

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-60791  
Summary Calendar

---

WILLIE BEN MCCOY,

Plaintiff-Appellant,

versus

THE BRAZORIA COUNTY SHERIFF'S  
DEPARTMENT, ET AL.,

Defendants-Appellees.

---

Appeal from the United States District Court  
for the  
Southern District of Texas  
(CA G 92 370)

---

( July 26, 1995)

Before JOHNSON, DeMOSS and PARKER, Circuit Judges.

JOHNSON, Circuit Judge:<sup>1</sup>

Willie Ben McCoy ("McCoy") appeals the district court's grant of summary judgment as to his civil rights action under 42 U.S.C. §§ 1983 and 1988 against the Brazoria County Sheriff's Department, the sheriff of Brazoria County, and two deputies.<sup>2</sup> Because we

---

<sup>1</sup>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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

<sup>2</sup>In addition to these claims, McCoy also alleged: that the defendants conspired to deprive him of his civil rights and failed to prevent the conspiracy in violation of 42 U.S.C. §§ 1985 and

agree with the district court's disposal of this case, we affirm.

### I. Facts and Procedural History

On July 27, 1990, J.E. Fairfield ("Deputy Fairfield"), a Brazoria County deputy sheriff, attempted to arrest McCoy on various misdemeanor charges. At the time of the arrest, Fairfield was in full uniform and he identified himself as a deputy sheriff. McCoy refused to cooperate with Deputy Fairfield, and instead got into his own car in an attempt to flee. Deputy Fairfield then reached into McCoy's car and attempted to remove him from the car. McCoy began driving away while Deputy Fairfield hung on and was dragged alongside the car. The rear wheel of the car ran over Deputy Fairfield's foot. Deputy Fairfield then let go of the car, rolled to the ground, and told McCoy to halt. Deputy Fairfield saw McCoy's car run into a sign. The deputy stated in his summary judgment affidavit that he "saw a flash of light from the rear of his car like backup lights and the car moved backwards towards me. I was afraid he was going to back his car over me." Deputy Fairfield also stated that he "knew Willie Ben McCoy supposedly carried a .25 automatic pistol." Deputy Fairfield expressed

---

1986; that the defendants improperly investigated the incident; that the defendants interfered with his transfer to the Texas Department of Criminal Justice—Institutional Division; and that the defendants failed to provide him with necessary medical treatment. The individual defendants filed a motion to dismiss certain claims. The district court dismissed the conspiracy and failure to prevent conspiracy claims, the investigation claim, and the transfer claim for failure to state a claim under FED. R. CIV. P. 12(b)(6). The district court also granted the defendants' motion for summary judgment as to McCoy's claim concerning medical treatment. McCoy has not appealed the district court's judgment concerning these claims.

concern that McCoy was armed and would try to kill or seriously injure Deputy Fairfield.

At this point, Deputy Fairfield shot at McCoy in his car and struck him. McCoy's car stopped moving and Deputy Fairfield then began to approach the car. McCoy looked at Deputy Fairfield, and his car then began to move toward the deputy again. Deputy Fairfield discharged his pistol for a second time. The deputy later took McCoy into custody and administered first aid to him. A three-man independent board of inquiry investigated the incident and unanimously determined that Deputy Fairfield was justified in using deadly force by discharging his weapon.<sup>3</sup>

The magistrate judge, to whom this case was initially referred, determined that Deputy Fairfield was entitled to qualified immunity against the excessive force claim because the shooting took place after McCoy threatened to run down Deputy Fairfield with his car. Additionally, the magistrate judge determined that McCoy could not defeat the defendants' motion for summary judgment regarding the claims against the county and sheriff, which alleged that there was a policy of allowing the use of excessive force in misdemeanor arrests and that there was a failure on the part of the county and sheriff to properly train deputies.

---

<sup>3</sup>It should be noted that McCoy presents a slightly different version of the facts in his brief; however, this Court may not consider these facts because McCoy failed to present them in any sworn summary judgment evidence to the district court. See *Johnston v. City of Houston*, 14 F.3d 1056, 1060 (5th Cir. 1994) ("Unsworn pleadings, memoranda or the like are not, of course, competent summary judgment evidence.")

Because McCoy objected to the magistrate judge's report and recommendations, the district court conducted a de novo review of the record. The district court came to the same conclusions as had the magistrate judge on all points and entered summary judgment accordingly. McCoy now appeals the district court's decision and contends that the district court erred in granting the defendants' motion for summary judgment as to his claims that Deputy Fairfield used excessive force, that the defendants had a policy of allowing the use of excessive force, and that the defendants failed to properly train and supervise the deputies.<sup>4</sup>

## II. Discussion

This Court reviews a grant of summary judgment de novo, using the same criteria used by the district court. *Fraine v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir.), *cert. denied*, 113 S. Ct. 462 (1992). The Court reviews the "evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." *Id.* Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). When a

---

<sup>4</sup>In the Discussion section of this opinion, primary emphasis is placed on analyzing the qualified immunity grounds for the grant of summary judgment. This is because that is the closest issue on which the summary judgment was based. As to the department-wide policy of using excessive force argument as well as the failure to train and supervise argument, McCoy simply did not present anything within his summary judgment evidence which would establish a genuine issue as to material fact as to these issues.

proper motion for summary judgment is made, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The mere allegation of a factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Fraire*, 957 F.2d at 1273. A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. See *Anderson*, 477 U.S. at 248. Material facts are facts that might affect the outcome of the suit under the governing law. *Id.*

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*, 113 S.Ct. 462 (1992). Qualified immunity shields government officials performing discretionary functions from civil damage liability if their actions were objectively reasonable in light of clearly established constitutional law. See *id.*

Evaluation of a defendant's right to qualified immunity necessitates a two-step inquiry. *Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994). The first step is to ask whether the plaintiff has alleged the violation of a clearly established constitutional right. *Id.* at 600. Because it is well settled that a law enforcement officer's use of excessive force implicates the Fourth Amendment's guarantee against unreasonable seizures, McCoy has overcome the first hurdle of the qualified immunity analysis by

alleging the violation of a clearly established constitutional right. See *King v. Chide*, 974 F.2d 653, 656-57 (5th Cir. 1992).

The next prong of the qualified-immunity standard measures the reasonableness of the officer's actions. *Harper*, 21 F.3d at 600. The objective reasonableness of the officer's conduct must be measured with reference to the law as it existed at the time of the conduct in question. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *King*, 974 F.2d at 657. Thus, this Court should evaluate the reasonableness of Fairfield's conduct under the law in effect in 1990 at the time of the incident in question.

Under *Johnson v. Morel*, the case governing excessive force claims during the time of the incident in question, the Fourth Amendment's "reasonable standard" is the gauge by which an officer's actions are judged. *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir. 1989). Pursuant to that "reasonable standard," McCoy can prevail on an excessive force claim only by proving each of the following three elements:

- (1) a significant injury,<sup>5</sup> which

---

<sup>5</sup>After a Fifth Circuit decision in 1994, the plaintiff is no longer required to demonstrate that a significant injury occurred due to the excessive force. See *Harper v. Harris Co.*, 21 F.3d 597, 600 (5th Cir. 1994). However, as that case recognized the objective reasonableness of an officer's conduct must be evaluated under the law as it existed at the time of the alleged violation of the plaintiff's constitutional rights. See *id.* at 600-01. Therefore, the *Johnson* test would apply in full to this case as to evaluating a constitutional claim based on excessive force grounds. See *id.*

At any rate, the significant injury inquiry is irrelevant to the case at bar since the decisive factors of this case are the remaining *Johnson* factors evaluating excessiveness of force and reasonableness of force. These two prongs of the excessive force test remain firmly intact. See *Harper*, 21 F.3d at 600.

(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 reasonable.

*Id.* at 480. When any one of these elements is lacking, the plaintiff's case fails. *Id.*

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). To determine whether Deputy Fairfield'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.* This determination requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the officers or others, and whether he was actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. If the officer used no more force than a reasonable police officer would have deemed necessary, he or she is entitled to qualified immunity. *See id.* The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Id.* 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. Thus, the reasonableness

standard must give ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). It is not constitutionally unreasonable to prevent escape by use of deadly force when the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. See *Fraire*, 957 F.2d at 1276.

Applying the law to the facts of this case, we do not believe that Deputy Fairfield's use of deadly force was objectively unreasonable under the circumstances. This incident involved rapidly evolving events which required split-second judgment. The shooting occurred only after McCoy violently resisted arrest by attempting to escape by car, dragging Deputy Fairfield alongside the car, and running over the deputy's foot. The first shot occurred after McCoy hit a sign and Fairfield saw the back-up lights on McCoy's car illuminate. The second shot occurred after Deputy Fairfield saw the car move toward him. Deputy Fairfield also stated that he suspected McCoy had a gun. Under these circumstances and given the complete lack of controverting evidence in McCoy's summary judgment materials,<sup>6</sup> this Court is unwilling to second guess Deputy Fairfield's split-second, on-the-scene decision. Because the district court did not err in determining

---

<sup>6</sup>Although McCoy presents a slightly different version of the facts on appeal in his appellant's brief, he wholly failed to present any summary judgment evidence before the district court. McCoy may not rest on mere allegations or denials in his pleadings in trying to overcome a motion for summary judgment when the other side demonstrates the lack of any genuine issue of material fact. See *Anderson v. Liberty Lobby*, 477 U.S.242, 248 (1986).



that Deputy Fairfield had probable cause to believe that McCoy posed a serious threat of physical harm to the deputy when he made the decision to fire shots at McCoy, Deputy Fairfield is entitled to qualified immunity.

Additionally, McCoy has pointed out absolutely no evidence which would establish any genuine issue of material fact as to either the failure to train and monitor deputies argument or the department-wide policy of using excessive force argument. Hence, the district court was justified in granting the summary judgment as to these claims as well.

### III. Conclusion

Under the circumstances of this case as set forth in the summary judgment evidence, Deputy Fairfield is entitled to qualified immunity for his use of deadly force against McCoy when McCoy was evading arrest by apparently attempting to run over Deputy Fairfield with his automobile. Additionally, McCoy has failed to establish any material fact issues as to any other of his grounds for relief. Therefore, the decision of the district court granting the defendants' summary judgment motion is affirmed.

AFFIRMED.