FILED
United States Court of Appeals
Tenth Circuit

August 20, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIC ST. GEORGE,

Plaintiff - Appellant,

v.

CITY OF LAKEWOOD, COLORADO; DEVON TRIMMER, a/k/a Devon Myers; JASON MAINES; JEFF LARSON; DAN MCCASKY,

Defendants - Appellees.

No. 20-1259
(D.C. No. 1:18-CV-01930-WJM-STV)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

Defendant Devon Trimmer, an agent with the Lakewood Police Department (LPD), allegedly shot plaintiff Eric St. George without warning. The shooting culminated a bizarre late-night police investigation involving Trimmer, LPD Sergeant Jason Maines (another defendant), and two other LPD officers. The officers, wishing to interview St. George about his firing a gun during an altercation with an escort at his home earlier in the evening, called St. George six times in 15 minutes to instruct him to exit his apartment and speak with them in his yard. Yet on the three occasions that he

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

emerged, the officers hid from view and failed to identify themselves. The first two times he stepped outside it was apparent that he was not carrying a firearm; and during the fourth call it was apparent that he did not believe the callers were police officers. When he finally walked into his yard carrying a shotgun, the hiding Trimmer allegedly shot him without a prior word.

St. George filed suit in the United States District Court for the District of Colorado, raising several state-law claims and claims under 42 U.S.C. § 1983 that his Fourth Amendment rights were violated because Trimmer used excessive force in shooting him and Maines failed to prevent the shooting. The district court granted the officers' motion to dismiss under Rule 12(b)(6) on the ground that St. George's operative complaint, his Fourth Amended Complaint (the Complaint), failed to state an excessive-force claim against Trimmer and therefore failed to state the derivative claim against Maines; it then exercised its discretion to dismiss the state-law claims without prejudice. St. George appeals. Reading the Complaint in the light most favorable to St. George, we determine that it pleaded a plausible claim of excessive force against Trimmer. We have jurisdiction under 28 U.S.C. § 1291 and reverse.

I. BACKGROUND

A. Factual Background

Because this case comes to us on review of a dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, we accept as true the well-pleaded allegations in the Complaint and any documents that it incorporates by reference. *See Gee v. Pacheco*, 627 F.3d 1178, 1183–86 (10th Cir. 2010). The following version of events is from

St. George's 2019 Amended Affidavit, which was incorporated by reference into the Complaint.

On the evening of July 31, 2016, St. George arranged for a female escort to meet him at his home in Lakewood, Colorado. The escort arrived about 9:00 p.m. to find cash equaling her advertised hourly rate on the kitchen counter. She took the cash, but a dispute arose, and St. George asked for his money back. The escort refused and called her agency. This alarmed St. George because the escort had advertised as a "solo operator," and he did not want other parties involved in the transaction. Aplt. App., Vol. 2 at 178 (internal quotation marks omitted). St. George nonetheless spoke with the agency and reached an agreement for one hour of service. Thirty minutes later, however, the escort ceased services and said she was leaving. St. George again demanded return of his money, but the escort refused, pushed St. George, and left the apartment. St. George grabbed a handgun (for which he held a valid license) and followed the escort. Once outside, the escort brandished a can of mace, and St. George responded by raising his gun over his head and firing a warning shot into the air. He then lowered his gun and took aim at the escort, who fled the scene. Several minutes later the escort called 911 and reported that St. George had made unlawful sexual contact and fired two shots, one in the air and one at her. St. George maintains that he never fired a second shot at the escort.

After the incident St. George went to a local restaurant to eat and drink, unaware of the escort's call to the police. At 10:13 p.m. four LPD officers—Trimmer, Maines, Sergeant Nathan Muller, and Agent Eric Brennan—arrived at the apartment complex to investigate. They parked their marked vehicles out of view from St. George's apartment.

Trimmer spoke with a neighbor, a former law-enforcement officer, who reported hearing a single sound akin to "a car backfire, or a bottle rocket . . . not a gunshot." *Id.* at 183 (internal quotation marks omitted). The officers searched for bullet casings or bullet holes but found none. They ultimately determined that there was no "active shooter" and "[no] imminent threat of danger." *Id.* at 184 (internal quotation marks omitted).

St. George returned home at 11:15 p.m. When he arrived, he did not see the officers' vehicles, nor did they contact him. They walked into his backyard, looked through his windows, and observed him sitting at his computer with a glass of wine. With information from their various observations, the officers were able to confirm St. George's identity and learn that he had no violent or criminal history nor any outstanding warrants. The officers decided that they lacked probable cause to obtain a warrant.

