FILED
United States Court of Appeals
Tenth Circuit

November 2, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALEK A. HANSEN, as administrator of the estate of Debra Arbuckle,

Plaintiff - Appellant,

v.

KALEB DAILEY, in his individual capacity,

Defendant - Appellee.

No. 21-3235
(D.C. No. 2:20-CV-02480-JWB-GEB)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **EID**, and **ROSSMAN**, Circuit Judges.

Sedgwick County Sheriff's Deputy Kaleb Dailey shot and killed Debra Arbuckle. Her son and administrator of her estate, Alek A. Hansen, sued Deputy Dailey under 42 U.S.C. § 1983, alleging Deputy Dailey violated Arbuckle's Fourth Amendment right to be free from unreasonable seizure. The district court concluded Deputy Dailey was entitled to qualified immunity and granted summary judgment in his favor. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I.

The facts are largely undisputed. Debra Arbuckle led Sedgwick County Sheriff's Deputies on a high-speed chase through Wichita, Kansas, in the early morning hours of December 30, 2019, after she had been seen driving a Volkswagen with a license plate registered to a different vehicle. During the chase, the deputies unsuccessfully attempted to stop her, twice by deploying spikes to deflate her tires and three times by attempting a "Tactical Vehicle Intervention," ramming the Volkswagen to bring it to a stop. The chase ended when Arbuckle drove her Volkswagen up over a curb. The car was still operational but badly damaged. There was no tire on the front left wheel, and the rear bumper was hanging off.

Sergeant Eric Slay and Deputies Kaleb Dailey, Stetson Johnson, and Tyler Marrero pulled up around Arbuckle's Volkswagen in their own vehicles, partially, but not entirely, boxing her in. Deputy Dailey parked on the right passenger side of the Volkswagen. Deputy Marrero parked behind the Volkswagen slightly to the left on the driver's side. A tree and fence blocked the Volkswagen from the front. The deputies' vehicle lights were flashing, as they had been throughout the chase. The deputies then got out of their cars, guns drawn, to perform a felony stop. Deputy Dailey stood next to his own vehicle on the passenger side of the Volkswagen. Deputy Marrero and Sergeant Slay stood on the driver's side of Deputy Marrero's car. Deputy Johnson went to the rear passenger side of Deputy Marrero's car and began walking toward the front passenger door.

Events unfolded rapidly over approximately the next six seconds. Deputy Dailey looked to his left and saw Deputy Johnson moving next to Deputy Marrero's car, approximately one car length behind and slightly to the side of the Volkswagen.[1] He saw that no one was standing directly behind the Volkswagen at that moment. Deputy Dailey then turned and faced forward again, looking away from the rear of the car and Deputy Johnson. Deputy Marrero called for Arbuckle to turn the car off. Arbuckle did not turn the car off. The rear lights of the Volkswagen illuminated, and the car reversed straight backward. The Volkswagen moved with enough speed that it could have hit and injured a person if there had been a person standing behind it. Deputy Johnson, who was close to but not in the immediate path of the reversing car, quickly moved behind Deputy Marrero's car. At the same time, Deputy Dailey, who was still facing the front passenger window of the Volkswagen, fired six shots through the passenger side window. One shot hit Arbuckle in the leg and another in the head, killing her. No other deputy fired his gun. Deputy Dailey later stated he feared Deputy Johnson was in danger of being run over at the moment Deputy Dailey fired.

Alek A. Hansen, as administrator of Arbuckle's estate, then sued Deputy Dailey for violating Arbuckle's Fourth Amendment right to be free from unreasonable seizure. Deputy Dailey moved for summary judgment on the basis of qualified immunity. The district court granted summary judgment after finding

[1] Deputy Dailey wore a head-mounted body camera, so his video shows roughly the same thing he would have seen.

Deputy Dailey had not violated Arbuckle's constitutional rights and, in the alternative, because the law was not clearly established. Hansen now appeals.

II.

