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

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

PLAINTIFF'S CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO CROSS-MOTION

Defendant City of Evanston learned from a 2019 incident that its police officers should be cautious when they respond to a report from a civilian who believes they have "seen something" and is "saying something." (ECF No. 41-2, ¶¶ 24-26.) There, the lack of caution resulted in a large monetary settlement when police officers overreacted after a civilian reported to police that an African American Evanston resident was attempting to steal (what turned out to be) his car.[1] This case arises from a similar lack of caution: an anonymous complaint that a white male of nondescript height wearing a common dark jacket had been seen carrying a firearm

[1] Defendants object to each of the factual contentions about this incident as based on inadmissible hearsay. (ECF No. 41-2, ¶¶ 24-26.) Defendants do not, however, raise any foundation objection to the Evanston squad car camera that captured the incident. (ECF No. 41-2, ¶¶ 25-26.) Plaintiff does not offer the video for the truth of the statements made, but to show the acts undertaken by the officers when they ordered the suspect to "get on the ground" and, while they were beating him, "to stop resisting, stop resisting." The Court should therefore overrule the hearsay objection and consider the video, Plaintiff's Video Exhibit V7.

should not result in officers using firearms and coercive threats to seize an African American male across the street from his home in the middle of the afternoon so that other officers can search him for a non-existent firearm.

All parties have moved for summary judgment. Plaintiff in this consolidated memorandum replies to defendants' argument in opposition to plaintiff's motion for summary judgment and responds to defendants' cross-motion.

I. The Court should reject defendants' attempt to reframe plaintiff's claims

Plaintiff succinctly identified the two constitutional claims he raises against the individual defendants in his opening memorandum:

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

The Court should decline to consider defendants' alternate (and defendant friendly) framing of plaintiff's claims. (ECF No. 39 at 2.) The "plaintiff as master of the complaint may present (or abjure) any claim he likes." *Katz v. Gerardi*, 552 F.3d 558, 563 (7th Cir. 2009). Plaintiff unambiguously identified his claims against the individual officers in his opening memorandum and the Court should respect plaintiff's prerogative to choose the claims on which he relies.

II. Defendants Kubiak and Kane used excessive force in seizing plaintiff

Defendants Kubiak and Kane seized plaintiff when, by "show of authority," they restrained plaintiff's liberty. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Torres v. Madrid*, 592 U.S. 306, 311 (2021). The "show of authority" in this case were the firearms Kubiak and Kane displayed with the warning, "Do what we tell you, and you won't get hurt."

Defendants contend that this seizure was reasonable under the Fourth Amendment because they believed that plaintiff "was armed with a gun in his hand." (ECF No. 39 at 6.) Defendants do not, however, contend that either Kubiak or Kane saw plaintiff with a firearm.[2] To demonstrate the unreasonableness of the seizure, plaintiff also relies on the undisputed difference in appearance between the white male described by the anonymous complainant and plaintiff, who is African American. Defendants do not address this difference.

Defendants ask the Court to accept the subjective beliefs of defendant Kubiak that plaintiff may have had a gun. The Court should reject this improper argument, as plaintiff explains below.

III. Officer Kubiak's subjective beliefs are immaterial

Defendants ask the Court to consider defendant Kubiak's belief that plaintiff was armed. (ECF No. 40 at 3, ¶ 13.) The Court should decline this invitation because

[2] The best defendants can do is to assert that Kubiak "observed Plaintiff holding a black object in his hand." (Defendants' Additional Facts, ¶ 5, ECF No. 41-1 at 2.) Kubiak was unable to describe the black object and did not see it pointed at anyone. (Plaintiffs' Additional Facts, ¶ 7.)

Kubiak's subjective belief "is irrelevant." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006). As the Supreme Court recently stated in *Thompson v. Clark*, 596 U.S. 36 (2022), "[t]he Court has 'almost uniformly rejected invitations to probe subjective intent' in Fourth Amendment cases." *Id.* at 52 (quoting *Ashcroft v. al Kidd*, 563 U.S. 731, 736 (2011).) Thus, as this Court stated in *United States v. Black*, No. 20-cr-247-1, 2023 WL 5934911 (N.D. Ill. Sept. 12, 2023), "[t]he standard for reasonableness is objective, not subjective." *Id.* at *6.

IV. The cross-motions for summary judgment should be decided on the facts known to the defendant officers

The Court should reject defendants' request to consider information gathered by defendants after their interaction with plaintiff.

Defendants support their summary judgment motion with information they claim to have learned after plaintiff was seized and searched. (ECF No. 40 at 2, ¶¶ 7-8.) Some of these asserted facts are false, such as the claim that the complainant identified plaintiff as the offender.[3] (ECF No. 40 at 2, ¶ 8.) The Court should not consider any after acquired facts, whether true or made up.

"Fourth Amendment issues are analyzed on the basis of information available to the police at the time they act." *United States v. Espinoza*, 256 F.3d 718, 730 (7th Cir. 2001). Information acquired after a search "has no bearing on the probable

[3] Defendants assert that the complainant "observed Plaintiff" before she made her complaint. (ECF No. 40 at 2, ¶ 8.) This is incorrect. The complainant was interviewed by Officer Svendsen after the incident. Defendants submitted the video of this interview as Exhibit 15. The video shows that the complainant did not identify plaintiff, either from a photograph or from a corporeal identification procedure. See Plaintiff's Additional Facts, ¶ 19.

cause analysis." *United States v. Bell*, 925 F.3d 362, 372 (7th Cir. 2019). The Court must view "the facts and circumstances within [a police officer's] knowledge … at the moment the decision [to seize] was made" and disregard all after-acquired information." *Qian v. Kautz*, 168 F.3d 949, 953–54 (7th Cir. 1999). The Court should therefore decline to consider any of the contentions in paragraphs seven and eight of defendant's Local Rule 56.1(a)(2) statement of facts, ECF No. 40 at 2, ¶¶ 7-8.

V. The anonymous complaint provided only a general description of appearance and the location of a white male with a gun

The events resulting in this case began with an anonymous complaint to the Evanston police department about a white male with a gun. (ECF No. 41-2 at 2. ¶ 5.) The parties agree that the complainant reported a white male, between five feet and six feet tall, wearing a dark coat and jeans, and holding a gun. (*Id.*)

Plaintiff is African American (Incident Report, ECF No. 40-3 at 1) and, like 80% of the adult male population, is between five feet and six feet tall. (Plaintiff's Additional Facts, ¶ 16.) Nor was plaintiff the only person in the area of the beach wearing a dark coat. (Plaintiff's Additional Facts, ¶ 16.)

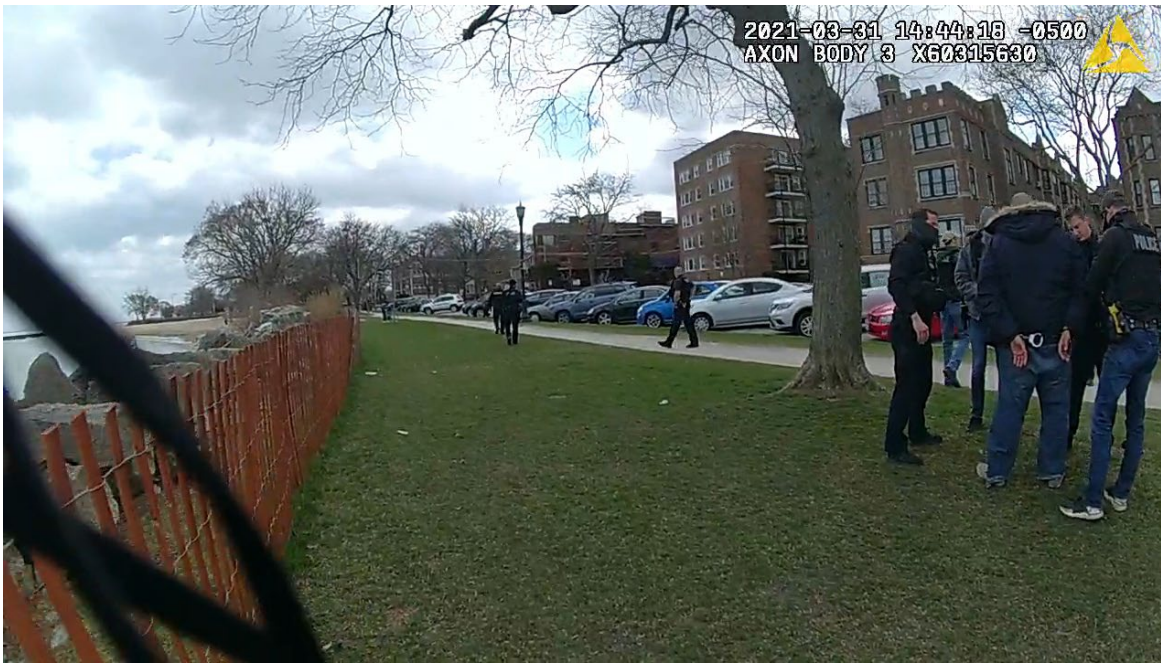
After the officers finished searching plaintiff, Officer Conley (who is not a defendant) walked south to the beach area, where he encountered two person who, like plaintiff, were wearing dark coats:

