

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1007

Summary Calendar

ETHELENE MONTGOMERY JEAN-LOUIS, ET AL.,

Plaintiffs,

ETHELENE MONTGOMERY JEAN-LOUIS,

Plaintiff-Appellee,

versus

CITY OF BIG SPRING, TEXAS, ET AL.,

Defendants,

JAMES SAWYER AND STEVE WRIGHT,

Defendants-Appellants,

Appeal from the United States District Court
for the Northern District of Texas
(1:92-CV-0047-C)

(November 16, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Ethelene Montgomery Jean-Louis filed suit pursuant to 42 U.S.C. § 1983 against the defendants, Officers James Sawyer and

*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Steve Wright. The district court denied Officers Sawyer and Wright's motion for summary judgment. The officers appeal. We DISMISS the appeal for lack of jurisdiction.

I.

On April 1, 1990, Police Officers James Sawyer and Steve Wright responded to a telephone call from Mrs. Rondel Brock, Jean-Louis' neighbor. Mrs. Brock wished to recover, with the assistance of the police officers, a baseball which Mrs. Brock's sons had lost in Mrs. Jean-Louis' yard. The neighbors had a history of disputes of this sort. After Officers Sawyer and Wright spoke with Mrs. Brock, they walked to the Jean-Louis residence and knocked on the door.

Mrs. Jean-Louis and her husband, Dr. Hubert Jean-Louis, greeted the policemen with tape recorder and camera in hand. Dr. Jean-Louis explained that his lawyer had instructed him to tape the conversation; Mrs. Jean-Louis then stepped out from behind the doctor and took a photograph of the officers with a polaroid camera. When Dr. and Mrs. Jean-Louis refused to turn over the photograph--and, for that matter, the baseball--the situation grew heated. At some point, Officer Sawyer pointed his finger at Mrs. Jean-Louis. He claims that he did so to calm her; she claims he antagonized her. Mrs. Jean-Louis asked the officer not to point at her. When he refused, she moved his finger away. She claims she did so gently; he claims she did so violently. Officer Sawyer then

pursued Mrs. Jean-Louis into the house and before, during, or after a struggle between the two, Sawyer informed Mrs. Jean-Louis that she was under arrest. All parties agree that violence attended Officer Sawyer and Mrs. Jean-Louis as they traveled about the house and then out to the police car. Officer Sawyer claims that Mrs. Jean-Louis resisted arrest, and that he restrained her firmly but fairly; Mrs. Jean-Louis explains that after the officer subdued her, she left her house peacefully even though the officer treated her roughly.

II.

Mrs. Jean-Louis sought compensation in federal district court pursuant to 42 U.S.C. § 1983 for the harm she suffered during this encounter. The officers responded by filing a motion for summary judgment arguing, *inter alia*, that they were protected from liability by qualified immunity. The district court denied their motion. The officers appeal.

In most instances, we lack jurisdiction to review a denial of a motion for summary judgment. Switzerland Cheese Assn. v. E. Horne's Market, Inc., 385 U.S. 23, 25 (1966). Nevertheless, we have jurisdiction to entertain a denial of a claim of qualified immunity "to the extent that it turns on an issue of law." Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989) (quoting Mitchell v. Forsyth, 472 U.S. 511, 530 (1985)) (internal quotation marks omitted). If the appeal turns on disputed issues of fact, however, we lack jurisdiction to entertain it. Id.

To determine whether the officers are entitled to qualified immunity, we first ascertain whether the Mrs. Jean-Louis has asserted the violation of a constitutional right. Correa v. Fischer, 982 F.2d 931, 933 (5th Cir. 1993). Mrs. Jean-Louis claims that the officers violated her Fourth Amendment right to be free from unlawful arrest and detention. We recognize this right. Duckett v. Cedar Park, 950 F.2d 272, 278 (5th Cir. 1992). She further claims that the officers, if they did indeed lawfully arrest her, violated her right not to suffer in the process from the use of excessive force. We recognize this right as well. Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc). We conclude that Mrs. Jean-Louis has asserted a violation of a constitutional right.

We next consider whether these rights were clearly established at the time of the incident. In particular, we ask whether reasonable officials in the position that the officers found themselves would have understood that their conduct violated Mrs. Jean-Louis' rights. Anderson v. Creighton, 483 U.S. 635, 640 (1987). The officers do not deny that the rights Mrs. Jean-Louis asserts were clearly established when they arrested her. They contest instead the merits of her claim.

The officers argue, first, that Officer Sawyer had probable cause to arrest Mrs. Jean-Louis. They rely on Texas Penal Code § 22.01(a)(3), claiming that Mrs. Jean-Louis "intentionally or knowingly" caused "physical contact" with Officer Sawyer when she knew or should have reasonably believed that he would have regarded

"the contact as offensive or provocative." Tex. Penal Code Ann. § 22.01(a)(3) (West 1993). The officers conclude that, since the arrest was not unlawful, no official in their position would have believed the arrest unlawful and, therefore, that no reasonable officer would have considered himself to have violated Mrs. Jean-Louis' rights. Whether Mrs. Jean-Louis knew or should have known how Officer Sawyer would have perceived the contact, however, is a hotly contested issue of fact that this court cannot appropriately resolve on appeal.

Similarly, the officers do not deny that Mrs. Jean-Louis' right to be free from excessive force was clearly established at the time of the arrest. Instead, they argue that she resisted arrest and, therefore, that Officer Sawyer's use of force was reasonable. Since the officers' did not use excessive force, their reasoning continues, under these circumstances no reasonable official would have considered their actions a violation of Mrs. Jean-Louis' rights. Again, the officers misconstrue the role of this court in reviewing a denial of qualified immunity. Whether or not Mrs. Jean-Louis resisted arrest--indeed, whether or not they arrested Mrs. Jean-Louis--is a disputed issue of fact. We cannot properly resolve that issue on appeal.

III.

The officers predicate their arguments on disputed issues of fact. We therefore find that the district court's order denying the defendants' motion for summary judgment is not appealable. Accordingly, the appeal must be DISMISSED.