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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LINDA K. CLIFFORD, individually with
right of survivorship and in her capacity
as the personal representative of THE
ESTATE OF ROBERT (BOBBY) S.
CLIFFORD,

Plaintiff,

v.

DEPUTY SHERIFF DAVID CLARK,
individually and in his official capacity
as a police officer,

Defendant.

No. 2:11-cv-02591-MCE-CKD

MEMORANDUM AND ORDER

By way of this action, Plaintiff Linda K. Clifford (“Plaintiff”) seeks to recover damages under 42 U.S.C. § 1983 against Defendant Deputy Sheriff David Clark (“Defendant”) for injuries sustained due to the shooting death of Robert Clifford (“Clifford”) by Defendant. Currently before the Court is Defendant’s Motion for Reconsideration (ECF No. 60) of the Court’s August 28, 2014 Order, which denied Defendant’s Motion for Summary Judgment (ECF No. 55). For the reasons set forth below, Defendant’s Motion for Reconsideration is DENIED.¹

¹ Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

1 **BACKGROUND**

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3 On August 1, 2011, at approximately 10:30 p.m., Defendant was on duty
4 conducting a routine patrol at Sierra College and Douglas Boulevard in Granite Bay,
5 California. Clark Decl., ECF No. 21-4, at ¶ 2. While visiting a convenience store,
6 Defendant observed a vehicle in the middle of the parking lot that was playing loud
7 music. Clark Decl. ¶ 4. Defendant approached the vehicle and found Clifford seated
8 inside. Id. at ¶ 6. The officer shined his spotlight on Clifford’s vehicle, which caused
9 Clifford to turn down the music volume, open his driver’s side door, and step out with his
10 left foot, after which Defendant ordered Clifford to get back in the vehicle. Id. at ¶ 7;
11 Clark Dep. Ex. A, ECF No. 40-1, at 68:2-9. According to Defendant, Clifford “seemed
12 impaired,” and he testified at his deposition that:

13 [Clifford] just was swaying a little bit. Looked a little
14 disheveled as I got closer to him. He seemed really slow with
15 his movements and his responses as far as trying to position
16 himself back into the car, almost like he wasn’t able to do it
without help, or he didn’t have the weight or the momentum
to get himself out of the car.

17 Id. at 68:25-69:6. Clifford did not respond to Defendant’s verbal commands, and
18 Defendant estimates it took him thirty seconds or more to get back in the car. Id. at
19 71:5-17.

20 Once Clifford was back in the car, Defendant asked why he was playing his music
21 so loudly, but Clifford gave only “some type of unintelligible response.” Id. at 75:8-11,
22 76:3-10. Defendant then asked Clifford for identification, and in response Clifford
23 reached forward to open the glove compartment. Clark Decl. ¶ 9. It was at this point
24 that Defendant noticed that there was a gun on the passenger seat of the vehicle, an
25 arm’s length away from Clifford. Id. Defendant drew his gun, ordered Clifford to keep
26 his hands on the steering wheel, radioed for backup, and informed dispatch that he had
27 a person at gunpoint. Id. at ¶ 9-10.

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1 Clifford thereafter slowly moved his hands back in the “general direction of the
2 steering wheel” and “briefly” placed his hands on the wheel. Clark Dep. 84:1-4,
3 85:24-86:1. Clifford proceeded to keep taking his hands off the steering wheel, looking
4 toward the gun, and “moving, swaying in the seat.” Id. at 86:22-24. Defendant
5 continued to tell Clifford not to reach for the gun and that he would be shot if he did. Id.
6 at 87:1-3. Clifford nonetheless kept taking his hands on and off the wheel and began to
7 ask Defendant who he was. Id. at 87:5-6. In response, Defendant verbally identified
8 himself as a Placer County Sheriff’s Deputy. Id. at 87:8-9. Although he believed Clifford
9 knew he was a sheriff’s deputy, he gave him the “benefit of the doubt” and shined his
10 flashlight on his badge. Id. at 94:6. Defendant reported that at some point during this
11 exchange, Clifford’s “demeanor changed” and he became hostile, started to yell, and
12 was “more aggressive in his movements.” Id. at 96:14-18.

13 Defendant testified that he was shining his flashlight in Clifford’s eyes to impair
14 Clifford’s vision, which caused Clifford to try to lift himself above the door frame to get
15 the flashlight out of his eyes. Id. at 100:7-10. According to Defendant, Clifford was
16 “looking and . . . moving forward” and suddenly made “controlled–full arm’s reach for the
17 gun,” whereupon Defendant fired one series of four shots in rapid succession, shooting
18 Clifford and killing him. Id. at 100:11-12; 102:1-9. A toxicology report later indicated that
19 Clifford had a blood alcohol level of 0.223 and 8.0 ng/mL of methamphetamine. Mot. for
20 Summ. J. Ex. F, ECF No. 21-6, at 64, 70, 77.

