

**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 Additional Facts (Dkt. #47), pursuant to Local Rule 56.1(b)(3).

1. The dispatcher informed the responding officers about a complaint about a man “just north of the beach on the trail.” (ECF No. 40-3 at 2)

RESPONSE: This statement is disputed in part due to incompleteness. The full sentence from the report states: “[w]hile enroute dispatch advised that an unknown citizen, later identified as Madeline Pitman (11/15/93) reported see a white male, approximately 5 feet tall to 6 feet tall, in a dark coat and jeans situated just north of the beach on the trial with a gun in his right hand.” (ECF No. 40-3 at 2.).

2. 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.)

RESPONSE: Undisputed.

3. 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

RESPONSE: Undisputed.

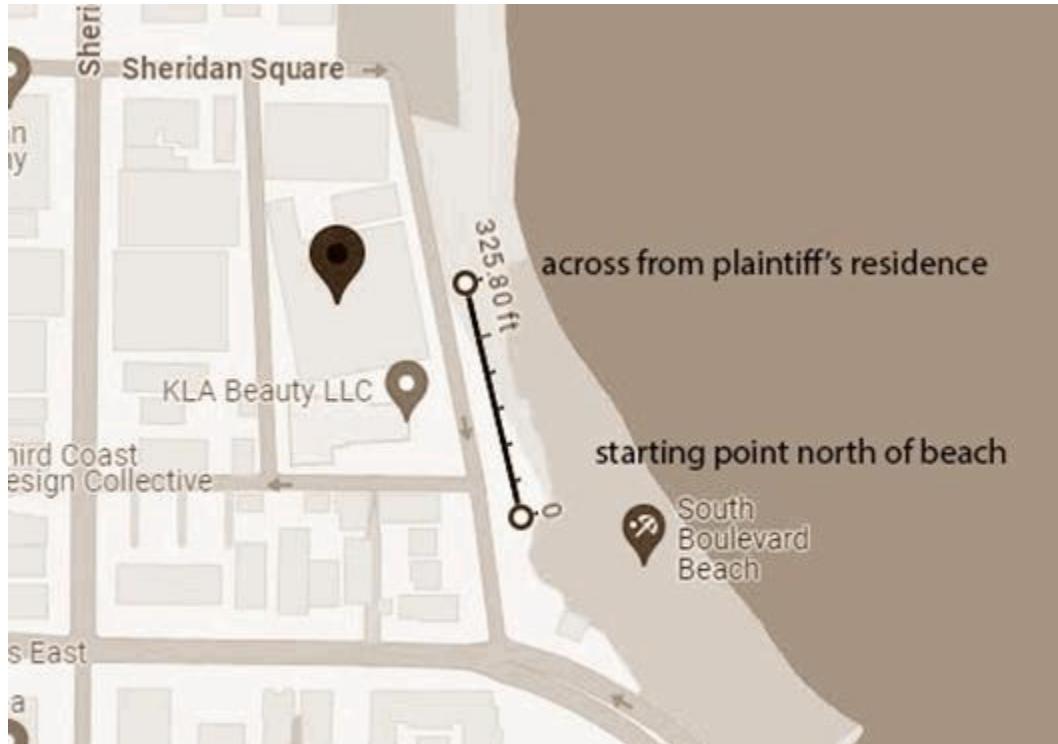
4. Kubiak asked the dispatcher to repeat the description of the person described by the anonymous complainant at 14:40:07, as shown on his body worn camera, Plaintiff's Exhibit V1 at 14:40:07.

RESPONSE: Undisputed.

5. Kubiak received the retransmitted description starting at 14:40:10 and parked his car at 14:41:10, Plaintiff's Exhibit V1. He then walked slowly past about nine diagonal parking spaces before reaching plaintiff at 14:42:17. (Plaintiff's Exhibit V1 at 14:40:10-14:41:10.) Although neither party has measured this distance, plaintiff estimates it to be 45 feet.

RESPONSE: Defendants do not dispute that Kubiak received the retransmitted description starting at 14:40:10 and parked his car at 14:41:10 and then walked slowly past about nine diagonal parking spaces before reaching plaintiff. Defendants object to plaintiff's estimate that the distance Kubiak walked was 45 feet as inadmissible speculation and without foundation.

6. 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), show 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):



RESPONSE: Defendants dispute this fact as to the effect that this Google Map shows a distance of 325 feet from “just north of the beach” to where plaintiff was detained. Plaintiff’s Map is fatally flawed due to the arbitrary placement of the starting point, north of beach, which therefore renders the 325 feet measurement meaningless. Further, Defendants object to Plaintiff’s placement of the label of “starting point north of beach” as its placement is conclusory, without foundation and plainly incorrect.

7. Officer Kubiak could not describe the black object he saw in plaintiff’s hand. (ECF 31-1 at 178, Kubiak Dep. 14:7-21) According to Kubiak, plaintiff was “just standing here” with the non-specific black object. (ECF 31-1 at 178, Kubiak Dep. 14:19-15:18.)

