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FEATURED CASE:

Denver Protest Case: Tenth Circuit Strips Qualified Immunity, Finds Potential Excessive Force Against Peaceful Protesters

Duran v. Budaj., No. 22-1365 (10th Cir. Nov. 14, 2023)

This case stems from 2020 protests in Denver, in which the Tenth Circuit found that Defendant Officers use of force against Plaintiffs was potentially excessive. Analyzing the facts through the lens of the Fourth Amendment, the court applied the *Graham* factors, highlighting the absence of any criminal offense, immediate threat, or attempt to flee by the Plaintiffs. With each factor favoring the Plaintiffs, the Circuit affirmed the district court's decision, denying qualified immunity to the officers and remanding the case for further proceedings.

Background:

Between May 28 and June 2, 2020, protests erupted on Denver streets in response to the death of George Floyd. Denver Mayor Michael Hancock declared a state of emergency, imposing a curfew and seeking assistance from mutual aid police departments, including the Aurora Police Department. On May 31, during a protest in downtown Denver, Plaintiff Zachary Packard kicked a tear gas canister away from himself and other protesters. Subsequently, Sergeant Patricio Serrant authorized the use of force against protesters kicking objects. Officer David McNamee fired a beanbag round, hitting Packard in the head, causing severe injuries. Another protester, Johnathen Duran, was shot with a foam baton round by Officer Cory Budaj. Packard and Duran ("Plaintiffs") sued the Denver police for use of excessive force.

The district court, relying on facts assumed or found at the procedural stage, determined that Mr. Packard's kicking the tear gas cannister did not pose an immediate threat, as officers were equipped with gas masks. Similarly, Mr. Duran, wearing a media-labeled hardhat, was shot while not posing a threat to anyone. The court concluded the law is clearly established that officers cannot shoot protesters with less-lethal munitions when protesters commit no serious crime, pose no threat, and

are not attempting to flee. The district court granted summary judgment to Plaintiffs, denying qualified immunity to Officers McNamee and Budaj and Sergeant Serrant (“Defendants").

Appeal:

Defendants appealed the district court's denial of qualified immunity. They argued that their conduct was objectively reasonable and that the law, as articulated in *Buck v. City of Albuquerque*, did not clearly establish the impropriety of their actions in this context. *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008).

The Circuit Court affirmed the district court's decision, rejecting the appeal on both prongs of the qualified immunity inquiry. The court maintained that its review was limited to questions of law and that it could not disturb the district court's factual findings unless they were blatantly contradicted by the record. The court upheld the district court's conclusion that the officers' actions violated clearly established law, citing *Buck*, and affirming the denial of qualified immunity. The Circuit also dismissed the appeal relating to the district court’s denial of summary judgment for lack of appellate jurisdiction and remanded the case for further proceedings.

Analysis:

Violation of Rights Prong

The court initially focused on whether the district court erred in determining that a reasonable jury could find that Plaintiffs’ rights had been violated. It concluded that, based on the established facts, the district court did not err in finding Defendants' use of force to be potentially excessive.

The excessive force claims, arising in the context of an arrest or investigatory stop, invoke Fourth Amendment protections. To substantiate such claims, the plaintiffs must demonstrate that the use of force by the defendants was objectively unreasonable under the circumstances, aligning with precedents like *Tennessee v. Garner* and *Graham v. Connor*. *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386, (1989).

The court emphasized the need to evaluate the facts from the perspective of a reasonable officer on the scene, considering the totality of circumstances and acknowledging the challenges officers face in making split-second judgments in tense situations. The Supreme Court's factors in *Graham*—severity of the crime, immediate threat posed by the suspect, and resistance to arrest—guided the court’s reasonableness analysis.

Addressing the severity of the alleged crime (first *Graham* factor), the court explored whether Plaintiffs committed any offense and emphasized that a minor offense supports only minimal force. Here, the absence of any indication that Plaintiffs committed an offense weighed in their favor.

Moving to the second *Graham* factor, which the court deemed as the most crucial, it examined whether the Plaintiffs posed an immediate threat. The court deferred to the district court's factual finding that neither Plaintiff posed a threat, a determination that binds the panel on interlocutory appeal.

The third *Graham* factor considers whether the plaintiffs were actively resisting arrest or attempting to flee. The court concurred with the district court's finding that the Plaintiffs were not actively resisting arrest or attempting to flee, favoring the Plaintiffs.

With each *Graham* factor favoring the Plaintiffs and no blatant contradictions in the factual findings, the court agreed that a reasonable jury could find the use of force against both Plaintiffs to be unconstitutionally excessive.

The court dismissed the defendants' arguments, asserting that Plaintiffs were not intentionally targeted, and that less-lethal munitions are tools to disperse crowds. The court emphasized its limited jurisdiction to review factual findings and rejected contentions that the Plaintiffs were unintended victims of crowd dispersal efforts.

In conclusion, the court upheld the district court's determination that Plaintiffs established a violation of their rights based on the excessive use of force, affirming the potential unconstitutionality of the Defendants' actions in the given circumstances.

Clearly Established Rights Prong

In the second prong of the qualified-immunity inquiry, the court delineated the requirement for plaintiffs to establish that the violated constitutional or statutory rights were clearly established at the time of the conduct. This involves identifying a relevant Supreme Court or Tenth Circuit decision or a clear consensus in legal authority supporting the plaintiff's position.

The court cited *Nelson v. McMullen* and emphasized the need for the law's contours to be well-defined, providing clarity to a reasonable officer that their conduct was unlawful in the situation they confronted. *Nelson v. McMullen*, 207 F.3d 1202 (10th Cir. 2000). The court rejected the notion of defining "clearly established law" at too high a level of generality, especially in the Fourth Amendment context, where assessing the application of legal doctrine to rapidly evolving situations can be challenging.

Turning to the two precedents relied upon by Plaintiffs and the district court, *Fogarty v. Gallegos* and *Buck v. City of Albuquerque*, the court discussed how these cases establish that the use of less-lethal munitions on an unthreatening protester committing no serious offense is unconstitutionally excessive force. *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008). In both *Fogarty* and *Buck*, the court affirmed the denial of qualified immunity to officers based on the unreasonableness of the force used, considering factors such as the severity of the offense, immediate threat, and resistance to arrest.

The court rejected Defendants' argument that *Fogarty* and *Buck* did not involve situations similar to the present case, asserting that factual dissimilarities do not preclude notice of clearly established law. The court underscored the specificity required in the Fourth Amendment context and maintained that the factual differences identified by Defendants are in dispute and bound by the district court's findings.

In conclusion, the court affirmed that, by May 2020, it had been clearly established for over twelve years that deploying less-lethal munitions on an unthreatening protester engaged in minor offenses and not attempting to flee constitutes unconstitutionally excessive force. The court affirmed the district court's determination that Plaintiffs met their burden on the clearly-established prong, thereby denying qualified immunity to the Defendants.

Duran v. Budaj

SHORT SUMMARIES:

4th Circuit – Jail Suicides – Duty of Care – Deliberate Indifference – Monell - Sheriffs

The lower court dismissed the case for failing to state a claim. The panel reversed finding sufficient allegations to move forward on a claim of deliberate indifference. Long story short, policies are in place to protect both the inmates and guards of correctional facilities. An inmate who had attempted suicide a few days before was arrested due to a domestic disturbance at her home. Rather than put her in a cell with another inmate as dictated by policy, the officers put her in an individual cell where she managed to kill herself. The policy was designed to prevent suicides (or at least protect against them). Other policies failures reflected badly on the department as periodic checks were not made timely and communication gaps existed between intake and assignment. (Bear in mind these were allegations, not necessarily the facts.) Back to trial for this one. The panel also reinstated the Monell claim. In deciding the case, the court concluded that prior analysis under circuit precedent needed to be reformed saying: "Finally, we recognize that the Supreme Court's decision in *Kingsley [Kingsley v. Hendrickson, 576 U.S. 389 (2015)] abrogated* our prior precedent, which is irreconcilable with *Kingsley*'s mandate that pretrial detainees' Fourteenth Amendment claims be evaluated under the objective framework we identify in this opinion."

Learning lesson: Offices that represent jails should conduct regular legal audits to determine if polices are up to date, legally supportable, and most importantly – being followed.

Short v. Hartman

8th Circuit – Attorneys fees - Counties

Although unpublished and short on information, this case affirms an award of attorney's fees to the defendants in a suit against a county and others.

Milliman v. Howell County

9th Circuit – Covid – False Arrest – Qualified Immunity

Because it's the Ninth Circuit the general rules for common sense don't always apply, but fortunately, only one of the judges on this panel lacked that necessary judicial characteristic. Here, an officer arrested the operator/owner of a restaurant that violated the state's covid emergency order. Dancing on the head of a pin, the court and plaintiff argued about whether the mandate applied to only the corporation or to the owner/operator and whether the notice given under a prior executive order could satisfy a notice requirement under the existing executive order. All in all the majority of the panel found that the officer should have qualified immunity.

Miller v. Scottsdale