347 F.Supp.3d 1156
United States District Court, S.D. Florida.

Curtis GREEN, Jr., Plaintiff,
v.
Detective Peter CROFT, et al., Defendants.

CASE NO.: 15-14207-CIV-MAYNARD
|
Signed 12/14/2018

Synopsis

Background: Arrestee brought § 1983 action against law enforcement officers who arrested him for marijuana possession, alleging that officers used unlawful and excessive force in violation of the Fourth Amendment. Arrestee filed motion in limine seeking pretrial order precluding officers from referring during trial to arrestee's state court convictions for battery on a law enforcement officer and resistance with violence, and from asking questions of any witnesses that were designed to elicit testimony concerning details of those convictions, including that they were based on a nolo contendere plea at trial.

Holdings: The District Court, Shaniek M. Maynard, United States Magistrate Judge, held that:

arrestee's prior convictions were not admissible as substantive evidence under evidentiary rule excluding evidence of convictions based on nolo please from use as proof of the matter asserted, and

arrestee's prior convictions were not admissible for impeachment purposes based on evidentiary rule excluding evidence the probative value of which was substantially outweighed by dangers of unfair prejudice, confusing issues, or misleading jury.

Motion granted.

Attorneys and Law Firms

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Bruce Wallace Jolly, Gregory James Jolly, Purdy, Jolly, Giuffreda and Barranco, P.A., Fort Lauderdale, FL, for Defendants.

ORDER GRANTING PLAINTIFF'S MOTION IN LIMINE

SHANIEK M. MAYNARD, UNITED STATES MAGISTRATE JUDGE

THIS CAUSE comes before the Court upon Plaintiff's Motion in Limine, filed December 3, 2018. D.E. 127. On December 10, 2018, Defendants filed a Response. D.E. 136. On December 12, 2018, Plaintiff issued a Reply. D.E. 141. Having considered the merits of the Motion, Response, Reply, and the relevant authority, this Court finds as follows.

BACKGROUND

On May 28, 2013, Plaintiff was arrested after Defendants Detective Croft and Deputy Manganiello of the Martin County Sheriff's Office observed him in the passenger side of a vehicle possessing marijuana. During the course of the arrest, a physical altercation ensued. Plaintiff contends that Defendants used unlawful and excessive force by violently removing him from and pushing him against the vehicle, as well as tasing, choking, punching and kicking him resulting in serious injuries. In contrast, Defendants allege that after Plaintiff was ordered out of the vehicle, he violently resisted efforts to take him into custody and any injuries he received resulted from his own misconduct and wrongful acts, including battery on an officer and resisting arrest with violence.

Following the arrest, Plaintiff was charged with several offenses in state court. Plaintiff entered a *nolo contendere* ("*nolo* ") plea and was adjudicated guilty of (1) battery on a law enforcement officer; (2) resisting an officer with violence; (3) possession of cannabis with intent to sell or deliver within 1,000 feet of a park; (4) assault on a law enforcement officer; and (5) use or possession of drug paraphernalia. Plaintiff is currently serving a fifteen year sentence as a result of these convictions.

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Plaintiff initiated the instant action for damages under 42 U.S.C § 1983, alleging that Defendants used unlawful and excessive force in violation of the Fourth Amendment of the United States Constitution. The matter is set for trial on Monday, December 17, 2018. Plaintiff filed this Motion seeking a pretrial order precluding Defendants from (i) referring during trial to the convictions described above for battery on a law enforcement officer arid resistance with violence, and (ii) asking questions of any witness that are designed to elicit testimony concerning the details of those convictions, including that they were based on a *nolo* plea at trial.

DISCUSSION

I. Plaintiff's Battery and Resistance Convictions are Not Admissible as Substantive Evidence under Federal Rules of Evidence 803(22) and 410.

Plaintiff argues that the convictions stemming from the May 28, 2013 incident should not be admissible at trial because they were based on *nolo* pleas. Defendants ***1159** respond that Plaintiff's convictions should be admitted to prove that Plaintiff did in fact commit battery on an officer and resist with violence when encountered by Detective Croft and Deputy Manganiello on May 28, 2013. Generally, the Federal Rules of Evidence prohibit hearsay statements from admission at trial except in limited circumstances. Fed. R. Evid. 801 and 802. Federal Rule of Evidence 803(22) provides one of these exceptions, namely that evidence of a final judgment of conviction may be admitted if "the judgment was entered after a trial or guilty plea, but not a *nolo* contendere plea[.]" Thus, Rule 803(22) allows evidence of a final judgment of conviction to be admitted for the truth of the matter asserted unless, *inter alia*, it results from a *nolo* plea.

In *United States v. Green*, 873 F.3d 846 (11th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 2620, 201 L.Ed.2d 1031 (2018), the Eleventh Circuit specified that evidence of a conviction resulting from a *nolo* plea cannot be used to prove the truth of the underlying facts pertaining to that conviction under Rule 803(22). *See id.* at 865 (Rule 803(22) provides "strong[ ] support for an argument that a conviction based on a *nolo* plea should not, as a general matter, be considered for the truth of the matter asserted."). *See also* Fed. R. Evid. 803, Advisory Committee Note to Rule 803(22) ("Judgments of conviction based upon pleas of *nolo* contendere are not included" in Rule 803(22)'s exception to the hearsay rule). Plaintiff's convictions for battery on a law enforcement officer and resistance with violence resulted from *nolo* pleas. Thus, under Rule 803(22), they may not be admitted to prove the truth of the matter asserted (i.e., that Defendant actually battered a law enforcement officer and resisted arrest with violence on May 28, 2013).

This conclusion makes sense because one who enters a *nolo contendere* plea is not admitting the facts underlying the conviction. As the Eleventh Circuit has stated, a plea of *nolo contendere* "admits nothing" for purposes of subsequent proceedings. *United States v. Flowers*, 664 Fed. Appx. 887, 888-89 (11th Cir. 2016) (*quoting United States v. Williams*, 642 F.2d 136, 139 (5th Cir. 1981)). It is a "mere statement of unwillingness to contest and no more. It is not receivable in any other proceeding as evidence of guilt." *Id.* (*quoting Mickler v. Fahs*, 243 F.2d 515, 517 (5th Cir. 1957)); *see also Garron v. State*, 528 So.2d 353, 360 (Fla.1988) ("A *nolo* plea means 'no contest,' not 'I confess.' It simply means that the defendant, for whatever reason, chooses not to contest the charge. He does not plead either guilty or not guilty, and it does not function as such a plea."). Indeed, "the rule in the [Eleventh] Circuit generally forbids the use of a plea of *nolo contendere* for the purposes of impeachment or to show knowledge or intent in a proceeding different from that where the plea was offered." *Flowers*, 664 Fed Appx. at 889 (*quoting United States v. Morrow*, 537 F.2d 120, 142 (5th Cir. 1976)). In *United States v. Wyatt*, 762 F.2d 908 (11th Cir. 1985), for example, the Eleventh Circuit allowed the government to prove the facts underlying the conviction, but did not allow the government to use the defendant's *nolo* plea to prove he had admitted his guilt by pleading and "thereby meet the initial burden of proving the defendant committed the act." *Id.* at 911. This Court makes a similar ruling. Defendants are free to offer admissible evidence through witnesses, testimony, and exhibits about what happened when they encountered Mr. Green on May 28, 2013. They may not, however, use Plaintiff's no contest pleas and subsequent convictions to establish what happened because his *nolo* pleas "admit nothing" ***1160** for purposes of the present litigation. Had his convictions been based on guilty pleas instead of *nolo contendere*, that would be the end of any discussion as to whether Defendant indeed committed battery and resistance with violence on May 28, 2013. "A guilty plea is an 'admission of all the elements of a formal criminal charge.' " *Green*, 873 F.3d at 865 (*quoting Blohm v.*

Comm'r, 994 F.2d 1542, 1554 (11th Cir. 1993)). A *nolo* plea, on the other hand, is simply " 'consent by the defendant that he may be punished as if he were guilty and a prayer for leniency.' " *Green*, 873 F.3d at 865 (*quoting Blohm*, 994 F.2d at 1554).

Defendants argue that Florida law regarding when a judge in Florida may accept a *nolo contendere* plea changes this analysis. Specifically, "[b]efore accepting a plea of guilty or *nolo contendere*," a Florida judge must determine that the plea is voluntarily entered and that a factual basis for the plea exists." Fla. R. Crim. P. 3.172(a); *see also Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064, 1068 (Fla. 1995) ("[U]nlike the Federal Rules of Criminal Procedure, which make no provision for a judicial determination of the factual basis of a nolo contendere plea, the Florida Rules of Criminal Procedure require the trial court to satisfy itself that there is a factual basis for such a plea before it can be accepted. Fla. R. Crim.P. 3.172(a)." (internal footnote omitted)). The Eleventh Circuit in *Green* mentioned the uniqueness of Florida law in this regard in *Green* but did not conclusively address it. *Green*, 873 F.3d at 866, n. 11. The undersigned recognizes the merit in Defendants' argument, but will apply the plain language of the Federal Rules of Evidence to this federal question case. Rule 803(22) and the commentary thereto make no exception for *nolo contendere* pleas taken in states where a judge must find a factual basis prior to accepting the plea. Moreover, despite this difference in how *nolo contendere* pleas are handled, Florida law continues to recognize a fundamental difference between guilty pleas and *nolo* pleas in that a *nolo* plea allows an accused, in effect, to plead guilty while continuing to maintain his or her innocence. *T.J. v. State*, 215 So.3d 71, 72 n.6 (Fla. 3DCA 2016). That fact is not compatible with Defendants' argument. Like other courts, the Florida Supreme Court has recognized that "[a] plea of *nolo contendere* does not admit the allegations of the charge in a technical sense but only says that the defendant does not choose to defend... It is merely a formal declaration that the accused will not contest the charges with the prosecutor and is in the nature of a compromise between the state and the accused." *Vinson v. State*, 345 So.2d 711, 715 (Fla. 1977). The *Vinson* court further explains that "[a] plea of *nolo contendere* has been determined to be equivalent to a guilty plea only insofar as it gives the court the power to punish." *Id.* (emphasis added). This Court therefore sees no reason to exempt Florida *nolo contendere* pleas and convictions resulting therefrom from the mandate of the Federal Rules of Evidence.

The parties also dispute the applicability of Federal Rule of Evidence 410. Rule 410 governs the admissibility of pleas, plea discussions, and related statements. It provides that a plea of nolo contendere is not admissible in any civil or criminal proceeding against the defendant who made the plea. FRE 410 is an uncertain basis, however, on which to find that Plaintiff's convictions for battery and resistance are not admissible. Rule 410 speaks in terms of admissibility of a plea, plea discussions and statements relating to a plea. It does not address whether the conviction resulting from the plea is itself ***1161** inadmissible. *Green*, 873 F.3d at 865; *see also Sharif v. Picone*, 740 F.3d 263, 271 (3d Cir. 2014) ("Rule 410 does not bar the admission of a *conviction* resulting from a *nolo* plea, but rather prohibits only the admission of the plea itself.") (citations omitted). [1] Read in conjunction with Rule 803(22), however, the undersigned finds that both Rules 410 and 803(22) preclude admission at trial of Plaintiffs convictions for battery on a law enforcement officer and resistance with violence.

II. Plaintiff's Battery and Resistance Convictions are Not Admissible under Federal Rule of Evidence 609 because their Probative Value as Impeachment Evidence is Substantially Outweighed by the Dangers of Unfair Prejudice and Confusing the Issues under Federal Rule of Evidence 403.

Next, this Court addresses whether Plaintiff's convictions for battery on a law enforcement officer and resistance with violence may be admitted for purposes of impeaching Plaintiff's credibility. Federal Rule of Evidence 609 allows prior felony convictions to be used as impeachment evidence to attack a witness' character for truthfulness. "The rule is premised on the belief that a witness's criminal past is indicative of a dishonest character or willingness to flaunt the law. Therefore, jurors may infer that a witness with a criminal past is less deserving of credit than one with an unblemished past." *See* COURTROOM HANDBOOK ON FEDERAL EVIDENCE, FRE 609, Author's Comments. Rule 609 requires admission of prior felony convictions for the limited purpose of attacking truthfulness unless Rule 403 dictates otherwise. Rule 403, for its part, excludes even relevant evidence if its probative value is substantially outweighed by dangers of unfair prejudice, confusing the issues, or misleading the jury.

