UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID FLOYD, et al.,	:	
	:	
	:	No. 08 Civ. 1034 (SAS)
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Plaintiffs,	:	**ECF CASE**
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- v -	:	
	:	
THE CITY OF NEW YORK, et al.,	:	
	:	
	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR RELIEF UNDER RULE 60(b) OF THE COURT'S AUGUST 31, 2011 OPINION AND ORDER

PRELIMINARY STATEMENT

Plaintiffs submit this memorandum of law in support of their motion pursuant to Federal Rule of Civil Procedure 60(b) for relief from that portion of the Court's August 31, 2011 Opinion and Order (Dkt # 153) granting summary judgment in defendants' favor on plaintiff David Floyd's Fourth and Fourteenth Amendment claims arising out of his February 27, 2008 stop-and-frisk by Defendants Sergeant James Kelly, Officer Cormac Joyce, and Officer Eric Hernandez.

In granting summary judgment, this Court relied exclusively on what appeared to be two undisputed facts: (1) that Floyd and his neighbor had engaged in "furtive movements", and (2) the existence of a "midday burglary pattern" in the vicinity of Mr. Floyd's home in the Bronx, in front of which the stop-and-frisk took place. As the Court acknowledged, neither fact, standing alone, could have provided a sufficient basis for the officers' reasonable articulable suspicion, but the Court concluded that, taken together, they did justify the stop under the Fourth and Fourteenth Amendments.

However, plaintiffs' recent examination of the New York Police Department's own crime data reveals that the second of these two facts is actually very much in dispute. As set forth below, these data clearly show that far from a "burglary pattern," there was only one reported burglary in the vicinity of Mr. Floyd's home in the two months preceding his February 27, 2008 stop-and-frisk. Thus, these data create a disputed issue of fact as to whether the defendant officers had the requisite reasonable articulable suspicion to justify Mr. Floyd's stop. Accordingly, in the interests of justice, this Court should modify its August 31 Opinion and Order to reinstate Mr. Floyd's clearly viable constitutional claims.

STATEMENT OF FACTS

In its summary judgment decision, the Court found that there were two undisputed facts which, taken together, formed a sufficient basis for the officer defendants to reasonably suspect that Floyd and his neighbor were committing a burglary at the time they were stopped and frisked them in front of their home in the Bronx on February 27, 2008. The first was Floyd and his neighbor's so-called "furtive movements," which took the form of trying several different keys, at most 7-10, in the front door of the neighbor's basement apartment in an attempt to unlock it, an activity which the Court noted was consistent with both "the criminal activity of attempting to break into a house" and "the innocent activity of trying to open a door you are authorized to open when you are unsure which is the correct key." (Dkt #153 at 53-54). The Court acknowledged, however, that such furtive movements, by themselves, could not establish the reasonable articulable suspicion needed for a constitutionally-valid stop-and-frisk. (*Id.* at 64 n. 254.)

The second fact the Court relied upon as undisputed was the existence of a "midday burglary pattern" in the vicinity of Floyd's home. The Court based this finding solely on the testimony and stop-and-frisk paperwork of the three defendant officers, which was not rebutted by any of the evidence submitted in plaintiffs' summary judgment opposition papers. (Dkt # 153 at 52). Specifically, the Court noted that two of the stop factor boxes checked off on the UF250 form completed by Officer Joyce corresponded to "the investigation of a burglary pattern." *Id.* In addition, Sergeant Kelly testified that, based on his review of the "crime trends" in the 43rd Precinct, including the "time of day" and "location" of reported crimes, he was aware of a burglary pattern in "the vicinity of, the blocks, the neighborhood" surrounding Floyd's home. Kelly Tr. at 26:4-11, 33:19-20, 35:22-36:25; Def. 56.1 Stmt ¶ 463. Pls 56.1 Stmt ¶ 463. Sergeant

Kelly's assertion was not supported with any documentary evidence. Similarly, Officer Joyce testified that there had been "multiple burglaries that occurred previous to [the day of Mr. Floyd's stop] that coincided with time of day and the area," Joyce Tr. at 127:11-18, Def. 56.1 Stmt ¶ 457, and Officer Hernandez testified that he had "knowledge of burglaries going on in the 4-3 precinct." Def. 56.1 Stmt ¶ 461; Hernandez Tr. at 169:16-17.

The Court held that, Mr. Floyd and his neighbor's alleged furtive movements "in combination" with the existence of the midday burglary pattern "create[d] enough reasonable suspicion to justify the officers briefly detaining the men for an investigatory stop." (Dkt # 153 at 55.)

At the time their summary judgment opposition papers were due, plaintiffs were in possession of the New York Police Department's ("NYPD") data on reported crime in the 43rd precinct in January and February of 2008. However, because of severe time constraints and the sheer volume of defendants' summary judgment submissions to which they had to respond, plaintiffs were unable at that time to review the data to test the veracity of defendants' claims of a burglary pattern in the vicinity of Floyd's home in weeks preceding his February 27, 2008 stop. Plaintiffs received defendants' 89-page, 518-paragraph 56.1 Statement of Undisputed Facts, replete with thousands of deposition and document citations, on February 2, 2011, and, under the summary judgment briefing schedule set by the Court, had only one week, until February 9, 2011, in which to respond. *See* Transcript of Proceedings held January 26, 2011, at 15:23-16:5. Meanwhile, plaintiffs were during the very same time period attempting to prepare their expert witness, Professor Jeffrey Fagan, for his deposition, and to draft their own statement of additional undisputed facts. Thus, plaintiffs did not have an opportunity to do the necessary data

analysis to determine whether a burglary pattern in fact existed in the area around David Floyd's home at the time of his stop.

However, following the Court's August 31, 2011 Opinion and Order, plaintiffs and their expert Professor Fagan examined the NYPD's criminal complaint report data for January and February 2008, which includes information on all crimes reported to the NYPD during that time period. The data, which was produced to plaintiffs in discovery, includes date, time, location (street address, intersection, and in some case, geographic (x-y) coordinates), precinct, and offense category (e.g., burglary, robbery, assault, etc.) information for each crime reported to the NYPD. *See* Affidavit of Jeffrey Fagan, dated Sept. 28, 2011 (Fagan Aff.) ¶ 6, Ex. B . Combining this data with data on the geographic boundaries of census tracts in the Bronx, Professor Fagan was able to determine the total number of burglaries reported in January and February 2008 in both the census tract in which David Floyd lived, as well as the immediately adjacent census tract. *Id.* ¶¶ 7-13. Together, these two census tracts, both of which are located entirely in the NYPD's 43rd Precinct, encompass a 9- block-by-4-block area around Mr. Floyd's home on Beach Avenue in the Bronx, with a total population of approximately 4861 people. Fagan Aff. ¶ 12.

Based on his analysis of the criminal complaint report and census boundary data, Professor Fagan found that there was only one reported burglary in Mr. Floyd's census tract and 0 reported burglaries in the adjacent census tract in the two months preceding Mr. Floyd's February 27, 2008 stop. *Id.* ¶ 14.

ARGUMENT

A. Legal Standard Governing Rule 60(b) Motions

Federal Rule of Civil Procedure 60(b) authorizes a court to "relieve a party or its legal representative from a final judgment, order or proceeding" in five enumerated circumstances: (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence that, with reasonable diligence, could not have been previously discovered, (3) fraud, misrepresentation, or misconduct by the opposing party, (4) the judgment is void, or (5) the judgment has been satisfied, is based on an earlier judgment that has been reversed or vacated, or applying it prospectively is no longer equitable. F.R.C.P. 60(b)(1)-(5). In addition, a sixth paragraph to the Rule permits a court to act "for any other reason that justifies relief," F.R.C.P. 60 (b)(6), if no other paragraph is applicable, Rule 60(b)(6) will not apply. *Bernstein v. Appellate Division First Dept. Disciplinary Committee*, 2010 U.S. Dist. LEXIS 132830, *5 (S.D.N.Y. Dec. 15, 2010)(Scheindlin, J.)(citations omitted).

