IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

STATE OF MARYLAND

vs. Case Number: 115141033

EDWARD NERO,

DEFENDANT.
_____/

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Verdict)

Baltimore, Maryland

Monday, May 23, 2016

BEFORE:

HONORABLE BARRY G. WILLIAMS, Associate Judge

APPEARANCES:

For the State:

JANICE BLEDSOE, ESQUIRE
MICHAEL SCHATZOW, ESQUIRE
MATTHEW PILLION, ESQUIRE
JOHN BUTLER, ESQUIRE
SARAH AKHTAR, ESQUIRE

For the Defendant:

MARC ZAYON, ESQUIRE
ALLISON LEVINE, ESQUIRE

* Proceedings Digitally Recorded *

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T A B L E O F C O N T E N T S

P R O C E E D I N G S

(10:32 a.m.)

THE CLERK: The Circuit Court for Baltimore City, Part 31, is now in session. The Honorable Barry G. Williams presiding.

THE COURT: Good morning, everyone. Please be seated.

THE GALLERY: Good morning, Your Honor.

THE COURT: Call the case.

MR. SCHATZOW: Good morning, Your Honor. This is the case of State versus Officer Edward Nero, Number 115141033. Present on behalf of the State, I'm Michael Schatzow; Deputy State's Attorney Janice Bledsoe; and Assistant State's Attorneys Matt Pillion, John Butler, and Sarah Akhtar.

THE COURT: Good morning.

COUNSEL: Good morning, Your Honor.

MR. ZAYON: Your Honor, Good morning. For the record, Marc Zayon. As the Court knows, I represent Officer Edward Nero, to my left, with Allison Levine, as well.

THE COURT: Good morning. You may be seated.

All right. This Court has been asked to render a decision in this matter and will give the information as follows:

The State has charged the defendant with assault, misconduct in office by corruptly performing an unlawful act, reckless endangerment and misconduct in office by corruptly failing to do an act that is required by the duties of his office.

In order to convict the defendant of assault, the State must prove that the defendant caused offensive physical contact with Freddie Gray; that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and that the contact was not legally justified.

In order to convict the defendant of misconduct in office, the State must prove that the defendant was a public officer, that the defendant acted in his official capacity, and that the defendant corruptly did an unlawful act. For this count, the State alleges that the defendant arrested Freddie Gray without probable cause.

In order to convict the defendant of reckless endangerment, the State must prove that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; that a reasonable person would not have engaged in that conduct; and that the defendant acted recklessly.

Finally, in order to convict the defendant of the second count of misconduct in office, the State must

prove that the defendant was a public officer; that the defendant acted in his official capacity; and that the defendant corruptly failed to do an act required by the duties of his office. For this count, the State alleges that the defendant failed to ensure the safety of Freddie Gray by failing to secure Mr. Gray with a seat belt during the process of Mr. Gray being transported in a police vehicle while he was in police custody.

The State has the burden of proving, beyond a reasonable doubt, each and every element of the crimes charged. If the State fails to meet that burden for any element of a crime, this Court is required to find the defendant not guilty of that crime.

I will discuss each allegation in order.

Again, the defendant is charged with the crime of assault.

In order to convict the defendant of assault, the State must prove that the defendant caused offensive physical contact with Freddie Gray. The defendant acknowledges that any unwanted or unwarranted contact can be considered offensive, and the evidence is clear that at no point did Mr. Gray want to be touched by any of the officers.

Two, that the contact was the result of an intentional or reckless act of the defendant and was not

accidental. Clearly, when the defendant touched Mr. Gray, it was done intentionally. But for reasons that I will soon discuss, I find that it was not reckless, but acknowledge that is not the end of the analysis.

And finally, that the contact was not legally justified. In order to assess whether the contact was not legally justified, it is helpful to discuss some of the facts presented at trial. All times mentioned are on the morning April 12, 2015.

At 8:40:03, video time stamp one minute and fifteen seconds of Exhibit 41, shows the defendant coming down an alley. And at 8:40:10, video time stamp one minute and thirty-five seconds, it shows Officer Garrett Miller on foot, and the defendant on bike riding over to the area where Mr. Gray is ultimately detained. At 8:40:13, there is a call over KGA, which is Exhibit 40, where either Miller or the defendant calls out, "We got one."

Miller testified that he apprehended Mr. Gray, and that Mr. Gray gave up without a fight and did not resist. He testified that the defendant did not touch Gray at any time prior to the time Miller approached and detained Gray. By the time Miller cuffed Gray, the defendant was standing to their left at the ramp. While Miller believed that the defendant was ready to assist

because they work together, he reiterated that the defendant did not have anything to do with the cuffing and initial detention. While Miller detained Mr. Gray at the handicap ramp, he told the defendant to go retrieve Miller's bike, which Miller had left in the court when he got off his bike to chase Mr. Gray.

Exhibit 56 and 41 both show the defendant getting on his bike at 8:40:21, video time stamp fourteen seconds and four minutes and thirty-seven seconds, respectively. And approximately twenty seconds, later Exhibit 41 shows the defendant walking with two bikes toward the area where he ultimately met with Miller and Mr. Gray. I note that the video does not show Miller and Mr. Gray at the corner at that time.

Finally, Exhibit 41 shows Miller walking towards the corner with Mr. Gray at 8:40:52, video time stamp five minutes and sixteen seconds.

The State concedes, that pursuant to Wardlaw and Terry, that Miller had a right to stop Mr. Gray but, based on the KGA tape, part of the defendant's statement, and part of Miller's statement referenced at trial, wants this Court to find that the defendant was an integral part of the initial detention and subsequent arrest of Mr. Gray.

Officer Miller, who testified under a grant of

immunity from the State, stated unequivocally, while on the stand and under oath, that he was the one who detained and handcuffed Mr. Gray, that he was the one who walked Mr. Gray from the handicapped entrance to the wall where the defendant met him after retrieving officer Miller's bike.

Mr. Brandon Ross clearly stated that it was not the defendant who was with Mr. Gray initially but another bike officer. Mr. Ross saw the defendant with two bikes walking towards Mr. Gray and the other officer, and this was after the bike officer cuffed Mr. Gray.

There is no value for Brandon Ross to say this because he is not a friend of the defendant. He saw what he saw, and it corroborates the testimony of Miller stating that he and he alone was involved in detaining, cuffing, and taking Mr. Gray to the wall to await transport, and it is consistent with the statement of the defendant where he stated that he went to get the bikes and met Miller and Mr. Gray at the opening of the court. This is corroborated by State's Exhibit Number 41, which shows the defendant walking with two bikes.

The testimony that was presented from Miller and the interview with the defendant, where both indicated that “we handcuffed,” is more in line with the habit of Baltimore City Police Officers who testify to speak in

terms of what was done by the collective and not necessarily what is done by the individual. Therefore, the Court does not find that the use of the term "we" implicates the defendant in either participating in the initial detention of Mr. Gray or the subsequent decision to arrest Mr. Gray.

The Court finds that the only contact that the defendant had with Mr. Gray at the first stop at Presbury Street occurred when he interacted with Gray after Miller walked him to the area to await the van. By that time, the Wardlaw/Terry stop had been effected by Miller and only Miller. It was Miller who detained Mr. Gray. It was Miller who cuffed Mr. Gray. And it was Miller who walked Mr. Gray over to the area where the defendant met them.

When the detention morphed into an arrest, the defendant was not present. As such, the Court rejects the state's theory that the defendant was involved in the arrest because, absent "I and we," there are no credible facts to show that he was involved in the touching of Mr. Gray before Miller brought him to the corner.

Furthermore, the Court does not find, with the facts presented, that there was a duty on the part of the defendant to ask any questions of Miller before he assisted with the continued detention and ultimate arrest

of Mr. Gray.

The defendant was aware of the KGA call from Rice; knew that Miller had detained Mr. Gray and moved him from one area to another; and that a van had been summoned.

For the same reasons, minus the van call, the defendant did not have a duty to make an inquiry of Mr. Gray.

Since the defendant's contact with Mr. Gray came after Mr. Gray was detained by Miller, this Court finds that the contact by the defendant was legally justified and not reckless. Therefore, as alleged by the State, there is no assault by the defendant.

Next, the State alleges that the defendant corruptly arrested Mr. Gray without probable cause, and that the arrest rises to the level of misconduct in office. Misconduct in office is corrupt behavior by a public official in the exercise of his duties of office or while acting under color of law.

In order to convict the defendant, the State must prove, one, that the defendant was a public officer; two, that he acted in his official capacity; and, three, that he corruptly did an unlawful act.

There is no question that elements one and two of the misconduct charge are met since the defendant was

a public officer acting in his official capacity on the day of Mr. Gray's arrest.

But, as noted, the Court does not find that the defendant detained Mr. Gray at the ramp, nor does the court find that any actions by the defendant turned the detention into an arrest.

The Court does find, based on a review of Exhibit 41, the testimony of the defendant, Mr. Ross, and Mr. Miller, that the initial contact concerning detention and arrest occurred when Miller, acting alone, interacted with Mr. Gray.

As such, this Court does not find that the defendant detained or arrested Mr. Gray without probable cause. The propriety and basis for Miller's actions are not before this Court and, therefore, have not been assessed by this Court.

The State has indicated its belief that the facts as presented lend themselves to the application of accomplice liability for all the charges, and the defendant should be held criminally liable for the actions of Miller and others as an accomplice.

In order to convict the defendant of any of the charges under the theory of accomplice liability, the State would have to prove that a crime occurred; and that the defendant, with the intent to make the crime happen,

knowingly aided, counseled, commanded, or encouraged the commission of the crime, or communicated to the primary actor in the crime that he was ready, willing, and able to lend support, if needed.

The State's theory from the beginning has been one of negligence, recklessness, and disregard for duty and orders by this defendant. There has been no information presented at this trial that the defendant intended for any crime to happen. Nor has there been any evidence presented that the defendant communicated any information to a primary actor that he was ready, willing, and able to lend support, if needed, to any crime.

Since the assault and misconduct are based on a detention and arrest that this Court has already determined was effected by Miller acting alone and on the information provided over KGA, and especially where there is no conspiracy charged, this Court does not find that accomplice liability on the charge of assault and misconduct is an appropriate application of the law.

I will now discuss the charges of reckless endangerment and misconduct in office. The State alleges that the next two criminal acts occurred at what is referred to as the second stop. After Mr. Gray was placed in the van at the first stop, he was driven a

block or so away to the Mount Street location where the van was met by the defendant, Miller, Rice, and other officers.

When the van driver opened the door, Mr. Gray was seated. Rice and Miller took Mr. Gray out of the van. Miller retrieved his cuffs, replaced them with flex cuffs, and placed shackles on Mr. Gray. At this point, allegedly, Mr. Gray had gone limp. So, to get him back into the van, Rice got into the van and pulled Mr. Gray by the shoulders while the defendant had Mr. Gray's legs.

At three seconds of Exhibit 35, which is the video by Mr. Ross, the video shows the defendant kneeling down and placing his hands on Mr. Gray's lower body. By eleven seconds, his hands are off. And at thirteen seconds, Rice jumps out of the van.

The State alleges that the failure of the defendant to seat belt Mr. Gray once he was placed back in the van rises to the level of reckless endangerment and misconduct in office.

In order to convict the defendant of reckless endangerment, the state must prove that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; that a reasonable person would not have engaged in that act; and that the conduct and that the defendant acted recklessly.

Reckless endangerment focuses on the actions of the defendant and whether or not his conduct created a substantial risk of death or injury to another. The crime occurs when the actions are found to be unreasonable under the circumstances presented. It does not focus on the end result, which can be, if charged, a separate crime.

Two questions are at issue here. Question 1: Could an officer, similarly situated as the defendant, reasonably rely on the fact that an officer in the van with the detainee could and would, if required, seat belt the detainee, especially when that person is a superior officer? Question 2: Could an officer, similarly situated as the defendant, reasonably assume and rely on the fact that the transport officer, who presumably has custody, would and could make sure that the detainee now inside of his van is properly secured before driving off? The answer to both of those questions, based on the facts presented, is yes.

As to the reasonableness of not taking steps to seat belt Mr. Gray, this Court finds that a reasonable officer in the defendant's position and, in particular, the defendant, could reasonably assume that an officer, superior or not, in the back of the van would make a determination as to whether seat belting was appropriate

under all the facts that that officer was aware of at the moment.

This Court does not find that a reasonable officer similarly situated to the defendant, at the point where there are people coming out on the street to observe and comment, would approach the lieutenant, who just got out of the van, to tell him to seat belt Mr. Gray or make an inquiry concerning the issue of whether or not Mr. Gray has been seat belted. There is no evidence that was part of his training and no evidence that a reasonable officer would do the same.

While the State did not present clear evidence of any protocol in the approximately 1500 pages of General Orders or directives concerning transfer of custody from an arresting officer to a transporting officer, a review of policy 1114, Exhibit 2, published on April 3, 2015, which may not have gone into effect until after the incident in question, does shed some light on the issue.

Policy 1114 requires that when a person is taken into custody, members shall ensure the safety of a detainee. Section 1.5 of the policy notes that whenever a detainee is transported in a police vehicle, one must make sure that the detainee is searched and handcuffed by the arresting member before being placed in a police

transport vehicle, and the transporting officer must also search each detainee prior to placing him in the transport vehicle. The policy goes on to state that all passengers shall be restrained by seat belts.

This Court has to assume that "member" and "one" is in reference to police officers who are required to follow the General Orders.

The policy seemingly uses "police vehicle," "police transport vehicle," and "transport vehicle" interchangeably. The Court notes that there certainly could be differences that are relevant, but no definitional terms were presented during the trial by the State.

It is certainly reasonable to believe that before a vehicle pulls off, the officer who is charged with transporting a detainee may have the duty to make sure that the person being transported is properly secured and, if not, seek help from other officers if there is a need to do so.

However, this Court acknowledges that there may be circumstances where that duty may shift or be nonexistent in relation to a particular officer. But, again, this Court is making its decision only on what has been presented for this trial for this defendant.

Having found that a reasonable person would act similarly to the defendant, the Court does not find that his actions were reckless and, therefore, finds that there is no criminal liability under the theory that the defendant's failure to act recklessly endangered Mr. Gray.

Finally, there is the misconduct charge stemming from the stop on Mount Street. The State alleges that the defendant failed to ensure the safety of Mr. Gray when he failed to seat belt him after Mr. Gray was placed back in the van. As stated previously, misconduct in office is corrupt behavior by a public official in the exercise of his duties of office or while acting under color of law.

In order to convict the defendant, the State must prove that the defendant was a public officer; that he acted in his official capacity; that he corruptly failed to do an act required by the duties of his office.

Again, there is no question that elements one and two of the misconduct charge are met since the defendant was a public officer acting in his capacity as a law enforcement officer on the day of Mr. Gray's arrest.

Here, unlike in the other misconduct charge, the State asserts the defendant failed to do an act

required by his office; and that failure to act is corrupt behavior; and, therefore, the defendant should be convicted of misconduct.

Along with the analysis this Court used to determine whether the defendant was guilty of reckless endangerment, I also must determine whether, under this statute, he corruptly failed to do an act required by the duties of his office. While this Court has already determined that the defendant is not guilty of reckless endangerment, based on the facts presented, I believe I still must determine whether he corruptly failed to do an act that is required of his office.

The comments to the Maryland Pattern Jury Instructions note that the committee chose not to define or explain "corrupt" or "corruptly," believing that the words communicate their meaning better than a definition would.

A review of relevant case law shows that a police officer corruptly fails to do an act required by the duties of his office if he willfully fails or willfully neglects to perform the duty. A willful failure or willful neglect is one that is intentional, knowing, and deliberate. And mere error in judgment is not enough to constitute corruption, but corruption does

not require that the public official acted for any personal gain or benefit.

In order to fail to perform a duty, the defendant had to know about this duty. Out of the more 1500 pages of the General Orders, at best, there seems to be ambiguity on the issue of when custody is transferred concerning someone who has been arrested and is about to be transported by the non-arresting officer.

Again, the Court does not find that the defendant was the one who placed Mr. Gray under arrest, but clearly the defendant was involved in placing Mr. Gray back into the van after Miller recovered his handcuffs and placed shackles on Mr. Gray.

The State presented Exhibit 7, which is a document that showed on June 26, 2012, the defendant, when he was appointed as police trainee, acknowledged receipt of nine listed items, including the General Orders. It does not say in what format they were provided, but there was testimony that generally it was presented on a flashdrive. I do note that this form crossed out "Police Commissioner's Memorandums" [sic]. It appears to be a given that any member of an organization is required to follow the rules of that organization once one is aware of the rules.

Defense Exhibit 10 is General Order A-2, which is titled "Departmental Written Directives." Under the General Information section, it states, in part, that "Employees shall be responsible for complete familiarity with and adherence to written directives, general orders, and Police Commissioner Memoranda. As directed, written directives shall be maintained by employees in their General Manuals."

It goes on to say that, "Digital versions of General Orders and Police Commissioner's Memoranda shall be distributed in a pdf file, via email. Simultaneously, hard copies of directives shall be printed and distributed to each member. New directives shall require all supervisors to communicate the content of the new directive to their subordinates at roll call."

There was no evidence presented to this Court that at any time between 2012 and the date of this incident that the defendant's General Orders were ever updated pursuant to the policy presented in General Order A-2. There is no evidence that he was ever given any information at roll call. This is not to say that the Baltimore City Police Department does not follow General Order A-2 concerning the dissemination of new orders and updates, just that it was not presented to this Court during this trial.

The audits in Exhibits 20 and 21 concerning seat belting individuals in prisoner transport vehicles was presented to this Court, but clearly they were directed towards transport drivers and what they do by the time they get to Central Booking. The exhibits had nothing to do with what is done on the streets in an active situation.

The State points to Exhibit 22, which shows that at 6:01 p.m., on April 9, 2015, the defendant's police email account received, among other documents, amended policy 1114. Policy 1114 amended K14, purportedly to take away discretion when seat belting a detainee.

Andrew Jaffe who is the director of IT for the police department stated that the emails containing new polices was sent out as a blind copy to all officers under "All BPD," which is a distribution group that includes over 3000 people. He had no way of knowing if it was opened or read by the defendant, and it was not listed as high priority.

The State entered three emails authored by the defendant on April 9, 2015, as evidence that he was using his email account on that day. I note that Exhibit 23 was sent at 1:28 p.m.; Exhibit 24 was sent at 1:39 p.m.; and Exhibit 25 was sent at 2:16 p.m. The State did not

present any evidence to show defendant used his email at any time between 2:16 p.m. and 6:01 p.m., and certainly did not present any evidence to show that he used it after 6:01 p.m. on the 9th of April 2015.

Concerning the training that the defendant received in the area of transport, Exhibit 27 is the defendant's arrest and control performance evaluation from his time at the Academy. The State presented Officer Adam Long, who instructed the defendant on the issue of placing a person into a vehicle and how to seat belt them. In the eighty-hour course, Long noted that there were a number of modules taught, and that the defendant passed the section for placing a suspect into a vehicle. He did not state that there was separate training for placing someone into a transport wagon or van. He said there was no specific training for wagon drivers but noted, after the incident with Mr. Gray, there is now.

Sergeant Charles Sullivan from the Western District was assigned as the defendant's field training officer in 2012. Field training is 10 weeks, but he had the defendant for a few weeks less but did not know why. When asked about wagon training, he stated that he did not train the defendant on transport wagon or transporting prisoners, even though it was part of the

required training. If he had, he would have used a van and shown him how to transport a prisoner. This was never done.

A review of Exhibit 9, which is the defendant's police trainee manual shows that Sergeant Sullivan initialed most of the areas where there is proof that the defendant completed a required task. Sullivan stated that if there was no check next to the area, the defendant did not complete the task. Sergeant Sullivan would have referred the defendant to General Orders if it was something that he trained him on. If he did not train him, he would not have referred him to the General Orders.

Brenda Vicenti, who was the field training coordinator, admitted that she was not a trainer, and the area where it is noted for "Arrest Procedures/Processing Prisoners" in Exhibit 9, the very subject matter where the defendant would have received training for the issue at hand, she indicated she did not train him. She and the defendant initialed "Review," but that was done because she was told to do so by someone at the Academy and believes that the defendant did the same.

The Court is not satisfied that the State has shown that the defendant had a duty to seat belt Mr. Gray and, if there was a duty, that the defendant was aware of

the duty. This Court finds that the State has failed to meet its burden to show that the defendant corruptly failed to do an act required.

The Court also finds that, under the facts presented, accomplice liability does not apply for the charges of reckless endangerment and misconduct.

Based on the evidence presented, this Court finds that the State has not met its burden to prove, beyond a reasonable doubt, all required elements of the crimes charged. Therefore, the verdict for each count is not guilty.

This Court is in recess.

THE CLERK: All rise.

(Whereupon, the matter concluded at 10:57 a.m.)

REPORTER'S CERTIFICATE

I, Patricia A. Trikeriotis, Chief Court Reporter of the Circuit Court for Baltimore City, do hereby certify that the proceedings in the matter of State of Maryland vs. Edward Nero, Case Number 115141033, on May 12, 2016, before the Honorable Barry G. Williams, Associate Judge, were duly recorded by means of digital recording.

I further certify that the page numbers 1 through 24 constitute the official transcript of these proceedings as transcribed by me or under my direction from the digital recording to the within typewritten matter in a complete and accurate manner.

In Witness Whereof, I have affixed my signature this 23rd day of May, 2016.

Patricia A. Trikeriotis
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Patricia A. Trikeriotis
Chief Court Reporter