IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Alexander Gray,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 23-cv-1931
	)	
City of Evanston, Evanston Police Officers Kubiak, Kane, Popp, Rosenbaum, and Pogorzelski,	)	*(Judge Seeger)*
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. Introduction

Plaintiff brings this action under 42 U.S.C. § 1983 against the City of Evanston and five of its police officers arising out of an incident that occurred on March 31, 2021.

The incident began with a report from an anonymous complainant about a white male with a gun in a park in Evanston.[1] Plaintiff is an African American male. (Plaintiff's Statement of Undisputed Facts, ¶ 1.) The complainant described the white male as "approximately 5 feet tall to 6 feet tall,

[1] Plaintiff assumes, for the purposes of his motion for summary judgment, that the police department received the complaint through a 911 system. *See Navarette v. California*, 572 U.S. 393, 398 (2014) (one factor relevant to the reliability of an anonymous complaint is whether it came through a 911 system.) This factor is not controlling because the complaint did not otherwise establish reasonable suspicion. *See infra* at 6-7.

in a dark coat and jeans," carrying a handgun north of the beach at 501 Sheridan Square in the City of Evanston. (Plaintiff's Statement of Undisputed Facts, ¶ 5.) (

Defendants Kubiak, Kane, Popp, Rosenbaum, Pogorzelski, and other Evanston police officers responded to the report of the white male holding a firearm. (Plaintiff's Statement of Undisputed Facts, ¶ 5.) Plaintiff asserts two claims against these officers and a *Monell* claim against the City of Evanston.[2]

First, plaintiff contends that defendants Kubiak and Kane are responsible for the excessive force Kubiak used when he pointed his firearm at plaintiff and ordered plaintiff to lay on the ground with the warning, "Do what we tell you, and you won't get hurt." (Plaintiff's Statement of Undisputed Facts, ¶ 14(a).)

Second, plaintiff sues defendant Kane, Kubiak, Popp, Rosenbaum, and Pogorzelski for conducting an unlawful search: Kubiak and Rosenbaum pointed their firearms at plaintiff while Kane and Popp conducted the search;

[2] Plaintiff did not plead these claims in separate counts, in accordance with Bartholet v. Reishauer A.G. (Zurick), 953 F.2d 1072, 1078 (7th Cir. 1992) ("Although it is common to draft complaints with multiple counts, each of which specifies a single statute or legal rule, nothing in the Rules of Civil Procedure requires this. To the contrary, the rules discourage it. Complaints should be short and simple, giving the adversary notice while leaving the rest to further documents.")

Pogorzelski provided Kane and Popp with a set of handcuffs and supervised the search. (Plaintiff's Statement of Undisputed Facts, ¶¶ 16-22.)

Plaintiff's *Monell* claim against the City of Evanston is based on the City's written policies: Evanston learned that its policies were deficient in 2019 when it agreed to settle a lawsuit arising out of an incident very similar to that presented here. (Plaintiff's Statement of Undisputed Facts, ¶¶ 24-26.) But Evanston's written policies for the use of force and search and seizure authorize unlawful police conduct. (Plaintiff's Statement of Undisputed Facts, ¶¶ 27-37.)

The events material to this case were captured on body worn cameras ("BWC"). Plaintiff will file BWC videos from defendants Kane, Kubiak, and Popp and three non-defendant police officers (Brown, Burgers, and Conley) using the Court's "Digital Media Exhibit Submission" procedure. Plaintiff bases this motion for summary judgment on the police incident report, Evanston's written policies, and the BWC videos.[3]

II. The Use of Excessive Force by Defendants Kubiak and Kane

Defendants Kubiak and Kane subjected plaintiff to a seizure under the Fourth Amendment when, "by show of authority," they "restrained the

[3] The police report is admissible as a business record. *Torry v. City of Chicago*, 932 F.3d 579, 586 (7th Cir. 2019). The same is true for Evanston's written policies and the BWC videos.

liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968). This restraint was a seizure under the Fourth Amendment because "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). As this Court recognized in *Woods v. Village of Bellwood*, 502 F.Supp.3d 1297, 1312 (N.D. Ill 2020), this rule is settled law. *Id.* at 1312.

Kubiak restrained plaintiff by pointing his firearm and ordering plaintiff to the ground; Kane participated by instructing plaintiff to spread his hands "like Superman" and making plain that plaintiff risked death or great bodily harm if he failed to obey the police orders. (Plaintiff's Statement of Undisputed Facts, ¶ 14(a), 14(b).) In this case, the officers' use of force was unreasonable under the Fourth Amendment.

