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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-929

No. COA21-547

Filed 29 December 2022

Mecklenburg County, No. 18 CVS 16700

RAKEYIA SCOTT, as Administratrix of the Estate of KEITH LAMONT SCOTT (Deceased), Plaintiff,

v.

CITY OF CHARLOTTE and BRENTLEY VINSON, both individually and in his official capacity as a law enforcement officer with the Charlotte-Mecklenburg Police Department, Defendants.

Appeal by defendants from order entered 15 March 2021 by Judge Forrest D.

Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 March 2022.

Charles G. Monnett III & Associates, by Matthew C. Berthold and Charles G. Monnett III, for plaintiff-appellee.

Charlotte-Mecklenburg Police Department, by Jessica K. Battle, for defendant-appellant City of Charlotte.

Law Offices of Lori R. Keeton, by Lori R. Keeton, for defendant-appellant Brentley Vinson.

DIETZ, Judge.

¶ 1

In 2016, Charlotte-Mecklenburg Police Officer Brentley Vinson shot and killed Keith Lamont Scott in a residential area of Charlotte. Plaintiff, on behalf of Scott's

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estate, brought this action against Officer Vinson and the City of Charlotte asserting numerous claims for negligence, gross negligence, wrongful death, and other torts. The trial court denied Defendants’ motion for summary judgment and this appeal followed.

¶ 2 As explained below, we reverse the trial court’s denial of summary judgment in favor of Officer Vinson based on public official immunity. Viewing the facts in the light most favorable to Plaintiff, and taking every reasonable inference in Plaintiff’s favor, Plaintiff has failed to put forth sufficient evidence to rebut the presumption that Officer Vinson acted in good faith and failed to make a prima facie case that Officer Vinson acted maliciously or outside the scope of his authority as a law enforcement officer. Based on the undisputed record in this case, in the tense, moment-by-moment sequence of events, a reasonable officer acting in good faith could have concluded that Scott was armed and about to use deadly force against Vinson and his fellow officers. We therefore reverse the trial court and remand for entry of summary judgment in favor of Officer Vinson on the claims subject to public official immunity.

¶ 3 With respect to Defendants’ remaining arguments, we dismiss for lack of appellate jurisdiction. Defendants contend that the “interests of judicial economy” warrant consideration of those issues, but this Court’s precedent holds that we lack jurisdiction over these additional issues, which do not concern immunity. Defendants

did not petition for a writ of certiorari and we therefore dismiss these remaining arguments for lack of appellate jurisdiction.

Facts and Procedural History

¶ 4 In September 2016, officers from the Charlotte-Mecklenburg Police Department were conducting undercover surveillance at an apartment complex in Charlotte. The officers were trying to locate a suspect with outstanding felony warrants who has no connection to this case.

¶ 5 Officer Brentley Vinson and his supervisor, Sergeant Pendergraph, were among the officers assembled that day. Officer Vinson was driving an unmarked van and Sergeant Pendergraph was in the rear of the van.

¶ 6 During their surveillance activity at the apartment complex, Officer Vinson noticed Keith Lamont Scott's vehicle, a white SUV, close to the officers' van. At some point, Scott drove away and then returned approximately ten minutes later. When Scott drove back to the area and again parked near the officers' van, Officer Vinson saw Scott open his car door and pour marijuana from an orange pill bottle into a cigarillo. Moments later, Officer Vinson saw Scott hold up a handgun and begin to load the gun.

¶ 7 Officer Vinson told Sergeant Pendergraph what he had seen. Sergeant Pendergraph radioed the other officers on the operation and told them they observed a man who "was rolling a joint and had a gun." He instructed the other officers to

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meet him in a nearby parking lot to work out a plan to arrest Scott.

¶ 8 After assessing the situation, Sergeant Pendergraph decided that the “only option” was to conduct a vehicle takedown to ensure that Scott did not attempt to flee while armed through the surrounding residential neighborhood. This “takedown” involved rapidly surrounding Scott’s SUV with police vehicles and officers to prevent Scott from fleeing in the SUV or on foot.