Conley Body Worn Camera, 14:14:48
Plaintiff's Video Exhibit VI

Defendants assert that Kubiak "observed Plaintiff in the same location provided by the dispatcher" (ECF 40 at 3, ¶ 12) and double down on this claim in their memorandum, stating that Kubiak "arrived at the location described by the caller" (ECF No. 39 at 6) where he found plaintiff "standing in the reported location." (*Id.* at 7.)

The dispatcher, however, did not provide Kubiak with a specific location. The electronic message described the alleged offender as being "just north of the beach on the trail" in the vicinity of 501 North Sheridan Square. (CAD Report, ECF No. 40-4 at 1.)

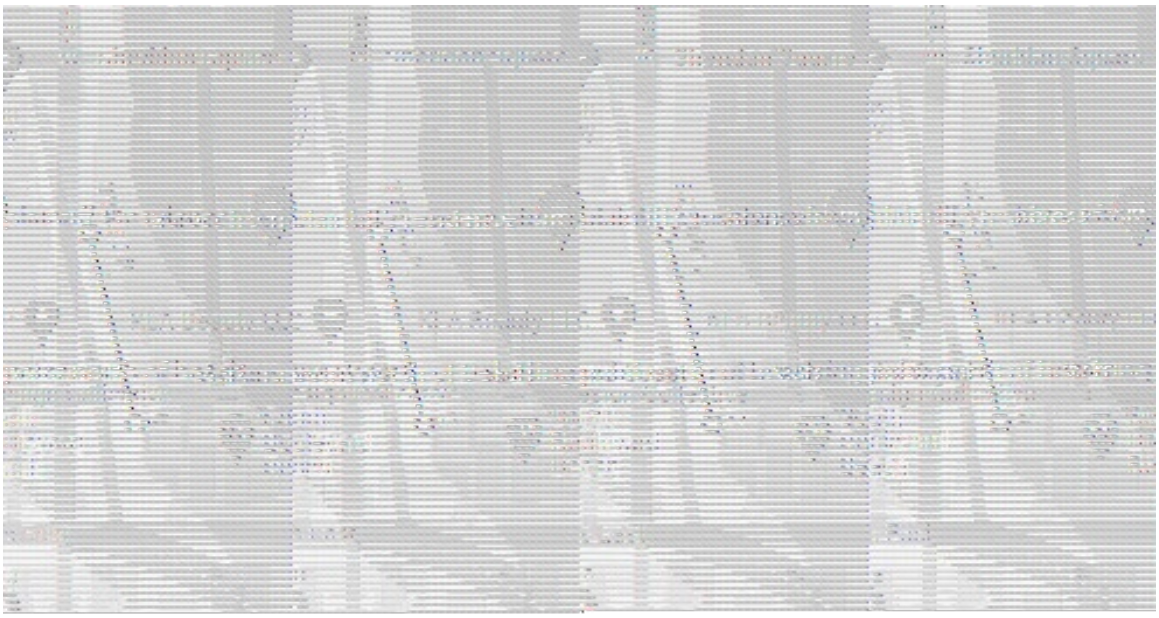
The beach is at the south end of the park, as shown in the frame grab from Officer Brown's body worn camera (Plaintiff's Additional Facts, ¶ 3):



Brown Body Worn Camera, 14:44:48
Plaintiff's Video Exhibit V4

The area between the beach and the location of plaintiff when he was searched is shown in the video from Officer Conley's body worn camera as he inspected the area south of the where other officers had searched plaintiff. (Plaintiff's Video Exhibit VI at 14:44:08-14:45:43.)

Google Maps, which are the proper subject of judicial notice for estimates of distance, *United States v. Julius*, 14 F.4th 752, 756 (7th Cir. 2021), shows the distance from "just north of the beach" to a point opposite plaintiff's residence as follows (Additional Facts, ¶ 6):



The undisputed facts show that defendants acted on a non-specific description about a white male at one location when they detained plaintiff, an African American male at a location more than 300 feet away. Defendants are in error in seeking to compare the decision of defendants Kubiak and Kane to seize plaintiff with the stop in *United States v. Williams*, 731 F.3d 678 (7th Cir. 2013) (ECF No. 39 at 6.)

The officers in *Williams* were acting on an anonymous tip that "weapons were (1) being brandished by individuals, (2) who were part of a boisterous crowd of twenty-five, (3) outside a bar, (4) which previously had been identified as a high-crime location, (5) late at night, and (6) in such a manner as to cause passers-by to leave the area and contact authorities." 731 F.3d at 694 (Ripple, J., dissenting in

part). The panel majority in *Williams* concluded that this report described "an emergency" and provided reasonable suspicion to stop the criminal defendant. *Id.* at 684.

None of the factors that justified the stop in *Williams* are present in this case. The person described by the anonymous caller in this case did not describe any brandishing of a weapon: The caller's complaint was about open carry of a firearm. (ECF No. 41-2 at 2, ¶ 5.) Nor did the anonymous complainant report a "boisterous crowd," or state that the white male had annoyed anyone.

Equally unavailing is defendants' reliance on *Williams v. City of Champaign*, 524 F.3d 826 (7th Cir. 2008). (ECF No. 39 at 7.)

There, the police responded to a complaint of a robbery by a "black male probably in his late 20s or early 30s … about six feet one in height … [who] had been seen leaving the mall in a dark van with license plate number RASHAD8 … [with] a black woman in the van." 524 F.3d at 827. The officers found the dark van with the specified license plate number and detained the occupants while they investigated the alleged robbery. *Id.* In this case, the officers responded to a report of a white male and detained an African American male.

Defendants (without citing to the record) assert that neither Kubiak nor Kane "threatened Plaintiff." (ECF No. 39 at 8.) The Court should reject this argument because it contradicts defendants' admissions to paragraph 14 of plaintiff's statement of undisputed facts that, after Kane and Kubiak unholstered their

firearms, and while Kubiak was pointing his gun at plaintiff, plaintiff followed Kubiak's order to get on the ground 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.)

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

Defendants admit each contention. (ECF No. 41-2 at 5, Response to Plaintiff's Undisputed Facts, ¶ 14.)

Having admitted these contentions, defendants should not be permitted to argue that the statement "Do what we tell you and you won't get hurt," spoken by police officers with unholstered handguns, at least one of which is pointed at plaintiff, is not a threat. This is a paradigmatic show of authority that requires submission and results in a seizure. *Torres v. Madrid*, 595 F.3d 306, 311 (2021).

Nor should defendants be permitted to argue that it was reasonable for defendant Kane to draw his firearm and instruct plaintiff to stay on the ground with his hands "like Superman" because "he was entitled to rely on Officer's Kubiak's firsthand knowledge of the facts amounting to the necessary level of suspicion for the action to the necessary level of suspicion." (ECF No. 39 at 7.) Contrary to this theory, the law is clearly established that a police officer is subject to liability for "fail[ing] to step in when another state actor is violating the plaintiff's rights." *Young v. Dart*, No. 17-cv-1914, 2021 WL 3633927, at *5 (N.D. Ill., August 17, 2021); *see also Stewardson v. Biggs*, 43 F.4th 732, 736 (7th Cir. 2022); *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994). Thus, Kane should have told Kubiak to stop

when he saw that plaintiff was an African American male, rather than a white male, and did not have a gun in either of his hands. Kane cannot escape liability by arguing that he was entitled to blindly continue an unlawful seizure initiated by Kubiak.

The Court should also reject defendants' assertion that they "terminated the display of force immediately upon finding Plaintiff unarmed." (ECF No. 39 at 8, citing ECF No. 40 at 29.) This contention is incorrect. Defendants Kubiak and Rosenbaum both displayed their weapons while Kane and Popp searched plaintiff. (ECF No. 31-1 at 45, Plaintiff's Exhibit 5 at 1.)

United States v. Williams, *supra*, 731 F.3d 678 (7th Cir. 2013) makes plain that a search "should only be allowed when the officer can point to articulable facts that would establish the separate and specific condition that the detainee has a weapon or poses some danger." *Williams*, 731 F.3d at 686. Here, defendants Kane and Kubiak concede that they knew that plaintiff did not have a weapon or posed any danger when they reached him and learned that he was unarmed (and African American rather than white, like the subject of the anonymous complaint).

The Court should reject defendants' meritless arguments, as well as their hyperbolic claim that the anonymous complaint was about "an ostensible ongoing emergency situation."[4] (ECF No. 39 at 6.) The Court should grant summary

[4] The complaint about open carry of a firearm and the differences between a white male and plaintiff, an African American male, distinguish this case from *Carr v. Jehl*, 2015 WL 362089 (No. 13-cv-6063, N.D. Ill., January 28, 2015). The complaint there was that a "male just pulled a gun" and "was in a garage in a gray Cadillac behind a Super Sub near Roosevelt and Pulaski streets." *Id.* at *1. The officers found the plaintiff in his garage with his gray Cadillac about a minute after the call was

judgment on liability against defendant Kubiak and Kane for the initial seizure of plaintiff.

VI. The search exceeded a *Terry* protective pat down

Defendants agree that a *Terry* protective pat down search is limited to "an outer search of a suspect's clothing." (ECF No. 39 at 9.) Defendants, however, ask the Court to ignore the video evidence which shows that defendants Popp and Kane searched plaintiff's pockets. See Plaintiff's Response to Defendants' Statement of Facts, ¶ 27.)

More importantly, however, defendants assume that the Court will disregard the fact that reasonable suspicion to search had vanished when defendants were face to face with plaintiff and could plainly see that he is African American, rather than a white male as described by the complainant.

VII. Plaintiff did not consent to the search of his pockets

The Court should reject defendants' argument that plaintiff consented to a search of his pockets. (ECF No. 39 at 10.)

Defendants base this meritless claim on the assertion that "Officer Pogorzelski asked Plaintiff for his consent to search his person." (ECF No. 39 at 9-10.) The video (and audio) evidence does not support this claim.

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dispatched. *Id.* The district judge concluded that this information justified a *Terry* stop of the owner of the Cadillac. *Id. at* *4. The Court relied on the complainant's "use of the 911 system, the perceived emergency situation, the caller's contemporaneous report, and the Officers' nearly simultaneous observation of Plaintiff in the location described." *Id.* at 5. The only fact in common with this case is the use of the 911 system.

Defendant Pogorzelski asked plaintiff "Do you mind if we open your jacket." (Plaintiff's Additional, Facts, ¶ 20.) Plaintiff did not object to this request but did not thereby consent to a search of his pockets. *United States v. Dichiarinte*, 445 F.2d 126, 129 (7th Cir. 1971).

VIII. The law limiting searches during a *Terry* stop is clearly established

Defendants do not dispute that the law is clearly established that a *Terry* stop requires the existence of "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cole*, 21 F.4th 421, 433 (7th Cir. 2021) (en banc) (cleaned up). This "particularized and objective basis" is missing in this case.

Nor do defendants dispute that the law is clearly established that a *Terry* stop is limited to a "a pat down." *Ybarra v. Illinois*, 444 U.S. 85 (1979).

The summary judgment record shows that defendants violated both rules and are not entitled to qualified immunity.

IX. The Monell claim

The record in this case shows that nearly twenty members of the Evanston police department participated in detaining and searching plaintiff, an African American male, in responding to an anonymous that a white male was displaying a handgun. The record also shows that each police officer acted as if this conduct was lawful. Plaintiff explained his theory of *Monell* liability in his opening memorandum and stands on those arguments.

X. Conclusion

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

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