

[Cite as *Henley v. Ohio Dept. of Rehab. & Corr.*, 2016-Ohio-1276.]

BRIAN D. HENLEY

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00275

Judge Patrick M. McGrath
Magistrate Robert Van Schoyck

JUDGMENT ENTRY

{¶1} On August 26, 2015, the magistrate issued an opinion recommending judgment in favor of defendant. On November 13, 2015, plaintiff filed a motion for leave to use alternate technology pursuant to Civ.R. 53(D)(3)(b)(iii). On the same day, plaintiff filed objections to the magistrate’s decision. Defendant did not file a response.

{¶2} Civ.R. 53(D)(3)(b)(i) states, in part: “A party may file written objections to a magistrate’s decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).” When ruling on objections to a magistrate’s decision, a “court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law.” Civ.R. 53(D)(4)(d). Additionally, when a party objects to a magistrate’s factual findings, “whether or not specifically designated as a finding of fact * * * [it] shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available.” Civ.R. 53(D)(3)(b)(iii). If an objecting party fails to submit a transcript or affidavit, the trial court must accept the magistrate’s factual findings and limit its review to the magistrate’s legal conclusions.” *Triplett v. Warren Corr. Inst.*, 10th Dist. Franklin No. 12AP-728, 2013-Ohio-2743, ¶ 13.

{¶3} As an initial matter, plaintiff's motion for leave requests the court to review the audio recording made on May 6, 2015 during trial in lieu of a transcript because he is indigent. The motion is hereby GRANTED, and the court has reviewed the audio recording while evaluating plaintiff's objections.

{¶4} According to the record, the facts of the matter are as follows: Plaintiff, an inmate in the custody and control of defendant, brought this action for negligence based upon allegations that a correctional officer (CO) at the Richland Correctional Institution (RiCI) used excessive force upon him on November 20, 2013. On that day, CO Praeuner, acting upon the request of her supervisor, Captain Adams, stopped plaintiff in the prison yard and informed him that the gray sweater he had on was considered contraband under defendant's rules. Consequently, he needed to either mail the article of clothing to someone outside the prison or surrender it to an appropriate prison official. Plaintiff argued with Praeuner about the matter. Adams, who was in the yard at the time, then ordered Praeuner to escort plaintiff to what is known as the "captain's office." Praeuner directed plaintiff to cuff up before going to the office, but plaintiff refused to be cuffed until CO Tarocco confronted him on the sidewalk and ordered that he follow Praeuner's instructions. Praeuner escorted plaintiff into the space outside the captain's office and had him sit down on a chair.

{¶5} Lieutenant Crago, upon hearing a commotion as plaintiff and Praeuner approached, came out of the office and ordered plaintiff to be quiet and to remain seated. Plaintiff disobeyed Crago's orders to be quiet, however, and instead told Crago that Praeuner too should be made to be quiet. Plaintiff also continued yelling argumentatively. With the aim of deescalating the situation and calming plaintiff down, Crago had Praeuner leave the area and tried to speak with plaintiff one-on-one and understand the problem. In spite of Crago's orders to quiet down and to remain seated, plaintiff would not be quiet. Then, he made a sudden forward movement from the chair toward Crago, who stood two to three feet in front of plaintiff. Crago reasonably

perceived this action by plaintiff as a threat of physical harm and, in response, administered a burst of pepper spray (OC spray) at plaintiff's brow. He already had the canister of spray in his hand based upon the fact that in his judgment, the situation had the potential to escalate to such a point. In accordance with defendant's policies on the administration of OC spray, plaintiff was subsequently taken to the clinic to be examined and he was able to wash up.

{¶6} Considering the circumstances surrounding the incident, including plaintiff's refusal to obey orders to be quiet, plaintiff's failure to remain seated as ordered, and the threat of physical harm perceived by Crago, the magistrate found in favor of defendant. Specifically, he found that Crago was justified and privileged to use force. Further, he also found that the degree of force used by Crago was not excessive and satisfied the duty of reasonable care. With regard to the issue of whether Crago was entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86, the magistrate found that Crago, at all times pertinent, acted within the scope of his state employment, and did not act with malicious purpose, in bad faith, or in a wanton or reckless manner. Lastly, because there was no evidence offered to establish that the 20 grams of OC spray actually discharged from Crago's canister during the incident was significant, the magistrate found that Crago used only the amount of spray that was reasonably necessary.