"Rule 60(b) was intended to preserve the delicate balance between the sanctity of final judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Bernstein*, 2010 U.S. Dist. LEXIS 132830, at * 4 (citations omitted). While "final judgments should not be lightly reopened," Rule 60(b) "should be broadly construed to do substantial justice." *Nemaizer v. Baker*, 798 F.2d 58, 61 (2d Cir. 1986); *see also International Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977)(noting that FRCP 60(b)(6) "confers broad discretion on the trial court to grant relief when "appropriate to accomplish justice") (citations omitted). "Motions under Rule 60(b) are addressed to the sound discretion of the district court." *Mendell in behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990); *Bernstein*, 2010 U.S. Dist. LEXIS 132830, at * 5 (same). However, "the Second Circuit has set

forth a three-prong test in order for a Rule 60(b) motion to succeed: (1) there must be "highly convincing" evidence in support of the motion; (2) the moving party must show good cause for failing to act sooner; and (3) the moving party must show that granting the motion will not impose an undue hardship on any party." *Bernstein*, 2010 U.S. Dist. LEXIS 132830, at * 5 (citing *Kotlicky v. United States Fid. Guar. Co.*, 817 F.2d 6, 9 (2d Cir. 1987)).

Finally, while courts sometime use an "exceptional circumstances" test in resolving certain 60(b) motions, *see, e.g.*, *Bernstein, supra*, at *5, this standard is typically applied only to those motions brought more than one year after entry of the judgment. *See* Wright & Miller, 11 FEDERAL PRACTICE & PROCEDURE CIV. §2864 (2d. ed.). In contrast, prompt motions under Rule 60(b) are typically granted when doing so serves the interests of justice. *Id.*

B. The Court Should Grant Plaintiff Floyd Relief from the Its August 31, 2011 Award of Summary Judgment to Defendants

In light of the foregoing standards and the powerful evidence submitted by plaintiffs directly contradicting defendants' testimony of a supposed midday burglary pattern, this Court should vacate that portion of its August 31, 2011 Opinion and Order granting summary judgment in favor of defendants' on Floyd's Fourth and Fourteenth Amendment claims arising out of his February 27, 2008 stop-and-frisk and reinstate those clearly valid constitutional claims.

First, the evidence submitted by plaintiffs in support of this motion is "highly convincing" with respect to Floyd's claim that the three defendant officers who stopped him did not have reasonable suspicion to do so. An officer's reasonable suspicion necessary to conduct a so-called *Terry* stop-and-frisk must be "*based on specific and articulable facts* of unlawful conduct." *United States v. Bayless*, 201 F.3d 116, 132 (2d Cir. 2000)(emphasis added). As set forth above and in the accompanying Fagan Affidavit, one of the two facts which the defendant officers claimed gave them a basis to reasonably suspect Floyd and his neighbor were

committing a burglary, the supposed midday burglary pattern in the area surrounding Floyd's home, likely did not exist. Professor Fagan's analysis of the NYPD's own reported crime data from January and February 2008, the same data Sergeant Kelly would have reviewed to determine the existence of a burglary pattern, showed that only one burglary had been reported in the 9-block-by-4-block area surrounding Floyd's home in the two months preceding his stop on February 27, 2008. Fagan Aff. ¶¶ 12-14, Ex. D. One burglary in two months cannot possibly be considered a burglary pattern.[1] Thus, the only undisputed fact on which it could be said that an objectively reasonable police officer could have relied in deciding to stop Floyd and his neighbor were their supposed "furtive movements", which, by themselves, cannot form a sufficient factual basis for reasonable suspicion. *See, e.g.*, Dkt # 153, at 64 n.254; *U.S. v. Bellamy*, 592 F.Supp.2d 308, 318 (E.D.N.Y. 2009).

In addition, while the data that makes the existence of a burglary pattern very much in dispute was in plaintiffs' possession and could have been provided in response to defendants' summary judgment motion in February 2011, their failure to do so is understandable in light of the extreme time constraints and workload demands they were under at the time in this case. Plaintiffs had only one week to respond to defendants' enormous summary judgment motion, which included an 89-page statement of 518 allegedly undisputed facts and thousands of deposition and document citations, while at the same time attempting to prepare their expert witness Professor Fagan for his deposition. Thus, plaintiffs' failure to include the crime data evidence in their original summary judgment opposition papers was, if not completely excusable,

[1] Moreover, given that "[r]easonable suspicion is an objective standard," and "the subjective intentions or motives of the officer making the stop are irrelevant," *Bayless*, 201 F.3d at 133, it would make no difference whether, in the face of the reported crime data, the three defendant officers nevertheless subjectively but unreasonably believed that there was a burglary pattern in Floyd's neighborhood.

at least understandable under the circumstances, and, given the importance of such evidence to Mr. Floyd's claims, should not prevent the Court from considering it now.

Moreover, vacating the summary judgment decision, to the extent it dismissed Mr. Floyd's claims based on the February 2008 stop-and-frisk, will not impose an undue hardship on defendants for several reasons. First, the court's decision only granted *partial* summary judgment to both the City and the three individual officer defendants; Mr. Floyd is still proceeding with claims against the defendants stemming from his April 2007 stop-and-frisk and an unconstitutional search claim against Sergeant Kelly and Officers Joyce and Hernandez. *See* Dkt # 153, at 56, 57 n. 235. Thus, reinstating Floyd's claims for his February 27, 2008 stop-and-frisk will not significantly add to either the City's or the three defendant officers' workload, or exposure to liability, in this case. Second, the reported burglary statistics which plaintiffs have submitted and would rely on to support Floyd's stop-and-frisk claims going forward have long been in defendants' possession-- the data came from the NYPD itself-- and the NYPD already has extensive experience doing the kind of geographic mapping and analysis of crime data which Professor Fagan performed in support of this motion. *See* Def 56.1 Stmt ¶¶ 100-02, 125-26.

Finally, in addition to the equities involved in reinstating Mr. Floyd's individual stop-and-frisk claim, granting plaintiffs' motion will have important implications for plaintiffs' Fourth Amendment *Monell* claim against the defendants for a widespread pattern and practice of suspicionless stops-and-frisks. The convincing evidence submitted on this motion that there were that there in fact was no burglary pattern in the vicinity of Floyd's home prior to his February 27, 2008 stop, raises a serious question of fact as to whether the three officer defendants lied about the facts upon which they based their decision to stop-and-frisk Mr.

Floyd.[2] Such conduct on the part of NYPD officers is consistent with the statistical patterns in the UF250 stop-and-frisk data found by Professor Fagan which suggest that officers are often using "high crime area" as a stop justification "promiscuously and indiscriminately," even in areas with lower crime rates, which in turn "raises doubts about whether stops based on [that factor]"—which is more than 50% of all recorded stops- "are valid markers of [reasonable articulable suspicion]." Report of Jeffrey Fagan, dated October 15, 2010, at 53.

Accordingly, at both the individual plaintiff and police officer as well as a City-wide level, reinstating Mr. Floyd's claims will serve the interests of justice.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant their motion pursuant to F.R.C.P. 60(b) and reinstate Plaintiff David Floyd's claims arising out of his February 27, 2008 stop-and-frisk.

Dated: New York, New York
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Sunita Patel
Darius Charney
CENTER FOR CONSITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464
spatel@ccrjustice.org
dcharney@ccrjustice.org

Philip Irwin
Eric Hellerman
Taylor Hoffman

[2] Even if it could be determined that the officers did not knowingly testified falsely, the evidence of the lack of a "midday burglary pattern" becomes a disputed fact which precludes summary judgment.

COVINGTON & BURLING, LLP
620 Eighth Avenue
New York, NY 10018
(212) 841-1000 (t)
thoffman@cov.com

Jonathan C. Moore
BELDOCK, LEVINE & HOFFMAN, LLP
99 Park Avenue, 16th Floor
New York, NY 10016
(212) 277-5800(t)
jmoore@blhny.com