

STATE OF MARYLAND

* IN THE

* CIRCUIT COURT

v.

* FOR

OFFICER EDWARD NERO

* BALTIMORE CITY

* Case No.: 115141033

* * * * *

MOTION IN LIMINE PRECLUDE REFERENCE TO OR ARGUMENT ABOUT EXCESSIVE FORCE BEING USED ON MR. GRAY IN THE COURSE OF HIS DETENTION OR ARREST

Defendant, Officer Edward Nero, by undersigned counsel, pursuant to Maryland Rule 5-609, files this Motion in Limine to order the preclusion of any and all reference to or argument that excessive force was used on Mr. Gray in the course of his detention or arrest. In support, Defendant states the following:

The State's witnesses may seek to testify as to allegations that excessive force was used on Mr. Freddie Gray in the course of his detention and arrest on April 12, 2015. Notably, the State does not now allege nor has it ever alleged that any excessive force was used on Mr. Gray by any of the six defendant officers, including Defendant Officer Nero. Instead, the State's theory of second degree assault against Defendant Officer Nero is that, as a result of a lack of probable cause, any physical contact with Mr. Gray was unlawful.¹ See State's Resp. to Def.'s Demand for Bill of Particulars ¶ 1. More importantly, the State could not ethically put forth any witness to testify that excessive force was used on Mr. Gray, as such an act would be tantamount to subornation of perjury.

¹ The inaccuracy of that contention and the resulting prejudicial effect is addressed in a separate motion in limine.

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CRIMINAL DIVISION

MD. RULE 5-402 states that “evidence that is not relevant is not admissible.” MD. RULE 5-401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” “Even reliable evidence is admissible only if it is relevant in the particular case, *i.e.*, if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *State v. Smullen*, 380 Md. 233, 268 (2004). Because the State does not allege and could not support a contention that excessive force was used on Mr. Gray, testimony or reference to this type of behavior would not be relevant in a trial against Defendant Officer Nero. Moreover, MD. RULE 5-403 states that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” The testimony or reference Defendant Officer Nero is seeking to preclude would unquestionably lead to “unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time.”

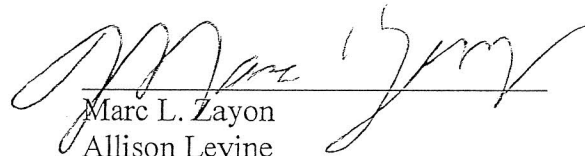
Police officers, as opposed to citizens, as necessitated by their duties, are permitted to utilize physical contact that is not consented to which would otherwise be an assault in the course of a lawful arrest. The standard against which police officers are judged is not that of a reasonable civilian in the same situation, but that of a reasonable police officer similarly situated. *Pagotto v. State*, 127 Md. App. 271, 297 (1999) (citing *Graham*, 490 U.S. 386, 396 (1989)). The Court stated in *French v. Hines*, 182 Md. App. 201, 265-266 (2008):

The use of reasonable force to effectuate an arrest defeats a battery or an assault claim. In other words, contact incident to an arrest cannot form the basis of a claim for battery. Indeed, officers are privileged to commit a battery pursuant to a lawful arrest, subject to the excessive force limitation....

Id. (emphasis removed). In this matter, the State's allegation of assault against Defendant Officer Nero is now and always has been that the alleged second degree assault occurred, not as a result excessive force being used, but because contact incident to arrest was not made pursuant to a lawful detention or arrest.

WHEREFORE Defendant Officer Edward Nero respectfully requests this Honorable Court to order the preclusion of any and all reference to or argument that excessive force being used on Mr. Gray in the course of his detention or arrest.

Respectfully submitted,



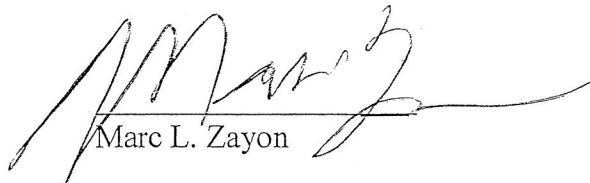
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Attorneys for Officer Edward Nero

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on the 1 day of February 2016, a copy of the foregoing Motion was hand-delivered to Janice Bledsoe, Deputy State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202.



Marc L. Zayon

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ORDER

Upon consideration of the Defendant's Motion, it is this ____ day of _____,
2016 hereby **ORDERED** that the Defendant's Motion is **GRANTED**.

Judge