

Kingsley v. Hendrickson, et al.

The following summary is merely a compilation of some of the statements attributable to witnesses and others who interacted with or witnessed the interaction among and/or between Mr. Michael B. Kingsley and Monroe County (WI) Deputies on May 21, 2010. It is not intended as, nor should it be considered as, a complete statement of the actual occurrence.

On May 21, 2010 Mr. Kingsley was a *pre-trial* detainee in the Monroe County (WI) jail and was reported to be age 28, white, 5-foot 7-inches in height, and 170 pounds. Mr. Kingsley, a convicted felon, had a lengthy jail and/or prison history having been incarcerated in the Monroe County Jail, the Dane County Jail, and the Wisconsin State Prison System. In April 2010 he was incarcerated in the Monroe County Jail that was approximately one month prior to his May 21, 2010 confrontation with Monroe County Jail Deputies.

On Thursday, May 20, 2010 Monroe County Sheriff's Deputy Manka performed mandatory cell checks and saw the light fixture above Mr. Kingsley's bunk was covered with a sheet of yellow legal paper. Deputy Manka told Mr. Kingsley to remove the paper. Mr. Kingsley replied, "[you] will have to call a CERT team then." CERT is an acronym for Correctional Emergency Response Team.

At approximately 10:45 p.m. Deputy Manka conducted a cell check after lock-down of the jail, and saw the yellow paper had not been removed. After again asking Mr. Kingsley to remove the paper, Mr. Kingsley replied, "Better call in the CERT team." Deputy Manka warned Mr. Kingsley that if he failed to comply with jail rules he would be subject to disciplinary action. Mr. Kingsley was written an "Inmate Minor Violation Report" by Deputy Manka that suggested a 23-hour lock-in of his cell starting on May 20, 2010 at the time of the incident and ending at 9:00 p.m. on May 21, 2010.

On Friday, May 21, 2010 at approximately 6:33 a.m., all inmates were locked in their individual cells. After the inmates were in lock-down, Lt. Conroy entered the cell block and walked to Mr. Kingsley's cell and directed him to remove the paper from the light fixture. Mr. Kingsley refused to remove it. Lt. Conroy told his staff they would need to make a cell entry. Two Deputies were called into the jail from their road duties to help handle the situation with Mr. Kingsley.

At approximately 6:38:55 a.m. Lt. Conroy, Sergeants Hendrickson and Shisler, and Deputies Blanton and Fritz entered the cell block and approached Mr. Kingsley's cell. Mr. Kingsley was ordered to stand up and put his arms behind his back. He refused the order. Lt. Conroy then ordered Mr. Kingsley to put his hands behind his back, and although he complied, he kept them far enough apart so the handcuffs could not be applied.

At approximately 6:40:35 a.m. Mr. Kingsley's cell door was opened and Mr. Kingsley was handcuffed. After being handcuffed, Mr. Kingsley refused to walk out of the cell.

At approximately 6:42:15 a.m. Mr. Kingsley was carried out of his cell by Deputies because he claimed his foot hurt and that he could not walk. Because Mr. Kingsley offered active resistance in the form of “dead weight,” the Deputies lifted him under both arms and carried him from the cell and down the hallway into Receiving Cell #3. Mr. Kingsley’s cell extraction was videotaped and showed how the Deputies carried him down the jail hallway.

At approximately 6:44:15 a.m. Mr. Kingsley was placed on a concrete bunk in Receiving Cell #3. When Deputies attempted to remove the handcuffs from Mr. Kingsley’s wrists, he “became physically resistive, struggling and trying to get up.” Mr. Kingsley can be heard grunting loudly on the audio recording when Deputies told him to “stop resisting.” Both the video and Sergeant Hendrickson’s report confirmed Sergeant Hendrickson “placed his knee and lower leg across Mr. Kingsley’s upper back and applied pressure to help maintain control and to keep him from resisting and struggling with officers.” Mr. Kingsley told Sergeant Hendrickson, “get the fuck off me.”

After turning his head toward Sergeant Hendrickson’s leg causing Sergeant Hendrickson to believe Mr. Kingsley was going to bite him, Lt. Conroy reported that Sergeant Hendrickson “had been involved with a cell entry in the past where [Mr.] Kingsley bit him.” [NOTE: At trial it was proven this was a misunderstanding: Mr. Kingsley had not tried to bite Sergeant Hendrickson in the past.] Deputy Degner was told to apply a drive stun to Mr. Kingsley.

At approximately 6:45 a.m., Deputy Degner, who was holding his TASER® in his right hand removed its cartridge and applied a drive stun (contact or touch stun) to “the right shoulder blade muscle area” of Mr. Kingsley. The drive stun to Mr. Kingsley’s back area lasted for a standard-5-second cycle. The drive stun had little or no effect on Mr. Kingsley. At approximately 6:46 a.m. the Deputies decided to leave the handcuffs on Mr. Kingsley until he calmed down; Mr. Kingsley replied, “Fine leave.”

At approximately 6:47 a.m. the video showed Deputy Blanton double-locking the handcuffs so they would not tighten on Mr. Kingsley’s wrists. The Deputies left Receiving Cell #3 at approximately 6:48 a.m. Approximately 11 minutes later, the handcuffs were removed from a compliant Mr. Kingsley at approximately 6:59 a.m. Mr. Kingsley testified he was not fighting or struggling with the Deputies when they removed the handcuffs.

TRIAL #1

When the first trial began, the constitutional force standard that applied to *pre-trial* detainees was the Fourteenth Amendment. On October 17, 2012--at the end of the trial in federal court--the Honorable Barbara B. Crabb gave the jurors instructions that were jointly proposed by plaintiff and defense counsel. The following is a partial copy of those jury instructions:

Ladies and Gentlemen of the Jury. Now that you

4 have heard the evidence and the arguments, I will give
5 you the instructions that will govern your deliberations
6 in the jury room. It is my job to decide what
7 instruction -- what rules of law apply to the case and
8 to explain those rules to you. It is your job to follow
9 the rules, even if you disagree with them or don't
10 understand the reasons for them. You must follow all of
11 the rules; you may not follow some and ignore others.

New Page

Excessive force means force applied recklessly;

6 that is, unreasonable in light of the facts and
7 circumstances of the time. Thus, to succeed on his
8 claim of excessive use of force, plaintiff must prove
9 each of the following factors by a preponderance of the
10 evidence:

11 First, defendants used force on plaintiff.

12 2. Defendants use of force was unreasonable in
13 light of the facts and circumstances at the time;

14 3. Defendants knew that using force presented a
15 risk of harm to plaintiff, but they recklessly
16 disregarded plaintiff's safety by failing to take
17 reasonable measures to minimize the risk of harm to
18 plaintiff; and

19 4. Defendants' conduct caused some harm to
20 plaintiff.

21 In deciding whether one or more defendants used
22 "unreasonable" force against plaintiff, you must
23 consider whether it was unreasonable from the
24 perspective of a reasonable officer facing the same
25 circumstances that defendants faced. You must make this

New Page

1 decision based on what defendants knew at the time of
2 the incident, not based on what you know now.

3 Also, in deciding whether one or more defendants
4 used unreasonable force and acted with reckless
5 disregard of plaintiff's rights, you may consider such
6 factors as:

7 The need to use force;

8 The relationship between the need to use force and
9 the amount of force used;

10 The extent of plaintiff's injury;

11 Whether defendants reasonably believed there was a
12 threat to the safety of staff or prisoners, and

13 Any efforts made by defendants to limit the amount
14 of force used.

15 A person can be harmed even if he did not suffer a
16 severe injury.

17 You have heard evidence about whether the
18 defendants' conduct complied with or violated their
19 training and Monroe County Sheriff's Department
20 policies. You may consider this evidence in your
21 deliberations. But remember that the issue is whether
22 the defendants used excessive force on plaintiff, not
23 whether defendants complied with or violated their
24 training or the Monroe County Sheriff's Department
25 policies.

The jury returned a defense verdict in favor of all Defendants. Plaintiff next appealed to the 7th Circuit Court of Appeals. The verdict was affirmed along with the definition of excessive force. Plaintiff next appealed to the SCOTUS where it was heard and held that the constitutional force standard that will apply to *pre-trial* detainees is the Fourth Amendment. The Justices remanded the case back for a retrial using the Fourth Amendment standard.

February 22, 2016

The trial began on Monday, February 22, 2016 with jurors returning a verdict on Friday. This time the arguments made were very straightforward and not complicated: Deputies had caused pain to Mr. Kingsley (i.e., use of pressure points, knee on the back, drive stun, etc.), and that force was unreasonable given the totality of the circumstances. The trial was held in the same federal courthouse, but a different Judge had been assigned to hear the case.

After both sides had rested, jurors were instructed by the Judge regarding force using the Fourth Amendment standard. The following is a partial copy of those jury instructions:

“Plaintiff alleges that defendants used excessive force against him in violation of his constitutional rights. To succeed on this claim, plaintiff must prove by a preponderance of the evidence that one or both of the defendants used unreasonable force against plaintiff. You must decide whether each defendant’s use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that each defendant faced. You must make this decision based on what the officer knew at the time, not based on what you know now. In deciding whether each defendant’s use of force was unreasonable, you must not consider whether that defendant’s intentions were good or bad.

“In performing his job, an officer can use force that is reasonably necessary under the circumstances. In deciding whether the force that each defendant used was reasonable, you must consider all of the circumstances of the case. Some of the factors that you may consider include:

- the need for the use of force;
- the relationship between the need for the use of force and the amount of force used;

- the extent of plaintiff’s injury;
- any efforts made by defendants to temper or limit the amount of force;
- the threat reasonably perceived by the officers; and
- whether plaintiff was actively resisting.

“The factors listed above are examples of the circumstances that can apply to a determination of excessive force, but they are not the only factors that you can consider. You have heard evidence about whether defendants’ conduct complied with or violated their training and the Monroe County Sheriff’s Department’s policies. You may consider this evidence in your deliberations as it is relevant to the totality of the circumstances. But remember that the issue is whether defendants’ use of force was unreasonable under the circumstances, not whether defendants complied with or violated their training or the Monroe County Sheriff’s Department’s policies.

“If you find that plaintiff has proved by a preponderance of the evidence that one or both of the defendants used unreasonable force against him, then you should find for plaintiff by answering “yes” to the question on the verdict. If, on the other hand, you find that plaintiff did not prove by a preponderance of the evidence that one or both of the defendants used excessive force against him, then you should find for defendants by answering “no” to the question on the verdict.”

The jury returned a defense verdict in favor of all Defendants.

Take a moment and compare the two sets of jury instructions. Note their differences. It is rare that people get to see one set of facts be examined on two separate occasions using two separate constitutional standards.

Observations of Dr. Peters

The following observations were made by John G. Peters, Jr., Ph.D. who appeared as an expert witness for all defendants at the original trial and at the second trial following the Supreme Court of the United States (SCOTUS) vacating the original verdict and remanding it back for trial. Dr. Peters attended the last day of trial testimony, and was not present for opening or closing statements, nor was he present during the plaintiff’s testimony or that of the plaintiff’s expert, a certified and working Wisconsin police officer. On the final day of testimony, Dr. Peters saw 3 deputies examined by counsel, and based his observations and recommendations upon what he observed. Counsel for plaintiff and defendants were quite competent, and vigorously represented their client(s). The document does not provide a summary of the trial. The intent of this document to provide helpful insights that will assist others when involved in force events and/or involved in litigation.

Appearance: Between the first and second trials, one defendant Deputy had retired from the department and was working as a school janitor. Fortunately, he lived close to Madison so it was convenient for him to attend trial. He was Grandfatherly in appearance and did not look like a heavy-handed deputy as portrayed by the Plaintiff. His voice was mild, yet he answered the questions succinctly and with the knowledge of an experienced law enforcement officer. The Deputies who testified while I was in the courtroom were wearing civilian clothes, except one road deputy who happened to be the one who used a drive stun on the Plaintiff. All were dressed very nicely, and gave a good appearance.

Know definitions: A major focus of the cross examination was whether or not Mr. Kingsley demonstrated “active resistance.” The Wisconsin DAAT (Defensive and Arrest Tactics) manual contained the definition of “active resistance,” and since you have just reviewed the Judge’s instructions to the jury this was a key variable jurors had to consider in analyzing force. Plaintiff’s expert, a working Wisconsin police officer, had testified Mr. Kingsley did not engage in “active resistance.” During cross examination, at least one Deputy testified that when the drive stun was applied, Mr. Kingsley was not “active resisting” the Deputies.

Before testifying, know the key definitions and remember them. Defendants had very skilled counsel. Skilled or not, counsel cannot answer the questions for the officers who are testifying. Therefore, review key definitions.

Also, get a copy of your federal Circuit’s jury instructions. Review the jury instructions about force standards. Know ahead of time how the jury will be instructed. This may provide some insights into how you answer questions.

The Deputy who applied a drive stun to the Plaintiff really understood the force levels he had been taught. He testified the first level of force was presence, then verbal, then empty-hand control, and then TASER® or pepper spray. When asked why he had used a drive stun, the Deputy spoke directly about the levels of force he was taught during training, and that he had stopped after using a drive stun because additional force would have violated his training. In short, he told the jurors the Deputies responded to Mr. Kingsley’s refusal to allow them to remove the handcuffs. “I’ve never had a prisoner who wanted to keep on the handcuffs,” he told the jurors. “Everyone wants them off as soon as possible.” Great testimony!

Put it into your report: Plaintiff’s counsel continuously asked the Deputies why they had used the force they did on Mr. Kingsley. Most of the deputies testified about what Mr. Kingsley did to blunt their efforts to remove him from the cell or to remove the handcuffs, and also what he “could” have done to them, but few of these concerns were written in their reports. “If it is so important today, why didn’t you put it into your report when you wrote it?” asked Plaintiff’s counsel. One Deputy testified “I didn’t do it then, but I do it now,” which caused the Judge to ask him from the bench, “Is it a result of this litigation?” The Deputy replied, “Yes.”

One point that was repeatedly made by the Deputies during their testimonies was the fear of Mr. Kingsley trapping their fingers in the chain of the handcuffs, injuring them. Law enforcement officers know from training that getting a finger caught in the handcuff chain can cause severe injury. Yet, no Deputy had written about this concern in his report.

It is very important to explain why you had to use force, including your concerns. Write a detailed report before leaving the building. If you think of something a day or two later, write a Supplemental Report. Testifying at deposition or at trial about concerns you had when you used force that were not included in your report may give the impression that “you’re making up stuff” to justify the force used.

Another focus was on why the Deputies had not removed the handcuffs from Mr. Kingsley sooner than after they had left the cell and then returned several minutes later, all which was captured on video. Many of the Deputies had testified they wanted to remove the handcuffs while Mr. Kingsley was face-down on the concrete bunk. When asked “Why?” these Deputies cited a number of reasons including: (1) If Mr. Kingsley had rolled off the approximate 3-foot high concrete bunk, he could not use his hands to blunt his fall; and, (2) If Mr. Kingsley had stood-up after getting off the bunk and then fell, he could not have used his hands to blunt his fall.

After these “safety concerns” for Mr. Kingsley had been explained (i.e., not being able to stop or minimize his fall because he was handcuffed), Plaintiff’s counsel asked, “What did you do next?” Deputies testified, which was supported by the video, they left the cell and Mr. Kingsley, who remained lying face-down on the concrete bunk. “Weren’t those same safety concerns present when you left the cell and Mr. Kingsley?” asked Plaintiff’s counsel. It was clear to most everyone in the court room these safety concerns remained, even after the Deputies had left the cell leaving Mr. Kingsley lying face-down on the bunk.

If the initial reports had discussed these concerns and that there was nothing else the Deputies could have done to remove the handcuffs, this line of questioning may not have been very effective.

Study your reports and video before testifying: Plaintiff’s counsel focused on when the handcuffs were double-locked and argued they before they were double-locked the handcuffs had caused unnecessary pain to Mr. Kingsley. The video showed what appeared to be one Deputy double-locking the handcuffs approximately 6 minutes after they had been applied to Mr. Kingsley. At trial, a Deputy testified the double-locking took place much earlier, which was not supported by video. **STUDY**—not simply read—your report and the video. The implications of conflicting testimony--report vs. video segment--can be damaging. Remember: Your credibility and integrity are on the line!

Speak-up: The Deputy who used his TASER on Mr. Kingsley’s shoulder area had a strong voice, and explained his reasons for using a drive stun. He could be clearly heard in the court room. Some of the other Deputies could barely be heard when they testified. Remember: Keep your voice strong, because you want the jurors and the Court Reporter to hear your answers.

In summary, this was a very different trial compared to the first one. The Plaintiff’s argument was very clear: The force used by Deputies caused pain to a handcuffed inmate, and that force was excessive under the totality of the circumstances. Also, all the Deputies reports and initial testimony were a product of their initial training that had instructed them to use the Fourteenth Amendment force standard. When the force standard was changed and/or clarified by the SCOTUS as a Fourth Amendment standard (at least one Circuit had applied the Fourth Amendment to *pre*-trial detainees), the Deputies’ original reports could not be changed. Their testimony could not be changed either because there was a record of previous trial testimony and deposition testimony. The big change was substituting the Fourth Amendment criteria and then applying it to the facts of the case to determine if the Deputies’ use of force was reasonable.

For those who attended the Institute’s 2014 international conference and heard Detective Gary McFadden speak about the arrest of Mr. Connor of *Graham v. Connor*, it is good to remember the advice he gave to attendees. “Write every report as if it’s going to the SCOTUS.” Good advice. Follow it!