The officers never knocked on St. George's door to speak with him. Instead, they called him six times over the course of 15 minutes, beginning at 12:17 a.m. Each was from a blocked number, so St. George could not use Caller ID to identify the caller. Agent Brennan made the first call, which St. George did not answer; he associated blocked numbers with prank callers, telemarketers, stalkers, and other persons with bad intentions. Brennan called again at 12:20 a.m., and this time St. George answered. Brennan identified himself as an LPD officer and instructed St. George to come outside to talk. St. George opened his front door and looked outside, but he did not see any signs of the officers because they remained hidden around the corner of the building's breezeway. The officers made no attempt to make their presence known.

The third call was placed at 12:23 a.m., and again St. George did not answer. Meanwhile, Trimmer and Maines had taken positions in St. George's backyard. The backyard, which was on the north side of the apartment building, extended to a fence between 15 and 25 feet from St. George's back door, beyond which lay an open nature preserve. Little light reached the backyard at night, and the two officers hid in the shadows near the fence.

At 12:24 a.m. Sergeant Muller placed the fourth call, which St. George answered. During the five-minute call Muller introduced himself as an LPD sergeant and said that his "friends" were in the backyard watching St. George through the apartment windows. *Id.* at 187 (capitalization and internal quotation marks omitted). He instructed St. George to go outside and speak with them. Based on this conversation, Muller reported that St. George did not believe he was speaking with police and that he seemed "upset," "unsettled," and "paranoid." *Id.* at 188 (internal quotation marks omitted). St. George turned off his bedroom lights to get a better view into his backyard. Maines reported this and told the other officers that St. George appeared unarmed.

The fifth call was placed at 12:30 a.m., but St. George did not answer. He instead exited his back door to investigate whether anyone was lurking nearby. He was unarmed and appeared tentative as he used his cell phone as a light source. Trimmer and Maines watched from their hiding spots near the fence. Even though they knew St. George had been instructed to go out and talk with them, they made no attempt to announce their presence. (Maines has reported that he planned to grab St. George if he moved further away from his home.) Failing to discern any sign of the police, St. George reentered his

apartment at 12:32 a.m. By this point, he believed that the callers were affiliated with the escort, and he was "terrified" that they would ambush him. *Id.* at 190.

Just after he returned inside, he received the sixth and final call. Muller again identified himself and said there were officers outside. St. George responded by saying, "[Y]ou aren't out there." *Id.* at 191 (parentheses and internal quotation marks omitted). After Muller told him to come outside with nothing in his hands, St. George replied, "I have something in my hands." *Id.* (internal quotation marks omitted). Brennan radioed the other officers that St. George was "being threatening on the phone." *Id.* (internal quotation marks omitted).

Having concluded that he was under threat from a malicious actor impersonating the police, St. George exited his back door armed with a shotgun. Once outside, he loudly "pumped" the shotgun to announce his presence, ejecting a live shell in the process. *Id.* Trimmer and Maines heard this and moved to more protected locations to the east of St. George's building. Maines hid behind foliage at the northwest corner of the adjacent building, while Trimmer moved to a communal driveway on the east side of the apartment building and took cover behind a parked pickup truck; the other two officers were on the west side of the building. St. George stood in his backyard, unknowingly being watched by Maines. At some point he put down his shotgun and, while holding a smartphone, said, "C'mon, call me back man!" *Id.* at 192 (internal quotation marks omitted). Still, the officers failed to make their presence known.

After nearly six minutes outside, St. George started to walk around the east side of his building from his backyard to the front of the building via the communal driveway.

He walked at an average pace and carried his shotgun in the low-ready position. *See Reeves v. Churchich*, 484 F.3d 1244, 1248 n.5 (10th Cir. 2007) ("The 'low ready' position involves [an individual] gripping the gun with both hands in front of him while pointing it to the ground."). Maines radioed to Trimmer (who was still behind the pickup truck) that St. George was heading toward her. Trimmer stayed hidden with her gun drawn as she started to hear "crunching gravel and footfalls." Aplt. App., Vol. 2 at 193. St. George still did not know of Trimmer's presence as he walked down the driveway.

St. George came into Trimmer's view 21 seconds after Maines reported that he was on the move. At that moment Trimmer opened fire, hitting St. George in the leg. She still did not identify herself. Wounded and still believing his assailant was not the police, St. George returned fire but missed Trimmer. The two exchanged several more errant shots. Maines, hidden behind a bush, also began firing at St. George and St. George fired back. The entire shootout lasted less than 90 seconds.

St. George then retreated into his apartment, where he called 911 and reported, "I've been shot! Shot! I've been shot!" *Id.* at 215. When dispatchers asked who shot him, he replied, "I don't [expletive] have a clue." *Id*. Still bleeding, St. George crawled back out of his apartment with his handgun and fired four additional shots to warn off perceived assailants. Finally, 16 minutes after Trimmer's first shot, the officers identified themselves. St. George immediately complied with their orders to show his hands and was taken into custody.

B. Procedural History

Proceeding pro se in district court,[1] St. George filed suit against Trimmer and Maines, alleging claims under 42 U.S.C. § 1983 that Trimmer used excessive force in violation of the Fourth Amendment when she shot him and that Maines failed to prevent Trimmer's excessive force.[2] *See Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996) ("[A] law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under § 1983."). The Complaint also raised Colorado tort claims against both officers.

The officers moved to dismiss the Complaint under Rule 12(b)(6), arguing that it failed to state a constitutional violation and that the claims were barred in any event by qualified immunity. They further argued that the district court should decline supplemental jurisdiction over the state-law claims or, alternatively, rule that those claims were barred by state sovereign immunity.

The district court dismissed with prejudice the claims against Trimmer and Maines on the ground that the allegations in the complaint did not support a claim that Trimmer had used excessive force. It then exercised its discretion under 28 U.S.C. § 1367(c)(3) to dismiss without prejudice the state-law claims.

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[1] We appointed pro bono counsel to represent St. George on appeal. We thank counsel and his students for their able representation in this matter.

[2] St. George has also raised claims against other defendants, but those claims are not at issue in this appeal.

II. DISCUSSION

A. Legal Framework

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). To achieve "facial plausibility," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This plausibility standard "does not impose a probability requirement," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), but it demands more than mere conceivability, *see id.* at 570. In assessing a claim's plausibility, we must "draw on [our] judicial experience and common sense." *Iqbal*, 556 U.S. at 679. St. George's pro se pleadings "are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). But pro se status "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Id.* "We review de novo the grant of a . . . motion to dismiss for failure to state a claim." *Gee*, 627 F.3d at 1183.

A valid Fourth Amendment excessive-force claim requires a plaintiff to show "*both* that a seizure occurred and that the seizure was unreasonable." *Bond v. City of Tahlequah*, 981 F.3d 808, 815 (10th Cir. 2020) (internal quotation marks omitted). Because St. George was intentionally shot, there is no question a seizure occurred. *See Torres v. Madrid*, 141 S. Ct. 989, 994 (2021). We therefore turn to the question whether the seizure was unreasonable.

Our task is to determine "whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force." *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008); *see Cnty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) ("Reasonableness is always the touchstone of Fourth Amendment analysis." (brackets and internal quotation marks omitted)). In this highly fact-dependent inquiry, we must carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake," *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted), allowing for the fact that an officer's use-of-force decision often turns on "split-second judgments" made under "tense, uncertain, and rapidly evolving" circumstances, *id.* at 397.

In *Graham* the Supreme Court said that "proper application" of the reasonableness test requires consideration of the particulars of each case, including "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. We have stated that the second *Graham* factor is "undoubtedly the most important and fact intensive." *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017) (internal quotation marks omitted).

A frequent concern of the courts is the use of deadly force—that is, "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm." *Jiron v. City of Lakewood*, 392 F.3d 410, 415 n.2 (10th Cir. 2004) (internal quotation marks omitted); *see id.* (shooting a firearm at

someone constitutes deadly force). To assess the seriousness of a threat that precipitated an officer's use of deadly force, we consider four nonexclusive factors set forth in *Estate of Larsen*: "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." 511 F.3d at 1260. Although these so-called *Larsen* factors are significant, they are only aids in making the ultimate determination of whether the totality of circumstances justifies the use of deadly force from the perspective of a reasonable officer. *See Estate of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1061 (10th Cir. 2020).

B. Application to this Case

We now apply the *Graham* factors to this case, although we take them out of order, leaving the second factor for last.

1. First *Graham* Factor

The first *Graham* factor is "the severity of the crime at issue." 490 U.S. at 396. This factor weighs in favor of the officers.

According to the Complaint, Trimmer and Maines were investigating a report that St. George had committed two offenses: unlawful sexual contact and attempted murder (by firing two shots, including one aimed at the escort).[3] Attempted murder is a felony

[3] The Complaint alleges that the escort knowingly exaggerated in her statements to the police by, for example, falsely claiming that he had fired not only a warning shot into the air but also a second shot at her. But it never alleges that Trimmer or Maines knew that the escort was exaggerating, and we must evaluate their actions "from the perspective of

offense, *see* Colo. Rev. Stat. §§ 18-2-101(4), 18-3-102(3), 18-3-103(3), and "the first *Graham* factor weighs against the plaintiff when the crime at issue is a felony," *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1170 (10th Cir. 2021). The seriousness of the offense establishes the need to investigate and to apprehend a perpetrator and also may suggest the danger posed by the suspect.

St. George argues that this factor nonetheless favors him because the officers had concluded that they lacked probable cause for an arrest well before they drew him out of his home. This fact, says St. George, shows that the officers "d[id] not believe that [he] ha[d] committed a crime" and, accordingly, they could not "rely on that crime to justify the use of force." Aplt. Reply Br. at 7; *see also id.* at 6–7 (citing *Pauly*, 874 F.3d at 1215 (where officers were investigating possible misdemeanor offenses, first *Graham* factor weighed in favor of plaintiff since officers lacked probable cause to arrest and did not believe there were any exigent circumstances)). He also argues that the two-hour time interval since the incident "eliminated the possibility of exigent circumstances." Aplt. Br. at 22. These points are well taken. They both suggest less of a need for immediate action by the officers. But this factor still weighs somewhat in favor of the officers. *See McCoy v. Meyers*, 887 F.3d 1034, 1050 n.17 (10th Cir. 2018) (first *Graham* factor weighs in favor of officers even though crime was complete at time of alleged use of excessive force).

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a reasonable officer on the scene." *Bond*, 981 F.3d at 812 n.3 (internal quotation marks omitted).

2. Third *Graham* Factor

The third *Graham* factor asks "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396. This factor weighs strongly in favor of St. George.

The officers had determined well before the shooting that they had no basis to arrest St. George. St. George could not have been actively resisting arrest if Trimmer and Maines had no intention of arresting him. *See Bond*, 981 F.3d at 820; *Pauly*, 874 F.3d at 1222. Nor do the Complaint's allegations support the notion that St. George was evading the police. Twice he responded to police requests (demands) to leave his home to talk to them. And even after he had expressed doubts that the callers were police officers, he went outside after the sixth and final call and stood in his backyard for nearly six minutes before starting to walk around the side of his building at an average pace.

The officers acknowledge that this factor weighs in favor of St. George but suggest that the weight is minimal because he "disobeyed the command to exit without anything in his hands." Aplee. Br. at 36. We disagree. In light of the officers' refusal to identify themselves on the prior two occasions and their knowledge that St. George (for very good reason) doubted that the callers were officers, it would have been highly unreasonable for them to think that his carrying a shotgun when he exited the third time indicated any lack of respect for law-enforcement authority.

3. Second *Graham* Factor

The second *Graham* factor is the immediacy of the threat posed by the suspect. *See* 490 U.S. at 396. "[D]eadly force is justified *only if* a reasonable officer in the

officer's position would have had probable cause to believe that there was a threat of serious physical harm to himself or others." *Bond*, 981 F.3d at 820 (emphasis added) (internal quotation marks omitted). The four *Larsen* factors guide our assessment of this second *Graham* factor. *See Estate of Larsen*, 511 F.3d at 1260.

a. First *Larsen* Factor

First, we consider "whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands." *Id*. The Supreme Court has said that "deadly force may be used if necessary to prevent escape [of one who threatens an officer with a weapon], and *if, where feasible, some warning has been given*." *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) (emphasis added). Here, Trimmer never even identified herself, much less provided warning that she might use deadly force, despite having ample opportunity to do so. The officers concede this factor. They do not seem to appreciate, however, that the failure to warn when feasible and without excuse is so fundamental that it is often dispositive.

b. Second *Larsen* Factor

The second *Larsen* factor—"whether any hostile motions were made with the weapon towards the officers," *Estate of Larsen*, 511 F.3d at 1260—also favors St. George. True, officers "need not await the glint of steel before taking self-protective action." *Id.* (internal quotation marks omitted). But there is a fundamental distinction between mere *possession* of a weapon and *hostile movements* with it. *See Bond*, 981 F.3d at 820–21.

The Fourth Circuit's decision in *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013), is instructive. Cooper lived in a mobile home in rural North Carolina. About 11:00 p.m. one night a neighbor called 911 to report a noisy altercation, like "two males screaming at each other," on the property. *Id.* at 155 (internal quotation marks omitted). Two officers in separate vehicles (one a marked patrol car) drove to the vicinity of the home and approached it; the officers heard screaming coming from the property and saw a man (not Cooper) on the home's back porch who appeared to see the two cars as they arrived. *See id.* One officer tapped on the window to alert those inside to their presence, but they failed to identify themselves as officers. *See id.* Responding to the tapping, Cooper "called out for anyone in the yard to identify himself, but no one responded." *Id.* He then emerged from his back door "[w]ith the butt of [his shotgun] in his right hand and its muzzle pointed toward the ground." *Id.* Without warning, the officers shot him multiple times. *See id.* at 156. Cooper had made "no sudden moves," "made no threats," and "ignored no commands." *Id.* at 159. The appellate court affirmed the district court's denial of qualified immunity, stating that "the mere possession of a firearm by a suspect is not enough to permit the use of deadly force," which "may only be used by a police officer when, based on a reasonable assessment, the officer or another person is *threatened* with the weapon." *Id*. Emphasizing that the officers had never identified themselves, the court concluded that "the facts fail to support the proposition that a reasonable officer would have had probable cause to feel threatened by Cooper's actions." *Id.*; *see also George v. Morris*, 736 F.3d 829, 835, 838 (9th Cir. 2013) (officers responding to domestic-violence call would have used unreasonable force if they shot

suspect who had not ignored commands to drop his gun, had only pointed it toward the ground, and had made no threatening gestures such as pointing it at the officers).

