

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
Juvenile Department

In the Matter of)
) Case No. 14JU02757
) Petition No. 140916138
GURULE, THAI)
)
) FINDINGS AND ORDER
A Child.)

This case came before me for hearing and trial. Ms. Lori Fellows appeared on behalf of the State and Mr. Steven Houze appeared on behalf of the youth, Mr. Gurule. By stipulation of the parties, the court has considered all of the evidence presented at the suppression motion hearing on February 25 and 26, 2015, and at trial on March 5 and 6, 2015, to include exhibits and testimony presented on all days. Additionally, I take judicial notice of various legal authorities and other commonly known sources of knowledge which I will specifically reference herein. I do not consider the narrative accompanying the second cell phone video clip of Exhibit 141, but do consider the audio of the first clip of Exhibit 141 and the video of both.

Late on the night of September 14, 2014, Thai Gurule, his older brother and two or three other men were crossing a street in the St. John's downtown area of North Portland. None of the men, including the youth, were engaged in any disruptive, suspicious, or criminal behavior. The court has ruled by way of separate findings and order that the youth were illegally stopped by Officer Betsy Hornstein who frisked at least one, perhaps more of the men. Nothing of concern was discovered.

The officer called for backup and Officers Jiminez and Hughes quickly came to the scene and were joined later by other officers. Thai Gurule turned away and walked up the sidewalk away from Officers Jiminez and Hornstein.

As the youth walked past, Officer Hughes said, "Hey" to the youth and when the youth continued, he again said, "Hey" and clapped his hands.

Thai Gurule turned to face Officer Hughes and in an angry or aggressive voice said "Don't fucking clap your hands at me". Officer Hughes stepped forward while the youth stepped back.

Both Officer Hughes and Hornstein indicate that they grabbed hold of the youth in an escort or control hold within seconds of the youth's angry statement. Both agree that this was done without warning or other preface. The court notes for the record that the demonstration given the court of a control hold shows a considerable use of force

gripping both the wrist and upper arm above the elbow. The purpose of the technique is to immobilize the person preventing them from the use of the arm thus controlled.

Both officers acknowledge that the youth had done nothing at this point to demonstrate any danger to the officers, himself or anyone else. Nothing in his conduct could reasonably lead to a suspicion that he was or had engaged in any criminal conduct. He was not being disruptive. At most he demonstrated anger at the manner in which he was being addressed by the officer and a desire to walk away from the scene. Again, the court has previously made findings and issued a ruling that the second detention was an illegal stop.

At the time of this restraint, both Officer Hughes and Hornstein testify that the youth tensed the muscles in his arm not letting the officers pull his arms down to his side. According to Officer Hughes the youth took no other action, and did not struggle but did say, "I don't like this, I don't like this". The Officers responded by telling him repeatedly to relax.

Officer Hughes informed the youth that he wanted to remove his backpack and wanted to handcuff him in order to do that. The youth indicated he did not want to be cuffed and offered to remove the pack himself, but the officers continued their attempt to control the youth physically.

Meanwhile a crowd was gathering. At this point the video demonstrates that from a distance of a few feet, the youth's older brother was loudly protesting the treatment of the youth. He was moved back from the immediate scene but can clearly be heard telling the officers that the youth was a high school student who played football, didn't smoke or drink and that their conduct was not called for.

Officer Hughes acknowledges hearing this information but continued with the control holds. More people gathered and began yelling obscenities at the police.

To this point, Officer Hughes agrees that the youth was not attempting to swing his arms, to strike at the police, to break free or to run away. He was standing with his arms tensed and drawing them towards his chest and not relaxing. All of the officers acknowledge that they had no knowledge of any criminal behavior of the youth that would be grounds for arrest.

However due to the growing crowd, and the youth "not relaxing", Officers Hughes and Hornstein decided to take the youth "to the ground" to secure him in order to address the crowd for officer safety. Officer Hughes informed Mr. Gurule of his intent and began what he intended to be a slow and gradual movement of the youth down to the ground. However, there was no time for a response from the youth since unknown to Officer Hughes, Officer Hornstein immediately performed a leg sweep attempting to trip the

youth's legs from underneath him thereby causing him to lose balance and fall face forward towards the ground.

The video in Exhibit 141 shows a fall of the youth towards the ground with his hands landing on the ground in front of him to stop his fall. Officer Hughes testified that he still had control of the youth's arms and the youth only had use of his feet.

The youth attempted to get his feet underneath himself and stand up by pushing up off the ground and then tried to stand and move forward. His arms are behind him while the officers still have hold of his upper arms. Officer Hornstein decided to deliver a knee strike driving her knee into his stomach as hard as she could to "knock the wind out of him."

At this point people in the crowd can be heard to be loudly condemning the police action. Throughout the incident, the brother can be clearly heard to be repeatedly and angrily telling officers that their conduct is illegal, that it is harassment, and that they have no cause for their conduct. Other bystanders are also loudly joining into that refrain

The youth continued to attempt to get up and move forward away from the officers. As Officer Hornstein described, the youth kept "driving" forward attempting to remain his feet and move away from the officers with his arms either in front and on the ground or behind his body. At this point, contrary to Officer Hornstein's testimony, the youth was not throwing wild punches or striking out at officers.

At some point in the conflict the two officers were joined by Sergeant Lile who had just arrived and had no knowledge of anything preceding his arrival except that he saw two officers presumably placing the youth under arrest. He seized the youth by his large afro and began placing pressure on the youth's head to force him to the ground.

The youth continued to struggle to get to his feet. Officer Hornstein delivered 3 or 4 punches to the youth's soft tissue of his torso. When he continued to attempt to stand, Officer Hornstein lowered her body position to below the youth and lifting his leg up, again attempting to cause him to lose his balance and fall to the ground.

It is somewhere in this time that Officer Hornstein states that she felt the youth wrap one arm around her neck for two or three seconds and start to get tighter. Officer Hornstein stepped back and out. She testifies that she reengaged and delivered another 3 or 4 "focused blows" with as much momentum as she could deliver to the soft tissue of his torso.

At this early stage of the encounter both Officer Hughes and Sgt. Lile deny seeing either the physical force being used by Officer Hornstein or any attempt by the youth to place

Officer Hornstein in a choke hold. From other evidence at trial, the court finds that at this time when the youth arm came into contact with Officer Hornstein his arm was over the Officer's shoulder not around her neck in any kind of choke hold.

The officers acknowledge that in their second attempt to take the youth back to the grounds they used more of their strength and force with much quicker action. All three officers lost their balance falling with the youth. It is noted that Officer Hornstein is 6'1" and 185 lbs. and Sgt. Lile is 6'2" and 235 lbs. The youth continued to struggle to get to his feet, so Officer Hornstein described delivering 3 or 4 punches to the youth's soft tissue of his torso. When he continued to attempt to stand, Officer Hornstein lowered her body position to below the youth and lifting his leg up, again attempting to cause him to lose his balance and fall to the ground.

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The officers all generally agree that they were not observing the tactics or actions of the other officers throughout most of the encounter and rather, were focused on their own encounter with the youth.

Officer Hughes withdrew from the encounter with the youth to address the increasingly hostile crowd which had grown to at least 20 people. Officer Lile took his place.

All of the officers concur that estimating time during the interaction with the youth is very difficult. Tracking time on the video, in fact the entire encounter from the time hands were first put on the youth until he was tased lasted only approximately 1 minute and 40 seconds. Officer Hughes estimated that the control hold last as much as a minute prior to the first attempt to put the youth on the ground which leaves less than a minute for the encounter from the "take down" to the Taser use.

Officer Hornstein testified that the youth was violently throwing punches. Sgt. Lile's account is much more accurate. The portion of the Austin Bain video prior to the time that the group reached the bank wall, clearly repudiates the allegations that the youth was throwing punches. While he forcefully attempted to regain his feet and maintain his balance, the youth was attempting to move forward away from the officers. He was not wildly throwing punches.

Sgt. Lile testified that he did not want to use punches or knee strikes since the knee is a large and blunt instrument that can cause internal injury or break ribs. If a person is on the ground and the officer is over the person, injury can be much more significant. Punches are also dangerous given that the officer can break bones in the hand and the person can sustain an injury.

The second attempt by all three police almost forced the youth to the ground but he then twisted his body getting his feet under him again. At about this time, Sgt. Lile believed that the youth attempted to punch at him. Officer Hughes stepped away to focus on crowd control .

The two remaining officers then moved the youth into a corner of the bank brick wall and its ATM machine wall. Officer Hornstein asserts that she again felt the youth wrap an arm around her throat and grab her hair. Again she backed away from his arm. She then delivered two more knee punches to his body which she indicated slowed him down.

Officer Hornstein testified that somewhere near the ATM while the youth was throwing wild punches, she was punched under the right eye. She states that she could feel throbbing for about an hour. No mark occurred and no swelling happened.

Sgt. Lile observed at this time Officer Hornstein's knee strikes and punches and was concerned that in the escalated encounter someone would get hurt. Sgt. Lile then tased the youth who fell to the ground wailing in pain. The youth was then taken to the patrol car and subsequently transport to an ER by EMTs with the Portland Fire Department.

At trial, Officer Lile acknowledged that he did not have a good view of what was happening between Officer Hornstein and the youth. At the wall he initially testified that the participants were "tangled together" and that the youth "somehow had an arm around her" referring to Officer Hornstein and that she was bent at the waist. After being directed back to his report, Sgt. Lile changed his testimony that the youth's arm was "locked around Officer Hornstein in a head lock and that he was trying to punch her".

On redirect, Lile testified that Officer Hornstein delivered the knee strikes and punches in self-defense due to the youth's choke hold on her. At that point he decided to tase the youth.

After carefully reviewing testimony and reviewing the exhibits, the first testimony of Sgt. Lile is more accurate that the youth's arm was again momentarily somehow around Officer Hornstein. In viewing all of the evidence, the court finds that the state has not established beyond a reasonable doubt that the youth's arm was positioned around Officer Hornstein's throat.

The youth, Mr. Gurule, has been charged with five charges arising from this incident. They are:

Count 1 - Assaulting a Public Safety Officer; Count 2 - Attempted Assaulting a Public Safety officer; Count 3 – Resisting Arrest; and Counts 4 and 5 which are both Attempted Strangulation charges. The youth has raised the defense of self-defense pursuant to ORS 161.209.

Count 3 – Resisting Arrest.

In this case, the fact that I have previously found the stops to be unlawful is not a defense to the resisting arrest charge. It plays no part in my determination herein.

ORS 162.315 (1) states that a person commits the crime of resisting arrest if the person intentionally resists a person known by the person to be a peace officer in making an arrest. Arrest is defined to include either placing a person in actual or constructive restraint, or to take a person into custody for the purpose of charging that person with an offense. *State v. McClure*, 355 OR 704 (2014). An actual or constructive restraint is more than a stop.

It is no defense that the officer lacked legal authority to make the arrest so long as the officer is acting under color of official authority. In this case, the officers all acknowledge that at the onset the youth was doing nothing which would constitute justifying charging him with a crime.

Rather, the state argues that the officers were placing the youth in lawful actual restraint presumably acting under color of official authority. It is unclear to this court what statutory basis establishes the official authority permitting the restraint imposed in this case other than perhaps ORS 133.033 which authorizes officers to perform community caretaking functions. That statute establishes broad authority in performing “any lawful acts that are inherently in the duty of the peace officer to serve and protect the public.”

That authority is described by several examples, none of which resemble the use of actual restraint as done herein. However, those examples are not intended to be exclusive and the statute broadly allows the police to engage in such functions “except as otherwise expressly prohibited by law.”

Actual restraint was placed upon the youth at the moment that Officers Hughes and Hornstein placed control or escort holds on the youth. At that moment, even given the broad authority described above, there is insufficient evidence before the court that the Officers were operating under their community caretaking function, or therefore under color.

At that time, there is no evidence of concerns about a crowd forming. That concern arose as much as a minute later when the officers decided to take the youth to the ground.

The only facts before the court are that the youth failed the attitude test when he turned and aggressively complained about Officer Hughes clapping him hands. Officer Hughes stepped forward and the youth stepped back and Officer Hughes, immediately followed by Officer Hornstein placed the holds restraining the youth.

A necessary element that is required to be proven by the State is that an "arrest" as defined above was occurring. Since there was no charge for which the youth was being taken into custody and insufficient evidence of authority for the actual restraint, the State has not met its burden that the youth resisted a person known by the youth to an officer in making an arrest while acting under color of official authority.

Even if the restraint was imposed lawfully, this fact finder does not find sufficient evidence to permit a finding beyond a reasonable doubt that the youth resisted arrest.

"Resists means the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury to any person and includes, but is not limited to, behavior clearly intended to prevent being taken into custody by overcoming the actions of the arresting officer. The behavior does not have to result in actual physical injury to an officer. Passive resistance does not constitute behavior intended to prevent being taken into custody." ORS 162.315(2)(c).

For purposes of analysis, this court divides the conduct of the youth to conduct before and after the take down attempts to the ground. Testimony from the three officers who testified is inconsistent with each other and therefore, the court also relies upon the first of the videos in Exhibit 141. The conduct seen in that early portion of the video is consistent with Officer Hughes' testimony that prior to the take down, the youth was not swinging to attempt to strike out or break free and not try to run away. He was tensed up. He was not swinging or attempting to strike out or kick at the officers. He was standing with his arms tensed.

At this point, the State does not establish beyond a reasonable doubt that the youth is using or threatening the use of physical force that is creating a substantial risk of physical injury. At most, he is passively resisting the officers' efforts to place him in actual or constructive restraint.

After the effort to take the youth to the ground since actual force is being used against the youth, the defense of self-defense applies.

Justification, including the justification of self-defense, once raised by a defendant, requires the state to disprove the defense beyond a reasonable doubt. ORS 161.055. A person's right to self-defense is governed by ORS 161.209, which provides that a person is justified in using physical force to defend himself "from what *the person* reasonably believes to be the use or imminent use of unlawful physical force and the person may use a degree of force which the person reasonably believes to be necessary for the purpose."

Therefore, as the Oregon Supreme Court articulated in *State of Oregon v. Oliphant*, 347 OR 175, at 189 (2009) "The plain wording of that statute thus establishes that, in

general, a person's right to use force in self-defense depends on the person's *own* reasonable belief in the necessity for such action, and not on whether the force used or about to be used on him actually was lawful.”

It is the imminent danger, real or apparent, of great bodily injury to himself which justifies a defendant in protecting himself.

Commentary to sections 22 to 24 of the Proposed Oregon Criminal Code adopting ORS 161.209.

And while a person may not use physical force to resist what is actually or perceived by the defendant to be an unlawful arrest, a person may use physical force in defending oneself from excessive use of force by an arresting officer. Any injury caused to an officer in the course of engaging in a justifiable use of force to defend oneself may under such circumstances be justified and not criminal.

The court is unaware of any Oregon cases that establishes guidance about what circumstances of a defendant are appropriate to consider. However, the finder of fact must be allowed to analyze the circumstances surrounding the event with the particular circumstances of the defendant in mind in order to assess whether the defendant's assessment of the event and the need for self-defense was reasonable from that person's perspective. As the Court of Appeals stated in *State v. Carlon*, 265 Or App 390 at 397 (2014) citing *Oliphant*, a defendant has the right to have the jury consider the circumstances surrounding the event from his own point of view.

In this case, the youth's age is a relevant factor which the court considers even without the testimony of youth. Therefore, the question before the court is whether this youth and a reasonable 16 year old youth in his position would have believed that the use or imminent use of force against him exceeded the force reasonably necessary and whether he was entitled to defend himself with a degree of force which a reasonable 16 year old would reasonably believe to be necessary for the purpose.

I take judicial notice of findings and reasoning of the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 1 at 15 (2005) in which the Court found that “as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm “ a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young....Even the normal 16 year old customarily lack the maturity of an adult....juveniles have less control or less experience with control over their own environments.”

The take down, although intended to be gentle and with adequate warning was nothing like that plan. Officer Hornstein swept the youth's feet out from under him causing he the sensation of falling forward without the use of his hands to break his fall. The next 35 to 45 seconds was a melee of fists and punches and bodies falling upon him. Prior to reaching the wall, the youth was attempting to regain his footing and get back on his

feet and remove himself from what a reasonable person would have felt was a senseless and aggressive use of excessive physical force.

Once at the wall, the independent evidence of the video clips is less clear but continues to show the youth trying to struggle away from the officers rather than engage in a physical altercation. Officer Hornstein again can be seen using physical blow on the youth.

From the officer testimony alone, and from common sense, the tactics used by Officer Hornstein with the degree of force described and the parts of his body where she chose to repeatedly strike him objectively subjected the youth to significant risk of serious physical injury which was one of the reasons that Sgt. Lile chose not to use such tactics. The legality or appropriateness of the use of tactics is not the issue here.

Rather, I must determine whether the youth was reasonable in the use of force and degree of physical force used to defend himself. Especially given that confusion, rapidity of events, the tangle of officers and the youth and the confusion caused by the crowd, I find that as to all charges herein, the state has not established beyond a reasonable doubt that the youth was not reasonably justified in the use of self-defense as to all of the charges herein.

Even if justification is not a complete defense herein, as to Count A which charges the youth with assaulting Betsey Hornstein, there is insufficient evidence concerning the level of discomfort or the amount of pain that Officer Hornstein alleges when she states that her cheek throbbled for about an hour after the event to find substantial pain resulted from any contact with the youth especially given the credibility findings herein and the lack of any photograph or evidence of impairment of bodily functioning.

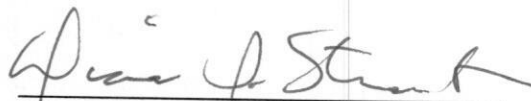
As to Counts B and D, factually, the evidence is contradictory and the evidence with the least room for error, the videos does not confirm the youths arm around the throat and neck of Officer Hornstein. The state has not established beyond a reasonable doubt that the youth unlawfully and intentionally attempted to impede the normal breathing and blood circulation by applying pressure on the throat and neck of Officer Hornstein

Therefore, the court holds that the state has not established beyond a reasonable doubt the five counts of this petition.

IT IS HEREBY ORDERED THAT:

The youth is not found to be within the jurisdiction of the court and the petition is dismissed.

Dated this 12th day of March, 2015.


Diana I. Stuart, Circuit Court Judge