

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8190
Summary Calendar

KENNETH TERRELL,

Plaintiff-Appellant,

versus

CITY OF SAN ANTONIO, ET AL.,

Defendants.

Appeals from the United States District Court
for the Western District of Texas
(SA-90-CV-401)

(January 4, 1994)

Before POLITZ, Chief Judge, JOLLY and DUHÉ, Circuit Judges.

PER CURIAM:*

Kenneth Terrell, an inmate in the Texas Department of Corrections, appeals an adverse jury verdict in his 42 U.S.C. § 1983 suit against two San Antonio police officers for the alleged use of excessive force. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

The instant complaint arises from the use of force by Officers Angela Ruks and Jerry Ray Whitson in their arrest of Terrell. Although there is significant dispute about the events in question, all parties agree that in the early morning hours of April 21, 1987 Terrell went to a neighbor claiming that someone was trying to kill him. Officers Ruks and Whitson were dispatched to the scene and upon arrival at the residence were approached by Terrell. Terrell's upper body was covered with scratches and blood and his neighbor testified that he appeared to be hallucinating.

Because of the nature of the call, Officer Whitson handcuffed Terrell but, upon being told by Terrell's neighbor that Terrell had requested the call, he removed the cuffs. Terrell became uncooperative and began to run away. Whitson gave foot chase; Ruks returned to the patrol car. Terrell stopped running and a struggle with Whitson ensued.¹ During the struggle Whitson was knocked unconscious, his jaw was broken in four places and his skull was seriously fractured.

As Officer Ruks arrived on the scene gunfire was exchanged. Terrell was struck by several bullets, sustaining injuries to his wrist, arm, finger, and abdomen. Ruks says Terrell fired first; Terrell says Ruks fired first.

Terrell was convicted of attempted capital murder of the two officers. He then filed the instant suit claiming excessive force.

¹Terrell testified that Whitson struck him with a flashlight without any provocation. Whitson testified that Terrell grabbed for his gun.

His case was tried to a jury which returned a verdict in favor of the two officers. Terrell timely appealed.

Analysis

On appeal, Terrell urges us to vacate the jury verdict, alleging three errors in the district court's charge to the jury. In reviewing the charge we accord the trial court "substantial latitude in fashioning jury instructions" and "if, in the totality of the charge, the instructions are 'comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury, the charge will be deemed adequate.'"²

Terrell first asserts that the district court's instruction on the legal standard for qualified immunity improperly incorporated a subjective element.³ Using Fifth Circuit pattern jury instructions, the trial court charged the jury that if it found in the totality of the circumstances that the officers had a "reasonable and good faith belief" their actions would not violate Terrell's rights the officers could not be held liable. Terrell alleges error in the injection of "good faith" into the instruction.

This argument lacks merit. The instruction at issue required

²**Sommers Drug Store Employee Profit Sharing Trust v. Corrigan**, 883 F.2d 345, 350 (5th Cir. 1989) (citations omitted).

³**Anderson v. Creighton**, 483 U.S. 635, 641 (1987) ("[t]he relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed" s/he committed no violation; officer's "subjective beliefs . . . are irrelevant" to qualified immunity determination).

both objective reasonableness and subjective good faith, a standard for immunity even higher than the one Terrell suggests. This instruction could not have misled the jury in a fashion detrimental to Terrell. It therefore provides no basis for rejecting the verdict.

Terrell's second argument criticizes the district court's statement that "[i]njuries which result from, for example, an officer's use of force to overcome resistance to arrest does not [sic] involve constitutionally protected interests." This instruction, with one difference, was a near-verbatim quote from one of our *en banc* decisions.⁴ Although in isolation this instruction might leave a jury with the impression that excessive force may be used against resisters, in the jury charge as given it was immediately preceded by a complete instruction on the elements of unconstitutional excessive force. In context, the district court's statement could not reasonably be said to have likely misled the jury. We are persuaded it did not.

Terrell's final argument suggests that the district court erred in presenting to the jury its second Special Interrogatory requiring the jury to consider reasonableness from the perspective of a police officer on the scene. This interrogatory appears

⁴**Johnson v. Morel**, 876 F.2d 477, 480 (5th Cir. 1989) (*en banc*) (*per curiam*). The relevant difference between the district court's instruction and the **Johnson** quote is the latter's caveat that the officer's justified use of force to overcome resistance cannot be unconstitutional.

correct under **Graham v. Connor**.⁵ Even if it was not, however, it could have had no influence on the jury because the jury did not reach the second interrogatory.⁶

AFFIRMED.

⁵490 U.S. 386, 396 (1989) ("reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene").

⁶**Knight v. Caldwell**, 970 F.2d 1430 (5th Cir. 1992), cert. denied sub nom. Knight v. Walker, 113 S.Ct. 1298 (1993) ("Because the jury never reached the later interrogatories involving these terms and instructions, they could not have affected the outcome.").