

# New York State Court of Claims



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**REYNOLDS v. THE STATE OF NEW YORK, # 2009-009-209, Claim No. 106738**

## Synopsis

The State was found liable for excessive and unjustified force by members of the New York State Police during a routine traffic stop of the claimant.

## Case information

<b>UID:</b>	2009-009-209
<b>Claimant(s):</b>	DAVID M. REYNOLDS
<b>Claimant short name:</b>	REYNOLDS
<b>Footnote (claimant name) :</b>	
<b>Defendant(s):</b>	THE STATE OF NEW YORK
<b>Footnote (defendant name) :</b>	
<b>Third-party claimant(s):</b>	
<b>Third-party defendant(s):</b>	
<b>Claim number(s):</b>	106738
<b>Motion number(s):</b>	
<b>Cross-motion number(s):</b>	
<b>Judge:</b>	NICHOLAS V. MIDEY JR.
<b>Claimant's attorney:</b>	CHARLES BURKWIT, ESQ. and ROBERT L. BURKWIT, ESQ.
<b>Defendant's attorney:</b>	HON. ANDREW M. CUOMO Attorney General BY: Michael R. O'Neill, Esq., Assistant Attorney General Of Counsel.
<b>Third-party defendant's attorney:</b>	
<b>Signature date:</b>	December 23, 2009
<b>City:</b>	Syracuse
<b>Comments:</b>	
<b>Official citation:</b>	
<b>Appellate results:</b>	
<b>See also (multicaptioned case)</b>	

## Decision

In this claim, claimant alleges that two New York State troopers used excessive and unjustifiable force against him during a traffic stop which occurred on December 20, 2001 in the Town of Wolcott, New York. The trial of this claim was bifurcated, and this decision therefore

addresses solely the issue of liability.

Claimant testified that on the morning of December 20, 2001, he left his girlfriend's house in her car to drive to Auburn, New York, where he was planning to purchase some tires. He testified that between 8:30 and 9:00 a.m., he was on Ridge Road, approaching State Route 104 when he was pulled over by a New York State trooper. Claimant testified that although he was within sight of Route 104, this area of Ridge Road was isolated, as it was surrounded by apple orchards and there were no houses in the vicinity.

Claimant testified that when he was stopped, he remained in his vehicle, and as the trooper approached him, he recognized the trooper as Trooper Thomas Connor. He further testified that as Trooper Connor approached his vehicle, he rolled down his window and shouted at the trooper that "This is bullshit"<sup>(1)</sup> and that he had a valid driver's license. He testified that Trooper Connor then told him to shut up and to get out of the car at which point he was immediately handcuffed with his hands behind his back. He testified, however, that before he got out of his car, a second trooper had arrived (Trooper William Dertinger), and that Trooper Dertinger assisted Trooper Connor in handcuffing him.

Claimant testified that he repeatedly told the officers that he had a valid New York State driver's license and that his "temporary" license was in his wallet. Claimant asserts that he told both officers that he had a valid driver's license several times before he was handcuffed.

Claimant testified that after he was handcuffed, the officers conducted a pat-down search. Claimant testified that he asked Trooper Connor to loosen the handcuffs, but Trooper Connor responded by tightening them.

Claimant testified that he was taken to the back of his girlfriend's car to be handcuffed, and that he was facing the front of the car. Claimant testified that after he was handcuffed, Trooper Connor "slammed" his head several times against the back window of the car, that he was also punched several times in the back of his head, and Trooper Connor pulled on his hair, which was in a ponytail. He testified that Trooper Connor forced his head several times against the back of the trunk, and that his whole face came in contact with the trunk. He testified that Trooper Connor never said anything to him during this time, and that Trooper Dertinger stood by while this occurred.

Claimant testified that immediately thereafter the officers took him to one of the trooper cars, and it was only at that point that the troopers took his wallet, found his "temporary" license and removed it, issued him an appearance ticket for driving with a cracked windshield, and then released him. He testified that during this time he was bleeding from his nose and his mouth, and that his shirt had blood on it as a result of the actions taken by Trooper Connor at the back of his car.

Claimant also estimated that from the time he was pulled over, he was handcuffed within one or two minutes of the stop, that five or ten minutes elapsed before he was taken back and placed in the trooper's vehicle, and that he then remained in the vehicle for an additional five to ten minutes before he was released.

Claimant testified that upon his release, he returned directly to his girlfriend's house, which took him approximately 15 to 20 minutes. When he arrived, Bonnie David (his girlfriend) was home and she observed his injuries. He then called Sergeant Clark at the State Police Barracks in Wolcott, who asked claimant to come to the barracks to file a report. Claimant advised Sergeant Clark that he first needed medical attention, and testified that he then drove himself to Myers Community Hospital in Sodus. Claimant testified that while he was in the Emergency Room awaiting treatment, he observed Trooper Connor walk by his room, and that although he made

eye contact with Trooper Connor, they did not speak.

Claimant testified that upon his release from the hospital, he drove back to Bonnie David's house, and then drove to the State Police Barracks in Wolcott, where he was interviewed by Sergeant Clark. Claimant testified that Sergeant Clark observed his injuries, asked him what happened, and took photographs of his injuries. Claimant testified that he advised Sergeant Clark that he wanted to press charges against Trooper Connor, but that Sergeant Clark refused. After he left the State Police Barracks, claimant testified that he proceeded to the Wayne County Sheriff's Department and attempted to file charges against Trooper Connor, but that he was also refused.

Claimant also testified that he had been afraid of Trooper Connor for many years, based upon their history. Claimant estimated that Trooper Connor, over the years, has issued approximately ten traffic tickets to him. Additionally, claimant mentioned an occasion at the Wolcott carnival when Trooper Connor made him strip down in front of hundreds of people in a parking lot in order to search him for drugs. He also testified that on another occasion Trooper Connor pulled him over and conducted a search of his van, and although he did not find anything, he took claimant's keys, requiring him to make an emergency call. During these prior confrontations, claimant acknowledged that Trooper Connor never used physical force against him.

Bonnilyn (Bonnie) M. David also testified on behalf of claimant. Ms. David described the appearance of claimant, and the injuries he suffered, when he returned to her house immediately after this incident. Under cross-examination, Ms. David acknowledged that, in the past, she had requested assistance from State Troopers based upon incidents of domestic violence involving claimant, and that she had obtained orders of protection against him.

Sergeant Terry M. Clark testified on behalf of the State. Sergeant Clark confirmed that he was assigned to the State Police Barracks in Wolcott in December 2001 and that he received a call from claimant on December 21, 2001 alleging that he had been assaulted by a trooper during a traffic stop on Ridge Road.

Sergeant Clark testified that claimant had swelling in his eye when he arrived at the barracks, and that he took photographs of his injuries (Exhibits 1-4). He also observed an indentation in the skin in the area of claimant's wrist. Sergeant Clark testified that he spoke with Trooper Connor about the incident that same afternoon, and that he later spoke with Trooper Dertinger.

Sergeant Clark testified that based upon his investigation, he had not formed any opinion as to whether claimant's injuries were sustained during the traffic stop by Trooper Connor. He acknowledged, however, that both Troopers Dertinger and Connor admitted to him that some physical force had been used against claimant during this traffic stop.

Sergeant Clark also acknowledged that a "General 45 Search Report" was not completed by Trooper Connor following this traffic stop, even though Trooper Connor was responsible for doing so. Sergeant Clark explained that a "General 45 Search Report" must be completed by a trooper when a search of a person or vehicle occurs during a traffic stop.

Thomas J. Connor, the arresting officer, also testified. Trooper Connor testified that he has been a New York State Trooper for approximately 21 years, and during this time he has primarily been stationed at the Wolcott Barracks. He testified that at approximately 8:30 a.m. on December 20, 2001, he recognized claimant driving past him while he was parked in his trooper vehicle. He testified that he immediately radioed Wayne County Dispatch to inquire as to whether claimant had a valid license, since he was aware from prior experience that claimant often drove without a valid driver's license. He was advised by the dispatcher that claimant did not have a

valid license, and he therefore proceeded after claimant and initiated the traffic stop.

Trooper Connor testified that as he approached claimant's door, claimant remained seated in the vehicle, but was yelling obscenities at him out of the driver's side window. At approximately the same time, Trooper Dertinger showed up unexpectedly in another State Trooper vehicle.

Trooper Connor testified that although he normally will ask a driver if he or she has a license when making a vehicle and traffic stop, he did not do so in this instance since he had just received the information from Wayne County Dispatch that claimant did not have a valid license.

