IN THE UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 94-60445
(Summary Calendar)

FREDERICK DENSTEL, JR.,
As Administrator on Behalf of
the Estate of Heinrich C. Denstel,

Plaintiffs-Appellants,

versus

THE CITY OF MCCOMB,
MISSISSIPPI, POLICE DEPARTMENT
ET AL.,

Defendants,

CHARLES ROLAND, Individually and
in his Official Capacity, etc., and
FRED JOHNSON, Individually and in
his Official Capacity, etc.,

Defendants-Appellees.

Appeal from United States District Court
for the Southern District of Mississippi
(3:92cv675LN)

(March 8, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Frederick and Beverly Denstel appeal the judgment of the district court dismissing their, 42 U.S.C. § 1983 claim against the two police officers who, while in the line of duty, killed their

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

son. For the following reasons, the judgment of the district court is affirmed.

BACKGROUND

Heinrich Denstel suffered from schizophrenia and mild mental retardation and shared a home with his parents, Frederick and Beverly Denstel (the "Denstels"). Heinrich had a history of violence and threats against his family. McComb police officers, including Officers Roland and Johnson, had been summoned to the Denstels' home numerous times to control Heinrich. On October 23, 1991, Officers Roland and Johnson, as well as, several other officers, were dispatched to the Denstel home in response to a report that Heinrich had threatened the Denstels' lives. Upon arriving at the residence, Officer Roland briefly spoke to the Denstels, who were across the street in a neighbor's yard. Heinrich was in the Denstel home. Officer Roland asked the Denstels if they had any guns in their home, and Frederick replied negatively. Roland and Johnson approached the Denstel home, spoke to Heinrich for a few minutes, and then returned to their patrol cars satisfied that the situation was under control. Officer Roland spoke briefly to the Denstels, informing them that the officers were leaving.

At this time, Heinrich burst through the front door carrying a rifle, stopped on the front porch, and shouted threats at the officers. The officers sought shelter behind the patrol cars parked in the street and shouting ensued: Heinrich continued to shout threats at the officers; the officers shouted at Heinrich several times to drop the gun; and the Denstels shouted at the

officers that the gun was inoperable. Heinrich then pointed the gun at the officers as if taking aim, and both Roland and Johnson fired upon him, striking him in the leg, forearm, and abdomen. Heinrich was transported to a hospital where he died.

The Denstels filed a § 1983 suit against McComb, Mississippi; the city's police department; and, individually and in their official capacity, the City's Police Chief, Police Officers Charles Roland and Fred Johnson, and the city's mayor and selectmen. They alleged that Officers Roland and Johnson used excessive force against Heinrich in violation of the Fourth, Fifth, and Fourteenth Amendments and supplemental state-law claims. The defendants filed a motion for summary judgment, alleging that all individual defendants were entitled to qualified immunity and that the police department and defendants in their official capacities were entitled to sovereign immunity on the plaintiffs' state-law claims.

The district court denied summary judgment to Officers Roland and Johnson, granted summary judgment as to all other defendants, and dismissed the appropriate supplemental state law claims. The district court then granted Officers Roland and Johnson's motion for reconsideration and, after review, reversed itself, granting summary judgment to Officers Roland and Johnson based on qualified immunity. The district court entered judgment dismissing the plaintiffs' claims against all defendants with prejudice, including the state-law claims, on June 20, 1994. The plaintiffs appealed timely.

DISCUSSION

Arguments presented in the district court that are not briefed on appeal are waived. Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987). The plaintiffs raise only the issue of summary judgment based on qualified immunity as it applies to Roland and Johnson, waiving all arguments relating to summary judgment in favor of all other defendants.

Summary judgment is proper if the moving party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1119 (5th Cir. 1992); Fed. R. Civ. P. 56(c). The party opposing a motion for summary judgment may not rely on mere allegations or denials set out in its pleadings, but must provide specific facts demonstrating that there is a genuine issue for trial. Id.; Fed. R. Civ. P. 56(e). On appeal from summary judgment, this Court examines the evidence in the light most favorable to the non-moving party. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992).

Public safety officials are entitled to assert the defense of qualified immunity. Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 462 121 L.Ed.2d 371 (1992). Qualified immunity shields government officials performing discretionary functions from civil damages liability if their actions were objectively reasonable in light of clearly established constitutional law. Id.

Evaluation of a defendant's right to qualified immunity necessitates a two-step inquiry. See King v. Chide, 974 F.2d 653, 656-57 (5th Cir. 1992). The first step is whether the plaintiff alleged the violation of a clearly established constitutional right. Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991); King, 974 F.2d at 656. The next step is to determine the reasonableness of the officers' behavior. See King, 974 F.2d at 657.

In considering the first prong of the qualified immunity standard, the officers' conduct is measured by currently applicable constitutional standards. Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993). Excessive-force claims implicate constitutional rights. "[A]ll claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other `seizure' of a free citizen should be analyzed under the Fourth Amendment and its `reasonableness' standard . . . . " Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Because it is well settled that a law enforcement officer's use of excessive force implicates the Fourth Amendment's guarantee against unreasonable seizures, the plaintiffs alleged the violation of a clearly established constitutional right. See King, 974 F.2d at 656; Rankin, 5 F.3d at 106-07.

The next prong of the qualified-immunity standard measures the reasonableness of the officers' actions. The objective reasonableness of the officers' conduct must be measured with

reference to the law as it existed at the time of the conduct in question. King, 974 F.2d at 657; see Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Under Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989), the necessary elements were: "(1) a significant injury which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." The plaintiff's claim failed if any one of these elements was lacking. Id. (footnote omitted).[1]

Determination of objective reasonableness entails a highly fact-specific inquiry measured against a standard that "`is not capable of precise definition or mechanical application.'" Spann v. Rainey, 987 F.2d 1110, 1115 (5th Cir. 1993) (citation omitted). To determine whether Roland and Johnson's use of deadly force was objectively reasonable the Court must "balance the amount of force used against the need for that force," in the context of the law at the time. Id.

If the officers used no more force than a reasonable police officer would have deemed necessary, they are entitled to qualified immunity. See id. "The reasonableness of a particular use of

[1] The Supreme Court has since eliminated the need to prove a significant injury in the context of an Eighth Amendment excessive-force claim. See Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156 (1992). In Harper v. Harris County, Tx, 21 F.3d 597 (5th Cir. 1994), we held that the significant injury test no longer applied to excessive force claims under the Fourth Amendment. Id. at 600. However, at the time the claim arose, a significant injury was required and thus that is the law that is to be applied. See id. at 601. Defendants do not dispute that a significant injury occurred here.

force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." Id. at 396-97. If an individual poses a threat of serious physical harm to the officer or others, the use of deadly force is not a constitutional violation. See Fraire, 957 F.2d at 1275-76 (citing Tennessee v. Garner, 471 U.S. 1, 11-12, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)).

The case under consideration involves such a rapidly evolving and tense situation. The district court considered the circumstances surrounding the shooting and the knowledge available to the officers at that time and ruled that,

> even had [the officers] heard the Denstels' warnings, they cannot be faulted for failing to heed them, as the Denstels had already lied to, or at least misled them once. Thus, at the time he was shot, Heinrich was threatening to kill the officers and holding a gun which, so far as the officers knew or had reason to believe, was in working order. . . . [T]he officers' actions were objectively reasonable given the circumstances with which they were confronted and the information known to them. [Footnotes omitted.]

In Young v. City of Killeen, 775 F.2d 1349 (5th Cir. 1985), a police officer had observed a drug transaction between Young and another person. The officer approached the suspects in his car with the lights flashing. Young attempted to flee in his car, but

the officer blocked Young's path with his patrol car. The officer left his car and told Young to get out of his vehicle. In response, Young reached under the seat. The officer then shot and killed him.

This Court in finding that the individual police officer's actions were reasonable stated "If Young's movements gave [the police officer] cause to believe that there was a threat of serious physical harm, [the police officer's] use of deadly force was not a constitutional violation." Id. at 1353 (citations omitted). We also stated that "no right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts." Id.

The instant case is similar to Young in that the victim of the shooting had acted in a threatening manner. In Young, it was Young's act of reaching under the seat. In this case, it was Heinrich Denstel's far more threatening actions of bursting onto the porch brandishing a weapon and making threats. The Denstels' protestations to the officers that the weapon could not fire did not diminish the threat of serious bodily harm posed by Heinrich given the possibility that: (1) the Denstels had lied about whether a weapon was on the premises and thus they couldn't be trusted about whether the weapon worked or (2) Heinrich had obtained a working weapon from a location in the house unknown to the Denstels.

In Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the Supreme Court stated, in the context of using deadly force to prevent an escape, that:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon . . deadly force may be used if necessary to prevent escape, and if, where feasible some warning has been given.

Id. at 11-12, 105 S.Ct. at 1701. In the context of this case, where the officers faced a threat of serious physical harm, it was not constitutionally unreasonable for them to use deadly force. We therefore hold that the officers were entitled to qualified immunity.

The Denstels contend that the location of the bullet wound and the evidence of foreign material in the wound indicate that Heinrich Denstel was shot while trying to turn away from the officers. They also argue that Heinrich posed no threat because the police officers had shielded themselves behind their patrol cars. Our examination of the testimony reveals that Denstel was shot while his body was turning and that the officers had shielded themselves behind their patrol cars. However, these facts do not change the results of our analysis. Heinrich still had a rifle and he was still threatening to shoot the officers. Thus, when the officers made their decision to use deadly force, Denstel still posed a risk of causing serious bodily injury to others.

CONCLUSION

Because Heinrich Denstel posed a threat of causing serious bodily harm to other officers, Officers Roland and Johnson reasonably responded with deadly force. Officers Roland and Johnson are therefore entitled to qualified immunity for their actions. The judgment of the district court is therefore AFFIRMED.