

[Cite as *Patton v. Dept. of Rehab. & Corr.*, 2017-Ohio-7509.]

DAURIN PATTON

Plaintiff

v.

DEPARTMENT OF REHABILITATION
AND CORRECTION

Defendant

Case No. 2016-00166

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

{¶1} Plaintiff is an inmate in the custody and control of defendant. Plaintiff brought this action claiming that an employee of defendant at the Warren Correctional Institution (WCI), Corrections Officer James Burrows, committed an assault “by applying mace to Plaintiff’s face when there was no provocation or justification.” Plaintiff also claims that Burrows “was not properly trained” by defendant. The case proceeded to trial before the undersigned magistrate.

{¶2} Plaintiff testified at trial that on the evening of February 20, 2016, a fire alarm sounded in his housing unit, resulting in all inmates being escorted outdoors. Plaintiff related that about 15 minutes later, Corrections Officers James Burrows and Ari Combs escorted the inmates back into the unit. Plaintiff stated that when he re-entered the unit he saw that the window of his cell was covered up from the inside, which signified that his cellmate was using the toilet. According to plaintiff, Combs consequently told him he could wait a few minutes before returning to his cell.

{¶3} Plaintiff recounted that he sat down at a table and joined a card game, but that Combs came back earlier than previously indicated and told him to return to his cell. Plaintiff testified that rather than following Combs’ directive, he told Combs to first let him go to the JPay machine, through which inmates can send and receive email, and check his messages before going back to the cell. Plaintiff related that he then walked

into the room where the JPay machine was located and tried to log in, but Combs and Burrows followed him and Combs grabbed his shoulder. By plaintiff's account, he told Combs that he did not have to grab him, and at that time Burrows administered pepper spray toward his eyes. According to plaintiff, he felt a sense of shock when the spray came into contact with his eyes, and if the officers ordered him to get on the floor, he did not comprehend that instruction. Plaintiff testified that he nevertheless got on the floor and was put in handcuffs before being escorted out of the unit.

{¶4} Corrections Officer Combs testified that he has been employed with defendant at WCI since July 2015. On the date of the incident, Combs stated, he served as a relief officer, filling in at different posts around the compound when the regularly-assigned officers had a day off. Combs explained that inmates were assigned to cells on either the upper range or the lower range of the unit, and the two ranges had separate hours designated as dayroom time, when the inmates could be outside their cells. According to Combs, he observed plaintiff in the dayroom during the time set aside for upper range inmates, but plaintiff's cell was on the lower range, meaning that plaintiff was considered "out of place" under institutional rules. Combs, who stated that he had no recollection of the fire alarm going off nor any recollection about plaintiff's cellmate covering the window to the cell, testified that he told plaintiff multiple times to "lock down," or return to his cell. Plaintiff failed to comply, Combs stated, so he requested assistance from his partner, Burrows, who was seated at the officers' desk.

{¶5} Combs testified that when Burrows came over, plaintiff was given additional directives to return to his cell but did not comply and instead walked into the JPay room. Combs, who stated that he had not given plaintiff any sort of permission to use the JPay machine that evening, testified that he followed plaintiff and ordered him again to return to his cell, and when plaintiff still refused he attempted to put plaintiff in the "escort position." Plaintiff pulled away from him, however, and took a combative stance, Combs stated. Combs testified that he had on his person a canister of OC (oleoresin

capsicum) spray issued by defendant, and, out of concern for the safety of himself and his partner, he reached for the spray at this point but did not use it, as Burrows dispersed his own spray and they proceeded to subdue plaintiff.

{¶6} Combs testified that he subsequently prepared an Incident Report in which he documented what had occurred, and also a Conduct Report in which he charged plaintiff with violating institutional rules 20 (“Physical resistance to a direct order”), 21 (“Disobedience of a direct order”), and 35 (“Being out of place”). (Defendant’s Exhibits A, C.)