The Seventh Circuit has established that a police officer may only point his firearm to restrain a person who presents an objective threat. This rule has evolved from *McDonald v. Haskins*, 966 F.2d 292 (7th Cir. 1992), where a police officer pointed a gun at a nine-year-old girl during a search of an apartment and threatened to pull the trigger. 966 F.2d 292, 294-95 (7th Cir. 1992). The Court of Appeals concluded that the use of force "was objectively unreasonable given the alleged absence of any danger to Haskins or other

officers at the scene and the fact that the victim, a child, was neither a suspect nor attempting to evade the officers or posing any other threat" *Id.* at 295.

The Court reaffirmed this rule in *Jacobs v. City of Chicago*, 215 F.3d 758, 774 n.7 (7th Cir. 2000). There, police officers were executing a warrant to search a single-family dwelling and searched plaintiff's apartment in a three-floor multi-family dwelling. *Id.* at 768. One of the officers placed a gun to the plaintiff's head. *Id.* at 773. The Court observed that pointing a gun "carries with it the implicit threat that the officer will use that weapon if the person at whom it is directed does not comply with the officer's wishes." *Id.* at 774 n.7.

The Seventh Circuit then "examine[d] the totality of the circumstances to determine whether the intrusion on the citizen's Fourth Amendment interests was justified by the countervailing government interests at stake." *Jacobs*, 215 F.3d at 733. The Court concluded that the use of force "was out of proportion to any danger that Jacobs could possibly have posed to the officers or any other member of the community." *Id.* at 774.

In *Baird v. Renbarger*, 576 F.3d 340, 345 ((7th Cir. 2009), a police officer, while executing a warrant, detained the plaintiffs by pointing a 9-millimeter submachine gun. The Court evaluated the totality of the circumstances and concluded that this use of force was unreasonable. *Id.* at 344-45.

The totality of the circumstances in this case includes the anonymous complaint and what defendants Kane and Kubiak saw when they arrived on the scene.

The anonymous complaint stated that a white male was in a specific park in the City of Evanston holding a gun in his right hand. (Statement of Undisputed Facts, ¶ 5.) Plaintiff is African American. (Statement of Undisputed Facts, ¶ 1.) The video evidence makes plain that plaintiff was not holding a gun. (The videos are identified in Statement of Undisputed Facts, ¶ 12.)

The contradiction between the complaint of a white male and the black male that the officers found in the park deprived the complaint of reliability:

> [R]ace is one of the most important physical characteristics of a criminal that one could include in this description. It is something a witness can easily see and remember, like clothing, hair style, or facial hair. But, even better than all of those, it is immutable. A mustache, beard or head can be shaved, hair can be colored or trimmed, and clothing can be changed with ease. Not so with race. Such an unchangeable, highly visible trait has real value in accurately describing the suspect.

David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 449 (2003)

The totality of the circumstances did not provide the officers with reasonable suspicion that plaintiff had a firearm.

First, the anonymous complaint did not come from a reliable informant under *Adams v. Williams*, 407 U.S. 143, 146-47 (1972). Second, the complaint was not corroborated by plaintiff's race. Neither Kane nor Kubiak is able "to point to specific and articulable facts," *Terry v. Ohio*, 392 U.S. 1, 21 (1968), that plaintiff was armed. Nor can these officers show any reason to believe that plaintiff posed a threat to their safety.

This Court recognized in *Cruz v. City of Chicago*, 2021 WL 2645558 (No. 23-cv-250, N.D. Ill., Mem.Op., June 28, 2021) that "pointing a gun at someone is dangerous business," *id.* at *5, and "there needs to be a reason for pointing a lethal weapon at someone." *Id.* at *6.

Defendants Kubiak and Kane knew that an anonymous caller had reported seeing a white male holding a handgun in a park in Evanston. (Statement of Undisputed Facts, ¶ 7.) As the Supreme Court observed in *Florida v. J.L.*, 529 U.S. 266 (2000), "[a]n anonymous tip must be reliable in its assertion of illegality, not just in its tendency to identify a determinate person, if it is to provide reasonable suspicion for a *Terry* investigatory stop." *Id.* at 272. Here, the anonymous tip flunked on both grounds.

III. The Search

When defendants Kane, Kubiak, Popp, Pogorzelski, and Rosenbaum gathered around plaintiff, it was obvious that he was not holding a firearm in

either of his hands and that, unlike the white male described in the anonymous complaint, plaintiff is African American.

