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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES M HERNDON, Plaintiff-Appellant, v. M. GILLIS; et al., Defendants-Appellees.	No. 21-16720 D.C. No. 2:19-cv-00018-GMN-NJK MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Argued and Submitted October 4, 2022
Seattle, Washington

Before: MURGUIA, Chief Judge, and W. FLETCHER and BENNETT, Circuit Judges.

This case arises from police officers' mistake of identity during a robbery at Sportsman's Warehouse in Henderson, Nevada. Officers mistook Plaintiff-Appellant James Herndon for the robbery suspect and beat him amid the scuffle to apprehend the suspect. Based on his resulting injuries, Herndon brought 42 U.S.C. § 1983 claims under the Fourth and Fourteenth Amendments of the U.S.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Constitution against six City of Henderson, Nevada police officers (the "Officers"), as well as claims against the City of Henderson (the "City") for municipal liability under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), and negligent hiring, training, and supervision. Herndon also brought several related state law claims.

The issues on appeal concern the district court's grant of the Officers' and the City's (the "Defendants") motions for summary judgment and the district court's denial of several discovery related motions regarding the City's failure to train. On appeal, Herndon only disputes the district court's grant of summary judgment in favor of Sgt. M. Gillis and the City; he does not appeal the district court's grant of summary judgment in favor of Officers D. Nerbonne, L. Good, D. Russo, E. Vega, and A. Nelson; and he does not appeal the district court's grant of summary judgment on his Fourteenth Amendment substantive due process claim. Because the district court erred in concluding there was no seizure, the case is affirmed in part, reversed in part, and remanded.

1. In January 2018, Sportsman's loss prevention manager notified Herndon, who was a store manager, that Justin Franks (the "Suspect") was stealing several items. After they saw a handgun fall out of the Suspect's "pocket or waistband," Sportsman's loss prevention manager called 911, and Sgt. Gillis and five other Officers of the Henderson Police Department ("HPD") went to the store.

Two Officers approached the Suspect with their guns drawn and ordered him to show his hands, but the Suspect ran. As the Suspect ran, he tripped and fell, and Herndon jumped on top of the Suspect to prevent him from getting up. After Herndon jumped on the Suspect, other Officers jumped on top of Herndon and the Suspect, and several Officers proceeded to hit Herndon. Sgt. Gillis approached the scuffle with his M4 rifle, and when he saw that the Officers were struggling to control the scene, he quickly turned his rifle around and used the butt of the rifle to hit Herndon. Sgt. Gillis also tased Herndon. The Officers, including Sgt. Gillis, claimed that they thought they had been subduing the Suspect, not Herndon, and that they did not realize that there were two civilians involved until they pulled Herndon off the Suspect.[1] As a result of this incident, Herndon suffered significant injury.

2. After Herndon filed the instant action, the magistrate judge extended discovery deadlines several times. However, it was not until after the final discovery cutoff that Herndon filed his motion to compel. Therein, he sought

[1] In its order, the district court favorably cited the Officers' testimony that they "did not intend to stop" Herndon because "they did not know that the subject individual was" Herndon. The district court did not explain why it resolved this fact in favor of the moving parties—the Defendants—rather than the non-moving party—Herndon—despite the difference in Herndon's and the Suspect's clothing and that some of the Officers had met Herndon when they entered Sportsman's. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Officers' subjective intent of who they thought they were seizing, however, is not dispositive to the seizure analysis, which is an objective test. *See Brower v. Country of Inyo*, 489 U.S. 593, 597 (1989); *Villanueva v. California*, 986 F.3d 1158, 1166 (9th Cir. 2021).

additional documents related to the Officers' personnel files and complaints of excessive force. The magistrate judge denied the motion to compel and Herndon's subsequent renewals of that motion to compel as untimely. Herndon filed an objection to the magistrate judge's orders with the district court. During this time, the Defendants moved for summary judgment on all claims.

In April 2021, a local newspaper published an article detailing Sgt. Gillis' history of misconduct and alleging HPD's apparent failure to adequately discipline its officers. Based on this article, Herndon moved the district court for leave to supplement his opposition to the motions for summary judgment and moved for leave to supplement his objection to the magistrate judge's order denying his motions to compel.

The district court granted the motions for summary judgment, concluding that there was no seizure under the Fourth Amendment and that the remaining federal claims also failed. Without any federal claims, the district court determined that it did not have jurisdiction to consider the state law claims. Last, the district court denied as moot Herndon's objection to the magistrate's order and his motions to supplement.