St. George's carrying a gun in the low-ready position to protect himself as he walked around his house late at night to see who it was that wanted him to come outside and talk was not a hostile or threatening action. If he knew (or, more accurately, if the officers reasonably thought that he knew) that those outside his home were law-enforcement officers, his wielding a gun might reasonably be perceived as hostile. But in light of the officers' prior failure to identify themselves and Muller's report to the other officers after the fourth phone call that St. George did not believe that the callers were police officers, it would have been unreasonable of those officers to think that St. George believed that he was dealing with law enforcement. This factor weighs strongly in favor of St. George.

c. Third *Larsen* Factor

The third *Larsen* factor is "the distance separating the officers and the suspect." *Estate of Larsen*, 511 F.3d at 1260. St. George and Trimmer were separated at most by the width of a pickup truck and some portion of a communal driveway. St. George was close enough to Trimmer to inflict serious injury on short notice. The situation is similar to that in *Estate of Valverde*, where the parties stood on opposite sides of a parked sedan. 967 F.3d at 1065. Although the estate alleged that the car "could be used as cover," we pointed out that the victim-suspect "could have taken three or four steps around the hood of the car and shot the crouching [officer] at close range." *Id.* (internal quotation marks omitted). This factor clearly favors the officers.

d. Fourth *Larsen* Factor

The final *Larsen* factor is the "manifest intentions of the suspect." *Estate of Larsen*, 511 F.3d at 1260. Assuming the truth of the allegations in the Complaint, St. George manifested only an intent to protect himself from unknown intruders, not to harm police officers. After the second call St. George opened his front door while unarmed and simply looked around for the officers. After the fourth call, Maines reported that St. George had extinguished his apartment lighting to get a better view into his dark backyard, apparently to see if anyone was there. After the fifth call, St. George exited his back door—tentative and unarmed—carrying a cell phone, apparently to use as a light source, and went back inside after about two minutes. When St. George left his home carrying his shotgun after the sixth call, he apparently called into the darkness, "C'mon, call me back man!" Aplt. App., Vol. 2 at 192 (internal quotation marks omitted). It would have been unreasonable to view these actions as manifesting an intent to harm police officers. St. George was clearly trying only to identify who, if anyone, might be lurking around his residence and what threat they might pose.

The officers point to the fact that St. George pumped his shotgun once he got outside after the sixth call. But this action is fully consistent with what has already been said. It was not an act of hostility to law enforcement. One can plausibly infer from the Complaint that any reasonable officer would have realized that it was the act of a frightened man facing hidden foes who were acting nothing like one would expect from the police. This factor strongly favors St. George.

4. Synthesis

A review of the *Larsen* factors compels the conclusion that St. George has plausibly pleaded that it was unreasonable for the officers to believe that St. George posed a threat of grave danger to them or anyone else. Although St. George was close enough to Trimmer to pose a significant threat with his shotgun, no officer had come forward to identify himself or herself, much less to order him to drop the shotgun; and he made no hostile motions or manifested any intention to harm an officer. Under the second *Graham* factor, "the decisive question is whether [Trimmer] was reasonable in believing that [St. George] was going to fire his gun at [Trimmer] or other officers." *Estate of Valverde*, 967 F.3d at 1062; *see Bond*, 981 F.3d at 820 ("[D]eadly force is justified *only if* a reasonable officer in the officer's position would have had probable cause to believe that there was a threat of serious physical harm to himself or others." (emphasis added) (internal quotation marks omitted)). And the simple answer to that question is no.

Not only did the officers acknowledge that they lacked probable cause to believe that St. George had fired a shot at the escort; but they had no reason to believe that he would refuse to comply with orders from properly identified police officers. He had not carried a weapon on the first two occasions that he opened his door in response to directions to come outside to talk with purported officers. When he did carry a firearm on the third occasion, he had already expressed doubts (which were eminently reasonable in the circumstances) that there were officers outside his home who, for inexplicable reasons, would hide and not even verbally identify themselves. And even then, St.

George did not say or do anything threatening with his shotgun, obviously carrying it for protection rather than for aggression. Nor did the officers need to make any split-second decisions. Trimmer's shot at St. George came 21 seconds after she was alerted that he was walking around the building and close to six minutes after he had come outside.

Based on the facts alleged in the Complaint, it is at least plausible that Trimmer was unreasonable in believing that St. George posed a sufficiently immediate threat to justify deadly force. Having adequately pleaded that it was unreasonable to believe that he posed a danger, St. George has survived a motion to dismiss the unreasonable-force claim against Trimmer. Even though the offense being investigated was a serious one (*Graham* factor 1), law enforcement has no right to use deadly force against even a heinous criminal who poses no danger (factor 2) and is neither resisting arrest nor attempting to flee (factor 3).

As for the derivative failure-to-intervene claim against Maines, the only basis articulated for dismissal, both by the district court below and Maines on appeal, was that the claim must fail if the unreasonable-force claim against Trimmer fails. That basis is no longer sound. The same is true of the basis for the dismissal of the state-law claims, over which the district court declined to exercise supplemental jurisdiction only after it dismissed the federal claims. *See* 28 U.S.C. § 1367(c)(3).

Even if the officers violated St. George's Fourth Amendment rights, they may still be entitled to qualified immunity if the law they violated was not clearly established at the time of the episode. But on appeal they do not seek affirmance on that ground,

requesting only that the matter be left to the district court on remand. We agree that that is the appropriate course to follow.

III. CONCLUSION

We **REVERSE** the district court's dismissal of St. George's claims against Trimmer and Maines in the Fourth Amended Complaint and **REMAND** for further proceedings consistent with this opinion. We also **GRANT** St. George's motion to proceed *in forma pauperis*.

Entered for the Court

Harris L Hartz
Circuit Judge

20-1259, *St. George v. City of Lakewood, et al.*
TYMKOVICH, Chief Judge, dissenting

"The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm." *Est. of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1064 (10th Cir. 2020). The majority's opinion concludes Agent Trimmer should have revealed herself to a hostile suspect with a loaded and racked shotgun before attempting to use any force. But it is not for judges "from the comfort of [their] chambers" to determine whether an officer's actions in making a high-pressure, life-threatening, and split-second decision were unnecessary or incorrect. *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005). Rather, we must determine, from the "perspective of a reasonable officer on the scene, [whether] the totality of the circumstances justified the use of force." *Est. of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008). Conduct that may seem "unnecessary when reviewed" may "nonetheless be reasonable under the circumstances presented to the officer at the time." *Phillips*, 422 F.3d at 1080.

Here, Agent Trimmer acted reasonably given St. George's threatening and hostile behavior. I respectfully dissent.

As detailed by the majority, Lakewood Police Department was alerted by a female escort that St. George had fired two shots in front of his apartment, one in the air and another directed at the woman. Police arrived at his home, aware that he was armed and potentially violent. The officers then called St. George by phone six times to alert him that police were outside. Each time, he was uncooperative and slow to respond. He

explained after the fact that he suspected the individuals outside were impersonating police officers and had intended to do him harm. But St. George did not take any action to verify these suspicions, such as calling 911 or asking for the uniformed officers to show a badge or send identifying information by phone. After numerous efforts, the police officers took cover when he came outside.[1]

St. George exited with a shotgun and pumped it, clearly signaling that he was willing to use violent force against anyone he encountered. A few minutes later, St. George, with a shotgun in a "low-ready" position, walked towards Agent Trimmer, who was secreted behind a truck. Once St. George came into her view, Agent Trimmer shot him in the leg. He returned fire. After a brief exchange of gunfire with Agent Trimmer, Sergeant Maines turned on the flashlight under the barrel of his handgun and aimed it at St. George. St. George then fired shots at Sergeant Maines. Afterwards, St. George crawled inside the house and, only then, called 911. He then used a handgun to fire three more shots from inside his apartment and a fourth shot into the ceiling of the breezeway outside of his home. Soon thereafter, police entered his home and took him into custody.

[1] The majority states that the first two times St. George stepped outside "it was apparent that he was not carrying a firearm," and St. George alleges "officers . . . confirmed [St. George] is not armed" but it is unclear how this fact would be apparent to law enforcement responding to a call about a man threatening someone with a firearm. Maj. Op. at 2; Aplt. App., Vol. II, at 187.

Looking at these alleged facts, the majority concludes St. George has made out a plausible case that Agent Trimmer's use of force was unreasonable. I disagree. The majority incorrectly balanced the *Graham* factors in St. George's favor, and so I would find that St. George has not plausibly presented an excessive force claim.

The Fourth Amendment prohibits state and federal governments from making "unreasonable . . . seizures." U.S. Const. amend. IV. A police officer's use of force in the course of arrest "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). That standard asks whether police employed objectively reasonable force given the totality of the circumstances. *See Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1313 (10th Cir. 2009). In *Graham*, the Supreme Court identified the following factors to consider when evaluating whether the officer's use of force was excessive: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396. We examine the "facts and circumstances as they existed at the moment the force was used, while also taking into consideration the events leading up to that moment." *Emmett v. Armstrong*, 973 F.3d 1127, 1135 (10th Cir. 2020). In this case, while there were multiple police officers interacting with St. George, we must look to the actions and knowledge of Agent Trimmer specifically.

1. Severity of the Crime

St. George and the majority do not dispute that the crime reported to the officers in this case is a severe crime. On her 911 call, the female escort indicated that St. George had made illicit sexual contact with her and then later fired two rounds from a handgun, one aimed at the escort, as she left.

St. George argues that this factor still weighs in his favor because the officers admit they lacked probable cause for an arrest. Whether or not police had probable cause to arrest St. George for any crime is irrelevant. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921–22 (9th Cir. 2001) (finding that use of force may be reasonable even in the absence of probable cause). This factor may still weigh in the officer's favor even if he did not have probable cause to arrest the suspect. At most, probable cause is merely one fact among many to consider when weighing a crime's severity. *See Pauly v. White*, 814 F.3d 1060, 1077 (10th Cir. 2016) *vacated and remanded on other grounds,* 137 S. Ct. 548 (2017) (describing the considerations going into whether a crime is severe). Rather, "in an excessive force inquiry, we ask whether the force used would have been reasonably necessary *if the arrest or the detention were warranted*." *Morris v. Noe*, 672 F.3d 1185, 1195 (10th Cir. 2012) (internal citation omitted) (emphasis original).

The majority suggests that because the police lacked probable cause and two hours had passed from the time of the initial report, a less immediate need for police action

existed. But it is clear the officers viewed this as a serious crime—at least four police officers responded to the scene. And it is likely that the officers responded warily because they knew St. George had a firearm in his possession. This factor weighs in favor of Agent Trimmer.

2. Immediate Threat to Safety of Officers

As the majority notes, this is "undoubtedly the most important and fact intensive factor in determining the objective reasonableness" of use of force. *Pauly v. White*, 874 F.3d 1187, 1216 (10th Cir. 2017). Regardless of whether St. George subjectively believed that the individuals outside his home were police officers, his behavior still gave ample reason for Agent Trimmer to conclude that he was an immediate threat to her safety: St. George quickly approached Agent Trimmer's hiding spot with a shotgun, he had racked the shotgun moments earlier, he held the shotgun in a low-ready position, and he had just made threatening statements to officers over the phone.

To determine the extent a party presents an immediate threat to officers, we consider four non-exhaustive subfactors set out in *Estate of Larsen*, "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." 511 F.3d at 1260. Applying the *Larsen* subfactors, I conclude St. George presented a deadly and immediate threat.

a. Officer Warnings

While Agent Trimmer did not give St. George any warning prior to firing at him, courts have never required officers to give a warning when they are faced with situations involving imminent threats of deadly force. *See Est. of Smart ex rel. Smart v. City of Wichita*, 951 F.3d 1161, 1175 (10th Cir. 2020). The majority notes that the Supreme Court has held that an officer should give warnings "where feasible" before using deadly force. Maj. Op. at 14 (citing *Tennessee v. Garner,* 471 U.S. 1, 11–12 (1985)). This language indicates the Supreme Court intended to give officers flexibility in precisely the type of situation Agent Trimmer was facing. Courts should not "fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing—particularly where, as here, such a warning might easily have cost the officer his life." *McLenagan v. Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994).

The majority states that Agent Trimmer had "ample opportunity" to warn St. George of her presence and identity. The facts in the record simply do not bear this out. Once Agent Trimmer heard St. George exit his house and rack his shotgun, she hid and took cover farther away from his location. Agent Trimmer knew that St. George was holding a dangerous weapon while he was rapidly approaching the area she was hiding. She had no reason to believe St. George would have been responsive to a police warning when he had ignored instructions from police officers in the six phone calls prior to his exit from his house. A warning in these fast-moving circumstances would have revealed

her location and could have even cost her life. Given these facts, I conclude Agent Trimmer "acted in an objectively reasonable manner" in a "split-second, rapidly escalating situation involving perceived deadly force." *Carr v. Tatangelo*, 338 F.3d 1259, 1269 (11th Cir. 2003) (citing *Graham*, 490 U.S. at 396–97 (1989)).

b. Hostile Motions

St. George contends that holding a weapon in a low-ready position is not a hostile motion. This is incorrect. The cases cited by St. George involve instances where the plaintiffs were unaware that there were police outside their homes before arming themselves with a weapon. Aplt. Br. at 25 (citing *Pena v. Porter*, 316 F. App'x 303, 312 (4th Cir. 2009) (unpublished) (stating that this was not a situation where a suspect "refused to obey police commands in a tense situation"); *Johnson v. City of Roswell,* No. 15-1071, 2016 U.S. Dist. LEXIS 109994, at *35 (D.N.M Aug. 18, 2016) (unpublished) (finding that the suspect was "unadvised and otherwise unaware of the identity of the persons outside his home")). The majority cites *Cooper v. Sheehan* for support that St. George's actions were not hostile. Maj. Op. at 15. But in *Cooper*, unlike here, "no reasonable officer could have believed that [Cooper] was aware that two sheriff deputies were outside." 735 F.3d 153, 157 (4th Cir. 2014). St. George, however, had plenty of warnings and was told numerous times that there were police waiting for him outside.

