United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
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Lyle W. Cayce
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No. 22-10876

MARY DAWES, *Individually and the Administrator of* THE ESTATE OF DECEDENT GENEVIVE A. DAWES; ALFREDO SAUCEDO; VIRGILIO ROSALES,

Plaintiffs—Appellants,

versus

CITY OF DALLAS; CHRISTOPHER HESS; JASON KIMPEL,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-1424

Before DENNIS, ENGELHARDT, and OLDHAM, *Circuit Judges*.

PER CURIAM:[*]

On January 18, 2017, Dallas police shot and killed Genevieve Dawes. This federal civil rights suit followed. Defendants prevailed at summary judgment in the court below in a lengthy and careful decision. We agree with the district court that the officer defendants did not violate clearly established

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

law, and so are entitled to qualified immunity. But we remand the claims against the City of Dallas for further consideration.

I.

A.

Qualified immunity cases present two questions. First, did the officers violate a constitutional right? And second, was the right at issue clearly established at the time of the officers' alleged violation? *See Morrow v. Meacham*, 917 F.3d 870, 874 (5th Cir. 2019). To reverse the district court in favor of plaintiffs, we must answer "yes" to both questions. We may approach them in either order, and we need not reach both if one proves dispositive. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

This case reaches us after summary judgment. We review a district court's grant of summary judgment de novo. *See Aguirre v. City of San Antonio*, 995 F.3d 395, 405 (5th Cir. 2021). Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is "material" only when it could change the judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986). And a dispute is "genuine" only when the evidence could support a reasonable jury's decision to resolve that dispute against the movant. *See Westfall v. Luna*, 903 F.3d 534, 546 (5th Cir. 2018) (relying on *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986)). Where, as here, facts are documented by video camera, we may take them "in the light depicted by the videotape." *See Scott v. Harris*, 550 U.S. 372, 381 (2007).

B.

Because excessive force claims are "necessarily fact intensive," we narrate in some detail. *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009).

On the evening of January 17, 2017, Genevieve Dawes and her husband, Virgilio Rosales, parked a black Dodge Journey in the back corner of an apartment complex parking lot and went to sleep in the vehicle. A resident called police and reported a suspicious vehicle. Police ran the tag and were told the car was stolen.[1] Officers were dispatched to the scene around 5:00 AM on January 18.

Officers Christopher Alisch and Zachary Hopkins arrived at the complex first, shortly after 5:00 AM. They found the Journey vehicle boxed in on three of four sides—by fences to the front and left and by another car to the right. They approached with weapons drawn, calling to the driver and repeatedly demanding that the occupants "put your hands out the window." As they shouted, four more officers arrived, including Christopher Hess and Jason Kimpel.

The officers conferred, expressing uncertainty as to whether the Journey was still occupied. The windows of the car were fogged; one officer remarked that "you can't see shit." Around this time, Hess pulled a police cruiser closer to the Journey. He sounded the horn and turned on the cruiser's spotlight.

Hopkins tried to open the right rear door of the Journey and found it locked. Hopkins then moved around behind the Journey and stood near its rear left taillight. Meanwhile, another officer discerned and announced that the Journey was in fact occupied. During the first minute that elapsed after

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[1] Rosales would later say that Dawes purchased the car from someone else and did not know it was reported stolen, an assertion defendants do not contest. But our analysis centers on the perspective of responding officers at the time of the relevant confrontation. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (instructing that we consider the perspective of the "officer on the scene"). In other words, it does not matter whether the Journey was stolen or who stole it; it matters only that the officers were told the car was stolen.

this discovery, officers shouted commands to the effect of "show your hands" eight times and twice identified themselves as Dallas police.

While the officers were shouting, Hopkins and Kimpel stood just behind the Journey. Hopkins decided to retreat and said, "C'mon Kimpel, back up a little bit." The officers retreated but remained in the path directly behind the Journey.

Eight seconds after Hopkins's statement, the Journey's engine ignited. Hess leapt into a police cruiser and said "watch out" as he pulled the cruiser behind the rear bumper of the otherwise boxed-in Journey.

The Journey reversed and collided with Hess's cruiser. The Journey then accelerated forward and hit the fence in front of it. This impact occurred at low speed, but the sound of the impact is audible on Hopkins's body camera, and the jolt of the fence visibly shook the surrounding trees.

Kimpel and Hopkins still stood behind the Journey at the moment of the Journey's impact against the fence. Kimpel said "watch out watch out watch out," and moved laterally out of the Journey's path and towards other officers near the police cruiser. Kimpel passed in front of Hopkins (and could not see Hopkins) as Kimpel traveled.

Hess, after the Journey hit the cruiser, jumped out from the driver's seat and trained his weapon on the Journey. He and other officers shouted several more times for the Journey's occupants to show their hands.

After hitting the fence, the Journey immediately reversed. As it did so, Hess fired twelve rounds, all within a five second interval. Kimpel fired one round, simultaneous with Hess's sixth shot.

Kimpel later stated that he fired his weapon "in fear of Officer Hopkins' life." Hess said he fired to protect both Hopkins and Kimpel, who he believed were in the path of the reversing Journey.

Hopkins's bodycam reveals that, although he was not in Hess's or Kimpel's immediate field of view, he had moved out of the Journey's path several seconds before Hess first fired.

Four of Hess's bullets struck Dawes, who later died at the hospital. None struck Rosales. Kimpel's round struck neither person.

Rosales and Dawes's estate filed a 42 U.S.C. § 1983 excessive force suit against Hess, Kimpel, and the City of Dallas. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (an officer's use of deadly force is a "seizure" within the meaning of the Fourth Amendment). Hess and Kimpel prevailed on qualified immunity grounds at summary judgment. This appeal followed.

II.

The Supreme Court's approach to qualified immunity reflects concern that, absent privilege for in-the-moment street decision-making, officers would be deterred from "the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quotation omitted). Accordingly, qualified immunity shields officers from civil suit unless they had "fair notice that [their] conduct was unlawful." *Nerio v. Evans*, 974 F.3d 571, 574 (5th Cir. 2020) (quotation omitted). That notice requirement means a § 1983 plaintiff must show that the defendant officer violated "clearly established law." *Id.*

To make that showing in the excessive force context, a plaintiff must "identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) (quotation omitted).[2] That is not easy, because clearly

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[2] A plaintiff might also succeed without a governing precedent on extraordinarily egregious facts where the defendant officer faced a complete absence of exigency. *See*

established law cannot be defined "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Instead, a precedent must "squarely govern[]" the facts of the plaintiff's claim; facts that fall in the "hazy border between excessive and acceptable force" result in qualified immunity. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam) (quotation omitted).

How clear must fair warning be? "[F]or a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (quotation omitted). The law must be clear enough that, "in the blink of an eye, in the middle of a high-speed chase—*every* reasonable officer would know it immediately." *Morrow*, 917 F.3d at 876 (emphasis added); *see also Reichle v. Howards*, 566 U.S. 658, 664 (2012) (discussing the "every reasonable official" standard); *Harmon v. City of Arlington*, 16 F.4th 1159, 1165–66 (5th Cir. 2021) (same).

Plaintiffs here present several cases that they contend clearly established the law as applied to Hess and Kimpel's specific actions. In part, they rely on seminal Fourth Amendment cases like *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989). But neither of those cases involved a nighttime confrontation between officers and the occupants of a reportedly-stolen vehicle, much less did they involve suspects who backed their reportedly-stolen vehicle into a police cruiser after refusing numerous commands from police. The Supreme Court has repeatedly made clear that we may not rely on general rule statements in *Garner* and *Graham* to clearly establish the law in far-afield cases like ours. *See Mullenix v. Luna*,

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Ducksworth v. Landrum, 62 F.4th 209, 218 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part) (discussing the current state of obvious-case doctrine).

577 U.S. 7, 12–13 (2015) (per curiam); *Kisela v. Hughes*, 584 U.S. 100, 105 (2018) (per curiam).

Plaintiffs also point to several circuit precedents, but those precedents are unavailing. One, *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012), concerned an alleged tasing and beating of a man not in a vehicle. *Id.* at 759–60. A second, *Edwards v. Oliver*, 31 F.4th 925 (5th Cir. 2022), post-dated the events of this case and so could not have given Hess and Kimpel fair notice of their legal obligations. *See Pearson*, 555 U.S. at 232 (the law must be clearly established "at the time of the defendant's alleged misconduct"). A third, *Baker v. Coburn*, 68 F.4th 240 (5th Cir. 2023), also post-dated the events of this case. In any event, *Baker* did not conclude that an official violated the Fourth Amendment, so it cannot clearly establish law. *See id.* at 251; *Wesby*, 583 U.S. at 64. Moreover, *Baker* involved several fact disputes, including whether shots were fired after a vehicle was, in daylight and in the plain view of every responding officer, traveling away from officers when they fired. *Id.* at 248–49. Here, the facts exhaustively documented by multiple cameras cannot be disputed. Shots were fired in the dead of night as a vehicle traveled towards a location an officer had stood in seconds before. *Baker* therefore cannot "squarely govern[]" today's facts. *Brosseau*, 543 U.S. at 201.

Plaintiffs rely most heavily on *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2019). Like *Baker*, *Lytle* did not find a constitutional violation, and so it did not clearly establish law. *Wesby*, 583 U.S. at 64; *see also Nerio*, 974 F.3d at 575. And *Lytle* featured significant fact disputes that distinguish it from this case. In *Lytle*, the panel resolved those disputes in favor of the plaintiff for the purposes of evaluating summary judgment. *Lytle*, 560 F.3d at 409 ("We therefore adopt Lytle's version of the facts."). What were *Lytle*'s assumed facts? In broad daylight, with no other officers present, and without first giving a warning, an officer fired at a vehicle "three to four houses down the block." *Id.* This case could hardly be more different because officers gave

several warnings, shot their weapons in close quarters, in the predawn darkness, and with officers in the harm's way just seconds before the shots were fired.

For its part, the dissenting opinion correctly recognizes that "*Lytle* itself cannot form the clearly established law in this case." *Post*, at 6 (Dennis, J., dissenting). The dissenting opinion instead points to two out-of-circuit precedents to clearly establish the relevant law. *Post*, at 7–8 (Dennis, J., dissenting). This contention is foreclosed by our precedent, however. In *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002), we recognized that six circuits sanctioning "some version" of the question at issue was insufficient to give officers "fair warning." *Id.* at 330; *see also Vincent v. City of Sulphur*, 805 F.3d 543, 549 (5th Cir. 2015) ("[T]wo out-of-circuit cases and a state-court intermediate appellate decision hardly constitute persuasive authority adequate to qualify as clearly established law sufficient to defeat qualified immunity in this circuit."); *id.* at 550 ("[T]wo cases from other circuits and one from a stayed intermediate court do not, generally speaking, constitute persuasive authority defining the asserted right at the high degree of particularity that is necessary for a rule to be clearly established despite a lack of controlling authority."); *Morrow*, 917 F.3d at 879-80 (holding that two Sixth Circuit cases could not establish a robust consensus and relying in part on *McClendon*).

III.

The district court's grant of summary judgment to the City of Dallas rested on its alternative holding that, if the law was clearly established, the officers nevertheless committed no constitutional violation. *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (requiring a constitutional rights violation for § 1983 claims against a municipality). Because we do not reach the district court's alternative holding, we remand the claims against Dallas

to the district court for further consideration. On remand, the district court may reiterate its no rights-violation finding, may reconsider that finding, or may consider any other aspect of the plaintiffs' claims against the City of Dallas.

* * *

The grant of summary judgment to the defendant officers is AFFIRMED. The grant of summary judgment to the City of Dallas is REMANDED.