NOT RECOMMENDED FOR PUBLICATION
File Name: 18a0099n.06

No. 17-3459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 28, 2018
DEBORAH S. HUNT, Clerk

SARA KNOWLTON, *as Administrator of the estate of Brian Garber*,	)	
Plaintiff-Appellee,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
RICHLAND COUNTY, OHIO; RAYMOND FRAZIER; ANDREW KNEE; JAMES NICHOLSON,	)	
Defendants-Appellants.	)	

BEFORE: SILER, WHITE and THAPAR, Circuit Judges.

HELENE N. WHITE, Circuit Judge. Defendants-Appellants, Richland County, Ohio Sheriff's Officers Raymond Frazier, Andrew Knee, and James Nicholson ("the Officers"), appeal the district court's denial of their motion for summary judgment on the bases of qualified and statutory immunity in this excessive force case brought by Sara Knowlton, the widow and Administrator of the estate of Brian Garber ("Garber"), who was shot and killed by the Officers. We **AFFIRM**.

I.

At approximately 7:10 p.m. on March 16, 2014, the Richland County Sherriff's Office ("RCSO") received a report of domestic violence at Garber and Knowlton's home. Garber had a history of mental-health issues including bipolar disorder, depression, and anxiety, although the

Officers may not have been fully aware of that.[1] By the time RCSO deputies arrived at the house, Garber had left the home. *Id.* Knowlton told the responding deputies, including Deputy Knee, that she feared for her safety and the safety of her children because Garber had just forced his way into the house, pushed her onto a bed, and held her down by her "neck-shoulder area." Garber also pushed his mother, Connie Garber ("Mrs. Garber"), in the chest.

Knowlton and Mrs. Garber reluctantly signed statements and filled out domestic violence packets, which allowed RCSO to file assault charges against Garber. The women "wanted [Garber] to go to the hospital," [R. 32-3 at PID 305], and "wanted mental health care for [Garber], they did not want him to go to jail." [Appellee's Br. at 7]. Meanwhile, Deputy Frazier, Sergeant Nicholson, and other officers arrived and searched for Garber at several properties surrounding the residence. After failing to locate Garber, RCSO officers ended their search and issued a bulletin alerting all local law enforcement that Garber was sought for arrest.

Garber's mother and father returned to their home, which was across the street and up the hill from the Knowlton-Garber home. Mr. Garber found Garber upstairs in his childhood bedroom. Garber strongly implied that he had a gun and did not deny it when his mother asked whether he had a gun:

> [Brian] didn't say he had a gun, he just said, you won't like what's under my shirt. He had his hand under his shirt, and I'm the one that said really, Brian, now you're trying to tell us you have a gun?
>
> And he goes like this (indicating). Yeah. And I knew he was -- I just knew it, I knew he was just saying that because he wanted to be left alone. He's never handled a gun in his life.

[R. 32-3 at PID 308].

[1] When Deputy Knee spoke to Knowlton and Garber's mother before the shooting, they discussed Garber's medication and mental state.

Roughly an hour later, Knowlton called 911 again because Garber had threatened her via text message and told her that he had a gun. RCSO officers returned to the Garber-Knowlton residence. Mrs. Garber answered the front door and informed the Officers that Garber was in her home. When Officers Knee, Frazier, and Nicholson arrived at Garber's parents' home, Mr. Garber answered the door and directed the Officers upstairs, where his son was sitting on the bed in his childhood bedroom.

The Officers climbed the stairs and reached the doorway of the bedroom. The Officers were equipped with, among other things, firearms with magazines, radios, pepper spray, Tasers, and handcuffs. Each officer testified that upon arriving at the threshold of the unlit bedroom, they saw Garber sitting upright on the bed, facing the door, and that he stated that he had a gun. Sergeant Nicholson took a position at the right of the door. Deputy Knee took a position at the left. Nicholson flipped the light-switch on and ordered Garber to show his hands, to which Garber replied "No."

Deputy Frazier moved between Knee and Nicholson and entered the bedroom. The Officers were roughly five or six feet away from the bed on which Garber sat. Although Garber appeared agitated, he did not verbally threaten the Officers. Garber told the Officers "shoot me," and Nicholson responded, "That's not going to happen tonight. We're going to get you some help." [R.32-14 at PID 757–59].

The Officers attempted to deescalate the situation over the course of forty-five seconds. Garber appeared agitated and told the Officers "you can't help me" and "F**k you guys, you're going to have to kill me, just shoot me." [R.32-14 at PID 757–59]; [R.32-2 at PID 283]; [R.32-5 at PID 340]. As the Officers stood in the doorway, Garber brandished what appeared to be a

rectangular object in a "tepee"[2] fashion under his shirt and refused to obey the Officers' commands to show his hands and drop his weapon. [R.32-14 at PID 756–57]. All three Officers testified that they did not feel they needed to use their firearms during this time. [R.32-14 at PID 282–83]; [R.32-5 at PID 341, 343]; [R.32-2, PID 282–83].

According to the Officers, at some point, they heard a loud "pop" or "bang" that they believed to be a gunshot coming from Garber's direction, although none of the officers saw any flash. All three officers then fired multiple fatal rounds at Garber. *Id.* Knee testified that before firing his own weapon, he heard shots "from [his] left, which would have been Deputy Frazier." [R.32-5 at PID 342]. Frazier and Knee had already fired their weapons by the time Nicholson fired his. Each Officer testified that he fired his weapon in response to a shot from Garber, and was adamant that the sound he heard did not come from one of his fellow officers.

After the shooting, Knee visually checked over Frazier, because there was concern Frazier may have been shot. None of the Officers saw a dark object, remote control, or anything that could have looked like a gun on the bed or in Garber's hand. The Officers then went downstairs to the kitchen and waited together for approximately one hour. There, the Officers

[2] Knee testified that Garber "had a very distinct rectangular-shaped impression underneath his shirt in the center area of his chest." [R.32-5 at PID 341].

Nicholson saw a protrusion under Garber's shirt, and described the protrusion as being "fully extended in the shirt to where it looked almost like a teepee." [R.32-14 at PID 758]. Nicholson "perceived it to be a firearm 100 percent. It wasn't like a finger or a sharp object or a pencil." [*Id.* at PID 759].

Frazier said Garber's left hand was between his legs holding a can, and his right hand was holding something under his shirt. Frazier described the object as appearing "to be the front end of a Glock-style firearm, a squared front end firearm." [R.32-2 at PID 282]. In front of the grand jury, Frazier testified that Garber "all at once moves his shirt up and he raises his hand and there's a pop. . . . He was bringing his hand out of his shirt and moving it forward." [Frazier Test. 23–24]. However, during his deposition, Frazier admitted Garber's hand did not come out from under his shirt, that Garber did not extend his arm, and that Garber did not lift his shirt and present a firearm. [R.32-2 at PID 284–85].

discussed that the object Garber had appeared to look like a Glock. The Officers had been instructed not to discuss their observations with each other.

RCSO Deputy Zehner, who was on the staircase when the shooting occurred, took photographs of the scene. The photos showed a remote control located on the bed next to Garber. The remote was tested for prints and DNA; however, no latent prints were suitable for comparison and the DNA swab collected was not sufficient for inclusion regarding Garber.

No gun was ever found. Ohio Bureau of Criminal Investigations ("BCI") agent Cory Momchilov served as lead investigator during the criminal investigation of the shooting. Momchilov testified that investigators were unable to identify another source that could have created the "pop" or "bang" sound the Officers described. Momchilov believed it was possible that a gunshot from one of the Officers precipitated the shooting.

Momchilov prepared an investigative report and presented his findings to the Special Prosecutors assigned to the case. The Special Prosecutors presented the case to a grand jury, which declined to indict the Officers. RCSO also conducted an internal investigation into the shooting. RCSO's Use of Force/Firearms Review Board reviewed the internal investigation findings and concluded the use of deadly force was reasonable.

II.

In January 2015, Knowlton, as Administrator of Garber's estate, filed a multi-count complaint alleging federal civil rights violations and state-law wrongful-death and negligent-supervision claims. The complaint named Richland County, the RCSO, the Sheriff, and each of the three Officers as defendants, individually and in their official capacities. After discovery, all Defendants moved for summary judgment, arguing that they did not violate Garber's constitutional rights and their actions did not rise to a level that would strip them of immunity under Ohio Revised Code § 2744.01.01.

The district court granted summary judgment in favor of the County, the RCSO, and the Sheriff. The district court permitted Knowlton to proceed against each of the Officers in their individual capacities on her § 1983 claim for excessive force and her state-law claims for assault and battery, wrongful death, survivorship, and willful, wanton, and reckless conduct. The district court found a dispute of material fact regarding whether the Officers' actions were reasonable under the Fourth Amendment.

On appeal, the Officers argue that no reasonable jury could find that the Officers' actions were objectively unreasonable so as to deprive them of qualified immunity, or that the Officers acted with the degree of culpability necessary to strip them of immunity under Ohio law.

III.

We review de novo a district court's denial of summary judgment on the grounds of qualified immunity. *Pollard v. City of Columbus, Ohio,* 780 F.3d 395, 402 (6th Cir. 2015). Knowlton bears the burden of demonstrating that the Officers are not entitled to qualified immunity. *Livermore ex rel. Rohm v. Lubelan,* 476 F.3d 397, 403 (6th Cir. 2007). However, we view the facts and any inferences reasonably drawn from them in the light most favorable to Knowlton. *Martin v. City of Broadview Heights,* 712 F.3d 951, 957 (6th Cir. 2013).

IV.

As a threshold matter, we address Knowlton's claim that we have no jurisdiction to entertain the Officers' interlocutory appeal. "The denial of a summary judgment motion usually presents neither a final appealable order nor an appealable interlocutory order." *Floyd v. City of Detroit*, 518 F.3d 398, 404 (6th Cir. 2008). However, an exception to that rule applies when a district court rejects a defendant's assertion of the qualified immunity defense "to the extent that the appeal presents a question of law and does not require us to resolve disputes of material facts." *Jefferson v. Lewis*, 594 F.3d 454, 459 (6th Cir. 2010) (citations omitted). The Officers

"must be willing to concede the plaintiff's version of the facts." *Id.* (citing *Morrison v. Bd. of Trustees of Green Twp.*, 583 F.3d 394, 400 (6th Cir. 2009). We thus exercise our jurisdiction to hear the Officers' appeal accepting Knowlton's version of the facts. "[I]f[,] after our review we determine that resolution of the legal questions turns on which version of disputed facts one believes, we must allow the case to proceed in the trial court." *Id.*

V.

Government officials are immune from civil liability under 42 U.S.C. § 1983 when performing discretionary duties, provided "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). When a defendant raises qualified immunity, the burden is on the plaintiff to demonstrate that the official is not entitled to qualified immunity, *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006), by alleging "facts sufficient to indicate that the [government official's] act in question violated clearly established law at the time the act was committed." *Russo v. City of Cincinnati*, 953 F.2d 1036, 1043 (6th Cir. 1992).

To determine whether a government official is entitled to qualified immunity, we analyze (a) whether the facts, when taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right; and (b) if so, whether that constitutional right was clearly established such that a "reasonable official would understand that what he is doing violates that right." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citation and internal quotation marks omitted), *overruled on other grounds by Pearson*, 555 U.S. at 229.

A.

Under the first *Saucier* prong, the court must identify "the specific constitutional right allegedly infringed," *Graham v. Connor*, 490 U.S. 386, 394, and determine whether that right

was violated. Knowlton alleges that the Officers used excessive force in seizing her husband. [R.3 at PID 62]. In Fourth Amendment claims, we apply "the objective reasonableness standard, which depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight." *Jefferson*, 594 F.3d at 460–61 (citation and internal quotation marks omitted). "[T]he use of deadly force is only constitutionally permissible if 'the officer has probable cause to believe that a suspect poses a threat of serious physical harm, either to the officer or to others.'" *Livermore ex Rel Rohm v. Lubelan*, 476 F.3d 397, 404 (6th Cir. 2007) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

Although "[a]s a matter of law, an unarmed and nondangerous suspect has a constitutional right not to be shot by police officers," *Floyd*, 518 F.3d at 407, "whether a suspect is 'nondangerous' is based on the facts known to the officer at the time of the incident." *Jefferson*, 594 F.3d at 461. Our reasonableness analysis "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). Nevertheless, "[e]ven a split-second decision, if sufficiently wrong, may not be protected by qualified immunity." *Bouggess v. Mattingly*, 482 F.3d 886, 894 (6th Cir. 2007).