St. George's behavior was undoubtably hostile. In *Cooper,* Cooper had "made no threats" and "no sudden moves" and merely emerged from his door with his shotgun held

in his hand. 735 F.3d at 159. Here, though, officers described St. George as "upset" and threatening based on their interactions over the phone. Aplt. App., Vol. II, at 188. After being informed multiple times of the police's presence outside, St. George stepped outside, loudly pumped his shotgun, and walked around with the gun in a low-ready position. These were clearly hostile motions meant to give off a threat of violence and not "mere possession" of a weapon. *Cooper*, 735 F.3d at 159. If we are to credit St. George's claims that he truly did not believe the individuals outside were police, it further bolsters the fact he meant for these actions to be threatening in an attempt to ward off his would-be assailants.

c. Distance Between Officers and Suspect

When Agent Trimmer shot St. George, she was positioned at the "driver's rear tire" of the truck and he was located "behind the pickup truck." Aplt. App., Vol. II, at 94. Once he came into her line of sight, she shot him in the leg. Seconds prior to this, Agent Trimmer could hear the sound of his footsteps crunching in the gravel and observed him walking towards her. The distance between them was minimal. The "immediacy of the danger to the police officer is important" to our analysis. *Pauly*, 814 F.3d at 1080. Given their proximity, a split-second decision to use deadly force was reasonable.

d. Manifest Intentions

The majority finds that because St. George truly believed that the individuals outside were not police officers, his manifest intentions were to defend himself from

potential assailants. But even if Agent Trimmer was mistaken in her understanding that St. George did not intend to harm a police officer, she had a "reasonable but mistaken belief" about the suspect's dangerousness, and she would still be entirely justified in her use of force. *Thomson*, 584 F.3d at 1315. The majority points to multiple allegations, such as St. George calling out "C'mon, call me back man!" and St. George opening his front door "while unarmed" to "simply [look]" around for officers. Maj. Op. at 17. We cannot, however, imbue facts from the collective knowledge of all the officers on the scene onto Agent Trimmer when examining reasonableness "at the moment" of her use of force. *Emmett*, 973 F.3d at 1135. In fact, evidence of St. George yelling "C'mon, call me back man!" was given by a neighbor on the scene, not an officer. Aplt. App., Vol. II, at 192.

Agent Trimmer and Sergeant Maines were hiding in the backyard during the phone calls to St. George and did not see him open his front door or have personal knowledge he was unarmed while doing so. It is unreasonable to expect Agent Trimmer to gather from the limited set of facts she knew that St. George believed those outside were not police officers.[2] Even if Agent Trimmer knew St. George did not believe the individuals outside

[2] The majority states that "it was apparent that [St. George] did not believe the callers were police officers." Maj. Op. at 2. The majority, however, does not cite to facts that allege Agent Trimmer in particular knew that St. George believed they were not police officers. St. George alleges "[Agent Trimmer] knows that she has never once identified herself" but does not allege facts stating Agent Trimmer knew that St. George did not believe the individuals outside were police. Aplt. App., Vol. II, at 193. St. George alleges only that Sergeant Muller told Agent Trimmer that St. George was

(continued...)

were police, she would have more reason to believe St. George's manifest intent was to harm her. Again, we look at the situation from Agent Trimmer's perspective. St. George was warned multiple times over the course of thirteen minutes that there were police officers outside his home. Despite this, he did not make any attempt to verify the officers' claims and instead chose to take a deadly weapon outside and walk around with a clear intention to shoot anyone he encountered. To Agent Trimmer, St. George manifested a deadly threat.

3. ***Attempting to Evade Arrest***

Agent Trimmer concedes that St. George could not have been found actively resisting arrest because the Lakewood Police officers were not seeking to arrest him when they initially arrived at his house. The majority suggests that it would be "highly unreasonable" that the officers would take St. George's action of carrying a shotgun as disrespectful towards law enforcement. Maj. Op. at 13. This is a questionable conclusion, especially after the police had identified themselves by name and position multiple times over the course of six phone calls.

* * *

The majority incorrectly concludes the *Graham* and *Larsen* factors weigh in favor of St. George. They do not. Agent Trimmer had ample reasons to believe that all of St. George's actions represented an immediate threat to her safety and the safety of other

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[2](...continued)
"'upset,' 'unsettled,' and 'paranoid'" over the radio. *Id.* at 188.

officers on the scene. While we may not fully understand or credit the method of investigation the officers in this case used, it is not for us to determine whether there was excessive force based on the quality of police investigation. Rather, we look to the actions of the officers facing a potentially lethal threat and ask whether they were objectively reasonable. In this situation, Agent Trimmer reacted quickly to an escalating situation with a reasonable amount of force.

I respectfully dissent.