IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4289
Summary Calendar

GARI WORTH BELLIS, et al.,

Plaintiffs-Appellees,

versus

UPSHUR COUNTY, TEXAS, Et Al.,

Defendants,

JOHNNY UPTON, Individually and
in his official capacity as
Deputy Upshur County, TX, Et Al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(2:92-CV-48)

(June 17, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

The individual defendants appeal the denial of summary judgment based upon qualified immunity. Concluding that the plaintiffs failed to adduce summary judgment evidence that would defeat the defense of qualified immunity, we reverse and render judgment for defendants.

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 Pursuant to that rule, the court has determined that this opinion should not be published.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

In April 1992, Gari and Nelwyn Bellis filed suit pursuant to 42 U.S.C. § 1983 against Upshur County, the City of Longview, Texas, and several government officials in their individual capacities. The Bellises alleged that the defendants subjected them to an unreasonable search and seizure, an unlawful arrest, and used excessive force in executing a search warrant on May 31, 1990.[1]

The Bellises alleged that they were watching television when Longview police officers used a "rammer" to break through their front door. In the process of ramming through the door, the structure and several of the Bellises' personal items were destroyed. The Bellises alleged that a Longview police officer then threw Nelwyn Bellis to the floor and placed a gun to her head.

The Bellises stated that the officers conducting the search "verbally abused, cursed, threatened and humiliated" them during the search. Gari Bellis was arrested and transported to jail. He alleged that he was forced to stand barefoot on broken glass during his arrest. No formal complaint was filed against the Bellises, and all seized property was returned to them.

The defendants filed motions for judgment on the pleadings, motions to dismiss for failure to state a claim, and motions for review of their qualified immunity defense to the Bellises' suit.

[1] The Bellises also alleged state-law claims of false imprisonment, malicious prosecution, abuse of office, intentional infliction of emotional distress, interference with a business, and the negligent infliction of emotional distress. The district court dismissed these claims, and they are irrelevant to the instant appeal.

The district court granted the motions to dismiss. Applying the heightened-pleading requirement of Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985), the court determined that the Bellises had not alleged specific facts to overcome the defendants' qualified immunity defense, but granted the Bellises thirty days to file an amended complaint.

The Bellises expanded their original allegations in the amended complaint to include facts to support their claims that there was not probable cause to support the search warrant for their home and that the county and city had policies of executing search warrants in a manner that violated the Fourth Amendment; the Bellises also alleged that the defendants failed to take adequate precautions in the hiring and training of officers. The defendants, again asserting qualified immunity, moved to dismiss or, in the alternative, for summary judgment, attaching, inter alia, affidavits and excerpts of deposition testimony.

The district court, evaluating the Bellises' claims in the light of the qualified immunity defense, (1) dismissed the state-law claims; (2) found that the allegations concerning the city of Longview's failure to train raised "a factual question sufficient to defeat the defendants' motion for summary judgment"; (3) dismissed the claims that the city and its police chief failed to take adequate precautions in the hiring, promotion, and retention of law enforcement personnel; (4) found that there was a genuine issue of material fact concerning whether a reasonable police officer would have concluded that there was probable cause

to search the house and that there were genuine issues of material fact concerning the reasonableness of the manner of the search; and (5) found that there were genuine issues of material fact concerning whether the defendants used excessive force.

II.

An order denying a motion for summary judgment based upon a qualified immunity claim is immediately appealable under the collateral order doctrine to the extent that it turns on an issue of law. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). The standard of review for a denial of summary judgment based upon qualified immunity is de novo. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992).

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." King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992) (citation omitted).[2]

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[2] The defendants argue that the district court improperly regarded allegations from the plaintiffs' complaint as summary judgment evidence. The burden upon the non-moving party in a summary judgment context is "significantly greater than in a motion to dismiss." Reese v. Anderson, 926 F.2d 494, 498 (5th Cir. 1991). The plaintiffs failed to present summary judgment evidence. They submitted no affidavits, depositions, or exhibits in opposition to the motion for summary judgment. At the summary judgment stage, allegations are not treated as true; the non-moving party has the burden of setting forth specific facts showing that there is a (continued...)

A.

This Court engages in a bifurcated, "somewhat schizophrenic" analysis when assessing a claim of qualified immunity. Rankin v. Klevenhagen, 5 F.3d 103, 109 (5th Cir. 1993). The first step is to ascertain whether the plaintiff has alleged the violation of a clearly established constitutional right. Siegert v. Gilley, 500 U.S. 226, 232 (1991). This Court uses "currently applicable constitutional standards to make this assessment." Rankin, 5 F.3d at 106. The second step is to "decide whether the defendant's conduct was objectively reasonable." Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993). Reasonableness is assessed in light of the legal rules clearly established at the time of the incident.

1.

The Bellises first contend that the police did not have probable cause to obtain the search warrant and that no reasonable well-trained officer would have applied for the warrant. This issue depends upon the accuracy of the warrant affidavit and the reliability of the informant.

The Bellises contend that the warrant affidavit contained two intentional misrepresentations: first, that a reliable informant had provided information on two prior occasions, and second, that the informant had placed stolen goods at the Bellises' residence. The warrant affidavit was substantially correct in both of these

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(...continued)
genuine issue for trial. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992).

regards. First, affidavits of Officers Jeter and Cueller indicate that the informant had provided Officer Cueller with reliable information on two occasions. Furthermore, the informant's "voluntary statement under arrest" indicated that she had provided police with reliable information concerning stolen property in the past. Moreover, she admitted to having participated in the transaction in question and provided intimate details of the transaction. The plaintiffs provided no summary judgment evidence to rebut these facts. Therefore, the warrant affidavit was substantially correct with respect to the informant's past reliability.

Second, the warrant affidavit was substantially correct with regard to the informant's placing the stolen goods at the Bellises' residence. The plaintiffs claim that the informant merely placed the goods in their possession, not at their residence. Although there was some confusion as to what the informant stated, a fair characterization of the informant's statement would place the goods at the plaintiffs' residence. It was not unreasonable to characterize a statement placing goods in plaintiffs' possession as placing the goods at their residence. Such characterization does not render the warrant affidavit false. United States v. Hare, 772 F.2d 139, 141 (5th Cir. 1985).

Plaintiffs also contend that the informant was unreliable, so that a well-trained police officer would not have sought a warrant. But plaintiffs failed to adduce summary judgment evidence challenging the informant's reliability. The fact that the

informant had been taking drugs on a day when unrelated burglaries were being committed (and as a result could not give the police details as to those burglaries) does not make the informant unreliable. The defendants' affidavits reflect a high degree of reliability for this informant.

We conclude that a reasonable police officer would have sought issuance of a warrant based upon the informant's information. The question is not whether probable cause in fact existed, but whether a reasonably competent officer would have concluded that a warrant should issue. Malley v. Briggs, 475 U.S. 335 (1986). The plaintiffs have failed to offer evidence to the contrary. Moreover, nothing in the record demonstrates that the officer made a false statement knowingly and intentionally, or with reckless disregard for the truth. Bennett v. City of Grand Prairie, Tex., 883 F.2d 400, 406 (5th Cir. 1989).

2.

Plaintiffs also alleged that the police officers used excessive force. The controlling authority in May 1990 required a plaintiff alleging an excessive-force case under the Fourth Amendment to prove a significant injury, which resulted directly and only from the use of force that was plainly excessive to the need, and the excessiveness was objectively unreasonable. Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc). The Supreme Court overruled the significant-injury prong in an Eighth Amendment excessive-use-of-force context. Hudson v. McMillian, 112 S. Ct.

995, 1000 (1992). And, as we have recently stated, Johnson's requirement of significant-injury in a Fourth Amendment excessive-use-of-force context is no longer valid in the wake of Hudson v. McMillian. Harper v. Harris County, Tex., No. 93-2062, 1994 U.S. App. LEXIS 10572 (5th Cir. May 11, 1994) (per curiam). Nevertheless, in May 1990, a plaintiff was required to prove significant injury, and we must apply the law as it existed at the time. Id. (citing Rankin, 5 F.3d at 108-09). Consequently, our inquiry is whether the plaintiffs have provided summary judgment evidence demonstrating that significant injury resulted from the use of force that was excessive to the need, and that the excessiveness was objectively unreasonable.

The officers in this case were executing a warrant for the recovery of stolen weapons, including automatic weapons. Furthermore, the officers knew that the suspect had a history of violent conduct. Plaintiffs alleged in their complaint that the officers broke through the front door, brandished weapons, used abusive language, and threw Nelwyn Bellis to the floor and placed a gun to her head. But speed, surprise, and security of the premises are essential to the safety of the officers, the suspects, and any third parties present in the dwelling.

The plaintiffs' entire argument, in their brief, concerning the forced entry consists of the following sentence: "If any announcement was made by police officers it was obviously made in conjunction with the forced entry and Bellis was not given any time to respond." Plaintiffs cite no authority that this states a

Fourth Amendment violation. They could rely upon United States v. Sagaribay, 982 F.2d 906 (5th Cir.), cert. denied, 114 S. Ct. 160 (1993), for the proposition that the destructive entry, without an attempt at loss-intrusive means, constituted excessive force. The acts here were pre-Sagaribay, however, and thus there was then no clearly established law that the officers' actions constituted an unreasonable search.

The only injury alleged is a minor cut on Gari Bellis's foot.[3] Cf. Wisniewski v. Kennard, 901 F.2d 1276, 1277 (5th Cir.) (per curiam) (two punches in the stomach and fear associated with having a gun placed in arrestee's mouth held not to be "significant"), cert. denied, 498 U.S. 926 (1990). The cut was treated with a bandage and required no further medical attention. Given the nature of the arrest and the minor injury alleged, we conclude that the injury was not significant, the force used was not excessive, and the officers' conduct was objectively reasonable for the circumstances.

III.

We find no genuine issues of material fact. Despite the unfortunate and distasteful incident at issue, the defendants have demonstrated that (1) a reasonable police officer would have sought issuance of the search warrant and (2) excessive force was not

[3] The police affidavit explains that Bellis received the cut from stepping on broken glass. Thus, the police did not directly cause the injury about which Bellis complains. Any delay in receiving medical attention did not make the injury significant.

employed; therefore, the defendants were entitled to judgment as a matter of law. Accordingly, the order denying summary judgment is REVERSED, summary judgment is RENDERED in favor of the appellants, and this matter is REMANDED for further appropriate proceedings.