FILED
United States Court of Appeals
Tenth Circuit

September 6, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BRIENA CRITTENDEN, as personal representative of the ESTATE OF JOSHUA P. CRITTENDEN,

Plaintiff - Appellant,

v.

CITY OF TAHLEQUAH, a municipality in Cherokee County, Oklahoma; RANDY TANNER, police officer for the City of Tahlequah; BRONSON McNIEL, police officer for the City of Tahlequah; SHANNON BUHL, a Cherokee Nation Marshal; REED FELTS, a police officer for the City of Tahlequah,

Defendants - Appellees.

No. 18-7036
(D.C. No. 6:17-CV-00106-RAW)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **MURPHY**, and **EID**, Circuit Judges.

*This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. INTRODUCTION

After Joshua Crittenden was killed by a City of Tahlequah ("Tahlequah") police officer, his estate (the "Estate") brought 42 U.S.C. § 1983 civil rights claims against four officers[1] and Tahlequah asserting: (1) Officer Tanner used excessive force when, pursuant to Tahlequah policy or custom, he shot Crittenden[2] ("Fourth Amendment Claim"); and (2) all officers, acting pursuant to Tahlequah policy or custom, failed to provide medical care to Crittenden after the shooting ("Fourteenth Amendment Claim"). The district court granted summary judgment to the officers, concluding they did not violate Crittenden's constitutional rights. Even assuming the existence of a constitutional violation, the district court determined the officers were entitled to qualified immunity because, considering the circumstances facing the officers, the constitutional rights at issue were not clearly established. Having ruled that no officer violated Crittenden's constitutional rights, the district court granted summary judgment in favor of Tahlequah. Alternatively, the district court concluded there existed no record evidence Tahlequah policy or custom led to any assumed constitutional violation.

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[1]Randy Tanner, of the Tahlequah Police Department ("TPD"); Bronson McNiel, of the TPD; Reed Felts, of the TPD; and Shannon Buhl, Marshal of the Cherokee Nation, who was a cross-deputized TPD officer.

[2]The Estate also brought an excessive-force claim against McNiel, but abandoned the claim in response to a motion for summary judgment.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms**. The district court correctly concluded Tanner did not violate Crittenden's Fourth Amendment right to be free of excessive force. This conclusion resolves the claims against both Tanner and Tahlequah. It is unnecessary to resolve whether the officers' actions after the shooting amounted to a violation of the Fourteenth Amendment. Even assuming the existence of such a violation, the law was not clearly established and, thus, the officers are entitled to qualified immunity. The Estate has not challenged the district court's rejection of its Fourteenth Amendment Claim against Tahlequah and has, therefore, waived that issue on appeal.

II. BACKGROUND

The order of the district court sets out the relevant facts in great detail. *See* District Ct. Order of June 25, 2008, at 5-26. In so doing, the district court's order also discusses at length the appropriate treatment of the factual allegations set out in the affidavit of Benjamin Brown, an affidavit attached to the Estate's responses in opposition to summary judgment. *See id.* at 12, 15, 17-20, 31-33. Because the parties are well aware of this background, this opinion sets out only those limited background facts necessary to set the parties' disputes, and this court's resolution thereof, in context.

At midday June 27, 2015, TPD received a 911 call describing a disturbance in an alley, which involved yelling and a possible fight. The caller, who identified himself by name, stated there were two men with guns in a white Dodge truck. The caller indicated he got his information from his neighbor who was scared.[3] Officers Tanner, McNiel, Felts, and Pam Bell responded to the 911 call. Felts arrived first and located the white truck parked near a house at 532 ½ South Mission Street. When Felts ran the tag number, the dispatcher noted the truck was reported stolen. When the other three officers arrived and approached the truck, Tanner observed ammunition in the truck bed.

Felts observed several individuals, including Katherine Temple, on a screened porch located on the west side of the residence. Tanner, Bell, and Felts approached the porch so they could engage those people. While Felts spoke with the individuals on the porch, Bell heard glass breaking at the southwest corner of the house. Bell ran toward the sound to investigate. McNiel left his position at the truck and also ran to the southwest corner of the house. When Bell reached the south end of the house, she saw someone looking out. Simultaneously, Felts asked Temple why someone would be breaking a window to exit the residence. Temple stated that her son, Benjamin Brown, was inside the house. At Felts's

[3]Pursuant to an order of this court entered February 26, 2019, the Estate filed a supplemental index containing a digital copy of the 911 call.

instruction, Temple called to Brown to come out of the house with his hands up. After Brown exited the house, Felts patted him down and asked him about the truck. Brown stated he was just a passenger and his friend Steven had been the driver, but Steven[4] had already left. Brown was handcuffed, placed in a police car, and moved away from the south side of the residence.

Felts ran a warrants check on Brown. While the records check was in progress, Bell looked in the front seat of the truck and found a loaded gun. She announced this fact over the radio to the other officers. Dispatch advised Felts that Brown had a warrant with a $15,000 bond. Given this information, Felts decided officers needed to clear the house. Felts and McNiel entered onto the back porch and Felts told Temple: "Here's the deal, your son's buddy is in here. He needs to come out now with his hands out, okay. If he jumps out, we're probably going to shoot him, okay." As they entered the house, McNiel told Felts the bedroom they were entering was the one where the window was broken out. In a video of the encounter, Felts can be heard yelling, "Steve, if you're in here, you need to call out right now so you don't get shot!" Less than a minute later, Tanner can be heard yelling loudly, "Hey, get down!" McNiel rushed out of the house to see what was happening. Once McNiel was outside, he saw Tanner

[4]It was Crittenden, not someone named Steven, who had accompanied Brown to the residence in the white truck.

pointing a TASER toward the attic vent on the north end of the house. McNiel looked upward and yelled, "Get your hands up now! Let me see your hands now!" McNiel exclaimed, "He's got a gun! He's got a gun!" and retreated to the northwest corner of the house. Tanner retreated to the northeast corner of the house.[5] Bell yelled at Crittenden to "drop that gun!" When Crittenden responded "Let me out please," Bell replied, "You're not getting out, drop the gun." During this time, Felts remained in the house to cover the attic access. Bell yelled to Felts, "He's got a gun! He's got a gun!" Felts acknowledged by saying, "I understand."[6]

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[5]As detailed in the district court's order, the Estate asserts there exists a material dispute of fact as to whether Crittenden actually possessed a gun during his encounter with the TPD officers. *See* District Ct. Order of June 25, 2008, at 12 n.11, 15 n.14, 17-20, 31-33. In so arguing, the Estate relies on Brown's affidavit, evidence presented for the first time in response to the various defendants' motions for summary judgment. The district court explained at length why the facts set out in Brown's affidavit were blatantly contradicted by the record, particularly by a contemporaneous video of the encounter. *Id.* at 31-33; *cf. Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). If forced to reach the question, it would be exceedingly difficult to fault the district court's analysis. We conclude, however, that it is unnecessary to resolve whether a jury could reasonably find Crittenden did not possess a weapon during the encounter. Even assuming a jury could so find, Tanner's use of deadly force to subdue Crittenden was, nevertheless, reasonable in light of all of the surrounding circumstances. *See infra* Section III.B.

[6]Indeed, as cataloged by the district court, the officers engaged in a series of conversations with each other, Crittenden, dispatch, and bystanders indicating

(continued...)

Bell observed Crittenden's legs protruding through the attic vent. Believing he was going to jump down, she retreated to the northwest corner of the house where McNiel was located and yelled, "He jumped! He jumped!" Bell announced, "He's got a pistol. He jumped. I believe he did." A few seconds later, gunshots can be heard. Felts asked, "Who is firing?" Bell replied, "I don't know." McNiel yelled, "Tanner, are you alright?" Felts then exited the house and led McNiel and Bell to the south end of the house. The recording of the incident shows Tanner standing with his gun drawn, facing west. As Felts approached the south end of the house, he announced, "Shots fired. Shots fired. We need EMS [emergency medical services], we have a suspect down." McNiel approached Crittenden and handcuffed him.