21 On February 14, 2014, Defendant filed a Motion for Summary Judgment (ECF
22 No. 21), which the Court denied because a reasonable jury could find that Clifford was
23 not capable of making a controlled reach for his gun based on Defendant’s testimony as
24 to Clifford’s impaired and confused state at the time. Order, ECF No. 55, at 20. In
25 addition, the Court found that Defendant’s potentially conflicting testimony as to Clifford’s
26 demeanor prior to the shooting could give rise to a jury question regarding Defendant’s
27 credibility. Id. at 21. Defendant now moves for reconsideration.

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1 Additionally, Local Rule 230(j) similarly requires a party seeking reconsideration to
2 demonstrate “what new or different facts or circumstances are claimed to exist which did
3 not exist or were not shown upon such prior motion, or what other grounds exist for the
4 motion,” and “why the facts or circumstances were not shown at the time of the prior
5 motion.”

7 ANALYSIS

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9 Defendant argues that he is entitled to reconsideration of the Court’s Order (ECF
10 No. 55) because “the Court’s ruling was clearly erroneous, manifestly unjust, and
11 because it did not consider material facts that were presented to it before its decision.”
12 Mot. for Reconsideration, ECF No. 60-1, at 5:21-26. In addition, Defendant contends
13 that the ruling was not “based on reasonable inferences from the factual record,” *id.* at
14 1:17-18, that any lingering issues are not material, and that Defendant is entitled to
15 qualified immunity. The Court disagrees.

16 First, Defendant argues that the Court’s finding was clearly erroneous because it
17 was inconsistent with Ninth Circuit case law. The doctrine of clear error “generally
18 allows for reversal only where the reviewing court is left with a ‘definite and firm
19 conviction’ that an error has been committed.” Tuan Van Tran v. Lindsey, 212 F.3d
20 1143, 1153 (9th Cir. 2000); see Baptiste v. Lids, No. C-12-5209-PJH, 2014 WL 1677597,
21 at *4 (N.D. Cal. Apr. 28, 2014) (holding that the court did not commit clear error because
22 it was not established that the court applied outdated or superseded legal standards).
23 The cases cited by Defendant to show inconsistency with binding precedent, Blanford v.
24 Sacramento County, 406 F.3d 1110 (9th Cir. 2005) and Billington v. Smith, 292 F.3d
25 1177 (9th Cir. 2002), are clearly distinguishable. In those cases, shooting victims who
26 were impaired by drugs or alcohol were still found to pose a threat to the officer. But
27 unlike in those cases, here the credibility of the shooter, the sole surviving witness, is
28 contested due to Defendant’s potentially incredible description of the events leading up

1 to the shooting. This credibility determination cannot be made on a motion for summary
2 judgment. See Anderson, 477 U.S. at 255.

3 Second, Defendant argues that the Court failed to consider material facts
4 contained in two declarations from expert witnesses. Those expert witnesses
5 determined that Clifford was attempting to commit suicide-by-cop and that he was likely
6 facing toward the gun and moving when shot. Defendant argues that this evidence
7 corroborates his version of events, thus defeating any possible credibility issues. In
8 support of the allegation that reconsideration is an available remedy when a Court does
9 not consider “material facts presented to it before its decision,” Defendant references a
10 single case from an Oregon district court, Lyons v. Nike, Inc., 920 F. Supp. 2d 1161,
11 1163 (D. Or. 2013), that cites only to the local rules from the Central District of California.
12 Despite the fact that Defendant fails to identify any controlling case law, the Court will
13 nonetheless consider the two declarations in turn.

14 In a supplemental brief in reply to Defendant’s Motion for Summary Judgment,
15 Plaintiff submitted a declaration from Thomas Streed, an expert in police procedures.
16 Streed opined that “if Deputy Clark’s description is accurate” the evidence suggested
17 that Clifford’s actions were consistent with a suicide-by-cop theory. Streed Decl., ECF
18 No. 48-1, at 16-17, 22-24. The Court did not consider this expert opinion when deciding
19 the motion for summary judgment because it correctly determined that the expert
20 testimony did not affect the outcome of the motion. Order at 10:20-23. Plaintiff’s expert
21 explicitly qualified his statement regarding the suicide-by-cop theory as dependent on
22 the accuracy of Defendant’s description of the events. Streed Decl. at 16. Because the
23 Court’s decision to deny Defendant summary judgment was based on the potential
24 inaccuracy of Defendant’s testimony, the expert testimony was rendered irrelevant.

25 Defendant later submitted a declaration from Robert Snook, an expert in shooting
26 reconstruction, who determined that Clifford “was generally facing forward in the seat
27 while likely also turned to his right” (i.e., toward the gun) when he was shot. Snook
28 Decl., ECF No. 46, at 12. Snook also noted that Clifford’s wound path trajectories are

1 consistent with some movement by Clifford. Id. at 7, 10. However, this declaration was
2 not submitted in support of the Motion for Summary Judgment, but as a designation and
3 disclosure of an expert witness for trial. Thus, Snook's expert testimony was not
4 properly before the Court when the Court ruled on the Motion for Summary Judgment.
5 Moreover, had the Court considered that testimony, it would not have necessarily
6 changed its decision. The issue is whether Clifford could make a controlled reach for the
7 gun, not whether he could turn to his right or move. Those facts were never in dispute.
8 Thus, any facts not considered by the Court in its earlier ruling were immaterial.

9 Third, Defendant argues that this Court came to an "unreasonable inference"
10 when it determined that Clifford was too impaired and confused to make a controlled
11 reach for the gun in the passenger seat. See Richards v. Neilson Freight Lines,
12 810 F.2d 898, 902 (9th Cir. 1987). Additionally, Defendant argues that Clifford's
13 capabilities prior to the shooting cannot be determined by the Court without the benefit of
14 expert testimony on the effects of drugs and alcohol.

15 The Court does not find the inference to be unreasonable or speculative, nor one
16 that requires expert testimony. The Court made its inference not just from Clifford's
17 blood alcohol level of .223 or the methamphetamine in his system, but also from
18 Defendant's own statements that Clifford was "significantly impaired, moving slowly, and
19 confused about what was going on." Order at 21:9-15. Defendant's argument also fails
20 to appreciate that the Court's previous ruling was based primarily on whether the
21 Defendant, the sole survivor to this shooting incident, was credible. The Court did not
22 conclude that Clifford was too impaired to make a controlled reach; the Court decided
23 that a reasonable jury could conclude that Defendant was not credible based on
24 Defendant's own testimony. To succeed on his Motion for Reconsideration, Defendant
25 must allege more than the belief that the Court was previously "wrong," he must show
26 that the decision was unjust or made in clear error. Twentieth Century-Fox Film Corp,
27 637 F.2d at 1341. Since the Defendant has not cited to any case law which shows that
28 the Court's previous decision was made in clear error or was manifestly unjust, he has

1 failed to meet his burden for reconsideration of this issue.

2 Fourth, according to Defendant, there is no genuine dispute over material issues
3 of fact in this case because Clifford's capability of making a controlled reach for the gun
4 is not material. The central issue in any excessive force case is "whether it was
5 objectively reasonable under the circumstances for the officer to believe that the
6 individual posed an immediate threat to their safety, warranting the immediate use of
7 deadly force, rather than less severe alternatives." See Hayes v. Cnty. of San Diego,
8 736 F.3d 1223, 1233 (9th Cir. 2013) (holding that the mere fact that a suspect
9 possesses a weapon does not justify deadly force). Defendant's inconsistent description
10 of the events leading up to the shooting is material to determining Defendant's credibility
11 and the reasonableness of the force used against Clifford. If the jury finds that
12 Defendant is not credible, it could find that Clifford was not reaching for the gun. The
13 jury could then find that the use of force was not objectively reasonable under the
14 circumstances. Thus, it was not clear error for the Court to hold that there are remaining
15 material issues of fact that must be resolved by a jury.

16 Finally, Defendant asserts that he is entitled to the second prong of qualified
17 immunity, namely, that the use of force was appropriate because the suspect "posed an
18 immediate threat to the safety of the officer or others." Defendant's reliance on the
19 defense of qualified immunity is unavailing. At summary judgment, resolution of the
20 qualified immunity defense turns on whether the undisputed facts and the inferences to
21 be drawn therefrom, viewed in the light most favorable to the non-moving party, show a
22 violation of clearly established federal constitutional rights. See Tolan v. Cotton,
23 134 S. Ct. 1861, 1866 (2014). Again, the immediacy of the threat encountered by the
24 Defendant turns on his credibility as to the facts of the encounter. Defendant fails to
25 establish that this Court's previous ruling was clearly erroneous, and thus his instant
26 argument fails as well.

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CONCLUSION

For the foregoing reasons, Defendant's Motion for Reconsideration (ECF No. 60) is DENIED.

IT IS SO ORDERED.

Dated: May 8, 2015


MORRISON C. ENGLAND, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT