

Court of Claims of Ohio

The Ohio Judicial Center
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JOSHUA DUNN

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2013-00151

Magistrate Anderson M. Renick

DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging that defendant's employees used excessive force against him. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At all times relevant, plaintiff was an inmate in the custody and control of defendant at the Mansfield Correctional Institution (ManCI) pursuant to R.C. 5120.16. Plaintiff testified that on July 14, 2012, he was involved in an altercation with other inmates and that defendant's corrections officers (COs) responded, sprayed him with an excessive amount of pepper spray, causing pain and injury to his eyes.

{¶3} "Allegations of use of unnecessary or excessive force against an inmate may state claims for battery and/or negligence. To prove a claim for battery, a plaintiff must demonstrate that the defendant 'act[ed] intending to cause a harmful or offensive contact, and * * * a harmful contact result[ed].'" *Brown v. Dept. of Rehab. & Corr.*, 10th Dist. No. 13AP-804, 2014-Ohio-1810, ¶ 13, quoting *Love v. Port Clinton*, 37 Ohio St.3d 98, 99 (1988). In a civil action for battery, defendant has the burden of proving a defense of justification, such as the exercise of lawful authority. *Id.* Furthermore, the

state owes a duty of reasonable care to provide for its prisoners' health, care, and well-being. *Id.* at ¶ 14.

{¶4} Ohio Adm.Code 5120-9-01 provides, in pertinent part:

{¶5} “(C) Guidelines regarding the use of force. * * *

{¶6} “* * *

{¶7} “(2) Less-than-deadly force. There are six general circumstances in which a staff member may use force against an inmate or third person. A staff member may use less-than-deadly force against an inmate in the following circumstances:

{¶8} “(a) Self-defense from physical attack or threat of physical harm;

{¶9} “(b) Defense of another from physical attack or threat of physical attack;

{¶10} “(c) When necessary to control or subdue an inmate who refuses to obey prison rules, regulations or orders;

{¶11} “(d) When necessary to stop an inmate from destroying property or engaging in a riot or other disturbance;

{¶12} “(e) Prevention of an escape or apprehension of an escapee; or

{¶13} “(f) Controlling or subduing an inmate in order to stop or prevent self-inflicted harm.”

{¶14} Ohio Adm.Code 5120-9-01(B)(3), defines “excessive force” as “an application of force which, either by the type of force employed, or the extent to which such force is employed, exceeds that force which reasonably appears to be necessary under all the circumstances surrounding the incident.”

{¶15} Plaintiff testified that early in the afternoon on July 14, 2012, two other inmates entered his cell and assaulted him during an attempted robbery, causing him to lose consciousness. Plaintiff stated that when he regained consciousness he was disoriented and realized that he was bleeding from injuries to his face. According to

plaintiff, CO Bradley Cole walked around a corner and, without provocation, administered pepper spray toward his face. Plaintiff related that he fell to the floor screaming in pain after Cole administered a second burst of pepper spray. Plaintiff testified that he did not resist or become aggressive and that he was subsequently escorted to the infirmary for a medical examination.

{¶16} Plaintiff referred to a medical exam report wherein medical staff noted that plaintiff had knots on both sides of his head, a laceration on the left side of his head, and “redness” on his face, neck, and upper torso. The subjective evaluation indicates that plaintiff stated he was “jumped” by “some white supremacists”; however, plaintiff denied making such a statement. (Plaintiff’s Exhibit 1.) On July 15, 2012, plaintiff was transported to a local hospital for further evaluation before he returned to ManCI where he was assigned to a segregation unit. (Plaintiff’s Exhibit 2.)

{¶17} During cross examination, plaintiff denied that he had refused to provide a statement about the incident, as is stated in Defendant’s Exhibit D. Plaintiff also denied that, on the day of the incident, he had been drinking inmate-manufactured alcohol, known as hooch. However, plaintiff admitted that he had previously received two or three conduct reports for drinking hooch.

{¶18} Plaintiff presented the testimony of inmate Jerel Nelson by way of deposition. Nelson testified that he was in the first floor “day room” when he heard a commotion on the second floor. Nelson explained that he observed a portion of the second floor, or top range, from where he was located on the first floor; however, he could not see “back in the corner” on the second floor. Nelson testified that he saw CO Cole walk upstairs and toward the corner with a can of pepper spray. According to Nelson, as Cole walked around the corner, he encountered plaintiff and immediately sprayed him, and as plaintiff fell to the floor, Cole sprayed him again. Nelson related

that Cole did not say anything to plaintiff prior to administering the pepper spray. Nelson testified that he was not certain whether another CO was on the second floor with Cole. Nelson estimated that at least 50 inmates were participating in recreation in the day room at the time of the incident.

{¶19} CO Cole testified that he was working with CO Marc Graham at the first-floor desk when he heard inmates yelling and that he observed a reflection in a convex mirror which revealed a group of inmates who were gathered around a corner. Cole and Graham approached the inmates and the group scattered as the COs walked around the corner. Cole encountered plaintiff, who he described as very aggressive, belligerent, yelling, and screaming. Cole testified that plaintiff was holding a cup, that liquid was on the floor, and that he detected the smell of hooch. Cole related that it was “obvious” that plaintiff had been drinking alcohol. Cole noticed that plaintiff was bleeding from the left side of his head. According to Cole, plaintiff refused his order to “cuff up” or go to his cell, and after plaintiff continued to yell while he approached, Cole administered a burst of pepper spray. The pepper spray caused plaintiff to sit on the floor; however, plaintiff continued to yell, refused to cuff up, and then began to stand up. Cole testified that he felt threatened when plaintiff failed to comply with his orders and began to get up while yelling “spray me again you fat bitch,” whereupon Cole administered another burst of pepper spray.

{¶20} Cole explained that he received annual training on the use of pepper spray and he stated that he used a “fogger” type device that deployed a wide cone of spray, which was appropriate for use in open areas. Cole identified an ammunitions inventory which shows that he used 100 grams of the 509 grams of pepper spray that was contained in the spray device. (Defendant’s Exhibit G.) Cole testified that in his experience, administering 100 grams of pepper spray in two bursts is not excessive

when deployed in an open area. Cole explained that the pepper spray can leave an orange stain on the white walls of the cell block. Cole stated that he filed an incident report regarding the use of force, and that although plaintiff's conduct was a violation of prison rules, the Corrections Captain on duty did not require a conduct report as a result of the incident.

{¶21} CO Graham recalled hearing voices and seeing movement on the upper range while he was sitting at the first floor desk. Graham estimated that he was approximately six or seven feet from plaintiff when he observed that plaintiff was "out of control," staggering, had blood on his face, and was yelling loudly, with somewhat slurred speech. Graham testified that he could not understand what plaintiff was saying, but plaintiff was acting belligerent. Graham moved away from where plaintiff was located to direct other inmates and he heard Cole give plaintiff a direct order to calm down and cuff up. Graham testified that he observed Cole administer a burst of pepper spray toward plaintiff after plaintiff refused Cole's order and continued to yell. According to Graham, Cole's use of pepper spray was justified to control the situation. Graham related that he was not in a position to see Cole the second time he deployed pepper spray.

{¶22} Upon review of the evidence, the court finds that COs Cole and Graham were more credible than plaintiff and inmate Nelson. Specifically, plaintiff's testimony that he had not been drinking hooch either during the night before or on the day of the incident conflicts with admissions that are memorialized in both two entries in plaintiff's medical records and an entry in a conduct report, each of which was submitted by a different staff member. (Defendant's Exhibits A, B, and C.) Plaintiff also denied making statements that are attributed to him in his medical exam report, and he denied refusing to provide a statement soon after the incident. (Plaintiff's Exhibit 1,

Defendant's Exhibit D.) CO Cole's testimony was credible regarding his observations that he smelled hooch and that plaintiff was obviously under the influence of alcohol. Graham's observation that plaintiff staggered and exhibited slurred speech supports Cole's testimony. Plaintiff's contention that any abnormal or aggressive behavior he exhibited on the day of the incident was caused by injuries he sustained during an assault by other inmates is not persuasive.

{¶23} The court concludes that Cole was justified in administering two bursts of pepper spray in response to plaintiff's actions and that he used appropriate force at all times during the confrontation inasmuch as he acted to protect himself while attempting both to subdue plaintiff and to obtain his compliance. Accordingly, judgment is recommended in favor of defendant.

{¶24} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

ANDERSON M. RENICK
Magistrate

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