FILED
United States Court of Appeals
Tenth Circuit

July 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FREDDY JOE REYES,

Plaintiff - Appellant,

v.

MIKE FOWLKS; CHASE PILI; MERCER OWEN; JAMES MORGAN,

Defendants - Appellees,

and

JOHN DOES, I - V; JANE DOES, I - V,

Defendants.

No. 22-4028
(D.C. No. 1:21-CV-00061-DAO)
(D. Utah)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ**, and **CARSON**, Circuit Judges.

A government defendant may move under Federal Rule of Civil Procedure 12(b)(6) for dismissal of a complaint based on qualified immunity. But that creates a tougher standard of review than would apply on summary judgment because we analyze the defendant's conduct as alleged in the complaint. Even under this standard, however, the plaintiff must still allege that the constitutional right the

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

defendant violated was clearly established at the time of the complained-of conduct. That did not happen here. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's dismissal of Plaintiff's complaint for failure to state a claim.

I.

We take the facts below from Plaintiff's Amended Complaint. Plaintiff was legally driving his ATV on a United States Forest Service road when Utah Department of Natural Resources officers pulled him over "without reasonable suspicion" and arrested him for driving under the influence. Officers later determined Plaintiff did not have alcohol or drugs in his system and they dismissed all charges. After conducting an "illegal search," DNR officers placed Plaintiff in handcuffs and a belly chain and transported him in the front seat of an off-road patrol vehicle ("OHV").[1] The OHV had a large sign requiring anyone riding in the vehicle to be securely fastened with a seatbelt and shoulder harness. None of the officers attached either to Plaintiff, although they fastened their own seatbelts and shoulder harnesses. Because of Plaintiff's handcuffs and belly chain, he could not move his hands more than a few inches or fasten his own seatbelt and shoulder harness.

Officer Chase Pili drove the OHV in a dangerous manner and drove off the road. He crashed into a fence post and caused serious physical injuries to Plaintiff.

[1] Although Plaintiff makes conclusory allegations that officers did not have reasonable suspicion and illegally searched him, he does not assert separate claims based on these allegations. And those allegations are not material to the deliberate indifference claims at issue in this appeal.

None of the officers sustained injuries. Rather than treat Plaintiff's injuries, they continued to process him for driving while impaired.

Plaintiff sued under 42 U.S.C. § 1983 asserting Fifth, Eighth, and Fourteenth Amendment violations, as well as a claim under the Utah Constitution. He first contended that Defendants violated his federal constitutional rights by failing to provide proper care during his arrest and detention. He alleged that Defendants had a duty to provide basic and legally required vehicular safety restraints when transporting him and that Defendants deprived him of necessary and legally required seat and shoulder restraints while transporting him after arrest and while in custody. Second, he alleged that Defendant Mike Fowlks violated his federal constitutional rights by failing to adequately train or supervise the officer defendants. Third, he claimed that Defendants violated Article I, Section 9 of the Utah Constitution by treating him with "unnecessary rigor" following his arrest.

The district court dismissed the Fifth Amendment claims because the Fifth Amendment does not apply to state employees. The district court dismissed the Eighth Amendment claims because Plaintiff was a pretrial detainee and not a prisoner. As to the Fourteenth Amendment claim that Defendants denied Plaintiff constitutionally adequate care, the district court said Plaintiff did not allege facts sufficient to state a claim for a violation of the Fourteenth Amendment, let alone a violation of clearly established rights. And as to his failure-to-train claim, because Plaintiff failed to state a claim for an underlying constitutional violation, he also failed to state a claim for inadequate training, supervision, and policies. Finally, the

district court declined to exercise supplemental jurisdiction over the state-law claim. Plaintiff appealed.

II.

We review a district court's dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) based on qualified immunity de novo. Truman, 1 F.4th at 1235 (citing Wilson v. Montano, 715 F.3d 847, 852 (10th Cir. 2013)). But when a defendant asserts a qualified immunity defense in a Rule 12(b)(6) motion to dismiss, he subjects himself "to a more challenging standard of review than would apply on summary judgment." Id. (quoting Peterson v. Jensen, 371 F.3d 1199, 1201 (10th Cir. 2004)). That is because, at the motion to dismiss stage, we accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to Plaintiff. Id. (citing Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007)).

III.

On appeal, Plaintiff contends that the district court erred by dismissing his § 1983 claims alleging that Defendants violated the Fourteenth Amendment when it failed to provide him constitutionally adequate care during his transport in the off-road patrol vehicle ("OHV"). He then posits that, even if the district court properly dismissed his § 1983 claims, the district court abused its discretion by declining to exercise supplemental jurisdiction over his state law claims. We turn first to Plaintiff's § 1983 claims.

A.

Title "42 U.S.C. § 1983 allows an injured person to seek damages against an individual who has violated his or her federal rights while acting under color of state law." Est. of Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014) (quoting Cillo v. City of Greenwood Vill., 739 F.3d 451, 459 (10th Cir. 2013)). Plaintiff's § 1983 claims seek damages against Defendants for violating the Fourteenth Amendment, which protects pretrial detainees from deliberate indifference to medical needs.[2] Strain v. Regalado, 977 F.3d 984, 989 (10th Cir. 2020).

A § 1983 defendant's assertion of qualified immunity is an "affirmative defense [that] creates a presumption that the defendant is immune from suit." Truman v. Orem City, 1 F.4th 1227, 1235 (10th Cir. 2021) (quoting Est. of Smart by Smart v. City of Wichita, 951 F.3d 1161, 1168 (10th Cir. 2020)). Once a defendant asserts qualified immunity, the plaintiff bears the burden to plausibly allege: "(1) the defendant's actions violated a constitutional or statutory right, and (2) that right was clearly established at the time of the defendant's complained-of conduct." Id. (citing Thomas v, Kaven, 765 F.3d 1183, 1194 (10th Cir. 2014)). "A right is clearly established 'when a Supreme Court or Tenth Circuit decision is on point, or if the

[2] The Eighth Amendment protects the rights of convicted prisoners from deliberate indifference to medical needs. Strain v. Regalado, 977 F.3d 984, 989 (10th Cir. 2020) (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). Pretrial detainees have access to the claim under the Fourteenth Amendment. Id. citing Garcia v. Salt Lake Cnty., 768 F.2d 303, 307 (10th Cir. 1985)). We apply the same deliberate indifference standard no matter which amendment provides the constitutional basis for the claim. Id. (citing Est. of Hocker by Hocker v. Walsh, 22 F.3d 995, 998 (10th Cir. 1994)).

clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains.'" We may decide these prongs in either order. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

Here, we begin with whether the right was clearly established. We conclude it is not. We have held—though in an unpublished opinion—that failure to seatbelt an inmate in a passenger van is not even a constitutional violation. Dexter v. Ford Motor Co., 92 F. App'x 637, 643 (10th Cir. 2004) (unpublished). Other circuits have agreed with this position. Jabbar v. Fischer, 683 F.3d 54, 58 (2d Cir. 2012); Spencer v. Knapheide Truck Equip. Co., 183 F.3d 902, 906–07 (8th Cir. 1999). Put simply, no case law exists that the officers' decisions to fasten their own seatbelts or ignore the seatbelt warning sign on the vehicle changes the analysis.

Plaintiff says the facts here do not compare to cases involving prison transports. To him, driving in an open-air OHV on a steep and muddy dirt road while handcuffed and without being buckled is more dangerous than driving in a covered vehicle on a paved highway. Plaintiff contends this situation coupled with Defendant Pili driving dangerously (which he claims is apparent considering the OHV lost control on the steep and muddy dirt road and veered off the road and hit a post) plausibly alleges that Defendants disregarded an obvious risk of serious harm to Plaintiff.

But again, even if we agree with Plaintiff that Defendants' conduct violated the Fourteenth Amendment, Plaintiff can point us to no case law clearly establishing

the unconstitutionality of Defendants' conduct at the time it occurred.[3] Indeed, Plaintiff concedes in his opening brief that "this is a case of first impression in terms of the factual allegations and the District Court needed to draw analogies from other areas of the law to justify its decision."

Absent any case on point, Plaintiff points us to the "sliding scale" approach to show that Defendants' unlawful conduct was apparent. Our more recent case law, however, "has shifted to consider 'obvious clarity' or 'flagrantly unlawful conduct' rather than engage in the sliding scale approach." Shepherd v. Robbins, 55 F.4th 810, 818 n.5 (10th Cir. 2022) (citing Lowe v. Raemisch, 864 F.3d 1205, 1210–11, 1211 n.10 (10th Cir. 2017)). And this is not a case of obviousness.[4]

In his reply brief, Plaintiff pivots to the fact that the officers delayed getting him to medical care, but Plaintiff did not argue that in his opening brief. He cites McCowan v. Morales, 945 F.3d 1276, 1289 (10th Cir. 2019), for the proposition that

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[3] Plaintiff argues that the district court erred by failing to recognize Defendants' actions of failing to seatbelt Plaintiff and failing to put Plaintiff's helmet on were a direct violation of the Utah Code. Plaintiff mistakenly attempts to equate a violation of an obligation under state law with a violation of clearly-established federal law. See Cummings v. Dean, 913 F.3d 1227, 1243 (10th Cir. 2019) (noting that a defendant may violate clearly-established state law, but that presents an entirely separate question from whether that failure violated clearly-established federal law).

[4] Plaintiff quarrels with both the district court's statement that Plaintiff's allegations of dangerous driving were conclusory and the district court's dismissal of the case at an early stage. But even taking the Complaint's factual allegations as true and assuming that they established a constitutional violation, because the law was not clearly established, Plaintiff's claim fails. And we need not reach the question of whether Defendants violated the Constitution. Est. of Reat v. Rodriguez, 824 F.3d 960, 964 (10th Cir. 2016) (citing Pearson, 555 U.S. at 236).

delayed medical care constitutes deliberate indifference. Even assuming this argument has some merit at this stage, Plaintiff focused exclusively on the failure to put him in a seatbelt in the opening brief, never citing McCowan. Because he makes this argument for the first time in his reply brief, we do not consider it. See United States v. Leffler, 942 F.3d 1192, 1197 (10th Cir. 2019) (citing United States v. Pickel, 863 F.3d 1240, 1259 (10th Cir. 2017)) ("we generally do not consider arguments made for the first time on appeal in an appellant's reply brief and deem those arguments waived").

B.

Finally, Plaintiff argues that the district court erred in declining to exercise supplemental jurisdiction over his state-law claims. We see no error. A district court may, "and usually should," decline to exercise supplemental jurisdiction over any state-law claims if the district court has dismissed all claims over which it has original jurisdiction. Koch v. City of Del City, 660 F.3d 1228, 1248 (10th Cir. 2011) (quoting Smith v. City of Enid ex rel. Enid City Comm'n, 149 F.3d 1151, 1156 (10th Cir. 1998)).

AFFIRMED.

Entered for the Court

Joel M. Carson III
Circuit Judge