

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

ALYIANA M. HENNING, THE ESTATE
OF GARRETT D. HENNING, DEAN C.
HENNING and MARIE E. HENNING,

Plaintiffs,

v.

MEMORANDUM and ORDER
05-C-582-S

TIMOTHY J. O'LEARY, MICHAEL BLASER,
SCOTT D. PETERSON, and CITY OF
JANESVILLE,

Defendants.

Plaintiffs Alyiana M. Henning, The Estate of Garret D. Henning, Dean C. Henning and Marie E. Henning commenced this action under 42 U.S.C. § 1983 claiming that Garrett D. Henning's Fourth Amendment rights were violated by defendants Timothy J. O'Leary, Michael Blaser, Scott D. Peterson and the City of Janesville. In their complaint they allege that defendants detained Garrett Henning, searched his vehicle and used excessive force in arresting him.

On March 1, 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.

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 Alyiana M. Henning is the minor daughter of the deceased Garrett D. Henning. Plaintiffs Dean C. Henning and Marie

E. Henning are the parents of Garrett D. Henning. Defendants Timothy J. O'Leary, Michael Blaser and Scott D. Peterson are police officers employed by the City of Janesville. The defendant City of Janesville is a municipal corporation in the State of Wisconsin.

Shortly after 11:00 p.m. on October 1, 2003 Janesville Police Officers Michael Blaser and Scott Peterson were dispatched to 1930 East Racine Street, Janesville, Wisconsin, for a report of a suspicious person, a man with a ski mask, leather jacket and gloves who had been in the parking lot of the apartment building in that area. While in route the officers received a description of an old silver gray Dodge truck which had been driven from the same apartment building parking lot. Officer Blaser left to pursue the vehicle.

Officer Peterson spoke with Michael Fox and Richard Buol at the apartment complex. Michael Fox stated that his wife had confronted a man in the parking lot and asked him what he was doing. Buol told Officer Peterson that the man was Garrett Henning, who had been in his apartment earlier in the evening wearing a black leather coat, gloves and a ski mask.

Officer Peterson went to Dawson Field to meet Officer Blaser to discuss the incident. While they were talking, Officer O'Leary told them he was following a truck matching the description of the suspicious person's truck. Officer O'Leary told them he would pursue the truck which was pulling into the Stop N Go gas station at Racine and Randall streets. Officer O'Leary activated his

squad's red and blue emergency lights, parked behind the vehicle and shined his spotlight on the driver. The sole purpose for O'Leary stopping and talking to the driver was to ask him what had happened earlier at 1930 Racine Street. It was not Officer Peterson's intent to issue plaintiff a citation.

Officer O'Leary spoke with the driver who identified himself as Garrett Henning. Officer O'Leary asked Henning about his argument with a female at the apartment parking lot. Henning said the woman confronted him stating he could not park there. Henning also said he had a car for sale there.

Officers Blaser and Peterson met Officer O'Leary at the Stop N Go gas station to discuss the incident at the apartment building with Henning. Officer Blaser knew that Henning was a convicted felon. Officer Peterson asked Henning if he had been to Buol's apartment earlier that evening. At first he said he had not, but then said he had been there for a short time. Henning was wearing a black leather coat and a black ski mask was in plain view on the seat.

Officer O'Leary told Officer Blaser that there was a baseball bat on the side of the passenger seat. Officer Blaser believed there was an issue of officer safety and decided they should have Henning leave the vehicle. He asked Henning to exit the vehicle and patted him down for weapons. Blaser told Henning to have a seat in the back of his squad car.

Officer Blaser asked Henning if he would consent to a search of his vehicle. Henning gave his consent. Although Blaser may have had written consent forms with him, he did not have Henning sign one.

A search of the vehicle revealed a holstered gun and some OC spray. Officer Blaser knew Henning was a convicted felon. Officer Blaser asked Henning to step from the vehicle, turn around, spread his feet and place his hands behind his back. Officer Blaser grabbed Henning's right hand and told him he was under arrest. Henning began to struggle and move away from the squad car. The officers attempted to gain control of Henning to handcuff him but without success.

The officers took Henning to the ground to gain control of him. Henning continued to struggle, twisting and turning while the officers tried to handcuff him. The officers told Henning to stop resisting and to place his hands behind his back. Henning continued to resist.

The officers tried hand strikes, verbal commands and OC spray to control Henning without success. Officer Blaser then struck Henning on his left torso and on his legs with a baton. Henning was face down on the ground with his arms underneath his chest.

During the struggle Officer Peterson noticed his weapon was missing. He had not unsnapped his holster or unholstered his gun. Officer Peterson saw his gun under Henning pointing in the

direction of O'Leary. Officer Peterson shouted that Henning had his gun underneath him. Officer Peterson tried to change the direction the gun was pointing but felt resistance. Officer Peterson believed Henning had control of the gun.

Officer O'Leary saw the gun pointed at his face and feared for his safety and the safety of the other officers. Officer O'Leary shot Henning one time in the torso. Henning died the morning of October 2, 2003 as a result of the gun shot wound.

MEMORANDUM

Plaintiffs claim that Garret Henning's Fourth Amendment rights were violated when he was stopped by the officers concerning suspicious activity at an apartment complex. An investigatory stop is authorized if the officer has a reasonable suspicion that a crime has occurred or will occur. Terry v. Ohio, 390 U.S. 1, 11 (1968).

When Officer O'Leary stopped Henning's vehicle, he did so to investigate an incident that had occurred earlier at an apartment complex. Officers received a complaint that someone matching Henning's description was engaged in suspicious activity and possible trespass at the apartment complex. The stop was based on a reasonable suspicion that a crime had occurred. Henning's Fourth Amendment rights were not violated by the Terry stop. The motion

of defendants O'Leary, Blaser and Peterson for summary judgment on this Fourth Amendment claim will be granted.

Plaintiffs claim that the City of Janesville had a policy of harassing young male persons. The only evidence presented in support of this claim is Richard Buol's affidavit at paragraph 12 which states that he is aware that the Janesville police Department has a routine or practice of harassing young males and stopping them for no reason. Buol's statement is speculative and inadequate to support a finding that such a policy existed. Further, there is no evidence that the stop of Henning was unreasonable or made to harass him. Since the individual officers did not violate Henning's Fourth Amendment rights by stopping him, the defendant City of Janesville can not be liable. The City's motion for summary judgment on this Fourth Amendment claim of plaintiffs will be granted. See Tom v. Volda, 963 F. 2d 952 (7th Cir. 1992).

Plaintiffs also claim that Henning's rights were violated when his vehicle was searched. A search does not violate an individual's Fourth Amendment right where he consents to the search. Schnekloth v. Bustamonte, 412 U.S. 218 (1973).

Plaintiffs argue that Henning did not consent to the search. They speculate that the reason Officer Blaser did not have plaintiff sign a written consent form was because Henning did not consent. Officer Blaser states in paragraph 8 of his affidavit that Henning gave his consent. There is no admissible evidence

which puts this fact in dispute. Since Henning consented to the search of his vehicle, the search did not violate his Fourth Amendment rights. Defendants are entitled to judgment in their favor on this claim.

Plaintiffs claim that Garrett Henning's Fourth Amendment rights were violated when excessive force including deadly force was used during the course of his arrest. 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. Deadly force is justified only where the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or others. Tennessee v. Garner, 471 U.S.1, 11 (1985).

The question is whether the officers' 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.

The reasonableness of a particular force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Graham, 490 U.S. at 396. The determination of reasonableness must take into account that police

officers are often forced to make split second judgments about the amount of force to be used in circumstances that are tense, uncertain and rapidly evolving. Id.

It is undisputed that as soon as the officers attempted to handcuff Henning he resisted. He attempted to move from the officers and began to struggle. The officers took him to the ground in their attempt to handcuff him. He continued to struggle and resist. Henning defied the officers' verbal commands to stop resisting and place his hands behind his back. The officers used a methodical escalation of force to obtain Henning's compliance with their orders. The three officers employed OC spray, hand strikes and the use of the baton.

Henning continued to struggle. During this ongoing struggle Officer Peterson noticed that his gun was no longer in his holster. He had not unsnapped his holster or unholstered his gun. The officers saw the gun under Henning's body. It appeared to Officer Peterson that Henning had control of the gun and was going to use it. Officer O'Leary saw the gun pointing at him and believed he and the other officers were in danger.

At this point the situation was tense, uncertain and rapidly evolving. It appeared to the officers that Henning's control of the gun posed a threat of serious physical harm to the officers. Although plaintiffs do not argue that Henning did not have his hand on the gun, it was reasonable for the officers to believe that he

did have control of the gun at the time. Defendant O'Leary's use of deadly force in this instance was reasonable based on the facts known to the officers on the scene. The fact that in hindsight the shooting might not seem necessary does not make it unreasonable under the Fourth Amendment. Defendants did not violate Hennings Fourth Amendment rights.

In the alternative, where defendants' use of force had not been objectively reasonable, they raise 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 defendants been mistaken on whether the use of force was reasonable in these circumstances, a reasonable officer could have

believed that this conduct was constitutional in light of the clearly established law and the information the officers possessed at the time the incident occurred. Accordingly, defendants would be entitled to qualified immunity on plaintiffs' Fourth Amendment claim.

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

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 plaintiffs DISMISSING their complaint and all claims contained therein with prejudice and costs.

Entered this 14th day of April, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge