UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

ASOCIACION DE PERIODISTAS DE PUERTO RICO, et al., Plaintiffs, v. ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	Civil No. 06-1931 (JAF)

OPINION AND ORDER

Plaintiffs, Asociación de Periodistas de Puerto Rico, Overseas Press Club of Puerto Rico, Normando Valentín, Víctor Sánchez, Joel Lago Ramón, Cossette Donalds Brown, Víctor Fernández, Annette Alvarez, and their respective conjugal partnerships, bring the present action for injunctive relief and damages against Defendants Robert Mueller and other agents of the Federal Bureau of Investigation ("FBI"). Docket Document No. 1-1. Plaintiffs allege that Defendants violated their First and Fourth Amendment rights by assaulting them and other members of the media in an attempt to prevent Plaintiffs from reporting on the execution of a search warrant on the home of an alleged pro-independence political

activist, which the undersigned had previously authorized.[1] Id. Defendants move for summary judgment on the basis of qualified immunity pursuant to Federal Rule of Civil Procedure 56. Docket Document No. 37. Plaintiffs oppose, Docket Document No. 49, and Defendants have replied to the opposition, Docket Document No. 64.

I.

Factual and Procedural Synopsis

We derive the following facts from Defendants' and Plaintiffs' motions, statements of material facts, and exhibits. Docket Document Nos. 38, 39, 41, 46, 50, 52, 53, 54, 55, 56, 58, 64. Unless otherwise indicated, facts contained herein are undisputed.

On February 10, 2006, FBI agents executed a search warrant at the home of Lillian Laboy-Rodríguez ("Laboy") at 444 De Diego Avenue, San Juan, Puerto Rico. When Plaintiffs and other members of the media caught wind of the operation, they arrived on the scene to cover the event. Members of the media set up behind the apartment complex's pedestrian gate and initially did not enter the gated grounds of the building. Throughout the day, other members of the public joined the press outside the gates of the apartment to observe and protest the FBI action. The crowd exhibited hostility towards the FBI by shouting and, towards the end of the day, by throwing rocks at FBI vehicles.

[1] The search warrant relates to an internal terrorism investigation and the possible involvement of certain pro-independence groups, including the "Ejército Popular Boricua" (Popular Boricua Army), also known as "Los Macheteros."

Approximately two hours into the four-hour search, a helicopter labeled Department of Homeland Security landed in a field adjacent to the apartment complex. Plaintiffs approached the landing area. Plaintiffs allege that Defendants "pushed away their recording equipment in a violent and threatening way" and that one agent "pointed a rifle at one of the plaintiffs in a threatening way." Docket Document No. 49.

After the search concluded and while agents loaded their cars, reporters entered the premises of the condominium in response to Laboy's daughter's signal to them to come through the pedestrian gate. FBI agents instructed the reporters to return to the other side of the gate. Agents then used pepper spray to compel the reporters back through the gate. Congestion occurred as the reporters squeezed through the narrow entrance. Several reporters sustained injuries during the agents' attempts to push the crowd back through the gate. Defendants assert that these injuries were caused by the crowd, Docket Document No. 39-1, while Plaintiffs claim that agents, in addition to using pepper spray against them, punched them, pushed them, kicked them, and used their batons against them, Docket Document No. 50. Plaintiffs also assert that Defendants acted with the express purpose of impeding Plaintiffs' efforts to record the day's events. Id.

On September 20, 2006, Plaintiffs filed a complaint against Defendants alleging (1) violations of Plaintiffs' First Amendment

rights of freedom of speech and the press, and (2) the use of excessive force in violation of the Fourth Amendment. Docket Document No. 1. Plaintiffs filed an amended complaint on February 8, 2007. Docket Document No. 34. Defendants moved for summary judgment on April 4, 2007. Docket Document No. 37. On April 13, 2007, Plaintiffs moved for relief pursuant to Federal Rule of Civil Procedure 56(f), seeking denial or continuance of the summary judgment motion to allow for discovery, which we denied on May 10, 2007. Docket Document Nos. 46-1, 63. Plaintiffs opposed the summary judgment motion on May 1, 2007. Docket Document No. 49. Defendants replied to Plaintiffs' opposition on May 16, 2007. Docket Document No. 64. Plaintiffs requested reconsideration of the order denying their Rule 56(f) motion on May 18, 2007. Docket Document No. 65. That request is still pending before this court.

II.

Standard for Rule 56(c) Motion for Summary Judgment

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions, and answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if

it potentially affects the outcome of the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

The moving party carries the burden of establishing that there is no genuine issue as to any material fact; however, the burden "may be discharged by showing that there is an absence of evidence to support the nonmoving party's case." See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 331 (1986). The burden has two components: (1) an initial burden of production, which shifts to the non-moving party if satisfied by the moving party; and (2) an ultimate burden of persuasion, which always remains on the moving party. See id. at 331.

The non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Summary judgment exists "to pierce the boilerplate of the pleadings and assess the proof in order to determine the need for trial." Euromodas, Inc. v. Zanella, 368 F.3d 11, 17 (1st Cir. 2004)(citing Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992)).

III.

Analysis

Defendants argue that (1) we should grant them summary judgment based on qualified immunity, and (2) Plaintiffs lack standing to

request injunctive relief. Docket Document No. 38. We first address Defendants' claim of qualified immunity.

A. Qualified Immunity

Qualified immunity protects state officials from the burden of standing trial or facing other onerous aspects of litigation. Saucier v. Katz, 533 U.S. 194, 200 (2001). "The reach of this doctrine is long, but not infinite." Pagan v. Calderon, 448 F.3d 16, 31 (1st Cir. 2006). The test to determine whether Defendants are entitled to qualified immunity has three parts: (1) "whether the plaintiff's allegations, if true, establish a constitutional violation;" (2) "whether the constitutional right at issue was clearly established at the time of the putative violation;" and (3) "whether a reasonable officer, situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right." Id. Qualified immunity, thus, "safeguards even unconstitutional conduct if a reasonable officer at the time and under the circumstances surrounding the action could have viewed it as lawful." Jordan v. Carter, 428 F.3d 67, 71 (1st Cir. 2005).

Applying this three-step approach, we first inquire if Plaintiffs allegations, if true, establish a constitutional violation. Pagan, 448 F.3d at 31. Plaintiffs allege violations of (1) their First Amendment rights to freedom of speech and the press and (2) the Fourth Amendment's protection against the use of

excessive force. Docket Document No. 34. We examine each of these allegations in turn.

1. First Amendment

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. Plaintiffs assert that Defendants have a First Amendment "obligation to accommodate the press' efforts to gather and report the news" and that "the First Amendment strictly limits the authority of law enforcement personnel to interfere with or prevent the gathering and reporting of news, particularly where the news is being reported live from a public location." Docket Document No. 49. Plaintiffs also state that "in the absence of any claimed interference or other security consideration, the police do not have the authority [to] deny the press access to the investigatory scene or facts." Id.

To support these assertions, Plaintiffs rely on cases that proclaim a general, but qualified, right of the press to gather news. Docket Document No. 49 (citing Richmond Newspapers v. Virginia, 448 U.S. 555, 578 (1980) (finding that the press may exercise their First Amendment rights on streets, sidewalks, and in parks); Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (finding that the press should be afforded some type of First Amendment protection); Daily Herald Co. v. Munro, 838 F.2d 380, 384 (9th Cir. 1988) (finding exit polling to be a protected activity when it occurs on public streets, sidewalks

and parks); CBS, Inc. v. Smith, 681 F. Supp. 794, 803 (S.D. Fl. 1988) (same); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D.Minn. 1972) (finding that the media has a right to be present in "public places and on public property")). Contrary to Plaintiffs' assertions, these cases do not establish specific rights of the press during the recording of live events from public locations or at an investigatory scene. See id.

Plaintiffs argue that Defendants violated their First Amendment rights when they "intentionally interfered with the gathering of information and news" by "violently knock[ing] aside microphones and cameras in an attempt to prevent the event from being recorded." Docket Document No. 34. Plaintiffs also allege that one agent "used his hand to block a video camera lens." Docket Document No. 49.

Plaintiffs rely on Connell v. Town of Hudson, 733 F. Supp. 465 (D.N.H. 1990), to support their theory that these actions represent First Amendment violations. Docket Document No. 49. In Connell, police instructed a photographer to move away from the scene of a car accident and, even after he retreated to the second floor of a house further away from the scene, threatened to arrest him if he continued taking pictures. 733 F. Supp. at 466. The court found that the police violated Connell's First Amendment rights by threatening to arrest him because Connell obediently followed police instructions and was taking pictures some distance from the scene. Id. at 470.

In contrast to the facts in Connell, here Plaintiffs do not contend that law enforcement instructed them to stop recording the

event or that the agents threatened to arrest them. See Docket Document Nos. 34, 49. Plaintiffs also do not allege that the agents asked Plaintiffs to turn over their cameras or film in violation of the First Amendment. See Gunnarson, 337 F. Supp. at 637 (finding that the police seizure of a reporter's camera constituted a prior restraint in violation of the First Amendment). Plaintiffs have not cited to any case, nor have we found one, where the court found a First Amendment violation based on law enforcement agents pushing away a microphone or temporarily seeking to obstruct recording by placing a hand in front of a camera.

We, therefore, find that Plaintiffs have not alleged a violation of their First Amendment rights. Because Plaintiffs do not meet the first prong of the test for qualified immunity in regard to their First Amendment allegations, we do not proceed to the second and third prongs. See Pagan, 448 F.3d at 31. Instead, we now turn to Plaintiffs' allegations regarding the Fourth Amendment.

2. Fourth Amendment

Plaintiffs allege that Defendants violated their Fourth Amendment rights by using excessive force against them. Docket Document No. 34. Specifically, Plaintiffs allege that "it was an excessive use of force to spray [Plaintiffs] with pepper spray and shove them backward through a security gate." Docket Document No. 49.

The Fourth Amendment protects people "against unreasonable searches and seizures." U.S. CONST. amend. IV. "To establish a

Fourth Amendment violation based on excessive force, a plaintiff must show that the defendant [agent] employed force that was unreasonable under the circumstances." Jennings v. Jones, 479 F.3d 110, 119 (1st Cir. 2007). We judge reasonableness "from the perspective of a reasonable officer on the scene." Graham v. Connor, 490 U.S. 386, 396 (1989).

In some circumstances, using pepper spray against non-suspects may be considered unreasonable. See Headwaters Forest Def. v. County of Humboldt, 276 F.3d 1125, 1130 (9th Cir. 2002) (finding the use of pepper spray against non-violent protesters to be unreasonable because "the protesters were sitting peacefully, were easily moved by the police, and did not threaten or harm the officers"). Where a crowd presents a threat to the safety of themselves or law enforcement, however, courts have found the deployment of pepper spray to be reasonable. Jackson v. City of Bremerton, 268 F.3d 646, 653 (9th Cir. 2001) (finding it reasonable for officers to use pepper spray against a group of people who attempted to interfere with an arrest, refused to obey the officers' commands to disperse, and engaged in verbal and physical altercations with officers).

Defendants argue that it was necessary for them to use pepper spray to subdue the crowd due to the "proximity of the crowd to weapons and the manner in which crowd members were crushed against the gate." Docket Document No. 38. Defendants also note that members of the crowd were shouting at the agents and carrying stones which they later threw at FBI vehicles. Docket Document Nos. 38, 41. We

agree with Defendants that they did not use excessive force when deploying pepper spray during their attempts to control the crowd, or when attempting to push the crowd back to the other side of the gate surrounding the apartment complex, because the agents reasonably could have believed that it was necessary to deploy the spray to maintain order. See Jackson, 268 F.3d at 653-54 (finding that the use of pepper spray was reasonable and necessary to control a "rapidly evolving" and escalating situation); McCormick v. City of Ft. Lauderdale, 333 F.3d 1234, 1245 (11th Cir. 2003) ("Given that pepper spray ordinarily causes only temporary discomfort, it may be reasonably employed against potentially violent suspects."); see also Griffin v. Runyon, No. 5:04-348, 2006 U.S. Dist. LEXIS 29688, at *33 (M.D. Ga., May 16, 2006) (referring to pepper spray as "a minimally intrusive tool"). None of the Plaintiffs in the present case complained that they suffered permanent injuries from the agents' use of pepper spray. Docket Document No 49.

Plaintiffs also allege, however, that Defendants punched them, kicked them, and hit them with metal batons. Docket Document Nos. 34, 49. Defendants deny these allegations. Docket Document No. 38. Defendants further ask us to substitute Plaintiffs' version of the facts with the evidence contained on a DVD submitted by Defendants. Docket Document Nos. 41, 64. Defendants cite to Scott v. Harris in support of their contention. 127 S. Ct. 1769 (2007). The Scott court found that the Court of Appeals should have relied on a videotape of the car chase at issue because the respondent's "version of events is

so utterly discredited by the record that no reasonable jury could have believed him" and there were "no allegations or indications that [the] videotape was doctored or altered in any way, nor any contention that what it depicts differs in any way from what actually happened." Id. at 1775-76.

In the present case, however, Plaintiffs dispute the accuracy and authenticity of Defendants' DVD. Docket Document No. 49. We, therefore, base our discussion on Plaintiffs' version of the facts and analyze whether by kicking, punching, and hitting Plaintiffs with batons, Defendants used excessive force in violation of the Fourth Amendment.

Courts have found that officers used excessive force when inflicting violence on individuals who posed no threat to themselves or others. See Vinyard v. Wilson, 311 F.3d 1340, 1348 (11th Cir. 2002) (finding excessive force when officer bruised and pepper sprayed female suspect who was handcuffed in back of patrol car); Park v. Shiflett, 250 F.3d 843, 853 (4th Cir. 2001) (finding excessive force where officers threw non-threatening couple against the wall and on the ground, used pepper spray against them, handcuffed and arrested them).

Courts have found, however, that law enforcement personnel may reasonably use force against members of a crowd when they ignore instructions to disperse and create a potential safety threat. See Gomez v. City of Whittier, No. 04-56944, 2006 U.S. App. LEXIS 29423, at **5 (9th Cir., Nov. 30, 2006) (affirming summary judgment on

excessive force claims where officers struck, tackled, and restrained plaintiffs during handcuffing due to "the volatile situation the officers faced, and the legitimate interest in maintaining order and safety"); Jackson, 268 F.3d at 653-54.

"The "most important single element" in the reasonableness analysis is the threat posed by the plaintiffs at the time of the incident." Gomez, No. 04-56944, 2006 U.S. App. LEXIS 29423, at **7-8 (quoting Smith v. City of Hernet, 394 F.3d 689, 702 (9th Cir. 2005)). We find that, faced with an angry mob that shouted insults at agents and carried rocks that they later hurled at departing FBI vehicles, Defendants reasonably could have believed that it was necessary to use physical force against members of the crowd that included kicking, punching, and hitting Plaintiffs with batons in order to prevent the situation from escalating into one that would threaten the safety of the agents, the crowd, and innocent bystanders.

"[O]fficers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." Graham v. Connor, 490 U.S. 386, 396 (1989). It is impossible to gauge exactly what measure of force would have been necessary to control the crowd at 444 De Diego Avenue and to maintain peace in the face of a potentially escalating situation. What is clear is that "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." Id. (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

We, therefore, find that Defendants did not act unreasonably in using pepper spray against Plaintiffs or in kicking, punching, or hitting them with batons. Because we find that Defendants did not use excessive force in violation of the Fourth Amendment, Plaintiffs have not satisfied the first prong of the qualified immunity test that requires them to prove that their allegations, if true, establish a constitutional violation. Pagan, 448 F.3d at 31. We, thus, find that Defendants are entitled to summary judgment on the basis of qualified immunity.

Because we hereby dismiss all of Plaintiffs' claims, we need not reach Defendants' argument that Plaintiffs lack standing to seek injunctive relief.

Finally, because we grant Defendants' motion for summary judgment, we find that Plaintiffs' motion for reconsideration of our Rule 56(f) motion, Docket Document No. 65, is moot.

IV.

Conclusion

For the aforementioned reasons, we hereby **GRANT** Defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. We also **DENY** Plaintiff's motion for reconsideration of our Rule 56(f) order.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 12th day of June, 2007.

s/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U. S. District Judge