RESPONSE: Defendants dispute this fact. Officer Kubiak testified that upon arriving at the location described by dispatch he observed Plaintiff holding something in his hand. (ECF 31-1 at 178, Kubiak Dep. 14:9-12.) Officer Kubiak observed that Plaintiff was holding a black object, which he believed to be a firearm. (ECF 31-1 at 178, Kubiak Dep. 14:18-21.)

8. Plaintiff was on the ground, arms outstretched, with his head-phones in front, under his head before he was searched. (Plaintiff Exhibit 3 at 30, ECF No. 31-1 at 42; Plaintiff’s Exhibit V1, Kubiak’s Body Worn Camera, 14:41:10-14:42:17; Plaintiff’s Exhibit 5, previously filed as ECF No. 31-1 at 45.)

RESPONSE: Undisputed.

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

RESPONSE: Defendants object to this paragraph because it violates Local Rule 56.1(d)(2), by failing to cite any source in the record to support this purported fact. Defendants

dispute that Plaintiff's record citation (Kane's Body Worn Camera, Plaintiff's Video Exhibit V2), supports the unsupported conclusion that the officers made a determination that plaintiff did not have a weapon when they conducted the initial pat-down search, which concluded at 14:42:36. Further, Officer Kane testified that the Officers continued to search parts of Plaintiff's jacket because they believed the subject to be armed with a firearm. (ECF No. 31-1 at 153, Kane Deposition 35:11-21.)

10. After the pat down search did not reveal any weapon, Defendant Pogorzelski 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.)

RESPONSE: Undisputed.

11. Defendant Rosenbaum held his rifle while defendant Kane and Popp handcuffed plaintiff. (Plaintiff's Video Exhibit V4 at 14:42:36.)

RESPONSE: Undisputed.

12. 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.



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)

RESPONSE: Defendants dispute this fact. Neither depiction shows defendant Rosenbaum raising his right hand from a “low ready” position.

13. 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 in-side 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
Items Removed from Plaintiff's Pockets**



Burger's Body Worn Camera,

Plaintiff's Video Exhibit V3 14:44:15
Pogorzelski's Hand Going into Inside Pocket of Jacket

RESPONSE: Undisputed.

14. 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?"

RESPONSE: Undisputed.

15. The complainant never identified plaintiff as the white male about whom she had complained to the police.

RESPONSE: Defendants dispute this fact. The complainant, in her interview by an Evanston Police Officer, reiterated Plaintiff's description and that she believed he was a black handgun. (Defendants Exhibit 15, 14:49:00-14:53:00) Further, Defendants object to this paragraph because it violates Local Rule 56.1(d)(2), by failing to cite any source in the record to support it.

16. 80% of the adult male population is between five feet and six feet tall. Cumulative Percent Distribution of Population by Height and Sex, available at <https://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/11s0205.pdf>

RESPONSE: Defendants object to this conclusion. Defendants are unable to access this link. Further, Defendants object to this paragraph as immaterial to cross motions for summary judgment and inconsistent with the purposes of Local Rule 56.1(b)(3) as it fails to set forth an additional fact or facts.

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



Conley Body Worn Camera, 14:14:48
Plaintiff's Video Exhibit V1

RESPONSE: Undisputed that Officer Conley walked south to the beach area, where he encountered two people wearing dark coats. Defendants dispute that this occurred on Conley's Body Worn Camera at 14:14:48. The screenshot was taken at 14:45:48 as shown above. (Conley Body Worn Camera, 14:45:48, Plaintiff's Video Exhibit V1)

18. 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 where other officers had searched plaintiff. (Plaintiff's Video Exhibit V1 at 14:44:08-14:45:43.)

RESPONSE: Undisputed.

19. The video of the interview with complainant (Defendants' Exhibit 16) shows that she did not make any identification of plaintiff as the person she claims to have seen with a gun.

RESPONSE: Defendants dispute this fact. The complainant reiterated Plaintiff's description and that she believed he was holding a black handgun in his right hand. (Defendants

Exhibit 15, 14:49:00-14:53:00) Further, Plaintiff's citation to the record is incorrect and should be cited as Defendants' Exhibit 15, (ECF No. 39-1).

20. At 14:43:56-48 of the video of Kubiak's Body Worn Camera, Plaintiff's Video Exhibit V1, Officer Pogorzelski can be heard asking plaintiff: "Do you mind if we open your jacket?" The subsequent search of the contents of plaintiff's pockets exceeded the scope of any consent.

RESPONSE: Defendants object to the unsupported legal conclusion that "[t]he subsequent search of the contents of plaintiff's pockets exceeded the scope of any consent." This statement is a legal conclusion rather than a factual assertion and is improper under Local Rule 56.1. Legal conclusions are not considered material facts for summary judgment purposes. Without waving the forgoing objection, Defendants dispute the subsequent search of the contents of plaintiff's pockets exceeded the scope of any consent. Defendants do not dispute that at 14:43:56-48 of the video of Kubiak's Body Worn Camera, Plaintiff's Video Exhibit V1, Officer Pogorzelski can be heard asking plaintiff: "Do you mind if we open your jacket?"

Date: February 11, 2025

Respectfully Submitted,
DEFENDANTS

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