Trooper Connor testified that he then directed claimant to get out of his vehicle and proceed to the back of the car, where he placed handcuffs on claimant because claimant was acting "out of control" and that he (Trooper Connor) was attempting to "get the situation under control". During this process, Trooper Connor recalls that claimant did tell him that he had a valid license, but that he did not believe him. Trooper Connor testified that after he handcuffed claimant, he conducted a frisk of claimant and took his wallet. Trooper Connor further testified that during this search, claimant was "bucking back against him" and in response he twice pushed claimant's head forward, pushing him down against the back of the car as he continued to search him. Although he admitted to using this physical force, Trooper Connor testified that the contact did not cause claimant to get a black eye, that claimant was not cut or bleeding as a result of this force, and that he never punched claimant or grabbed him by his ponytail.

Trooper Connor testified that once claimant was handcuffed, he was placed in the back seat of his patrol vehicle. Trooper Connor testified that Trooper Dertinger, who had assisted him in handcuffing claimant, also got into his car with claimant. He testified that once claimant was in his patrol vehicle, he then had the opportunity to examine his wallet, when he then discovered the DMV (Department of Motor Vehicles) License Reinstatement Form.

According to Trooper Connor, since claimant did have driving privileges, Trooper Dertinger recommended that claimant be issued a ticket for a cracked windshield, and Trooper Connor did so. Trooper Dertinger then removed claimant's handcuffs, and claimant was released.

Trooper Connor acknowledged that he issued the ticket because he observed this cracked windshield after the initial stop. He also acknowledged that the only reason for the initial stop of claimant was based on the information that he had received from Wayne County Dispatch that claimant was operating a vehicle with a suspended license. Trooper Connor further acknowledged that he had acted on incorrect information, that claimant in fact was in possession of documentary proof that his license had been reinstated, and that claimant had told him that his license was in effect before he was handcuffed, and that he discovered the license reinstatement form only during his search of claimant's wallet after claimant was handcuffed. Trooper Connor admitted that no other tickets were issued to claimant aside from the ticket for the cracked windshield, and that specifically no charges were instituted for disorderly conduct, resisting arrest, or assaulting an officer.

Under cross-examination, Trooper Connor admitted that prior to this incident, he had checked DMV records on a regular basis to see if claimant's license was suspended, since he was aware that claimant had a history of suspensions and ultimate reinstatements. He admitted that he made these regular license checks so that at some point he might be provided a legal basis on which he could stop claimant and conduct a search for drugs, since he suspected claimant to be a drug dealer.

Trooper Connor further stated, during cross-examination, that he was familiar with a "General 45 Search Report" but admitted that he did not complete one for this incident. He provided no explanation as to why a report was not completed following this stop and search, and

that it was the only occasion that he could ever remember when he did not complete such a form following a search.

With regard to seeing claimant at Myers Community Hospital later that day, Trooper Connor testified that he had gone to the hospital to visit his mother-in-law, who was having heart trouble.

The only other witness to testify at trial was Trooper William C. Dertinger. Trooper Dertinger testified that at the time of the incident, he had been employed by the New York State Police for approximately 16 years, and that he had responded to the traffic stop in order to assist Trooper Connor. He testified that he was aware of a "history" between claimant and Trooper Connor, and that the two of them "did not get along". He also testified that in his opinion, he (Trooper Dertinger) always got along with claimant, and that claimant was always friendly to him during previous encounters.

Trooper Dertinger testified that when he arrived at the scene, claimant was very animated and was swearing at Trooper Connor, but that he did not appear to be physically threatening, only emotionally upset. Nevertheless, Trooper Dertinger testified that he agreed with Trooper Connor's decision to place handcuffs on claimant, and that he assisted Trooper Connor in doing so. Trooper Dertinger also testified that before claimant was handcuffed, he did hear him yell several times about having his license. He testified, however, that he did not ask claimant to see his license because it was not his stop.

Trooper Dertinger testified that he was also present when physical force was used against claimant, and confirmed that claimant was pushed forward so that his face struck the back window of the car, but that he did not observe any blood or bruising resulting from the use of this force.

Trooper Dertinger acknowledged, under cross-examination, that he has stopped numerous drivers where DMV records indicated that the person had a suspended license. In such situations, he will always first ask if the driver has proof of his license, such as a court receipt. He stated that there can be a lag time from several weeks to even more than a month from the time that a person's license is reinstated until such time that it is reflected in the DMV computer system.

In sum, Trooper Dertinger acknowledged that if this had been his traffic stop, he would have handled the situation much differently, but that he did not disagree with any of the actions taken by Trooper Connor during this stop.