{¶7} In his objections, plaintiff presents three objections, each of which are discussed below.

I. The magistrate's finding that defendant was not negligent is against the manifest weight of the evidence.

{¶8} Plaintiff points to several reasons why the magistrate's finding was against the manifest weight of the evidence. First, plaintiff states that the magistrate erroneously misquoted several statements during trial which either he or other witnesses did not make. These include, but are not limited to, statements about the allegedly contraband gray sweater; why Praeuner stopped plaintiff; and whether plaintiff

used profanity. However, the sole issue at trial was whether defendant was negligent in using excessive force when Crago used OC spray on plaintiff. Even if the magistrate incorrectly summarized some factual statements made during trial, none of them were consequential and did not lead to an erroneous result. Based on the evidence presented, the magistrate properly determined that Crago had used an appropriate amount of force against plaintiff.

{¶9} Next, plaintiff states that defendant presented absolutely no evidence to prove that there was an institutional rule or policy which prohibits inmates from wearing anything gray. Furthermore, no one made a conduct report about the gray sweater and it was ultimately not confiscated. Again, whether or not the gray sweater was contraband was not pivotal in determining whether the amount of force used against plaintiff was excessive.

{¶10} Third, plaintiff notes that the “magistrate also made an issue of the height disparity between [p]laintiff and [O]fficer Praeuner and therefore the magistrate failed to see how [p]laintiff could feel threatened by a much shorter person.” Plaintiff’s Objections, p. 4-5. The only time the magistrate mentions the height disparity between plaintiff and Praeuner in his opinion is when he summarizes plaintiff’s testimony: “[p]laintiff admitted that he is 5’10” tall and weighs 190 pounds, whereas he estimated Praeuner’s height to be 4’11” tall.” There is no other discussion about the height disparity in the magistrate’s opinion, and consequently, the court is unable to conclude that it influenced the magistrate’s decision in any way.

{¶11} Fourth, plaintiff states that because RiCI’s Rules Infraction Board (RIB) did not find him guilty of threatening Crago, Crago’s use of force against him was not justified and therefore, defendant is negligent. It is well-settled that the Court of Claims has no jurisdiction over RIB decisions. *Saxton v. Ohio Dept. of Rehab. & Corr.*, 80 Ohio App. 3d 389, 390 (10th Dist.1992); *Shorter v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl.

No. 2003-04309, 2005-Ohio-3343, ¶ 5. It follows that a RIB decision, even if arising out of the same incident, is not persuasive in the case at hand.

{¶12} Lastly, plaintiff indicates that the U.S. Court of Appeals for the Sixth Circuit has repeatedly held that the use of force after an inmate has been subdued is excessive as a matter of law. However, review of the record indicates that plaintiff was not subdued after he was handcuffed,¹ and in fact, made a sudden movement from the chair toward Crago, which the latter reasonably perceived as a threat of physical harm.² Based on these reasons, plaintiff's first objection is **OVERRULED**.

II. Plaintiff objects to the magistrate's conclusions of law in which the magistrate recommends that defendant not be held liable when defendant's employees acted in violation of either R.C. 2921.44(C) or Ohio Admin. Code 5120-9-04.

{¶13} In his second objection, plaintiff states that the magistrate incorrectly relied upon *Peters v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-1048, 2015-Ohio-2668, to find that this court does not have jurisdiction for violations of R.C. 2921.44(C). Plaintiff further states that *Peters* is distinguished from this case in one crucial aspect: the plaintiff in *Peters* failed to raise a claim of negligence in his complaint. As a result, the Tenth District Court of Appeals held that the Court of Claims did not have jurisdiction to determine defendant's civil liability in that particular case. However, in this case, plaintiff asserts that he did raise a claim of negligence, thus invoking this court's jurisdiction to determine defendant's civil liability under R.C. 2921.44(C).

{¶14} The court disagrees with plaintiff's contention. Plaintiff's claims under R.C. 2921.44(C), a criminal statute, pertain to the misdemeanor offense of dereliction of duty. "R.C. 2743.02 limits actions brought in the Court of Claims to those which could

¹Audio recording hour stamp 1:04–1:05 (Praeuner testimony); hour stamp 1:47-49 (Crago testimony).

²Audio recording hour stamp 2:08 (Crago testimony).

be brought between private parties.” *Peters v. Ohio Dept. of Natural Resources*, 10th Dist. Franklin No. 03AP-350, 2003-Ohio-5895, ¶ 13. “In the absence of a specific provision to the contrary, criminal statutes generally do not create a private cause of action, but give rise only to a right of prosecution by the state.” *George v. State*, 10th Dist. Franklin Nos. 10AP-4 & 10AP-97, 2010-Ohio-5262, ¶ 32. Moreover, “[t]he Court of Claims does not have jurisdiction over any criminal matters against the state, as ‘R.C. 2743.02 does not confer jurisdiction to the Court of Claims to consider criminal charges that should be adjudicated in the courts of common pleas.’” *Howard v. Supreme Court of Ohio*, 10th Dist. Franklin Nos. 04AP-1093 & 04AP-1272, 2005-Ohio-2130, ¶ 17, quoting *Troutman v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 03AP-1240, 2005-Ohio-334, ¶ 10. Accordingly, the magistrate properly dismissed any claims based upon R.C. 2921.44(C).

{¶15} Next, plaintiff states defendant violated Ohio Admin. Code 5120-9-04, and the violation of this internal administrative regulation supports his claim of negligence, which the plaintiff asserts he has proven. Ohio Admin. Code 5120-9-04 is defendant’s administrative regulations pertaining to appropriate supervision, discrimination, and racial issues. In his opinion, the magistrate found Crago’s testimony persuasive, in that Crago reasonably perceived a threat of physical harm given his proximity to plaintiff, plaintiff’s agitated state, and plaintiff’s sudden move. Though plaintiff was wearing handcuffs, plaintiff still had the potential to cause harm, whether by head-butting, kicking, biting, or spitting.³ As a result, the magistrate found that defendant was not negligent because Crago was justified and privileged to use force and the degree of force used not excessive and satisfied the duty of reasonable care. The court agrees with the magistrate’s decision and because plaintiff did not succeed in establishing defendant’s negligence, he cannot use any perceived violation of Ohio Admin.

³Hour stamp 1:47-49 (Crago testimony).

Code 5120-9-04 to support that claim. Therefore, plaintiff's second objection is OVERRULED.

III. Plaintiff objects to the magistrate's recommendation that Lt. Crago is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶16} In his last objection, plaintiff states that Crago acted outside the scope of his employment with malicious purpose, in bad faith, or in a wanton or reckless manner. The magistrate determined that Crago acted, at all times pertinent, within the scope of his state employment and was entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. Furthermore, in his opinion, the magistrate noted that during closing arguments, counsel for both sides agreed that Crago's immunity was not in dispute.

{¶17} The court has reviewed the audio recordings and agrees with the magistrate's decision. Specifically, during closing arguments, plaintiff's counsel indicated that even if the magistrate were to find the state liable for plaintiff's injuries, Crago should still be afforded immunity for his actions.⁴ Moreover, both counsel agreed that Crago should not be stripped of immunity.⁵ In his objections, plaintiff has not introduced new evidence indicating that Crago acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Consequently, because this issue was not in dispute during trial, plaintiff's third objection is OVERRULED.

{¶18} Based upon the foregoing, all of plaintiff's objections are OVERRULED and the court adopts the magistrate's decision and recommendation as its own, including

⁴Audio recording hour stamp 2:42.

⁵Audio recording hour stamp 2:53.

findings of fact and conclusions of law contained therein. Judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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