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FEATURED CASE:

QUALIFIED IMMUNITY: Officer Lacked Basis to Use Deadly Force Where Unarmed Decedent Was Fifty Feet Away

***Bygum v. City of Montgomery*, no 21-2130 (4th Cir. Feb. 24, 2023).**

When a jury could reasonably find that an officer violated a person's Fourth Amendment right to be free from excessive force, an affirmative qualified immunity defense will not win summary judgment.

Facts: Officer Roger King (King), a police officer for the city of Montgomery in West Virginia, shot and killed an unarmed Eric Young (Young) after a pursuit on foot. During an overnight shift at the police station, King saw Young attempt to break into his locked police cruiser. King notified the police dispatch of Young's action and left the station to investigate catching up and confronting Young in a neighbor's garage. Young was non-compliant, refusing to get on the ground as directed and behaving erratically through the pursuit, even yelling about "Satan and the Lord". Young also repeatedly flailed his arms and shirt which King said made him suspect aggression and the possibility that Young was reaching for a weapon. Young stopped more than once to turn and lunge at King before turning to walk away from him. King fired his taser Young, but it was ineffective, and he drew his firearm while still carrying the taser. King fired five times, striking Young four times, and killing him.

Each party tells a drastically different story of the shooting, especially the positions, locations and movements of King and Young. According to King, Young had closed the distance between them to about eight to ten feet before Young lunged again at King. King reports that he feared for his life even after the first two shots struck Young, believing that Young was reaching for a weapon. Young's estate retained a forensic expert to reconstruct the shooting using physical evidence to conclude that King was fifty feet away from Young when King fired the first shot and twenty-five feet away when he was struck with the last bullet with King moving towards Young during the shooting.

Young's estate sued King and the cities of Montgomery and Smithers bringing federal and state-law claims including a claim that King violated Young's Fourth Amendment right to be free from excessive force. King and the city of Montgomery moved for summary judgment on grounds of qualified immunity. The district court denied summary judgment - viewing the facts most favorable to Young's estate - finding that a jury could find that the shooting violated Young's Fourth Amendment right to be free from excessive force.

Appeal: An objective reasonableness standard is used for excessive force claims, with a more specific test for cases involving deadly force. In determining whether an officer is entitled to qualified immunity, the court applies a two-step test, first determining whether the facts make out a violation of the plaintiff's constitutional rights, and second, whether that right was clearly established at the time. The burden of proof is on the plaintiff for the first question and on the defendant for the second. When reviewing a district court's denial of summary judgment in the qualified immunity context, the court reviews de novo, viewing the evidence in the light most favorable to the plaintiff and drawing all reasonable inferences in their favor.

Violation of Constitutional Rights: Viewing the facts most favorable to Young's estate, the court concluded that the district court correctly held that a reasonable jury could find King violated the Fourth Amendment. The court found King lacked probable cause to believe that Young posed an immediate threat of serious physical harm to King or others, according to the analysis. The streets were empty except for King and Young, and Young did not have a weapon. While there may have been times during the confrontation that King felt fearful, in the moments immediately preceding the use of deadly force, Young was fifty feet away, not moving, and not known to be armed.

Clearly Established Analysis: The Fourth Circuit Court of Appeals agreed with the district court that the Fourth Amendment right of Mr. Young not to be shot by Officer King under the circumstances was clearly established. The court emphasized that there is no requirement of a case directly on point, but rather the test is whether pre-existing law makes the unlawfulness of an act apparent. The court also noted that the government officials can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two. The court found that as of February 2019, two Fourth Circuit decisions provided fair warning that shooting a suspect under the circumstances in this case was unconstitutional. These cases did not specifically adjudicate Young's right not to be shot under these conditions but involve the court finding a suspect's right to be free from deadly force clearly established when the suspect posed a greater threat to the officer than Young did to Officer King. Thus, Young's right is "manifestly included within more general applications of the core constitutional principle invoked" in the findings of Fourth Amendment violations in these cases.

Bygum v. The City of Montgomery

SHORT SUMMARIES:

4th Circuit – Contract Clause – Vested Rights – Pensions - OPEB

As a retiree, I worry constantly about changes to the pension system and that some change will make my old age more difficult. The State of Maryland provided by statute that certain employees would receive Other Post Employment Benefits in the form of Health Care subsidies. The impetus was to close what was called the "doughnut hole" or the gap in Medicare coverage between the initial coverage and a higher amount where coverage kicked back in. The feds closed the doughnut hole over the course of a couple of legislative improvements and the State modified its statutes that provided for subsidies. A group of retirees sued asserting a breach of their vested rights to the

subsidy and got a preliminary injunction. A union and some employees sought to and did intervene to claim rights as well. The lower court concluded that a contract was formed between the employees and the state by virtue of the statute providing the subsidy, but concluded that the employees did not have vested rights, so the state could modify the law as applied to them. On appeal, the 4th Circuit concluded that the statutes did not establish a contractual agreement. The panel explained that a statute to establish a contract must explicitly reflect the legislative intent to create a private contractual relationship between a person or persons and the state and in this case the promised benefits were legislative promises that did not amount to a contract.

AFSCME v. Maryland

4th Circuit – First Amendment Retaliation – Police

Give a police officer a radio and record the conversation and you've got a great chance of ending up in civil litigation. A motorist who had complained about a police officer was stopped for illegally passing a stopped school bus while children were getting out. The officer who was the recipient of the complaint heard communications about the stop and radioed to the officer making the stop that she'd buy him a dinner if he ticketed the offender. The officer ticketed the offender. The officer had stopped two other violators but was called to a more important event and let those two go with warnings. The motorist hired a criminal defense attorney who, in the course of defending the motorist, requested and received body camera recordings that captured the conversation about the dinner offer. The motorist sued for First Amendment retaliation claiming the offer of dinner violated her rights, reflected retaliation for the complaint she had made and sought damages. Long story short, some issues were resolved by motion but the case went to trial on the issue of retaliation and a jury found no liability. That result was upheld by the 4th Circuit panel.

You gotta love the result, but this should be on your next learning tip for police officers: Don't try to be cute over the radio or when another officer has a body camera running. It's good for us to remember as well.

Snoeyenbos v. Curtis

9th Circuit – Heck – Excessive Force

Sometimes the forces of nature put you in the wrong place at the wrong time without any of the resources you need. Apparently, this happened to the Plaintiff in this case, who was standing near police officers who were arresting a suspect. When asked to back away several times, the Plaintiff's hearing failed him, so he stood where he was and the police took him down to the ground. When asked "politely" to show his hands, he was unable to do so as they were pinned by the officers and one of the officers struck him in the leg breaking a bone. He was arrested for various resisting arrest and obstruction violations and was given a chance to plea bargain for community service. He pled Nolo and once his community service was completed, his conviction was wiped away. He sues the police and the city, the DC dismisses based on Heck. But, heck, a panel of the 9th Circuit says there's no longer a Heck problem since the conviction has gone away. It is the 9th Circuit after all, but be prepared in other circuits for the erosion of the Heck concept that people shouldn't be able to sue civilly in ways that contradict their criminal conviction.

Duarte v. City of Stockton

10th Circuit - Excessive Force - Qualified Immunity - Heck

This case is on remand from the Supreme Court and on appeal again to the 10th Circuit. The Question at the SCT was whether a fleeing suspect who was shot while fleeing yet still got away was seized for purposes of the 4th Amendment. The Supreme Court said yes. The District Court granted Summary Judgment on the basis of Heck and on the basis of QI. The panel concluded that the Plaintiff's nolo plea and her suit were not inconsistent as her claim was that she was shot by the officers after she no longer posed a threat and had passed by the officers in her flight away from them. The Court also concluded that the officers were not entitled to QI because they didn't know at the time that she would escape. The panel remanded the case for the court to address other defenses posed by the officers including whether shooting at her through the rear window was reasonable.

Torres v. Madrid