IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5370

DOYLE V. TATUM,

Plaintiff-Appellee,

v.

CITY OF TEXARKANA, ET. AL.,

Defendants,

M. HAIRSTON and B.J. AUSTIN,

Defendants-Appellants.

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

(February 1, 1995)

Before WISDOM, KING, and DUHÉ, Circuit Judges.

PER CURIAM:[*]

Doyle Tatum sued two Texarkana, Texas police officers and their municipal employer under 42 U.S.C. § 1983 alleging, inter alia, that the officers used excessive force and denied him medical attention in the course of arrest. One of the officers, Brenda Austin, appeals from the district court's denial of her

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

motion for summary judgment on grounds of qualified immunity. We reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 4, 1982, Loyce Gates, an animal control officer of the City of Texarkana, Texas, issued a "Courtesy Warning Notice" to Tatum for failing to obtain a license for his dog and for violating that city's leash law. Tatum signed the warning notice to acknowledge its receipt. Over the next five months, Gates attempted to contact Tatum by phone and left numerous notices on Tatum's door reminding Tatum that he had to comply with the law. In August, 1982, after checking city records and finding that Tatum still had not obtained a license for his dog, Gates filed an offense report against Tatum. Gates also filed a sworn criminal complaint charging Tatum with failing to obtain a dog license. A municipal court judge then issued a warrant for Tatum's arrest.

Eight years passed. On May 1, 1990, Texarkana police officer Dwayne Lorance was assigned to warrant duty and went to Tatum's residence to advise him of the existence of the outstanding warrant and to arrange for its resolution. Tatum agreed to visit the warrant officer at the police station two days later, and Lorance left Tatum's residence without incident.

After contemplating the situation for a few minutes, Tatum called the police department and asked to speak to the officer who had been serving warrants, to see if he could "get that thing

ironed out that night" because Tatum believed that he neither lived in Texarkana nor owned a dog in 1982. As Lorance was no longer on duty, the Texarkana police dispatched officers Brenda Austin and Mike Hairston to Tatum's residence to try to resolve the matter.

Officer Hairston arrived at the Tatum residence first. Hairston radioed back to the police department and confirmed the existence of the warrant. Tatum informed Hairston that another officer, Lorance, had come by earlier and agreed to let Tatum come by the station in two days. Officer Austin, who had also confirmed the existence of the warrant, arrived at Tatum's residence and was also informed of Officer Lorance's earlier visit.

What occurred next is unclear. Tatum alleges that, despite their knowledge of Tatum's earlier agreement with Lorance, Austin and Hairston decided to arrest him, although he admitted in his deposition that he never asked the officers to delay the arrest. Officer Austin asserted in her deposition that she offered to let Tatum come to the police station the next day; however, Austin contends that Tatum insisted upon settling the matter that night. Austin informed Tatum that the matter could be settled immediately only by arresting Tatum.

Austin informed Johnson that he was under arrest. Tatum then told the officers that he had recently undergone back or neck surgery. Austin responded by asking Tatum if he would have any problem placing his hands behind his back to accommodate

handcuffs. Tatum replied that he would not have difficulty, and demonstrated his mobility by holding his arms out to the side and waving them behind his back. Austin placed the handcuffs on Tatum and asked Tatum if he was in any pain. Tatum replied that he was not. Austin led Tatum to her patrol car without exerting any force. As Tatum began to get into the patrol car, he stopped halfway and informed Austin that "this is not going to work."

Tatum contends that Austin then placed her hand atop Tatum's head and "shoved" his head downward and into the patrol car. Austin denies touching Tatum's head or making any other physical contact with Tatum. Austin buckled Tatum's seat belt around him, closed the door, and proceeded to drive to the police station. En route, Tatum asserts that he told Austin that he was in "tremendous pain" and asked Austin to release his left arm from the handcuffs to alleviate the pain. Tatum asserts that Austin did not respond. He also asserts that he complained of pain two additional times before arriving at the police station, but received no response from Austin other than noticing that she sped up after his third complaint. Austin claims that Tatum only complained of pain once. Tatum concedes that he never asked Austin for medical attention.

Once at the police station, Austin unfastened Tatum's handcuffs and booked him. Tatum did not complain of pain after arriving at the police station. Tatum was released that night after posting bail. Upon his release, Tatum went to the emergency room of a local hospital complaining of pain in his

neck, back, and left arm. The emergency room physician examined and released Tatum. The following day, Tatum visited a neurosurgeon who had previously performed surgery on his back. The physician prescribed some painkillers and asked Tatum to return if the pain continued. Tatum visited the neurosurgeon numerous times over the next year and a half, complaining of continuing pain in his neck, back, and left arm. Finally, approximately nineteen months after the arrest, Tatum underwent surgery on his neck to remove bone spurs.

Tatum instituted suit against Hairston, Austin, and the City of Texarkana, alleging violation of his federal constitutional rights to be free from unlawful arrest and excessive force and to obtain reasonable medical attention while in police custody. Hairston and Austin moved for summary judgment from all claims based upon the defense of qualified immunity. The district court granted the motion as to the unlawful arrest claim, but denied their motion as to the excessive force and medical attention claims. Austin now appeals the district court's denial of her motion for summary judgment[1], asserting that she is entitled to qualified immunity for her actions.[2] We agree and reverse.

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[1] An order denying a motion for summary judgment based upon a claim of qualified immunity in a § 1983 action, to the extent that it turns upon an issue of law, is immediately appealable. Mitchell v. Forsyth, 472 U.S. 511, 5320 (1985).

[2] Tatum has advised the defendants that he intends to dismiss his remaining claims against Hairston. Thus, Hairston is not a party to this appeal. We also note that the district court denied the City of Texarkana's motion for summary judgment on the unlawful arrest claim; however, the city is not a party to this appeal.

II. STANDARD OF REVIEW

This court reviews the denial of summary judgment on the basis of qualified immunity *de novo*, examining the evidence in the light most favorable to the nonmoving party. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992). Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1118-19 (5th Cir. 1992); FED. R. CIV. P. 56(c).

To determine whether a governmental official is entitled to qualified immunity, a court must first ascertain whether the plaintiff has asserted the violation of a clearly established constitutional right. Siegart v. Gilley, 500 U.S. 226, 232 (1991); Correa v. Fischer, 982 F.2d 931, 933 (5th Cir. 1993). This court uses "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993). Second, the court must determine whether a reasonable official in the defendant's shoes would have understood that his conduct violated the plaintiff's constitutional rights. Anderson v. Creighton, 483 U.S. 635, 640 (1987); Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994). Thus, even if the official's conduct violates a constitutional right, she is entitled to qualified immunity if her conduct was objectively reasonable. Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir.

1993); Salas, 980 F.2d at 305-06; Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). The reasonableness of the defendant's actions is assessed in light of the legal rules clearly established at the time of the incident. Johnson v. City of Houston, 14 F.3d 1056, 1060 (5th Cir. 1994); Spann, 987 F.2d at 1114.

III. ANALYSIS

A. Excessive Force Claim.

Tatum has made the requisite threshold allegation of the violation of a constitutional right to be free from excessive force. The Fourth Amendment right to freedom from unreasonable seizures protects arrestees from the use of excessive force by the arresting officers.[3] Graham v. Connor, 490 U.S. 386, 388

[3] Austin argues that our recent decision in Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir.), cert. denied, 63 U.S.L.W. 3437 (1994), requires us to use a Fourteenth Amendment due process analysis rather than a Fourth Amendment "reasonableness" analysis. We disagree. Brothers used a due process analysis in the context of analyzing a claim filed by a pretrial detainee, who was subjected to excessive force *after the incidents of arrest had been completed*. Id. at 457. The Brothers use of the Fourteenth Amendment was premised upon our earlier decision in Valencia v. Wiggins, 981 F.2d 1440 (5th Cir.), cert. denied, 113 S. Ct. 2998 (1993), which held that the use of a Fourth Amendment analysis is inappropriate when the alleged excessive force occurs "*after* the incidents of arrest are completed, *after* the plaintiff has been released from the arresting officer's custody, and *after* the plaintiff has been in detention for a significant period of time." Id. at 1444. In this case, the alleged excessive force took place *before* Tatum's arrest had been completed, *before* Tatum had been released from Austin's custody, and *before* Tatum had been in detention for a significant period of time. Hence, the Fourth Amendment, rather than the Fourteenth Amendment, provides the appropriate framework for analyzing Tatum's excessive force claim.

(1989); King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). Thus, our inquiry focuses on whether a reasonable officer standing in the shoes of Austin would have known that her actions violated Tatum's constitutional rights.

Tatum was arrested on May 1, 1990. Our reasonableness analysis must therefore begin with a determination of the clearly established law as it existed on May 1, 1990. Spann, 987 F.2d at 1114. In Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court held that, in assessing an excessive force claim, courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham, 490 U.S. at 396. In so balancing, we are to pay "careful attention to the facts and circumstances of each particular case . . . ." Id. Furthermore, "[t]he `reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id.

In addition to Graham, at the time of Tatum's arrest, this court had decided Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989) (per curiam) (en banc), which required § 1983 plaintiffs alleging excessive force to show "significant injury" to succeed in a constitutional excessive force claim.[4] Therefore, in determining

[4] The "significant injury" requirement has since been abrogated by the Supreme Court's decision in Hudson v. McMillan, 112 S. Ct. 995 (1992). See Harper v. Harris County, Tex., 21 F.3d 597, 600 (5th Cir. 1994) ("We now hold that the Johnson [significant injury] standard is no longer valid in the wake of

the objective reasonableness of Austin's use of force in 1990, the court should apply the significant injury test of Johnson since that was the constitutional benchmark when the events occurred. Harper v. Harris County, Tex., 21 F.3d 597, 601 (5th Cir. 1994); Rankin v. Klevenhagen, 5 F.3d 103, 108-09 (5th Cir. 1993). Thus, the seriousness of Tatum's injuries is relevant to our inquiry as to whether Austin's conduct was objectively reasonable. Harper, 21 F.3d at 601. However, as Graham makes clear, in assessing the various factors that comprise the reasonableness inquiry, we are to view the situation from the perspective of the officer at the scene, without the aid of 20/20 hindsight. Thus, in assessing the seriousness of Tatum's injury, we must disregard subsequent manifestations of illness which were not reasonably foreseeable at the time Tatum was arrested.

Thus, under Graham, our first task is to assess the "nature and quality of the intrusion on the individual's Fourth Amendment interests." Id. Taking the facts in the light most favorable to Tatum, we think that the "nature and quality" of the force employed by Austin was *de minimis*. The force alleged to be excessive by Tatum is a "shove" on Tatum's head. Although Austin knew that Tatum had undergone neck or back surgery, Tatum had not yet complained of any pain. Instead, Tatum indicated that he was flexible enough to place his hands in handcuffs behind his back. His only statement to Austin prior to the shove was, "This is not

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Hudson v. McMillan to assess whether plaintiff has alleged a constitutional violation.") (citation omitted).

going to work." This statement did not unequivocally suggest that Tatum was experiencing medical difficulties. Indeed, it would be reasonable for an officer in Austin's shoes to interpret this statement as indicating that Tatum, who was handcuffed, was having difficulty entering the patrol car without assistance. Even assuming that Tatum's statement conveyed pain, it did not indicate what part of Tatum's body was in pain, much less indicate that a shove to the head would foreseeably result in surgery to remove bone spurs in the neck nineteen months later.

In addition, we think that the seriousness of the injury which resulted from the shove was insignificant when viewed from the perspective of a reasonable officer at the time of the arrest. After the shove, Tatum did not manifest any immediate physical pain. He did not scream in agony. He did not even say "ouch." Indeed, according to Tatum's deposition testimony, he did not complain of any pain at all until Austin had driven approximately one mile. Thus, under the circumstances of this case, a reasonable officer would not foresee that Austin's action would cause a "significant injury" within the meaning of Johnson.[5]

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[5] This case is distinguishable from those situations in which an officer hits a peaceful arrestee on the head with a nightstick or points a gun at nondangerous suspect. Cf. Johnson v. Morel, 876 F.2d 477, 481 (5th Cir. 1989) (Rubin, J., concurring) (arguing that the "severe injury" requirement is inappropriate because it would classify such actions as constitutionally permissible). Under such situations, a reasonable officer on the scene would foresee that his actions could cause significant physical or psychological injury.

Having assessed the nature and quality of Austin's actions, we must next balance it against the countervailing governmental interests at stake. Graham, 490 U.S. at 396. As the Supreme Court noted in Graham, "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Id. In this case, the governmental interest at stake was the safe and speedy placement of Tatum under arrest. To achieve a safe and speedy arrest, the use of handcuffs, without more, is reasonable. In addition, we have no difficulty in concluding that a necessary corollary to achieving a safe and speedy arrest is transporting the arrestee to the police station. The obvious method of transportation in this case was to place Tatum in Austin's patrol car. As Tatum appeared to be unable or unwilling to enter the patrol car without assistance, a reasonable officer in Austin's position could have concluded that touching Tatum's head in order to place him into the patrol car was not a constitutional violation.

In short, the nature and quality of the force used against Tatum was insignificant. The governmental interest in using the force-- to achieve a safe and speedy arrest-- was significant. Under these circumstances, we think that reasonable officers could differ on the lawfulness of Austin's actions; therefore, Austin is entitled to qualified immunity. Harper, 21 F.3d at

600; Fraire, 957 F.2d at 1273; Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990).

B. Medical Attention Claims.

Tatum also alleges that Austin violated the constitution by failing to obtain needed medical attention for Tatum. In Estelle v. Gamble, 429 U.S. 97 (1976), the Supreme Court interpreted the Eighth Amendment's prohibition against cruel and unusual punishment as prohibiting prison officials from acting with deliberate indifference to the serious medical needs of convicted inmates. By contrast, under the Fourteenth Amendment's Due Process Clause, pretrial detainees may not be subjected to conditions or restrictions which amount to "punishment." Bell v. Wolfish, 441 U.S. 520, 536-37 (1979). We have interpreted the Bell v. Wolfish standard to entitle pretrial detainees to "reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective." Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987). Tatum contends that because he was an arrestee, Graham mandates that we use the Fourth Amendment's "reasonableness" standard applies.

The district court in this case applied the stricter "deliberate indifference" standard of the Eighth Amendment in denying Austin's motion for summary judgment on the medical attention claim. We need not decide at this time whether the Fourth, Fourteenth, or Eighth Amendment provides the appropriate

standard in such cases[6] because under each such standard, Austin's failure to seek immediate medical care for Tatum was not objectively unreasonable. See Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1988) (noting that if a defendant acts with "deliberate indifference" to a convicted inmate's medical needs, that same conduct would violate the "reasonable medical care" standard).

Viewed in the light most favorable to Tatum, the evidence indicates that Tatum told Austin three times that he was in pain. He asked Austin to remove the left handcuff so that his left arm would not hurt. On the other hand, Tatum never requested medical attention. Moreover, Tatum's injuries did not require immediate medical attention, and he has not alleged that the two to three hour delay in obtaining medical attention caused any complications. Finally, when Tatum went to the emergency room following his release, the doctor who examined him released him without treatment.

Given that Tatum never requested medical attention, that his injuries were not the kind which required immediate medical attention, and his detention was of short duration, Austin's failure to seek immediate medical care for Tatum was not objectively unreasonable. Accordingly, Austin is entitled to qualified immunity for her actions.

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[6] The standard under which we evaluate inadequate medical attention claims filed by pretrial detainees is the subject of our recent decision in Hare v. City of Corinth, 36 F.3d 412 (5th Cir. 1994), reh'g granted en banc, December 8, 1994 (pending), as to which rehearing en banc has been granted.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED.