IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30564
Summary Calendar

WALTER COLLINS,

Plaintiff-Appellee,

versus

CLINTON WILLIS, ET AL.,

Defendants,

CLINTON WILLIS,

Defendant-Appellant.

Appeal from the United States District Court for
the Eastern District of Louisiana
(CA 93 3871 R)

March 24, 1995

Before REAVLEY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

The two appellant-defendants, claiming qualified immunity, seek reversal of the district court's order denying their motion for summary judgment. Walter Collins brought this 42 U.S.C. § 1983 suit against Clint Willis, a police officer with the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Covington City Police Department. He also sued Jerome Di Franco in his capacity as the city's police chief.

The complaint alleged the following factual scenario. Collins was a passenger in a car driven by Ernest Route. The car was pulled over by police officers, and Collins fled. He was eventually chased onto a private driveway, and officer Melvin Crockett ordered him to lie on the ground. Collins complied and was handcuffed. Then, according to the complaint, defendant Willis arrived in another car, and without provocation intentionally shot Collins in the back as he was lying face down and handcuffed. Collins claims that the use of such excessive force violated his civil rights.

Defendants claim that the shooting was purely accidental, and occurred when Willis stumbled, fell towards Collins and inadvertently fired his weapon.

Defendants filed a motion for summary judgment, arguing that the shooting could not have taken place as Collins claimed. The motion relied in part on medical evidence which defendants argued was conclusive proof that Collins was not shot from behind as Collins claimed, and that his version of the incident was physically impossible. Collins responded to the summary judgment motion with three affidavits from individuals who claim they witnessed the incident. All three stated that Willis did not trip or was not about to stumble when he shot Collins. They further stated that Collins was not offering any resistance when he was shot. The district court concluded that a material issue

of fact existed as to whether Willis stumbled and accidently shot Collins, or shot Collins deliberately. Defendants later deposed the three witnesses who had signed affidavits in opposition to the summary judgment motion. Defendants then submitted a "motion for reconsideration of summary judgment in light of new evidence," arguing that the depositions demonstrated that the witnesses had inconsistent accounts of the shooting and that these account were also physically impossible. The court denied the motion.

Collins cannot dispute that if the shooting was purely accidental, he has no claim that defendants deprived him of his constitutional rights under § 1983. *See Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989). Conversely, Collins has a constitutional excessive force claim if, as he contends, he was deliberately shot in the back while he was unarmed, lying on the ground, handcuffed, and offering no resistance. *See Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989) (en banc). In short, the validity of the claim turns of the factual issue of whether Willis deliberately or accidently shot Collins.

The denial of a motion for summary judgment ordinarily is not appealable. An exception allowing for interlocutory appeal exists where the motion is based on qualified immunity and the review "turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). If disputed factual issues material to qualified immunity are present, the denial of summary judgment in not appealable. *Feagley v. Waddill*, 868 F.2d 1437, 1439 (5th

Cir. 1989). Here the latter situation exists. We have no jurisdiction. Accordingly we dismiss the appeal.

DISMISSED.