IN THE IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 2015-cv-891-RPM

MICHAEL YOUNG,

Plaintiff,
v.
CITY OF LOVELAND,
CHRISTOPHER BROWN and
DEREK STEPHENS

Defendants.

PLAINTIFF MICHAEL YOUNG'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Plaintiff, Michael Young submits his Response to Defendants' Motion for Summary Judgment.

I. INTRODUCTION

Defendants raise issues on summary judgment on behalf of the City of Loveland for Counts One (Excessive force executing the search warrant) and Four (Custom and practice relating to all counts).

Defendants also seek dismissal of Officer Brown based upon qualified immunity. No issues are raised regarding Officer Stephens; however, Defendants request dismissal of Counts Two (excessive force) and Three (retaliation).

Plaintiff contends that there is sufficient evidence in the record to support all his claims: A reasonable jury could find that the force used in executing the warrant was excessive; The Custom and Practice of the Loveland Police ("LPD") in prejudging Plaintiff, relying upon unverified suspicions, amounts to custom and practice that directly caused serious injury and damage to him; "deliberately indifferent" to his rights; That Officer Brown's "covering" him with an assault rifle while Officer Stephens inflicted

serious bodily injury amounts to a failure in his duty to intervene to protect his well-established rights.

II. ARGUMENT

A. Facts under Summary Judgment

Factual disputes preclude summary judgment. *Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014).

Plaintiff does not agree with the characterization of "undisputed facts" set forth by Defendants in their Motion for Summary Judgment. There are few undisputed material facts. Nearly all the material facts are in dispute and should be decided by a jury.

1. Undisputed Facts.

The only facts as stated by Defendants that are not disputed are: Young had a warrant; Stephens and Brown followed Alice Young's car as Michael Young was going to turn himself in; Michael Young appeared injured and had a cane; Brown fell into cover role for Officer Stephens; Brown maintained his "attention" on Young from the other side of Alice Young's car; Brown screamed at Mr. Young and pointed his rifle; Officer Brown did not physically strike Michael Young.

2. Disputed facts

1. Michael Young did not and (does not) own or possess a gun. (Michael Young Affidavit, Exh.1 ¶ 6)
2. The two different daggers in the police reports and attached to the warrant application, were not from Michael Young's house. (Michael Young Affidavit, Exh. 1 ¶ 6). (Exhibit 4, photos of daggers that were never at the scene).
3. LPD recklessly and falsely applied for a false warrant. (Exhibit 4, Arrest Warrant).
4. LPD supervisors did not adequately investigate the suspicion that Plaintiff had a gun or daggers. (Exhibit 3, Musselman Report); (Exh. 4, Affidavit and Warrant).
5. The affiant supervisor for the warrant had no direct knowledge of the events that took place on April 14, 2014. (Exhibit 3, Musselman Report).

6. LPD supervisors did not make sure a gun was actually seen. (Exhibit 3, Musselman Report).
7. The warrant was based in part on an “uneasy” or “gut feeling.” (Exhibit 3, Musselman Report)(Exh. 9, Sauer Report)(Exh 11, Stanek Report).
8. The police reports, submitted and approved by LPD supervisors were grossly inaccurate and omitted exculpatory information. (Exhibit 3, Musselman Report); (Exh.10 Letter from reporting party Woodard).
9. LPD officers used prior contacts with Michael Young in a grossly inaccurate and negative light to justify the falsified warrant. (Exhibit 3, Musselman Report).
10. LPD ransacked and maliciously caused damage and disarray to his house. (Michael Young Affidavit, Exh.1 ¶7); (Exhibit 2, Alice Young Affidavit ¶2).
11. Michael Young advised LPD aver the telephone he was shocked, in pain and took medication, so he could not drive to the station. (Michael Young Affidavit, Exh.1 ¶ 9); (Exhibit 3, Musselman Report).
12. Alice Young advised LPD she would obtain exact change to bond Michael out. (Michael Young Affidavit, Exh.1 ¶ 10); (Exhibit 2, Alice Young Affidavit ¶3).
13. LPD knew Michael Young was hurt, disabled, needed a cane to walk and could not raise his arms straight up. (Michael Young Affidavit, Exh.1 ¶12)
14. Michael Young complied with orders to the best of his ability. (Michael Young Affidavit, Exh.1 ¶12)
15. LPD policy of overwhelming force and intimidation, applied to the wrong situation, resulted in Michael Young being confused, terrorized, pained and frustrated, when he talked back to the officer. (Michael Young Affidavit, Exh.1 ¶12)
16. LPD continued screaming and pointing their assault rifles at Michael Young after he had raised his hands as high as he could, placing him in fear. (Michael Young Affidavit, Exh.1 ¶12).
17. Michael Young said “Fuck off, I’m following your command.” (Michael Young Affidavit, Exh.1 ¶12)
18. Upon hearing Michael Young talk back to the officers, Stephens immediately seized and struck Michael Young while Brown provided cover. (Michael Young Affidavit, Exh.1 ¶13).