Here, the Officers were all justifiably concerned that they were in danger under the circumstances. As the district court explained:

> The undisputed facts are that Brian Garber, a mentally disturbed man, went out of control. After assaulting his wife, he retreated to an upstairs bedroom in his parents' home. Members of his family believed he was armed, communicated such to the 911 dispatcher who in turn communicated it to the law enforcement officers in the field, and when three sheriff's deputies arrived in response to the

> domestic violence complaint, Brian Garber told them he had a gun. He menacingly pointed what appeared to be a gun from under his shirt. The deputies tried to calm Brian Garber down and get him to surrender, but he refused to raise his hands and said they would have to shoot him.

[R.39 at PID 1247]. Crucially, however, each Officer testified that he did not feel the use of deadly force was warranted until he heard the "pop" sound. The investigations that followed revealed that Garber did not have a gun and that the only shots fired came from the Officers. BCI was unable to reproduce any "popping" sound that could have come from Garber. The district court explained:

> These facts put the Court in the unusual situation where the testimony of all three deputies involved in the deadly shooting contradicts the objective facts of that event. *See Jefferson*, 594 F.3d at 462 ("Though we are hesitant to doubt Officer Lewis's testimony that he saw a flash, the court may not simply accept what may be a self-serving account by the police officer. It must look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story.").
>
> Because Brian Garber was unarmed and produced no "pop," the Court can only conclude that one of the deputies fired the first shot and that none of the deputies fired in response to any gunshot sound from Brian Garber. Thus, each of the deputies is either mistaken or lying about shooting in response to a gunshot sound from Brian Garber or otherwise. This is not a question of law for the Court, but a question of fact and credibility for a jury to decide.

[R.39 at PID 1250].

We agree. We lack jurisdiction to resolve factual disputes, *Romo v. Largen*, 723 F.3d 670, 674–75 (6th Cir. 2013), and we must view the facts in the light most favorable to Knowlton: i.e., that although the Officers did not perceive that deadly force was necessary, one of the Officers nevertheless shot Garber, and the other Officers fired in response to that Officer's shot. [Appellee's Br. at 17 n. 13, 31]. The record contains adequate evidentiary support for

Knowlton's theory, under which Garber's Fourth Amendment right to be free from excessive force was violated.

B.

The second *Saucier* inquiry is whether the Officers' actions were objectively unreasonable in light of a clearly established right. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202 (2001). It was.

We have found police use of deadly force reasonable under specific circumstances, even against an unarmed individual, where the individual indicates he or she is armed, as Garber did here. Crucially, however, we have found such police action reasonable when officers are confronted with additional indicia of immediate danger, such as a menacing gesture or other indication that the individual intends to use his or her weapon. *See Bouggess v. Mattingly*, 482 F.3d 886, 896 (6th Cir. 2007) ("The cases [the defendant] cites all stand for the proposition that, when a police officer both knows a defendant has a weapon *and* has a reasonable belief that the weapon will be used against him or others, the officer is justified in using deadly force. However, even when a suspect has a weapon, but the officer has no reasonable belief that the suspect poses a danger of serious physical harm to him or others, deadly force is *not* justified.") (emphasis in original) (citations omitted). *See also Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 366 (6th Cir. 2017) ("To be clear, we do not hold that an officer may shoot a suspect merely because he has a gun in his hand. Whether a suspect has a weapon constitutes just one consideration in assessing the totality of the circumstances.").

The Officers rely primarily on *Pollard v. City of Columbus, Ohio*, 780 F.3d 395 (6th Cir. 2015), and *Simmonds v. Genesee County*, 682 F.3d 438 (6th Cir. 2012). Both are distinguishable. In *Pollard*, police officers attempted to arrest Abram Bynum, a suspect in a rape case. Bynum led police on a high-speed car chase before eventually crashing into a tractor trailer. *Id.* at 403. After the crash, Bynum reached down to the floor of his vehicle and clasped his hands into a shooting posture, pointing at the officers on the scene. When Bynum reached his pointed shooting hands at the officers, the officers shot and killed him. *Id*. Considering the totality of the circumstances, we explained that it was these "gestures suggesting [Bynum] had a weapon" and "Bynum's sudden movement," particularly after he "had proven he would do almost anything to avoid capture" that supported our finding that the officers were entitled to qualified immunity. *Id*. (citations omitted).

In *Simmonds*, police officers responding to a 911 call fatally shot Kevin Simmonds, who "had been drinking, was displaying mentally unstable behaviors, and was possibly suicidal." *Id.* at 445. Officers approached Simmonds, who was sitting in his vehicle, and ordered Simmonds to show his hands. Simmonds refused to comply. Officers then attempted to use a Taser to de-escalate, but Simmonds was wearing a heavy jacket and the Taser did not properly attach. *Id.* at 441. Simmonds then "punched his hands out of the open car window, in a shooting position, with what [the officers] believed was a silver handgun." *Id.* at 442. It turned out that Simmonds was holding a silver and blue cell phone. Nevertheless, we found the officers were entitled to qualified immunity because it was reasonable that the officers believed Simmonds had a gun and that his sudden movement of pointing it at the officers was an imminent threat. *Id.*

Pollard and *Simmonds* are both distinguishable. In both cases, the officers' belief that they faced immediate danger did not rest only on indications that Bynum and Simmonds were

armed; the belief also rested on Bynum's and Simmonds' menacing gestures, which were reasonably interpreted as demonstrating an intention to shoot. In the absence of that indicium of immediate threat here, the Officers point to the "pop" sound as the factor precipitating the shooting. However, because Garber did not have a gun, and investigators were unable to find a source or explanation for the "pop" or "bang," whether the Officers actually heard the sound, and whether it was coming from Garber, as opposed to one of their fellow Officers or some other source, are disputed material facts that preclude summary judgment. *See, e.g.*, *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 903 (6th Cir. 1998) ("This Court has established that summary judgment is inappropriate where there are contentious factual disputes over the reasonableness of the use of deadly force."); *Jefferson*, 594 F.3d at 463 ("In light of the competing inferences one might draw from these facts and their effect on the question of whether Officer Lewis's actions were objectively unreasonable, we agree with the district court that the jury should find the facts that determine whether Officer Lewis is entitled to qualified immunity."); *Craighead v. Lee*, 399 F.3d 954, 962 (6th Cir. 2005) (denying qualified immunity when an officer shot an individual holding a gun when testimony diverged as to whether the gun was pointed upward or at the officer). *See also Floyd*, 518 F.3d at 408 (affirming the denial of summary judgment when an officer believed an unarmed individual fired a weapon when, in fact, another officer had fired the weapon because that argument "fails to address the true issue . . . namely, whether his mistaken perception and response were themselves reasonable. Plainly, not all mistakes—even honest ones—are objectively reasonable. The bare assertion that [the officer] allegedly formed an honest but mistaken belief thus does little to resolve the key issue of whether his belief and subsequent actions were nonetheless objectively unreasonable.").

Given the Officers' testimony that the threat Garber posed was not imminent and did not justify using deadly force until the Officers heard the "pop" sound, together with the evidence that one of the Officers fired at Garber without hearing any sound, the district court did not err in in denying summary judgment on the qualified immunity issue.

VI.

Knowlton asserted state-law claims against the Deputies for assault and battery, wrongful death, survivorship, and willful, wanton, and reckless conduct. [R.3 at PID 61–66]. The parties agree that the immunity analysis under Ohio Rev. Code Ann. § 2744 for these state-law tort claims is nearly identical to the above analysis for qualified immunity under 42 U.S.C. § 1983. [Appellants' Br. at 27–28]; [Appellee's Br. at 48–49].

Employees of an Ohio political subdivision are immune from suit for negligent torts arising from any act or omission in connection with a government function. *See Burgess v. Fischer*, 735 F.3d 462, 479 (6th Cir. 2013). This immunity does not extend to actions "outside the scope of [their] employment or official responsibilities" or "committed with malicious purpose, in bad faith, or in a wanton or reckless manner." *Id.* (quoting Ohio Rev. Code Ann. § 2744.03(A)(6)(b)) (internal quotation marks omitted).

Here, the district court denied the Officers summary judgment on these claims, stating that because "there is a dispute of material fact as to whether the actions of [the Officers] were reasonable under the Fourth Amendment . . . there is also a dispute of material fact as to whether the actions of those same Defendants were reckless for the purposes of Ohio tort immunity." [R.39 at PID 1260].

"'[R]eckless conduct' is the 'conscious disregard of or indifference to a known or obvious risk of harm . . . that is unreasonable under the circumstances and is substantially greater

than negligent conduct.'" *Burgess*, 735 F.3d at 479–80 (internal citations omitted). If the jury believes Knowlton's version of events, it could find that the Officers acted recklessly. Therefore, the district court properly denied summary judgment on Knowlton's Ohio state-law claims.

VII.

For the foregoing reasons, we **AFFIRM**.