UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS D'ANGELO,

Plaintiff,

vs.

Case No. 2:10-c-12195
Hon. Lawrence P. Zatkoff

PAUL PARENT, CLINTON TOWNSHIP, a municipal entity, NICHOLAS DYKAS, JASON FIGURSKI and KEITH WATSON, in their official and individual capacities, jointly and severally,

Magistrate Judge Mona Majzoub

Defendants.

_____/

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_____/

REPLY OF DEFENDANTS TOWNSHIP OF CLINTON, NICHOLAS DYKAS, JASON FIGURSKI, AND KEITH WATSON IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF ISSUES

I.

Whether Plaintiff's Claims For Violation Of The Fourth Amendment Against Officers Dykas And Figurski For Alleged False Arrest And False Imprisonment Should Be Dismissed Because There Was No Violation Of Plaintiff's Fourth Amendment Rights Where The Officers Had Probable Cause To Arrest Plaintiff For Indecent Exposure, And Alternatively, Where The Officers Are Entitled To Qualified Immunity?

Defendants' answer: Yes.

II.

Whether Plaintiff's Claim For Violation Of The Fourth Amendment Against Officers Dykas And Figurski For Malicious Prosecution Should Be Dismissed Where (1) There Was Probable Cause To Arrest Plaintiff, And (2) Where None Of The Defendant Officers Made The Decision To Prosecute Plaintiff For Indecent Exposure?

Defendants' answer: Yes.

III.

Whether Plaintiff's Claim For Violation Of The Fourth Amendment Against Officer Figurski For Excessive Force Should Be Dismissed (1) Where The Force Used To Arrest Plaintiff Was Reasonable, And (2) Alternatively, Where The Officers Are Entitled To Qualified Immunity?

Defendants' answer: Yes.

Introduction

Plaintiff's Response asserts Fourth Amendment wrongful arrest (arrest without probable cause), malicious prosection, and excessive force claims against Officers Dykas and Figurski only. (Plaintiff's Brief in Opposition to Summary Judgment, p. 2). Plaintiff has stipulated to drop all federal claims against Clinton Township and Officer Watson. (*Id.*). Any claims other than Plaintiff's excessive force, unlawful arrest, and malicious prosecution claims against Officers Dykas and Figurski are thus waived. See *U.S. v. Rogers*, 118 F.3d 466, 471 (6th Cir. 1997).

A. Parent's statement to the Officers that he saw Plaintiff masturbating was sufficient to establish probable cause to arrest Plaintiff for indecent exposure because there is no requirement in M.C.L. 750.335a that anyone actually see Plaintiff expose himself.

Plaintiff argues that Officers Figurski and Dykas lacked probable cause to arrest him for indecent exposure because no one actually saw Plaintiff expose his genitals. Specifically, Plaintiff argues "The one witness who claimed to see anything, never saw Mr. D'Angelo expose himself. All Parent said was that D'Angelo had been masturbating and watching pornography…" (Plaintiff's Brief, p. 11). Even accepting this as true for purposes of this Motion only, Parent's complaint to the Officers that Plaintiff was masturbating was sufficient to establish probable cause for the arrest.

M.C.L. 750.335a provides, in pertinent part as follows:

> (1) A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another.
>
> (2) A person who violates subsection (1) is guilty of a crime, as follows:
>
> * * *
>
> (b) If the person was fondling his or her genitals, pubic area, buttocks, or, if the person is female, breasts, while violating subsection (1), the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00., or both. MCL 750.335a.

Contrary to Plaintiff's suggestion, nowhere does M.C.L. 750.335a require that a defendant's genital exposure actually be witnessed by another person to constitute "open or indecent exposure," within the meaning of the statute, as long as the exposure occurred in a public place under circumstances in which another person might reasonably have been expected to observe it. *People v. Vronko*, 228 Mich. App. 649; 579 N.W.2d 138 (1998), *leave denied*, 459 Mich. 945; 590 N.W.2d 66 (1999). In fact, in *Vronko*, the Court of Appeals upheld the defendant's conviction for indecent exposure, M.C.L. 750.335a, even though the witness never saw the defendant's penis because the defendant was in a car across the street from the witness's home. The defendant was arrested and charged with indecent exposure based on the single witness's testimony that she noticed a "suspicious" automobile parked in front of her home and that the defendant appeared to be masturbating, although she could not see his genitals or tell whether he was wearing shorts or pants. In upholding the conviction, the *Vronko* Court concluded "we hold that there is no requirement that the defendant's exposure actually be witnessed by another person in order to constitute 'open or indecent exposure'" under MCL 750.335a.

Accordingly, whether Parent, Bodner, or anyone else ever saw Plaintiff actually expose himself is completely irrelevant and does not create a fact issue requiring trial. Parent consistently stated - at the criminal trial, and as reflected in the Clinton Township Police Report – that he observed Plaintiff masturbating in the adult computer lab. (Clinton Township Police General Incident Report; 9/11/08 Tr, p 39). Parent told this to Officer Dykas. (Dykas Dep, p 14). Parent's eyewitness account of public masturbation was sufficient to provide the Officers with probable cause to arrest Plaintiff for indecent exposure, M.C.L. 750.335a, and the existence of probable cause is not negated by Plaintiff's assertion that no one actually saw him expose his genitals. *Vronko*, *supra*. Further, at a minimum the Officers are entitled to qualified immunity. Summary judgment is therefore proper.

B. The alleged "falsifications" in the Officers' police report do not negate probable cause so as to support a claim for malicious prosecution.

Plaintiff's malicious prosecution claim appears to be premised on the Officers' alleged fabrication of Bodner and Parent's statements. (Plaintiff's Brief, pp. 11-13). According to Plaintiff, had Officer Dykas's report and statement accurately reflected that Bodner did not see Plaintiff do anything wrong and that Parent did not actually observe Plaintiff expose himself, a jury could find that there was no probable cause for Plaintiff's arrest or prosecution. (*Id.*). This argument is easily disposed of. First, as discussed above, there was no requirement that a witness actually observe the exposure, so long as the exposure occurred in a public place under circumstances in which another person might reasonably have been expected to observe it. *Vronko, supra.* Second, even accepting as true Plaintiff's assertion that Bodner did not see Plaintiff masturbating, Plaintiff has cited no authority that probable cause does not exist where the unlawful behavior is only observed by one witness. Here, Parent's statement that he observed Plaintiff masturbating in the adult area of the library established probable cause to justify the arrest for indecent exposure under M.C.L. 750.335a. Because Plaintiff cannot show the absence of probable cause for his arrest and prosecution, his malicious prosecution claim fails. *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006). Further, qualified immunity protects the Officers from the malicious prosecution claim. (*Id.*)

C. The case law Plaintiff cites to support his excessive claim against Officer Figurski is distinguishable.

Plaintiff maintains that Officer Figurski's conduct in re-positioning Plaintiff's legs - which were hanging sideways and extended out of the open police car - to a forward-facing position so the car door could be closed, constituted excessive force because Plaintiff's knee hit the doorjamb in the process. (Plaintiff's Brief, pp. 14-16). In so doing, Plaintiff relies on several Sixth Circuit cases in an effort to liken the defendant's conduct in those cases to Officer

Figurski's conduct. But each of these cases is distinguishable. In *Phelps v Coy*, 286 F.3d 295, 297-298 (6th Cir. 2002), the Sixth Circuit affirmed the denial of the officer's motion for summary judgment where the facts, taken in the light most favorable to the plaintiff, established that the officer hit the already-handcuffed plaintiff in the face twice, and then proceeded "to slam [the plaintiff's] head into the floor at least three times." Similarly, in *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994), the Sixth Circuit reversed the grant of summary judgment on the plaintiff's excessive force claim where the facts, taken in the light most favorable to plaintiff, created a fact question whether the officer's continual spraying of mace after mace in the plaintiff's face after he returned to the car constituted excessive force. In contrast to the beating in *Phelps* and the continual mace use in *Adams*, here Plaintiff complains of a single "hard shove" to get his legs correctly positioned in the car. (D'Angelo Dep, pp 66-68). Although Plaintiff maintains that the force caused him to say "ouch," this minimal force in no way compares to the level of force the Court determined could be excessive in *Adams* and *Phelps*.

Further, Plaintiff admitted that Officer Figurski picked up his legs for a purpose – to correctly position Plaintiff in the car. (D'Angelo Dep, p 68). Accordingly, Plaintiff's reliance on *McDowell v. Rogers*, 863 F.2d 1302 (6th Cir. 1988), is misplaced. The driving force in *McDowell* - which prompted the Court to conclude that the officer's blows to the plaintiff with a nightstick may be excessive - was the "nonexistent" need for application of force and the malicious application of force. But unlike *McDowell*, where there was no need or purpose for the application of force, here Plaintiff himself admitted that Officer Figurski picked up his legs in order to correctly position Plaintiff in the car: "to get me in the car, yeah, totally into the car." (D'Angelo Dep, p 68). Accordingly, although a shove might constitute excessive force in some circumstances, it fails to rise to that level here.

In addition, a reasonable officer would have concluded that the force Officer Figurski used was reasonable in light of the information he possessed at the time, thus entitling him to qualified immunity. *Bing v. City of Whitehall, Ohio*, 456 F.3d 555, 569-571 (6th Cir. 2006), supports Officer Figurski's position that even where an officer's use of force is excessive, or presents a jury-submissible question, the officer is nonetheless entitled to qualified immunity where his conduct was objectively reasonable in light of clearly established law. Plaintiff articulates the right at issue in its most general and abstract formulation. He argues that the right at issue is an incapacitated suspect's right to be free from the use of gratuitous force. (Plaintiff's Brief, p. 16). But *Anderson v. Creighton*, 483 U.S. 635 (1987), requires Plaintiff to frame his claim in a particularized way and then find authoritative rulings which would have put Officer Figurski on notice that his particular conduct was unlawful. Plaintiff's failure to cite any relevant precedent at the correct level of generality betrays an inability to show that the Officer violated a clearly established rule of constitutional law. See, e.g., *Duncan v. Wisconsin Dep't of Health and Family Services*, 166 F.3d 930, 934 (7th Cir. 1999). Accordingly, summary judgment is proper.

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CERTIFICATE OF SERVICE

Peter W. Peacock, attorney with the law firm of PLUNKETT COONEY, being first duly sworn, deposes and says that on the 13th day of April, 2011, he caused a copy of this document to be served upon all parties of record, and that such service was made electronically upon each counsel of record so registered with the United States District Court and via U.S. Mail to any counsel not registered to receive electronic copies from the court, by enclosing same in a sealed envelope with first class postage fully prepaid, addressed to the above, and depositing said envelope and its contents in a receptacle for the US Mail.

By: s/Peter W. Peacock

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