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Here, Plaintiff's prior convictions are probative of his credibility under Rule 609. According to the parties, Plaintiff has been convicted many times of numerous crimes. The parties stipulate that Mr. Green has thirteen (13) prior felony convictions. The fact and number of these convictions may be used by the Defendants to impeach Mr. Green's credibility for truthfulness should he take the stand and testify as a witness in this case. However, the impeachment value of informing the jury that two of Mr. Green's thirteen felony convictions were for battery and resistance with violence is fairly low since these are not crimes inherently involving dishonesty, fraud or making false statements. The likelihood that such information will confuse the jury or be unduly prejudicial, on the other hand, is extremely high since both convictions arise out of the same May 28, 2013 incident giving rise to Plaintiff's claims of excessive force. It would be almost impossible for a jury to hear about these particular convictions and use them only for the limited purpose of assessing Plaintiff's credibility as opposed to the impermissible purpose of proving the truth of the matter asserted. "Such mental gymnastics may well be beyond the ability of the common man and may be more confusing than helpful to the jury in light of the circumstances." *Sharif v. Picone*, 740 F.3d 263, 274 (3d Cir. 2014). Jurors would be left wondering what the battery and resistance with violence convictions have to do with Plaintiff's honesty, ***1162** and whether those convictions essentially mean Plaintiff admitted to Defendants' version of the case in the criminal proceeding. Trying to explain to the jurors the differences between the permissible and impermissible purposes of the information strikes this Court as untenable. Accordingly, Defendants may use Plaintiff's prior convictions to attack his credibility by introducing the stipulation that he has been convicted of thirteen prior felonies. The Court will give a limiting instruction about the proper purposes of that information. To go further than that would in this Court's view contravene the purposes of Rule 403.

This Court is persuaded to this result by the reasoning of the Third Circuit in *Sharif v. Picone*, 740 F.3d 263, 273 (3d Cir. 2014). As here, the conviction in *Sharif* "was not simply similar to the issue at hand, it *was* the issue at hand." *Id.* The *Sharif* court also noted that the plaintiff's testimony in that case and credibility were very important because he was his only witness. Mr. Green may very well be in a similar position in this case. Balancing the limited probative value of the specific nature of the convictions at issue against the very high potential for undue prejudice and juror confusion, the undersigned will not permit Defendants to introduce the specific nature of the battery and resistance with violence convictions to the jury. The fact that these convictions stem from the same incident at issue in this civil case makes the danger of unfair prejudice and confusion a significant issue. Given the limited value of these convictions (since they resulted from *nolo contendere* pleas and are not crimes involving dishonesty or fraud), the balance clearly favors their exclusion.

III. Defendants' Collateral Estoppel Arguments are Without Merit.

Lastly, this Court rejects Defendants' collateral estoppel arguments. Defendants assert that because Plaintiff was convicted of battery and resisting arrest with violence that he is collaterally estopped from denying that he resisted arrest with violence in the current civil case. In support of this argument, Plaintiff's rely on a Supreme Court of Florida decision in *Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064, 1067 (Fla. 1995). In *Starr Tyme*, the Florida Supreme Court decided whether a conviction entered pursuant to a *nolo* plea was a final judgment within the meaning of FL ST § 772.14. Chapter 772 of the Florida Statutes is the "Civil Remedies for Criminal Practices Act." FL ST 772.101. It provides a civil remedy to any person who has been injured by criminal activity, including theft, exploitation, human trafficking, drug dealing, terrorism and other enumerated crimes. FL ST §§ 772.103, 772.104, 772.11, 772.12, 772.13. Section 772.14 specifically provides that a defendant against whom a final judgment has been entered is estopped from denying matters pertaining to that judgment in civil actions brought pursuant to Chapter 772. In other words, the *Starr Tyme* court addressed whether FL ST 772.14 collaterally estops a defendant who pleads no contest to a crime from seeking affirmative relief against or defending a claim brought by a victim of that defendant's crime. The *Starr Tyme* Court concluded that Section 772.14 abrogates the requirements of mutuality of parties in the context of civil actions brought by or against crime victims under chapter 772. That is not the situation present here and *Starr Tyme* and Section 772.14 do not apply.

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiffs Motion in Limine, D.E. 127, is **GRANTED**. Defendants are

precluded from (i) referring to Plaintiff's battery and ***1163** resistance convictions by name, and (ii) asking questions designed to elicit testimony concerning the details of those convictions, including that they were based on a *nolo* plea at trial. Defendants are, however, permitted to assert that Defendant has thirteen total convictions.

DONE AND ORDERED in Chambers at Fort Pierce, Florida on this 14th day of December, 2018.

All Citations

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Footnotes

1 Moreover, at least one federal circuit court has held that that FRE 410 prohibits the use of a *nolo contendere* plea only when the person who entered the plea is a defendant in a civil case. *See Walker v. Schaeffer*, 854 F.2d 138 (6th Cir. 1988). That court held that Rule 410 does not apply when, as here, the person who entered the plea is the plaintiff in a civil case. The undersigned does not agree with the *Walker* court's analysis in that regard.

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