We review a grant of summary judgment based on qualified immunity de novo. *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014). "At the summary judgment stage in a qualified immunity case, the court may not weigh evidence and must resolve genuine disputes of material fact in favor of the nonmoving party." *Id.*

Qualified immunity "shields governmental officials performing discretionary functions 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." *Pyle v. Woods*, 874 F.3d 1257, 1262 (10th Cir. 2017) (cleaned up) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "[Q]ualified immunity generally protects all public officials except those who are 'plainly incompetent or those who knowingly violate the law.'" *Lowe v. Raemisch*, 864 F.3d 1205, 1208 (10th Cir. 2017) (quoting *White v. Pauly*, 580 U.S. 73, 78–79 (2017) (per curium)). This standard "gives government officials breathing room" to make reasonable mistakes, "regardless of whether the [] error is a mistake of law [or] a mistake of fact." *Singh v. Cordle*, 936 F.3d 1022, 1033 (10th Cir. 2019) (quoting *Lane v. Franks*, 573 U.S. 228, 243 (2014), then *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

After the defendant has invoked qualified immunity at the summary judgment stage, the "plaintiff must clear two hurdles." *Swanson v. Town of Mt. View, Colo.*, 577 F.3d 1196, 1199 (10th Cir. 2009). He must "demonstrate on the facts alleged [] that the defendant violated his constitutional or statutory rights." *Id.* He must also demonstrate that "the law was clearly established at the time [the] action occurred." *Harlow*, 457 U.S. at 818. We have discretion to decide which prong of the analysis to address first, *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010) (citing *Pearson*, 555 U.S. at 235), and "must grant the defendant qualified immunity if the plaintiff fails to prove either prong," *Arnold v. City of Olathe*, 35 F.4th 778, 788 (10th Cir. 2022). In this case, we need not decide whether the law was clearly established because Hansen has not carried his burden to demonstrate that Deputy Dailey violated Arbuckle's constitutional rights.

Hansen alleges that Deputy Dailey violated the Fourth Amendment's prohibition on excessive force when he used deadly force against Arbuckle. *See* U.S. Const. amend. IV. The touchstone of the Fourth Amendment is reasonableness. *See Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014). As such, we ask whether the officer's actions were reasonable under the specific circumstances at play, bearing in mind "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, 397 (1989). The dispositive question is not whether use of force was actually necessary, but whether the officer had an objectively reasonable belief that it was,

even if it turns out he was wrong. *See id.* at 396 ("[U]se of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.").

We use the three factors identified by the *Graham* Court to determine whether a use of force is reasonable. *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1169–70 (10th Cir. 2021). These factors are (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officer or others," and (3) "whether the individual is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396–97. The second factor is "undoubtedly the 'most important' and fact intensive." *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017) (quoting *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010)). In the end, we hold that Hansen cannot make out a constitutional violation under the *Graham* factors.

The first *Graham* factor, severity of the crime, weighs against Hansen. We have found that more significant force may be used when the suspect committed a felony, as opposed to a misdemeanor. *See Est.ate of Taylor v. Salt Lake City*, 16 F.4th 744, 764–65 (2021) (collecting cases); *see also Arnold*, 35 F.4th at 792 (factor weighed in favor of officers when offense was felony eluding); *Estate of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1061 (10th Cir. 2020) (classifying a felony as a serious crime under the first *Graham* factor). No one contests that Arbuckle committed numerous traffic violations. Namely, the body and dash cam video shows Arbuckle driving through numerous red lights and stop signs. At some points she is

driving at over 100 miles per hour. She fails to stop and pull over even though the sheriff's lights and sirens are obvious.

Hansen bears the initial burden of showing that a jury could find the crime was not severe. Hansen mentions that Arbuckle committed a "minor infraction" when her license plate did not match the car she was driving, but does not address the first *Graham* factor in his brief. Aplt. Br. at 8. In addition, we do not take the nonmoving party's version of events when it is blatantly contradicted by the record. *See Crane v. Utah Dept. of Corrections*, 15 F.4th 1296, 1300 n.2 (10th Cir. 2021). The video shows that Arbuckle drove in the wrong lane while evading police, which is a felony under Kansas law. *See* K.S.A. §§ 8-1568(b)(3), (c)(3). Given that felony, more significant force could be used, *see Estate of Taylor*, 16 F.4th at 764–65, and thus, Hansen fails to meet his burden of showing the crime was not severe.

