FILED
United States Court of Appeals
Tenth Circuit

November 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ESTATE OF PATRICK HARMON, SR; PATRICK HARMON, II, as personal representative of the estate of Patrick Harmon, Sr. and heir of Patrick Harmon, Sr.; TASHA SMITH, as heir of Patrick Harmon, Sr.,

Plaintiffs - Appellants,

v.

SALT LAKE CITY, a municipality; CLINTON FOX, in his individual capacity,

Defendants - Appellees.

No. 20-4085
(D.C. No. 2:19-CV-00553-RJS-CMR)
(D. Utah)

ORDER AND JUDGMENT*

Before **BACHARACH**, **KELLY**, and **CARSON**, Circuit Judges.

Plaintiffs-Appellants, the Estate of Patrick Harmon, Patrick Harmon, II, and Tasha Smith (collectively the Estate) appeal from the district court's dismissal of its Fourth Amendment excessive force and municipal liability claims. Estate of Patrick Harmon v. Salt Lake City, 471 F. Supp. 3d 1203 (D. Utah 2020). The district court

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

dismissed based on qualified immunity. This court has jurisdiction under 28 U.S.C. § 1291, and we reverse and remand to the district court for further proceedings.

Background

Around 10:00 p.m. on August 13, 2017, Salt Lake City Police Department (SLCPD) Officer Kris Smith stopped Patrick Harmon for riding a bicycle without a red taillight, in violation of a local traffic ordinance. Joint App. 13. According to Officer Smith, Mr. Harmon gave inconsistent names when he asked Mr. Harmon to identify himself. Id. During their discussion, Mr. Harmon informed Officer Smith that he probably had an outstanding warrant from an incident that occurred years ago. Id. Officer Smith then radioed for backup and returned to his car to check for a warrant. Id.

While Officer Smith was running the check, SLCPD Officers Clinton Fox and Scott Robinson arrived on scene. Id. After a few minutes, Officer Fox verified the outstanding warrant and said, "Yes! Excellent. We're going to go 82, 99, Fox 2," meaning that Mr. Harmon should be arrested. Id. at 13–14. The officers approached Mr. Harmon, told him that he was going to be arrested. Id. at 14. Mr. Harmon begged the officers to let him go, but complied with a request that he remove his backpack. Id. Officers Smith and Robinson began placing Mr. Harmon's hand behind his back to handcuff him and Officer Fox stood in front. Id. at 14–15.

Before the officers could place him in handcuffs, Mr. Harmon broke free from their grip and ran north, away from the officers. Id. at 15–16. After a few steps, Mr.

Harmon turned left onto the sidewalk and began running back south down the sidewalk. Id. at 16–17. Officer Robinson placed himself in Mr. Harmon's path and, in an attempt to grab him, struck Mr. Harmon near his head and neck. Id. at 17. Mr. Harmon pushed past him, and Officer Robinson fell to the ground. Id. at 17–18. Mr. Harmon continued running down the sidewalk and the officers continued to chase. Id. at 17–23. Officer Fox drew his firearm, and Officer Smith drew his taser. Id.

Seconds later, Mr. Harmon looked back at the officers turning his body left, while side-stepping away from the officers. See Ex. B, at 1:05–1:06; Ex. F. Mr. Harmon brought his hands together at chest height then dropped his left arm to the side while leaving his right arm bent at chest height. Id. With his firearm pointed at Mr. Harmon, Officer Fox yelled, "I'll fucking shoot you," and almost immediately fired three shots at him. Joint App. 24. The bullets struck Mr. Harmon in the left arm, right hip/thigh, and left buttock. Id. at 29–30. Mr. Harmon fell face down on the ground and began yelling out in pain. Id. at 27. Mr. Harmon was pronounced dead just after midnight due to the gunshot wounds, including one that hit his femoral artery and vein. Id. at 30.

As the SLCPD investigated the scene, Officer Fox stated that he shot Mr. Harmon because he saw Mr. Harmon reach for and produce a knife. Id. Officer Fox claims he saw Mr. Harmon reach for his pocket as he was running, and that Mr. Harmon made statements such as "I'm gonna cut you" and "I'll fucking stab you." Id. at 31–32. The Estate disputes this description of the events. The Estate's complaint contends that Mr. Harmon was unarmed, the video does not show a knife

visibly in his hands, and Mr. Harmon cannot be heard saying anything in the video. Id. The SLCPD did recover a knife from the area that was branded "Castleview Hospital," which is a rural hospital at which Mr. Harmon never worked. Id. at 33. Additionally, a still frame from the video shows the open knife on the ground near Mr. Harmon's right hand after he fell to the ground. See Ex. H, at 1:34.23.

In July 2019, the Estate and Mr. Harmon's two children brought this action against Officer Fox and Salt Lake City. The complaint asserts five claims: (1) an excessive force claim against Officer Fox; (2) a municipal liability claim against Salt Lake City for Officer Fox's excessive force; (3) an equal protection claim against both defendants; (4) a wrongful death claim under Utah law; and (5) an unnecessary rigor claim under Utah law. Joint App. 37–45. The Defendants moved to dismiss based on qualified immunity and failure to state a claim. Id. at 4, 49–77.

The district court dismissed the excessive force claims because the use of force was justified, and dismissed the equal protection claim for lack of discriminatory purpose. See Estate of Harmon, 471 F. Supp. 3d at 1218–24. As the federal claims were dismissed, the district court declined to exercise supplemental jurisdiction over the state law claims. Id. at 1225. The Estate appeals the district court's decision as to the excessive force claims against Officer Fox and Salt Lake City. See Aplt. Br. at 3 n.2. The Estate contends that the district court erroneously rejected its version of the facts by relying on the video evidence which it found supported the Defendants. Aplt. Br. at 18.

Discussion

This court reviews de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). Waller v. City & Cnty. of Denver, 932 F.3d 1277, 1282 (10th Cir. 2019). Under that review, the court accepts well-pleaded allegations as true and construes them in the light most favorable to the plaintiff. Id. While the court will ordinarily consider only the complaint's pleadings on a motion to dismiss, there is a limited exception that is applicable here. See id. That exception allows a court to "consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." Id. (citation omitted). Here, we may consider the body-cam videos and still frame excerpts because they were referred to in the complaint and neither party disputes their authenticity. Where there is video evidence, the court continues to accept all well-pleaded allegations as true unless they are "blatantly contradicted by the record." Scott v. Harris, 550 U.S. 372, 380 (2007); Estate of Ronquillo ex rel. Estate of Sanchez v. City & Cnty. of Denver, 720 F. App'x 434, 437 (10th Cir. 2017) (unpublished)[1] (applying this standard in the motion to dismiss context). This usually involves a "version of events [that] is so utterly discredited by the record that no reasonable jury could have believed [the plaintiff's version]." Scott, 550 U.S. at 380.

[1] We cite this and other unpublished dispositions only for their persuasive value. 10th Cir. R. 32.1.

A. Qualified Immunity

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009). Thus, when the qualified-immunity defense was raised, the Estate was required to show that "(1) the defendant violated a statutory or constitutional right, and (2) the right was clearly established at the time of the violation." A.N. ex rel. Ponder v. Syling, 928 F.3d 1191, 1196 (10th Cir. 2019). "Asserting a qualified immunity defense via a Rule 12(b)(6) motion . . . subjects the defendant to a more challenging standard of review than would apply on summary judgment," because at this stage in the proceedings the defendant's conduct as alleged in the complaint "is scrutinized for objective legal reasonableness." Thomas v. Kaven, 765 F.3d 1183, 1194 (10th Cir. 2014) (citations and quotations omitted). Accepting the Estate's well-pleaded allegations as true, we think the Estate has plausibly alleged a violation of clearly established law.

1. Constitutional Violation: Excessive Force Under the Fourth Amendment

In an excessive force case, a plaintiff must prove that an officer's actions were "objectively unreasonable." Estate of Valverde ex rel. Padilla v. Dodge, 967 F.3d 1049, 1060 (10th Cir. 2020). When assessing objective reasonableness, the court considers the "totality of the circumstances" and reviews the officer's actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. (quoting Thomson v. Salt Lake Cnty., 584 F.3d 1304, 1313 (10th

Cir. 2009)). This court has held deadly force is justified only if "a reasonable officer in Defendants' position would have had probable cause to believe that there was a threat of serious physical harm to themselves or others." Estate of Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008) (quoting Jiron v. City of Lakewood, 392 F.3d 410, 415 (10th Cir. 2004)). The Supreme Court has highlighted three relevant factors for determining whether a 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."[2] Graham v. Connor, 490 U.S. 386, 396 (1989). The second factor is most important. Pauly v. White, 874 F.3d 1197, 1215–16 (10th Cir. 2017).

With respect to the first Graham factor, the facts alleged by the Estate weigh slightly in favor of use of force. We may consider any criminal act involved in the police encounter at hand. See Clark v. Bowcutt, 675 F. App'x 799, 807 (10th Cir. 2017) (unpublished). Mr. Harmon was initially stopped for riding a bicycle without a red taillight, but was later determined to have an outstanding felony warrant. Joint App. 13–14. Thus, while the initial infraction would not justify use of force, the

[2] Defendants contend that the Estate has waived any arguments regarding the first and third Graham factors. Aplee. Br. at 18, 31. However, we have reviewed the district court's hearing on the motion to dismiss, and it is apparent the district court entertained arguments concerning the Graham factors, even some not raised by the parties, and remarked that, in addition to marching through the factors, it recognized that the totality of the circumstances was paramount. Joint App. 201–05. Were there any doubt, the district court addressed them in its opinion. See United States v. Williams, 504 U.S. 36, 41–43 (1992).

outstanding felony warrant — despite being years old — slightly favors the use of force. See Vette v. K-9 Unit Deputy Sanders, 989 F.3d 1154, 1170 (10th Cir. 2021).

The district court also considered an assault against Officer Robinson (a misdemeanor under Utah law) in its analysis of this Graham factor. Estate of Harmon, 471 F. Supp. 3d at 1220. The Estate's complaint states that Mr. Harmon "pushed past" Officer Robinson. Joint App. 17–18. One can hardly conclude that the encounter could only be characterized as an assault based on the body-cam footage. See Exs. A–C. As such, we cannot consider that alleged assault here. See Emmett v. Armstrong, 973 F.3d 1127, 1135 (10th Cir. 2020).

The third Graham factor weighs in favor of defendants. The Estate does not dispute that Mr. Harmon was attempting to evade arrest. The body-cam footage shows Mr. Harmon resisting arrest as he pushed past the officers while running away. See Exs. A–C. Therefore, this factor supports some use of force. See Graham, 490 U.S. at 396.

Turning to the second and most important Graham factor — the immediate threat Mr. Harmon posed to the safety of the officers — the facts alleged along with the video evidence do not render the Estate's version of events a "visible fiction," Scott, 550 U.S. at 381, thereby supporting the use of deadly force. We use the four non-exclusive factors stated in Estate of Larsen in evaluating the degree of threat posed to the officers during an encounter: "(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 toward the officers; (3)

the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." 511 F.3d at 1260. The district court concluded that the second Graham factor "strongly supports" the use of force because Mr. Harmon was not far from the officers and a reasonable officer could have believed that Mr. Harmon had a knife and was attempting to harm Officer Fox. See Estate of Harmon, 471 F. Supp. 3d at 1220–22. In reviewing the complaint as well as the body-cam footage at this stage, one cannot say, consistent with the standards for ruling on a motion to dismiss based on qualified immunity, that the Estate's version of facts is blatantly contradicted. In viewing the well-pled allegations in the light most favorable to the Estate, Mr. Harmon was unarmed and did not start back toward the officers. Accepting these facts as true, use of deadly force would not be justified. Accordingly, the district court erred in its assessment of the second Graham factor. We must conclude this factor, at this stage, favors the Estate.

While the third and fourth Estate of Larsen factors favor the defendants, the first and second favor the Estate. With respect to the third factor, there was around five to seven feet separating the officers and Mr. Harmon. See Estate of Larsen, 511 F.3d at 1260–61 (noting that a 7- to 20-foot separation justified force). With respect to the fourth factor, Mr. Harmon manifested the intention to evade arrest by running and pushing past an officer, but no verbal threats made by Mr. Harmon can be heard on the video. See Estate of Booker v. Gomez, 745 F.3d 405, 412 n.3 (10th Cir. 2014) (assuming no profanities were yelled where video evidence lacked audio).

As to the first Estate of Larsen factor, the officers never ordered Mr. Harmon to drop a weapon. Joint App. 27. In fact, the only statement that is audible on the video is Officer Fox yelling "I'll fucking shoot you" immediately before he shot Mr. Harmon. Joint App. 24. In assessing the second factor, the district court relied heavily on the hostile motions it found Mr. Harmon to have made. The district court found that: (1) Mr. Harmon threw Officer Robinson; (2) Mr. Harmon stood in "a threatening, stabbing stance"; and (3) Mr. Harmon "started back towards Officer Fox." Estate of Harmon, 471 F. Supp. 3d at 1220–21. But the approximately three seconds of relevant video footage cannot bear so much weight, let alone blatantly contradict, the Estate's well-pleaded factual allegations. The district court erred in making these findings. See Emmett, 973 F.3d at 1135.

First, it is not clear from the video that Mr. Harmon threw Officer Robinson to the ground. The Estate alleges that Mr. Harmon merely "pushed past" Officer Robinson, Joint App. 17, and the video does not blatantly contradict that allegation. Second, the fact that Mr. Harmon stopped running with his right arm raised does not clearly constitute "a threatening, stabbing stance." The Estate alleges that Mr. Harmon turned his head to look back at the officers as he continued to run. Joint App. 22. The video footage is simply too blurry and the sequence of events too quick to blatantly contradict this allegation. See Kalbaugh v. Jones, 807 F. App'x 826, 829 (10th Cir. 2020) (unpublished). Third, the Estate's complaint states that Mr. Harmon did not "come back at the officers." Joint App. 31. Again, the video evidence does

not clearly contradict this view, and the fact that Mr. Harmon was shot in his left buttock supports this allegation. See id. at 29–30.

The district court is correct that the relevant inquiry here is whether Officer Fox acted reasonably in light of a mistaken perception that Mr. Harmon was armed with a knife. See Estate of Smart v. City of Wichita, 951 F.3d 1161, 1171 (10th Cir. 2020). This is because "[a]n officer may be found to have acted reasonably even if he has a mistaken belief as to the facts." Thomas v. Durastanti, 607 F.3d 655, 666 (10th Cir. 2010). However, when viewing the evidence in the light most favorable to the Estate, we think a jury could conclude that Officer Fox unreasonably perceived Mr. Harmon to be armed with a knife. See Bond v. City of Tahledquah, 981 F.3d 808, 822 (10th Cir. 2020), rev'd on other grounds, --- U.S. ----, No. 20-1668, 2021 WL 4822664 (Oct. 18, 2021) (per curiam).[3] There was no knife visible in the video, and the complaint states that Mr. Harmon was unarmed. Joint App. 8, 18–19, 31–32. Accepting the Estate's allegations as true, Mr. Harmon's movements would not reasonably be considered hostile motions posing an immediate threat to the officers' safety. At this stage, acknowledging that further discovery could clarify these issues, we must conclude that the second Graham factor favors the Estate. See Truman v. Orem City, 1 F.4th 1227, 1238 (10th Cir. 2021).

[3] The Court reversed the Tenth Circuit's denial of qualified immunity in Bond based upon the lack of clearly established law and limited the reach of its decision to that element. City of Tahledquah v. Bond, 2021 WL 4822664, at *2.

In sum, the district court erred in drawing conclusions about Mr. Harmon's movements that were contrary to the Estate's allegations and were not blatantly contradicted by the record including the video footage. Based on the totality of the circumstances, a reasonable trier of fact could view Officer Fox's actions as objectively unreasonable. Accordingly, the Estate has established a plausible claim that Mr. Harmon's right to be free from excessive use of force under the Fourth Amendment was violated.

2. Clearly Established Law

The Estate is also required to show that the alleged constitutional violation was clearly established at the time of the violation. See Clark v. Wilson, 625 F.3d 686, 690 (10th Cir. 2010). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" Estate of Reat v. Rodriguez, 824 F.3d 960, 964 (10th Cir. 2016) (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)). Clearly established law "should not be defined at a high level of generality" but should be "particularized to the facts of the case." White v. Pauly, 137 S. Ct. 548, 552 (2017) (citations and quotations marks omitted). Typically, this requires a Tenth Circuit or Supreme Court decision on point. Tenorio v. Pitzer, 802 F.3d 1160, 1163–64 (10th Cir. 2015). "Nevertheless, our analysis is not a scavenger hunt for prior cases with precisely the same facts, and a prior case need not be exactly parallel to the conduct here for the officials to have been on notice of clearly established law." Reavis ex rel. Estate of Coale v. Frost, 967 F.3d 978, 992 (10th Cir. 2020).

There have been numerous cases in this circuit involving an officer shooting of an unarmed (or knife-wielding) person. For example, in Walker v. City of Orem, we stated, "[i]t was specifically established that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him," an officer's use of deadly force was unreasonable. 451 F.3d 1139, 1160 (10th Cir. 2006) (citing Zuchel v. City & Cnty. of Denver, 997 F.2d 730, 735–36 (10th Cir. 1993)). Tenorio held that where Mr. Tenorio had taken three steps toward the officers with a kitchen knife and ignored several police commands to drop his weapon, the law was clearly established that deadly force is objectively unreasonable. 802 F.3d at 1166. Considering the court must assume that Mr. Harmon was not armed with a knife at this stage in the case, and that he was not charging toward Officer Fox, there is clearly established law supporting the Estate's Fourth Amendment claim against Officer Fox.

B. Salt Lake City's Municipal Liability

As we reverse the district court's ruling as to Officer Fox, we also reverse its ruling as to Salt Lake City to allow the district court to fully assess whether there is a viable claim for municipal liability. See Lowe v. Town of Fairland, 143 F.3d 1378, 1381 (10th Cir. 1998).

REVERSED and REMANDED for further proceedings.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge