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

ALEXANDER GRAY,	)	
	)	
Plaintiff,	)	Case No. 23-cv-1931
	)	
v.	)	Judge Steven C. Seeger
	)	
CITY OF EVANSTON, EVANSTON POLICE OFFICERS KUBIAK, KANE, POPP, ROSENBAUM, AND POGORZELSKI,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants, by their undersigned counsel, submit this Memorandum of Law in support of their Motion for Summary Judgment.

I. INTRODUCTION

On March 31, 2021, the Evanston 911 Emergency call center received a report from an anonymous caller of seeing a man with a gun in his right hand at a lakefront public park located in the 500-block of Sheridan Square, Evanston. The caller described the man as being approximately 5 to 6 feet tall, wearing a dark coat and jeans. Evanston Police Officers were immediately informed of the report and dispatched to the location. Officer Kubiak was the first to arrive at the scene. Officer Kubiak observed a man who he believed matched the description standing in location reported by the caller holding a black object in his hand. Based on the totality of the circumstances that confronted him, Officer Kubiak believed Plaintiff presented danger to him and others. Officer Kubiak drew his firearm, pointed it in direction of Plaintiff and ordered him to put his hands up in the air. At about this time, Officer Kane joined Officer Kane at scene and as they approached

Plaintiff, Officer Kane directed Plaintiff to lay on the ground with his hands spread. By now several police officers had arrived at the scene, including Officers Popp, Rosenbaum and Pogorzelski. A pat down search of Plaintiff confirmed he did not have a firearm, and the black object Officer Kubiak saw in his hand was actually a cell phone and or a pair of black headphones, upon which Plaintiff was promptly released.

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 against Defendants, Evanston Police Officers Marcin Kubiak, Michael Kane, Kyle Popp, Daniel Rosenbaum, and Pauline Pogorzelski (collectively "Defendant Officers") alleging violations of his constitutional rights under Fourth and Fourteenth Amendments. Specifically, the Amended Complaint charges:

- Officers Kubiak, Kane, Popp, Rosenbaum, and Pogorzelski with unreasonable force (Dkt. No.10 ¶16,17);
- Officers Kubiak, Kane, Popp, and Pogorzelski for failure to intervene to stop Rosenbaum from allegedly pointing a firearm at Plaintiff (Dkt. No.10 ¶24);
- Officers Kane and Popp with unlawful search (Dkt. No.10 ¶23); and
- Officers Kubiak, Rosenbaum, and Pogorzelski for failing to intervene in the alleged unlawful search (Dkt. No.10 ¶25)

Plaintiff also brings a *Monell* claim against Defendant City of Evanston ("Defendant City") alleging its policy on the use of force by its police officers is unconstitutional, and for failing to train its police officers on the use of force based on uncorroborated anonymous tip.

For the reasons set forth below, Defendants are entitled to summary judgment on all of Plaintiff's claims.

II. STATEMENT OF UNCONTESTED FACTS [1]

[1] The events material to this case were captured on body worn cameras by Defendant Officers and other Evanston Police Officers. Defendants will file these videos via the Court's "Digital Media Exhibit Submission" procedure.

On March 31, 2021 at or about 2:35 pm the Evanston Police Department ("EPD") received a 911 call from an anonymous citizen[2] who reported seeing a man with a gun in his right hand at a lakefront public park located in the 500-block of Sheridan Square, Evanston. (SOMF ¶4) The 911 caller described the man as white male, approximately 5 to 6 feet tall, and wearing a dark coat and jeans. (SOMF ¶6) At about 2:38 pm, an EPD dispatcher radio broadcast the that a 911 caller reported a white male, approximately 5 to 6 feet tall, wearing a dark coat and jeans was at the lakefront public park in the 500-block of Sheridan Square, Evanston with a gun in his right hand. (SOMF ¶9) Officer Kubiak was on patrol in a police vehicle in the area at the time and drove to the location. (SOMF ¶10)

At 2:40 pm, as Officer Kubiak was pulling up to the location, he asked the dispatcher to repeat the description of the subject. The dispatcher responded "male, white 5' - 6', dark coat with jeans, the gun is in his right hand, it should be a black handgun. [inaudible background noise] Also, he's supposed to be north of the beach…. on the trail." (SOMF ¶11)

Less than one minute later, Officer Kubiak observed a man who he believed matched the description given by the 911 caller, standing in the location provided by the dispatcher. (SOMF ¶12) Officer Kubiak parked and exited his police vehicle and proceeded toward the man from behind a non-police vehicle that was parked between him and the subject. (SOMF ¶12) From this position, Officer Kubiak observed that the man was holding a black object in his hand. (SOMF ¶13) Officer Kubiak, believing the man was armed, radioed that he had "eyes on him." upon which, he unholstered and drew his firearm, pointed it in the direction of man (hereafter referred to as "Plaintiff"), ordered him to remove his hands from his pocket and directed he put his hands up. (SOMF ¶13)

[2] The individual was later identified and interviewed by police. *See* Exhibit 15.

At or about this same time, Officer Kane and other officers arrived at the scene and joined Officer Kubiak. (SOMF ¶14) Both Officers Kubiak and Kane walked toward Plaintiff while directing him to lay on the ground with hands out. (SOMF ¶21) Plaintiff voluntarily compiled with Officer Kubiak's direction. (SOMF ¶22) Officers Popp, Pogorzelski and Rosenbaum and other Evanston police officers, had responded to the scene and were present as Plaintiff was complying with Kubiak's directive. (SOMF ¶23) Officers Kane and Popp handcuffed Plaintiff as EPD officers explained to Plaintiff that they had received a call about a man with a gun in the park. (SOMF¶26)

Officers Kane and Popp then performed a protective pat down search of Plaintiff's outer clothing. (SOMF ¶27) Plaintiff was then helped to his feet by officers, upon which Officer Pogorzelski requested Plaintiff's consent to search his person for firearms. Plaintiff replied, "Of course." (SOMF ¶28) After officers determined that Plaintiff had no weapons on his person, they released him immediately. (SOMF ¶29) This entire event lasted approximately seven (7) minutes in total. (SOMF ¶30)

III. LEGAL STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To avoid summary judgment, the opposing party must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment is proper against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp* 477 at 322 (1986)

On summary judgment the Court generally views the facts in the light most favorable to the nonmovant, when video footage clearly contradicts the nonmovant's claims, however the Court may consider that video footage without favoring the nonmovant. see: *Horton v. Pobjecky,* 883 F.3d 941, 944 (7th Cir. 2018) ("When video footage firmly settles a factual issue, there is no genuine dispute about it, and we will not indulge in stories clearly contradicted by the footage.") (citing *Scott v. Harris*, 550 U.S. 372, 378-81 (2007).

IV. ARGUMENT

A. Officers Kubiak and Kane are entitled to Summary Judgment on Plaintiff's Excessive Force Claim.

Plaintiff's Fourth Amendment claim of use of excessive force during an investigatory stop is governed by the Fourth Amendment's "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989), *Becker v. Elfreich*, 821 F.3d 920, 925 (7th Cir. 2016). The right to make an investigatory stop "carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham* 490 U.S. at 396, citing *Terry v. Ohio*, 392 U.S. 1, 22-27, (1968)). The nature and extent of the force that may be used depends upon the circumstances surrounding the arrest, including "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 is actively resisting arrest or attempting to evade arrest by flight. *Graham* 490 U.S. at 396.

A court determines whether an officer has used excessive force on a standard of "objective reasonableness," that is from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham* 490 U.S. at 396-397. In assessing the facts from that perspective, the Court must recognize that police officers often need to make split second judgments based on rapidly developing events. *Holmes v. Vill. of Hoffman Estates*, 511 F.3d 673, 685 (7th Cir. 2007). Whether a particular use of force was objectively reasonable "is a legal

determination rather than a pure question of fact for the jury to decide." *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 520 (7th Cir. 2012). A police officer's use of force is unconstitutional if, "judging from the totality of circumstances at the time of the arrest, the officer used greater force than was reasonably necessary to make the arrest." *Lester v. City of Chicago*, 830 F.2d 706, 713 (7th Cir. 1987).

1. It was reasonable for Officers Kubiak and Kane to believe Plaintiff was armed and potentially dangerous.

"Pointing a gun at someone is dangerous business, but so is being a police officer" *Cruz v. City of Chi.*, No. 20-cv-250, 2021 U.S. Dist. LEXIS 119965, at *15 (N.D. Ill. June 28, 2021). "[W]hile police are not entitled to point their guns at citizens when there is no hint of danger, they are allowed to do so when there is reason to fear danger." *Baird v. Renbarger*, 576 F.3d 340, 346 (7th Cir. 2009). For this reason, courts afford considerable leeway to a police officer's assessment regarding the degree of force appropriate in dangerous situations. *Baird* 576 F.3d at 344. "The reasonableness of brandishing a weapon depends on the unique facts of each case, from a boots-on-the-ground perspective." *Cruz, 2021 U.S. Dist. LEXIS 119965at *15.* The totality of the circumstances confronting Officer Kubiak made it objectively reasonable for him to fear danger, namely that Plaintiff was armed with a gun in his hand.

