

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

Alexander Gray,	)	
	)	
<i>Plaintiff,</i>	)	
	)	
-vs-	)	No. 23-cv-1931
	)	
City of Evanston, Evanston Police	)	
Officers Kubiak, Kane, Popp, Ros-	)	
enbaum, and Pogorzelski,	)	(<i>Judge Seeger</i>)
	)	
<i>Defendants.</i>	)	

**PLAINTIFF'S RESPONSE TO DEFENDANT'S
RULE 56.1(b)(3) STATEMENT OF ADDITIONAL FACTS**

Plaintiff submits the following in response to defendant's Rule 56.1(b)(3) statement of additional facts in opposition to plaintiff's motion for summary judgment.

Many of defendants' numbered paragraph contain multiple asserted facts requiring separate responses. Accordingly, plaintiff uses brackets ([a], [b], [c], etc.) to denote the separate contentions in a single numbered paragraph. Plaintiff employs *italics* to identify the disputed matter.

Proposed Additional Fact 1. At about 2:38 pm, an EPD dispatcher radio broadcast 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. (Exhibit 1, Answer to Amended Complaint ¶5, Exhibit 3, EPD Report, Exhibit 4, Cad Ticket, Exhibit 6, Kubiak Dep. 6:19-24, 7:1-7, Exhibit 7, Kane Dep. 9:12-18, 11:18-24, Exhibit 8, Popp Dep. 26:8-24, 27:1-3, 29:5-11, Exhibit 5, Rosenbaum Dep. 11:18-22).

Response: Admit save for the following: The assertion that the caller saw the man with a gun “at a lakefront public park located in the 500-block of Sheridan Square, Evanston” is incorrect.

The dispatcher informed the responding officers about a man “just north of the beach on the trail.” (ECF No. 40-3 at 2) The beach is at 501 Sheridan Square; plaintiff’s interaction with the police occurred in the park east of 572 Sheridan Square, more than 300 feet north of the beach. The beach is at the south end of the park, as shown in the frame grab from Officer Brown’s body worn camera video:



Brown Body Worn Camera, 14:44:48

Plaintiff’s Video Exhibit V4

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 a distance of 325 feet from “just north of the beach” to where plaintiff was detained (across the street from his residence, as recorded on Kubiak Body Worn Camera, Plaintiff’s Exhibit V1 at 14:41:4):



Proposed Additional Fact 2. Officer Kubiak was on patrol in a police vehicle in the area at the time and drove to the location. (Exhibit 9, Kubiak Int Ans at ¶15, Exhibit 12, Kubiak Video 14:39:11)

Response: Admit.

Proposed Additional Fact 3. 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.” (Exhibit 12, Kubiak Video 14:40:10)

Response: Admit other than pulling “up to the location” (which is vague and undefined) and to the ellipses. This form of punctuation is used to signal that something has been omitted; the video does not include any omissions.

Kubiak asked the dispatcher to repeat the description at 14:40:07, as shown on his body worn camera, Plaintiff’s Exhibit V1.

Kubiak received the retransmitted description starting at 14:40:10 and parked his car at 14:41:10. He then walked slowly past about nine diagonal parking spaces before reaching plaintiff at 14:42:17. Although neither party has measured this distance, plaintiff estimates it to be 45 feet.

Plaintiff was on the ground, arms outstretched, with his headphones in front, under his head. (Plaintiff’ Exhibit 3 at 30, ECF No. 31-1:

Proposed Additional Fact 4. 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. (Exhibit 12, Kubiak Video 14:41:19)

Response: Admit.

13. [a] Officer Kubiak observed Plaintiff holding a black object in his hand. (Exhibit 6, Kubiak Dep. 14:7-21) [b] Officer Kubiak, believing the man was armed, [c] radioed that he had “eyes on him” upon which, [d] he unholstered and drew his firearm, [e] pointed it in the direction of man and ordered him to remove his hands from his pocket and put his hands up. (Exhibit 6, Kubiak Dep. 18:1-12, Exhibit 12, Kubiak Video 14:41:22)

[a] Admit.