Shortly after the shooting, Marshal Buhl arrived on the scene.[7] Felts asked Buhl if he had crime scene tape and advised there had been an officer-involved shooting. The officers discussed the possibility others might be hiding in the attic. Buhl put on rubber gloves, approached Crittenden, and turned him over onto his back. A video reveals Crittenden was gasping for air. No more than a

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[6](...continued)
that the officers, at a minimum, *believed* Crittenden had a weapon. *See* District Ct. Order of June 25, 2008, at 13-15. The record also makes clear Crittenden would have been well aware the officers, at a minimum, *thought* he had a weapon. *Id.*

[7]Buhl was accompanied by several other Cherokee Nation Marshals.

few minutes later, EMS arrived on the scene. Buhl decided to hold EMS from the scene until the attic could be cleared. Buhl asked McNiel if he minded "helping my guys in there" (i.e., the other Cherokee Nation Marshals) as McNiel was wearing a bulletproof vest. McNiel returned to the inside of the house and encountered several Marshals clearing an area adjacent to the attic access. A Marshal pointed at the access door and asked McNiel, "Have we cleared this at all?" McNiel replied, "He was the only one up there." When the Marshal asked whether officers were sure of that fact, McNiel replied, "No, we don't know for sure." The Marshal then said, "Let me go outside and see if we can get a polecam." While the officers were looking for a pole camera, Crittenden was lying on the ground bleeding from gunshot wounds and gasping for air. Officers on the scene did not provide CPR or any other medical attention to Crittenden. Buhl could not locate a pole camera to search the attic, so he and another Marshal went into the attic and cleared it.

Approximately twelve minutes after they arrived on the scene, EMS personnel were escorted to Crittenden. Although Crittenden was still breathing, none of the EMS personnel performed CPR on him after they were given access. An autopsy revealed Crittenden was struck by a bullet three times, a penetrating gunshot wound to the lower abdomen, a grazing wound of the right hand, and a

penetrating gunshot wound to the head. The gunshot wound to the head was a fatal injury which no amount of medical treatment or care could have changed.

III. ANALYSIS

A. Legal Background

1. Summary Judgment Standard

This court reviews a grant of summary judgment de novo, applying the same legal standard as the district court. *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016). Summary judgment is appropriate if a movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In applying this standard, "we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Ribeau v. Katt*, 681 F.3d 1190, 1194 (10th Cir. 2012) (quotation omitted).

2. Qualified Immunity

Section 1983 provides that a state actor who deprives a citizen of his constitutional rights "shall be liable to the party injured." 42 U.S.C. § 1983. Government actors may defend against a § 1983 suit by asserting entitlement to qualified immunity, a doctrine which "shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (quotation and

alteration omitted). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quotation omitted).

In the face of a qualified immunity defense, the plaintiff must carry a heavy burden to show that: (1) defendant's actions violated a constitutional right, and, if so, (2) the right was clearly established at the time of defendant's unlawful conduct. *Estate of Booker*, 745 F.3d at 411. We have discretion to resolve an appeal solely by reference to the clearly established prong. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "For a constitutional right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013) (alteration and quotation omitted). A plaintiff may satisfy this standard by identifying an on-point Supreme Court or published Tenth Circuit decision. *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010). Alternatively, "the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id.* (quotation omitted). A plaintiff need not locate a perfectly on-point case. *Id.* Nevertheless, the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Mullenix*, 136 S. Ct. at 308 (quotation omitted).

3. Municipal Liability

Tahlequah is a "person" subject to suit under § 1983. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). Nevertheless, "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be liable under § 1983 on a *respondeat superior* theory." *Id.* at 691. Instead, municipalities are only responsible for "their *own* illegal acts." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quotation omitted). To hold a municipality liable under § 1983, a plaintiff must prove (1) the existence of a municipal policy or custom by which the plaintiff was denied a constitutional right and (2) the policy or custom was the moving force behind the constitutional deprivation. *Monell*, 436 U.S. at 694. The requirement of a policy or custom distinguishes the "acts of the *municipality* from acts of *employees* of the municipality, and thereby make[s] clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986). This court has described several types of actions which may constitute a municipal policy or custom:

> A municipal policy or custom may take the form of (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that . . . is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to

> adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010) (quotations and alteration omitted). As should be clear from this list, "[a] municipality may not be held liable where there was no underlying constitutional violation by any of its officers." *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993).

B. Fourth Amendment Claim

1. Officer Tanner

This court reviews Fourth Amendment "excessive force claims under a standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Pauly v. White*, 874 F.3d 1197, 1215 (10th Cir. 2017) (quotation omitted), *cert. denied*, 138 S. Ct. 2650 (2018). We evaluate the totality of circumstances, allowing for the fact "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014) (alteration and quotation omitted). This analysis "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or

attempting to evade arrest by flight." *Pauly*, 874 F.3d at 1215 (quotation and emphasis omitted). Ultimately, however, the totality-of-the-circumstances test is holistic and open-ended. *See Cty. of L.A. v. Mendez*, 137 S. Ct. 1539, 1546 (2017); *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015). In applying this analysis, we will assume that Crittenden did not, as a matter of fact, possess a weapon when he was shot by Tanner. *See supra* n.6. Nevertheless, given the following contextual circumstances, all of which are indisputably established by the record, Tanner's split-second decision to employ deadly force to subdue Crittenden was reasonable under the particular circumstances of this case.

Officers were drawn to the scene of the incident by a 911 call, from a citizen who provided his name, indicating a fight was imminent and guns were present. Upon responding to that call, officers found a truck that was reported stolen with ammunition in the bed and a loaded pistol in the cab. Officers then detained Brown, an individual subject to an arrest warrant with a $15,000 bond. Brown asserted he had merely been a passenger in the truck and that the driver had left the scene. While officers were trying to verify this information with other individuals present in the home on 532 ½ South Mission Street, officers heard someone attempting to leave the house by breaking out a window. Crittenden eventually hid in the attic of the residence, a place where officers could not see him or safely apprehend him. Crittenden refused to comply with

repeated officer commands to "come down" or to "show his hands" or to "drop his weapon." Over the next few tense minutes, multiple officers indicated over radio and by yelling to each other that they could see Crittenden was in possession of a hand gun.[8] Following numerous unsuccessful attempts by police to have him come down from the attic, Crittenden jumped from an attic vent on the south end of the house. Rather than lie on the ground and surrender, Crittenden stood up, with his right hand forward, and moved toward Tanner. Tanner immediately took aim and fired, but ceased firing when he saw Crittenden fall to the ground.

These undisputed facts demonstrate (1) officers reasonably thought Crittenden was engaged in serious crimes involving an imminent fight with weapons and auto theft; (2) a reasonable belief on the part of Tanner that Crittenden might be armed; and (3) conduct a reasonable officer would view as an active effort by Crittenden to, at a minimum, evade arrest by flight. Each of the three relevant factors weigh heavily in favor of the conclusion Tanner's "split-second judgment[]" to use deadly force in a situation that was "tense, uncertain,

[8]Although Brown asserts in his affidavit that it was clear to him Crittenden did not possess a weapon when he pushed himself off the ground and moved toward Tanner, he does not, and cannot, say it was clear to Tanner that Crittenden was unarmed. Indeed, in light of all the other contextual circumstances, it was reasonable for Tanner to fear Crittenden could have a weapon as Crittenden moved in Tanner's direction.

and rapidly evolving" was reasonable. *Plumhoff*, 572 U.S. at 775. Accordingly, the district court correctly ruled that Tanner did not violate Crittenden's Fourth Amendment right to be free from excessive force.

2. Tahlequah

As set out above, Tanner did not violate Crittenden's Fourth Amendment rights. Thus, Tahlequah is not subject to § 1983 liability. *Hinton*, 997 F.2d at 782.

C. Fourteenth Amendment Claim

1. The Officers

The Estate asserts it has established the individual officers violated Crittenden's Fourteenth Amendment rights following the shooting when they (1) did nothing to assist him (e.g, check his vitals or perform CPR) and (2) prevented EMS from providing care for approximately twelve minutes. *Cf. Estate of Hocker v. Walsh*, 22 F.3d 995, 998 (10th Cir. 1994) (holding that the Fourteenth Amendment provides pretrial detainees with the same protection against denial of medical attention as that afforded to inmates under the Eighth Amendment). We exercise our discretion to bypass this question and, instead, resolve this appeal on the basis that even assuming the existence of a constitutional violation, the law was not clearly established at the time of the events in question. *See Pearson*, 555 U.S. at 236.

There is no precedent supporting the notion that police officers have an affirmative duty to provide immediate medical care in situations such as the instant case. *See Wilson v. Meeks*, 52 F.3d 1547, 1556 (10th Cir. 1995), *abrogated on other grounds by Saucier v. Katz*, 533 U.S. 194 (2001). In *Wilson*, after a police officer shot a man holding a gun, other officers handcuffed the victim before medical help arrived. *Id.* The officers did not provide medical care or first aid before EMS arrived. *Id.* The victim's estate alleged the officers interfered with EMS by refusing to remove the handcuffs upon request. *Id.* This court, applying the Fourteenth Amendment deliberate indifference standard, held that neither the handcuffing nor the refusal to remove the handcuffs amounted to a constitutional violation. *Id.* Further, *Wilson* refused to hold that the Due Process Clause establishes an affirmative duty on police officers to provide medical care (even something as basic as CPR), in any and all circumstances, or to render first aid. *Id.* *Wilson* held the district court erred in relying on dicta from a single Ninth Circuit case in concluding such a duty existed: "The district court here cited no other authority for the duty to render medical aid, or for guidance on what circumstances would mandate action. One ambiguous bit of dictum in a Ninth Circuit opinion cannot form the basis for a 'clearly established' and 'particularized' duty." *Id.* at 1555. Notably, however, *Wilson* did not

foreclose the possibility that such a duty could exist in some other factual circumstance. *Id.* at 1555-56

Nothing has changed since *Wilson*. The Estate relies entirely on this court's decision in *Estate of Booker*, 745 F.3d at 434. The facts in *Estate of Booker* are, however, so materially different from the case at hand that the decision could not sufficiently put the individual officers on notice that their actions violated Crittenden's constitutional rights.

Estate of Booker involved an allegation of "positional asphyxiation" wherein officers applied a carotid restraint for approximately two and half minutes, put 140 pounds of pressure to the suspect's back, and initiated an eight second TASER stun after the suspect was restrained. *Id.* Given the actions of the officers, *Estate of Booker* concluded they "had a front-row seat to Mr. Booker's rapid deterioration." *Id.* at 431 ("Unlike many deliberate indifference cases, here the Defendants actively participated in producing Mr. Booker's serious condition through their use of force against him, which included a carotid neck hold, considerable weight on his back, and a taser."). The *Estate of Booker* defendants had been trained on the use of a carotid restraint and had been warned that brain damage or death could occur if the technique is applied for more than a minute. *Id.* at 427. The officers also received training on the risks associated with the carotid restraint as well as steps that must be followed should the inmate become

unconscious. *Id.* at 431.[9] *Estate of Booker* denied the defendants qualified immunity due to (1) the existence of clearly established law with regard to the use of carotid restraint; and (2) the fact defendants' training required that they check for vital signs or seek medical attention after having rendered the suspect unconscious by the use of force. *Id.* at 431-32 ("In light of this training and Mr. Booker's limp appearance, a reasonable jury could conclude the Defendants inferred that Mr. Booker was unconscious and needed immediate medical attention. If a jury concludes the Defendants made this inference, then it could also conclude they were deliberately indifferent in failing to respond sooner.").

Given the lack of symmetry between the facts at issue here and the facts in *Estate of Booker*, that decision did not put the individual officers on notice their actions ((1) failing to provide medical treatment or first aid to an individual with a gunshot wound to the head and (2) deciding to clear a chaotic and potentially dangerous scene before allowing EMS access) would violate the Constitution. After all, the dispositive question in determining whether a defendant is entitled

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[9]*See also Estate of Booker*, 745 F.3d at 431 ("Given their training, the Defendants were in a position to know of a substantial risk to Mr. Booker's health and safety. Each of the Defendants received regular training in 'first aid/CPR' and 'training that any inmate involved in a use of force incident needs to be medically evaluated after the incident.' They also received specific training on the carotid restraint about 'the risks associated with the restraint as well as steps that must be followed should the inmate become unconscious (such as checking for breath and vital signs).'" (citations omitted)).

to qualified immunity is whether the violative nature of particular conduct considered in context is clearly established. *Mullenix*, 136 S. Ct. at 308 ("We have repeatedly told courts not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." (quotations, citations, and alteration omitted)).

The officers faced a chaotic situation and could reasonably be concerned about the presence of additional armed individuals in the attic. Although *Meeks* does not foreclose the existence of a Fourteenth Amendment duty to provide medical aid in such circumstances, it does suggest safety concerns bear on the existence of such a duty. 52 F.3d at 1556 ("As defendants correctly note, the first duty of a police officer is to ensure the safety of the officers and the public.").[10]

[10]For this same reason, the Estate's Fourteenth Amendment treatment-delay claim is also not clearly established. The Estate cites to *Mata v. Saiz*, 427 F.3d 745 (10th Cir. 2005) and *Sealock v. Colorado*, 218 F.3d 1205 (10th Cir. 2000) for the general proposition that a delay in medical treatment can amount to a due process violation. Neither case, however, involved the type of dangerous and chaotic situation at issue here. Instead, both cases involve delayed treatment of a heart attack in a custodial setting. Notably, in that section of its brief discussing clearly established law, the Estate does not cite to a single case with a set of facts even remotely similar to the facts here. Given all this, the officers were not on clear notice that a twelve-minute delay in treatment of a mortally wounded individual while officers worked to insure no other armed assailants were present amounts to a violation of the Fourteenth Amendment.

Likewise, given the nature of the gunshot wound to Crittenden's head, *Meeks* suggests medical intervention of any type on the part of the individual officers might be counterproductive. *Id.* at 1555-56 ("Few citizens would be likely to want police officers to render medical aid. Such steps are best left to the qualified and highly trained personnel who act as paramedics or EMTs.").

Ultimately, whether officers have a duty to provide medical care in circumstances like those in the instant case remains an open question in this circuit post-*Meeks*. Given the lack of citations to relevant authorities in the Estate's brief on appeal, it appears the question remains open in other circuits as well. Certainly, the highly contextual decision in *Estate of Booker* does not resolve these open questions one way or the other. Because the Estate has failed to carry its heavy burden of demonstrating the existence of clearly established law, the district court correctly concluded the individual officers were entitled to qualified immunity.

2. Tahlequah

Because this court has resolved the Fourteenth Amendment claim against the individual officers on the basis of qualified immunity (i.e., the lack of law clearly establishing the violation of a constitutional right), we must proceed to the merits of the claims against Tahlequah. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980) ("[T]here is no tradition of immunity for municipal

corporations, and neither history nor policy supports a construction of § 1983 that would justify [extending] qualified immunity [to municipalities]."). Nonetheless, in that portion of its brief addressing municipal liability, the Estate does not even discuss its Fourteenth Amendment claim against Tahlequah. Instead, it cites exclusively to cases, and the conduct of individual officers during Crittenden's encounter with police, to demonstrate allegedly "widespread, excessive, violent[,] and brutal use of force by TPD officers." Appellant's Br. at 42. The Estate's failure to provide reasoning and legal authorities in support of its assertion the district court erred in dismissing its Fourteenth Amendment claim against Tahlequah amounts to a waiver of the issue. Fed. R. App. P. 28(a)(8)(A) (requiring appellant's brief to include "appellant's contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies"); *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (noting this court routinely refuses to consider arguments that fail to meet Rule 28's requirements). In any event, absent record evidence demonstrating that the officers' failure to provide adequate medical care to Crittenden post-shooting was pursuant to Tahlequah policy or custom, the Estate's Fourteenth Amendment claim against Tahlequah necessarily fails on the merits. *Monell*, 436 U.S. at 694.

IV. CONCLUSION

For those reasons set out above, the order of the United States District Court for the Eastern District of Oklahoma granting summary judgment in favor of all defendants is hereby **AFFIRMED**.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge