FILED
United States Court of Appeals
Tenth Circuit

September 16, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRADLEY SOZA,

Plaintiff - Appellant,

v.

JAMES DEMSICH; THOMAS MELVIN, in their individual capacities,

Defendants - Appellees.

No. 19-2176

Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:17-CV-00627-JTM-JFR)

Justine Fox-Young, Justine Fox-Young, P.C., Albuquerque, New Mexico (Erlinda Johnson, Law Office of Erlinda Ocampo Johnson, LLC, Albuquerque, New Mexico, on the briefs), for Plaintiff-Appellant.

Kristin J. Dalton, Managing Assistant City Attorney, City of Albuquerque Legal Department, Albuquerque, New Mexico, for Defendants-Appellees.

Before **MORITZ** and **EBEL**, Circuit Judges, and **LUCERO**, Senior Circuit Judge.

EBEL, Circuit Judge.

After Albuquerque Police Officers Demsich and Melvin entered Bradley Soza's front porch with guns drawn, handcuffed him, and patted him down as part of a burglary investigation, Mr. Soza sued the Officers under 42 U.S.C. § 1983. He

alleges that the Officers violated his clearly established Fourth Amendment rights when they seized him without probable cause and entered the curtilage of his home without a warrant. The Officers moved for summary judgment, asserting qualified immunity, which the district court granted. Mr. Soza timely appealed. Because the law regarding the constitutionality of the Officers' actions was not clearly established, we agree with the district court that the Officers are entitled to qualified immunity. Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM.

I. BACKGROUND[1]

A. Burglary Investigation

On the afternoon of June 29, 2014, three women inside a residence in Building 14 of a gated condominium complex in Albuquerque, New Mexico, saw a man banging on their front door. The man then went around to the back of the residence and smashed the rear sliding glass door with a brick-sized rock. The women fled the home invader and hid in an upstairs bedroom closet, where they called 911 at approximately 12:51 p.m. The caller reported the home invasion to the police dispatcher, describing the intruder as a Spanish male around forty years of age wearing a grey shirt and baseball cap. While hiding in the closet, the women heard the man say "Hey" from what sounded like directly outside the door of the bedroom

[1] Because this appeal arises from a grant of summary judgment, we recount the facts here in the light most favorable to Mr. Soza, the nonmoving party, resolving factual disputes in his favor. Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1223 (10th Cir. 2008).

where the women were hiding. The caller reported this additional information to the police dispatcher, who relayed it to the Officers.

Officers Demsich and Melvin were dispatched at 12:53 p.m. to answer this Priority 1 burglary call, the highest priority type in the Albuquerque Police Department, used to indicate an immediate threat to life or property. After both arrived at Building 14 by approximately 1:03 p.m., Officer Melvin walked around the West side of the building and Officer Demsich the East side. While making his way around the building, Officer Demsich encountered Mr. Soza, less than 18 minutes after the burglary, walking from a building in the condominium complex across the street, and he ordered Mr. Soza to return home. Mr. Soza turned around and began to walk toward a unit in Building 16, located about eighty feet from Building 14. Both Officers subsequently met at the smashed-in sliding glass door at approximately 1:09 p.m.

Re-thinking the initial encounter with Mr. Soza, Officers Demsich and Melvin decided to investigate whether he was involved in the home invasion. They saw Mr. Soza standing on the recessed front porch of a unit in Building 16. Mr. Soza had just finished a cigarette and was moving to walk inside. It appeared to Officer Melvin that Mr. Soza was attempting to conceal himself. Mr. Soza matched all elements of the description of the home invader: he was a Spanish-looking man who seemed to be around 40 years old wearing a baseball cap and grey shirt. There was also no one, other than Mr. Soza, in the immediate proximity of the home invasion.

As Mr. Soza moved toward the unit's doorway, Officers Demsich and Melvin approached him with their guns drawn and ordered him, at gunpoint, to place his hands on his head. They entered the porch to handcuff him. Mr. Soza did not attempt to flee and made no threatening movements. While in the process of handcuffing Mr. Soza or just after, Officers Demsich and Melvin observed blood on Mr. Soza's hands and glass on his neck and clothing. Before the Officers asked him any questions, Mr. Soza told them that he broke the glass because he heard something. Officer Melvin read Mr. Soza his Miranda rights and patted him down, finding a knife, syringe, and flashlight. During a later, more thorough search, Officer Melvin found a loaded 9mm pistol in the small of Mr. Soza's back and methamphetamine in his pants pocket. Only after the Officers handcuffed Mr. Soza did he tell them that he was at his own residence.

B. Criminal Proceedings

In the federal criminal case arising from the same encounter, a grand jury charged Mr. Soza with knowingly possessing a firearm as a felon in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). Mr. Soza moved to suppress the physical evidence described above, as well as statements made by him during his arrest, on the ground that the arrest violated the Fourth Amendment. The District Court for the District of New Mexico denied the motion. United States v. Soza (Soza I), 162 F. Supp. 3d 1137 (D.N.M. 2016). It held that the handcuffing of Mr. Soza at gunpoint amounted to a lawful investigative stop rather than an arrest requiring probable cause given the violent nature of home invasions and reasonable suspicion that Mr. Soza

committed the crime. Id. at 1144–49. The court also held that the Officers' warrantless entry onto Mr. Soza's front porch to effectuate the detention did not violate his Fourth Amendment rights, finding an exception to the warrant requirement for front porch detentions. Id. at 1149–62.

On appeal, the Tenth Circuit reversed the district court's decision in an unpublished opinion, granting the motion to suppress after concluding that the Officers unconstitutionally arrested Mr. Soza without probable cause. United States v. Soza (Soza II), 686 F. App'x 564, 566–67 (10th Cir. 2017). Contrary to the district court, the Tenth Circuit found that the forceful measures used by the Officers to effectuate the detention elevated it to an arrest. Mr. Soza's proximity to the crime and similarities to the description provided reasonable suspicion to investigate further, but not the probable cause needed to arrest him. Id. at 568. Having reversed the district court on that basis, the Tenth Circuit did not consider the front porch entry. Id. at 567 n.1. On remand, the district court granted the government's motion to dismiss the indictment.

C. Current Appeal

After prevailing in the federal criminal case, Mr. Soza sued Officers Demsich and Melvin in their individual capacities under 42 U.S.C. § 1983. The Officers moved for summary judgment based on qualified immunity.

The district court entered summary judgment in favor of the Officers, finding that it was not clearly established at the time of the events that the forceful measures used by the Officers converted the lawful investigative detention into an

unconstitutional arrest. The court also extended this conclusion to the pat down. As to the front porch entry, the court adopted the reasoning from the district court in the criminal case, finding no clearly established Fourth Amendment violation. Mr. Soza timely appealed.

II. DISCUSSION

A. Legal Standards

1. Qualified Immunity

Qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). We review a district court's decision to grant summary judgment based on qualified immunity de novo. McCoy v. Meyers, 887 F.3d 1034, 1044 (10th Cir. 2018). In doing so, we view the evidence in the light most favorable to the nonmoving party, Mr. Soza. Fye, 516 F.3d at 1223.

When a defendant asserts qualified immunity at the summary judgment stage, it is the plaintiff's burden to prove (1) the defendant violated his constitutional rights; and (2) the law was clearly established at the time of the alleged violation. Saucier v. Katz, 533 U.S. 194, 201 (2001), overruled on other grounds by Pearson v. Callahan, 555 U.S. 223, 236 (2009). This Court has discretion to decide the order in which these two prongs should be addressed, and, when appropriate, does not need to address both. Pearson, 555 U.S. at 236–37 (2009). Only when a plaintiff satisfies this heavy burden must the defendant then satisfy the traditional summary judgment standard. Estate of Ceballos v. Husk, 919 F.3d 1204, 1212 (10th Cir. 2019).

For purposes of qualified immunity, law is clearly established if Supreme Court or Tenth Circuit precedent, or the weight of authority from other circuits, would put reasonable officers in the defendants' position on notice they were violating the Fourth Amendment. Carabajal v. City of Cheyenne, 847 F.3d 1203, 1210 (10th Cir. 2017). While there need not be a case exactly on point, Hope v. Pelzer, 536 U.S. 730, 741 (2002), existing caselaw must have placed the constitutional issue "beyond debate," White v. Pauly, 137 S. Ct. 548, 551 (2017).

2. Fourth Amendment

Interactions between the police and the public are guided by the Fourth Amendment, which protects "against unreasonable searches and seizures." U.S. Const. amend. IV. The "touchstone" of any Fourth Amendment analysis is the reasonableness of the police conduct. United States v. Merritt, 695 F.2d 1263, 1272 (10th Cir. 1982).

There are "three types of police/citizen encounters: consensual encounters, investigative stops, and arrests." Oliver v. Woods, 209 F.3d 1179, 1186 (10th Cir. 2000). These categories are not static and may change at different stages of an encounter. United States v. Shareef, 100 F.3d 1491, 1500 (10th Cir. 1996). Whereas a warrantless arrest requires probable cause to believe that a crime was or is being committed, an investigative detention, also known as a Terry stop, requires only reasonable suspicion. Id. Reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence" but something more than a

mere "hunch." United States v. Melendez-Garcia, 28 F.3d 1046, 1051 (10th Cir. 1994) (quoting Alabama v. White, 496 U.S. 325, 329–30 (1990)).

B. Handcuffing at gunpoint and pat down[2]

The Tenth Circuit in Mr. Soza's direct criminal appeal held that the Officers' use of forceful measures was unreasonable, resulting in an unconstitutional arrest. But that holding is not binding here because the individual Officers were not parties to or in privity with a party in that case. See Novitsky v. City of Aurora, 491 F.3d 1244, 1248, 1252 n.2 (10th Cir. 2007). In any event, the Tenth Circuit opinion on Mr. Soza's direct appeal obviously came after the operative events here and a later opinion (as the prior Tenth Circuit case obviously was) cannot by itself[3] clearly establish the law at the time of the earlier conduct in question. In fact, as discussed more below, here the Tenth Circuit opinion in the criminal case instead suggests that the law was not clearly established.

In this appeal, we decide this case on the second prong of qualified immunity and find that the law was not clearly established at the time of the underlying events

[2] We focus here on the use of handcuffs and guns, but, like the district court, find that if it was reasonable for the Officers to handcuff Mr. Soza at gunpoint, it was also reasonable for them to pat him down. In addition, to the extent the pat down occurred after the Officers noticed blood and glass, it could also be viewed as a lawful search incident to an arrest.

[3] This court has recognized that a case decided after the incident underlying a §1983 action can state clearly established law when that case ruled that the relevant law was clearly established as of an earlier date preceding the events in the later §1983 action. See McCowan v. Morales, 945 F.3d 1276, 1287, 1289 (10th Cir. 2019).

even though the Tenth Circuit after the operative events determined that this detention violated Mr. Soza's Fourth Amendment rights as an unlawful arrest without probable cause.

Mr. Soza first argues that it is clearly established that officers must have probable cause to make a lawful arrest. Officers Demsich and Melvin do not question this law, nor could they. Indeed, the Officers concede that they did not have probable cause to arrest Mr. Soza when they first approached him. Instead, at issue is whether it was clearly established that the actions of Officers Demsich and Melvin in handcuffing Mr. Soza at gunpoint amounted to an arrest at all as opposed to a Terry investigative stop with justifiable restraints. The Officers argue that Mr. Soza matching exactly the description of the suspect of a recent, violent crime and his temporal and geographic proximity to that crime provided reasonable suspicion to investigate further, and probable cause to arrest arose soon thereafter when the Officers discovered blood and glass on Mr. Soza's hands and neck. To prevail, then, Mr. Soza must show that it was clearly established that the actions of Officers Demsich and Melvin in immediately drawing their guns and handcuffing him when they had reasonable suspicion but not probable cause that he committed the recent home invasion constituted an unconstitutional arrest as opposed to a lawful investigative detention. This case thus turns on how this interaction may be reasonably characterized.

Although the use of forceful measures, such as handcuffs and guns, might normally transform an investigative detention into an arrest, Maresca v. Bernalillo

County, 804 F.3d 1301, 1308–09 (10th Cir. 2015), this is not necessarily the case. Police are authorized to use forceful measures even during an investigative stop when reasonably necessary for the safety of officers or bystanders. United States v. Merkley, 988 F.2d 1062, 1064 (10th Cir. 1993). The key inquiry is whether the forceful measures were reasonable, and the guiding standard is objective: "would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (quotations omitted); see also Gallegos v. City of Colorado Springs, 114 F.3d 1024, 1030–31 (10th Cir. 1997); Lundstrom v. Romero, 616 F.3d 1108, 1121 (10th Cir. 2010) ("In determining whether the use of weapons was reasonable, we look to the totality of the circumstances as viewed from the perspective of a reasonable officer on the scene."). An unreasonable amount of force elevates an investigative stop to an arrest requiring probable cause. United States v. Perdue, 8 F.3d 1455, 1462 (10th Cir. 1993). All the forceful measures employed by the Officers—handcuffs, display of firearms, and pat downs—have been previously upheld as reasonable during investigative detentions when safety concerns warranted them. United States v. Paetsch, 782 F.3d 1162, 1175 (10th Cir. 2015); see also Shareef, 100 F.3d at 1502.

In sum, both an arrest and an investigative stop with forceful measures involve a nonconsensual restraint of freedom, except that the former requires probable cause—which all parties agree was not present here—and the latter merely requires reasonable suspicion predicated on facts sufficient to persuade a reasonable officer

that the use of force was necessary for the safety of the officers or others during the Terry investigation. We conclude that there were sufficient facts in this record to support reasonable suspicion.[4]

We next turn to whether the use of a forceful detention for investigation purposes was warranted. This requires us first to consider whether reasonable police officers in Officer Demsich's and Officer Melvin's positions could have believed that safety concerns authorized them to apply force to accomplish a protective investigative detention. Or, more precisely, would all reasonable police officers in these circumstances have known that the forceful measures used here were clearly unreasonable (thereby requiring probable cause) predicated upon existing clearly established law?

We hold the answer is no, and that the law establishing the unconstitutionality of these officers' conduct was not clearly established, for three reasons. First, the facts go both ways, some suggesting a low and others suggesting a high likelihood of danger to the Officers. Second, Mr. Soza does not identify and we cannot find a sufficiently on-point case to clearly establish a Fourth Amendment violation under these circumstances. Third, after careful analysis, the district court and the Tenth

[4] Mr. Soza's arguments that the Officers did not even have reasonable suspicion are unavailing. (Reply 2–3.) The Officers had a "particularized and objective" basis, United States v. Cortez, 449 U.S. 411, 417–18 (1981), for suspecting Mr. Soza: he matched the description, which included more than just gender and ethnicity, exactly, and he was the only person located close by the home invasion soon after it occurred. See Soza II, 686 F. App'x at 567 ("[T]hese facts undoubtedly would have made the officers reasonably suspect [Mr. Soza] was the burglar . . . .").

Circuit in the criminal case came to opposite—but reasonable—conclusions as to whether the Officers' actions were unreasonable. Significantly, the Tenth Circuit in the criminal appeal explicitly acknowledged that this case presented a middle ground.

1. Facts on Both Sides

As already stated, whether the Officers' conduct was clearly unreasonable depends upon whether they had an objective basis to fear for their safety or the safety of others. This case presents a difficult middle ground because there are facts tending to suggest that Mr. Soza was not likely to present a threat of danger to the Officers and, alternatively, facts that suggest he did pose such a threat.

On one hand, Mr. Soza was calm, did not resist, did not make threatening movements, and the 911 call did not mention weapons, nor did the Officers initially observe any. Cf. Gallegos, 114 F.3d at 1031 (forceful measures reasonable during a lawful investigative stop when suspect took a wrestler's stance and appeared drunk and angry); Paetsch, 782 F.3d at 1175 (same when suspect of armed bank robbery disobeyed orders); Merkley, 988 F.2d at 1064 (same when driver acted violently and made death threat). Unlike these cases finding the use of forceful measures to be reasonable, Mr. Soza was not aggressive or disobedient.

On the other hand, Officers Demsich and Melvin undoubtedly had reasonable suspicion that Mr. Soza had committed a home invasion, a crime with "inherent potential for harm to persons," Taylor v. United States, 495 U.S. 575, 588 (1990), only about twenty minutes prior. Indeed, they were responding to a Priority 1 911 call, which required backup and indicated an immediate threat to life or property.

Mr. Soza matched exactly the description from the call, which included more than just generic traits (gender, ethnicity, age, and two articles of clothing) and came from a credible source (a witness who saw the home invader less than thirty minutes prior); and Mr. Soza was the only person in close physical and temporal proximity to the crime. Further, the facts of that particular home invasion, as revealed by the 911 call and corroborated by the Officers on the scene, suggested a particularly high likelihood of violence: the intruder entered an occupied residence by smashing a glass door with a brick-sized rock, and followed the victims inside to the bedroom. These facts created a "reasonable, articulable ground for fearing danger" from Mr. Soza. United States v. Neff, 300 F.3d 1217, 1221 (10th Cir. 2002).

Considering, as we must, the totality of the circumstances, Maresca, 804 F.3d at 1309, regardless of whether the Officers' conduct was in fact unreasonable, reasonable police officers in the same position as Officers Demsich and Melvin could have thought that forceful measures were necessary for their safety. In other words, the Officers cannot be said to be "plainly incompetent," Malley, 475 U.S. at 341, for acting as they did.

2. No Sufficiently On-Point Precedent

Given these conflicting facts, Mr. Soza has not come up with, and we cannot find, caselaw that clearly established the Officers' conduct as unreasonable at the time of the events.

In many of the cases in which this Court has found forceful measures to be unreasonable—elevating the encounter to an unlawful arrest requiring probable

cause—officers had not corroborated evidence of a crime or had no indication that the suspect was dangerous. See, e.g., Maresca, 804 F.3d at 1309–10 (no basis for believing parties suspected of driving stolen vehicle were armed or dangerous after officer made typo entering plate number); Lundstrom, 616 F.3d at 1123 (no evidence corroborating any element of 911 caller's report of domestic violence); United States v. King, 990 F.2d 1552, 1562–63 (10th Cir. 1993) (defendant, who was creating traffic disturbance by honking, was not suspected of committing any crime).[5] In contrast, here, as already discussed, Officers Demsich and Melvin corroborated the home invasion as described in the 911 call, knew the report was a Priority 1 threat,

[5] Mr. Soza also relies on Storey v. Taylor, 696 F.3d 987 (10th Cir. 2012), but that case did not involve a determination of whether the encounter was an investigative detention or an arrest; instead, Storey is about whether exigent circumstances or the community caretaker exception applied to allow officers to order a suspect to step out of his home. Id. at 994 (stating that the distinction between arrests and investigative stops did not matter in that case). Exigent circumstances and the community caretaker exception are not at issue here. Regardless, to the extent Storey is relevant, it is also distinguishable. There, police received a report of a domestic argument. The Tenth Circuit ruled this was not enough alone to create exigent circumstances or a need to protect the community given that, by the time the police arrived, they could not hear or detect an ongoing argument and there were no other facts indicating a likelihood of violence. Id. at 996. In so holding, the Court distinguished the facts in Storey from the facts of other cases in which additional indicia of violence existed, one of which was Tierney v. Davidson, 133 F.3d 189, 192 (2d Cir. 1998), in which the officer confirmed the existence of a domestic dispute with witnesses on the scene and "saw broken glass, indicating recent violence." Storey, 696 F.3d at 995 (emphasis added). Here, similarly, the Officers corroborated the home invasion report (by viewing the point of entry) and observed broken glass. Further, the Second Circuit also gave weight to the fact that the officer had been trained to treat the call at issue there as a "priority" and to "expect danger," Tierney, 133 F.3d at 197—just as the Officers here knew that the call at issue was Priority 1 due to an immediate threat of danger.

and had ample reasonable suspicion to believe that Mr. Soza committed a recent crime with a high potential for violence.

Melendez-Garcia, comes closest to being on point because, as in this case, the potential for violence came from the crime the suspects were thought to have committed—drug trafficking—rather than a tip about the particular suspects or observations of the suspect's behavior during the encounter. 28 F.3d at 1052–53. Although "[d]rugs and guns and violence often go together," the Tenth Circuit held that the mere suspicion of drug trafficking was not enough alone to justify the use of guns and handcuffs, which was therefore unreasonable, elevating the encounter to an unlawful arrest. Id. That drug trafficking crime, however, is not analogous to the home invasion that was being investigated here. Suspicion of drug trafficking, without more, does not contain the same inherent potential for violence as a home invasion in which the burglar smashed a glass door with a brick-sized rock and entered an occupied residence. Considering the direct threat of violence involved in this recent home invasion as relayed in the Priority 1 911 call and corroborated by the Officers on the scene, we cannot say that Melendez-Garcia would have put Officers Demsich and Melvin on notice that their use of forceful measures was unreasonable.

It is unconstitutional to use forceful measures in a Terry stop context "absent probable cause or an articulable basis to suspect a threat to officer safety combined with reasonable suspicion." Manzanares v. Higdon, 575 F.3d 1135, 1150 (10th Cir. 2009) (emphasis added). Because we know that the Officers had reasonable suspicion to believe Mr. Soza committed the home invasion, they are entitled to

qualified immunity if reasonable police officers in the same circumstances would have thought there was an articulable basis to fear for their safety—justifying the use of appropriate forceful measures. At a minimum, the totality of the circumstances in this case could reasonably reveal such a basis, and this Court has not found any on-point caselaw clearly establishing that the conduct was otherwise unreasonable. Thus, we cannot say that every reasonable officer in the position of Officers Demsich and Melvin would have understood that their conduct violated the Fourth Amendment. See Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

3. Not beyond debate

Finally, for law to be clearly established it must be "beyond debate." White, 137 S. Ct. at 551. Yet, in Mr. Soza's criminal case, the District of New Mexico and the Tenth Circuit recognized and emphasized the difficulty of the issue. Id. at 569 ("What should govern: Defendant's calm and submissive demeanor, or that he potentially may have been a violent burglar?"); Soza I, 162 F. Supp. 3d at 1148 ("Thus, within the framework of Tenth Circuit law, this case fits between the numerous cases . . . ."). Neither court felt that its position was clearly the correct outcome from the beginning. In other words, the answer was not beyond debate. Yet here Mr. Soza is asking us to hold that the Officers, in the heat of the moment, should have known from existing caselaw that the use of handcuffs and guns were clearly unreasonable even when learned judges, after taking time to consider the issue in the comfort of their chambers, were divided.

Although the Tenth Circuit did ultimately conclude that the use of handcuffs and the display of guns in this case were unreasonable, Soza II, 686 F. App'x at 570, we cannot ignore that, in its analysis, the Tenth Circuit recognized that this case "provides an interesting middle-ground." Id. at 569. For the reasons already discussed, we agree. Regardless of whether Officers Demsich and Melvin in fact acted unreasonably when they handcuffed Mr. Soza at gunpoint, in a "middle-ground" case such as this one, the law was certainly not clearly established at the time of the encounter.

* * *

For all these reasons, we affirm the grant of summary judgment as to the Officers' use of handcuffs, display of guns, and pat down.

C. Front Porch Entry

Mr. Soza lastly argues that, regardless of whether the forceful measures used by the Officers were unreasonable, they nonetheless violated his Fourth Amendment rights when they entered his front porch without a warrant to seize him. We again decline to resolve whether Officers Demsich and Melvin in fact violated the Fourth

Amendment in regards to the front porch entry because, regardless, the law regarding any such violation was not clearly established at the time of the conduct.[6]

To be sure, much concerning this issue is clearly established. A warrantless search or seizure within the home is presumptively unreasonable, Kentucky v. King, 563 U.S. 452, 459 (2011), subject to certain exceptions such as consent or where there exists exigent circumstances and probable cause, United States v. Flowers, 336 F.3d 1222, 1227 (10th Cir. 2003).[7] And Fourth Amendment protections apply to curtilage, defined as "the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life," as curtilage is "considered part of home itself for Fourth Amendment purposes." Oliver v. United States, 466 U.S. 170, 180 (1984) (internal quotation marks omitted). The front porch—the area at issue here—is undoubtedly curtilage. Jardines, 569 U.S. at 7.

It is also clearly established that a warrantless search of curtilage is unconstitutional. Jardines, 569 U.S. at 7–9; Collins v. Virginia, 138 S. Ct. 1663,

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[6] We do not address the relevance of whether the Officers were actually aware that Mr. Soza resided in the unit because the Officers do not raise this issue in their briefing. United States v. Fisher, 805 F.3d 982, 991 (10th Cir. 2015).

[7] Officers Demsich and Melvin do not argue that exigent circumstances were present to justify their warrantless entry onto Mr. Soza's front porch, and regardless they did not establish probable cause. They do, however, reference the knock-and-talk exception. See Florida v. Jardines, 569 U.S. 1, 8–9 (2013) (recognizing an implied license for warrantless entry onto a front porch for the purpose of knocking on the door and attempting to speak with occupants). This exception does not apply here. The knock-and-talk exception only permits officers to act as "any private citizen might do." Id. Here, Officers Demsich and Melvin had no intention of entering the front porch merely to speak with Mr. Soza; they entered intending to detain him.

1670 (2018); United States v. Shuck, 713 F.3d 563, 567–69 (10th Cir. 2013); Lundstrom, 616 F.3d at 1127–29. But all cases in the Tenth Circuit and Supreme Court addressing seizures only involve warrantless entry into a suspect's home itself, rather than the curtilage of the home. See, e.g., Payton v. New York, 445 U.S. 573, 576 (1980); United States v. Reeves, 524 F.3d 1161, 1165 (10th Cir. 2008); Flowers, 336 F.3d at 1225. We have found no case that addresses both 1) warrantless entry onto a front porch or other curtilage, rather than into the home, for 2) the purpose of a seizure, rather than a search—except, arguably, one: United States v. Santana, 427 U.S. 38 (1976).

And, not surprisingly, Officers Demsich and Melvin argue that Santana authorized their entry onto Mr. Soza's front porch. In that case, police spotted a drug trafficking suspect standing in the doorway of her home. 427 U.S. at 40. As the officers approached the suspect to arrest her, she entered the vestibule of the house, after which the officers followed the suspect inside and arrested her. Id. Relevant here, the Supreme Court deemed the arrest lawful because it was set in motion while the defendant was standing in her doorway, a "'public' place" where the suspect had no expectation of privacy.[8] Id. at 42. Although the Court recognized that "under the

[8] Santana is also a hot pursuit case, see 427 U.S. at 42–43, but hot pursuit was only relevant to the officers' ability, after initiating a lawful arrest, to follow the suspect inside after she retreated into her home. Here, we are only concerned with the Court's first holding that a seizure initiated when the suspect was in her doorway was constitutional, and not its discussion of hot pursuit, for which Santana is usually cited. See, e.g., Lange v. California, 141 S. Ct. 2011 (2021) (recently discussing Santana in hot pursuit context).

common law of property the threshold of one's dwelling is 'private,' as is the yard surrounding the house," it nonetheless concluded that the suspect was in a "public" place while standing at the threshold of her home because she "was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." Id. at 42.

The Santana holding appears, at least colorably, on point for a front porch detention, also at the threshold of one's home. It thus complicates the legal landscape, which otherwise establishes the presumptive unconstitutionality of a warrantless entry onto a defendant's curtilage (unless probable cause and exigent circumstances or another exception exists). To review: it is clear that warrantless seizures cannot occur within the home (subject to exceptions). Payton, 445 U.S. at 576. And curtilage, of which a front porch is certainly a part, is entitled to "the same Fourth Amendment protections attaching to the home."[9] Lundstrom, 616 F.3d at 1128. Therefore, at first glance it seems to follow that the warrantless entry of Officers Demsich and Melvin onto Mr. Soza's front porch was unconstitutional. Certainly, a reasonable argument can be made that the Officers' conduct violated the Fourth Amendment. But, again, this ignores Santana, which remains binding

[9] It is not entirely accurate to say that curtilage, particularly the front porch, receives identical protections as the home. Courts have recognized an exception to the warrant requirement that specifically allows for entry only onto front porches: the knock-and-talk exception described above. Jardines, 569 U.S. at 8–9. It would thus not be far-fetched to reason that Santana creates another such exception to the warrant requirement for front porch entries made for the purpose of detaining a suspect for a Terry investigation.

precedent.[10] See Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989) ("If a precedent of th[e Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions.").

It is true, as Mr. Soza argues, that Santana does not discuss curtilage specifically. Indeed, it pre-dates the curtilage doctrine. Nonetheless, Santana could be considered on point because it upholds a warrantless entry into the threshold of one's home—like the front porch—for the purpose of a seizure and it has not been overruled. See Flowers, 336 F.3d at 1227–28 (after the development of the curtilage doctrine, citing favorably Santana's holding that an arrest initiated in the publicly accessible and viewable doorway of the suspect's home was constitutional); McKinnon v. Carr, 103 F.3d 934, 935 (10th Cir. 1996) (same). If the Supreme Court believes that this aspect of Santana is no longer good law in light of the subsequent development of the curtilage doctrine, it is free to overrule that holding. In the absence of such a ruling, however, the constitutionality of a warrantless entry onto a publicly accessible front porch for the purpose of a seizure remains, at the very least, unclear.

The distinction between entering a front porch without a warrant to perform a search, which is clearly established to be presumptively unreasonable, and to seize a

[10] The district court in the criminal case provides a commendably thorough discussion of this issue. Soza I, 162 F. Supp. 3d at 1149–62.

suspect, which is potentially permissible under Santana, makes some sense. To start, even if officers can enter a suspect's front porch without a warrant in order to detain him, that suspect will still be protected by the Fourth Amendment against unreasonable seizures. A seizure will be unlawful no matter where it takes place unless officers first establish probable cause (for arrests) or reasonable suspicion (for investigative detentions). Officers will therefore remain unable to seize individuals on their front porch without a reasonable objective basis for believing they committed a crime.

Further, unlike seizures, searches are open ended. While performing a search, officers could invade a large amount of property hidden from public view and discover any number of otherwise private facts. See, e.g., Carpenter v. United States, 138 S. Ct. 2206, 2251–52 (2018) (Alito, J., dissenting) ("Private area after private area becomes exposed to the officers' eyes as they rummage through the owner's property in their hunt for the object or objects of the search. If they are searching for documents, officers may additionally have to rifle through many other papers—potentially filled with the most intimate details of a person's thoughts and life—before they find the specific information they are seeking."). Seizures, on the other hand, are focused on one purpose which has already been identified prior to entry—detaining or arresting a specific suspect. Seizures are therefore contained: officers know who they are seeking and where he is. We can thus see why the Supreme Court, even given its concerns about privacy, might continue to uphold the distinction between front porch searches and front porch seizures that is potentially

created by Santana. At the very least, until the Supreme Court provides more definitive guidance in this area, the theory that Santana supports warrantless entry onto a front porch for the purpose of a seizure is defensible.

In sum, although Santana's foundation has been eroded by subsequent curtilage cases like Jardines, its decision upholding the constitutionality of a warrantless seizure at the threshold of a suspect's home remains binding Supreme Court precedent. At the very least, considering Santana, we hold that reasonable minds could differ as to the constitutionality of a warrantless front porch seizure and we cannot say the law was clearly established in Mr. Soza's favor. The ultimate touchstone of the Fourth Amendment is reasonableness. Merritt, 695 F.2d at 1272. Officers Demsich and Melvin could have reasonably relied on Santana for the proposition that warrantless entry onto a front porch for the purpose of detaining a suspect is constitutional. They are, consequently, entitled to qualified immunity.

III. CONCLUSION

For these reasons, we AFFIRM the district court's grant of summary judgment on the grounds that Officers Demsich and Melvin are entitled to assert qualified immunity as to all claims.