The second *Graham* factor, officer safety, also weighs against Hansen. "[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." *Cordova v. Aragon*, 569 F.3d 1183, 1192 (10th Cir. 2009). The Supreme Court has held an officer may use deadly force to prevent a driver from escaping when the driver poses a risk to officers or other bystanders. *See Scott v. Harris*, 550 U.S. 372, 385–86 (2007) (involving use of PIT maneuver to stop driver in high-speed chase that posed a danger to other drivers). Hansen argues a jury could have found Deputy Dailey could not have reasonably believed Deputy Johnson was in danger because (1) Arbuckle's Volkswagen was "hobbled and surrounded" and

(2) Deputy Dailey looked into the space behind the Volkswagen before Deputy Johnson moved into it (that is, he did not know Deputy Johnson was standing behind the car). Aplt. Br. at 13–14. We disagree.

We assess the second *Graham* factor using the four non-exclusive *Estate of Larsen* factors, which are (1) whether the officer ordered the suspect to drop the weapon, (2) whether the suspect made a hostile motion toward the officer, (3) how far the suspect was from the officer or other bystanders, and (4) the manifest intentions of the suspect. *See Arnold,* 35 F.4th at792. The video does not show that the Volkswagen was "hobbled," "severely disabled," or "slowly roll[ing] back" as Hansen characterizes. Aplt. Br. at 4, 10, 14. The video does not show Deputy Johnson was in the clear when the car reversed. The video confirms Deputy Marrero yelled to Arbuckle, "Driver! Turn the car off!" *See, e.g.*, Aplt. App'x. Vol. IV, Sgt. Slay Body Cam 1 at 1:52. As discussed above, the video shows the car revving and moving backward—a hostile motion akin to a defendant with her finger on the trigger. *See, e.g.*, Aplt. App'x. Vol. IV, Dep. Dailey Body Cam 2 at 9:32. The video shows physical proximity—Deputy Johnson was close enough to the reversing Volkswagen that he had to rush to get out of the way. *See, e.g.*, Aplt. App'x. Vol. IV, Sgt. Slay Body Cam 1 at 1:59. Finally, it is uncontested that Arbuckle had just led police on a high-speed chase, and so it was reasonable for them to think she may be trying to flee again. Based on these facts, we do not believe a jury could conclude that it was objectively unreasonable for an officer in Deputy Dailey's position to believe Arbuckle posed an immediate threat. *See Arnold,* 35 F.4th at 792 (all four

Estate of Larsen factors present where suspect waved a gun at officers in a laundry room after they ordered her to drop it).

Finally, the third *Graham* factor, resisting arrest, also weighs against Hansen. Arbuckle had just led the Deputies on a high-speed chase for almost twenty minutes and, even though they surrounded her with flashing lights, attempted to back out again. Again, Hansen argues the video shows Arbuckle's car was disabled and she could not flee or actively resist arrest. But again, the video does not show this. The video shows her engine revving and the car reversing, indicating Arbuckle's further unwillingness to comply.

All three *Graham* factors weigh in favor of Deputy Dailey and against Hansen. Deputy Dailey's use of force was reasonable. This is particularly true given that Deputy Dailey's decision to shoot Arbuckle once she began to reverse is the "type of split-second judgment, 'made in tense, uncertain, and rapidly evolving' circumstances, 'that [courts] do not like to second-guess using the 20/20 hindsight found in the comfort of a judge's chambers.'" *Estate of Valverde*, 967 F.3d at 1049. Because all the *Graham* factors weigh in favor of Deputy Dailey, we conclude that his actions were reasonable under the specific circumstance that he encountered. Deputy Dailey did not violate Arbuckle's Fourth Amendment right to be free from excessive force. Therefore, Hansen has not met his burden to demonstrate that Deputy Dailey violated Arbuckle's constitutional rights, and Deputy Dailey is thus entitled to qualified immunity.

III.

For the reasons mentioned above, we AFFIRM the district court's grant of summary judgment in favor of Deputy Dailey on the basis of qualified immunity.

Entered for the Court

Allison H. Eid
Circuit Judge