FILED
United States Court of Appeals
Tenth Circuit

February 2, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KARINA HODGE,

Plaintiff - Appellee,

v.

JEFFREY BARTRAM,

Defendant - Appellant,

and

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY; MANUEL GONZALES, III, in his individual capacity,

Defendants.

No. 21-2125
(D.C. No. 1:20-CV-01212-WJ-JHR)
(D.N.M.)

ORDER AND JUDGMENT*

Before **HARTZ**, **McHUGH**, and **MORITZ**, Circuit Judges.

Deputy Jeffrey Bartram appeals a summary-judgment order denying him qualified immunity on Karina Hodge's Fourth Amendment excessive-force claim. Because the law does not clearly establish the unconstitutionality of Bartram's conduct, we reverse.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

Background[1]

Hodge's lawsuit stems from a traffic stop in Albuquerque, New Mexico. One night in October 2018, Bartram was on patrol in his squad car when he saw Hodge fail to stop at a stop sign and cross the yellow line on the left side of the road.[2] Based on these observations, Bartram activated his emergency lights to initiate a traffic stop. Hodge pulled over in a parking lot, and Bartram approached her car on the passenger side.

Bartram began the encounter by greeting Hodge and asking if she had her driver's license. Hodge said that she did but wanted to know if Bartram was "asking or demanding for it." App. vol. 1, 102. After Bartram asked to see Hodge's license again, Hodge asked what the basis for the stop was. Bartram repeated his request for identification, prompting Hodge to repeat her request for an explanation of why he had stopped her. When Bartram relayed his reasons, Hodge accused him of lying. In response, Bartram again asked to see her license; Hodge again refused, this time adding that she was "calling 911." *Id.* Faced with Hodge's repeated refusals, Bartram

---

[1] Because this appeal arises from an order denying summary judgment on qualified-immunity grounds, we describe the facts based on those the district court determined a reasonable jury could find, "view[ing] the evidence in the light most favorable to [Hodge] as the nonmoving party." *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1159 n.1 (10th Cir. 2021).

[2] In his opening brief, Bartram asserts that the parties "vigorously dispute[]" whether these traffic infractions occurred. Aplt. Br. 5. The district court initially noted the same, but it later separately determined that Hodge was precluded from relitigating a state court's finding in related criminal proceedings that Bartram at least had reasonable suspicion to stop her based on the infractions. Because Hodge has not cross-appealed that determination, we assume that Bartram had reasonable suspicion to stop Hodge's vehicle.

radioed for backup and walked to the other side of the car.

After arriving at the driver's-side door, Bartram asked for Hodge's license twice more, and then demanded that she present it. Hodge—who claims not to have heard Bartram because she was calling 911 on her cellphone—did not respond until after the third time, stating that the demand was "an unlawful order." *Id.* Bartram disagreed, explained that he was a deputy with the Bernalillo County Sheriff's Department, and made three more demands for Hodge to produce her license. As he was doing so, Bartram peered inside the vehicle with his flashlight, and Hodge told the 911 dispatcher that "an officer [was] being hostile with [her]." *Id.* As Hodge started to provide her location to dispatch, Bartram opened the driver's-side door and told Hodge to "step out of the vehicle." *Id.* Adamant that "this [was] unlawful," Hodge remained seated and continued talking to dispatch. *Id.* Over the next 30 seconds or so, Bartram gave seven more unanswered commands for Hodge to exit her vehicle, as well as one more unanswered demand for Hodge's license.

Bartram then attempted to remove Hodge from the vehicle. His first attempt failed: He leaned inside the vehicle and tried to grab Hodge's wrists, but Hodge shouted and pulled away. Before trying again, Bartram made two final demands that Hodge exit the vehicle, reiterated that his demands were lawful, and reached inside the driver's-side window to turn off the engine and take the keys. Hodge stayed put, so Bartram tried again to remove her. This time, Hodge "restrained herself" by briefly grabbing the steering wheel "to prevent [Bartram] from" removing her. App. vol. 2, 366. Within about ten seconds, Bartram pulled Hodge out of the car by her left

arm and onto the ground, where she curled up and "squirm[ed]" around while Bartram tried to handcuff her. *Id.* Unable to secure one of Hodge's hands, Bartram spun her on her side, sat on top of her to push her legs straight, and applied a pain hold to push her hands together and lock the handcuffs into place. As a result of Bartram's conduct, Hodge sustained injuries to her neck, shoulders, and right knee and elbow.[3]

Hodge later sued Bartram, another police officer, and the Board of County Commissioners for the County of Bernalillo County in state court, asserting various state- and federal-law claims related to the incident. After removing the case to federal court, the defendants moved for summary judgment on all claims. As relevant here, the district court denied the motion as to Hodge's claim that Bartram used excessive force in violation of the Fourth Amendment, determining that he was not entitled to qualified immunity. Bartram now appeals that decision.