¶ 9 Sergeant Pendergraph testified that his focus when deciding how best to arrest Scott was public safety:

The concern was our safety and the public’s safety. Those factors of what Mr. Scott displayed cause us – caused us to believe that we need to investigate further because, you know, it’s abnormal for somebody to sit next to a vehicle they know is occupied and then produce a weapon and marijuana.

...

We knew we had a suspect displaying strange behavior that was armed. That had been confirmed firsthand by Officer Vinson. We wanted to restrict Mr. Scott’s movements as much as possible, not let him out of the parking lot where he could be a threat to the public, not let him out of the vehicle on foot, you know, and then run and tackle him, because we knew he had a firearm. That’s unsafe for the public and for the officers involved.

¶ 10 The officers who were not in uniform wore tactical vests that identified them as police officers. Other officers were in “full CMPD uniform” and driving marked police vehicles. Officer Vinson wore a black armored vest with his police badge

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attached to the chest area.

¶ 11 Sergeant Pendergraph assigned each officer a role in the takedown. He instructed Officer Vinson to drive the van and attempt to cut off Scott's SUV to prevent Scott from driving away.

¶ 12 What occurred next is the subject of significant disagreement between Plaintiff and Defendants. We describe the sequence of events in the light most favorable to Plaintiff, relying largely on undisputed video footage from the cell phone recording by Scott's wife, Rakeyia Scott, together with the dash camera footage from an officer's patrol car at the scene, and Officer Hostutler's body camera footage.

¶ 13 Mrs. Scott's cell phone video recording begins as officers converge on her husband's vehicle with guns drawn. An officer can be heard saying, "put your hands up." Mrs. Scott continued to record the events as she walked toward the officers, who had their guns trained on her husband. As she approached, she spoke loudly to the officers, saying, "Don't shoot him. Don't shoot him. He has no weapon. He has no weapon. Don't shoot him."

¶ 14 Approximately eight seconds into the recording, an officer suddenly yells, "gun, gun! Drop the gun. Drop the f--king gun."

¶ 15 Mrs. Scott repeated to the officers, "Don't shoot him. Don't shoot him. He didn't do anything." In the background, as Mrs. Scott continued to speak to the officers, an officer can be heard shouting loudly at Scott to "drop the gun!" This officer's

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commands to Scott also can be heard on the dash camera recording inside the patrol car some distance away.

¶ 16 Mrs. Scott then told to the officers: “He doesn’t have a gun. He has a TBI. He’s not going to do anything to you guys. He just took his medicine.” During this time, Scott remained in his car with the door closed. He ignored officers’ commands to put his hands up.

¶ 17 After a few more moments, an officer yelled, “Let me get a f--king baton over here.” At that point, Officer Hostutler’s body camera shows him approaching Scott’s SUV with a baton. Mrs. Scott then loudly said, “Keith, don’t let them break the windows. Come on out the car.”

¶ 18 Just as Officer Hostutler’s body camera shows him striking the rear passenger window of Scott’s SUV with his baton, Mrs. Scott yelled, “Keith!” and then “Don’t do it!” In the light most favorable to Plaintiff, the statement “Don’t do it!” is directed at the officers.

¶ 19 When Officer Hostutler struck the window with the baton, it made a loud bang, but the window did not break. Officer Hostutler struck the window a second time and, this time, the glass broke.

¶ 20 As this was happening, Mrs. Scott yelled again, “Keith, get out the car. Keith. Keith!” At this point, Scott opened the driver’s side door of the SUV and began getting out. Scott’s movements can be seen on the patrol car dash camera footage. Some

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portions are visible in Mrs. Scott's cell phone video. Brief moments are captured on Officer Hostutler's bodycam video. Together, these recordings show that Scott opened his driver's side door and put one foot and then the other foot down on the pavement. Scott then stood up, turned to his left, and moved sideways in front of his open car door toward the front of his vehicle. Scott's movements are slow and appear cautious and his hands are by his sides. It is not possible to discern from the various dash camera, body camera, and cell phone footage what, if anything, Scott has in his hands. As Scott got out of the SUV and began this movement, his wife's tone becomes more frantic as she repeatedly shouted at Scott and the officers, "Keith! Keith! Don't you do it!"

¶ 21 After taking three steps, and with his hands still at his sides, Scott turned his body slightly to his right and slowly backed away from his SUV into the open space between the SUV and the surrounding vehicles and officers. Upon his fifth step, just as Mrs. Scott screamed again, "Don't you do it," Officer Vinson shot Scott four times in his upper body. Officer Vinson was directly in front of Scott, about a car-length away, and Scott was facing Vinson at the time.

¶ 22 Scott immediately fell to the ground after being shot. The officers rushed forward and surrounded him with their guns still drawn, and an officer immediately called for handcuffs. As the officers attempted to move Scott's hands behind his back to handcuff him, Officer Hostutler's body camera recorded one officer exclaiming,

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“grip in his hands, grip in his hands!” and another officer stating, “I got gun.” As the officers administer emergency care to Scott, one officer loudly instructs another, “Hey, stay right here, stay right here with the gun.”

¶ 23 As the officers moved Scott’s left hand behind his back, Officer Hostutler’s body camera recorded blood on Scott’s fingers. The officers recovered a Colt .380 semi-automatic handgun on the ground next to Scott. There was blood on the grip of the handgun and DNA from that blood matched Scott’s DNA. The gun had one round in the chamber, the safety was switched off, and the gun was cocked.

¶ 24 In August 2018, Plaintiff, on behalf of Scott’s estate, brought this action against the City of Charlotte and Officer Vinson alleging various tort claims including negligence, gross negligence, and wrongful death. After discovery, Defendants moved for summary judgment. The trial court denied the motions and Defendants appealed.

Analysis

I. Public official immunity

¶ 25 We begin by addressing Officer Vinson’s appeal based on public official immunity. Officer Vinson moved for summary judgment on the ground that, even taking all the evidence in the light most favorable to Plaintiff, he was entitled to judgment as a matter of law based on public official immunity.

¶ 26 Although, ordinarily, the denial of a motion for summary judgment is not immediately appealable, it is well-settled that the “denial of summary judgment on

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the ground of public official immunity is immediately appealable because it affects a substantial right.” *Bartley v. City of High Point*, 381 N.C. 287, 2022-NCSC-63, ¶ 17. “Public official immunity is more than a mere affirmative defense to liability as it shields a defendant entirely from having to answer for his conduct in a civil suit for damages.” *Id.* Thus, we have appellate jurisdiction over this interlocutory ruling.

¶ 27 Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. R. Civ. P. 56(c). We review a trial court order granting or denying a motion for summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences of fact against the movant and in favor of the nonmovant. *Doe v. City of Charlotte*, 273 N.C. App. 10, 24, 848 S.E.2d 1, 11–12 (2020).

¶ 28 Our Supreme Court recently reaffirmed that a law enforcement officer “is a public official who enjoys absolute immunity from personal liability for discretionary acts done without corruption or malice.” *Bartley*, ¶ 20. The law presumes that public officials will discharge their duties in good faith, and thus, to overcome a defendant’s claim of public official immunity, the burden is on the plaintiff to produce “substantial evidence that an officer failed to discharge his duties in good faith.” *Id.* ¶ 21. This obligation to produce substantial evidence imposes a “heavy burden on the party

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challenging the validity of public officials' actions." *Leete v. County of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995).

¶ 29 "To survive a motion for summary judgment based on public official immunity, a plaintiff must make a prima facie showing that the defendant-official's tortious conduct falls within one of the immunity exceptions." *Bartley*, ¶ 23. These exceptions apply if the officer's conduct was: "(1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Id.* ¶ 20.

¶ 30 Plaintiff asserts two of these exceptions in this case—that Officer Vinson's actions were outside his official authority and that they were done with malice. A defendant "acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Id.* ¶ 23. "An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others." *Id.* A public official acts outside the scope of official authority when the acts are not part of the performance of the duties of that public office. *Id.* ¶ 20.

¶ 31 Here, Plaintiff has not forecast sufficient evidence to overcome the heavy burden of demonstrating either malice or acts outside official authority. Make no mistake, the undisputed facts in this case show that Keith Scott's death was tragic. But with respect to Officer Vinson's actions, that same undisputed evidence puts this case squarely in the zone of cases covered by public official immunity. Scott was

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sitting in a parked SUV in a public area. He was committing a crime by openly possessing and using an illegal drug. At the same time, multiple law enforcement officers saw him either loading or handling a gun in public view. Importantly, there is no dispute that these officers reported seeing the gun in Scott's possession at these earlier points in the encounter, before the shooting took place.

¶ 32 When officers decided that this behavior represented a sufficient threat to public safety to warrant an arrest, they approached Scott's SUV. At the time, Scott's door was open and his leg was partially outside the SUV. The officers were wearing attire clearly indicating they were law enforcement officers. They loudly announced their presence and demanded that Scott show his hands.

¶ 33 Scott did not comply. Officers who were close enough to see inside the SUV then yelled, "Gun, gun!" and other statements indicating to surrounding officers that Scott still had the gun in his possession.

¶ 34 After another officer began breaking a window of the SUV, Scott got out of the SUV. He kept his hands at his sides. It is not possible to discern from the dash camera, body camera, and cell phone footage what, if anything, is in Scott's hand. Officers again repeatedly shouted, "Drop the gun!" and similar statements throughout this time period. Scott kept his hands at his sides, without moving them, and walked backwards, looking in the direction of Officer Vinson. Officer Vinson then fired at Scott, killing him.

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¶ 35 When the officers approached Scott as he lay on the ground, they moved his hands behind his back to handcuff him. As they did so, Officer Hostutler’s body camera recorded one officer exclaiming, “grip in his hands, grip in his hands!” and another officer stating, “I got gun.” As the officers moved Scott’s left hand behind his back, the body camera footage shows blood on Scott’s fingers. The officers recovered a Colt .380 semi-automatic handgun near Scott. There was blood on the grip of the handgun, and DNA from that blood matched Scott’s DNA. The gun was loaded and the safety was off.

¶ 36 These undisputed facts preclude Plaintiff from overcoming the heavy burden to show Officer Vinson acted with a “wicked purpose” or “reckless indifference” to Scott’s life. *Bartley*, ¶¶ 20–23. A law enforcement officer is justified in using deadly force if a reasonable officer in that situation could have believed he faced “an imminent risk of deadly physical force.” *Turner v. City of Greenville*, 197 N.C. App. 562, 567, 677 S.E.2d 480, 484 (2009).

¶ 37 From the perspective of a reasonable officer acting in good faith, the facts were these: First, multiple officers on the scene saw that Scott was armed, as indicated both by their observations when initially approaching the SUV, and their repeated exclamations of “Gun, gun!” and “Drop the gun!” in the moments before the shooting.

¶ 38 Second, Scott ignored an officer’s commands to put his hands up as the officers approached the vehicle.

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¶ 39 Finally, when Scott got out of the vehicle, his movements were unusual and, despite being surrounded by law enforcement officers, he kept his hands down at his sides, preventing the officers from seeing if he was still holding the gun. Scott then walked backwards, facing toward some of the officers, with his arms still at his sides. Body camera footage from immediately after the shooting recorded the officers stating that Scott had a gun in his hand as he lay on the ground. The footage also recorded Scott's bloody fingers as the officers handcuffed him. The gun the officers recovered had Scott's blood on the grip.

¶ 40 A reasonable officer faced with these facts could, in good faith, determine that the use of deadly physical force was necessary because Scott's own use of deadly force against the officers was imminent. *Id.* at 563, 677 S.E.2d at 481. As courts repeatedly have observed, "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). In the final moments of this encounter, a reasonable officer acting in good faith could have acted as Officer Vinson did. *Turner*, 197 N.C. App. at 567, 677 S.E.2d at 484.

¶ 41 We therefore hold that Plaintiff has not overcome the heavy burden to show either malice or that Officer Vinson acted outside the scope of his authority. Accordingly, the trial court erred by denying Officer Vinson's motion for summary judgment on the ground of public official immunity.

II. Remaining arguments on appeal

¶ 42 We next turn to the remaining claims presented by Defendants on appeal, all of which deal with the denial of summary judgment on various grounds other than immunity. Defendants concede that, unlike Officer Vinson’s public official immunity claim, these other claims are not immediately appealable on their own. But Defendants assert in their statement of the grounds for appellate review that it “is well-established that this Court will, in the interests of judicial economy, entertain the entirety of an appeal involving an issue which affects a substantial right, though the remaining issues on appeal do not, in and of themselves, affect such a right.”

¶ 43 This assertion is simply wrong. “Our jurisdictional doctrine does not recognize pendent appellate jurisdiction. So, for example, if a trial court denies the State’s motion to dismiss based on sovereign immunity—a ruling that is immediately appealable—the State ordinarily cannot appeal the denial of its motion to dismiss on other grounds, even if those other rulings are contained in the same order.” *State v. Carver*, 277 N.C. App. 89, 2021-NCCOA-141, ¶ 23. “Instead, a right to appeal those other issues exists only if this Court finds those issues inextricably intertwined with the issues before this Court as of right.” *Id.*

¶ 44 Defendants never suggest that these additional arguments on appeal are “inextricable intertwined” with the public official immunity issue. To the contrary, in their reply brief (while addressing Plaintiff’s argument that this Court lacks

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appellate jurisdiction over these additional issues), Defendants emphasize that they are asking this Court to exercise “discretion” to “consider the entirety of the appeal as it would promote judicial economy.”

¶ 45 Defendants are correct that we always have the *discretionary* authority to review additional, otherwise unappealable issues in an interlocutory appeal, but only through a writ of certiorari. *Doe*, 273 N.C. App. at 22–23, 848 S.E.2d at 10–11.

¶ 46 Defendants did not petition for a writ of certiorari. Although this Court once (fairly routinely) construed filings in appeals as petitions for a writ of certiorari, we have since recognized that this is an extraordinary and highly unusual step because the “Rules of Appellate Procedure provide a vehicle for requesting that this Court issue a writ of certiorari—that vehicle is a petition for a writ of certiorari.” *Id.* at 23, 848 S.E.2d at 11. We require the filing of a petition because it “has specific content requirements designed to ensure that the requesting party provides the Court with the facts and argument necessary to assess, in the Court’s discretion, whether issuing the writ is appropriate.” *Id.*

¶ 47 This case is not so extraordinary that it requires us to eschew this settled doctrine and to issue *sua sponte* a writ of certiorari. Defendants here are no different from countless other defendants whose motions for summary judgment were denied and who had to await final judgment before appealing. *Country Club of Johnston Cty., Inc. v. U.S. Fid. & Guar. Co.*, 135 N.C. App. 159, 161, 519 S.E.2d 540, 542 (1999).

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¶ 48 In sum, the only issue in this appeal over which we possess appellate jurisdiction is Officer Vinson’s claim of public official immunity. With respect to Defendants’ other arguments, they must wait for final judgment. We note, however, that our ruling on Officer Vinson’s public official immunity claim likely impacts at least some of the other claims asserted in this case. The trial court had no opportunity to consider how entry of judgment based on public official immunity could impact these other claims because the court rejected the application of immunity, leading to this appeal. We therefore “leave for the trial court, on remand, the determination of whether there are other grounds on which to rule in this case as a matter of law, or whether the case must proceed to trial.” *Copeland v. Amward Homes*, 269 N.C. App. 143, 151, 837 S.E.2d 903, 909 (2020).

Conclusion

¶ 49 We reverse the trial court’s denial of summary judgment in favor of Defendant Brentley Vinson on the ground of public official immunity and remand for entry of summary judgment in favor of Vinson on that issue. We dismiss Defendants’ remaining issues on appeal for lack of appellate jurisdiction.

REVERSED IN PART, DISMISSED IN PART, AND REMANDED.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).