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Police: Where Insufficient Evidence That Fleeing Driver Posed Imminent Risk to Police or Public, *Plumhoff* Does Not Provide Qualified Immunity

Luna v. Mullenix, No. 13-10899 (5th Cir. Aug. 28, 2014).

Interpreting the Supreme Court's recent *Plumhoff v. Rickard* decision, the Fifth Circuit has upheld a District Court's denial of qualified immunity sought by a police officer who shot and killed a driver fleeing from a misdemeanor warrant where there was little other traffic on the divided highway, no houses or civilians in the vicinity and officers had already placed spike strips in the path of the escaping vehicle

In March 2010, a Tulia,Texas Police Department officer located Israel Leija, Jr., who had as active misdemeanor warrant, and sought to arrest him. He approached Leija and spoke with him a couple minutes, but Leija got in his car and fled. This led to an eighteen-minute car chase on a rural highway that had very little traffic, was divided, and lacked houses or businesses along it. In short, despite reaching speeds between 80 and 100 miles per hour, the chase barely impacted the general public. Officers positioned sets of spike strips in three locations, but before Leija reached any of them, Trooper Chadrin Mullenix decided to shoot the vehicle from an overpass, under which the first set of spike strips was deployed. The trooper was set up 20 feet above the interstate and Leija's vehicle was travelling 80 miles per hour. Mullenix testified that he had never trained to shoot a moving vehicle and had never seen it done before. The District Court pointed out that there was no evidence that an attempt to shoot a moving vehicle's engine block would actually disable it. Trooper Mullenix radioed to his sergeant to ask permission or, as he testified, to "seek advice" on this procedure, but then promptly left his vehicle, placing himself out of range for any communication. He testified he never heard his supervisor's reply that he should "stand by" and "see if the spike strips work first." One officer mentioned to Mullenix that there was another officer under the bridge, and Mullenix responded that he didn't "think" he'd hit him. Mullenix shot six rounds toward the car, though there was no ambient light or streetlights and he could not see the driver or whether there were other people in the car. He shot Leija four

times and never hit the vehicle's hood. After the shooting Mullenix asked his supervisor "How's that for proactive?" Apparently Mullenix was in a counseling session earlier that day wherein his supervisor indicated he was not being proactive enough as a trooper.

A representative of Leija's estate and Christina Flores, on behalf of Leija's minor child, sued the Texas Department of Public Safety and Trooper Mullenix alleging violations of the Texas Tort Claims Act and §1983. In the lower court various parties were dismissed, leaving the sole remaining claim as a § 1983 suit against Trooper Mullenix, who argued he was entitled to qualified immunity. The District Court held he was not entitled to such a defense. Mullenix appealed.

HELD: The Fifth Circuit affirmed the District Court, with Judge King dissenting.

DISCUSSION: Qualified immunity is a two-part analysis, asking first whether the facts, taken in the light most favorable to the plaintiff, show the officer's conduct violated a federal right (constitutional or statutory) and, second, whether that right was so clearly established at the time of the conduct that the defendant officer would have known of it..

The majority found a reasonable jury could hold that Leija suffered an injury which resulted from the use of unreasonable and excessive force. The majority recognized that all fleeing suspects present some danger, but determined the "real" issue is whether, in a particular case, the suspect poses such a risk to officers or the public that deadly force is justified. In this instance, traffic was light, the highway was divided, Leija never left the road surface and had not run into any other cars or police vehicles, and the police had three sets of spike strips deployed ahead of the vehicle. However, the majority pointed to the fact that Leija had called police dispatch and said he had a gun, was willing to shoot at officers, and that his speeds were obviously excessive.

Defendant Mullenix relied heavily on the fact that there was an officer under the bridge he shot from, but the majority noted that in his testimony all he said when asked was that he did not think *he* would hit that officer – not that he had a concern about *Leija* shooting or hitting him. Moreover, Mullenix's own supervisor advised against the action until non-lethal force (spike strips) was employed first. Weighing all these facts, the majority thought a reasonable jury could find that Leija did not pose an immediate risk to officers or the public, and that therefore deadly force was not warranted.

As to the defendant's knowledge of the applicable standard, the majority cited *Lytle v. Bexar Cnty*., 560 F.3d 404 (5th Cir. 2009) for the proposition that it had "long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." While Mullenix relied on the Supreme Court's recent decision in *Plumhoff* to argue that the law was not clearly established, the majority disagreed, noting that all *Plumhoff* held was that "where a fleeing suspect 'indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby, a police officer's use of deadly force is not clearly established as unreasonable." (internal citations omitted).

This was not enough for the majority because it did not "undermine the clearly established law that an officer may not use deadly force against a fleeing suspect absent a sufficient risk to officers or bystanders." They therefore affirmed the District Court.

DISSENT: Judge King disagreed with the majority's treatment of the question in the case as a "fact issue" rather than a legal question to be determined by the Court. The dissent highlighted that the a footnote in the U.S. Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007) explained that "[a]t the summary judgment stage . . . once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of [an officer]'s actions . . is a pure question of law." The dissent felt that, in contrast to this direction, the majority permitted jurors to draw inferences and make decisions regarding undisputed facts – facts established in and used for summary judgment proceedings below. Judge King therefore believed the case was ripe to be decided on appeal. As he stated it: "What we cannot do, on this record, is decline to decide the Fourth Amendment issue and, instead, effectively lateral that decision to a jury. The ultimate issue of objective reasonableness is purely legal, and there are no genuine and material factual disputes preventing us from deciding that issue in this appeal."

Judge King also saw this as a "close case" and would have held that Trooper Mullinex was entitled to qualified immunity. He did not believe Mullenix's actions were objectively unreasonable because Leija possessed – or said he possessed – a gun and that he was willing to shoot officers. The dissent believed this posed a "grave risk to officers and civilians." Furthermore, he highlighted that Leija was "highly culpable for the risks he posed." Lastly, he determined the majority minimized the risk Leija posed to the officer under the bridge Mullenix shot from and all other officers positioned along the road. Despite evidence that officers are trained to set spike strips and take protective positions at those locations, the dissent noted "such protection was necessarily limited by the officers' need to position themselves near the roadway" and that there was "no evidence suggesting that the officers deploying road spikes could position themselves in a manner that would eliminate their exposure to gunfire from passing vehicles." As a result, Judge King would have granted Mullenix qualified immunity.

http://www.ca5.uscourts.gov/opinions/pub/13/13-10899-CV0.pdf (last accessed Sept. 24, 2014).