COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1211

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STEVEN T. ROBINSON AND
PRIMECARE HEALTH PLAN, INC.,

PLAINTIFFS-RESPONDENTS,

V.

CITY OF WEST ALLIS,
OFFICER ANTHONY R. BALL AND
OFFICER JAMES SCHUMITSCH,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. The City of West Allis (City) appeals from the portion of the trial court's order denying the City's summary judgment motion.

The City sought summary judgment on multiple claims brought against two West Allis police officers and the City by Steven Robinson. The City argues that the trial court erred when it failed to dismiss Robinson's claims that the police used excessive force when arresting him and that the police deliberately refused to provide him with medical care. We agree with the City that Robinson's summary judgment submissions failed to raise a genuine issue of material fact as to either claim. Consequently, we reverse the trial court's ruling and remand to the trial court for entry of an order granting summary judgment and dismissing Robinson's claims.

I. BACKGROUND.

¶2 On June 10, 1995, Robinson was operating a motorcycle when he was stopped by a West Allis police officer for several violations of the traffic code. Officers Anthony Ball and James Schumitsch's accounts of the events formed the basis of the criminal complaint charging Robinson with operating after revocation, fourth offense, carrying a concealed weapon, resisting an officer, battery to a police officer and disorderly conduct. They stated that, upon alighting from his motorcycle, Robinson began advancing towards one of the police officers with his hands in his pockets. Despite numerous requests by the officers for Robinson to remove his hands from his pockets and to reveal his identity, Robinson refused to do either. As a result, the police had to physically take Robinson's hands out of his pockets.

¶3 After physically removing Robinson's hands from his jacket pockets, the officer holding onto Robinson's arm turned away momentarily to talk to Robinson's companion. When the officer turned back towards Robinson, he observed that Robinson had a closed knife in his hand. A brief struggle for the

knife occurred until the police recovered the weapon. The police then placed Robinson under arrest and attempted to handcuff him. Robinson resisted their efforts and the police resorted to using pepper spray on Robinson to facilitate their handcuffing him. After the pepper spray was administered, Robinson continued to struggle but he was eventually thrown to the ground and handcuffed. Paramedics were called to the scene by the arresting officers to treat Robinson for the pepper spray aftereffects. After the paramedics administered first aid to Robinson, Robinson was taken to the West Allis police station, and ultimately transferred to the Milwaukee County Jail. During the struggle with police, Robinson injured one of the police officers by stomping on his foot. The injury required medical treatment and the officer missed several days of work.

¶4 After being formally charged, Robinson entered into a plea negotiation and pled guilty to the charge of carrying a concealed weapon and no contest to the charge of battery to a law enforcement officer. The other charges were read into the record for sentencing purposes, pursuant to § 973.20(1g)(b), STATS.[1] Robinson also agreed to use the criminal complaint as a factual basis for his pleas. Robinson was found guilty of both offenses and was sentenced.

¶5 After the completion of the criminal case, Robinson brought a civil suit against the two arresting officers and the City of West Allis. Robinson's version of the events, found in the complaint and later supplemented by his

[1] Section 973.20(1g)(b), STATS., provides:

> (b) "Read-in crime" means any crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted.

deposition testimony, differs from the police officers' sworn testimony. The civil complaint filed on behalf of Robinson made four claims against the officers. The complaint alleged that: (1) the police stop of his motorcycle was unlawful; (2) the officers engaged in an unreasonable seizure; (3) the officers used excessive force against him; and, (4) the officers denied him medical assistance. Robinson also claimed that the City "tolerated" these practices and "ratified the misconduct" and, thus, he argued, the City was liable for his injuries for this reason and as the employer of the officers.

¶6 After filing an answer to Robinson's complaint, the City filed a summary judgment motion. At the summary judgment hearing, the trial court dismissed Robinson's claims concerning the stop and seizure, finding that under the holdings in ***Heck v. Humphrey***, 512 U.S. 477 (1994), and ***Michelle T. v. Crozier***, 173 Wis.2d 681, 495 N.W.2d 327 (1993), Robinson was prohibited from relitigating facts which were necessary to establish the elements of the crimes of which he was convicted. Additionally, the trial court determined that Robinson failed to adequately plead that the City had a policy, practice or custom of deliberate indifference to the medical needs of its prisoners, nor did Robinson supply the necessary underpinnings for his additional claims against the City, and these claims were also dismissed. The trial court did not, however, grant the City's motion to dismiss the claim that the police officers used excessive force against Robinson or the claim that they failed to provide medical assistance to Robinson. After the trial court's ruling, the City brought a petition seeking an interlocutory appeal. Although Robinson opposed the interlocutory appeal, it was subsequently granted.

II. ANALYSIS.

Standard of Review

¶7 Our review of the trial court's decision to grant summary judgment is *de novo*.[2] *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315-16, 401 N.W.2d 816, 820 (1987). We follow the same methodology as the trial court. *See* ***Universal Die & Stampings, Inc. v. Justus***, 174 Wis.2d 556, 560, 497 N.W.2d 797, 799 (Ct. App. 1993). The methodology requires that we first examine the complaint to determine if it states a claim, and then the answer to ascertain whether it presents a material issue of fact. *See* ***id.*** If they do, we then look to the moving party's affidavits to determine if a *prima facie* case for summary judgment has been established. *See* ***id.*** If it has, we then examine the opposing party's affidavits to determine whether there are any material facts in dispute which would entitle the opposing party to a trial. *See* ***id.***

A. *Excessive Use of Force Claim.*

¶8 Robinson's complaint contains an allegation that the police officers used excessive force and, under 42 U.S.C. § 1983, he is seeking redress for this claimed violation of his constitutional rights. At the hearing on the summary judgment motion, the trial court refused to grant the City's request for dismissal of this charge, commenting that there were material issues of fact in that regard as to whether or not excessive force was used. Our independent review of the record

[2] Robinson argues that this court must review the claim of issue preclusion to see whether the trial court erroneously exercised its discretion. Although we observed in ***Ambrose v. Continental Insurance Co.***, 208 Wis.2d 346, 560 N.W.2d 309 (Ct. App. 1997), that some ambiguity existed concerning the correct standard of review to apply when the appeal involves the trial court's application of the issue preclusion doctrine, we note that the claims decided by the trial court concerning issue preclusion are not before us on appeal.

and the submitted summary judgment material reveals that the trial court failed to properly apply the summary judgment methodology. After applying it, we determine that summary judgment should have been granted on this claim.

¶9 The elements of a cause of action claiming excessive force during an arrest are contained in WIS JI—CIVIL 2155, which reads:

> **FEDERAL CIVIL RIGHTS: EXCESSIVE FORCE IN ARREST**
>
> Question 1 asks you to determine whether (defendant) used excessive force in arresting (plaintiff). It is admitted that (defendant) made contact with (plaintiff) and used force at the time of making the arrest, which force, if not reasonable under the circumstances, would constitute a battery.
>
> As a law enforcement officer, (defendant) had the duty to enforce the laws of Wisconsin and in making an arrest may use reasonable force to overcome the resistance of the person being arrested. This force, however, must not be excessive; that is, the officer must not use more force than is reasonably necessary under all of the circumstances.
>
> The fact that the evidence in the case shows physical contact between (defendant) and (plaintiff), which resulted in injury to (plaintiff), is not proof that (defendant) used excessive force.
>
> (Defendant) had the lawful authority to use such force as a reasonable police officer would believe to be necessary. But the use of force beyond that which a reasonable police officer would believe necessary under all the circumstances then existing is excessive force.
>
> The fact that (defendant) believed (plaintiff) was guilty of a crime is irrelevant. Persons being arrested have a right not to be mistreated by the use of excessive force.
>
> The burden is upon (plaintiff) to satisfy yo [sic] to a reasonable certainty by clear, satisfactory, and convincing evidence that the force used in arresting (him) (her) was excessive and more than was reasonable under the circumstances then and there existing.
>
> Question 2 asks you to determine whether, at the time and place in question, (defendant) was acting under color of the law. Acts are done under color of law of a state not only when state officials act within the bounds or limits of their

> lawful authority but also when such officers act without and beyond the bounds of their lawful authority. In order for unlawful acts to be done under color of law, the unlawful acts must be done while the official is, or is pretending to act, in the performance of official duties; that is to say, the unlawful act must consist of an abuse or misuse of power which is possessed by the official only because he or she is an official. For unlawful acts to be under color of law, the acts must be of such a nature and must be committed under such circumstances that they would not have occurred but for the fact that the person committing them was an official purporting to exercise his or her official powers.
>
> Color of law refers not only to acts done by an official under color of any state law but also to acts done by an official under color of any ordinance or regulation of any county or municipality of the state. Such acts also include acts done by an official under color of any regulation issued by any state or county or municipal official and even acts done by an official under color of some state of local custom.

In Robinson's brief in opposition to the summary judgment motion, Robinson agreed that by permitting the charge of resisting arrest to be read in for sentencing purposes, he conceded that the officers were acting in their official capacity and with lawful authority at the time of his arrest. Thus, those two issues cannot now be contested.

¶10 Further, in reviewing the record, we note that many of Robinson's allegations contained in his complaint are not supported by his deposition testimony. In Robinson's deposition testimony, he agreed with the police that he refused to give the knife to the police, stating that he did not want to give it to the police because he wanted his girlfriend to take the knife for safe keeping. His testimony also supports the police contention that he was unwilling to put his hands behind his back. He testified that he resisted the officer's attempts at placing handcuffs on him and that he would not cooperate because he felt that the police had a bad "attitude." Robinson's testimony also established that, contrary

to the complaint, he was pepper sprayed before he was handcuffed. He also testified that after he was pepper sprayed, a struggle ensued which resulted in his being tackled to the ground by the officers. Robinson's deposition testimony also contains numerous allegations by him that the police used excessive force on him during the incident, and that their treatment of him after he was pepper sprayed was improper. Nevertheless, Robinson's concessions that the police were acting in their official capacity and with lawful authority, coupled with his acknowledged resistance and lack of cooperation, leaves the question as to whether Robinson's claim survives summary judgment, turning on whether the police used reasonable force to overcome Robinson's resistance.

¶11 The trial court decided that summary judgment was inappropriate because there were material factual disputes. Unfortunately, the trial court never discussed the effect of Captain Amerpohl's affidavit, the West Allis training bureau chief, submitted on behalf of the City in support of its summary judgment motion on the excessive force claim.[3] Had the trial court properly considered the affidavit, a grant of summary judgment would have been required.

¶12 Captain Amerpohl's affidavit stated that he was in charge of the training bureau, and the law enforcement training that he conducted is governed by the standards promulgated by the Law Enforcement Standards Board. Further,

[3] In fact, the only mention of the Amerpohl affidavit was made by Robinson's attorney, who told the trial court that the police captain's opinion was based upon the facts as told to him by the police. Contrary to Robinson's attorney's statement, the affidavit is not premised upon the officers' testimony, but, rather, is based upon the sequence of events as testified to by Robinson and the police officers. These included the parties' agreement that Robinson reached into his clothing and produced a knife; that he initially refused to hand the knife to the officers, but the officers were finally able to wrest the knife away; that Robinson resisted the officers' attempts at handcuffing him; and, when the officers were unable to handcuff him, he was pepper sprayed. After the administration of pepper spray, a struggle ensued, which resulted in the officers ultimately placing Robinson on the ground where he was finally handcuffed.

he opined that, in his professional opinion, the police were following proper tactics when, after their verbal commands were ignored by Robinson, they initiated physical contact with Robinson. Captain Amerpohl also stated that the production of a knife by Robinson permitted the escalation of force and, at that point in the conflict, the officers were justified in using "deadly force." He further found that the officers' use of pepper spray was appropriate. Finally, in his affidavit he advised that it is recommended training that, when circumstances such as those presented here occur, *i.e.*, an uncooperative arrestee who refuses to be handcuffed, the officers are instructed to "decentraliz[e]" the prisoner; that is, take him to the ground. Finally, in his affidavit, Amerpohl concluded that, in his expert opinion, all of the police conduct when arresting Robinson was appropriate and reasonable. What constitutes reasonable force during an arrest and what are accepted practices for police when confronted with an uncooperative and armed person are not matters within the realm of ordinary experience and lay comprehension. Consequently, expert testimony was needed on these issues. *See* ***White v. Leeder***, 149 Wis.2d 948, 960, 440 N.W.2d 557, 562 (1989).

¶13 Thus, when determining whether the City was entitled to summary judgment on the excessive force charge, the trial court should have followed the established summary judgment methodology requiring it to consider the Amerpohl affidavit and then look for affidavits that countered Amerpohl's. Had this procedure been followed, the trial court would have discovered that no countering affidavit had been filed by an expert witness stating that the police actions were unreasonable.[4] Since the only expert witness who provided information

[4] Certainly Robinson testified that the officers' actions were inappropriate but, given the circumstances, an expert witness was needed.

concerning the reasonableness of the officers' actions stated that they took the appropriate actions, and Robinson did not produce the affidavit of any expert witness who stated that the police actions were unreasonable, Robinson was unable to sustain his claim that the police used excessive force.

B. *Deliberate Indifference to Medical Needs.*

¶14 In the City's briefs, the City acknowledges the viability of a cause of action for deliberately ignoring a prisoner's request for medical assistance. The City concedes that deliberately ignoring a prisoner's request for medical assistance can, under certain circumstances, constitute cruel and unusual punishment, in violation of the Eighth Amendment. The City argues, however, that this claim is proper only when the refusal to obtain medical care results in an injury or illness which is serious. *See* ***Estelle v. Gamble***, 429 U.S. 97, 104-06 (1976). Inasmuch as Robinson failed to show that he suffered either a serious illness or injury, the City contends that the trial court erred in failing to dismiss Robinson's medical care claim.

¶15 Robinson admits that he made no requests for medical treatment once he was transported to the West Allis police station, or later, at the Milwaukee County Jail, but he contends that his claim against the police officers survives for several reasons. First, he disputes the facts contained in the criminal complaint and the paramedic report and argues that because of these material factual disputes, summary judgment is inappropriate. Next, he claims that he has alleged sufficient facts to prove his cause of action. He asserts that his claim survives the City's summary judgment motion because he told Officer Schumitsch that he suffered from a polycystic kidney and high blood pressure, and the officer failed to take any steps to have him evaluated for these medical problems. Additionally, he

contends that when the paramedics failed to honor his request to be transported to a hospital, rather than to the police station, they evinced a deliberate indifference to his medical needs. Finally, he points to the fact that his mother called the police and advised them of his medical conditions as support for his claim that the police should have sought medical treatment for him when he was incarcerated. We are not persuaded by any of his arguments. Even assuming that Robinson's version of the events is true, his claim fails.

¶16 At the onset, we note that Robinson has not appealed the trial court's dismissal of his claim against the City for deliberately being indifferent to Robinson's medical needs. Therefore, his mother's call to unknown city or county employees advising them of Robinson's chronic medical problems has no bearing on whether Officers Ball or Schumitsch deliberately refused to provide him with medical care. The only evidence supporting Robinson's claim that the two police officers were indifferent to his medical needs consists of Robinson's statement that he told Officer Schumitsch about his pre-existing medical conditions shortly after the scuffle. Robinson avers that when Officer Schumitsch had his foot on his back, Robinson told him that he suffered from "high blood pressure and [sic] polycystic kidney," and if he were to be punched in the back, it could burst one of the cysts, causing him injury. The other support for Robinson's claim stems from his statement that he requested that the paramedics transport him to the hospital because his face hurt as a result of the pepper spraying and he was short of breath. Neither of these allegations is sufficient to survive the City's summary judgment claim.

¶17 The case of ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 514 N.W.2d 48 (Ct. App. 1994), addressed the propriety of the grant of summary judgment to a prison employee who was sued under the state tort claim of negligence. This court

concluded that: "[a prison guard] was not required to summon medical assistance because he had no reason to know that [the prisoner] was ill, or that [the prisoner] would not recover quickly without aid." ***Id.*** at 377, 514 N.W.2d at 51. Here, the police were not required to obtain medical assistance for Robinson's pre-existing medical problems, because he was not actually ill, nor did he show any signs of being ill from these particular medical conditions. Robinson did not tell the police that he was suffering from a burst cyst; he only mentioned the possibility that it could happen if he were punched in the back. Not only were there no punches to the back, but also Robinson never complained of having any symptoms of a burst cyst. Most of his medical complaints related to the use of pepper spray. With respect to those complaints, the officers summoned medical assistance for Robinson. Further, it was entirely reasonable for the police to assume that once he was released by the paramedics, Robinson no longer required medical treatment.

¶18 Moreover, Robinson has made no showing that he ever suffered either a serious illness or injury as a result of his arrest. In ***Brownelli***, we stated that "to prevail in a claim against a prison employee for failure to obtain medical attention, an inmate must show that such failure resulted in a serious illness or injury." ***Id.*** at 378, 514 N.W.2d at 52. Robinson cites ***Cooper v. Casey***, 97 F.3d 914 (7th Cir. 1996), and ***Smith v. Dooley***, 591 F. Supp. 1157 (W.D. La. 1984), *aff'd*, 778 F.2d 788 (5th Cir. 1985), in support of his position that he was not required to show objective signs of an injury in order to prevail on his claim of deliberate indifference to his medical needs. ***Cooper*** and ***Smith*** are, however, inapposite, because both cases involve suits by prisoners against prison guards who senselessly and severely beat them without cause and then failed to call for medical assistance. In ***Cooper***, the court remarked that while "[t]he Constitution is not a charter of protection for hypochondriacs," 97 F.3d at 916, "[w]hen guards

use excessive force on prisoners, the requirements for proving deliberate indifference to the medical needs of the beaten prisoners ought to be relaxed somewhat," ***id.*** at 917. As noted, Robinson has failed to prove his use of excessive force claim. Further, here the physical conflict was initiated by Robinson's refusal to cooperate and by his brandishing a knife.

¶19 In ***Smith***, the court explained that the prison guards would be held accountable for their deliberate indifference to Smith's medical needs without Smith showing any objective signs of serious injury, "[b]ecause they delivered the blows, [and thus they] knew that Smith had been struck on the back and in the ribs, which posed a risk of internal injuries." ***Id.***, 591 F. Supp. at 1170. This is not such a case. As noted, the officers' physical contact with Robinson was precipitated by Robinson's actions. The police used the amount of force necessary to obtain the knife from Robinson and to handcuff him.

¶20 Under the circumstances presented here, it is proper to extend the Eighth Amendment's protection only if the plaintiff can "demonstrate that prison officials were aware of imminent danger and consciously or knowingly refused to do anything about it." ***Estate of Frank v. City of Beaver Dam***, 921 F. Supp. 590, 597 (E.D. Wis. 1996). A case on point is ***Brownell v. Figel***, 950 F.2d 1285 (7th Cir. 1991). There, Brownell was taken to the hospital for treatment of injuries resulting from a car accident, prior to being taken to the police station where he was cited for drunk driving. Despite being given medical care before being taken to the police station, Brownell woke up the next morning to discover that he could not move and was rendered a quadriplegic as his severed vertebra had not been detected by the emergency room personnel. He sued the police, claiming that the police violated his constitutional rights by denying him adequate medical care.

¶21 The Court of Appeals, in affirming the trial court's grant of summary judgment to the police, opined that to constitute cruel and unusual punishment: "Only inattention to serious injury (or signs of serious injury) amounts to a constitutional violation; the due process clause does not require hospital care for minor injuries." ***Id.*** at 1291. Even if we evaluate the facts in the light most favorable to Robinson, Robinson has submitted no evidence to suggest he suffered a serious illness or injury. Besides the temporary effects of the pepper spray, Robinson's only complaint at the scene of the arrest was his shortness of breath, which ultimately subsided. Although he also had some minor cuts to his face and bruises as a result of his struggles with the police, these minor complaints do not rise to the level of a serious illness or injury. Under the applicable case law, Robinson's claim that the officers were deliberately indifferent to his medical needs fails.

¶22 In sum, the City's request for summary judgment should have been granted on both claims. Accordingly, we reverse and remand to the trial court for entry of an order dismissing Robinson's claims.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.