IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1695
Summary Calendar

RICKY DEAN RANDELL,

Plaintiff-Appellee,

VERSUS

GARTH DAVIS,
Trooper, Texas Department of Public Safety, et al.,

Defendants,

GARTH DAVIS,
Trooper, Texas Department of Public Safety,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(5:91-CV-172-C)

(February 17, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Defendant Garth Davis appeals the denial of his motion for summary judgment that was based upon his assertion of qualified immunity. Finding no error, we affirm.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Ricky Dean Randall sued Davis, a state trooper, individually under 42 U.S.C. § 1983 for use of excessive force incident to his arrest allegedly in violation of the Fourth Amendment.[1] Davis pleaded qualified immunity. Randell subsequently filed an amended complaint complying with the heightened pleading standard required when qualified immunity is pleaded. See Elliott v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985).

Randell's complaint alleges that on April 22, 1991, when Davis attempted to stop Randell for a traffic violation, Randell refused to stop and fled, whereupon Davis pursued him. Randell alleges that he drove to his mother's house, where he stepped out of the car, placed his hands above his head, and said, "I surrender." Randell claims that Davis handcuffed him, then struck him on his left eye with a flashlight. As a result of the blow, Randell later required four stitches to close the cut. He also alleges that he was then put on the ground face down and that Davis grabbed the back of his head and slammed his head into the ground, causing cuts, scratches, bruises, and knots.

The magistrate judge concluded that Randell had sufficiently pleaded a prima facie case for excessive use of force upon which relief could be granted and could overcome Davis's claim of qualified immunity. Davis then moved for summary judgment, arguing that he was entitled to qualified immunity and that any force used

[1] The district court dismissed Davis in his official capacity and dismissed the Texas Department of Public Safety on the ground of absolute immunity.

was objectively reasonable under the circumstances. The court denied the motion, stating that Davis was not entitled to qualified immunity and that the issue of the reasonableness of the force used was an issue of fact.

II.

Davis claims that he is entitled to qualified immunity in that his use of force was objectively reasonable under the circumstances and in light of the legal rules established at the time of the arrest and that therefore, he did not use excessive force. Review of a district court's ruling on a motion for summary judgment is plenary. King v. Chide, 974 F.2d 653, 655 (5th Cir. 1992). We apply the same standards as those that govern the district court's determination. Id.

Summary judgment is granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id. at 655-56; Fed. R. Civ. P. 56(c). To determine whether there are any genuine issues of material fact, we first consult the applicable substantive law to ascertain the material factual issues. Then we review the evidence bearing on those issues, viewing the facts and inferences in the light most favorable to the nonmoving party. King, 974 F.2d at 656.

The examination of a claim of qualified immunity is a two-step process. The first inquiry is whether the plaintiff has alleged a violation of a clearly established constitutional right. Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991). It is well settled that

if a law enforcement officer uses excessive force in the course of making an arrest, the Fourth Amendment guarantee against unreasonable seizure is implicated. King, 974 F.2d at 656. The next step is to determine the standard by which to judge the reasonableness of the officer's behavior. Id. at 657.

The objective reasonableness of an officer's conduct is judged according to the law that was clearly established on the date of the incident. Anderson v. Creighton, 483 U.S. 635, 639 (1987). Our standard at the time of Randall's arrest was that a plaintiff bringing an excessive force claim based upon force used during an arrest could prevail only by proving a significant injury that resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was objectively unreasonable. Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc) (per curiam).[2]

III.

Davis presented the district court with his affidavit, stating that he attempted to pull Randell over after observing him cross the center stripe of a two-lane highway. After Randell refused to stop, Davis pursued Randell through the town of Plainview in a chase that occasionally achieved high rates of speed. During this pursuit, Davis succeeded in stopping Randell, whereupon Davis

[2] The Johnson standard is no longer valid in the wake of Hudson v. McMillian, 112 S. Ct. 995 (1992).

exited his vehicle and approached Randell's car. Randell then drove away, striking Davis's right hand with his vehicle.

After Randell arrived at a residence, he continued to attempt to evade Davis. Finally, he left his car and fled on foot. Davis chased and caught Randell, who threw up his hands and stated that he gave up. However, Randell continued to struggle to get away, whereupon Davis struck Randell on the thigh to bring him to the ground. Randell continued to struggle while face down in the rocks and dirt. Davis and three other officers then handcuffed Randell and placed him on Davis's vehicle.

Davis transported Randell to the sheriff's office, where Davis noticed a small cut over Randell's eye. Randell was then to the hospital for stitches to this cut; Davis did not see any other lacerations, contusions, or marks of any kind on Randell.

Davis presented affidavits from several officers who witnessed Davis's arrest of Randell; these support Davis's version of the events. Judgments against Randell for driving while intoxicated and evading arrest, stemming from the events of the night of Randell's arrest, also were introduced.

Davis argues that he should have been granted summary judgment because the only evidence of the objective reasonableness of the use of any force that was before the district court was the evidence he provided. He contends that the court relied solely upon the conclusionary allegations in Randell's complaint in determining the existence of an issue of material fact.

A nonmoving party is not entitled to rest on his pleadings but must carry his burden of providing evidence of a genuine issue of material fact. King, 974 F.2d at 656. The record reveals that Randell filed documents supporting his allegations well before Davis filed his motion for summary judgment. These documents include notarized statements of two witnesses who saw the alleged attack. Randell also submitted his medical records concerning the stitches he received to the cut above his left eye. Another officer saw Randell's cut eye when Davis placed Randell in the police car after arresting him.

The above record reveals that the district court relied upon competent evidence other than the allegations in Randell's complaint. Such evidence reveals that genuine issues of material fact remain regarding the use of excessive force and the objective reasonableness of using such force, such that Davis is not entitled to summary judgment. Of course, Davis still may assert qualified immunity at trial, based upon the Johnson standard. We express no view as to the facts that may be established at trial or as to the legal significance of those facts.

The summary judgment is AFFIRMED.