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' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' CROSS MOTION ON FOR SUMMARY JUDGMENT

Defendants, by their undersigned counsel, submit this Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment ("Plaintiff's Response").

I. Defendants did not reframe Plaintiff's claims

Plaintiff urges the Court to "decline to consider defendants' alternate (and defendant friendly) framing of plaintiff's claims (ECF No. 39 at 2.)" presented in his Motion for Partial Summary Judgment (ECF No. 50-1 at 2). Plaintiff apparently has conflated Defendant's Cross Motion for Summary Judgment (ECF No. 39) with Defendants' Response to Plaintiff's Cross Motion for Partial Summary Judgment (ECF No. 41), which directly addresses the claims in Plaintiff's Cross Motion for Partial Summary Judgment (ECF No. 50-1).

II. Officers Kubiak and Kane did not need to see Plaintiff holding a gun to use the threat of force.

Plaintiff argues, without supporting authority, that Officers Kubiak and Kane's threat of force was excessive, and the seizure of Plaintiff was unreasonable because they did not see him with a firearm. (ECF No. 50-1, p.2) This argument fails as a matter of law. "*Terry* rejected the

notion that an officer must be certain that an individual is armed" for reasonable suspicion to exist. *United States v. Patton*, 705 F.3d 734, 741 (7th Cir. 2013) (*citing Terry*, 392 U.S. at 27). Instead, "so long as the suspicion that an individual could be armed is supported by specific, identifiable facts, it is an objectively reasonable suspicion that satisfies *Terry*." *Patton*, 705 F.3d at 741 (citations omitted).

Thus, if an officer reasonably believes a suspect places him, or others in the immediate vicinity, in imminent danger of death or serious bodily injury, deadly force can reasonably be used by the officer. *See Muhammed v. City of Chicago*, 316 F.3d 680, 683 (7th Cir. 2002); *see also United States v. Watson*, 558 F.3d 702, 704 (7th Cir. 2009) (Rejecting an excessive force claim based on gun pointing because "the police had reasonable suspicion to think they were approaching an illegal seller of guns, who had guns in the car.").

An officer's use of force during a seizure is unreasonable if, judging from the totality of the circumstances, the officer uses greater force than was reasonably necessary to effectuate the seizure. *Gonzalez v. City of Elgin*, 578 F.3d 526, 539 (7th Cir. 2009). The reasonableness of a particular use of force is not based on hindsight, but rather is determined considering the perspective of the officer on the scene, allowing "for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

The circumstances that confronted Officers Kubiak and Kane at the time, when viewed *objectively*, justified their use of force to effectuate the seizure of Plaintiff, including that (1) Officers Kubiak and Kane knew they was responding to a contemporaneous eyewitness report of an ongoing emergency situation of a man holding a gun in his hand in a public park; (2) Officer

Kubiak arrived at the reported location almost immediately of receiving the report and observed Plaintiff, who reasonably matched the description provided by the dispatcher, standing in the reported location; (4) Officer Kubiak had just been warned by the dispatcher that the 911 caller reported seeing Plaintiff holding a gun in his hand; and (5) Officer Kubiak observed Plaintiff holding an indiscernible black object in his hand.

III. Officer Kubiak had a reasonable suspicion Plaintiff was armed

Plaintiff argues Officer Kubiak's subjective belief that Plaintiff was armed is irrelevant and should be ignored by the Court. (ECF No. 50-1, pp. 3-4). As set forth in Section II of this Memorandum, Officer Kubiak does not contend, nor do the facts show, he pointed his firearm at Plaintiff based on a subjective belief or hunch that Plaintiff was armed. *See Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed *objectively*, justify [the] action." (emphasis original)).

IV. Defendants Motion for Summary Judgment does not rely on after acquired facts

Plaintiff asserts Defendants seek to support their motion for summary judgment with information acquired from an interview of the 911 caller that occurred shortly after the incident. (ECF No. 50-1, pp. 4-5) Defendants' however, neither argued nor used the information acquired from the post incident interview of the 911 caller to justify Officer Kubiak's decision to seize Plaintiff. The reference in Defendant's Motion to the interview was presented to mitigate Plaintiff's prospective argument that the 911 caller's report was not made through a "traceable" 911 system.