Trooper Dertinger did admit, however, that it was improper for Trooper Connor to go to Myers Community Hospital later that day, regardless of his reason, since that made Trooper Connor "off post", as troopers from the Wolcott Barracks did not cover the Town of Sodus (in which Myers Community Hospital is located). He acknowledged that Trooper Connor was on unofficial business at that time and therefore was improperly "off post".

## DISCUSSION

In his claim, claimant has asserted four separate causes of actions against the State based upon the actions taken by Troopers Connor and Dertinger (primarily Trooper Connor) during this traffic stop. His first cause of action is based upon allegations of negligence in that the troopers failed to properly assess the situation, negligently arrested claimant, and negligently failed to exercise restraint during the course of this traffic stop. Claimant's second cause of action is based upon allegations of assault and battery. The third cause of action alleges the intentional infliction of emotional distress, while the fourth cause of action alleges negligent infliction of emotional distress.

First of all, with regard to the cause of action alleging the intentional infliction of emotional

distress, it is well settled that there can be no recovery against the State for this tort, as it has been held to be against public policy (*Wheeler v State of New York*, 104 AD2d 496). Claimant's third cause of action must therefore be dismissed.

Additionally, and as is readily apparent from the testimony provided by all witnesses at trial, there is no proof whatsoever from which any negligent conduct from either Trooper Connor or Trooper Dertinger could be found. As a result, claimant's first and fourth causes of action, both of which are based on allegations of negligence, must be dismissed as well.

Liability in this case therefore rests upon a determination as to whether the actions taken by Troopers Connor and Dertinger in effecting and carrying out this traffic stop constitutes an assault and battery upon claimant.

The law is well-settled that the State can be held liable for assaults and batteries committed by State Police officers (*Jones v State of New York*, 33 NY2d 275). It is equally well-settled, however, that police officers are entitled to use force when effectuating an arrest (*Faccioli v State of New York*, 46 Misc 2d 983, *affd* 26 AD2d 604), although the use of more force than is reasonably necessary under the particular circumstances may constitute a battery. In other words, "[a] police officer is authorized to use force that is objectively reasonable under the prevailing circumstances" (*Passino v State of New York*, 175 Misc 2d 733, 736, *affd* 260 AD2d 915, *lv denied* 93 NY2d 814). Determining whether an officer used excessive force is based upon "a fact-specific analysis in which an array of factors may be relevant, including the nature of the officer's intrusion, the severity of the crime, whether the suspect posed an immediate threat and whether the arrest was actively resisted" (*Passino v State of New York*, 175 Misc 2d 733, 736). Allegations of the use of excessive force must be "analyzed under the 4<sup>th</sup> Amendment [of the US Constitution] and its standard of objective reasonableness" (*Passino v State of New York*, 260 AD2d 915, 916; *see Graham v Connor*, 490 US 386).

In this particular matter, the Court must determine whether Troopers Connor and Dertinger used a reasonable amount of force during their traffic stop of claimant, since they have both acknowledged that force was in fact used during this stop.

From Trooper Connor's testimony at trial, it is readily apparent to this Court that he had a pre-existing motive and was, quite simply, looking for an excuse to conduct this traffic stop. He admitted that he routinely checked DMV records for claimant's license status, and that he hoped to find a legitimate basis to pull claimant over if he observed him driving. In this Court's opinion, there is no question that Trooper Connor stopped claimant on this date solely because of the information that he received from the DMV, and not because of any observations that he made of claimant's driving or condition of his vehicle. Simply stated, this Court believes that claimant had become a "target" of Trooper Connor. Even so, based on the information provided to Trooper Connor from the Wolcott Barracks (even though such information was erroneous), the Court must nevertheless find and conclude that Trooper Connor, at the outset, had good cause to initiate this traffic stop.

At this point in time, and based upon prior encounters, Trooper Connor, as well as Trooper Dertinger when he arrived, had no reason to anticipate any violent conduct from claimant. In fact, Trooper Dertinger testified that claimant had always been friendly to him, even though he was quite aware of the mutual dislike between claimant and Trooper Connor. Furthermore, even though claimant admitted to the use of loud and vulgar language when Trooper Connor approached his vehicle, there is no indication that he posed any immediate threat of violence, or that he ever actively resisted arrest. In fact, based upon their testimony, neither officer believed that claimant posed an immediate threat at any time during this stop.

Furthermore, since two officers were now present on the scene, there does not appear to be

any reason why claimant was removed from the vehicle and placed in handcuffs. Additionally, the Court credits claimant's testimony (corroborated by Trooper Dertinger) that he shouted several times to Trooper Connor, prior to being handcuffed, that he had a valid license. Although Trooper Connor denies that claimant said anything about having a license prior to being handcuffed, his testimony defies logic, especially in light of the testimony from both claimant and Trooper Dertinger.

Although both officers state that some force was necessary because claimant "reared back" while being handcuffed, this testimony is contradicted by their other testimony that claimant never resisted arrest, and that he cooperated and followed instructions when he was told to get out of his vehicle, to walk to the back of his car, and to place his hands behind his back. This Court finds that Trooper Connor forcing claimant's head against the back window, while claimant was handcuffed with his arms behind his back, was excessive and certainly not justified.

Furthermore, the Court simply does not credit the testimony of Troopers Connor and Dertinger when they each stated that they did not notice any visible injuries to claimant as a result of the force used upon him. No other explanation was provided or even suggested as to the source of claimant's injuries, which were readily apparent when he went to the Emergency Room at Myers Community Hospital, and when he met later that morning with Sergeant Clark at the police barracks.

Trooper Connor's credibility as a witness, in this Court's opinion, is also called into question by actions taken by him immediately after this incident. For example, the Court notes that Trooper Connor failed to complete a "General 45 Search Report", a form which is required to be completed whenever a frisk is performed. The Court finds it very peculiar that Trooper Connor failed to complete such a report in this situation, especially since he admitted that he had been searching for an excuse to pull claimant over in order to justify such a search. Trooper Connor provided no explanation whatsoever for his failure to complete such a report, even though he knew he was required to do so.

Additionally, the Court finds it extremely peculiar that Trooper Connor decided to improperly venture "off post" and make a visit to his mother-in-law at Myers Community Hospital at the same time that claimant was there receiving treatment for his injuries.

Finally, the Court finds it revealing that Trooper Dertinger, although he did not find fault with Trooper Connor's actions during this stop, did in fact testify that he would have handled the situation quite differently if it had been his stop; that he would have requested claimant to produce his proof of driving privileges prior to being handcuffed; and that if it had been his stop, he would not have found it necessary to handcuff claimant based on his knowledge gained from prior encounters with claimant.

Based on the foregoing, therefore, the Court finds that the use of force described at trial by all of the witnesses was excessive under the circumstances existing at the time, and that it constitutes an assault and battery against claimant. The Court makes this finding based upon its determination that the nature of the intrusion (a routine traffic stop) and severity of the alleged crime (driving with a suspended license) did not warrant the actions taken by Troopers Connor and Dertinger, especially considering the fact that claimant did not pose an immediate threat, nor did he ever actively resist arrest. It appears to the Court that this entire incident could have been avoided had Trooper Connor simply taken a moment to examine claimant's paperwork, which claimant had tried several times to bring to the officers' attention. Rather, Trooper Connor seized the opportunity to harass claimant, ultimately resulting in the use of physical force, after claimant had been secured and placed in handcuffs.

Although not necessary in determining liability, the Court questions the "investigation" which

was conducted by Sergeant Clark following this incident, especially after he personally observed the injuries suffered by claimant and took photographs to document those injuries. Aside from discussing this incident with both Troopers Connor and Dertinger, it does not appear to this Court that Sergeant Clark made any effort whatsoever to determine how claimant suffered those injuries. It appears to this Court that an inadequate investigation was conducted, considering that claimant's injuries resulted from allegations of trooper misconduct.

Based upon the foregoing, therefore, this Court finds that claimant has established his claim, by a preponderance of the evidence, that excessive force was used upon him during the traffic stop of December 20, 2001. Furthermore, based on the testimony at trial, there is no basis to assign any comparative fault to claimant, and therefore the State is 100% liable for the damages suffered by him. A trial limited to the issue of damages resulting from this incident will be scheduled as soon as reasonably practicable.

Any motions not heretofore ruled upon are hereby denied.

LET INTERLOCUTORY JUDGMENT BE ENTERED ACCORDINGLY.

December 23, 2009  
Syracuse, New York

NICHOLAS V. MIDEY JR.  
Judge of the Court of Claims

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1. Unless otherwise indicated, all references and quotations are taken from the Court's trial notes.