

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-10194

ERIK WILLIAMS,

Plaintiff-Appellee,

VERSUS

CITY OF DALLAS, ET AL., STANLEY MCDANIEL,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Texas
(3:96-CV-1523-T)

September 4, 1998

Before KING and DAVIS, Circuit Judges, and VANCE,* District Judge.

PER CURIAM:**

Erik Williams filed suit under 42 U.S.C. § 1983, claiming that Dallas Police Officer Stanley McDaniel deprived him of his constitutional rights by using excessive force to apprehend him. Following a tip that persons in a white van were burglarizing cars in a nearby neighborhood, Officer McDaniel spotted the van and attempted to stop it. The van took off, avoiding the stop, and Officer McDaniel chased it. During the chase, Officer McDaniel

* District Judge of the Eastern District of Louisiana, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

observed gunfire coming from the van. The van eventually stopped, and the passengers fled on foot. Officer McDaniel stopped his police vehicle next to the van, and exited his car. After observing Williams and another passenger across the street, Officer McDaniel fired at Williams and shot him in the leg.

In this appeal, Officer McDaniel claims that the district court erred in its denial of summary judgment on the basis of qualified immunity. The district court concluded that summary judgment was inappropriate due to the existence of genuine issues of material fact.

We have jurisdiction to review the district court's interlocutory order denying summary judgment on the basis of qualified immunity with respect to whether the genuine issues of fact identified by the district court are material. Colston v. Barnhart, ___ F.3d ___ (5th Cir. 1998)(denial of reh'g en banc).

Although the district court did not specify the issues it considered material, our review of the summary judgment evidence reveals the existence of at least one issue of material fact. See id. at ___ ("where the district court does not identify those factual issues as to which it believes genuine disputes remain, an appellate court is permitted to go behind the district court's determination and conduct an analysis of the summary judgment record to determine what issues of fact the district court probably considered genuine"). Williams claims that after Officer McDaniel yelled "stop, freeze," Williams turned and faced the officer with his hands in the air, and yelled "don't shoot." Officer McDaniel

does not discuss the circumstances immediately prior to the shot in his affidavit, but generally explains his shooting as a reaction to all of the circumstances leading up to the shot. His affidavit stated: "I fired my gun because of the previous shots fired at me and because I thought that the person or persons were still armed and shooting at me." Because this issue of fact is material, we have no jurisdiction to review the district court's denial of summary judgment. We therefore dismiss the appeal.

DISMISSED.