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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
JAMES ROSSI and SUSAN ROSSI,

HON. JEFFREY D. LEBOWITZ

Plaintiffs,

INDEX No. 13731/95

- against -

May 2002

THE CITY OF NEW YORK,

Defendant.

DECISION

-----X
Plaintiff James Rossi moves this Court for a verdict of liability against the City of New York premised upon the actions of his fellow police officer, as violative of General Municipal Law Section 205-e. Upon stipulation of both parties, a non-jury trial was conducted before the court.

Plaintiff, the driver of a police vehicle pursuing a fugitive, testified that he sustained hearing loss after his partner fired several shots from the police vehicle during a high speed chase. Testimony elicited at trial from the plaintiff established that at different times during the chase the driver of the fleeing vehicle brandished what appeared to be a weapon and fired shots in the direction of plaintiff's police vehicle. Further testimony established that the ensuing chase continued from the service road of the Long Island Expressway and Springfield Blvd. where the first shot was fired by the perpetrator, and onto the Cross Island Parkway, where additional shots were fired by him. The chase concluded with the capture of the suspect in the vicinity of the Jamaica Avenue exit of the parkway and recovery from him of a weapon, later determined to be a starters pistol. It was during the chase on the parkway that defendant, Officer Miles, discharged his weapon numerous times in the direction of the fleeing vehicle.

General Municipal Law Section 205-e is intended to provide police officers with an avenue of recourse where injuries sustained in the line of duty are causally related to a specific violation of a statute. See, *Desmond v. City of New York*, 88 N.Y.2d 455 (1996). In order to serve as a predicate for an action under §205-e, the statute must be considered a "well developed body of law and regulation" and "impose clear duties." See, *Desmond, supra*. In determining whether 205-e has been violated, plaintiff must identify the statutes with which the defendant allegedly failed to comply, the manner in which the injuries occurred, and how it may be inferred that defendant's negligence directly or indirectly caused harm to the plaintiff. See, *Zanghi v. Niagra Frontier Transp. Com'n.*, 85 N.Y.2d 423 (1995).

In the instant case, plaintiff set forth the following statutory sections allegedly violated by the defendant: Penal law sections 35.30(1)(a)(i), (b) and (2). Penal Law §35.30(1) provides in relevant part: "A police officer ... in the course of effecting or attempting to effect an arrest ... of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to ... defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes that:

- (a) The offense committed by such person was:
 - (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or
- (b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon.”

The court finds that the evidence establishes proof sufficient under both sections 35.30(1)(a)(i) as evidence established that the perpetrator was operating a stolen vehicle and was wanted in the armed robbery of a bodega earlier in the day, as well as sub-section (b), as the starter pistol, possessed by the perpetrator, may constitute a deadly weapon. See, *People v. Jones*, 54 A.D.2d 740. The justification defense under these sections is limited to the non-reckless behavior of a police officer. See Penal Law §35.30(2), which provides that “deadly physical force under ... paragraphs (a) and (b) of subdivision one does not constitute justification for reckless conduct by such police officer ... amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.” The Plaintiff therefore contends that even if defendant’s conduct was justified, the indiscriminate manner in which the weapon was discharged was exercised in reckless fashion and therefore was violative of both 35.30(1)(a) and (b).

The Court, however, finds that the defendant’s conduct may also be reviewed under section 35.30(1)(c) which allows for the use of “deadly physical force” to defend against what the officer reasonably believes to be the use or imminent use of deadly physical force against himself or another person. Justification under this section is not limited to non-reckless behavior.

Penal Law Section 10 (11), defines “Deadly Physical Force” as physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.

Two recent cases involve the interplay between 205-e and the justified use of deadly physical force by police officers. In *Brunelle v. City of New York*, 269 A.D.2d 347 (2nd Dept. 2000), the Second Department found deadly physical force permissible where the police were struggling with a “machine gun wielding suspect.” In *McCormack v. City of New York*, 2002WL171621 (1st Dept. 2002), the Supreme Court, Manhattan, found deadly physical force justified where a suspect was armed, refused to drop her gun, and fired two shots at officers who were present in an apartment pursuant to the execution of a search warrant.

The instant case provides a somewhat more difficult scenario, in that the above response by Officer Miles, did not follow immediately or momentarily after the initial display and firing of a weapon by the fleeing suspect. “It has been held that even if a defendant is justified in using deadly physical force at the beginning of a single, ongoing encounter with an assailant, his right to use that force terminates at the point where he can no longer reasonably believe that the assailant still poses a threat to him.” *People v. Colecchia*, 251 A.D.2d 5 (1st Dept. 1998). *Accord, People v. Del-Debbio*, 244 A.D.2d 195 (1st Dept. 1997). In the instant case the question arises whether or not the discharge of his weapon by Officer Miles was justified after some time had passed following the first firing by the perpetrator, coupled with the fact that the perpetrator was in a fleeing car and the officers had some insular protection afforded them by the fact that they were in a trailing police vehicle some distance behind the perpetrator.

The Penal Law recognizes the right, under appropriate circumstances, to exercise deadly physical force as long as there is a reasonable basis, based upon an objective standard. See, *People v. Goetz*, 68 N.Y.2d 96 (1986). That the weapon was a starters pistol is of no moment as the law does not require that the officer be correct about the perpetrator's intention, i.e. to threaten deadly physical force, as long as there is a reasonable basis for the officer's belief. The statute allows for the appropriate use of force, irrespective of the result, where the officer's belief is reasonably based on the circumstances that are known to him. See, *People v. Pena*, 641 N.Y.S.2d 794 (N.Y. Sup. 1996).

The testimony establishes that following the initial discharge of the perpetrator's weapon, a chase ensued onto the Cross Island Parkway. At trial the Plaintiff did not recollect whether or not Officer Miles discharged his weapon prior to a second or third round of firing by the perpetrator. However, on cross examination of the plaintiff, defense counsel established to the Court's satisfaction through the plaintiff's deposition testimony taken several years prior to trial, that Officer Miles did not discharge his weapon before the perpetrator discharged his weapon at least one additional time. While the argument can be made that the perpetrator no longer posed a threat to Officer Miles and the Plaintiff at that time, the statute in question allows for the use of deadly physical force to defend the police officer or another person. See, Penal Law Section 35.30(1)(c). As the suspect was firing on a congested, traffic laden highway, the threat to drivers and occupants of nearby cars was a reasonable one to assume by Officer Miles. The Court cannot therefore conclude that the perpetrator no longer posed a threat as he had continued to discharge his weapon after the initial encounter with the officers on Springfield Blvd. See, *People v. Rosario*, 2002WL467900 (1st Dept. 2002). In concluding that Officer Miles conduct was justified under Penal Law 35.30(1)(c) and that such conduct is not limited to non-reckless behavior, the Court finds no violation of the applicable statute, Penal Law Section 35.30, and therefore no predicate for liability under General Municipal Law 205-e.

Verdict in favor of Defendant. The Clerk of the Court is directed to enter judgment accordingly.

Dated: May 7, 2002

J.S.C.