The totality of the circumstances before Officer Kubiak included that the 911 caller had provided a contemporaneous eyewitness report of an ostensible ongoing emergency situation of a man openly holding a gun in a public park. see *United States v. Williams*, 731 F.3d 678, 684 (7th Cir. 2013 (An emergency report "can support an officer's reasonable suspicion with less objective evidence to corroborate the report."). Officer Kubiak arrived at the location described by caller within three minutes of receiving the report from dispatch, (SOMF ¶9-11), and found Plaintiff, who he reasonably believed matched the description given by the 911 caller, standing in the same

location described by the 911 caller. (SOMF ¶12), see *Carr v. Jehl*, No. 13 cv 6063, 2015 U.S. Dist. LEXIS 9866, at *13 (N.D. Ill. Jan. 28, 2015) (Police observation of an individual "in the location described by the caller immediately after receiving the dispatch call makes it more likely that Plaintiff was in fact involved in the situation reported by the caller."); see also *United States v. Swinney*, 28 F.4th 864, 866-67 (7th Cir. 2022).

After arriving in the reported location, the dispatcher repeated to Officer Kubiak that the 911 caller reported seeing Plaintiff holding a black gun in his right hand. (SOMF ¶11) Officer Kubiak further corroborated the information by putting "an eye on him," at which time he observed a black object in Plaintiff's hand. (SOMF ¶13) At this juncture, it was reasonable for Office Kubiak to assume the worst and approach Plaintiff with his firearm. see *Williams v. City of Champaign, 524 F.3d 826, 828 (7th Cir. 2008)* (finding that even though the caller did not specify an alleged robber was armed, it was reasonable for the officers to assume the worst and approach the suspect's van with the "utmost caution" drawing their guns at the occupants).

Officer Kane, who had also heard the dispatcher's broadcast and was aware of the dangerous nature of the situation, arrived at the scene at or about the time Officer Kubiak had begun his approach toward Plaintiff. (SOMF ¶14) Officer Kane, who saw that Officer Kubiak had begun approach Plaintiff with his firearm deployed, joined Officer Kubiak with his firearm drawn in a low ready position and assisted in effectuating Plaintiff's compliance with Officer Kubiak's instructions. (SOMF ¶15) Notwithstanding that Officer Kane reasonable believed he and Officer Kubiak faced a dangerous situation that warranted the utmost caution, he was entitled to rely on Officer Kubiak's firsthand knowledge of the facts amounting to the necessary level of suspicion for the action to the necessary level of suspicion for the action.

During the course of the events described above, neither Officer Kubiak nor Kane threatened Plaintiff or took any action beyond what was necessary to safely effectuate the stop. Officers Kubiak and Kane terminated the display of force immediately upon finding Plaintiff unarmed. (SOMF ¶29) As the undisputed facts show, Plaintiff was holding a cell phone in his hand and based on the video evidence, a set of black headphones. (SOMF ¶19, 20)

Taken together, these circumstances provided Officers Kubiak and Kane a reasonable suspicion that Plaintiff posed a threat of death or serious physical injury to them or to justify their display of force. Plaintiff. For this and the other reasons presented above, Officer Kubiak is entitled to summary judgment on Plaintiff's claim of excessive force.

2. Officers Popp, Rosenbaum, and Pogorzelski are entitled to summary judgment.

Plaintiff also charges Officers Popp, Rosenbaum, and Pogorzelski with violating Plaintiff's Fourth Amendment rights by pointing their firearms at him. (Dkt. No.10 ¶18,19) Officers Popp and Pogorzelski are entitled to summary judgment because there is no dispute that they neither displayed nor pointed their firearm toward Plaintiff. Plaintiff however contends Officer Rosenbaum pointed his assault rifle at him during the course of being handcuffed and searched; however, Plaintiff's contention is inconsistent with the video evidence of the incident. (SOMF ¶17) As depicted in the video evidence, while at the scene, Officer Rosenbaum was carrying a tethered rifle and at no time did he point the rifle at Plaintiff or otherwise use the rifle to threaten Plaintiff. (SOMF ¶17), See *Horton* 883 F.3d at 944 ("When video footage firmly settles a factual issue, there is no genuine dispute about it . . . ").

Officers Popp, Rosenbaum, and Pogorzelski are also entitled to summary judgment based on the "collective knowledge" doctrine. Under the "collective knowledge" doctrine, "[t]here is no

Fourth Amendment violation if the knowledge of the officer directing the stop ... is sufficient to constitute" reasonable suspicion. *United States v. Williams*, 627 F.3d 247, 252 (7th Cir. 2010). *see also U.S. v. Street*, 917 F.3d 586, 598 (7th Cir. 2019) ("When more than one police officer is involved in the reasonable-suspicion analysis, courts consider their collective knowledge.").

For the reasons set forth above, the Court should grant Officers Popp, Rosenbaum, and Pogorzelski summary judgment on Plaintiff's excessive force claims.

B. Officers Popp and Kane's use of handcuffs and search of Plaintiff was reasonable.

Plaintiff's claim against Officers Popp and Kane for unlawful search and handcuffing of Plaintiff fails for the same reason as his excessive force claim, namely because the totality of circumstances known to the Officers Popp and Kane (and the other Officers at the scene), including that Plaintiff was wearing a heavy coat (SOMF ¶12), provided them a reasonable suspicion that Plaintiff may be armed.

Police officers are permitted to take reasonable steps to insure their own safety during a *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 30 (1968), *United States v. Jackson*, 300 F.3d 740, 746 (7th Cir. 2002). These steps include performing an outer search of a suspect's clothing that is "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer." *Id*., quoting *Terry*, 392 U.S. at 29. Police officers are also permitted to use handcuffs or place suspects on the ground during a seizure. see *United States v. Tilmon*, 19 F.3d 1221, 1228 (7th Cir. 1994) ("When a suspect is considered dangerous, requiring him to lie face down on the ground is the safest way for police officers to approach him, handcuff him and finally determine whether he carries any weapons.").

Officers Popp and Kane's search of Plaintiff while he was on the ground was limited to his outer clothing. (SOMF ¶27) After the Officers helped Plaintiff to his feet, Officer Pogorzelski

asked Plaintiff for his consent to search his person, to which Plaintiff replied, "of course," and once it was determined he was not armed, the handcuffs were removed, and the seizure was terminated. (SOMF ¶28, 29)

In light of the totality of the circumstances, it was reasonable for Officers Popp and Kane (and the other officers on scene) to handcuff Plaintiff and perform a limited search to determine whether he was armed. (SOMF ¶27-29)

C. The absence of an underlying constitutional violation compels summary judgement on Plaintiff's Claim against Officers Kubiak, Kane, Popp, and Pogorzelski for failure to Intervene.

Plaintiff asserts claims against (1) Officers Kubiak, Kane, Popp, and Pogorzelski for failing to intervene to stop Officer Rosenbaum from allegedly violating Plaintiff's constitutional rights by pointing a firearm at Plaintiff and Officers Kubiak, Kane, Popp, and Pogorzelski and (2) Officers Kubiak, Rosenbaum, and Pogorzelski for failing to intervene in the alleged unlawful search. To prevail on each of these claims, Plaintiff must establish (1) "an underlying constitutional violation," (2) that the defendant "knew that the constitutional violation was committed," and (3) that the defendant "had a realistic opportunity to prevent it." *Gill v. City of Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017). Plaintiff has not established an underlying constitutional violation, without which, both his claims for failure to intervene fail. see *Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005) ("If Plaintiff was unsuccessful on his excessive force claim, there would be no failure to intervene claim.").

Even assuming, *arguendo*, that the facts are sufficient to establish a constitutional violation, Plaintiff is unable to demonstrate that these officers knew a constitutional violation was committed and had a realistic opportunity to prevent it. see *Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017).

For these reasons, both of Plaintiff's claims for failure to intervene fail.

D. Defendant Officers are entitled to Qualified Immunity.

Even if Plaintiff establishes a constitutional violation, the Defendant Officers are shielded by qualified immunity. "The doctrine of qualified immunity protects government officials from liability for civil damages when their conduct does not clearly violate established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

"Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "Determining whether a defendant state officer is entitled to qualified immunity involves two inquiries: '(1) whether the facts, taken in the light most favorable to the plaintiff, make out a violation of a constitutional right, and (2) whether that constitutional right was clearly established at the time of the alleged violation.' ' If either inquiry is answered in the negative, the defendant official is entitled to summary judgment." *Gibbs v. Lomas*, 755 F.3d 529, 537 (7th Cir. 2014) (citation omitted).

For the reasons above, the Officers' threat of force and search of Plaintiff was objectively reasonable, thus no constitutional right was violated. Moreover, a constitutional violation was not clearly established in the law. For a right to be clearly established "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). At the time of this incident, several analogous cases had established that the Officers' threat of force and subsequent search of Plaintiff whom they reasonably believed to be armed or dangerous was lawful. *see, e.g.,* *Williams* 524 F.3d at 828; *Tilmon* 19 F.3d 1228; *Jackson*, 300 F.3d at 746. Because the law did not clearly establish that the threat of force and search of Plaintiff was an unreasonable response the totality of the

circumstances they faced at the time, the Defendants have qualified immunity and are entitled to summary judgment in their favor on Plaintiff's Fourth Amendment claims.

E. Plaintiff's Monell Claim Fails

Plaintiff brings a *Monell* [3] claim against the City of Evanston alleging:

> (1) at the time of this incident it had "an express policy that authorized its police officers to point loaded firearms, including assault rifles, at a person without reasonable suspicion that the person was involved in criminal activity or that deadly force was reasonable," (Dkt. No.10 ¶26) and
>
> (2) "failed to instruct and train its police officers that an uncorroborated anonymous tip that a person is carrying a firearm does not permit a police officer to point a firearm at a person, order that person to lay on the ground, and order that person to comply with the police orders under penalty of death while officers searched that person." (Dkt. No.10 ¶27)

Plaintiff further asserts the City of Evanston's above policy on the use of force and failure to train its police officers was the motivating force of the unconstitutional conduct alleged against the Defendant Officers.

"In order to succeed on a Monell claim, a plaintiff must ultimately prove three elements: (1) an action pursuant to a municipal policy, (2) culpability, meaning that policymakers were deliberately indifferent to a known risk that the policy would lead to constitutional violations, and (3) causation, meaning the municipal action was the 'moving force' behind the constitutional injury." *Hall v. City of Chicago*, 953 F.3d 945, 950 (7th Cir. 2020). A municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee. *Petty v. City of Chicago*, 754 F.3d 416, 424 (7th Cir. 2014); *Sallenger v. City of Springfield*, 630 F.3d 499, 504-05 (7th Cir. 2010).

The official policy of the City of Evanston on the use of force by its police officers is set forth in in Policy No. 300. (SOMF ¶30) There is nothing in Policy 300, nor can Plaintiff point to

[3] *Monell v. New York City Dept. of Social Serv*., 436 U.S. 658 (1978)

any other express policy of the City of Evanston that authorizes it's police officers to point loaded firearms at an individual without reasonable suspicion the individual was involved in criminal activity or that the use of deadly force was reasonable in these circumstances.

Likewise, Plaintiff has not sought to discover, nor can it produce evidence demonstrating the City of Evanston failed to instruct and train its police officers that an uncorroborated anonymous tip that a person is carrying a firearm does not permit a police officer to point a firearm at a person, order that person to lay on the ground, and order that person to comply with the police orders under penalty of death while officers searched that person. In short, Plaintiff has not carried his burden of proving Monell liability, which includes proof of each of the essential elements of the claim. *Sizelove v. Madison-Grant United Sch. Corp*., No. 1:19-cv-03659-SEB-TAB, 2022 U.S. Dist. LEXIS 112854, at *10 (S.D. Ind. June 27, 2022).

"At the summary judgment stage, allegations no longer suffice. Summary judgment is the time for evidence. Proof counts for everything, and allegations count for nothing. Summary judgment is show and tell time, but in the end, Plaintiff has little to offer." *Harvey v. Dart*, No. 19-cv-2996, 2023 U.S. Dist. LEXIS 45235, at *27 (N.D. Ill. Mar. 17, 2023). For these reasons, and because there is no underlying constitutional violation by the Defendant Officers, summary judgment on Plaintiff's *Monell* claims is properly entered in favor of the City of Evanston.

V. CONCLUSION

For the reasons stated above, the Defendants respectfully request Summary Judgment entered in their favor on all of Plaintiff's claims.

Date: March 6, 2024,

Respectfully Submitted,

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