[b] [b] Objection: Kubiak’s subjective belief is irrelevant. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006); *Thompson v. Clark*, 596 U.S. 36, 52 (2022).

[c] Admit.

[[d] Disputed. Kubiak’s body camera shows that he took out his gun before he made the statement “eyes on him”. (Kubiak Video, 14:41:22-24, Plaintiff’s Video Exhibit V1.)

[e] Admit.

Proposed Additional Fact 6. [a] Officer Kane deployed his firearm [b] drawn in a low ready position and assisted in effectuating Plaintiff’s compliance with Officer Kubiak’s instructions. (Exhibit 7, Kane Dep. 15:19-22, Exhibit 13, Kane Video 14:41:40)

[a] Admit.

[b] Dispute. Kane did not use the phrase “low ready” in his deposition testimony. Kane offered the opinion that “[b]ased on the video, I did not point my handgun at the subject.” (Kane Dep. 15:19-22.) Kane’s body worn camera, at 14:42:01-02 (Plaintiff’s Video Exhibit V2, Defendants’ Video Exhibit 13) shows Kane lifting his firearm toward plaintiff, as shown in the following three videos:



Kane's Body Worn Camera, 14:42:01



Kane's Body Worn Camera, 14:42:01¹

¹ Although the body worn camera records video at 29.970 frames per second, the time shown on the body worn camera videos is limited to integer seconds. Thus, two events separated by less than one second may appear to have occurred at the same time.



Kane's Body Worn Camera, 14:42:02

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Proposed Additional Fact 7. Officers Kane and *Popp* performed a *protective pat down search* of plaintiff's outer clothing. (Exhibit 12, Kubiak Video 14:42:24, Exhibit 13, Kane Video 14:42:24, Exhibit 14, Brown Video 14:42:24)

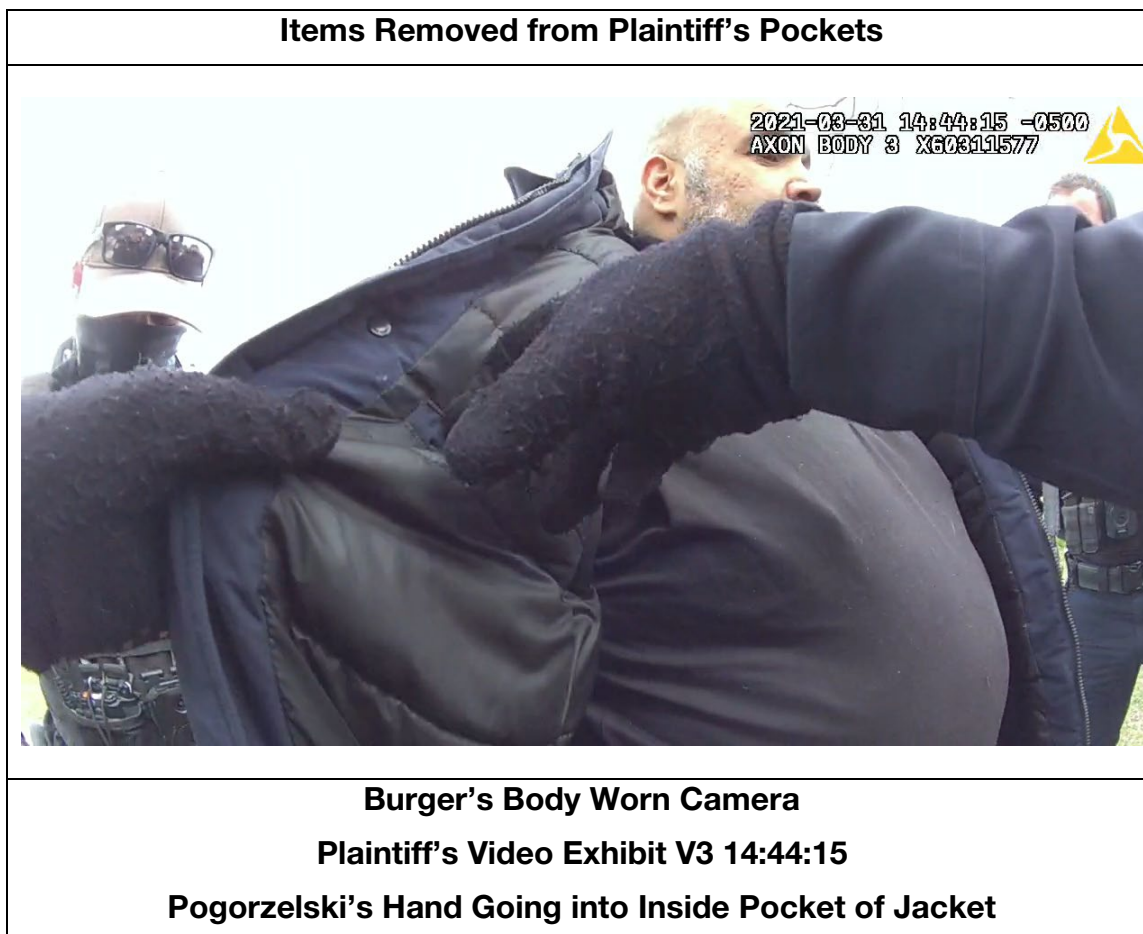
Disputed as to "protective pat-down search." The Supreme Court defined this type of search in *Terry v. Ohio*, 392 U.S. 1 (1968) as patting down the outer clothing of a suspect. *Id.* at 30. Defendant Kane admitted at his deposition that the video shows that he searched plaintiff's jacket. (Kane Dep. 35:14-17, ECF No. 31-1 at 153.) The body worn camera videos show that the officers searched inside the pockets of plaintiff's pants and jacket:



Kane Body Worn Camera
Plaintiff's Video Exhibit V2 14:42:35
Popp's Hand Going into Pants Pocket



Kane Body Worn Camera
Plaintiff's Video Exhibit V2 14:43:38



Proposed Additional Fact 8. **Officers** explained to Plaintiff that they had received a call about a man with a gun in the park, with a handgun in his right hand. (Exhibit 12, Kubiak Video 14:42:52)

Response: Disputed.

Proposed Additional Fact 9. 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. (Exhibit 12, Kubiak Video 14:43:31)

Admit other than to the plural "officers." These statements were made only by Defendant Pogorzelski. (Burgers Body Worn Camera, Plaintiff's Exhibit V3, 14:44:40-52.)

Proposed Additional Fact 10. Officers Rosenbaum and Kane maintained their firearms in "low ready" position but did not at any point in time point their firearm at Plaintiff. (Exhibit 7, Kane Dep. 15:19- 21, Exhibit 13, Kane Video 14:42:03)

Response: Disputed.

Disputed. Kane did not use the phrase “low ready” in his deposition testimony. Kane offered the opinion that “[b]ased on the video, I did not point my handgun at the subject.” (Kane Dep. 15:19-22.) Kane’s body worn camera, at 14:42:01-02 (Plaintiff’s Video Exhibit V2, Defendants’ Video Exhibit 13) shows Kane lifting his firearm toward plaintiff, as shown in the following three videos:



Kane’s Body Worn Camera, 14:42:01



Kane's Body Worn Camera, 14:42:01²



Kane's Body Worn Camera, 14:42:02

The two frame grabs below show defendant Rosenbaum (third officer from the left, wearing jeans and a hat) raising his right hand from a “low ready” position:

² Although the body worn camera records video at 29.970 frames per second, the time shown on the body worn camera videos is limited to integer seconds. Thus, two events separated by less than one second may appear to have occurred at the same time.



**Conley's Body Worn Camera
Plaintiff's Video Exhibit V5 14:42:20**



**Conley's Body Worn Camera
Plaintiff's Video Exhibit V5 14:42:28
(the white circle is around Rosenbaum's upraised right arm)**

Proposed Additional Fact 11. [a] Plaintiff was then helped to his feet by officers, upon which [b] Officer Pogorzelski *requested Plaintiff's consent* to search his person for firearms. Plaintiff replied, "Of course." (Exhibit 12, Kubiak Video 14:43:55)

Response: [a] Admit.

[b] Disputed. At 14:43:56-48 of Kubiak's Body Worn Camera, Officer Pogorzelski can be heard asking: "Do you mind if we open your jacket?" The subsequent search of the contents of plaintiff's pockets exceeded the scope of any consent. *United States v. Dichiarinte*, 445 F.2d 126, 129 (7th Cir. 1971).

Proposed Additional Fact 12. After determining Plaintiff did not have a weapon, they released him immediately. (Exhibit 4, Cad Report, Exhibit 3, Field General Report, Exhibit 12, Kubiak Video 14:47:28)

Response: Disputed.

Disputed. The officers determined that plaintiff did not have a weapon when they conducted the pat-down search, which concluded at 14:42:36. (Kane's Body Worn Camera, Plaintiff's Video Exhibit V2.)

Defendant Pogorzelski then gave handcuffs to Defendant Popp, who placed them on plaintiff. (Brown's Body Worn Camera, Plaintiff's Video Exhibit V4 at 14:42:36-39.)

After plaintiff was handcuffed, defendant Popp searched the pockets of plaintiff's jacket. See the images offered in response to Contention 10 above.

Proposed Additional Fact 13. [a] As Kane and Kubiak approached, Plaintiff was holding a *black cell phone* in his hand. (Exhibit 2, Plaintiff Dep. 8:20-24, 9:1-4) [b] Plaintiff also had a pair of black headphones on his person at this time. (Exhibit 12, Kubiak Video 14:42:17)

Response: [a] Disputed. While plaintiff thought that he might have had a cell-phone when Kubiak and Kain approached him, the video shows that plaintiff had only black headphones in his hand. Plaintiff's Exhibit 5, previously filed as ECF No. 31-1 at 45, shows Kubiak pointing his firearm at plaintiff who is on the ground, arms outstretched, headphones in front.

[b] Admit.

Proposed Additional Fact 14. The city of Evanston maintains a policy regarding use of force. This policy is set out in "Policy 300" (Exhibit 10, Evanston Force Policy)

Response: Admit.

Proposed Additional Fact 15. Police were later able to identify the 911 caller as Madeline Pitman. Ms. Pitman was located by Officer Svendsen at approximately 2:40 p.m. and interviewed to reconfirm the report. (Exhibit 3, EPD Report, Exhibit 15, Pitman Video 14:49:23)

Objection: Any information that the police obtained from Ms. Pitman after the incident is not material to this lawsuit, which turns on the reasonableness of police actions, based on the facts then known to the officers. *Carmichael v. Village of Palatine*, 605 F.3d 451, 548 (7th Cir. 2010). Information acquired after a search “has no bearing on the probable cause analysis.” *United States v. Bell*, 925 F.3d 362, 372 (7th Cir. 2019).

Dispute that Svendsen interviewed Pitman “at approximately 2:40 p.m.” Svendsen’s body worn camera shows that she began her conversation with Pitman at 2:49 p.m. (Defendants’ Video Exhibit 15.)

Dispute that the purpose of the conversation was “to reconfirm the report.” There is no direct evidence of the purpose for interviewing Pitman. An equally plausible scenario is that the police were investigating a potential violation of the Illinois statute prohibiting the making of a false police report. 720 ILCS 5/26-(a)(5).