19. While Brown provided cover: Stephens slammed Michael Young on his grandmother's car; Stephens used his forearm to smash Michael Young's head and face into the rear passenger window; Stephens wrenched Young's wrists to the extent his shoulders were injured; Stephens needlessly lifted Michael Young's arms, causing pain and damage, to push him across the parking lot, forcing him to walk on his toes, without his cane; Stephens slammed Michael Young against the LPD SUV; Stephens kicked Michael Young's left leg to the left, causing injury; Stephens struck the back of Michael Young's neck causing injury. (Michael Young Affidavit, Exh.1 ¶13)(Exh.5 Photos of Plaintiff's ear and neck taken the following day)(Exh.2, Affidavit of Alice Young, ¶13).
20. Officer Stephens took Mr. Young's ice bag saying "You won't need this where you're going." (Exh.1 ¶15)
21. Sgt. Belk threatened Michael Young if he filed a complaint or law suit, saying it was all on video and LPD denies touching him. (Exh.1 ¶20).

3. Undisputable facts omitted by Defendants

1. LPD broke Michael Young's door in when he was not home. (Michael Young Affidavit, Exh.1 ¶ 7); (Exhibit 3, Musselman Report).
2. Michael Young was required to obtain exact change to bond out. (Exh.1 ¶10).
3. There was no gun. (Exh.1 ¶3); (Exh.3, Musselman Report); (Exh.4 Inventory); (Exh.12, Brown Report); (Exh.13 Stephens Report).
4. The alleged "gun" was Michael Young's pain control ice bag. (Exh.1 ¶3); (Exh.13 Stephens Report).
5. LPD located the pain control ice bag in Mr. Young's waist band. (Exh.1 ¶15)
6. The Felony charge was dismissed. (Exh.1 ¶22)
7. LPD knew the black bag was full of money, not a gun. (Exhibit 6, LPD photo taken by Det. Ertman of money bag found during search).
8. The Youngs took the money bag with them because it was all the money Michael Young had, the front door could not be locked and the house had just been ransacked. (Exhibit 2, Alice Young Affidavit ¶5).
9. Over the telephone, Det. Musselman told Alice Young she needed exact change for bond; Alice Young told him she would have to get the exact change in cash;

She told him she would bring Michael to the LPD station; They never agreed upon an exact time to arrive; They never agreed upon an exact route. (Exhibit 2, Alice Young Affidavit ¶3,4)

10. Alice Young pulled over to a safe parking spot a very slow speed-she did not fail to stop-she did not try to elude the police. (Exhibit 2, Alice Young Affidavit ¶6).
11. The officers were in an unmarked SUV; They wore plain clothes; They did not identify themselves; They came out screaming and pointing loaded assault rifles at Michael and Alice Young. (Michael Young Affidavit, Exh.1 ¶11)(Exh,2 ¶7).
12. The car was searched; Michael Young and Alice Young were searched;There were no weapons. (Exh.12, Brown Report).
13. There was no threat to any officers or the public; Michael Young was injured and barely able to walk; He could not fully raise his arms; He did not make a threatening move toward any officer; He complied with orders, peacefully and to the best of his ability; He did not attempt to flee; He did not look around for a place to run; He could not run. (Michael Young Affidavit, Exh.1 ¶¶ 12,13,14)

B. Municipal Liability

The LPD custom and practice is to give too much credence to officer's hunches, feelings, fears and prejudice over verifying and corroborating claims; This leads to dangerous actions involving overwhelming force and intimidation, placing all involved in danger.

The LPD carries out this practice under the authority of the written policies, justified by the undisputed importance of "officer safety," but with "deliberate indifference" to the rights, safety and feelings of those citizens prejudged as not deserving protection.

The case escalated from a welfare check of a quiet, resting person, feeling sick from new medications, to an "uneasy feeling;" From a startled person picking up and putting down a small flashlight and adjusting his groin-pain ice bag, to "He might have a gun;" From the policy that "Officer Safety is the overriding concern" to snipers, a SWAT team, detectives wrecking his house, creating life threatening situation with plain clothes officers' assault rifles, to Mr. Young's to serious injuries and trauma. (Exhibit 8, *Incident*

Summary, p.5 "felon, was seen in possession of a sword and answered the door with a firearm in hand.").

The custom and practice of using overwhelming force against a prior offender who was not liked, based upon mere suspicion, was maintained with conscious disregard for the consequences. This can amount to deliberate indifference leading to an almost inevitable constitutional wrong to a citizen. *See, Bd. Of Comm'rs of Bryan Cty v. Brown*, 520 U.S. 397, 397, 403, 407 (1997); *see also City of Canton v. Harris*, 489 U.S. 378, 389 (1989). (Three elements are required for municipal liability based upon custom and practice: (1) official policy or custom, (2) causation, and (3) state of mind).

1. Official custom or practice

A challenged practice may be deemed an official policy or custom for § 1983 municipal-liability purposes if it is deliberately indifferent supervision. *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 770 (10th Cir. 2013).

The City of Loveland has a *Policy and Procedure* document. Relevant policies regarding Use of Force, section 11.04, Taking Complaints, section 5.04 are standard language that replicates statutes. (Exh. 7 Policy Sample text). However, the Policy does not address practices regarding: care of property during search; fact development for probable cause beyond uneasy feelings and vague suspicions, or dealing with false evidence. (Exh.4, Warrant with photos of Daggers not part of case);(Exh. 3, 4 9, 10, 11).

Officer safety is the overriding concern in executing a warrant. (Exhibit 7, section 13.08). Plaintiff does not dispute this basic policy. However, when taken to the extreme, coupled with prejudicial treatment of prior offenders and the "lesser citizens," the policy amounts to deliberate indifference to those lesser citizens' rights. This custom and practice leads to damage, injury and placing people in avoidable danger.

In this case the LPD exaggerated suspicions and overreacted, using overwhelming force and intimidation. The LPD set in motion an unchecked chain of events causing harm to Plaintiff without regard to his rights. (Exhibit 8, *Incident Summary*, p.5).

The stated policy is ignored by the custom and practice. The Values stated in the Loveland P.D. "Policy and Procedure" vanish under the cover of officer safety. For example: Communication. There is no record that anyone from LPD attempted to

discuss matters with Mr. Young. We Value the people we serve and Each Other. "We care about people and treat everyone with dignity and respect." No respect was ever shown to Mr. Young. LPD took away Plaintiff's dignity. He was prejudged because of his past. If anyone had met with him in a respectful and dignified manner, they would have seen that he completely had changed his life and is consumed with coping with his disabilities. (Exhibit 7, Values Set Forth).

2. Causation

To establish the causation element, the challenged policy or practice must be "closely related to the violation of the plaintiff's federally protected right." *Schneider v. Grand Junction Police Dept.,* 717 F.3d 760, 770 (10th Cir. 2013). This requirement is satisfied if the plaintiff shows that "the municipality was the 'moving force' behind the injury alleged." *Brown*, 520 U.S. at 404.

For example, in *Poolaw v. Marcantel*, 565 F.3d 721, 732–33 (10th Cir.2009), a plaintiff brought a § 1983 claim against two police supervisors involving a police search of the plaintiff's home. It was determined that the search was not supported by probable cause and therefore violated plaintiff's Fourth Amendment rights. Id. at 732. The police supervisors were not present during the search, but they ordered the search and swore out the affidavit in support of the search warrant. Id. at 733. The 10th Circuit Court concluded that the supervisors' actions "set in motion a series of events" they reasonably should have known would result in the search. The plaintiff accordingly, would satisfy the causation element for summary judgment purposes. *Schneider*, at 769; (Exh. 3 Musselman Report and 4 Affidavit for Warrant).

The requisite causal connection can be established by setting in motion a series of acts by others which the LPD knew or reasonably should have known would cause others to inflict the constitutional injury. *Schneider*, at 768; *Dodds*, 614 F.3d at 1200. *Poolaw, at* 732–33; see also *Starr v. Baca*, 652 F.3d 1202, 1218 (9th Cir.2011), cert. denied, 132 S.Ct. 2101 (2012). As Plaintiff alleges, LPD conducted a military type SWAT attack and then used "high risk felony stop" i.e. overwhelming force and intimidation, that resulted in serious injuries to the Plaintiff. (Exh.8 Incident Report); (Exh.1 Michel Young Affidavit).

3. State of mind/Deliberate Indifference

"[A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." *Brown*, 520 U.S. at 407; *see also City of Canton*, 489 U.S. at 389.

The "deliberate indifference" standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. In most instances, notice can be established by proving the existence of a pattern of tortious conduct. In a narrow range of circumstances, however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction. *Barney* v. Pulsipher, 143 F.3d 1299,1307 (10th Cir. 1998). In this case, the supervisors from the Captain through Detective Musselman, supervisors Newbanks and Belk, Sgt. Metzler with his SWAT Team, officers Sauter, Stanek, Stucky, Brown and Stephens. all personally participated to plan, implement and supervise the warrant, search and arrest. *See,* (Exh. 3, 4, 8, 9,11,12,13).

In this case, there was never any real or suggested threat to the officers or any need for immediate action preventing verification. Reasonable officers would be expected to confirm the accuracy of her information. *Marescas,* at 1311,1312.

Absence of clear policy regarding the actual custom and practice fosters an environment and culture to enable SWAT raids without good investigation, false information in warrants, excessive force - in the search and arrest - retaliation, threats against making claims, all with supervision and approval of the chain of command. *See, e.g., Barney, Marescas.*

It is generally demanded of the many factual determinations that must regularly be made by agents of the government--whether the magistrate issuing a warrant, the police officer executing a warrant, or the officer conducting a search or seizure is not that they always be correct, but that they always be reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 185, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).

There was a need for more pre-arrest investigation, verification and corroboration before dangerous and drastic actions are taken. *Cortez v. McCauley,* 478 F.3d 1108,1117 (10th Cir. 2007). Defendants conducted no investigation. Instead, the Defendants relied on the flimsiest of information conveyed by a telephone call. (Exh.9, Sauter Report states a "bad feeling"); (Exh.11 Stucky Report "I think he has a gun" describing Sauter describing Plaintiff adjusting his ice bag and "gut feeling" used to construct the case for the Arrest Warrant); (Exh. 3, Det. Musselman asked Officer Sauter if it was something like a gun), *and see*, (Exh.10 Woodard letter).

Moreover, in determining whether there is probable cause, officers are charged with knowledge of any "readily available exculpatory evidence" that they unreasonably fail to ascertain. *Baptiste v. J.C. Penney*,147 F.3d 1252, 1259 (quoting *Clipper v. Takoma Park*, 876 F.2d 17, 19-20 (4th Cir. 1989)). " [T]he probable cause standard of the Fourth Amendment requires officers to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of warrantless arrest and detention." *Cortez*, 478 F.3d at 1117.

These steps were not taken. *See Baptiste*, 147 F.3d at 1257 ("A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest.") (quoting *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986)); *see also Phelan v. Village of Lyons*, 531 F.3d 484, 488 (7th Cir. 2008). Even after searching the home, car and person LPD could have gleaned readily available exculpatory evidence by reasonably interviewing Mr. Young, Alice Young or Ms. Woodard.

In this case, such readily available exculpatory evidence included the recanting of the ex-girlfriend's allegations in earlier "no-file" matters, no guns in the house, black bag with no guns, Mr. Young's medical condition and actual non-violent record. *Marescas v. Bernalillo Cnty.,* 804 F.3d 1301,1311, 1314 (10th Cir. 2015).

C. Counts Two and Three, regarding Officer Brown

1. Pointing a weapon

Mr. Young claims that the officers pointed loaded guns directly at him and his grandmother, despite their compliance with the officers' orders. (Exh 1); (Exh 2).

"The display of weapons, and the pointing of firearms directly at persons inescapably involves the immediate threat of deadly force. Such a show of force should be predicated on at least a perceived risk of injury or danger to the officers or others, based upon what the officers know at that time." *Holland ex rel Overdorff v. Harrington*, 268 F.3d 1179, 1192 (10th Circuit 2001). The officers' initial show of force gained immediate and unquestioned control of the situation. Thereafter, the justification for continuing and additional force simply evaporated."). LPD knew the black bag had no gun. (Exh. 6). The arresting officers observed Plaintiff leave his house and get in his grandmother's car. Then they searched him and the car. (Exh. 12, 13).

Where a person has submitted to the officers' show of force without resistance, and where an officer has no reasonable cause to believe that person poses a danger to the officer or to others, it may be excessive and unreasonable to continue to aim a loaded firearm directly at that person, in contrast to simply holding the weapon in a fashion ready for immediate use. *Marescas,* at 1314*.* (Exh 1, ¶11).

Here, the officers pointed loaded AR-15s at Michael and Alice Young when they posed no risk to officer safety. Other LPD officers apparently stood by, armed, and watched. Defendants deny that any officer ever pointed a weapon directly at any party inappropriately, thus creating a genuine dispute of material fact for a jury. (Exh.12); (Exh.13). While the evidence indicates it was primarily officer Stephens who injured Michael Young, a reasonable jury could find that both officers pointed their weapons directly at Michael and his grandmother.

2. Duty to prevent excessive force – Duty to intervene and Protect

A jury could find that Brown was liable for not taking steps to stop the other officer from using excessive force. It is clearly established that a law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under § 1983, *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996).

Thus, even if Officer Brown did not use excessive force, a reasonable jury could nonetheless find on this record that he violated Mr. Young's clearly established rights by not taking steps to prevent Officer Stephens' use of excessive force. *See Mascorro v. Billings*, 656 F.3d 1198, 1204 n.5 (10th Cir. 2011) ("It is not necessary that a police

officer actually participate in the use of excessive force in order to be held liable under section 1983. Rather, an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance."). *In Fogarty v. Gallegos*, 523 F.3d 1147 (10th Cir. 2008), the court denied qualified immunity on a failure to intervene claim because the defendant was present during the allegedly unconstitutional arrest. In the present case, it does not appear disputed that Officer Brown, along with supervisors, Newbanks and Belk, were present and observed the use of excessive force. *See, Booker*, at 423.(Exh. 12 Brown Report).

Both the Young and the Brown affidavits establish that Officer Brown was present and he "provided cover." A reasonable jury could find him liable for failing to intervene. See *Mick*, 76 F.3d at 1137 (reasoning a "sworn affidavit by an eyewitness to the effect that [the defendant] watched the [excessive force] incident and did nothing to prevent it" precluded summary judgment for defendant based on qualified immunity for failure to intervene claim).

III CONCLUSION

The material facts are strongly disputed: Mr. Young and the LPD officers have very different versions of events - that should be decided by a jury.

Mr. Young contends that the City of Loveland violated his Fourth Amendment right to be free from unreasonable search and seizure by targeting him, prejudging him based upon his prior record and unfounded, false allegations that would have been shown false with a minimum of professional investigation. He alleges that the City, through the LPD supervisors and officers, failed to adequately verify claims that he violated the law. In addition, he alleges that supervisors failed to confirm or corroborate poorly conceived observations, based upon "uneasy feelings," "He might have a gun," and a gut feeling." The affidavit for search and arrest warrants was based upon flimsy unverified, uncorroborated suspicions and included false evidence, specifically the photos of daggers that had no relation to the case. The LPD process has no checks or reasonable restraint. The power unleashed by a full SWAT takedown of someone's home and then a "high risk" felony arrest with loaded assault rifles, creates life-threatening danger to the suspect, traded for officer safety. No thought at all is given to

Mr. Young's safety or well-being ("deliberate indifference"). He is truly a second-class citizen to the LPD. The actions of the LPD supervisors and department in its entirety shows "deliberate indifference." This was the direct causal link to Mr. Young's injuries. To add to the injury and insult, Mr. Young suffered a retaliatory attack by the arresting officers in full view of other officers that caused him further serious bodily injury.

The policy of Officer safety as overriding factor when taken to the extreme leaves citizens without protection of rights.

A citizen's only recourse is through the Court, to present his case to a jury.

A jury should decide whether Mr. Young was injured after he posed no risk to the police during the arrest; Whether Officer Stephens retaliated after the comment; Whether Officer Brown should have intervened; Whether the LPD should have used such force to search the house and whether they should have exercised more care.

A jury should decide whether the LPD custom and practice is, with supervisory and institutional participation, to prejudge a prior (non-violent) offender and treat him as if he is a dangerous criminal, acting on inaccurate information, exaggeration and such prejudice; deliberately indifferent to his rights.

WHEREFORE, Plaintiff Michael Young respectfully requests the Court to deny Defendants the City and Officer Brown's request for Summary Judgment.

Respectfully submitted,

s/ Erik A. Johnson

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Erik A. Johnson
Erik A. Johnson Law Offices, P.C.
325 East 7th Street, Loveland, CO 80537
Telephone: (970) 481-8876
Facsimile (970) 669-2203
Email: Lovelandlaw@gmail.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2016, I served counsel for Defendants the foregoing Response via the U.S, Court ECF system to:

Eric Ziporin
eziporin@sgllc.com

s/ E. Johnson
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