

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Matthew F. Kennelly	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 C 552	DATE	11/17/2009
CASE TITLE	Mercado vs. Dart		

DOCKET ENTRY TEXT

For the reasons stated below, the Court denies defendant’s motion for judgment as a matter of law or for a new trial [# 470]. The Court directs the Clerk to terminate motions 415 and 436, upon which the Court previously ruled.

■ [For further details see text below.]

Docketing to mail notices.

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A jury found in favor of the plaintiffs as to liability in this class action. The defendant, Cook County Sheriff Thomas Dart, has moved for judgment as a matter of law or for a new trial.

1. U.S. Department of Justice report

The Court admitted pursuant to Federal Rule of Evidence 803(8) an excerpt of a report by the U.S. Department of Justice (USDOJ) issued to the Sheriff pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997a. The Sheriff argues that the report contained double-hearsay, it consisted of opinions and conclusions, and it was unfairly prejudicial, in part due to its purportedly late identification by plaintiffs. This matter was fully briefed as a part of a pretrial motion *in limine* by Dart on which the Court heard extensive argument and made a detailed ruling. *See* 7/29/09 Tr. 42-52.

The Court deals with Dart’s timeliness point first. Plaintiffs persuasively argued in the motion *in limine* briefing that it was Dart who should have produced the report in discovery but failed to do so. Plaintiffs discovered it on their own and identified it as a possible exhibit in reasonably prompt fashion after discovering it. Dart has identified no real prejudice arising from the late disclosure. Though he contends that the information in the report could not be verified, the report itself contained an offer by USDOJ to provide information that would enable Dart to identify particular incidents referenced in the part of the report in question.

The Court correctly ruled that the report qualified for admission under Rule 803(8). In the language of that Rule, the report amounted to “factual findings resulting from an investigation made pursuant to authority granted by law.” Fed. R. Evid. 803(8). *See, e.g., Palo v. Dallas County*, No. 3:05-CV-0527-D, 2007 WL 2140590, at *8 (N.D. Tex. 2007); *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1133 n.1 (D. Haw. 2006); *McKnight*

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v. District of Columbia, 412 F. Supp. 2d 127, 133 n.7 (D.D.C. 2006) (all admitting similar reports under Rule 803(8)). Dart argued prior to trial, and argues now, that the sources of information indicated lack of trustworthiness, but that argument was unpersuasive. Dart's argument along these lines may have implicated the appropriate weight to be given the report, but it did not affect the report's admissibility. The same is true of Dart's double-hearsay argument. See generally *Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3d Cir. 1994); *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1309-10 (5th Cir. 1991); *McClure v. Mexia*, 750 F.2d 396, 399-400 (5th Cir. 1985). As indicated above, Dart had all the tools needed to attempt to refute the report if he wished to do so, and he had both the ability and the opportunity to argue its weight before the jury.

Dart's objection also suggests that the Court should have excluded the report under Federal Rule of Evidence 403 as unfairly prejudicial. The Court is unpersuaded that the balancing required under Rule 403 favors exclusion. Before evidence may be excluded under that rule, its probative value must be "*substantially outweighed*" by the danger of unfair prejudice (etc). Fed. R. Evid. 403 (emphasis added). Such was not the case here.

Finally, and in any event, in the overall context of the trial Dart suffered no appreciable harm from the admission of the USDOJ report. The incidents described in the report were far less specific and detailed than those discussed by the nearly twenty detainees who testified during the trial. The jury's determination regarding what happened during intake strip searches largely boiled down to a determination of whether to believe those witnesses. The particular incidents referenced in the USDOJ report paled by comparison.

The Court also notes that Dart himself offered, and the Court admitted, reports by Illinois authorities regarding their inspections of the Cook County Jail. These reports were admitted on the same basis as the USDOJ report. The USDOJ report was no less admissible than the state authorities' reports.

2. References to the L3 body scanning machine

Defendant says that the Court excluded reference to the Jail's use of a body scanning machine. The Court agrees with plaintiffs that defendant has mischaracterized the record as well as the Court's ruling.

At the final pretrial conference, the Court became aware that in or around March 2009, the Cook County Jail purportedly had begun to use a body scanning machine to examine male inmates at intake, allegedly in lieu of strip searches. Plaintiffs objected to the admission of this evidence at trial primarily on the ground that they had not been advised until late June 2009 (about six weeks before trial) of a policy change that supposedly had taken place more than three months earlier and that, one could reasonably infer, had been decided upon even before that. See July 27, 2009 Tr. 58-61. Dart did not dispute that his counsel first advised plaintiffs' counsel about the change in policy in June 2009, three months after it supposedly went into effect. *Id.* 63; see also *id.* 60-61. As a result, plaintiffs argued, they had been completely foreclosed from attempting to determine whether the policy was actually being enforced and whether strip searches were still occurring. *Id.* 64.

Because plaintiffs were hamstrung in responding to the claimed policy change, the Court ruled that the liability trial would cover only the period through March 18, 2009, the date on which the change purportedly took effect. *Id.* 64. This made the alleged policy change effectively immaterial and irrelevant for purposes of the trial.

Contrary to Dart's argument in his post-trial motion, Dart himself injected into the trial the use of the body scanning machine for searches of male detainees. See Pls.' Resp. to Def.'s Mot. for Judg. at 9 (citing trial

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transcript). The Court allowed a good deal of this evidence to be admitted. Dart contends that the Court “refused” what Dart characterizes as his “attempt[] to explain why the L3 was being used” via witness Dan Brown. Def.’s Mot. for Judg. at 6 (“Through Dan Brown, the Sheriff attempted to explain why the L3 was being used. The Court refused. This ruling prevented a number of issues from being discussed.”). This, to be charitable, is revisionist history. During Brown’s examination, Dart introduced, without objection or adverse ruling, a good deal of evidence regarding an alleged “pilot project” relating to the L3 scanning machine. Tr. Vol. V 1169-71. Plaintiffs’ counsel objected when the testimony reached a point where it appeared it might run afoul of the Court’s pretrial ruling barring evidence regarding the claimed March 2009 policy change. *Id.* 1172. After hearing extensive argument outside the jury’s presence, the following interchange took place between the Court and Dart’s counsel:

THE COURT: So what additional are you planning to do at this point regarding with [sic] this witness regarding the subject of this body scanning machine that is in these pictures and so on?

MR. CATANIA: *This one, nothing further.* We have another one coming up. That is the female’s body scan.

Id. 1180-81 (emphasis added). Plaintiffs’ counsel advised that he did not object to introduction of evidence regarding use of a body scanning machine for searches of female detainees. *Id.* 1181.

In short, the contemporaneous comments of Dart’s own counsel at the time of the Court’s ruling put the lie to Dart’s current argument that the Court “refused” to allow witness Brown to explain further. Rather, Dart’s counsel said that he did not have further questions for Brown on the topic.

Following this discussion, the Court determined that to avoid running afoul of the pretrial ruling concerning the claimed policy change, no further evidence regarding use of a body scanning machine for searches of male detainees would be introduced “until I have an opportunity to address this further.” *Id.* 1183-84. At the start of the next day of trial, after hearing further argument, the Court stated that “I don’t want there to be any further questions or answers that even by implication talk about a change in procedures in March of 2009” *Id.*, Vol. VI 1306-07. The Court advised both sides that “if you think that there’s something along those lines that you need to get in, on either side, you need to front it with me first at a sidebar before it is asked of a witness and before you ask a question that I conclude after the fact is reasonably likely to draw testimony like that out of a witness’ mouth.” *Id.* 1308. *After this, Dart never once asked the Court to introduce further evidence regarding use of the L3 scanning machine.* In short, Dart has forfeited any argument regarding introduction of further evidence about the L3 machine, and even if he had not done so, the argument is without merit, because he was offered an opportunity to advise the Court about any further evidence on the topic he wished to offer, but never took that opportunity.

3. Jury instructions

In his motion for new trial, Dart “adopt[ed] and incorporate[d] by reference all objections made to Plaintiffs’ tendered instructions as stated in the jury instruction conference.” Def.’s Mot. for Judg. at 6. This one-sentence argument forfeits the issue because it fails to develop whatever points Dart was making. *See, e.g., White Eagle Co-op. Ass’n v. Conner*, 553 F.3d 467, 476 n.6 (7th Cir. 2009) (“[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived . . .”).

In any event, the sole objection that Dart pressed involved whether the Court should give the jury a list of

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factors to be considered in deciding plaintiffs' due process and equal protection claims. *See* Trial Tr. 1890-91 (discussing defense comments on instructions). Indeed, that is the only instruction that Dart discussed in his reply brief on the current motion after plaintiffs made their argument about forfeiture. *See* Def.'s Reply at 10. The Court declined to give a list of factors because it found them incomplete and, in part, argumentative, a ruling that the Court continues to believe was correct. In any event, the Court specifically permitted counsel to discuss these or any other factors during closing argument. Trial Tr. 1890.

Dart also complains that the instructions omitted or downplayed the factor of jail security. The Court disagrees. The instructions made it clear that jail security was "an important governmental objective and a legitimate governmental purpose." *See, e.g.*, Jury Instructions 14.

4. Weight and sufficiency of the evidence

Dart argues that the jury's verdict on each of the claims was against the manifest weight of the evidence. A court considering a motion for new trial may not set aside the jury's verdict "if a reasonable basis exists in the record to support the verdict, viewing the evidence in the light most favorable to the prevailing party, and leaving issues of credibility and weight of the evidence to the jury." *Kapelanski v. Johnson*, 390 F.3d 525, 520 (7th Cir. 2004); *see also, Wipf v. Kowalski*, 519 F.3d 380, 384 (7th Cir. 2008).

In their argument, Dart repeatedly mischaracterizes plaintiffs' claims that were tried to the jury. As was made abundantly clear on numerous occasions, plaintiffs did not challenge the *fact* of a strip search; rather they challenged the *manner* in which Sheriff's personnel conducted the search. In its final instructions, the Court described the parties' contentions as follows:

The plaintiffs contend that upon intake to the Cook County Jail, they were subjected to searches that were conducted in an inhumane and unreasonable manner, and that they were inappropriately subjected to harsher searches than women.

The defendant contends that searches were conducted in an appropriate manner and for the purpose of safety and security at the Jail. The defendant also contends that any differential treatment of men and women was justified.

Jury Instructions 11. Plaintiffs' equal protection claim concerned differences in which men and women were searched on intake; their due process claim required them to prove that "[s]trip searches were done in a manner that was not rationally related to a legitimate non-punitive governmental purpose, or the searches were done in a manner that appears excessive in relation to that purpose"; and their Fourth Amendment claim required them to prove that they "were searched in an unreasonable manner." Jury Instructions 15-17.

The jury's decision on each of the claims largely boiled down to a credibility contest, as the Court has discussed. The plaintiffs' witnesses all testified that they were strip searched and body cavity searched in a group, shoulder to shoulder, with no privacy protection. The jury was entitled to believe these witnesses' testimony over that of the several Sheriff's personnel who testified in contrary fashion. In addition, enough of the plaintiffs' witnesses testified that they were subjected to degrading comments and treatment that the jury was entitled to find that this, like the practice of strip searching and body cavity searching new detainees in a group without privacy, amounted to a policy of the Sheriff. Moreover, Dart has cited no case that holds that group strip searches conducted in this manner on pretrial detainees are *per se* legal (indeed the law is to the contrary, *see Mays v. Springborn*, 575 F.3d 643, 650 (7th Cir. 2009)), or that suggests that a jury finding of liability in this situation is against the manifest weight of the evidence. In addition, Dart's arguments that

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certain elements of what plaintiffs claimed are not illegal or improper standing alone misses the point; the jury properly considered the totality of the circumstances, not bits of evidence considered in isolation. In sum, no new trial is required, nor are defendants entitled to judgment as a matter of law.

As part of their “manifest weight” argument, Dart challenges additional evidentiary rulings that the Court made. He advances no reason why any of these rulings were incorrect, let alone prejudicial in a way that would require a new trial.

- First, Dart’s counsel never offered any decent reason why the fact that a detainee had had a bond hearing had anything to do with the proper manner of an intake strip search. In any event, Dart managed to get in, on several occasions, evidence that detainees had come from the court system before the intake search, and he was not precluded from arguing that this evidence might show that the plaintiffs’ witnesses were mistaken or lying about what happened to them.

- Second, the nature of the testifying plaintiffs’ charges had no bearing on how they were searched, as Dart’s witnesses made it clear that all detainees are searched the same way, irrespective of the charges against them. And as plaintiffs point out, Dart was able to introduce before the jury the fact that the Jail housed persons accused of serious crimes – something that would have been obvious to the jury in any event.

- Third, Dart was not prejudiced by the inability to introduce specific instances in which contraband was found. Dart was given the opportunity to articulate how this impacted the *manner* of the search as challenged by plaintiffs (as opposed to the *fact* of the search), and he could offer nothing. And in any event, Dart was able to introduce a number of specific instances in which contraband was found, so even if the ruling was wrong, Dart was not unfairly prejudiced in a way that would require a new trial.

- Fourth, Dart did not object to testimony by certain plaintiffs about their feelings of humiliation, so he has forfeited that point. The Court also rejects Dart’s remaining evidentiary arguments for the reasons that formed the basis of the Court’s rulings before and during the trial.

Finally, the Court rejects Dart’s argument that he is entitled to judgment as a matter of law on plaintiffs’ equal protection claim based on the differential treatment between male and female detainees in intake searches. His argument essentially consists of a request that the Court reweigh the evidence, *see* Def.’s Mot. for Judg. 14-15, which is not the standard for determining a motion for judgment as a matter of law. *See Filipovich v. K&R Express Sys., Inc.*, 391 F.3d 859, 963 (7th Cir. 2004). It is beyond question that the Sheriff treated male and female detainees differently in searching them at intake during the relevant period, and there was more than sufficient evidence supporting a finding that the differences were not justified under the standard that Dart agreed applies to equal protection claims.