IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Benjamin Jackson,	:	
Plaintiff	:	Civil Action 2:08-cv-0068
v.	:	Judge Marbley
City of Gahanna, *et al.*,	:	Magistrate Judge Abel
Defendants	:	

Discovery Conference Order

Plaintiff Benjamin Jackson brings this action under 42 U.S.C. § 1983 alleging that on February 25, 2006 defendant Sgt. Sheila Murphy of the Gahanna Police Department stopped his vehicle without probable cause, arrested him without probable cause for driving a vehicle while under suspension, used excessive force by Tasering him, and falsely swore a criminal complaint stating that he had caused her physical harm by using a deadly weapon (the officer's Taser). This matter is before the Magistrate Judge on plaintiff Jackson's May 19, 2009 motion for a protective order that he not be required to answer deposition questions about his knowledge of illegal drugs found in a search of his car on February 25, 2006 (doc. 20).

On January 19, 2006, Sgt. Sheila Murphy of the Gahanna Police Department stopped a vehicle operated by Jackson. He was placed in the back seat of a cruiser, but escaped. Seven grams of cocaine was found in the vehicle he was operating. On February 25, 2006, Murphy stopped a vehicle operated by Jackson, allegedly for a license plate light being out. Jackson did not get out of the vehicle. Murphy tasered him. Then either

Murphy pulled him out of the car or Jackson came out of the car and confronted Murphy. Murphy testified that Jackson took possession of her taser and discharged it into her hand. A subsequent search revealed about 16 grams of cocaine, 8 grams of marijuana, 3 joints, and a digital scale. Officers also seized $1,146.00 in cash from his person.

Defense counsel attempted to question Jackson about whether his knowledge that there were illegal drugs in his vehicle affected how he responded on January 19 and February 25 to being stopped by police. Plaintiff maintains that the line of questioning is not relevant. I previously held in a March 2, 2009 Discovery Conference Order that the questions were relevant.

Plaintiff now argues that the testimony is not relevant because a video of the incident demonstrates that he did not attempt to flee and that Sgt. Murphy pulled him out of the car. Alternatively, if the Court were to conclude that the line of questioning is relevant and permissible during discovery, Jackson maintains that he is entitled to assert his Fifth Amendment privilege against self-incrimination. He further argues that defendantsmay not use his assertion of the privilege against him at trial.

Having viewed the video, I again conclude that the line of questioning is relevant. Jackson ran from the scene on January 19, 2006, and Sgt. Murphy testified on deposition that during the February 25, 2006 stop she feared he would attempt to run. The video of the stop does not unequivoc-ally support either plaintiff's or defendant's version of the events at issue. When assessing Jackson's conduct and the likelihood that his version of the events at issue is accurate, the jury has a right to consider whether his conduct was motivated by the fact that there were illegal drugs in the vehicle he was driving.

At the same time, Jackson has the right to invoke his Fifth Amendment privilege against self-incrimination. The statute of limitations has not run on the crime of possession of illegal drugs for sale, and he has a realistic fear that a prosecutor might attempt to use whatever testimony he gives about his knowledge of the contents of his vehicle against him during a criminal prosecution.[1]

The Fifth Amendment privilege against self-incrimination applies in any civil proceeding where a witness's answer to a question "might incriminate him in future criminal proceedings." *Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973); *McCarrthy v. Arnstein,* 266 U.S. 34, 40 (1924). A court in a civil case cannot compel a plaintiff to give up his privilege against self-incrimination. *Wehling v. Columbia Broadcasting System,* 608 F.2d 1084, 1087 (6th Cir. 1979); *Serafino v. Hasbro, Inc.,* 82 F.3d 515, 519 (1st Cir. 1996). The question is what consequences should flow from that invocation.

The cases generally involve a plaintiff invoking the privilege to avoid answering questions that are critical to the defendant's defense of his claims. For example, in *Wehling* the plaintiff refused to answer questions about the truth or falsity of the statements he maintained were libelous. To permit him to do so but continue prosecuting the lawsuit would have unfairly deprived the defendant of information it needed to prove its truth defense. The Sixth Circuit held that "a civil plaintiff has no absolute right to both his silence and his lawsuit." 608 F.2d at 1088. Nonetheless, "dismissal is appropriate only

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[1]I do not know whether Jackson had knowledge of the illegal drugs in the automobile. This decision assumes that he did not. As explained in the text, his innocence would not negate a real fear that a prosecutor might use his testimony against him in a criminal prosecution.

where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defend-ant." *Id.* The court should balance the constitutional interests with those of the parties in the civil lawsuit. That balancing led the Sixth Circuit to stay the civil case until the crim-inal statute of limitations ran. 608 F.2d at 1089. *Accord, Serafino,* 82 F.3d at 519.

Here defendants have reason to believe that Jackson's knowledge of the contents of the automobile would have a "tendency" to make it more probable within the meaning of Evid. Rule 401 that his conduct was motivated by the fact that there were illegal drugs in the vehicle he was driving and it is some evidence a jury might consider in weighing the likely truthfulness of his testimony about his conduct during the stop and ensuing physic-al contact with Sgt. Murphy.

Having determined that the testimony is minimally relevant, I now turn to what remedy should be available to defendants. That requires balancing the liberty interest with defendants' right to a fair trial and the public's interest in the prompt, just adjudica-tion of civil disputes. *Wehling,* 608 F.2d at 1088. Comment on the exercise of the right to remain silent is not an appropriate remedy here. It places too high a penalty on the exercise of the constitutional right. The presence of the drugs in the automobile is wholly irrelevant to the issue of probable cause for the arrest. It also does not tend to prove or disprove that Sgt. Murphy used excessive force or falsely charged Jackson with Tasering her. Its relevance is only to Jackson's underlying motivation both as to his conduct on February 25 and his truthfulness when he recounts those events. Defendants have the right to offer the evidence that the illegal drugs were in the automobile on January 19 and

again on February 25, 2006. If plaintiff offers no evidence regarding Jackson's knowledge/lack of knowledge about the illegal drugs being in the car, defendants can point that out to the jury. Defendants will suffer no injury from Jackson's exercise of his right to remain silent.

Defendants do have the right to resume Jackson's deposition and have him respond to the line of questioning. If Jackson invokes the privilege against self-incrimination, that will be the end of the enquiry.

Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P., and Eastern Division Order No. 91-3, pt. F, 5, either party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the Order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

s/Mark R. Abel
United States Magistrate Judge