V. Officer Kubiak had a reasonable basis to believe Plaintiff was the individual described by 911 Caller

Plaintiff argues a depiction taken from Office Conley's body camera shows there were other individuals wearing the same dark coats described by 911 were in the same area as Plaintiff. (ECF No. 50-1, p. 6) First, the depiction presented by Plaintiff was taken *after* Plaintiff's seizure and thus not relevant to the issues presented in Defendants Motion for Summary Judgment. As Plaintiff points out in his Response to Defendants' Motion, the Court, in assessing the reasonableness of the action taken by the Officers, 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). (ECF No. 50-1, p. 5) Second, as shown in the screen capture of Officer Kubiak's bodycam video, there is no genuine dispute that at the time Officer Kubiak confronted Plaintiff, there was no other individual at the location described by the 911 caller except Plaintiff.

Kubiak Body Worn Camera 14:41:47
Defendants Video Exhibit 12

Plaintiff also argues that Officer Kubiak was not provided a specific location via dispatch.[1] (ECF No. 50-1, p. 6) Neither party disputes that the dispatcher informed Officer Kubiak that the alleged offender was reported to be located "just north of the beach on the trial" in the vicinity of 501 North Sheridan Square. (CAD Report, ECF No. 40-4 at 1) As a public trail, the location doesn't have a specific street address; however, as evident by the video evidence, Plaintiff was found and seized by Officer Kubiak on the *trail just north of the beach on the trial in the vicinity of 501 North Sheridan Square*.

Plaintiff presents a depiction from Google Maps to try to show Plaintiff was more than 300 feet away from the reported location; however, the measurement points Plaintiff uses to show this distance are flawed, without foundation, and fail to create a genuine dispute of a fact. (ECF No. 50-1, p. 8) Plaintiff's Google Map correctly identifies the location Plaintiff where was seized (labeled as "across from plaintiff's residence). *Id.* Plaintiff's measurement however starts at the center point of the beach (labeled as "starting point of north of beach"), which is materially inconsistent with the location provided by the dispatcher, namely that the subject was reported to have been seen *north of the beach*, which according to Plaintiff's Google Map, is where he was seized by Officer Kubiak. Plaintiff's Google Map measurements are plainly flawed and fail to create a genuine dispute of fact. (ECF No. 50-1, p. 8)

Plaintiff attempts to distinguish *United States v. Williams,* 731 F.3d 678 (7th Cir. 2013) from the instant case by arguing that the anonymous caller in *Williams* described the suspects as brandishing weapons, whereas the 911 caller's report in the instant case was "about open carry of a firearm." (ECF No. 50-1, pp. 8-9) The 911 caller's actual report was of a man "holding a gun in his right hand" in a public park (SOMF ¶4). Such information provided the Officers a reasonable

[1] Plaintiff does not argue the purpose or relevance of the information.

inference that the suspect posed an ongoing emergency.[2] *See United States v. Swinney*, 463 F. Supp. 3d 851, 858 (N.D. Ill. 2020) ("Courts have repeatedly held that the brandishing of guns in public places constitutes an ongoing emergency for purposes of the reasonable suspicion" (citations omitted)".

Plaintiff purports Defendants reliance on *Williams v. City of Champaign* 524 F.3d 826 (7th Cir. 2008) is unavailing, however he offers no reason for this conclusion. (ECF No. 50-1, p. 9)

Plaintiff also purports, without citation to the record, "that 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". (ECF No. 50-1, p. 11) This purported fact is baseless. There is nothing in the record resembling this concession.

Plaintiff argues Officer Kane failed to intervene to stop Officer Kubiak when he saw that Plaintiff was African American, not white. (ECF No. 50-1, p. 11) Officer Kubiak's body cam shows Plaintiff is of light skin and was wearing a dark winter coat with a large hood attached, (Exhibit 12, Kubiak Video, 14:42:07). Plaintiff also was in the reported location and was holding a black object in his hand, which the 911 caller reported to be a gun. Neither of these Officers was required to take their own life in their hands on the chance they or the 911 caller may have been mistaken. *See United States v. Rickmon*, 952 F.3d 876, 883 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2505 (Apr. 5, 2021) Further, in determining whether an officer had the requisite particularized suspicion for a Terry stop, the Court does not "consider in isolation each variable of the equation that may add up to reasonable suspicion." *Matz v. Klotka*, 769 F.3d 517, 523 (7th Cir. 2014). "Instead, it is the sum of all the information known to officers at the time of the stop that is considered, including the behavior and characteristics of the suspect." *Id.*

[2] On March 31, 2021, the date of the incident, it was unlawful for any person to carry a firearm in a public park in Evanston Illinois (Exhibit 6, Kubiak Dep. 36:7-24, 37:1-14). See also 720 ILCS **5**/24-1(a)(10).

VI. The search of Plaintiff did not exceed scope permitted by *Terry*

Plaintiff argues Officers Kane and Popp search of Plaintiff exceeded the permissible scope of *Terry*. (ECF No. 50-1, p. 12) To support his conclusion Plaintiff relies on the video taken from Officer Kane's body worn camera. (Plaintiff's Video Exhibit V2 14:42)

The video evidence shows Officers Kane and Popp performed a pat-down search of Plaintiff's outer clothing. (Exhibit 12, Kane Video, 14:42:20-42:37) The sole intrusion into Plaintiff's pocket can be seen in Officer Kane's bodycam video at 14:42:31, which shows Officer Kane patting down a large outer pocket of Plaintiff's winter coat, and feeling a something in the pocket, briefly inserting his fingers no more than knuckle deep into the pocket and pulling out a pack of cigarettes, which he immediate returned to the pocket. (Exhibit 12, Kane Video, 14:42:32)).

Here the limited intrusion into Plaintiffs front pockets is permitted because, the sole justification of the search was the protection of the officers and others nearby, and it was confined in scope to an intrusion that was reasonably designed to discover guns, or other hidden instruments for the assault of the officers. *See Terry*, 392 U.S. at 29. "[U]nder *Terry*, an officer may conduct a protective search for weapons of an individual's person, 'and area within his control,' if 'a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" *United States v. Richmond*, 924 F.3d 404, 414 (7th Cir. 2019) (quoting *Terry*, 392 U.S. at 27).

VII. Plaintiff Consented To Be Searched

Plaintiff asserts he did not consent to be searched; however, Officer Pogorzelski can clearly be heard asking Plaintiff "do you mind if we open your jacket just to make sure there is nothing…," to which Plaintiff answers, "of course" (Exhibit 13, Kane Video 14:43:55).

Next, Plaintiff cites *United States v. Dichiarinte*, 445 F.2d 126, 129 (7th Cir. 1971), to highlight that the search of Plaintiffs pockets exceeded the scope of Plaintiff's consent. As discussed below, the totality of the circumstances, justified a protective search for weapons.

VIII. Seizure and Search Justified under *Terry* and Seventh Circuit case law

Plaintiffs allege that this *Terry* stop was improper because *Terry* stops require the existence of "a particularized and objective basis for suspecting the particular person stopped on criminal activity." Defendants have pointed to many factors in their Memorandum in Support of Summary Judgment and in this Reply Memorandum, which provided the Officers a particularized and objective basis for suspecting Plaintiff was involved in criminal activity.

Further, Plaintiff assertion that Defendants do not dispute that the law is clearly established that a *Terry* stop is limited to a "pat down." (ECF No. 46, p. 13) This assertion is undermined by Defendants Memorandum in Support of their Cross Motion for Summary Judgment:

> Police officers are permitted to take reasonable steps to ensure 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 (7thCir. 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 (ECF. No 41 at 11)

In this case, the totality of the circumstances made it entirely reasonable for the Officers to conduct a protective search for weapons on Plaintiff's person.

IX. The Defendant Officers are entitled to Qualified Immunity

Even if Plaintiff establishes a constitutional violation under the Fourth Amendment, for the reasons set forth in Defendants Cross Motion for Summary Judgment (ECF 39), Defendant Officers are shielded from liability under those claims by the doctrine of qualified immunity.

X. Conclusion

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

Date: April 3, 2024

Respectfully Submitted,

/s/ James V. Daffada
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