

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-13157

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT MAR 14, 2007 THOMAS K. KAHN CLERK

D.C. Docket No. 04-20379-CV-STB

JUAN VELAZQUEZ,

Plaintiff-Appellant,

versus

CITY OF HIALEAH,
a Municipal Corporation in Dade County,
Florida,
RAUL MARTINEZ,
ROLANDO BOLANOS, Police Chief,
KELVIN ORLANDO BOSTIC,
BARBARO HERNANDEZ,
THERESA PEARCE, Sargeant,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(March 14, 2007)

Before TJOFLAT, CARNES and HILL, Circuit Judges.

PER CURIAM:

Juan Velazquez appeals the grant of summary to the City of Hialeah (the “City”) on his claim for damages under 42 U.S.C. §1983, alleging that two of its police officers used excessive force upon him after he was handcuffed during his arrest for driving under the influence. The district court held that Velazquez could not prove a “critical element of his case – i.e., which officer actually inflicted the injuries he is claiming.” Order Granting Motion for Amendment of Judgment and Amending Order on Motions for Summary Judgment at 5. As this conclusion is based upon an erroneous view of the law, we shall reverse.

The law of this circuit is that “an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer’s use of excessive force, can be held liable for his nonfeasance.” *Skirtch v. Thornton*, 280 F.3d 1295, 1302 (11th Cir. 2002) (quoting *Fundiller v. Cooper City*, 777 F.2d 1436, 1441-42 (11th Cir. 1985); *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 924 (11th Cir. 2000). Therefore, an officer who is present at such a beating and fails to intervene may be held liable though he administered no blow. *Id.* Furthermore, in *Skirtch*, we expressly rejected the argument that “the force administered by each defendant in [a] collective beating must be analyzed separately to determine which of the defendants’ blows , if any, used excessive

force.” 280 F.3d. at 1302. The City of Hialeah concedes that this is the law.

Nonetheless, the district court agreed with the City that it was entitled to summary judgment because Velazquez would be unable at trial to prove the essential element of his claim of excessive force – that one or both officers beat him while he was handcuffed. Apparently, the district court agreed with the City that because Velazquez did not see who beat him, if anyone did, there would be no evidence at trial from which a jury might assign liability for the beating.

This is not the law. Were this the law, all that police officers would have to do to use excessive force on an arrestee without fear of consequence would be to put a bag over the arrestee’s head and administer the beating in silence.

Velazquez alleged that two officers were present when he was subjected to a beating while handcuffed. He has named the two officers in his complaint. They have admitted being present. Velazquez’s allegations, taken in the light most favorable to him, as we must on summary judgment, create a triable issue of fact as to whether one or both of the officers used excessive force upon him, and whether one or the other failed to intervene to stop the use of such force.

Velazquez’s testimony at trial that he was beaten is competent evidence from which a jury may infer that excessive force was used. His testimony that two officers were present, coupled with their admission that they were present, permits

the jury, if it believes that he was beaten, to find that both of the officers administered the excessive force or that one beat him while the other failed to intervene.¹

The officers may testify that they did not beat him. They may also testify that because no excessive force was used, no one failed to intervene. Their testimony is competent evidence that permits the jury to find that they did not use excessive force. But, whether excessive force was used in this case is an issue of fact for the jury to resolve. In view of Velazquez's proffered testimony, we may not resolve his claim of excessive force on summary judgment.

The district court's opinion rests on the flawed premise that if Velazquez cannot identify which officer beat him, if any did, or which officer failed to intervene, if any did, that there is *no* evidence from which a jury could reasonably infer that one or more of the officers present beat him and that if one did not beat him, then he failed to intervene in the beating. This is not so. Velazquez's testimony that he was beaten and that the two officers were present permits such an inference where the law prohibits both the beating and the failure to intervene.

The judgment of the district court is due to be reversed and the case is to be remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

¹The City conceded at oral argument that no officer reported any beating.