{¶7} Corrections Officer Burrows testified that he has been employed with defendant at WCI since July 2015. Like Combs, Burrows testified that he was a relief officer when the incident occurred and served at different posts around the compound. Burrows stated that he was thus not familiar with all the inmates who lived in this housing unit, which has a capacity of 128, and he may not have realized plaintiff was out of place if Combs had not brought it to his attention. Burrows recounted that he was at the officers’ desk when Combs came to him and asked for assistance, explaining that plaintiff was out of place and would not return to his cell.

{¶8} According to Burrows, he got up from the desk and observed plaintiff standing near the doorway to the JPay room, refusing Combs’ directives to return to his cell. Burrows stated that he walked over and gave plaintiff additional directives to return to his cell, but that plaintiff ignored him and entered the JPay room. Burrows recalled that he and Combs followed plaintiff into the JPay room and Combs started to put plaintiff into an escort position, but plaintiff turned away and made fists with both hands. Burrows testified that upon observing this he perceived it as an immediate threat of harm, more so a threat to Combs than himself, as he was standing behind Combs. Burrows stated that he and Combs both reached for their OC spray, but that he drew his first and immediately administered it upon plaintiff.

{¶9} Burrows acknowledged on cross-examination that he and other officers have been known on occasion to extend the courtesy of allowing an inmate to temporarily leave a cell while his cellmate uses the toilet, even though the inmate would technically be out of place, but Burrows stated that he does not recall plaintiff saying anything throughout this incident about his cellmate using the toilet or otherwise explaining why he was out of his cell.

{¶10} Burrows testified that he documented what occurred in an Incident Report, which he said is standard practice when there has been a use of force or any other unusual event. (Defendant's Exhibit B.) Burrows also explained that it is standard practice at WCI for every reported use of force to undergo a review by a Use of Force Committee, and upon cross-examination he authenticated a statement that he gave to the Use of Force Committee which reviewed this incident. (Plaintiff's Exhibit 1.)

{¶11} As stated earlier, plaintiff claims that the use of OC spray upon him constituted assault. "To prove assault under Ohio law, plaintiff must show that the defendant willfully threatened or attempted to harm or touch the plaintiff offensively in a manner that reasonably placed the plaintiff in fear of the contact." *Miller v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-12, 2012-Ohio-3382, ¶ 11.

{¶12} It has also been held that "[a]llegations of use of unnecessary or excessive force against an inmate may state claims for battery and/or negligence." *Brown v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 13AP-804, 2014-Ohio-1810, ¶ 13. "To prove battery, the plaintiff must prove that the intentional contact by the defendant was harmful or offensive. * * * Ohio courts have held that, in a civil action for assault and battery, the defendant has the burden of proving a defense of justification, such as the exercise of lawful authority." *Miller v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-12, 2012-Ohio-3382, ¶ 11; see also *Brown* at ¶ 13 ("A defendant may defeat a battery claim by establishing a privilege or justification defense.").

{¶13} “To recover on a negligence claim, a plaintiff must prove by a preponderance of the evidence (1) that a defendant owed the plaintiff a duty, (2) that a defendant breached that duty, and (3) that the breach of the duty proximately caused a plaintiff’s injury.” *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10. “Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners’ health, care, and well-being.” *Ensmann v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 06AP-592, 2006-Ohio-6788, ¶ 5.

{¶14} “The use of force is sometimes necessary to control inmates.” *Jodrey v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-477, 2013-Ohio-289, ¶ 17. “Correctional officers considering the use of force must evaluate the need to use force based on the circumstances as known and perceived at the time it is considered.” *Brown* at ¶ 15, citing Ohio Adm.Code 5120-9-01(C). “[T]he precise degree of force required to respond to a given situation requires an exercise of discretion by the corrections officer.” *Ensmann* at ¶ 23. “In Ohio Adm.Code 5120-9-01, the Ohio Administrative Code sets forth the circumstances under which correctional officers are authorized to use force against an inmate.” *Id.* at ¶ 6.

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

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

{¶17} “* * *

{¶18} “(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:

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

{¶20} “(b) Defense of another from physical attack or threat of physical attack.

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

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

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

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

{¶25} “Pursuant to Ohio Adm.Code 5120-9-01(C)(1)(a), correctional officers ‘may use force only to the extent deemed necessary to control the situation.’ Additionally, correctional officers ‘should attempt to use only the amount of force reasonably necessary under the circumstances to control the situation and shall attempt to minimize physical injury.’ Ohio Adm.Code 5120-9-01(C)(1)(b).” *Brown* at ¶ 16. Also pertinent is Ohio Adm.Code 5120-9-01(B)(3), which 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.”

{¶26} Upon review of the evidence presented at trial, which included viewing a video recording of the incident during plaintiff’s cross-examination, the magistrate finds as follows. On February 20, 2016, at approximately 7:50 p.m., plaintiff was in the dayroom of his housing unit at a time when institutional rules required him to be in his cell. Due to the fact that plaintiff was out of place, Corrections Officer Combs gave plaintiff directives to return to his cell. Plaintiff failed to comply with Combs’ directives. In spite of the reasons that plaintiff gave at trial as to why he did not comply and remained out of his cell, whether it be an earlier fire alarm, his cellmate using the toilet, his desire to check his email, or Combs supposedly telling him earlier that he could stay out of his cell for a few minutes, under institutional rules he was supposed to be in his cell at that time of the evening and he was required to comply with Combs’ instruction to return to his cell.

{¶27} After plaintiff failed to comply with Combs' orders, Combs requested assistance from his partner, Corrections Officer Burrows, who was nearby at the officers' desk. When Burrows walked over, he too instructed plaintiff to return to his cell. Plaintiff ignored Combs and Burrows and entered the room where the JPay machine was located. Combs and Burrows followed plaintiff and Combs again ordered plaintiff to go to his cell but plaintiff refused. As plaintiff started to log in to the JPay machine, Combs grabbed plaintiff's shoulder and started to put plaintiff into an escort position. Plaintiff resisted and pulled away and made fists with both hands. Combs and Burrows each reached for their canisters of OC spray, and Burrows administered a short burst of spray in the direction of plaintiff's face. Combs and Burrows then ordered plaintiff to get on the ground, and when he failed to comply with that instruction, Combs and Burrows placed him on the ground and handcuffed him. Another corrections officer subsequently escorted plaintiff out of the unit. Aside from irritation incidental to the OC spray, plaintiff was apparently uninjured.

{¶28} The use of OC spray by Burrows was justified and privileged under the circumstances in that plaintiff defied direct orders to return to his cell, plaintiff physically resisted being escorted out of the JPay room, and plaintiff exhibited an aggressive physical demeanor when he pulled away from Combs and balled his fists, giving rise to what the officers reasonably perceived as a threat to their safety. And, the degree of force used by Burrows was not excessive and satisfied the duty of reasonable care. Burrows deployed only a minimal, short burst of OC spray to subdue plaintiff and control the situation, and when plaintiff then failed to comply with directives to get on the ground, Burrows and Combs reasonably and justifiably used some very limited force to place plaintiff on the ground and secure him in handcuffs.

{¶29} Accordingly, whether under a theory of assault, battery, or negligence, plaintiff is not entitled to relief regarding his claim that Corrections Officer Burrows used excessive force against him. Furthermore, to the extent that the complaint raises a

claim of negligent training on the part of defendant, this too must fail because the evidence did not establish any incompetence or underlying wrong by an employee of defendant. See *Ford v. Brooks*, 10th Dist. Franklin No. 11AP-664, 2012-Ohio-943, ¶ 22.

{¶30} Based on the foregoing, the magistrate finds that plaintiff failed to prove his claims by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant.

{¶31} *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).*

ROBERT VAN SCHOYCK
Magistrate

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