NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 5, 2023*
Decided January 9, 2023

Before

DIANE S. SYKES, *Chief Judge*

DAVID F. HAMILTON, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-2147

HENRY SHIRLEY,
Plaintiff-Appellant,

v.

LEE RABENSTEINE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:19-cv-4111-RLM-MJD

Robert L. Miller, Jr.,
Judge.

O R D E R

Invoking 42 U.S.C. § 1983, Henry Shirley sued the Indianapolis police officers from whom he fled while unlawfully possessing a weapon, then hid in an inaccessible attic for hours until they restrained him with force. He accuses them of violating his Fourth Amendment rights by using excessive force. The district judge entered summary

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

judgment for the defendants, correctly ruling that their use of force was reasonable under the circumstances of Shirley's resistance. We therefore affirm.

We recount the facts in the light most favorable to the plaintiff and draw all reasonable inferences in his favor. *Avina v. Bohlen*, 882 F.3d 674, 676 (7th Cir. 2018). In January 2019, a police officer pulled over Shirley's car for a traffic stop. The officer knew that Shirley had an outstanding arrest warrant for unlawfully possessing a firearm as a felon, and that he was a suspect in a recent home invasion and shooting. Shirley sped away from the stop in his car. When he later began to flee on foot, the pursuing officer saw a gun fall out of Shirley's car. Shirley then broke into a stranger's house to hide.

Shirley hid in the attic of the house and resisted arrest. He lay across drywall between wood beams. For two hours, police unsuccessfully tried to get Shirley to leave: first they called his cell phone (he did not answer); then they used a loudspeaker to order him to leave; and finally they used tear gas and flashbangs (stun grenades that produce loud bangs and flashing lights). Eventually, as the defendants—members of the Indianapolis SWAT team—entered the house, Shirley's leg fell through the ceiling as drywall cracked under his weight. Shirley asserts that shortly after his leg broke through the ceiling he announced "I give up." (The officers dispute this, but at this stage of the case, we accept Shirley's version as true.)

After Shirley's leg broke through the ceiling, the police used significant force. An officer fired a "beanbag" round (ammunition that is less likely than bullets to kill) that hit Shirley's exposed leg, and others ordered Shirley to surrender. Shirley withdrew his leg back into the attic, and the officer then fired four more beanbag rounds at Shirley's hip, at which point the ceiling gave way and he dropped onto the floor. Shirley says that the fall rendered him unconscious, and he remembers nothing else. The officers assert that Shirley writhed on the ground, making arrest difficult. They also feared that he might have another gun. To arrest him safely, two officers used a Taser twice on Shirley (one time hitting him in the face) while another kicked him in the leg three times. According to the officers, at that point Shirley was finally subdued. Shirley was taken immediately to the hospital, where he received treatment for his injuries.

Shirley was charged with unlawful possession of a handgun and resisting arrest. He pleaded guilty and received a prison sentence of five years.

Shirley then brought this § 1983 action, alleging that the police officers violated his Fourth Amendment rights. The defendants moved for summary judgment, arguing

that the use of force was reasonable and that the officers were entitled to qualified immunity. The district judge declined to consider Shirley's testimony about when he became unconscious, faulting him for not citing his deposition in his materials opposing summary judgment. Based on the record cited to the judge, he concluded that the officers used reasonable force, were entitled to qualified immunity, and therefore deserved summary judgment.

We review de novo a district court's summary judgment award. *Turner v. City of Champaign*, 979 F.3d 563, 567 (7th Cir. 2020). On appeal, Shirley argues that because he said "I give up" when his leg broke through the ceiling, and became unconscious (and thus, he contends, passive) after he fell, the beanbag rounds, kicks, and use of the Tasers that he received upon falling reflect excessive force. The officers respond that because Shirley had actively resisted arrest for hours, and they reasonably feared he had a gun (because of the outstanding warrant and the gun they saw fall from Shirley's car), the force was reasonable.

A claim for excessive force under § 1983 invokes the Fourth Amendment's protection against unreasonable seizures. The standard is objective, "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). It requires a fact-intensive inquiry into the totality of the circumstances, including the severity of the crime, potential threats to the safety of officers or bystanders, and whether the plaintiff was actively resisting arrest. *Turner*, 979 F.3d at 567.

Based on the undisputed facts, at the time that the officers used significant force, their actions were reasonable under the circumstances. At that time, the officers knew that Shirley—a felon wanted on charges of unlawful possession of a gun, suspected in a recent shooting, and observed earlier that day with a gun—had fled from police by car and foot and broken into a home's attic to hide. Moreover, for two hours, entreaties to surrender and the use of lesser force (teargas and flashbangs) had failed to quell his resistance. Finally, when the officers saw Shirley's leg break through the ceiling's drywall, followed by his entire body dropping to the floor, they could reasonably fear that he would continue his active flight and resistance, potentially with a gun. That reasonable fear permitted them to respond with the significant force they used.

It is true that using potentially deadly force against a passively resisting suspect who makes no attempt to flee is excessive. *See Phillips v. Comm. Ins. Corp.*, 678 F.3d 513, 524 (7th Cir. 2012). Contrary to the district court's approach to the record, we consider

Shirley's assertion that he said, "I give up" and became unconscious when he fell to the floor. The defendants submitted and cited this portion of Shirley's deposition testimony in their motion for summary judgment. The district court was aware of it even if Shirley himself did not also cite it. Shirley may thus ask us to rely on it in reviewing summary judgment. But even when we consider this testimony, the norm that officers should not use deadly force against a subdued suspect does not help Shirley because it "depends critically on the fact that the suspect is indeed subdued." *Johnson v. Scott*, 576 F.3d 658, 660 (7th Cir. 2009). In *Johnson,* we explained that officers reasonably used violent force on a fleeing suspect, even though he suddenly said, "I give up," because they could not readily determine if the suspect's apparent surrender mid-chase was sincere. *See id*. Likewise, the officers here had ample reason to doubt that Shirley—who had actively resisted arrest for hours by car, by foot, and by hiding, who was suddenly dropping onto them from the ceiling, and who might be armed—was sincere. And even if Shirley was unconscious after he fell, the officers' unrebutted testimony that he continued thrashing on the ground suggests that a reasonable officer would perceive that Shirley was still resisting arrest. Thus, even under Shirley's version of the events, the use of force was not unreasonable under the circumstances.

We AFFIRM the judgment of the district court.