Proposed Additional Fact 16. [a] Officer Kubiak observed Plaintiff *in the same location provided by the dispatcher*. (Exhibit 6, Kubiak Dep. 12:16-19). [b] Plaintiff was wearing a wearing a dark coat and jeans. (Exhibit 12, Kubiak Video 14:41:19)

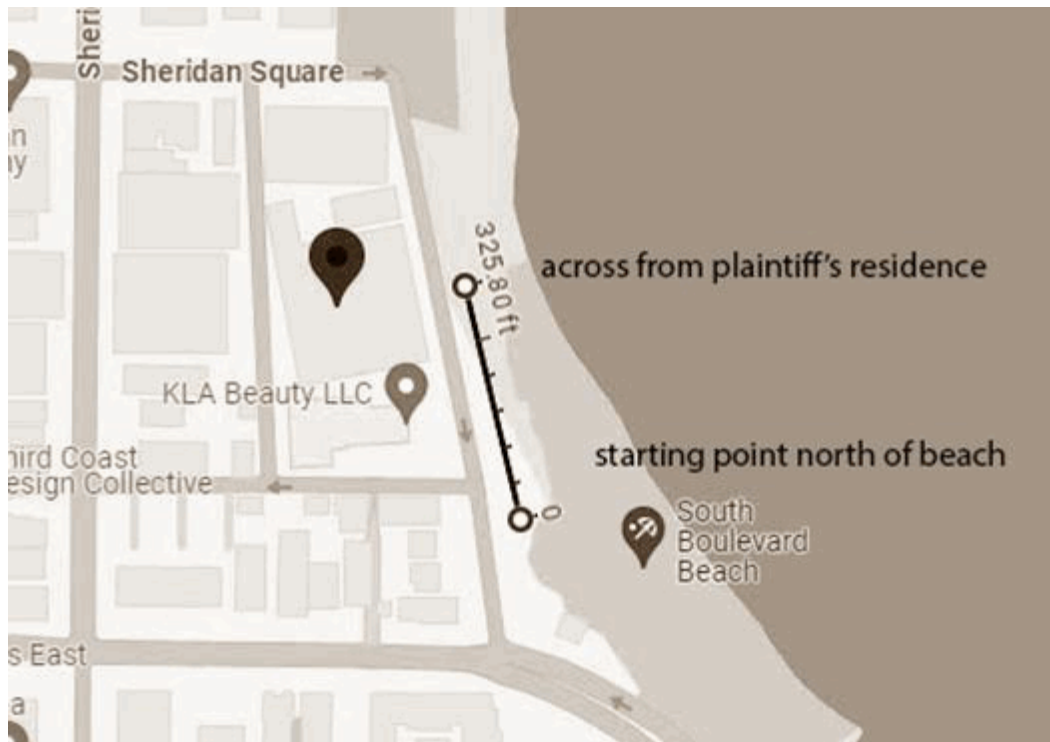
Response: [a] The dispatcher provided the “location of incident” as 501 Sheridan Road (Incident Report, ECF No. 40-3) or “just north of the beach on the trail” each of Sheridan Square. (CAP Report, ECF No. 40-4.) The beach is at the south end of the park, as shown in the frame grab from Officer Brown’s body worn camera video:



Brown Body Worn Camera, 14:44:48

Plaintiff's Video Exhibit V4

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 a distance of 325 feet from “just north of the beach” to where plaintiff was detained (across the street from his residence, as recorded on Kubiak Body Worn Camera, Plaintiff's Exhibit V1 at 14:41:4):



[b] Admit.

Proposed Additional Fact 17. Officer Kubiak arrived on scene and first encountered Plaintiff at 14:41:23. By 14:47:50 Plaintiff was released, and Defendants left the scene. This entire event lasted approximately 7 minutes from Officers arriving on the scene to Plaintiff's release. (Exhibit 14 Brown Video, Exhibit 12, Kubiak Video, Exhibit 13, Kane Video)

Response: Admit.

/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