

SPECIAL CONSIDERATIONS IN CIVIL RIGHTS CASES

11/19/09 Civil Rights Law For the Criminal Practitioner

Outline by: Michael Hueston, Esq.
Attorney at Law
350 Fifth Avenue, Suite 4810
New York, New York 10118
(212) 643-2900
mhueston@nyc.rr.com

Richard J. Cardinale, Esq.
Attorney at Law
26 Court Street, Suite 1815
Brooklyn, New York 11242
(718) 624-9391
rcardinaleesq@gmail.com

I. Excessive Force – Standard

Finnegan v. Fountain, 915 F.2d 817, 823 (2d Cir. 1990) (quoting *Graham v. Connor*, 490 U.S. 386, 395-96 (1989)). In order to establish an excessive force claim, a plaintiff must show that the force used by the defendant officer was, in light of the facts and circumstances confronting him, “objectively unreasonable” under Fourth Amendment standards.

Maxwell v. City of New York, 380 F.3d 106, 108 (2d Cir. 2004) (A police officer’s use of force is excessive, in violation of the Fourth Amendment, “if it is objectively unreasonable ‘in light of the facts and circumstances confronting [the officer], without regard to [his] underlying intent or motivation.’”) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

A. Bruising Is Enough / De Minimus Injuries

Wheatley v. Beetar, 637 F.2d, 863, 867 (2d Cir. 1980). A beating severe enough to leave marks is sufficient proof of a compensable injury.

Robison v. Via, 821 F.2d 913, 924-25 (2d Cir. 1987). “While Robison did not seek medical treatment for her injuries, and this fact may ultimately weigh against her in the minds of the jury in assessing whether the force used was excessive, this failure is not fatal to her claim. If the force used was unreasonable and excessive, the plaintiff may recover even if the injuries inflicted were not permanent or severe.”

Simpson v. Saroff, 741 F.Supp. 1073, 1078 (S.D.N.Y.1990). Allegations by plaintiff of “punched stomach, swollen and bleeding wrists from the tight handcuffs, as well as a faintly detectable scar on her left wrist” states claim of use of excessive force under Section 1983.

Gibeau v. Nellis, 18 F.3d 107, 110 (2d Cir. 1994). In an action brought pursuant to Section 1983, “even when a litigant fails to prove actual compensable injury, he is entitled to an award of nominal damages upon proof of violation of a substantive constitutional right.”

Landy v. Irizarry, 884 F.Supp. 788, 799 (S.D.N.Y. 1995). Plaintiff alleges no injury as a result of being kicked. An arrestee must prove some injury, even if insignificant, to prevail in an excessive force claim. *Knight v. Caldwell*, 970 F.2d 1430, 1432 (5th

Cir.1992), *cert. denied*, 507 U.S. 926 (1993) (arrestee required to prove that he suffered some injury, even if insignificant); *Roundtree v. City of New York*, 778 F. Supp. 614, 620-623 (E.D.N.Y. 1991).

Smith v. Yonkers Police Dept., 1995 WL 489461, *3 (S.D.N.Y. 1995). Although plaintiff's injuries were concededly minor, this does not, as the defendants admit, "deny the possibility of excessive force."

Daniels v. City of Binghamton, 947 F.Supp. 590, 597 (N.D.N.Y. 1996). The fact that a plaintiff's injuries are not severe, or are relatively minor, however, does not foreclose an excessive force claim.

Bender v. City of New York, 78 F.3d 787, 792-73 (2d Cir.1996). Holding that \$150,000 was a proper compensatory damage award for plaintiff who suffered a physical blow to the mouth that resulted in no bruise or cut, 29 hours in custody, the pendency of disorderly conduct and assault charges for six months, prior to their dismissal; and emotional distress.

Atkins v. New York City, 143 F.3d 100, 104 (2d Cir. 1998). "A beating severe enough to leave marks is sufficient proof of a compensable injury[.]"

Griffin v. Crippen 193 F.3d 89, *92 (2d Cir. 1999). Appellant need not prove "significant injury" to make out an excessive force claim and, thus, the fact that he suffered only minor injuries does not warrant dismissal.

Ba v. New York City Police Dept., 2001 WL 1098019, *8 (S.D.N.Y. 2001). Serious physical injury is not required in order to establish a claim of unreasonable force.

Kee v. Hasty, 2004 WL 807071, *11 (S.D.N.Y. 2004). The absence of a serious injury is a relevant, but not dispositive, factor in this analysis.

Webster v. City of New York, 333 F. Supp.2d 184, 197 (S.D.N.Y. 2004). "[M]inor" injuries sustained because of a police officer's use of excessive force is not as a matter of law *de minimis*.

Estate of Heilbut ex rel. Rangel v. City of New York, 2006 WL 2807722, *6 (S.D.N.Y. 2006). Defendants contend that Heilbut's excessive force claim fails because he was not physically injured. The standard under the Fourth Amendment, however, is not whether the force used was *de minimis* or serious, but whether it was "objectively unreasonable." While Heilbut is barred in this case from pursuing damages for physical injuries or even psychological injuries that would require support through medical evidence, he may still seek compensatory damages for emotional injury arising from the use of excessive force.

Davis v. City of New York, 04 CV 3299 (JFB), 2007 WL 755190, **11-13 (E.D.N.Y. 2007). A plaintiff need not sustain severe injury to maintain a claim that a use of force was unreasonable under the Fourth Amendment.

Davenport v. County of Suffolk, 2007 WL 608125, *10 (E.D.N.Y. 2007). A plaintiff need not sustain severe injury to maintain a claim that the use of force was objectively unreasonable under the Fourth Amendment. Davenport may be able to demonstrate that the officer **intentionally hit his head** on the car during the arrest, causing an injury to his head, and he could argue that this alleged gratuitous use of force by an officer constituted an objectively unreasonable use of force.

More specifically, in *Maxwell v. City of New York*, 380 F.3d at 108, the Second Circuit specifically focused on a Section 1983 claim alleging that the police had banged the head of the plaintiff while she was being put into a police car. The district court in *Maxwell* granted summary judgment for the defendants and found, among other things, that plaintiff's claim that she "allegedly scraped her head when being shoved into the car is not sufficient for any reasonable jury to find excessive force claim in this case-minor scrapes, bumps or bruises potentially could occur, often unintended, during any arrest, and an arresting officer can not be held unremittingly liable for every such incident." *Maxwell*, 380 F.3d at 109 (quoting *Maxwell v. City of New York*, 272 F.Supp.2d 285, 298 (S.D.N.Y.2003)). However, the Second Circuit reversed the district court and found the alleged conduct and injury sufficient to require the claim to be submitted to the jury. *Id.* at 109-10.

Although Davenport has not alleged or proffered injuries as significant as those in *Maxwell* and referred to his injury as a bump on the head in oral argument, the Court cannot conclude as a matter of law that any claim of this type by Davenport would necessarily be futile such that the Court should deny leave to amend. **A jury may consider the lack of serious injury as evidence that the implemented force was not excessive, and may weigh it against Davenport's testimony, but that does not mean that there are no circumstances under which Davenport can prevail.** *See Pierre-Antoine*, 2006 WL 1292076, at *5 (noting that although the lack of severe injury may be considered by a jury as evidence that force was not excessive, it did not entitle defendants to judgment as a matter of law); *see Murray v. Williams*, No. 05-CV-9438 (NRB), 2007 WL 430419, at *7 (S.D.N.Y. Feb. 7, 2007) (refusing to find that alleged force was *de minimis* where plaintiff alleged a laceration to his lower lip, a bloody nose, pain and suffering, and mental anguish); *see also Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir.1999) ("While the main purpose of a § 1983 damages award is to compensate individuals for injuries caused by the deprivation of constitutional rights, a litigant is entitled to an award of nominal damages upon proof of a violation of a substantive constitutional right even in the absence of actual compensable injury.")

B. Hot Car

Esmont v. City of New York, 371 F.Supp.2d 202, 214 (E.D.N.Y. 2005). Leaving a suspect in a hot, unventilated squad car for a lengthy period of time can give rise to a Fourth Amendment violation. *Burchett v. Kiefer*, 310 F.3d 937, 945 (6th Cir. 2002). **Evidence that the suspect was left in the back of the unventilated car for three hours, for example, is sufficient to state a claim of excessive force.** *Id.* One-half hour in a hot car, however, generally is not. *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir.2001). Esmont testified that she was left in the squad car for merely ten minutes and does not contend that she suffered any physical injury as a result. Defendants are

therefore entitled to summary judgment to the extent that Esmont's claim is based on being left in the unventilated squad car.

C. *Drawn Firearm*

Mills v. Fenger, 2006 WL 3793374, *2 (2d. Cir. 2006). Mills claims that Dill used excessive force when he pointed a gun to Mills' head and said, "I ought to blow your brains out and save these taxpayers money." In his deposition, however, Mills said only that he "remember[ed] [Dill] taking the gun and" making the comment. **Circuit law could very well support Mills' claim that a gunpoint death threat issued to a restrained and unresisting arrestee represents excessive force;** however, given the lack of a factual predicate for the claim that the gun was pointed at Mills's head and the resulting vagueness as to what precisely Dill did with the gun, we cannot find that the comment was sufficiently threatening to constitute excessive force.

DiSorbo v. Hoy, 343 F.3d 172, 184 (2d Cir.2003) (stating that a jury could reasonably find and award damages for psychological injuries in an excessive force case, though finding the award excessive in that case); *Kerman v. City of New York*, 261 F.3d 229, 239-40 (2d Cir. 2001) (finding that officers' name-calling and threat to "blow [arrestee's] brains out" amounted to "verbal abuse [and] humiliation" which "might well be objectively unreasonable and therefore excessive"); *see also Robison v. Via*, 821 F.2d at 923 (stating that "whether the constitutional line has been crossed depends on such factors as ... whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm" (internal quotation marks omitted)). For cases in other circuits, *see Robinson v. Solano County*, 278 F.3d 1007, 1015 (9th Cir.2002) (stating that "**brandishing a cocked gun**" in front of an individual's face lays "**the building blocks for a section 1983 claim**" even in the absence of physical injury); *Jacobs v. City of Chicago*, 215 F.3d 758, 774 (7th Cir.2000) ("[H]olding [a] gun to a person's head and threatening to pull the trigger is a use of deadly force.").

D. *Tight Handcuffing*

Vogeler v. Colbath, WL 2482549, *9 -10 (S.D.N.Y.,2005). When analyzing a claim of excessive force based upon the use of handcuffs, in addition to evidence of the fact that the handcuffs were too tight and that the plaintiffs' requests for them to be loosened went unanswered, the court may consider the degree of injury suffered by the Plaintiffs. *Esmont v. City of New York*, 371 F. Supp 2d at 215. While tight handcuffing, alone, can give rise to a cause of action under § 1983, *Simpson v. Saroff*, 741 F. Supp. 1073, 1078 (S.D.N.Y. 1990), the plaintiffs must suffer some form of injury from the tight handcuffs in order for such a claim to be actionable. *Id.* (excessive force claim proper when tight handcuffing lead to bloody wrist and scarring). Though the Plaintiffs' injuries need not be severe or permanent, some injury must be asserted. *Esmont*, 371 F. Supp 2d at 215.

E. Inmate Excessive Force Cases

To establish an excessive force claim, an inmate must satisfy **both subjective and objective tests**. *Hudson v. McMillian*, 503 U.S. 1, 7-8 (1992). To satisfy the subjective test, the inmate must show that the prison officials “had a ‘wanton’ state of mind when they were engaging in the alleged misconduct.” *Davidson v. Flynn*, 32 F.3d 27, 30 (2d Cir. 1994) (citing *Hudson*, 503 U.S. at 7). In analyzing whether such a showing has been made, courts may consider: “the need for the application of force, the relationship between that need and the amount of force used, the threat ‘reasonably perceived by the responsible officials’ and ‘any efforts made to temper the severity of a forceful response.’” *Hudson*, 503 U.S. at 7 (quoting *Whitley v. Albers*, 475 U.S. 312, 321 (1986)).

To satisfy the objective test, the inmate must show that the force applied was “sufficiently serious” to establish a constitutional violation. *Farmer v. Brennan*, 511 U.S. 825, 834, (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (additional citations omitted)). This inquiry is “context specific, turning upon ‘contemporary standards of decency.’” *Griffin v. Crippen*, 193 F.3d 89, 91 (2d Cir. 1999) (quoting *Blyden v. Mancusi*, 186 F.3d 252, 263 (2d Cir. 1999)). One of the factors to be considered is the nature and seriousness of any injury. See *Branham v. Meachum*, 77 F.3d 626, 630 (2d Cir. 1996). Although “a de minimis use of force will rarely suffice to state a constitutional claim,” *Romano v. Howarth*, 998 F.2d 101, 105 (2d Cir. 1993) (citation omitted), a plaintiff “need not prove ‘significant injury’ to make out an excessive force claim” *Griffin*, 193 F.3d at 92.

II. Unlawful Strip Searches – Standard

In *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001), the Second Circuit held that the Fourth Amendment to the United States Constitution prohibits officials from performing strip searches of pretrial detainees charged with misdemeanors or other lesser offenses unless there exists reasonable suspicion that the detainee is concealing a weapon or other contraband based on the crime charged, the particular characteristics of the arrestee, or the circumstances of the arrest.

Dodge v. County of Orange, 2002 WL 1683917, *7 (S.D.N.Y.), quoting *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986). As the Court in *Dodge* observed, citing *Wachtler v. County of Herkimer*, 35 F.3d 77 (2d Cir. 1994) and *Walsh v. Franco*, 849 F.2d 66 (2d Cir. 1988), this law has been “well settled for some time” and qualified immunity is therefore not available to shield an officer from conducting a strip search in the absence of reasonable suspicion. *Dodge*, 2002 WL 1683917, *7, citing *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001); see also *Ciraolo v. City of New York*, 216 F.3d 236, 238 (2d Cir. 2000); *Lee v. Perez*, 175 F. Supp.2d 673, 680 (S.D.N.Y. 2001); *Mason v. Village of Babylon*, 124 F. Supp.2d 807 (E.D.N.Y. 2000); *Gonzalez v. City of Schenectady*, 141 F. Supp.2d 304 (N.D.N.Y. 2001).

A. Narcotics Offenses

McBean v. City of New York, 2009 U.S. Dist. LEXIS 72690. One principal issue raised by the cross-motions for summary judgment was whether arraignment on a narcotics- or weapons-related misdemeanor offense was, in itself, sufficient to evoke reasonable suspicion that a detainee may be concealing weapons or contraband at intake despite the fact that the offense was not known to the searching officer at the time of the search. The DOC conceded not only that all misdemeanants were strip-searched pursuant to a mandatory and indiscriminate policy, but also that the record demonstrated a pattern and practice of strip-searching all misdemeanants during the intake process without the searching officer's making any determination or knowing whether the detainee had been arraigned on a charge that was related to the possession or use of a drug and/or weapon. On these facts, the searches could not have been supported by reasonable suspicion. Because, it was well-settled that reasonable suspicion had to exist at the time the search was conducted, the issue of liability was resolved squarely against defendants. Finally, because the detainees were not incarcerated at the time their action was commenced, 42 U.S.C.S. § 1997e(e) was inapplicable.

B. Public Strip Searches (Reasonableness)

Bell v. Wolfish, 441 U.S. 520, 559 (1979) (requiring courts to evaluate the manner in which a strip search is conducted); *Illinois v. Lafayette*, 462 U.S. 640, 645 (1983) (“the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street”); *Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001) (“we have repeatedly emphasized the necessity of conducting a strip search in private”); *Leverette v. Bell*, 247 F.3d 160 (4th Cir. 2001); *Polk v. Montgomery Co., Md.*, 782 F.2d 1196, 1201-02 (4th Cir. 1986) (whether the strip search was conducted in private “is especially relevant in determining whether a strip search is reasonable under the circumstances”); *see also Rivera v. U.S.*, 928 F.2d 592, 605-06 (2d Cir. 1991) (claim of a “publicly observable” strip search); *United States v. Ogberaha*, 771 F.2d 655, 660 (2d Cir. 1985) (noting that strip searches were “performed as discreetly as possible by a female inspector in a private examination room” and were no “more demeaning or intrusive” than necessary).

Campbell v. Fernandez, 54 F. Supp.2d 195, 198 -199 (S.D.N.Y. 1999). The issue was whether it was reasonable to strip plaintiff in the store, when there was no evidence to suggest either that Campbell represented any threat to the officers or that, once arrested, he had the ability to dispose of contraband before they could find it. Based on the evidence before the Court, a reasonable juror could easily find that the police officers - who were carrying out a procedure already found by courts to be an invasion of rights “of the first magnitude,” *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir.1993) - acted unreasonably in subjecting plaintiff to the added humiliation of being denuded, exposed and taunted in a public place.

III. Duty to Investigate

When they do, police officers who have probable cause to arrest are not required to adjudicate disputed issues of fact on the spot. Nor are they required to walk away; once a police officer has probable cause, he need not explore “every theoretically plausible

claim of innocence before making an arrest.” *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 129 (2d Cir. 1997). A suspect’s denial of his suspicious behavior is a factor the officer may consider in determining whether probable cause exists, but it does not require the officer to forego arrest if the facts otherwise establish probable cause. *Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988). To hold otherwise would allow suspects to avoid arrest simply by denying guilt. *Id.*

The function of law enforcement officers “is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence.” *Krause v. Bennett*, 887 F.2d 362, 372 (2d Cir. 1989). Accordingly, they have no duty to investigate an exculpatory statement of the accused, and their refusal to do so does not defeat probable cause. *Torchinsky v. Siwinski*, 942 F.2d 257, 264 (4th Cir. 1991); *Dukes v. City of New York*, 879 F. Supp. 335, 343 (S.D.N.Y. 1995); *Grant v. City of New York*, 848 F. Supp. 1131, 1135 (S.D.N.Y. 1994); *Steiner v. City of New York*, 920 F. Supp. 333, 338 (E.D.N.Y. 1996).

Officers are not absolutely privileged to arrest upon a charge by any private individual who claims to be a victim. There is a caveat: victim complaints ordinarily establish probable cause absent circumstances that raise doubts as to the victim's veracity. *Singer*, 63 F.3d at 119; *Lee v. Sandberg*, 136 F.3d 94, 102-03 (2d Cir. 1997); *see generally* 2 Wayne A. La Fave, *Search and Seizure* § 3.4(a), at 204-14 (3d ed. 1996 & Supp.1998).

An arresting officer advised of a crime by a person who claims to be the victim, and who has signed a complaint or information charging someone with the crime, has probable cause to effect an arrest absent circumstances that raise doubts as to the victim's veracity.” *Singer*, 63 F.3d at 119; *see also* *Fulton v. Robinson*, 289 F.3d 188, 195 (2d Cir. 2002); *Williams v. City of New York*, 208 A.D.2d 919, 920, 617 N.Y.S.2d 867 (2d Dep't 1994).