2. This court reviews a district court's grant of summary judgment de novo. *Longoria v. Pinal County*, 873 F.3d 699, 703–04 (9th Cir. 2017). In so doing, this court "accept[s] the facts in the light most favorable to the [nonmoving

party]." *Mena v. City of Simi Valley*, 226 F.3d 1031, 1036 (9th Cir. 2000).

3. On appeal, Herndon argues that the district court erred in concluding that Sgt. Gillis did not seize him.[2] A seizure occurs when "there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (emphasis omitted). In *Brower*, the Supreme Court explained that a "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking . . . ." *Id.* at 596. "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement . . . ." *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

Here, there is no dispute that Sgt. Gillis intentionally applied physical force to Herndon to subdue him. Sgt. Gillis testified that when he saw that the Officers were struggling to control the situation, he used the butt of his rifle to hit "the male"—Herndon—because Sgt. Gillis "was hoping to temporarily incapacitate the male long enough so that the Officers . . . [could] get a hold of the male's arms and

[2] The Defendants contend that Herndon's seizure argument is made for the first time on appeal. Although the general rule is that "a party will be deemed to have waived any issue or argument not raised before the district court," that rule "does not apply where the district court nevertheless addressed the merits of the issue." *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1260 n.8 (9th Cir. 2010) (quotation omitted). Here, the district court determined that no seizure occurred, so the issue is not waived.

place him into restraints before someone got shot." Sgt. Gillis also tased Herndon so that the Officers "could control him . . . ." Sgt. Gillis' applications of intentional physical force to subdue "the male" are all the quintessential hallmarks of a seizure. *See Hodari D.*, 499 U.S. at 625–26. Because the test for whether a seizure occurred is objective, the male's identity is irrelevant to whether Sgt. Gillis seized him, *Brower*, 489 U.S. at 596 ("A seizure occurs even when an unintended person . . . is the object of the detention . . . ."), and Herndon's decision to jump onto the Suspect and Sgt. Gillis' subjective intent of who he thought he was subduing are also irrelevant, *see id.*; *Villanueva v. California*, 986 F.3d 1158, 1166 (9th Cir. 2021).

Despite the foregoing analysis, the Defendants urge the panel to adopt the unsupported reasoning that a mistake of identity as to who an officer is hitting means the application of force is not intentional. None of the cases the Defendants cite are analogous because they concern situations where police unintentionally harm a third party while attempting to seize a suspect, and these cases do not address mistaken identity. *E.g.*, *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000) (bystander travelling with suspect shot in police crossfire); *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000) (hostages held by escaped prisoners harmed by police gunfire). These cases would only be analogous if Sgt. Gillis had attempted to hit the Suspect with the butt of his gun, but swung and *missed*,

inadvertently hitting Herndon. Here, Sgt. Gillis did not miss. Rather he intentionally struck Herndon and deployed his taser to subdue him.[3]

Because there was a seizure, the next step is to determine whether Sgt. Gillis' use of force was "objectively unreasonable under the circumstances." *Zion v. County of Orange*, 874 F.3d 1072, 1075 (9th Cir. 2017). Because the district court did not analyze the reasonableness of the seizure, this court will remand to the district court for appropriate development of the record and to determine in the first instance whether the seizure was reasonable.[4] *Cf. Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (per curiam) (remanding to the district court on a "highly fact-dependent" issue that "the district court is in a better position to develop").

4. Based on the foregoing, (i) the district court's order granting summary judgment in favor of Officers Good, Nerbonne, Russo, Vega, and Nelson, and the district court's grant of summary judgment on Herndon's Fourteenth Amendment substantive due process claim are **AFFIRMED**; (ii) the district court's conclusion that Sgt. Gillis did not seize Herndon is **REVERSED**; (iii) the case is

[3] The Defendants and the district court also rely heavily on *United States v. Al Nasser*, 555 F.3d 722 (9th Cir. 2009). None of the facts or issues in *Al Nasser*, where the defendant voluntarily stopped when border patrol agents shone a flashlight at his car, are implicated here. *Id.* at 728–32. Further, Herndon did not consent to being hit with a rifle.

[4] Even though it was resolving motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the district court relied primarily on the First Amended Complaint to develop the factual background instead of relying on the record.

REMANDED for the district court to determine whether the seizure was reasonable and to reconsider the remaining claims on summary judgment; and (iv) the case is also **REMANDED** for the district court to consider the merits of the motions to supplement as they are no longer moot and to allow the district court to reconsider, if necessary, the motion to compel.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**.