

[Cite as *Tucker v. Ohio Dept. of Rehab. & Corr.*, 2022-Ohio-2735.]

ANTONIO L. TUCKER, JR

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2021-00357JD

Judge Patrick E. Sheeran
Magistrate Robert Van Schoyck

ENTRY GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

{¶1} On May 10, 2022, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). Plaintiff did not file a response. The motion is now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4(D).

Civ.R. 56(C) states, in part, as follows:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

See also *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, ¶ 6, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

{¶2} According to the complaint, plaintiff was at all times relevant an inmate in defendant's custody and control at the Ross Correctional Institution. Plaintiff alleges that on January 4, 2021, "after a (UOF) [use of force], C/O T. Elliott was escorting me to a holding cage when for no reason at all he just started to punch me all in my head". (Complaint, ¶ 12.) Plaintiff alleges that he then fell to the ground, at which point a Corrections Officer Tanner told Elliot to "spray his ass", which Elliott did (apparently with oleoresin capsicum (OC) spray). (*Id.*) Plaintiff, who states that he was handcuffed throughout the incident and never resisted against the officers, claims that he sustained emotional and physical harm as a result of the incident, including long-term neck pain. Plaintiff brings this action seeking unspecified monetary damages.

{¶3} "Allegations 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. "A defendant may defeat a battery claim by establishing a privilege or justification defense." *Brown* at ¶ 13. "However, 'the use of excessive force by one privileged to use force on another may constitute battery.'" *Russell v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 19AP-424, 2019-Ohio-4695, ¶ 11, quoting *Shadler v. Double D. Ventures, Inc.*, 6th Dist. Lucas No. L-03-1278, 2004-Ohio-4802, ¶ 19.

{¶4} "To prevail on a negligence claim, a plaintiff must establish the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom." *Woodbridge v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 19AP-321, 2020-Ohio-891, ¶ 30. "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.

{¶5} “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.

Ohio Adm.Code 5120-9-01 provides, in part:

(C) Guidelines regarding the use of force. * * *

* * *

(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:

- (a) Self-defense from physical attack or threat of physical harm.
- (b) Defense of another from physical attack or threat of physical attack.
- (c) When necessary to control or subdue an inmate who refuses to obey prison rules, regulations or orders.
- (d) When necessary to stop an inmate from destroying property or engaging in a riot or other disturbance.
- (e) Prevention of an escape or apprehension of an escapee; or
- (f) Controlling or subduing an inmate in order to stop or prevent self-inflicted harm.

{¶6} “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.’” *Brown* at ¶ 16. “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.’” *Id.*, quoting Ohio Adm.Code 5120-9-01(C)(1)(b). “‘Excessive force’ means ‘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.’” *Russell*, 2019-Ohio-4695, at ¶ 14, quoting Ohio Adm.Code 5120-9-01(B)(3).

{¶7} In support of its motion for summary judgment, defendant submitted an affidavit from Corrections Officer David Marcum. Marcum states, in part:

5. On January 4, 2021 I was working as a corrections officer at the Ross Correctional Institution.
6. At about 6:54 A.M. that day, I was performing a range check and collecting laundry from inmate Tucker’s cell. At that time, inmate Tucker placed his arm out of the cuff port and stated that “I’m not giving up this cuff port.”
7. I gave him directives to bring his arm back into his cell. Tucker did not comply and then placed a tray lid over the remaining part of the open cuff port and stated that he would not comply, and that I would have to spray him.
8. I called to my partner, corrections officer Thomas Elliott, to come down to my location for assistance. Once C.O. Elliott arrived I tried to speak to Tucker and persuade him to release the cuff port. Tucker did not comply, and instead reached his arms further out of the cell towards me, at which time C.O. Elliott pulled out his spray and started moving the tray covering the cuff port with his hand.

9. Tucker responded by moving the tray and trapping C.O. Elliott's hand between the tray and the metal cuff ports, causing cuts to C.O. Elliott's wrists [sic] and hand.

10. Upon seeing this, I grabbed Tucker's arm to stop him and helped C.O. Elliott move the tray, at which time C.O. Elliott dispersed O.C. spray into the cell to gain Tucker's compliance.

11. After a few moments Tucker and his cell mate, inmate Smith, complied with being cuffed up and were escorted to the holding cages in the lobby. Tucker became combative, spitting and kicking at C.O. Elliott while he was being placed in the holding cage. C.O. Elliott took him to the floor to regain compliance and control.

12. I heard the commotion, and once I had secured inmate Smith in the holding cage, I went to assist C.O. Elliott, as Tucker was continuing to kick C.O. Elliott while on the ground.

13. C.O. Elliott disbursed [sic] another burst of O.C. spray to gain Tucker's compliance, which it did, and he was successfully placed in the holding cage and the door was secured.

14. Captain Michael Yates arrived to escort Tucker to medical for a use of force medical exam. After leaving medical, Tucker was carried by other officers back to his cell.

15. C.O. Elliott and I did not use any excessive force in our interaction with Tucker, nor did I witness any excessive force used by any other DRC staff.

16. I used the minimum amount of force reasonably required to gain compliance of inmate Tucker and to ensure my own safety. The force used was consistent with DRC policy.

(Motion, Exhibit A.) Corrections Officer Marcum goes on in his affidavit to authenticate a copy of a Use of Force Report that he prepared to document the incident. (Motion, Exhibit A-1.)

{¶8} Based upon the uncontroverted affidavit testimony from Corrections Officer Marcum, plaintiff cannot prevail on his claim that excessive force was used against him. Reasonable minds can only conclude that plaintiff refused directives to put his arm back in his cell, reached out toward Marcum, and used a tray to trap Corrections Officer Elliott's hand and cause cuts to Elliott's wrist and hand, and shortly afterward while plaintiff was being escorted to a holding cage he became combative, spitting and kicking at Elliott. It can only be concluded that, under the circumstances, Elliott and Marcum had the lawful authority and privilege to use such force as may have reasonably appeared necessary under the circumstances both to control or subdue plaintiff following his refusal to obey directives and to defend themselves and one another from plaintiff's physical attack or threat of physical attack or harm. It must also be concluded that the degree of force used by the officers involved in the incident was justified and privileged, and satisfied the duty of reasonable care.

{¶9} Finally, the court notes that although defendant's motion refers to an affidavit from Captain Michael Yates as Exhibit B, the affidavit attached to the motion as Exhibit B is a duplicate copy of Corrections Officer Marcum's affidavit. The omission of Captain Yates' affidavit appears to be immaterial, though, as the uncontroverted testimony of Corrections Officer Marcum demonstrates that plaintiff cannot prevail on his claim, and, moreover, as described in the motion, Captain Yates' testimony pertains to events subsequent to and separate from the incident alleged in the complaint.

{¶10} Based upon the foregoing, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. As a result, defendant's motion for summary judgment is GRANTED and judgment is hereby rendered in favor of defendant. All previously scheduled events are VACATED. 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 E. SHEERAN
Judge

Filed June 29, 2022
Sent to S.C. Reporter 8/8/22