

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50434
Summary Calendar

SYLVETTE GARCIA, individually and as
Administratrix of the Estate of Jose E.
Garcia and as next friend of Yasmin
Garcia, a minor child, ET AL.,

Plaintiffs-Appellees,

versus

CITY OF ROBINSON, ET AL.,

Defendants,

CITY OF ROBINSON, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for
the Western District of Texas
(W-93-CA-415)

(March 6, 1995)

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

REAVLEY, Circuit Judge:*

Sylvette Garcia, individually and as administratrix of the
Estate of Jose E. Garcia and as next friend of Yasmin Garcia,

*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that this opinion should not be published.

Carlos Garcia and Gladys Garcia brought suit against the City of Robinson and Officers Mike Holder, Jeff Lewellen, Tracy O'Connor and Gary Hinson under 42 U.S.C. §1983 and the Texas Wrongful Death Act. The district court granted summary judgment in Hinson's favor for lack of evidence indicating a basis for liability, but denied the other officers' motion for summary judgment based on qualified immunity. The officers appeal the denial of summary judgment based on qualified immunity. We dismiss the appeal.

BACKGROUND

On May 4, 1993, Officer O'Connor arrived at the home of Jose and Sylvette Garcia in response to a 911 hang-up call. Ms. Garcia met O'Connor outside the house and told him that her husband had made the 911 call by mistake, that he was recently released from the hospital where he was treated for depression, that he was intoxicated and had taken medication. She told him that her husband was in the house and was holding a knife. O'Connor entered the house where he found Mr. Garcia in the kitchen with a knife. O'Connor had a gun drawn and pointed at Garcia and asked him to put down the knife, but Garcia refused and was belligerent towards the police officer. O'Connor drew Garcia out of the house and into the garage. Officers Lewellen and Hinson arrived and joined O'Connor in the garage. All three officers had their guns drawn and repeatedly asked Garcia to drop the knife. Garcia continued to refuse. Garcia told the officers to shoot him and allegedly threatened to stab one of them if they

did not shoot him. Mr. Garcia moved toward the officers in what the officers say was a threatening manner. Officer Lewellen shot Garcia in the chest and fatally wounded him.

There is varying testimony with respect to the distance between the officers and Garcia at the time that he was shot. There is also varying testimony as to whether Garcia "lunged" towards the officers or "stumbled" towards the officers. All of the officers stated that they believed that Garcia's movement towards them created a threat of physical harm to them.

DISCUSSION

The plaintiffs contend that this court does not have jurisdiction over this appeal because the district court denied summary judgment based on qualified immunity due to the presence of disputed facts. "Where the adjudication of the immunity defense requires resolution of a question of fact, the denial . . . is not immediately appealable." Hurlman v. Rice, 927 F.2d 74, 79 (2nd Cir. 1991); accord Kenyatta v. Moore, 744 F.2d 1179, 1186 (5th Cir. 1984), cert. denied, 471 U.S. 1066 (1985); Samaad v. City of Dallas, 940 F.2d 925, 942 (5th Cir. 1991).

The officers contend that jurisdiction exists because the disputed facts are not material to the issue of qualified immunity. They contend that even accepting the version of the facts most favorable to the appellees, the actions of the police officers were objectively reasonable, and therefore, as a matter of law, they are protected by qualified immunity. "Of course, as with any issue of nominally disputed fact, if the state of the

evidence is such that reasonable jurors could reach only one conclusion, then that factual issue is appropriate for decision by the court as a matter of law." Oliveira v. Mayer, 23 F.3d 642, 649 (2nd Cir. 1994).

The central issue in this case is whether we can determine as a matter of law that the conduct of the officers was objectively reasonable under all of the circumstances. Graham v. Connor, 109 S.Ct. 1865, 1872 (1989); Johson v. Morel, 876 F.2d 477, 479 (5th Cir. 1989). The evidence is not such that reasonable jurors could reach only one conclusion.¹ Whether Mr. Garcia was 12 feet or 5 feet away from the officers when he was shot and whether Mr. Garcia stumbled or lunged may not be determinative as to whether the officers' use of force was unreasonably excessive. Nevertheless, under either scenario, that most favorable to the officers or that most favorable to the Garcias, the issue of the objective reasonableness of the officers' actions is an issue of fact for the jury. Therefore the appeal is dismissed for lack of appellate jurisdiction.

¹ The officers contend that the facts of this case are analogous to several cases in which this court decided that, as a matter of law, the officers were protected by qualified immunity. Fraire v. City of Arlington, 957 F.2d 1268, 1272-73 (5th Cir.), cert. denied, 113 S.Ct. 462 (1992); Reese v. Anderson, 926 F.2d 494, 500-501 (5th Cir. 1991); Young v. City of Killeen, 775 F.2d 1349, 1353 (5th Cir. 1985). Those cases dealt with police shootings instigated by a suspect reaching for what the officer thought was a weapon or, in the Fraire case, by a suspect heading for the police officer in a moving vehicle. In those cases, the threat of physical harm was more clearly apparent than in this case. The possibility of a concealed gun, albeit merely a possibility, is more obviously dangerous than a steak knife pointed at three officers with guns.

DISMISSED.