

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

TODD W. WILLKOMM,

Plaintiff,

v.

MEMORANDUM and ORDER
05-C-523-S

PERRY MAYER, TRAVIS CLAUSEN
and CITY OF WISCONSIN DELLS,

Defendants.

Plaintiff Todd Willkomm commenced this action under 42 U.S.C. § 1983 claiming that his Fourth Amendment rights were violated by defendants Perry Mayer, Travis Clausen and City of Wisconsin Dells. In his complaint he alleges that defendants used excessive force in arresting him.

On February 6, 2006 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision. Plaintiff objects to the consideration of arguments and evidence raised by defendants for the first time in their reply brief. The Court will disregard such evidence and arguments.

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 defendants' motion for summary judgment the Court finds that there is no genuine dispute as to the following material facts.

Plaintiff Todd W. Willkomm is an adult resident of the state of Wisconsin. Defendant City of Wisconsin Dells is a municipality organized under the laws of the state of Wisconsin. Defendants

Perry Mayer and Travis Clausen are police officers with the City of Wisconsin Dells Police Department.

On September 1, 2003 at about 12:30 a.m. in the City of Wisconsin Dells defendant Clausen saw the driver of a vehicle throw a beer can from the driver's side window of the vehicle. The driver was later identified as plaintiff Todd Willkomm. The vehicle turned left into a Mobil gas station parking lot. As the vehicle turned, Clausen activated his emergency lights and siren. The vehicle stopped in the parking lot and Clausen spoke with the driver.

Clausen told Willkomm that he had stopped him for throwing a beer can from the car. Willkomm told Clausen he did not know what he was talking about. Clausen asked Willkomm for his driver's license and identification. Plaintiff responded that he did not have any identification with him. Willkomm admitted that he had been drinking alcohol prior to driving.

Willkomm exited the vehicle and agreed to submit to field sobriety tests. Willkomm argued with Clausen about the tests. Sgt Mayer arrived on the scene. Willkomm walked away from Clausen and approached Sgt. Mayer. Clausen then grabbed Willkomm, told him he was under arrest, directed him against a nearby squad car and moved Willkomms' right arm behind his back. Sgt. Mayer told Willkomm he would shock him with a Taser if he did not place his left arm

behind his back. When plaintiff did not comply Sgt. Mayer shocked Willkomm.

After Willkomm was handcuffed with his hands behind his back he was placed in the rear of the squad car. Willkomm was moving around, yelling and banging his hands on the back window of the car. He was able to reposition his handcuffed hands to the front of his body.

Willkomm was then told to exit the car but he refused. The officers then removed him and placed him face down on the ground. Willkomm's handcuffs were repositioned behind his back and his feet were secured with flexcuffs. The officers then carried him to the squad car. Willkomm was told if he did not swing his legs into the car he would be shocked. Willkomm failed to comply and was shocked by Mayer. The officers were then able to get plaintiff in the squad car.

Willkomm attempted again to move his handcuffed hands to the front of his body and caught them on his feet. He was removed from the squad car and placed face down on the ground. Sgt. Mayer shocked Willkomm again and the officers were able to reposition the handcuffs.

Willkomm was then placed in the squad car and transported to St. Claire Hospital. Willkomm used profanities, made threatening comments about Sgt. Mayer and purposely banged his head against the squad car's cage window. At the hospital Willkomm refused to exit

the car. The officers placed him in a wheelchair. A blood draw was taken from Willkomm which indicated he had a blood alcohol content of .158 g/100 ml. After being medically cleared by the hospital Willkomm was transported to Sauk County Jail.

Willkomm was never punched, kicked, pepper sprayed or hit with a baton or nightstick by any officer of the Wisconsin Dells Police Department.

Sgt. Perry Mayer is a certified instructor in the use of the Taser.

On November 5, 2003 plaintiff was found guilty after pleading no contest to operating a motor vehicle with a prohibited alcohol concentration .10 or above based on his September 1, 2003 arrest. On December 15, 2003 plaintiff was found guilty after pleading no contest to resisting or obstructing an officer on September 1, 2003.

MEMORANDUM

Plaintiff claims that his Fourth Amendment rights were violated because defendants used excessive force in arresting him. In Graham v. Connor, 490 U.S. 386, 394 (1989), the Court held that force used during the course of an arrest, investigatory stop or other seizure violates the Fourth Amendment where it is unreasonable.

To prevail on this claim plaintiff must prove that the force during the arrest was unreasonable. The question is whether the

officer's actions are objectively reasonable in the light of the facts and circumstances confronting him. Saucier v. Katz, 533 U.S. 194 (2001). These circumstances include 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 or she is actively resisting arrest or attempting to evade arrest by flight. Id.

Although plaintiff argues that material facts remain in dispute, the Court considers only the undisputed facts. It is undisputed that when Officer Clausen stopped plaintiff's vehicle he failed to produce identification and admitted to drinking alcohol before driving. Plaintiff also admits that while performing field tests he walked away from Officer Clausen. At that point Officer Clausen could reasonably have believed that plaintiff was trying to flee or resist arrest by not completing the tests. At that point Officer Clausen grabbed plaintiff and put his right arm behind his back. Plaintiff was told to place his left arm behind his back by Sgt. Mayer and did not do so. Although plaintiff states he flexed his arm in an attempt to pull it out from between his chest and the squad car where it was stuck, Sgt. Mayer could have reasonably concluded that plaintiff was resisting the handcuffing. Sgt. Mayer's application of force by use of the Taser to handcuff plaintiff was reasonable in light of the facts and circumstances confronting him.

Plaintiff does not dispute the following facts. When he was in the squad car plaintiff moved around, yelled, banged his hands on the back window of the car and repositioned his handcuffed hands to the front of his body. He was told to exit the car and refused. The officers removed him from the car and placed him on the ground to reposition his handcuffs and secure his legs with flexcuffs. The officers carried him to the car and told plaintiff to swing his legs into the car. He was told if he did not do so he would be shocked. After he failed to comply he was shocked. From the time plaintiff was placed in the squad car he was disruptive and failed to comply with the officers' orders. The use of force by Officer Mayer to gain defendant's compliance in returning him to the squad car was reasonable.

After plaintiff was in the squad car he again attempted to move his handcuffed hands and caught them on his feet. He was removed from the car. Sgt. Mayer used force for the third time by use of the Taser gun in order to reposition plaintiff's handcuffs. The use of force was reasonable to gain compliance with the officers order and to secure plaintiff for transportation to the hospital.

Since the use of the taser gun by defendant Mayer as an application of force was objectively reasonable on all three occasions, the defendant City of Wisconsin Dells was not liable for any violation of plaintiff's Fourth Amendment rights. A violation

of a city policy by the defendant officers is not a federal law claim.

In the alternative where defendant's use of force was not objectively reasonable, he raises the defense of qualified immunity. An officer is entitled to qualified immunity if a reasonable officer could have believed that his conduct was constitutional in light of the clearly established law and the information the officer possessed at the time the incident occurred. Saucier v. Katz, 533 at 202. The Court stated at p. 205 as follows:

The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Had defendant Mayer been mistaken on whether the use of force was reasonable in these circumstances, a reasonable officer could have believed that his conduct was constitutional in light of the clearly established law and the information the officer possessed at the time the incident occurred. Accordingly, defendants would

be entitled to qualified immunity on plaintiff's Fourth Amendment claim.

Defendants are entitled to judgment in their favor as a matter of law on plaintiff's Fourth Amendment claim and their motion for summary judgment will be granted.

Plaintiff may be pursuing state law claims of assault and battery. This Court declines to exercise continuing supplemental jurisdiction over plaintiff's state law claims pursuant to 28 U.S.C. §1367(c) (3) and United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1986). See Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993). Plaintiff's state law claims will be dismissed without prejudice.

ORDER

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

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants against plaintiff DISMISSING his complaint and all federal law claims contained therein with prejudice and costs and all state law claims without prejudice.

Entered this 9th day of March, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge