Marcus Ke1ley v. McDougal, Wheatcroft and Giolitti
Case No: 11-CV-13116

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARCUS KELLEY,

Plaintiff,

Case No: 11-13116
Honorable Victoria A. Roberts

v.

MARC FERGUSON, et al.,

Defendants.
_______________________________/

JURY INSTRUCTIONS

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A. GENERAL INSTRUCTIONS

1.01 FUNCTIONS OF THE COURT AND THE JURY

Members of the jury, you have seen and heard all the evidence and arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be

1.02 NO INFERENCE FROM JUDGE'S QUESTIONS

During this trial, I questioned witnesses myself. Do not assume that because I asked questions I hold any opinion on the matters I asked about, or on what the outcome of the case should be.

1.03. JUDGE'S COMMENTS TO LAWYER

I have a duty to caution or warn an attorney who does something that I believe is not in keeping with the rules of evidence or procedure. You are not to draw any inference against the side whom I may caution or warn during the trial.

1.04. EVIDENCE

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence and stipulations.

B. EVALUATION OF THE EVIDENCE

2.01 STIPULATIONS

A stipulation is an agreement between both sides that certain facts are true.

A. Defendants were acting under color of law at the time of the events which are the subject of this suit.

B. Defendants are being sued as individuals. The City of Pontiac is not party to this lawsuit.

C. Plaintiff was arrested on February 3, 2011. Plaintiff was charged with the following felonies during the subsequent criminal prosecution:

1. Delivery/Manufacture of Cocaine, 50 to 449 Grams;
2. Conspiracy to Commit Controlled Substance Delivery/Manufacture of Cocaine, 50 to 449 Grams
3. Delivery/Manufacture of Cocaine, 50 to 449 Grams;
4. Delivery/Manufacture of Cocaine, Less Than 50 Grams
5. Delivery/Manufacture of Cocaine, Less Than 50 Grams
6. Delivery/Manufacture of Cocaine, Less Than 50 Grams
7. Police Officer - Assault/Resist/Obstruct

On July 7, 2011, The parties in the criminal case stipulated to dismiss the delivery/manufacturing less than 50 grams and Assault/Resist/Obstruct charges. The jury found Plaintiff guilty of the remaining felony-counts on May 7, 2012, Plaintiff 's appeal of the May 7, 2012, convictions was denied. Plaintiff has filed a motion for relief from this judgment.

Plaintiff's criminal history also includes convictions for:

1. March 26, 2007: Fleeing a Police Officer – Third Degree
2. September 30, 1997: Armed Robbery (two counts)

D. Richard Crawford's criminal history is a conviction for:

1. Possession of less than 25 grams of cocaine

You must now treat these facts as having been proved for the purpose of this case.

2.02 WHAT IS NOT EVIDENCE

Certain things are not to be considered as evidence. I will list them for you:

First, if I told you to disregard any testimony or struck any testimony such testimony is not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, Internet or television reports you may have seen or heard . Such reports are not evidence and your verdict must not be influenced in any way by such publicity.

Third, questions and objections or comments by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection, and you should not infer from my rulings that I have any view as to how you should decide the case.

Fourth, the lawyers' opening statements and closing arguments to you are not evidence. Their purpose is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

2.03 NOTE-TAKING

You may use the notes taken by you during the trial. However, the notes should not be substituted for your memory. Remember, notes are not evidence. If your memory should differ from your notes, then you should rely on your memory and not on your notes.

2.04 WEIGHING THE EVIDENCE

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

2.05 DEFINITION OF "DIRECT" AND "CIRCUMSTANTIAL" EVIDENCE

You may have heard the phrases "direct evidence" and "circumstantial evidence." Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from a witness who says, "I was outside a minute ago and I saw it raining." Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including circumstantial evidence.

2.06 CONSIDERATION OF ALL EVIDENCE REGARDLESS OF WHO PRODUCED

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

2.07 TESTIMONY OF WITNESSES
(DECIDING WHAT TO BELIEVE)

You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, you may consider, among other things:

1. the ability and opportunity the, witness had to see, hear, or know the things that the witness testified about;
2. the witness's memory;
3. any interest, bias, or prejudice the witness may have;
4. the witness's intelligence;
5. the manner of the witness while testifying; and
6. the reasonableness of the witness's testimony in light of all the evidence in the case.

2.08 PRIOR INCONSISTENT STATEMENTS

Evidence that at some other time while not under oath a witness who is not a party to this action has said or done something inconsistent with the witness' testimony at the trial may be considered for the sole purpose of judging the credibility of the witness. However, such evidence may never be considered as evidence of proof of the truth of any such statement.

2.09 IMPEACHMENT OF WITNESS — CONVICTIONS

A witness may be discredited or impeached by evidence that the witness has been convicted of a felony: an offense punishable by death or imprisonment for in excess of one year.

If you believe that any witness has been impeached and thus discredited, it is your exclusive responsibility to give the testimony of that witness such credibility, if any, as you think it deserves.

2.10 NUMBER OF WITNESSES

The weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses that does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence producing such belief in your minds.

The test is not which side brings the greater number of witnesses and which evidence appeal to you minds as being most accurate and otherwise trustworthy.

2.11 ABSENCE OF EVIDENCE

The law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned during this trial.

C. SUBSTANTIVE INSTRUCTIONS

3.01 MULTIPLE DEFENDANTS

Although there is more than one defendant in this action, it does not follow from that fact alone that if one defendant is liable to the Plaintiff, all defendants are liable. Each defendant is entitled to fair consideration of the evidence. No Defendant is to be prejudiced should you find against another Defendant. Unless otherwise stated, all instructions I give you govern the case as to each defendant.

3.02 BURDEN OF PROOF

Plaintiff Marcus Kelley has the burden to prove every essential element of his claim by a preponderance of the evidence. If Marcus Kelley should fail to establish any essential element of his claim by a preponderance of the evidence, you should find for Defendants as to that claim.

"Establish by a preponderance of the evidence" means evidence, which as a whole , shows that the fact sought to be proved is more probable than not. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence, unless otherwise instructed you may consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard applicable in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

3.03 EXCESSIVE FORCE UNDER THE FOURTH AMENDMENT

Plaintiff claims the defendant police officers used excessive force when they arrested him. In making a lawful arrest, a law enforcement officer has the right to use such force as is necessary under the circumstances to effect the arrest. Whether or not the force used in making an arrest was unreasonable is a question to be determined by you in light of all of the evidence received in the case.

You must determine the degree of force that a reasonable and prudent police officer would have applied in effecting the arrest under the circumstances shown from the evidence received in this case. In determining whether the defendant police officers used excessive force, you may consider:

1. The extent of the injury suffered,
2. The need for the application of force,
3. The relationship between the need and the amount of force used,
4. The threat reasonably perceived by the responsible officials, and
5. Any efforts made to temper the severity of a forceful response. Injuries which result from, for example, an officer's use of force to overcome resistance to arrest do not involve constitutionally protected interests. An officer's use of excessive force does not give constitutional protection against injuries that would have occurred absent the excessive force.

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with hindsight. The nature of reasonableness must allow for the fact that police officers are often forced to make split-second judgments—under circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

This reasonableness inquiry is an objective one. The question is whether the defendant police officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

If you find Marcus Kelley has proven his claim, you must then consider the defense of defendant police officer that their conduct was objectively reasonable in light of the legal rules clearly established at the time of the incident in issue and that they are therefore not liable.

Police officers are presumed to know about the clearly established constitutional rights of citizens to be free from excessive force.

If, after considering the scope of discretion and responsibility generally given to police officers in the performance of their duties, and after considering all of the surrounding circumstances of the case as they would have reasonably appeared at the time of the arrest, you find from a preponderance of the evidence that Marcus Kelley has proved that defendant police officers knowingly violated the law regarding his constitutional rights, you must find for him.

If, however, you find that defendant police officers had a reasonable belief that their actions did not violate the constitutional rights of the Plaintiff, then you cannot find defendant police officers liable even if the plaintiff's rights were in fact violated as a result of the defendant police officers' objectively reasonable action.

3.04 EVIDENCE OF POLICIES

You have heard evidence about whether Defendants' conduct complied with locally imposed policies. You may consider this evidence in your deliberations. But, remember the issue is whether Defendants used excessive force on Plaintiff, not whether a policy might have been violated. The Policies do not set the constitutional standard required by the Fourth Amendment.

M Civ JI 31 115.09 Battery—Defense— Use of Force by Law Enforcement Officer in Lawful Arrest

If a person has knowledge, or by the exercise of reasonable care should have knowledge, that he or she is being lawfully arrested by a law enforcement officer, it is the duty of that person to refrain from resisting the arrest.

An arresting officer may use such force as is reasonably necessary to effect a lawful arrest. However, an officer who uses more force than is reasonably necessary to effect a lawful arrest commits' a battery upon the person arrested to the extent the force used was excessive.

M Civ JI 115.20 Assault—Burden of Proof

Plaintiff has the burden of proving each of the following:

A. that defendant made an intentional and unlawful threat or offer to do bodily injury to the plaintiff
B. that the threat or offer was made under circumstances which created in plaintiff a well-founded fear of imminent peril
C. that defendant had the apparent present ability to carry out the act if not prevented

If you find that plaintiff has proved each of the elements that I have explained to you, and the defendant failed to prove that the use of force was reasonable, then, your verdict will be for the plaintiff.

