

[Cite as *Miller v. Ohio Dept. of Rehab. & Corr.*, 1992-Ohio-272.]

IN THE COURT OF CLAIMS OF OHIO

ANDREW E. MILLER, #223-784 :

Plaintiff : CASE NO. 91-04501

v. : REFEREE REPORT

OHIO DEPARTMENT OF : Fred D. Gartin, Referee
REHABILITATION AND CORRECTION :

Defendant

: : : : : : : : :

Andrew E. Miller, Pro se

Lee I. Fisher, Attorney General
Peter E. DeMarco, Esq.
for Defendant

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On April 13, 1992, a trial was conducted in the above-captioned matter by the referee sitting at the Mansfield Correctional Institution (MCI). Plaintiff is an inmate under the custody and control of defendant.

Plaintiff filed this action alleging he was battered by defendant's agents at MCI on February 18, 1991. Defendant responded that the correctional officers were dealing with an emergency situation and any force used on plaintiff was necessary to get him to comply with direct orders of the correctional

officers. The findings herein are derived from the court file,
testimony presented at trial and the admitted evidence.

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On February 18, 1991, MCI was experiencing an emergency situation wherein inmates were on a hunger strike and there were threats that the dining hall would be taken over. Correctional officers were in riot gear and advised the inmates to remove their belts, shoes, and coats, afterwhich they would be let out for breakfast. Officer Jansen proceeded to plaintiff's cell, told plaintiff to extinguish his cigarette, take off his shoes, belt and jacket and stand at the back of the cell. Plaintiff disobeyed the order and Officer Jansen went in to get plaintiff.

Plaintiff was cuffed and pushed out of the cell. Plaintiff was told to get in line and he again disobeyed and was pushed a second time.

Inmate Douglas York testified that he was positioned horizontally from plaintiff's cell and observed the correctional officer get plaintiff out of the cell. York testified that the officers were ignoring what plaintiff was saying and that plaintiff was trying to talk to other inmates when the officer told him to shut up.

Inmate Cockham testified that he was straight across from plaintiff's cell and he observed the incident. Cockham testified plaintiff did not want to go to chow and it was not mandatory that an inmate go to chow. Cockham testified that plaintiff was

manhandled, tossed around and struck with a stick or a flashlight. Cockham testified that plaintiff was punched twice.

Inmate Charles Miller testified that he was across from plaintiff's cell and he could see what was going on in plaintiff's cell. Miller testified that Corrections Officer Jansen hit plaintiff "pretty hard." However, Miller testified that plaintiff was not pushed into the wall, but was pushed twice and hit once with Officer Jansen's open hand.

Inmate Herbert Burchett, plaintiff's cellmate, testified that plaintiff was pushed out of his cell and that officers grabbed him, slammed his face into the ping pong table and cuffed him. However, Burchett testified he did not see plaintiff getting hit, but did see plaintiff getting slammed down in the chair inside the cell. Burchett further testified that the officer packed up plaintiff's belongings.

Plaintiff testified that he was waiting to go to chow when Jansen came in and told him to take off his shoes and coat. Plaintiff further testified Officer Jansen kept calling him "boy," and that he was shoved and hit by Jansen when he was sitting down to take off his shoes. Plaintiff testified that he was slammed on top of the ping pong table and wall. Plaintiff also testified that he was not properly treated for the injuries

he received to his back and the handcuffs were on too tight,
causing him injury.

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A review of plaintiff's case indicates the testimony was inconsistent as to what happened. However, it is clear that some physical contact between Officer Jansen and plaintiff did occur.

On defendant's case-in-chief, it presented the testimony of Officer Jansen. Jansen testified that his shift was held overtime due to security problems. Jansen testified that he was ordered to plaintiff's cell for a disturbance and told plaintiff to go to the rear of the cell. Jansen walked into the cell and again told plaintiff to go to the rear of the cell and put out his cigarette.

Officer Jansen testified that plaintiff threw his cigarette in the toilet and blew smoke in his face. Jansen then pushed plaintiff to the rear of the cell, cuffed him, and took plaintiff out of the cell.

Officer Jansen testified that he told plaintiff to face the wall and plaintiff kept yelling to other inmates. Jansen further testified that he told plaintiff to be quiet and that plaintiff never hit the wall as plaintiff alleged. However, Officer Jansen testified he did push plaintiff a second time when he did not move where told.

Jansen stated plaintiff had no option to leave the cell, although under ordinary circumstances plaintiff would not have to go to chow. Jansen further testified he was the only one who had

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any physical contact with plaintiff. Jansen also testified he wrote plaintiff a conduct ticket for disobeying direct orders; however, the ticket was misplaced.

Corrections Officer Stan Bredigan, who was on duty and working with Jansen, testified that he did not observe Officer Jansen use excessive force nor did he see Jansen hit plaintiff. Corrections Officer Scott, who was also working with Jansen, testified that he did not recall Jansen using force or punching plaintiff, nor could he recall any other officer jumping on plaintiff February 18, 1991.

A determination of the case at bar requires an analysis of the law on battery.

Battery is the unlawful touching the person of another or the striking, beating, or wounding of another by the aggressor with the intent of inflicting injury upon the person assaulted *** such intent need not, however, be an expressed intent but may be inferred from the nature of the defendant's act or conduct, nor is it necessary that the defendant act in anger or with malice toward the person when the battery was directed.

6 Ohio Jurisprudence 3d (1978), 103, Assault, Civil Aspects, Section 4.

Defendant would be liable if Officer Jansen used more force than was necessary. *Drolesbaugh v. Hill* (1901), 64 Ohio St. 257. However, the force used, as long as it was no more than necessary, would be justified and

a defense to an action for battery. *Skinner v. Brooks* (1944), 74 Ohio App. 288.

The referee finds Officer Jansen did use force on February 18, 1991. However, plaintiff disobeyed direct orders and Officer Jansen acted properly in an emergency situation. Officer Jansen used no more force than necessary to get plaintiff to comply with the direct orders. Therefore, finding battery, but justified, it is recommended that judgment be rendered for defendant on plaintiff's claim sounding in battery.

As to plaintiff's assertion that he received injuries to his right hand on February 18, 1991, Donna Sanders, a nurse employed by defendant, testified that on February 10, 1991, plaintiff had sustained injuries to his right hand, little and middle fingers. Brian Cain testified that he was the nurse that checked plaintiff on February 18, 1992, and he did not note any physical harm other than what was written in plaintiff's Exhibit A, which did not indicate any abrasions or gross abnormalities. Therefore, plaintiff failed to prove by a preponderance of the evidence that he was not treated properly for any alleged injury received on February 18, 1991.

As to plaintiff's claim that defendant lost or misplaced his property when he was transferred, Lieutenant Davis, who worked in the vault and was

responsible for the control of the inmates' property, testified as to what property plaintiff had on February 1, 1991, and what property he had on March 12, 1991. There was no inventory report on February 18, 1991, the date plaintiff was transferred.

This court in *Mullett v. Department of Corrections* (1976), 76-0292-AD, held that the defendant does not have the liability of an insurer (*i.e.*, is not liable without fault) with respect to inmate property, but that it does have the duty to make "reasonable attempts to protect, or recover" such property. Although not strictly responsible for a prisoner's property, defendant had at least the duty of using the same degree of care as it would use with its own property.

Henderson v. Southern Ohio Correctional Facility (1979), Ct. of Claims Case No. 76-0356-AD, unreported. Defendant has the duty to use ordinary care in the packing or storing of inmate property, even when such packing or storing is due to an inmate's disciplinary confinement. *Gray v. Department of Rehabilitation and Correction* (1985), 84-01577-ADjud. However, plaintiff has the burden of proving by a preponderance of the evidence, he suffered a loss that was proximately caused by defendant's negligence.

Barnum v. **Ohio State University** (1977), Ct. of Claims Case No. 76-0368-AD, unreported; **Baisden** v. **Southern Ohio Correctional Facility** (1977), Ct. of Claims Case No. 76-1617-AD, unreported; **Stewart** v. **Ohio National Guard** (1979), Ct. of Claims Case No. 78-0342-AD, unreported.

By a preponderance of the evidence and upon review of the testimony and exhibits, negligence by the defendant has been shown with respect to the claim for the following items:

\$37.00	thirty-seven pictures @ \$1 per picture
\$ 4.00	two photo albums @ \$2 per album
\$20.00	\$20 per law book (plaintiff still had one law book on March 12, 1991, so his recovery is limited to one law book)
\$ 5.00	dictionary
\$20.00	Bible
\$ 3.00	baseball cap
\$ 2.00	skull cap
\$ 9.00	three towels @ \$3 per towel
\$ 2.00	cup
\$ 6.00	three pairs of socks @ \$2 per pair of socks

\$ 9.00	lock
\$ 1.50	toothpaste
\$ 1.50	three bars of soap @ \$.50 per bar of soap
\$ 1.29	baby oil
\$.90	two soap dishes
<u>\$ 2.00</u>	hair pomade

Total \$124.19

The best and most credible evidence would have been an inventory report taken when plaintiff was transferred on February 18, 1991. It was not admitted and the referee finds plaintiff's testimony credible. Therefore, it is recommended that plaintiff recovery \$124.19 for his lost property.

Based upon the above findings it is recommended judgment be rendered for defendant on plaintiff's battery claim and judgment rendered for plaintiff on plaintiff's property claim.

FRED D. GARTIN
Referee

Entry cc:

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Filed 8-4-92

To S.C. reporter 10-19-2001