The officers lacked "articulable suspicion that [plaintiff] is armed and dangerous." *Green v. Newport*, 868 F.3d 629, 635 (7th Cir. 2017). Nonetheless, defendant Kane and Popp handcuffed plaintiff, using handcuffs provided by defendant Pogorzelski. (Statement of Undisputed Facts, ¶¶ 18-19.) Handcuffing "seems to have been automatic—a reflexive next step untethered to anything except highly generalized concerns about officer safety." *Mwangangi v. Nielsen*, 48 F.4th 816, 827 (7th Cir. 2022). As in *Mwangangi*, the use of handcuffs exceeded the permissible scope of a *Terry* stop. In this case, however, there was no ground for a *Terry* stop because plaintiff is African American, unlike the white male sought by the police.

There was likewise no justification for Kane and Popp to search plaintiff's pockets. (Statement of Undisputed Facts, ¶¶ 22.) As in *United States v. Williams*, 731 F.3d 678 (7th Cir. 2013), there was nothing that "could have supported a reasonable suspicion that [plaintiff] was armed and dangerous." *Id.* at 687. Nor was there a reason for defendants Kubiak and Rosenbaum to hold their firearms at the ready while plaintiff was handcuffed. (Statement of Undisputed Facts, ¶¶ 20-21. The Court should therefore grant summary judgment in favor of plaintiff and against these defendants on liability.

IV. The Defective Policies Caused the Constitutional Harm

Evanston has refused to adopt policies to prevent its officers from using firearms to compel compliance with police orders: Evanston's use of force policy does not expressly forbid the threat of deadly force to compel compliance with a police order. (Statement of Undisputed Facts, ¶ 29.) Nor are Evanston's officers trained to know that pointing a firearm at a suspect is the use of deadly force. (Statement of Undisputed Facts, ¶ 30.)

Evanston has been on notice since at least 2019 about the gaps in its policies. As summarized in Statement of Undisputed Facts, ¶ 24, Evanston police engaged Lawrence Crosby, an African American resident, on a citizen complaint that the Crosby was stealing a car. The officers who responded to the call, like the officers in this case, ordered the "suspect" to "get on the ground, get on the ground." (Statement of Undisputed Facts, ¶ 24.) Unlike plaintiff, Crosby did not comply with the police order; the result was that about six Evanston officers attached Crosby, yelling "get on the ground." (*Id.*)

Evanston has not adopted a policy to prohibit the unlawful conduct Evanston police officers used against Crosby, which Evanston officers subsequently used against plaintiff in this case. Evanston's policies authorized defendant to use his rifle because he was "providing security" for the officers handcuffing plaintiff. (Statement of Undisputed Facts, ¶ 32(a).) This does not

justify the incursion on Fourth Amendment rights. Nor has Evanston adopted an explicit policy to require its officers to comply with the Fourth Amendment. Instead, Evanston's policies allow an officer to search a suspect based on the hunch that the person to be searched "was armed with a handgun." This basis for a search was rejected in *Terry v. Ohio*, 392 U.S. 1, 27 (1968); it has long been clearly settled law that a search may not be based on "inchoate and unparticularized suspicion of 'hunch.'" *Id.* at 27.

The summary judgment record establishes the "three requirements to establish a *Monell* claim." *Orozco v. Dart,* 64 F.4th 806, 823 (7th Cir. 2023). First, Evanston received notice of its defective policies when it settled Mr. Crosby's case in 2019. (Statement of Undisputed Facts, ¶ 32.) Second, Evanston has consistently ignored the practice of its police officers to instruct "suspects" to get on the ground without any plausible justification other than vague concerns of "officer safety." The policy was the moving force for the way in which the officers mistreated plaintiff: Had the municipal policies included the settled Fourth Amendment principles that control police citizen interaction, the officers would not have ordered plaintiff to get to the ground at gunpoint, and would not have searched the African American male when they were responding to a complaint about a white male.

The Court should therefore grant summary judgment in favor of plaintiff and against the City of Evanston on liability.

V. Conclusion

For the reasons above stated, the Court should summary judgment in favor of plaintiff and against all defendants on liability.

/s/ Kenneth N. Flaxman
Kenneth N. Flaxman
ARDC No. 08830399
Joel A. Flaxman
200 South Michigan Ave Ste 201
Chicago, Illinois 60604
(312) 427-3200

Attorneys for Plaintiffs