If you find that the plaintiff has failed to prove any one of the elements or if you find that the defendant has proved that the use of force was reasonable, your verdict will be for the defendants.

M Civ JI 115.21 Battery—Burden of Proof

Plaintiff has the burden of proving that defendant willfully and intentionally touched the plaintiff against the plaintiff's will or defendant put in motion an object or substance that touched the plaintiff against the plaintiff's will .

If you find that this has been proved, and the defendant has failed to prove that the use of force was reasonable, then, your verdict will be for the plaintiff.,

If you find that the plaintiff has failed to prove this, or if you find that the defendant has proved that the use of force was reasonable, then your verdict will be for the defendants.

3.05 NO NEED TO CONSIDER DAMAGES INSTRUCTION

If you decide for the defendants on the question of liability, then you should not consider the question of damages.

3.06 VALIDITY OF WARRANT NOT AN ISSUE

You may have heard discussion about a search warrant, what statements or facts that warrant was based upon, and who provided that information. In general, in a civil rights case, investigators or officers are entitled to rely upon a judicially-secured search warrant as satisfactory evidence of probable cause. The issue of the validity of that warrant is not before the court. Thus, when evaluating the objective reasonableness of the Defendants' actions you should limit your considerations to the elements provided in the excessive force instruction and not consider circumstances that might have had an impact on any warrant.

D. DAMAGES

4.01 DAMAGES: PREFATORY INSTRUCTION

If you find that Plaintiff has proved any of his claims against any of Defendant(s), then you must determine what amount of damages, if any, Plaintiff is entitled to recover.

4.02 DAMAGES: COMPENSATORY

If you find in favor of Plaintiff, then you must determine the amount of money that will fairly compensate Plaintiff for any injury that you find he sustained. These are called "compensatory damages".

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others:

1. The reasonable value of medical care and supplies that Plaintiff reasonably needed and actually received.
2. The physical and mental/emotional, pain and suffering and loss of a normal life that Plaintiff has experienced and is reasonably certain to experience in the future. No evidence of` the dollar value of physical or mental/emotional, pain and suffering or loss of a normal life has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering, You are to determine an amount that will fairly compensate the Plaintiff for the injury he has sustained.

If you find in favor of Plaintiff on his excessive force claim but find that the plaintiff has failed to prove compensatory damages, you must return a verdict for Plaintiff in the amount of one dollar ($1.00).

4.03 DAMAGES: PUNITIVE ON EXCESSIVE FORCE CLAIM ONLY

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award the injured person punitive damages in order to punish the defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct. You may not award punitive damages on Plaintiff's Assault and Battery claim.

If you find in favor of plaintiff and against defendant and if you find the conduct of that defendant was malicious or wanton in addition to any other damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish defendant or deter defendant and others from like conduct in the future. Whether to award plaintiff punitive damages and the amount of those damages are within your sound discretion.

You may assess punitive damages against any or all defendant police officers or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.

4.04 MALICIOUS CONDUCT

An act or a failure to act is “maliciously” done, if promoted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward a person in one or more groups or categories of which the injured person is a member.

4.05 WANTON CONDUCT

An act or a failure to act is “wantonly” done, if done in a reckless or callous disregard or indifference to the rights of one or more persons, including the injured person.

E. DELIBERATIONS AND CONCLUDING INSTRUCTIONS

5.01 SELECTION OF FOREPERSON

GENERAL VERDICT

Upon retiring to the jury room, you must select a foreperson. The foreperson will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

Take these forms to the jury room, and when you have reached an agreement of six (6) out of seven (7) on the verdict, your foreperson will fill in, date, and sign the appropriate form.

5.02 COMMUNICATION WITH COURT

I do not anticipate that you will need to communicate with me. If you do need to communicate with me, the only proper way is in writing. The writing must be signed by the foreperson. The writing should be given to the case manager, who will give it to me. I will respond either in writing or by having you return to the courtroom so that I can respond orally.

If you do communicate with me, you should not indicate in your note what your numerical division is, if any.

5.03 DISAGREEMENT AMONG JURORS

The verdicts must represent the considered judgment of each juror. You may reach your verdict[s], whether for or against the parties, by a vote of six (6) out of seven (7).

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of other jurors or for the purpose of returning a verdict.

All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts.

5.04 COURT HAS NO OPINION

Let me finish up by repeating something that I said to you at the beginning of the trial. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if Marcus Kelley has proved the elements of his claim against the Defendants by a preponderance of the evidence.

5.05 VERDICT FORMS—JURY'S RESPONSIBILITY

Nothing said in these instructions and nothing in any verdict form prepared for your convenience is meant to suggest or convey in any way or manner any suggestion or hint as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.