

#161-289

AFSCME, COUNCIL 24, WISCONSIN  
STATE EMPLOYEES UNION, AFL-CIO,  
and its appropriately affiliated  
LOCAL NO. 1,

Petitioners,

-vs-

WISCONSIN EMPLOYMENT RELATIONS  
COMMISSION,

Respondent.

MEMORANDUMDECISION

Decision No. 15261-A

This matter is before the Court for review of the Commission's decision that the arrest of Mr. Kenyatta did not violate Wis. Stat., sec. 111.84. The only issues before the Court are those outlined in its order of March 6, 1979.

An arresting officer is privileged to use whatever force is reasonably necessary to make a lawful arrest. McCluskey v. Steinhorst, 45 Wis. 2d 350, 173 N.W. 2d 148 (1970). Any force not reasonably necessary is excessive.

Lawful arrest

Wis. Stat. Anno., sec. 968.07(1) (1971), provides in part that "(a) law enforcement officer may arrest a person when: (t)here are reasonable grounds to believe that the person is committing or has committed a crime." Whether such grounds existed depends on the circumstances of each case. On the basis of the record the Court finds that the officer had reasonable grounds to believe that Mr. Kenyatta had committed or was committing a crime; namely, a violation of Wis. Stat., sec. 943.13(1)(b). It is not necessary to determine whether there were reasonable grounds to believe that a violation of Wis. Stat., sec. 947.01 was also involved. The arrest was lawful and the privilege was in force.

Excessive force

The Commission's determination that the arresting officer did not use excessive force involves the application of law to fact. Analytically, this is a question of law. Pabst v. Dept. of Taxation, 18 Wis. 2d 313, 120 N.W. 2d 77 (1963). The Court is not bound by the Commission's interpretation; neither is any deference due it by virtue of the exercise of any specialized knowledge or expertise. See Bucyrus-Erie Co. v. D.I.L.H.R., 90 Wis. 2d 408, 280 N.W. 2d 142, 147 (1979). However, the Court cannot "substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." Wis. Stat., sec. 227.20(6) (1977). Of course, the Commission's findings of fact must be supported by substantial evidence. Id.

The Commission found testimony supporting a finding that excessive force was not used was more "credible and reliable" than testimony to the contrary. Memorandum Accompanying Order Denying Motion For Rehearing. It also stated that the weight of the evidence did not show that excessive force was used. Id.

Upon review of the testimony, and keeping in mind the Commission's finding as to the reliability and credibility thereof, the Court agrees that excessive force was not used. The applicable test was set forth in McCluskey, supra, at 173 N.W. 2d 150:

"What amounts to reasonable force on the part of an officer making an arrest usually depends on the facts in the particular case, and hence the question is for the jury. The reasonableness of the force used must be judged in the light of the circumstances as they appeared to the officer at the time he acted, and the measure is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances. 5 Am. Jur. 2d, Arrest, p. 768, sec. 81."

Mr. Kenyatta indicated that he would have to be forcibly removed. The officer could therefore reasonably believe that some force would be necessary. When he approached Mr. Kenyatta, the latter jerked his arm away from him. This could lead the officer to reasonably believe that Mr. Kenyatta was going to actively resist, thus requiring a greater degree of force. The officer then grabbed him in such a way as to minimize the problems which might result from such active resistance. In the process of grabbing him they went down to the floor. This, in itself, requires no inference of excessive force. They then got up from the floor and the officer finished handcuffing Mr. Kenyatta and frisked him. During this process the officer grabbed Mr. Kenyatta's leg and he slipped. This also requires no inference of excessive force. From what had happened previously the officer could reasonably believe that a brusque approach was necessary in order to minimize potential problems.

Because the arrest was valid and excessive force was not used, no assault and battery occurred. It is, therefore, unnecessary to determine if an assault and battery constitutes a violation of Wis. Stat., sec. 111.84(1)(a).

The Commission's decision is affirmed. Counsel for the Commission may prepare an order for my signature.

Dated: October 9, 1979.

BY THE COURT:

P. Charles Jones /s/

P. CHARLES JONES, CIRCUIT JUDGE  
DANE COUNTY CIRCUIT COURT III