

January 29, 2013

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

Elisabeth A. Shumaker  
Clerk of Court

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JOHN F. SMITH,

Plaintiff-Appellant,

v.

ROBERT MCCORD; JEREMY  
STOREY, police officers employed by  
the City of Las Cruces Police  
Department, in their individual  
capacities,

Defendants-Appellees.

No. 12-2041  
(D.C. No. 2:10-CV-01030-JCH-  
LAM)  
(D. N.M.)

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**ORDER AND JUDGMENT\***

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Before **TYMKOVICH, GORSUCH**, and **HOLMES**, Circuit Judges.

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This case presents us with an unfortunate tale of poor lawyering. A 75 year-old man, John Smith, was in his home when he heard noises coming from his front yard. Mr. Smith opened his front door and was surprised to see an array of

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\* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

police officers, EMTs, police cars, and fire trucks splayed in front of his house. A suicidal man with knives was on the sidewalk and authorities were attempting to take control of the situation. Unaware of all this and curious about the commotion, Mr. Smith approached an officer and asked if something was wrong. The officer didn't answer but instead commanded Mr. Smith to get back inside. Understandably perplexed Mr. Smith mumbled, "Well that just beats me, a man is not able to find out what happens in his front yard."

At that point Mr. Smith alleges the officer leapt into action, telling him he was going to arrest him and ordering him to place his hands on top of the car parked in his driveway. Mr. Smith initially complied but jerked his hands away because, he says, the car was too hot from sitting in the sun. An officer then kicked Mr. Smith's legs out from under him and he fell to the ground. There, two officers allegedly placed their knees on Mr. Smith's back and legs before thrusting him into the police car for a trip to the station. Eventually, Mr. Smith was taken to a medial center where he received treatment for a sprain to both wrists, contusions on his knees and elbows, and a lumbar strain.

After the episode Mr. Smith sued the officers under 42 U.S.C. § 1983 for using excessive force in the arrest. But when the officers moved for summary judgment claiming qualified immunity, Mr. Smith's attorney did not respond. To be sure, he argued as one does in ordinary summary judgment proceedings that a material dispute of fact existed. But once an officer asserts qualified immunity,

the plaintiff bears the “heavy two-part burden” of showing both that (1) “the defendant violated . . . [a] constitutional . . . right[],” and (2) the “infringed right at issue was clearly established at the time of the allegedly unlawful activity such that a reasonable law enforcement officer would have known that his or her challenged conduct was illegal.” *Martinez v. Carr*, 479 F.3d 1292, 1294-95 (10th Cir. 2007). These are burdens Mr. Smith’s attorney didn’t even try to meet. His response brief failed even to include the terms “qualified immunity” or “clearly established.” Inexorably, this led the district court to grant judgment for the defendants, a disposition this court can hardly now fault as a matter of law.

This isn’t to say Mr. Smith lacked (or possessed) a meritorious case. It is to say only we will never know because clients like Mr. Smith are usually bound by their lawyers’ actions — or, as here, inactions. Sometimes that means good cases are lost by bad lawyers, a lamentable cost of our legal system. Other remedies seek, if imperfectly, to address this problem, including administrative sanctions (Mr. Smith’s trial lawyer was suspended from practice, *In re Dennis W. Montoya*, 266 P.3d 11, 23-25 (N.M. 2011)) and malpractice claims. But none of this allows us to find fault with the district court’s unassailable conclusion that Mr. Smith, through his counsel, failed to carry the burden assigned him by law.

The judgment of the district court is affirmed.

ENTERED FOR THE COURT

Neil M. Gorsuch  
Circuit Judge