

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

Alexander Gray,)	
)	
<i>Plaintiff,</i>)	Case No. 23-cv-1931
)	
v.)	Judge Steven C. Seeger
)	
City of Evanston, Evanston Police Officers)	
Kubiak, Kane, Popp, Rosenbaum, and)	
Pogorzelski,)	
)	
<i>Defendants.</i>)	
)	
)	

**DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT
OF MATERIAL FACTS UNDER LR 56.1(B)(3)(C)**

Defendants City of Evanston, Officers Kubiak, Kane, Popp, Rosenbaum, and Pogorzelski (Collectively "Defendants") through their counsel, Leinenweber Daffada and Sansonetti, submits this Response to Plaintiff's Statement of Material Facts, pursuant to Local Rule 56.1(b)(3).

I. Parties and Venue ¹

1. Plaintiff Alexander Gray is a 50-year-old, (Gray Dep. 4:17, Exhibit 9, App. 106), African American resident of Evanston, Illinois. (Police Report at 1, Exhibit 2, App. 8.)

RESPONSE: UNDISPUTED.

2. Defendant City of Evanston is an Illinois municipal corporation. (ECF No. 11, Answer to Amended Complaint, ¶ 3, Exhibit 1 at 1, App. 1.)

¹ Defendants have not responded to any of the headings in Plaintiffs' Statement of Material Facts because these are for organization according to the Court's rules. To the extent any response is needed to the headings, they are denied.

RESPONSE: UNDISPUTED.

3. Defendants Marcin Kubiak, Michael Kane, Kyle Popp, Daniel Rosenbaum, and Pauline Pogorzelski were police officers of the City of Evanston on March 31, 2021. (ECF No. 11, Answer to Amended Complaint, ¶ 4, Exhibit 1 at 2, App. 2.)

RESPONSE: UNDISPUTED.

4. All the events at issue in this case occurred in the Northern District of Illinois.

RESPONSE: UNDISPUTED.

II. The Report of a White Male with a Gun

5. On March 31, 2021, the Evanston police department informed its police officers that an anonymous caller had reported “a white male, approximately 5 feet tall to 6 feet tall, in a dark coat and jeans” carrying a handgun north of the beach at 501 Sheridan Square in the City of Evanston. (ECF No. 11, Answer to Amended Complaint, ¶ 5, Exhibit 1 at 2, App. 2.)

RESPONSE: UNDISPUTED that, on March 31, 2021, the Evanston police department informed its police officers that an anonymous caller had reported “a white male, approximately 5 feet tall to 6 feet tall, in a dark coat and jeans” carrying a handgun north of the beach at 501 Sheridan Square in the City of Evanston.

DISPUTED to the effect that this lacks context. The full answer to the complaint states, “On March 31, 2021, the Evanston police department informed its police officers by electronic means that an anonymous caller had reported “a white male,

approximately 5 feet tall to 6 feet tall, in a dark coat and jeans” carrying a handgun north of the beach at 501 Sheridan Square in the City of Evanston.

6. Defendants Kubiak, Kane, Popp, Rosenbaum, Pogorzelski, and other Evanston police officers responded to the report. (ECF No. 11, Answer to Amended Complaint, ¶¶ 4, 6, Exhibit 1 at 2, App. 2.)

RESPONSE: UNDISPUTED.

7. The City of Evanston informed each defendant that they were responding to a report about a white male. (ECF No. 11, Answer to Amended Complaint, ¶¶ 5-6, Exhibit 1 at 2, App. 2.)

RESPONSE: UNDISPUTED.

III. The Seizure (Kubiak and Kane)

8. Defendant Kubiak was the first officer to arrive at the scene. (ECF No. 11, Answer to Amended Complaint, ¶ 7, Exhibit 1 at 2, App.2) The timestamp of his body camera shows that he arrived at 14:41:10. (Plaintiffs’ Video Exhibit V1; “Frame Grabs,” Exhibit 3 at 1, App. 11.)

RESPONSE: UNDISPUTED.

9. Shortly after exiting his vehicle Kubiak unholstered his firearm (Video Exhibit V1 at 14:41:23), pointed it at plaintiff (Video Exhibit V1 at 14:41:24; “Frame Grabs,” Exhibit 3 at 5, App. 15), and walked towards plaintiff in the manner captured on Kubiak’s body camera. (Exhibit V1, 14:41:27 to 14:42:16, “Frame Grabs,” Exhibit 3 at 6-30, App. 16-40.)

RESPONSE: UNDISPUTED.

10. Plaintiff appeared as follows at the time Kubiak drew his firearm:



(ECF No. 11, Answer to Amended Complaint, ¶ 10, Exhibit 1 at 2, App. 2.) (The image appears in paragraph 10 of the amended complaint, ECF No. 10.)

RESPONSE: UNDISPUTED.

11. Kubiak instructed plaintiff to put his hands up (Video Exhibit V1, 14:41:24; “Frame Grabs,” Exhibit 3 at 5, App. 16) and to get on the ground. (Video Exhibit 1.14:41:27, “Frame Grabs,” Exhibit 3 at 6, App. 16.)

RESPONSE: UNDISPUTED.

12. Defendant Kane arrived on the scene at 14:41:15 (Video Exhibit V2, 14:41:15, “Frame Grabs,” Exhibit 3 at 2, App. 12.) Kane unholstered his firearm (Video Exhibit V2, 14:42:03, “Frame Grabs,” Exhibit 3 at 23, App. 33) and joined defendant Kubiak in approaching plaintiff. (Video Exhibit V1 at 14:42:07-14:42:14, “Frame Grabs,” Exhibit 3 at 24-29, App. 34-39.)

RESPONSE: UNDISPUTED.

13. Plaintiff displayed his empty hands in response to Kubiak's directions as appears below:



(Video Exhibit V1 at 14:41:46, "Frame Grabs," Exhibit 3 at 16, App. 26.)

RESPONSE: DISPUTED that, Plaintiff displayed his empty hands in response to Kubiak's directions as appears below. *See* Kubiak's Deposition p. 14-15, ¶¶ 7-18. Plaintiff's Deposition p. 9, ¶ 3-4. Plaintiff admitted in his deposition that he was holding his cell phone in his hand.

14. After Kane was on the scene, and while plaintiff was on the ground:

a. Kubiak told plaintiff "Do what we tell you and you won't get hurt." (Kubiak Interrogatory Answers, ¶ 14, Plaintiff's Exhibit 8 at 5, App. 73; Video Exhibit V1, 14:42:00.)

RESPONSE: UNDISPUTED.

b. Kand told Plaintiff "Putt your hands farther [apart], like Superman." (Video Exhibit V2, 14:42:07.)

RESPONSE: UNDISPUTED.

15. Plaintiff followed the orders given by Kane and Kubiak and appeared as follows:



(Video Exhibit V1 at 14:42:14, "Frame Grabs," Exhibit 3 at 29, App. 39.)

RESPONSE: UNDISPUTED.

IV. The Search (Kane, Kubiak, Pogorzelski, Popp, and Rosenbaum)

16. Defendants Kane, Kubiak, Popp, and other Evanston police officers, including defendants Pogorzelski, and Rosenbaum gathered around plaintiff while he lay on the ground with his arms spread in a "Superman" position. (Video Exhibit V4 at 14:42:20; "Search Frame Grabs," Exhibit 5 at 1, App. 43.)

RESPONSE: UNDISPUTED.

17. The persons depicted in "Search Frame Grabs," Exhibit 5 at 1-2, App. 43-44, are as follows:

- a. Defendant Rosenbaum is the officer holding a rifle and standing with his back to the camera. (Kane Dep. 28:24-29:3, Exhibit 13 at 28, app. 144-45.)

RESPONSE: UNDISPUTED.

- b. Defendant Kane is the officer without a mask standing to plaintiff's left. (Kane Dep. 28:5-7, Exhibit 13 at 28, App. 144.)

RESPONSE: UNDISPUTED.

- c. Defendant Popp is the officer wearing a mask, crouching to plaintiff's right. (Popp Dep. 15:14-18, Exhibit 15 at 15, App. 217.)

RESPONSE: UNDISPUTED.

- d. Defendant Kubiak is wearing a dark uniform and no hat, standing to the right of defendant Rosenbaum. (Rosenbaum Dep. 40:13-17, Exhibit 16 at 40, App. 283.)

RESPONSE: UNDISPUTED.

- e. Defendant Pogorzelski is wearing a hat, standing up, and closest to the tree toward the left of the frame. (Rosenbaum Dep. 40:12-17, Exhibit 16 at 40, App. 283.)

RESPONSE: UNDISPUTED.

- 18. Defendants Kane and Popp handcuffed plaintiff. (Kane Dep. 32:21-23, Exhibit 13 at 32, App. 148; Popp Dep. 25:12-14, Exhibit 15 at 25, App. 227)

RESPONSE: UNDISPUTED.

- 19. Defendant Pogorzelski assisted by handing her handcuffs to defendant Kane. (Video Exhibit V4 at 14:42:36-37; "Search Frame Grabs," Exhibit 5 at 6-7, App. 48-49.)

RESPONSE: UNDISPUTED.

- 20. Defendant Rosenbaum held his rifle at the ready while defendant Kane and Popp handcuffed plaintiff. (Video Exhibit V4 at 14:42:36, "Search Frame Grabs," Exhibit 5 at 7, App. 49.)

RESPONSE: UNDISPUTED.

21. Defendant Kubiak held his handgun pointed at plaintiff while defendant Kane and Popp handcuffed Plaintiff. (Video Exhibit V4 at 14:42:36, “Search Frame Grabs,” Exhibit 5 at 7, App. 49.)

RESPONSE: DISPUTED that Kubiak held his handgun pointed at plaintiff while defendant Kane and Popp handcuffed Plaintiff. (Video Exhibit V4 at 14:42:36, “Search Frame Grabs,” Exhibit 5 at 7, App. 49.) See Rosenbaum Deposition, p. 40, para 13-20. The search frame grab does not show Kubiak’s weapon at all. Only a portion of his body can be seen from this frame.

22. Defendants Kane and Popp performed a pat down search of plaintiff’s outer clothing and Kane then searched in plaintiff’s pockets. (Video Exhibit V2 at 14:42:25-34, “Search Frame Grabs,” Exhibit 5 at 2-5, App. 44-45; Video Exhibit V1 at 14:43:25-14:43:49, “Search Frame Grabs,” Exhibit 5 at 9- 11, App. 51-53; Video Exhibit V4 at 14:44:02 “Search Frame Grabs,” Exhibit 5 at 12, App. 54; Kane Dep. 8:15-18, Exhibit 13 at 8, App. 124; Popp Dep. 37:20- 38:5, Exhibit 15 at 37-38, App. 239-40.)

RESPONSE: UNDISPUTED.

23. Defendant Rosenbaum or Officer (and non-defendant) Burgers searched in plaintiff’s pockets after Kane had searched those pockets. (Video Exhibit V3 at 14:44:16-17, “Search Frame Grabs,” Exhibit 5 at 15-16, App. 57- 58.) (Popp identified Burgers as the second person who searched in plaintiff’s pockets. (Popp Dep. 33:5-9, Exhibit 13 at 33, App. 149.) A jury could find that the gloves worn by

the second person who searched in plaintiff's pockets depicted in "Search Frame Grabs," Exhibit 5 at 15-16 matches those worn by Defendant Rosenbaum, as shown in "Search Frame Grabs," Exhibit 5 at 13, App. 66.)

RESPONSE: DISPUTED. Defendants dispute the fact that a jury could find that the gloves match Rosenbaum's gloves. Further Defendants dispute that Rosenbaum searched Plaintiff. (Rosenbaum Deposition, 52:21-23)

V. The Municipal Policies

A. Knowledge of Defects in Policies

24. The following facts were reported in the Daily Northwestern on January 21, 2019 (following the settlement of a civil suit), <https://dailynorthwestern.com/2019/01/21/lateststories/former-nu-graduate-student-settles-case-with-city-following-wrongful-arrest/>:

- a. On October 10, 2015, a citizen informed the Evanston police that Lawrence Crosby, then an African-American Evanston resident, was attempting to steal a car.

RESPONSE: DISPUTED. Defendants object to this fact as inadmissible hearsay and thus disputes this fact. Fed. R. Evid. 801, 802.

- b. Evanston police officers responded to the call and stopped Crosby, who was lawfully driving his vehicle.

RESPONSE: DISPUTED. Defendants object to this fact as inadmissible hearsay and thus disputes this fact. Fed. R. Evid. 801, 802.

- c. Crosby exited his vehicle with his hands in the air and a cellphone in one hand.

RESPONSE: DISPUTED. Defendants object to this fact as inadmissible hearsay and thus disputes this fact. Fed. R. Evid. 801, 802.

d. Evanston police officers ordered Crosby to get on the ground.

RESPONSE: DISPUTED. Defendants object to this fact as inadmissible hearsay and thus disputes this fact. Fed. R. Evid. 801, 802.

e. Crosby refused; Evanston police officers forced him to the ground.

RESPONSE: DISPUTED. Defendants object to this fact as inadmissible hearsay and thus disputes this fact. Fed. R. Evid. 801, 802.

f. A body camera video captured a police officer telling Crosby that he was lucky that an officer had not shot him.

RESPONSE: DISPUTED. Defendants object to this fact as inadmissible hearsay and thus disputes this fact. Fed. R. Evid. 801, 802.

25. A video of the incident is publicly available at <https://www.youtube.com/watch?v=0hbIZy43fSo&t=40s>. Plaintiff will submit a copy of that video (“V7”) through using the Court’s “Digital Media Exhibit Submission” procedure as “CrosbyArrest.mp4.”

RESPONSE: DISPUTED. Defendants object to this fact as inadmissible hearsay and thus disputes this fact. Fed. R. Evid. 801, 802.

26. The video includes the voice of an Evanston police officer telling Crosby “get on the ground, get on the ground” at 24 seconds from the start of the video. When Crosby does not comply, about six Evanston officers tackle him, yelling “get on

the ground” as they use force. One of the officers is heard ordering Crosby to “stop resisting, stop resisting” at about 41 seconds into the video. As officers handcuff Crosby, one is heard to say at about 56 seconds into the video, “When we tell you to get down, you get down.”

RESPONSE: DISPUTED. Defendants object to this fact as inadmissible hearsay and thus disputes this fact. Fed. R. Evid. 801, 802.

B. Use of Force

27. Evanston’s use of force policy is set out in “Policy 300,” Exhibit 17, App. 302.

RESPONSE: UNDISPUTED.

28. The use of force policy requires officers to “use only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose.” (Policy 300.2.2, Exhibit 17 at 2, App. 303.)

RESPONSE: DISPUTED. Defendants object to this fact as it is not supported by the record cited by Plaintiff. Evanston’s policies on the use of force are set forth in Section 300.3 and elsewhere throughout Policy 300, including on the use of deadly force, which is set forth in Section 300.4. Defendants object to this fact to the extent that it fails to set forth Evanston’s complete policy on the use of force, including deadly force. Without waiving this objection, Defendants do not dispute this fact.

29. The policy relating to deadly force does not explicitly forbid the threat of deadly force to compel compliance with a police order. (Policy 300.4, Exhibit 17 at 4, App. 306.)

RESPONSE: DISPUTED. See Section 300.4.

30. Evanston police officers are not trained that pointing a firearm at a suspect is the use of deadly force. (Rosenbaum Dep. 27:4-7, Exhibit 16 at 27, App. 270.)

RESPONSE: DISPUTED. Defendants object to this fact as it is not supported by the record cited by Plaintiff. Without waiving this objection, Defendants dispute this fact. See Rosenbaum Dep. 26:6-13, 26:21-24, 27:1-3, 28:15-18.

31. Evanston police officers view the use of force policy as authorizing an officer to point a firearm at a civilian solely for officer safety when the officer had not observed the civilian in possession of a firearm or committing an offense. (Kubiak Dep. 18:23-19:6, Exhibit at 18-19, App. 180-181; Rosenbaum Dep. 33:14-18, 38:18-22, Exhibit 16 at 32, 38, App. 276, 281.)

RESPONSE: DISPUTED. Defendants object to this fact as improper factual argument, Malec, 191 F.R.D. at 585 (Rule 56.1 statement not intended for factual or legal argument) and as speculation and conclusions unsupported by the record Defendants further object to this fact as it is neither supported by the records cited by Plaintiff nor in any other record.

32. Defendant Rosenbaum was acting in accordance with the written policies of the City of Evanston when he displayed his rifle while other officers searched plaintiff:

a. Defendant Rosenbaum was “providing security of the officers handcuffing plaintiff. (Rosenbaum Dep. 38:18-23, Exhibit 16 at 38, App. 281.)

RESPONSE: DISPUTED. Defendants object to this fact as it is not supported by the record cited by Plaintiff or otherwise. Without waiving this objection, Defendants dispute this fact.

b. All of Rosenbaum’s actions were consistent with the written policies of the City of Evanston. (Rosenbaum Dep. 50:13-18, Exhibit 16 at 50, App. 293.)

RESPONSE: DISPUTED. Defendants object to this fact as it is not supported by the record cited by Plaintiff or otherwise. Without waiving this objection, Defendants dispute this fact.

33. Defendant Kubiak followed the rules and regulations of the Evanston Police Department in pointing his firearm at plaintiff and instructing him to get on the ground. (Kane Dep. 25:15-21, Exhibit 132 at 25, App. 141.)

RESPONSE: UNDISPUTED.

C. Search and Seizure

34. Evanston's search policy is set out in "Policy 312," Exhibit 18, App. 316.

RESPONSE: UNDISPUTED. Defendant objects to this fact as not material to Plaintiff's Motion for Partial Summary Judgment and therefore does not comply with Local Rule 56.1(a)(2). See *Outlaw, Malec*, 191 F.R.D. at 583. Without waiving this objection, Defendants do not dispute this fact.

35. The policy identifies several situations in which an officer may conduct a search without a warrant:

- a. Consent
- b. Incident to a lawful arrest
- c. Legitimate community caretaking
- d. Vehicle searches "under certain circumstances"
- e. "Exigent circumstances"

RESPONSE: DISPUTED. Defendant objects to this fact as not material to Plaintiff's Motion for Partial Summary Judgment and therefore does not comply with Local Rule 56.1(a)(2). See *Malec*, 191 F.R.D. at 583. Defendant further objects to this fact as to this fact

as it is not supported by a citation to the record., Without waiving this objection, Defendants dispute this fact.

36. In addition to situations described above, the policy acknowledges other situations in which an officer may conduct a warrantless search and directs each officer “to act in each situation according to current training and his/her familiarity with the subject’s clearly established rights as determined by case law.” (Policy 312.3, Exhibit 18 at 1. App. 316.)

RESPONSE: DISPUTED. Defendant objects to this fact as not material to Plaintiff’s Motion for Partial Summary Judgment and therefore does not comply with Local Rule 56.1(a)(2). See *Malec*, 191 F.R.D. at 583. Defendant further objects to this fact as to this fact as incomplete and thus out of context. Without waiving this objection, Defendants dispute this fact.

37. These policies authorized the defendant Officers to conduct the pat-down and to search plaintiff’s pockets on March 31, 2021:

RESPONSE: UNDISPUTED. Defendant objects to this fact as not material to Plaintiff’s Motion for Partial Summary Judgment and therefore does not comply with Local Rule 56.1(a)(2). See *Outlaw*, *Malec*, 191 F.R.D. at 583. Defendant further objects to this fact as to this fact as it is not supported by a citation to the record. Without waiving this objection, Defendants do not dispute this fact.

a. Defendant Kane search plaintiff because he “believed the suspect I searched was armed with a handgun.” (Kane Dep. 124:19-22, Exhibit 13 at 8, App. 124.)

RESPONSE: DISPUTED. Defendants object to this fact as it is not supported by the record cited by Plaintiff and misstates the record cited. Without waiving this objection, Defendants dispute this fact.

- b. Defendant Popp explained that the only reason for handcuffing and searching plaintiff was “because the dispatch call saying a suspect was on the beach with a gun.” (Popp Dep. 29:5-12, Exhibit 15 at 29, App. 231.)

RESPONSE: DISPUTED. Defendants object to this fact as it is not supported by the record cited by Plaintiff and wholly misstates the record cited. Without waiving this objection, Defendants dispute this fact.

Date: March 6, 2024,

Respectfully Submitted,
DEFENDANTS

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