so that the non-moving party has a chance to respond.

Defendants are entitled to summary judgment on plaintiffs' claim that plaintiff Jack Wilke was restrained in violation of his Fourth Amendment rights. With the dismissal of all of plaintiffs' federal claims, I decline to exercise supplemental jurisdiction over their fifth claim, for wrongful death, which arises under state law, if at all, and that part of their first claim that rests on claims of negligence. Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or decline jurisdiction over state law claims).

ORDER

IT IS ORDERED that the motion for summary judgment of defendants City of Reedsburg, the Reedsburg Police and Fire Commission, Officer Andrew T. Foesch, Investigator Bernand Jernander, Detective John W. Trago and Dale Meyer is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 9th day of July, 2002.

BY THE COURT

Barbara B. Crabb
District Judge