Analysis

Qualified immunity insulates police officers from civil liability when their challenged conduct "does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Vette*, 989 F.3d at 1169 (quoting

[3] As a further result of this incident, Hodge was prosecuted in state court for several misdemeanors arising from her purported traffic infractions and conduct during the stop. The state court denied Hodge's motion to suppress, ruling that Bartram had reasonable suspicion for the traffic stop and probable cause to arrest Hodge. The case went to trial, and a jury returned a split verdict that found Hodge guilty of only one of the charged crimes (concealing ID). But the state court later granted a new trial based on instructional errors, and the prosecutor opted to dismiss the case rather than retry Hodge.

Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam)). When raised at summary judgment, this defense gives rise to a presumption that the officer is immune from suit. *Id.* The plaintiff must then rebut this presumption by showing that (1) the officer's actions violated a constitutional right and (2) this right was clearly established when the violation occurred. *Id.* On appeal, we review the district court's conclusion that the plaintiff satisfied these two prongs de novo, and we do so based on the facts the district court determined a reasonable jury could find from the parties' evidence. *See id.* at 1169, 1162. Because the plaintiff must overcome both prongs to defeat qualified immunity, we may address either one first. *Surat v. Klamser*, 52 F.4th 1261, 1271 (10th Cir. 2022).

The district court here determined that Hodge carried her burden on both prongs. On the first prong, it concluded that Hodge had shown a violation of her rights under the Fourth Amendment, which prohibits police officers from using excessive force when making an arrest. *See id.* at 1271. Specifically, the district court determined that under the Supreme Court's familiar three-factor analysis, a reasonable jury could find that the amount of force Bartram used—pulling Hodge out of her vehicle and applying a pain hold to handcuff her—was excessive given that she posed no immediate threat to his safety and neither resisted arrest nor attempted to flee. *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (listing factors that affect whether force was excessive, including (1) severity of suspected crimes, (2) whether plaintiff posed an immediate threat to officers or others, and (3) whether plaintiff resisted arrest or attempted to flee). Turning to the second prong, the district

court held that because these *Graham* factors "obvious[ly]" weighed against the level of force used, Hodge's Fourth Amendment right was clearly established such that Bartram should have known his actions were unconstitutional. App. vol. 2, 383 (quoting *White v. Pauly*, 580 U.S. 73, 80 (2017) (per curiam)). Although Bartram challenges the district court's analysis on both prongs, we need only address the second to resolve this appeal. *See Surat*, 52 F.4th at 1271.

As mentioned earlier, the second prong considers whether Hodge's right to be free from excessive force was clearly established when Bartram's conduct occurred in October 2018. *See Vette*, 989 F.3d at 1169. For that right to be clearly established, its contours must have been "sufficiently definite that any reasonable official in [Bartram's] shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 572 U.S. 765, 778–79 (2014). Said differently, "existing law must have placed the constitutionality of [his] conduct 'beyond debate,'" *Surat*, 52 F.4th at 1276 (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018)), thus putting him "on notice that his specific conduct was unlawful," *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam).

To satisfy this standard, Hodge must supply on-point precedent from the Supreme Court, this court, or other circuits that "have found the law to be as [she] maintains." *Surat*, 52 F.4th at 1276 (quoting *Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015)); *see also Irizarry v. Yehia*, 38 F.4th 1282, 1293–94 (10th Cir. 2022) (noting that "the consensus of persuasive authority" from sibling circuits may provide sufficient notice for purposes of second qualified-immunity prong). We treat

a prior decision as on point if it either "involves *materially similar conduct* or applies with *obvious clarity* to the conduct at issue." *Irizarry*, 38 F.4th at 1294 (quoting *Lowe v. Raemisch*, 864 F.3d 1205, 1208 (10th Cir. 2017)); *see also id.* ("[G]eneral statements of the law can clearly establish a right for qualified[-]immunity purposes if they apply with obvious clarity to the specific conduct in question." (quoting *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018))).

Echoing the district court's analysis, Hodge argues that the law was clearly established based on the latter type of on-point authority. In other words, she acknowledges that no prior traffic-stop case found an excessive-force violation under facts materially similar to those here. Instead, she argues, the unconstitutionality of Bartram's conduct was "obvious" under the *Graham* factors.[4] Aplee. Br. 5. Bartram, for his part, does not dispute that in "'an obvious case,'" the *Graham* factors alone may "create clearly established law." Aplt. Br. 23 (quoting *White*, 580 U.S. at 80); *see also Rivas-Villegas*, 142 S. Ct. at 8 (explaining that "without a body of relevant

[4] Hodge also mentions general "principles" from five factually dissimilar Tenth Circuit cases, arguing that the combination of these principles and *Graham* together put Bartram on notice that his conduct "was obviously unconstitutional." Aplee. Br. 37. But the "principles" Hodge extracts from these cases are just the *Graham* factors themselves. *Compare* Aplee. Br. 40 (arguing that "[t]he recurring theme among these five cases is that a certain combination of factors"—(1) "a less-than-severe" crime, (2) "an arrestee who presents no indication of dangerousness," and (3) the absence of resisting or attempting to flee—"require an officer to effect an arrest with minimal . . . force"), *with Graham*, 490 U.S. at 396–97 (listing those same three factors). Because Hodge cites these cases only to illustrate that the *Graham* factors alone may render the law clearly established, we need not separately discuss them. Nor do they constitute materially factually similar cases that could clearly establish Hodge's rights in this case; as Hodge acknowledges, she does not offer these cases "for their close factual similarity to the instant case." Aplee. Br. 37 n.8.

case law," *Graham*'s general standards may provide sufficient notice only in "an obvious case" (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam))). Instead, he argues that his conduct was not "such an egregious violation so as to be 'obvious' under *Graham*." Aplt. Br. 26.

At the outset, we note that Hodge faces an uphill battle in proving that this case involves an obvious *Graham* violation. The Supreme Court has repeatedly cautioned against defining clearly established law "at a high level of generality," especially in the Fourth Amendment context where "'[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'" *Mullenix*, 577 U.S. at 12, 16 (alteration in original) (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)). For that reason, cases finding clearly established law based solely on the *Graham* factors are rare. *See Surat*, 52 F.4th at 1279 (concluding plaintiff's case was "not one of the 'rare obvious case[s]' where reliance on *Graham* alone is sufficient" (alteration in original) (quoting *Wesby*, 138 S. Ct. at 590)). And when such exceptional cases do arise, they typically involve a use of force that is unquestionably excessive. *E.g.*, *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016) (finding clearly established law under *Graham* where "nothing in the record" supported "disturbing" and "aggressive" level of force officers used to remove plaintiff from vehicle); *cf. also Crane v. Utah Dep't of Corr.*, 15 F.4th 1296, 1310 (10th Cir. 2021) (explaining that general legal principles apply with obvious clarity to novel circumstances when alleged constitutional violation is "inarguable"). As explained below, the conclusion that Bartram used excessive force

is far from unquestionable.

In Hodge's view, that the *Graham* factors weigh in her favor establishes the obviousness of the constitutional violation: her suspected crimes were minor, she posed no immediate threat, and she neither resisted arrest nor attempted to flee. But even if the application of those factors could support the finding of a constitutional violation, they do not weigh so heavily in her favor as to render Bartram's conduct "inarguabl[y]" excessive. *Crane*, 15 F.4th at 1310. For example, the third factor at best weighs just slightly against the use of force because, although Hodge did not attempt to flee, she engaged in conduct that Bartram reasonably could have construed as resistance—repeatedly refusing to provide her license or to leave the vehicle as instructed, grabbing the steering wheel to prevent him from removing her, and squirming around to avoid being handcuffed. *See Davis*, 825 F.3d at 1136 (weighing third *Graham* factor only "slightly against" officers because plaintiff's actions, including her "refus[al] to exit the vehicle when ordered to do so[,] could suggest that she was attempting to resist").

Similarly, on the first factor, it is not immediately apparent that Bartram used an amount of force disproportionate with Hodge's minor crimes. *See Davis*, 825 F.3d at 1134–35. Indeed, his conduct—pulling Hodge from the vehicle by her arm and applying a pain hold to secure handcuffs—involves decidedly less force than that deployed by the officers who committed obvious *Graham* violations in the cases Hodge cites. *E.g.*, *id.* at 1134, 1136 (holding that officers committed obvious *Graham* violations when they used "disturbing" degree of force to arrest misdemeanant during

traffic stop, including smashing her car window, dragging her out through the window by her hair and arms, and "pinn[ing] her face-down on the broken glass outside the car" while handcuffing her); *Fogarty v. Gallegos*, 523 F.3d 1147, 1161–62 (10th Cir. 2008) (finding obvious *Graham* violation where officers used pepper balls and tear gas against suspected misdemeanant); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) (finding obvious *Graham* violation where officers tore suspected misdemeanant's shirt, tackled him, tased him, and beat him).

In sum, whether or not Hodge could show that Bartram's lesser degree of force in the face of her potential resistance was nevertheless excessive, the *Graham* factors do not so decisively weigh in Hodge's favor as to place the unconstitutionality of Bartram's conduct "beyond debate." *Surat*, 52 F.4th at 1276 (quoting *Wesby*, 138 S. Ct. at 589). Simply put, "this is not one of the 'rare and obvious cases' where the degree of force rises to a level justifying reliance on *Graham* itself to clearly establish the law." *Id.* at 1280.

Conclusion

This is not a case of an obvious constitutional violation, and Hodge has not identified on-point precedent that would have put every reasonable officer on notice that Bartram's conduct violated Hodge's Fourth Amendment rights. Because this absence of clearly established law entitles Bartram to qualified immunity, we reverse

the district court's order denying him summary judgment.

Entered for the Court

Nancy L. Moritz
Circuit Judge