

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01993-RPM

ANTHONY MARTINEZ,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

Anthony Martinez (“Martinez”) brought this action for damages claiming that he was injured as a result of the negligent conduct of three Southern Ute Tribal Police Officers for which the United States of America (“Government”) is liable pursuant to the Federal Tort Claims Act, 28 U.S.C. § § 2671, *et seq.* After trial the following narrative constitutes this court’s finding of facts and conclusions of law as required by Fed. R. Civ. P. 52.

The events giving rise to this case occurred on the evening of December 4 and the early morning hours of December 5, 2012. At that time, Martinez was 24 years old living at his father’s house at 189 County Rd. 320B near Ignacio, Colorado, within the Southern Ute Indian Reservation and LaPlata County, Colorado.

Martinez was hosting a party at the house attended by Andrew Rossi, Bridgette Weaver, Fabian Pena and his girlfriend Luana Price. During the evening, Pena and Rossi got into a fight. Martinez told them to take it outside which they did. Martinez broke up the fight and told Pena to leave. He did with Price. Weaver also left. Soon

thereafter Pena returned with Darien and Draven Price, brothers of Pena's girlfriend. When the Price brothers surrounded Rossi, Martinez started fighting to protect him, which turned violent with injuries. When Martinez yelled "let's get the bats" and ran to the house, Pena and the Price brothers drove off in a dark colored SUV.

One of the Price brothers called 911 to report the fight. Dispatch from the LaPlata County Sheriff's office notified the SUPD at about 1:00 a.m. on December 5. Officers Herrera, Backer and Mitchell met the Price brothers at the intersection of County Roads 320 and 320B. Herrera took statements and with Backer drove two injured men to a hospital in Durango, Colorado.

Officers Mitchell and Hibbard went to the Martinez house to conduct a "knock and talk." County Road 320B is a short road resulting in a dead end. There are no street lights on it and only one other occupied house which is at the dead end and occupied by a reclusive old man who was not a witness to any of the relevant events.

Mitchell and Hibbard drove into the Martinez driveway in a police car with flashing lights. They went to the front door, knocked and announced their presence as police officers. There was no response. Mitchell went to the side of the house, shined a flashlight through a window and saw Rossi lying on the floor. Failing to make contact the officers drove away at about 1:30 a.m.

After returning from Durango at about 3:30 a.m., Herrera decided that the officers should go to the Martinez house to conduct a welfare check for Bridgett Weaver because the Price brothers had said that Rossi struck her during the fighting and that she was a member of the Tribe. At that time Herrera was still in training as a new officer and Backer was her Field Training Officer. He had been with the SUPD for a year. Mitchell had been a patrol officer for 2 ½ years.

Although still in training with only months as an officer, Herrera was given command. She decided to approach the house in her police SUV with lights off in a stealth approach and park at the dead end. Backer was with her as they drove to the dead end and turned around. This police tactic is referred to as a “black out” approach designed to protect police officers from a possible shooting from inside the house.

Mitchell was driving down Road 230B when Herrera instructed him to turn off the lights on his SUV. Mitchell did that about half way down the road. He had seen people in the yard and knew they had seen him turn off the lights. Martinez had observed it from inside the house. The street was very dark and the only light was a small porch light in front of the house illuminating only a small part of the front yard. Bridgette Weaver had driven into the driveway with a friend named Lopez a short time earlier. Martinez asked if she had turned off her headlights and got a negative answer.

Martinez and Rossi were alarmed thinking that the Price brothers had come back to renew the fight, possibly with weapons. That would be consistent with their reputation for violence. The three officers started walking up the road toward the Martinez house. The weather was cold. Herrera and Backer wore dark coats over their uniforms with dark pants. Mitchell was in uniform but was walking behind the dark clad officers. Peeking from behind a clump of bushes in his yard, Martinez saw these dark figures walking toward him which reinforced his belief that they were the Price brothers coming to do him and Rossi harm. He had taken his son’s T-Ball metal bat from the house. As the officers approached Martinez jumped out from behind the bushes and ran toward the officers waving the bat in his right hand above his head and yelling in an attempt to scare the intruders as he had done previously by his reference to go get the bats. The officers were startled and shined their flashlights on Martinez. Both Mitchell

and Backer drew their weapons which were .40 caliber Glock pistols. Herrera also drew her weapon but had difficulty getting it ready to fire because of her gloves.

What happened next is much disputed. Martinez testified that he was blinded by the lights, turned and started running toward his house. He then heard a gun shot and then felt pain in his leg, fell to the ground and felt that his legs were paralyzed. Backer testified that he fired two shots directed at the center mass of Martinez' body and that he fell backward onto the road still holding the bat in his right hand. The distance between Backer and Martinez when shots were fired was estimated differently by the testimony of the officers at trial ranging between five feet and twenty feet. There were differences as well in their prior statements in the investigations done by LaPlata County, the Colorado Bureau of Investigation, and the Bureau of Indian Affairs as well as at the two criminal trials of charges against Martinez. He was acquitted of assaults on the police officers.

This was a highly charged emotional event over six years ago in less than three minutes time. It would be unlikely that the witnesses would have a clear memory of what happened as well as their perceptions of what actually happened in this dark, isolated area. These differences are understandable and do not impeach the credibility of the officers.

As may be relevant there is different testimony as to what was said just before the shots were fired. Martinez said that he heard shouts of "drop the bat - drop the fucking bat" but no identification that these were police officers. Mitchell said he yelled "police."

What is relevant is that Martinez had no knowledge that a police officer had shot him. That is clear from his conversation with Backer who recorded it when standing over Martinez after he was shot.

Martinez' perceptions and conduct were affected by alcoholic intoxication. A blood test taken at the hospital more than an hour after the shooting showed a level 2½ times that for impaired driving.

The plaintiff's testimony that he was shot in the back while running toward his house is disproven by the trajectory of the bullet that hit him. The entry wound was on the right side of his back. The hollow point bullet shattered when it hit vertebrae and fragments went out on the left side. Some fragments remain in his body. Dr. Robert Bux gave persuasive testimony that Martinez must have been starting to turn away from the shooter when he was hit by the second shot.

Conclusions of Law

The plaintiff's claim is that the officers were negligent in using the black out approach concealing both their presence and identity causing him to attempt to defend himself from expected injury from assailants known to be dangerous. The evidence does not support a finding that such an approach is, in itself, an unreasonable method of an approach to the unknown risks involved in the investigation of domestic violence. As many witnesses testified that is the second most dangerous police call. The decision to make a welfare check two hours after Mitchell and Hibbard had been to a quiet house and saw Rossi lying on the floor by himself is questionable judgment. There was no reason to suspect that there was any ongoing violence. Herrera was concerned that Weaver may have been injured and needed assistance. That decision may have been imprudent but it is not a basis for finding a lack of reasonable care for the safety of a resident. When the officers were at the intersection talking to the Price brothers, a deputy sheriff told them that he would take over the investigation and that he was going to get an arrest warrant for Rossi. They had reason to believe that Rossi

might react violently if they went directly to the house in the same manner used by Mitchell.

The officers are charged with knowledge that a stealth approach could be misinterpreted and cause the occupants to believe that they were about to be assaulted but they had no reason to believe that Martinez would run at them on the county road threatening them with a bat with little time to react.

That lack of foreseeability breaks the chain of causation. Martinez charged at them which is an intervening cause of his injury. The stealth approach was not the proximate cause of injury to Martinez.

Under Colorado law a plaintiff may not recover damages for negligent conduct if his own negligence was greater than that of a defendant. Martinez was himself negligent in going out of his house and confronting what he assumed were the Price brothers on the county road. That was a lack of reasonable care for his own safety and contributed more to his injury than the stealth approach by the officers. The claim for negligent infliction of emotional harm fails for the same reasons as the claim for negligent injury. In short, Martinez' claim is barred by his own negligence if the police officers were negligent in creating a dangerous circumstance because his negligence was greater than that of the officers.

It is ORDERED that judgment shall enter for the defendant, The United States of America, dismissing this civil action with an award of costs.

DATED: March 14, 2019

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge