IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1881

Summary Calendar

GEORGE A. POGUE,

Plaintiff-Appellee,

v.

CITY OF DALLAS, TX and
MICHAEL A. HACKBARTH, Officer,
Individually and in His
Official Capacity,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-1676-P)

(October 14, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

George A. Pogue ("Pogue") filed a 42 U.S.C. § 1983 action against the City of Dallas and Dallas police officer Michael Hackbarth ("Hackbarth"), alleging that he was falsely arrested, subjected to the use of excessive force, and deprived of his

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

right to operate his business. Defendants moved for summary judgment, and the trial court denied the motion. Because there are genuine issues of material fact, we dismiss this appeal for lack of jurisdiction.[1]

I. FACTS AND PROCEDURAL HISTORY

Pogue filed a § 1983 action alleging that he was falsely arrested, subjected to the use of excessive force, and deprived of his right to operate his business by Hackbarth. Pogue also filed a claim against the City of Dallas alleging that the City has a custom and practice of permitting officers to commit unconstitutional acts against its citizens.

The defendants filed a joint motion for summary judgment and a motion to dismiss and submitted several affidavits and other documentary evidence in support. Hackbarth asserted that he is immune from suit based on qualified immunity. The City of Dallas argued that Pogue had not been injured as a result of any policy or custom of the City. Pogue filed a response and also submitted supporting affidavits and other lengthy documentation.

Hackbarth's affidavit, which was substantially corroborated by the affidavits of other officers, reflected that he entered Pogue's grocery store based on a report of drug-trafficking in the store. Hackbarth claimed that he observed several plastic baggies of marijuana on the shelves and advised Pogue that he was

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[1] Although appellants stress several times in their briefs that our jurisdiction has not been contested, we may evaluate our own jurisdiction sua sponte. Vincent v. Consolidated Operating Co., 17 F.3d 782, 785 (5th Cir. 1994).

under arrest. Hackbarth also stated that Pogue resisted the arrest, which compelled Hackbarth to apply a neck restraint with sufficient force to cause Pogue to lose consciousness. Additionally, Hackbarth recounted that a sawed-off shotgun was found on a store shelf. Finally, Hackbarth stated that he subsequently returned to Pogue's store to investigate additional claims of drug-trafficking in the store.

Pogue's affidavit, which was corroborated by the affidavits of several other individuals, told a wildly different story. Pogue maintained that while he was speaking to Hackbarth about a burglary in his store, another officer discovered a brown paper bag on a shelf. Pogue stated that he reported to the officers that he was not aware of the contents of the bag or its source. Hackbarth then asked Pogue for his license, and as Pogue reached for it, Hackbarth grabbed him from behind and put a chokehold on him. Pogue stated that even though he did not resist the officer, Hackbarth did not release the hold, causing Pogue to pass out. Pogue was charged with possession of marijuana, resisting arrest, and possession of an unlawful weapon. The resisting arrest and drug charges were subsequently dismissed, and Pogue pleaded nolo contendere to the possession of the unlawful weapon.

Pogue asserted that his business began to decrease after the incident and that Hackbarth returned to his store on two occasions and harassed his customers. Pogue further stated that

he was eventually unable to pay his rent because of the lack of customers and that he lost the business.

The district court denied the motion. The district court noted that the facts presented were highly divergent and that it was unable to determine the qualified immunity issue without resolving the disputed factual issues. Both Hackbarth and the City of Dallas appeal.

II. STANDARD OF REVIEW

A. Motion to Dismiss

The defendants' motion for summary judgment included a request to dismiss Pogue's complaint for failure to state a claim upon which relief can be granted because Pogue failed to plead facts sufficient to overcome a defense of qualified immunity. Hackbarth makes this same argument on appeal, relying on Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985). Pogue argues that this heightened pleading requirement is inapplicable to a complaint filed against an individual officer, citing Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993).[2]

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[2] In Leatherman, the Supreme Court held that a heightened pleading standard could not be required in § 1983 claims against municipalities, reserving the issue of whether a heightened pleading standard was still permissible in a suit against an individual government official. 113 S. Ct. at 1162-63. We have not yet found it necessary to determine whether the heightened pleading standard remains applicable to individuals. See Cinel v. Connick, 15 F.3d 1338, 1342 (5th Cir. 1994), petition for cert. filed, (U.S. July 5, 1994) (No. 94-55). We do not need to determine this issue today because, as discussed below, the procedural status of the case precludes an analysis of the sufficiency of the complaint.

Generally, the denial of a motion to dismiss raising a colorable claim of immunity is immediately appealable. Malina v. Gonzales, 994 F.2d 1121, 1124 (5th Cir. 1993). Nevertheless, we may not limit our consideration to the facts alleged in the complaint when reviewing a summary judgment order. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). Instead, we "must examine the record as a whole to determine whether there are genuine issues of material fact and whether the movant is entitled to a judgment as a matter of law." Id. Here, the district court did not address Hackbarth's argument that the complaint failed to state a claim, but considered matters outside the pleadings and treated the defendants' motion to dismiss the same as the motion for summary judgment.[3] Thus, "the procedural posture of the case . . . precludes an analysis of whether [the] complaint, by itself, could withstand scrutiny." Id. Therefore, we cannot consider Hackbarth's argument that Pogue's complaint failed to state a claim upon which relief can be granted.

B. Summary Judgment on a Qualified Immunity Claim

In reviewing the district court's denial of a motion for summary judgment, we apply the same standard that governs the district court's determination of that motion. Id. Thus, "[s]ummary judgment must be granted if the court determines that there is no genuine issue as to any material fact and that the

[3] See Fed. R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . .").

moving party is entitled to a judgment as a matter of law." Id. at 655-56 (citation and internal quotation omitted). In determining whether there are genuine issues of fact, "the court must first consult the applicable substantive law to ascertain what factual issues are material. The court must then review the evidence bearing on those issues, viewing the facts and inferences in the light most favorable to the nonmoving party." Id. at 656 (citation omitted).

An order denying a motion for summary judgment based on a qualified immunity claim is immediately appealable the extent that it turns on an issue of law. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). However, "if disputed factual issues material to immunity are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable." Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989) (citations omitted).

The first inquiry in examining a defense of qualified immunity asserted in a motion for summary judgment is whether the plaintiff has alleged "the violation of a clearly established constitutional right." Harper v. Harris County, 21 F.3d 597, 600 (5th Cir. 1994) (citing Siegert v. Gilley, 500 U.S. 226, 231-32 (1991)). We use "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993) (citing Spann v. Rainey, 987 F.2d 1110, 1115 (5th Cir. 1993)). The second step is to "decide whether the defendant's conduct was objectively reasonable" in light of the

legal rules clearly established at the time of the incident. Id. at 105.

III. DISCUSSION

A. Defendant Hackbarth

Hackbarth contends that based on the facts within his knowledge and the well-established law, Pogue's claims are barred by qualified immunity. Specifically, Hackbarth argues that the affidavits which he presented establish the objective reasonableness of his actions and that Pogue produced no credible contrary evidence.

1. False Arrest Claim

Hackbarth does not question that Pogue has a clear right to be free from false arrests. However, Hackbarth maintains that a reasonable officer could have found probable cause under Texas law to arrest Pogue because he was in possession of an unlawful weapon. Hackbarth asserts that Pogue was convicted for the possession of the weapon and, thus, the arrest must be viewed as proper.

We have held that a "police officer has probable cause to arrest if, at the time of the arrest, he had knowledge that would warrant a prudent person's belief that the person arrested had already committed or was committing a crime." Duckett v. City of Cedar Park, 950 F.2d 272, 278 (5th Cir. 1992). Although Hackbarth argues on appeal that he had probable cause to arrest Pogue because Pogue was in possession of the sawed-off shotgun, Hackbarth stated in his affidavit in support of the summary

judgment motion that he arrested Pogue because he found several plastic baggies of marijuana behind some cereal boxes on a shelf. Additionally, Hackbarth indicated in his affidavit that the sawed-off shot gun was not discovered until after he had subdued and handcuffed Pogue to complete the arrest. Therefore, Hackbarth's own pleadings have created a factual issue regarding the basis for the arrest.

Moreover, Pogue's story is completely different than Hackbarth's version of the events. Pogue's affidavit reflects that the officers discovered a brown paper bag on a shelf and that Pogue denied any knowledge of the bag's contents or source. Even so, Pogue contends that Hackbarth immediately placed a chokehold on Pogue's neck and handcuffed Pogue while he was unconscious. The affidavits of Pogue and his witnesses also reflect that Pogue did not resist the officer in any manner after the bag was discovered.

Pogue has shown the existence of several highly-disputed material facts regarding the basis for the arrest. We cannot determine whether a reasonable officer could have determined that probable cause existed without resolving the underlying factual dispute. It is not our role to resolve those facts. Therefore, because there are genuine issues of material fact regarding the propriety of Hackbarth's conduct during the arrest, we do not have jurisdiction to review the denial of the summary judgment motion on the false arrest claim. See Feagley, 868 F.2d at 1439.

2. Excessive Force Claim

Hackbarth also claims that Pogue failed to demonstrate that he was subjected to excessive force. Hackbarth contends that Pogue produced no evidence of a significant injury and that any force was necessary to overcome Pogue's resistance to the arrest.

Conversely, Pogue alleged that Hackbarth employed excessive force in the course of the arrest. This allegation states a violation of a clearly established constitutional right. Harper, 21 F.3d at 600 (noting that an allegation of the use of excessive force by officers during arrest implicates the Fourth Amendment guarantee against unreasonable seizures). Hackbarth is entitled to qualified immunity only if his conduct was objectively reasonable in the circumstances and did not violate Pogue's right to be free from excessive force as that right was understood at the time of Pogue's arrest. Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 621 (5th Cir. 1992).

At the time of the arrest, Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989) (en banc), was the clearly established law for the use of excessive force by a police officer. This test required a showing of 1) a significant injury which 2) resulted directly and only from the use of force that was clearly excessive to the need and the excessiveness of which was 3) objectively unreasonable. Id. at 480.[4]

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[4] We have held that in light of Hudson v. McMillian, 112 S. Ct. 995 (1992), the significant injury component of the Johnson standard is no longer valid and that a plaintiff is no longer required to prove a significant injury to state a Fourth Amendment claim. Harper, 21 F.3d at 600. This is irrelevant here because we must consider the law as it was at the time of the incident. Id.

Hackbarth asserts that Pogue has not presented any evidence of a significant injury. However, in his complaint, Pogue listed his injuries as "dizziness, light headaches, neck strain, and temporary chronic nerve damage in two of his fingers." Medical reports submitted by Pogue in his response to the summary judgment motion reflect that testing revealed cervical radiculopathy with left lower cervical nerve root irritation, requiring physical therapy, anti-inflammatory medication, and possible future surgical intervention. Similar allegations of injuries have been found to be sufficient to withstand summary judgement for lack of a "significant injury." See, e.g., Harper, 21 F.3d at 601 (concluding that allegations that an officer grabbed the plaintiff by the throat and threw her to the ground, resulting in a sore throat and a badly bruised knee, were sufficient to withstand a summary judgment seeking dismissal of an excessive force claim); see also Hale v. Townley, 19 F.3d 1068, 1074 (5th Cir. 1994) (noting that failing to allege a "lasting harm" is not fatal to a claim for excessive force).

Further, the standard for a significant injury is lower if the attack is intentional and unprovoked. See Townley, 19 F.3d at 1074 (noting that "bleeding cuts and swelling have been held legally `significant injuries' when they were intentionally inflicted in an unprovoked and vindictive attack"). The affidavits submitted by Pogue allege that Hackbarth, without provocation, placed a chokehold on Pogue's neck that caused him to lose consciousness.

The evidence presented by Pogue also raises an issue as to whether the force employed by Hackbarth was clearly excessive to the need. Thus, there are disputed material facts regarding whether Hackbarth intentionally and unnecessarily inflicted a significant injury on Pogue without provocation. Because these issues of fact remain, we do not have jurisdiction to review the denial of summary judgment on the excessive force claim. See Feagley, 868 F.2d at 1439.

3. Loss of Business Claim

Hackbarth claims that the undisputed facts presented establish that he did not threaten Pogue's business or customers and that Hackbarth went to Pogue's store on each occasion to conduct legitimate police business. Hackbarth also argues that any losses resulting from the operation of the criminal justice system are not compensable.

In order for Pogue to prove a § 1983 claim for deprivation of his right to operate a business, Pogue "must establish that the state sought to remove or significantly alter a life, liberty, or property interest recognized and protected by state law or guaranteed by one of the provisions of the Bill of Rights." San Jacinto Sav. & Loan v. Kacal, 928 F.2d 697, 701-02 (5th Cir. 1991). To avoid summary judgment, it is sufficient to show that Hackbarth's harassment of Pogue's patrons was the direct cause of the failure of Pogue's business. Id. at 704.

Hackbarth does not question Pogue's clear right to operate a lawful business, but denies that he did anything to interfere

with this right. The affidavits presented by Pogue reflect that Hackbarth made derogatory comments about Pogue to potential customers and harassed individuals who frequented the store. Additionally, according to Pogue's evidence, Hackbarth communicated to the neighbors verbally and by his actions that Pogue was engaging in drug-trafficking activities in his store. Issues of material fact remain regarding whether Hackbarth harassed Pogue's customers or made false factual representations concerning Pogue to third parties and whether these actions resulted in the loss of his business. Because of these fact issues, we do not have jurisdiction to review the district court's denial of the motion for summary judgment seeking dismissal of Pogue's property interest claim. See Feagley, 868 F.2d at 1439.

4. State Law Claims

Hackbarth also contends that qualified immunity shields him from Pogue's state-law claims of assault and battery because he was acting in good faith during the incidents. The district court did not address the state claims in ruling on the summary judgment motion. Following remand, these issues should be addressed by the district court during the remaining proceedings in the case. See Harper, 21 F.3d at 602.

B. Defendant City of Dallas

The City of Dallas asserts that it should not be subjected to suit in the absence of a finding that a constitutional harm was caused by a final municipal policymaker applying official

policy. The City argues that the district court's determination that the chief of police is a final municipal policymaker is a question of law which is immediately appealable.

As previously discussed, we have jurisdiction over some interlocutory appeals from a district court's denial of an individual officer's motion for summary judgment based on qualified immunity. Mitchell, 472 U.S. at 530. However, this right to an interlocutory appeal has not been extended to municipalities. See McKee v. City of Rockwall, 877 F.2d 409, 412 (5th Cir. 1989) (noting that municipalities are not entitled to the benefits of Mitchell v. Forsyth doctrine), cert. denied, 493 U.S. 1023 (1990); accord Nicoletti v. City of Waco, 947 F.2d 190, 191-92 (5th Cir. 1991); Reese v. Anderson, 926 F.2d 494, 498 (5th Cir. 1991). This is so even if an individual officer has also appealed and that officer's defenses, if accepted, may protect the municipality from liability. McKee, 877 F.2d at 412.

Therefore, we have no jurisdiction over the City of Dallas's appeal of the district court's denial of its motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, we DISMISS FOR LACK OF JURISDICTION.