

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-7686  
Summary Calendar

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DONALD CLARK, a/k/a Donald Clark, Jr.,

Plaintiff-Appellant,

versus

DONALD BROUSSARD, Police Officer,  
Yoakum Police Department, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Southern District of Texas  
(CA-92-60)

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(July 1, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

I

Donald Clark, a Texas state inmate, filed this 42 U.S.C. § 1983 action alleging that he was subjected to the use of excessive force by a police officer and was denied medical care by

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

jail officials. Clark has abandoned the denial-of-medical-care claim on appeal.

Clark alleged the following facts. Clark was taken before a magistrate judge for arraignment on a robbery charge on November 27, 1991. Clark jumped out of the courtroom window in an attempt to avoid prosecution. Clark injured his shoulder and was rendered unconscious as a result of the fall. When Clark regained consciousness, he saw the defendant police officer, Donald Broussard, standing in the window, pointing a gun at him. Clark alleged that he tried to duck and to raise his hands and the officer "maliciously" and unnecessarily shot him in the leg.

The district court determined that it was reasonable for the police officer to shoot Clark in the leg because he attempted to avoid prosecution by jumping out of the window. The district court further determined that the force used was not excessive because Clark merely sustained a leg wound and did not sustain injuries to his vital organs. The district court dismissed the complaint as frivolous pursuant to 28 U.S.C. § 1915(d).

Clark filed a notice of appeal and filed a document entitled "PLAINTIFF'S OBJECTIONS TO ORDER OF DISMISSAL" within ten days of the district court's entry of judgment. The district court construed the objections as a motion for relief pursuant to Fed. R. Civ. P. 60(b) and denied the motion. Clark did not file a new notice of appeal.

Because the defendants had not been served with the complaint and Clark's motion was filed within ten days of entry of judgment, it is considered to be a motion pursuant to Fed. R. Civ. P. 59(e). See Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., 784 F.2d 665, 668 (5th Cir.), cert. denied, 479 U.S. 930 (1986); see also Craig v. Lynaugh, 846 F.2d 11, 13 (5th Cir. 1988) (if service of process has not occurred, and "[i]f a judgment has been entered, a Rule 59(e) motion, or its legal equivalent, filed within 10 days after the date of entry of judgment is timely even though it has not been served on the defendants"). Under former Fed. R. App. P. 4(a)(4), this court would lack jurisdiction over the entire appeal because he failed to file notice of appeal after entry of the order disposing of his postjudgment motion. See Harcon Barge, 784 F.2d at 668. Although Clark's notice of appeal was filed before the effective date of the new rules of appellate procedure, this court will apply retroactively the new rules when it is just to do so. See Burt v. Ware, 14 F.3d 256, 258-60 (5th Cir. 1994). As such, under new Rule 4(a)(4), this Court has jurisdiction over the final judgment, because Clark's notice of appeal became effective when the district court denied the postjudgment motion. See id.

## II

Clark argues that the officer's use of deadly force was unreasonable because he was not a threat to the officer or any other person. Clark argues that he was unarmed and that the

officer shot him as he lay immobilized on the ground. Clark argues that the force use was disproportionate to the need for action.

A complaint may be dismissed as frivolous if it lacks an arguable basis in law or in fact. Denton v. Hernandez, \_\_\_U.S\_\_\_, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992).

"[A] court may dismiss a claim as factually frivolous only if the facts alleged are clearly baseless, a category encompassing allegations that are fanciful, fantastic, and delusional." Id. (internal quotations and citations omitted). An IFP complaint may not be dismissed simply because the court finds the allegations to be unlikely. Id. The dismissal of the complaint is reviewed for an abuse of discretion. Id. at 1734.

The district court assumed that Clark was a pretrial detainee during the incident because he had been in custody, but analyzed the excessive-force claim under the Fourth Amendment principles stated in Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

Whether Clark was an arrestee or a pretrial detainee at the time of the incident in question is not clear. The Fourth Amendment is not "an appropriate constitutional basis for protecting against deliberate official uses of force occurring, . . . after the incidents of arrests are completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention awaiting trial for a significant period of time." Valencia v. Wiggins, 981

F.2d 1440, 1443-44 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993). The Fourth Amendment is "primarily directed to the initial act of restraining an individual's liberty, such as an investigatory stop or arrest."

Clark's complaint indicates that he had been incarcerated for some period and that he had not been arrested immediately prior to his arraignment. However, the period of Clark's incarceration cannot be ascertained from his complaint. Further, a question arises whether Clark lost his pretrial detainee status because he was attempting to escape at the time of the incident. See Wisniewski v. Kennard, 901 F.2d 1276, 1277 (5th Cir.), cert. denied, 498 U.S. 926 (1990) (court did not reach difficult issue whether the Fourth Amendment or substantive due process governs excessive force used after apprehension of an escaped prisoner). However, this issue need not be resolved at this time because Clark has alleged an arguable excessive-force claim under either standard.

The Fourth Amendment guarantee against unreasonable seizure is implicated if a law enforcement officer uses excessive force in the course of an arrest. Hale v. Townley, 19 F.3d 1068, 1074 (5th Cir. 1994). This Court has recently held that in the light of Hudson v. McMillian, \_\_\_ U.S. \_\_\_, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992), a plaintiff is no longer required to prove a significant injury to assert a Fourth Amendment excessive force claim. Harper v. Harris County, Tex., \_\_\_ F.3d \_\_\_ (5th Cir. May 11, 1994, No. 93-2062),

1994 WL 126758 at \*2. The plaintiff is required to prove that the officer employed force "that was clearly excessive to the need" and "the excessiveness of which was objectively unreasonable." See Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989). Clark's claim that his Fourth Amendment rights were violated when the defendant officer unnecessarily shot him in the leg in an attempt to thwart Clark's escape is arguable in fact and in law.

A pre-trial detainee's excessive-force claim must be analyzed under the standards governing excessive-force claims asserted by convicted prisoners, which were announced in Hudson v. McMillian \_\_\_ U.S. \_\_\_, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) and Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). Valencia, 981 F.2d at 1446. The question to be considered is whether the "force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." Id. (internal quotation and citation omitted). Consideration may be given to factors such as the extent of the injuries suffered, the apparent need for the application of force, the relationship between the need and the degree of force exerted, the threat reasonably perceived by the responsible official, and any efforts made to temper the severity of the forceful response. Id. at 1446 n.29. Clark's allegation that the officer unnecessarily and maliciously shot him in the leg is an arguable excessive-force claim under Valencia.

Because Clark has alleged an arguable § 1983 claim based on the use of excessive force regardless whether he is considered to be an arrestee or a pretrial detainee, the district court abused its discretion in dismissing the complaint as frivolous.

VACATED and REMANDED.