

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

ALPHONSO ACOY,

Plaintiff,

vs.

**GOVERNMENT OF THE VIRGIN ISLANDS,
VIRGIN ISLANDS POLICE DEPARTMENT,
VIRGIN ISLANDS DEPARTMENT OF
PUBLIC SAFETY, POLICE COMMISSIONER
ANTON CHRISTIAN, POLICE OFFICERS
NASTANOVITCH, W. MCFARLAND
and UNKNOWN JOHN and JANE DOES,**

Defendants.

CIVIL NO. 924/1994

ACTION FOR DAMAGES

NOT FOR PUBLICATION

Eszart A. Wynter, Esq.
Law Offices of Eszart Wynter
#27 Estate Whim
P.O. Box 1847
Frederiksted, St. Croix
U.S. Virgin Islands 00841
(Attorney for Plaintiff)

W. Bartlett Ary, Esq.
Assistant Attorney General
Department of Justice
3008 Orange Grove
Christiansted, St. Croix
U.S. Virgin Islands 00820
(Attorney for Defendants)

CABRET, P.J.

MEMORANDUM OPINION

(October 3, 2000)

Alphonso Acoy sued the Government of the Virgin Islands, Department of Public Safety and numerous police officers (collectively "Defendants") alleging that the officers used excessive force against him during an investigatory stop. Defendants moved for summary judgment on the

ground that the officers' actions were protected by qualified immunity. Although granted several extensions, Acoy has failed to respond to Defendants' motion. For reasons which follow, the Court will grant summary judgment to Defendants.

I. FACTS AND PROCEDURAL HISTORY

On the evening of August 24, 1994, agents of the Federal Drug Enforcement Administration ("DEA") and officers from the Virgin Islands Police Department Quick Response Team ("QRT") conducted a covert drug interdiction operation in the Ralph de Chabert public housing community on St. Croix. The operation, known as a "buy-bust," entailed plain clothes DEA agents driving through the community and attempting to purchase narcotics.¹ After purchasing narcotics, the agents would drive away and describe the dealer to nearby uniformed QRT officers. The QRT officers, who were dressed in black fatigue pants, black t-shirts with the word "police" in five-inch bright yellow lettering on the front and back and a baseball cap with the word "police" on the front, would then move in and arrest the suspect.

On this particular evening, the "buy-bust" team was concentrating its efforts on an area identified as "the big tree,"² a well-known drug area in the housing community. According to police officer Steven Nastanovitch, one of the defendants who was a QRT member on the night in question, "the big tree" is a place where there are "lots of guys gambling and selling narcotics" and it is an area known for shootings.³ Thus, the DEA agents drove to "the big-tree" to attempt

¹ Summary Judgment hearing of June 14, 1996, transcript ("T.1") at 7-8.

² Id.

³ Id. at 9. *See also* Hearing transcript of June 18, 1996 ("T.2") at 5.

to purchase drugs while the QRT officers waited nearby. When the DEA agents approached the area, however, two of the individuals under the big tree assaulted them with bottles and rocks. Bloodied, the agents sped away and called the QRT officers for assistance. In response, the QRT officers formulated a plan to "secure the area, do a quick pat of the individual[s'] outer body and then have the two agents come in and identify the individual[s] that assaulted them."⁴ The QRT officers who testified at the hearing all stated that they were concerned for their safety and that they intended to conduct the pat-down for safety reasons.

As planned, the 10 uniformed QRT officers immediately converged on "the big tree," some in marked police vehicles. The officers exited their vehicles, repeatedly yelled "police" and ordered the approximately 12 to 15 individuals at the scene, which was poorly lighted, to "get down" on the ground.⁵ The QRT officers then moved in to conduct the pat downs. Officer Nastanovitch, however, stayed back to monitor the situation. He testified that he was a trained K-9 officer and that he was the designated safety officer for the QRT. As such, his job was to assist any officers who needed his help.

As he was monitoring the situation, Officer Nastanovitch heard "a lot of commotion and yelling and arguing" a short distance off to his right side. He approached the area with his K-9 dog where he observed an individual, later identified as Acoy, in a scuffle with two other officers. Acoy, who was approximately six feet, two inches tall and 235 pounds, refused to obey the officers' commands to lie on the ground. When the officers attempted to control him, Acoy

⁴ Hearing transcript of afternoon of June 18, 1996 ("T.3") at 12.

⁵ Id. at 25.

began flailing his arms and knocking the officers out of his way. By now, Officer Nastanovitch and his dog had reached the confrontation and he ordered Acoy to "get down."⁶ Acoy ignored Officer Nastanovitch. Officer Nastanovitch stated that Acoy then "reached for his waistband area." As Acoy made this move, the K-9 dog, without any command from Nastanovitch, bit him "in the thigh area where he was reaching for."⁷ Acoy then grabbed the dog's head and held its nose and mouth shut. After several commands from the officers, Acoy released the dog. Officer Nastanovitch stated that the dog responded as he was trained to under the circumstances. The dog, he testified, is trained to "apprehend" an individual who is acting "highly aggressive" and reaching for his waistband.⁸

Acoy disputed that he was confrontational with the officers. According to Acoy, although the officer attempted to force him to the ground, he resisted because he was "sore from playing basketball."⁹ Acoy further testified that he did not need to comply with the officers' demands because he knew some of the officers:

I recognize some of the officers at that time. One of them was McFarland. . . . McFarland and me went to school together, and at that time me and he was just conversating (sic). He was just saying stuff like 'it's all right, it's all right.' And, you know, it was like I didn't have to do it again because I was already approached by somebody I knew, so the situation was under control at that moment.¹⁰

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Id. at 29.

⁷ Id.

⁸ Id. at 32.

⁹ T.2 at 27.

¹⁰ Id. at 28.

Officer McFarland acknowledged that he knew Acoy, but said that he told Acoy to get down. McFarland stated that Acoy was cursing, "saying that he is not getting down,"¹¹ and that the dog bit Acoy when he was struggling with McFarland and another officer.

II. DISCUSSION

Defendants argue that the case should be dismissed because their conduct is protected by qualified immunity. Such immunity is provided to "government officials performing discretionary functions. . . . [I]t shields them from civil damages liability as long as their action could reasonably have been thought consistent with the rights they are alleged to have violated. Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). The Court's analysis in this regard is on the specific right allegedly violated:

The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Id., 483 U.S. at 640, 107 S.Ct. at 3039 (internal citations omitted).

In Anderson, the plaintiff sued a law enforcement officer alleging the officer violated his Fourth Amendment rights by conducting a warrantless search of plaintiff's home without probable cause. The Court found that under the circumstances, the officer's conduct was reasonable:

We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and

¹¹ T.3 at 15

we have indicated that in such cases those officials--like other officials who act in ways they reasonably believe to be lawful--should not be held personally liable.

[T]he determination . . . will often require examination of the information possessed by the searching officials. . . . The relevant question in this case, for example is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the official's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. [The official's] subjective beliefs about the search are irrelevant.

Id., 483 U.S. at 641, 107 S.Ct. at 3039-40.

The Court must make a similar inquiry in this case. The relevant question is whether a reasonable officer could have believed that the force used to restrain Acoy was lawful in light of clearly established law and the information the officers possessed. Mindful that the incident occurred on August 24, 1994, the Court must look to the law as it existed at that time to determine the reasonableness of the officers' conduct.

Law enforcement officers were and still are permitted to temporarily detain individuals for investigative purposes. This detention, which is not an arrest, must be supported by "specific and articulable facts" and "rational inferences from those facts," that the person is engaged in criminal activity. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). U.S. v. Laing, 889 F.2d 281, 285 (D.C. Cir. 1989). "During an investigative stop law officers may, under appropriate circumstances, search the detainee to determine whether he is armed." Id. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. (Quoting Terry, 392 U.S. at 27).

The amount of force used to carry out the stop and search must be reasonable, but may include using handcuffs or forcing the detainee to lie down to prevent flight. . . Factors that may justify an investigative stop, a search for weapons, or the escalated use of force include the time of day, the 'high crime' nature of the area, an informant's tips that persons might be armed, furtive hand movements, flight or attempted flight by the person sought to be detained, and a pressing need for immediate action.

Id. at 286.

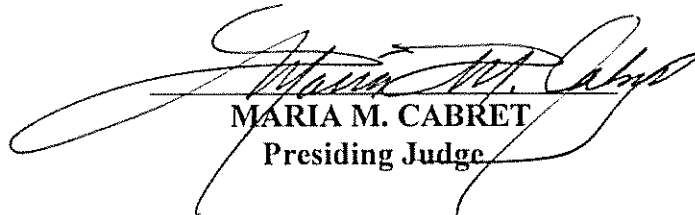
The officers' treatment of Acoy was reasonable in light of these factors. The officers had sufficient information to conduct an investigative stop. Indeed, two federal agents had just been assaulted by individuals congregating under the big tree and the officers needed to determine exactly which individuals were responsible for the assault. In light of the high volume of criminal activity conducted there and the numerous shootings, the officers' fear of encountering armed resistance was also reasonable. For these same reasons, the officers were justified in ordering the individuals to lie on the ground. It was a high-crime area, poorly lighted and the officer, who were outnumbered, reasonably believed that some of the suspects could have been armed.

As for Acoy, he resisted the officers' orders to lie on the ground. Even by Acoy's own account, he refused to lie on the ground when ordered to do so. Although Acoy may have thought that he was excused from complying because he knew one of the officers, subjective beliefs are irrelevant here. The information available to the officers showed that Acoy was resisting their attempts to force him to the ground and at the moment the dog bit him, Acoy was

moving his hand towards his waistband.¹² Under these exigent circumstances, a reasonable officer would believe that there was a pressing need for immediate action. *See id.*; *see also Tom v. Volda*, 963 F.2d 952 (7th Cir. 1992) (court held that officer's conduct in handcuffing suspect during investigatory stop was reasonable in light of suspect's attempt to flee); *U.S. v. Weaver*, 8 F.3d 1240 (7th Cir. 1993) (court held that officers' use of physical force to subdue suspect was reasonable in light of suspect's attempt at flight); *Watkins v. State*, 420 A.2d 270 (Md.App. 1980) (court held officer's use of physical force was reasonable due to defendant's flight.). And, while the officers' investigation ultimately revealed that Acoy was not armed and that he was not one of the individuals who assaulted the federal agents, their actions were nonetheless reasonable under the circumstances. *See Anderson*, 483 U.S. at 641, 107 S.Ct. at 3039-40.

III. CONCLUSION

For the reasons stated above, the Court concludes that the defendants are entitled to summary judgment. The officers' actions were reasonable as a matter of law in light of the law existing at the time of the incident and was therefore protected by qualified immunity.


MARIA M. CABRET
Presiding Judge

A T T E S T:
DENISE D. ABRAMSEN
Clerk of the Court

¹² By:  10/3/00

It is noteworthy that although Acoy was not ultimately arrested, his conduct toward the officers constituted a misdemeanor under Virgin Islands law. *See V.I. Code Ann. tit. 14, §1508 (1996)* (defining the offense of interfering with officer discharging his duty).