STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Floid Posey,
Plaintiff Below, Petitioner

vs) No. 11-1204 (Lewis County 10-C-48)

Deputy Robert E. Davis, individually and as a member of the Lewis County Sheriff's Department, Corporal D.L. Cayton, individually and as a member of the West Virginia State Police Department, and the West Virginia State Police Department,
Defendants Below, Respondents

FILED
November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner's appeal, by counsel Erika Kolenich, arises from the Circuit Court of Lewis County, wherein the circuit court granted respondents' motions for summary judgment by order entered on July 22, 2011. Respondent Robert Davis, by counsel Boyd Warner and Melissa Roman, has filed a response. Respondents D.L. Cayton and the West Virginia State Police, by counsel Michael Mullins and Peter Raupp, have also filed a response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On May 29, 2009, petitioner's doctor's office called the Upsher County Sheriff's Department to report that petitioner was suicidal. Petitioner's daughter also called Lewis County 911 and reported that petitioner had threatened to commit suicide with a firearm. Respondents Deputy Robert E. Davis and Corporal D.L. Cayton responded to the call and met petitioner's daughter along the road leading to petitioner's home. Petitioner refused to surrender to the officers and threatened physical violence if they touched him. The officers thereafter physically subdued petitioner, who was then taken to a mental health facility. Upon examination, it was determined that petitioner had broken his ankle, consistent with a fall. After the incident in question, petitioner filed an excessive force lawsuit. Following the completion of discovery, Respondents Deputy Davis and the Lewis County Sheriff's Department filed a motion for summary judgment, as did Respondents Corporal Cayton and the West Virginia State Police. Petitioner timely filed responses thereto and also voluntarily dismissed the claims against the law

enforcement entities, but preserved his claims against the individual respondents. The circuit court granted the respondents' respective motions for summary judgment, finding no genuine issue of material fact.

On appeal, petitioner alleges that the circuit court erred in granting respondents' motions for summary judgment. According to petitioner, when applying the test set forth in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989), the officers exhibited an unreasonable response to subdue a small, seventy-year-old man. Petitioner argues that the situation did not warrant the level of force used, especially since he made no efforts to actually harm himself or others and had no weapons. Based upon the facts and circumstances, petitioner argues that it was entirely possible that a jury would find that he posed no immediate threat and that the officers' actions constituted unreasonable force. Petitioner also argues that it was error to grant summary judgment because his expert witness, Donald Decker, authored a report indicating that respondents' use of force was excessive.

Deputy Davis argues that he was entitled to qualified immunity because his actions were reasonable under the circumstances presented to him, thereby entitling him to summary judgment. He argues that ordinarily, the question of qualified immunity should be decided at the summary judgment phase, and that qualified immunity is an immunity to suit rather than a mere defense to liability. According to Deputy Davis, the law provides that no issue of material fact exists when the petitioner's version of events is a "visible fiction." *Scott v. Harris*, 550 U.S. 372, 381, 127 S.Ct. 1769, 1776 (2007). No other witness claims petitioner was stomped or kicked, and petitioner even testified that the alleged kicking could have been unintentional when the officers tried to get him up off the ground. Further, petitioner's expert's opinion does not create a genuine issue of material fact because the expert actually admitted that Respondent Davis' actions did not constitute excessive force.

Respondents Cayton and the West Virginia State Police argue that an excessive force claim must be analyzed under an objectionably reasonable standard, which does not require the officer to use the least intrusive means to effectuate a seizure or even the minimum amount of force available. According to respondents, reasonableness is instead judged by whether the officer's use of force was within a range of conduct that could be deemed to have been reasonable under the circumstances. Because the officers had a reasonable belief petitioner would harm himself, respondents argue that the actions were warranted and did not constitute excessive force. Further, respondents argue that petitioner's expert's testimony did not create a genuine issue of material fact because the circuit court found that the expert misstated the relevant legal standard for the use of force and then properly ruled his testimony to be irrelevant.

"'A circuit court's entry of summary judgment is reviewed *de novo*.' Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)." Syl. Pt. 1, *Hicks ex rel. Saus v. Jones*, 217 W.Va. 107, 617 S.E.2d 457 (2005). Upon our review of the record, the Court finds no error in the circuit court's entry of summary judgment in favor of respondents. Having reviewed the circuit court's "Order Granting Defendants' Motions For Summary Judgment" entered on July 22, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions

as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we find no error in the decision of the circuit court, and the order granting respondents' motions for summary judgment is hereby affirmed.

Affirmed.

ISSUED: November 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

FLOID R. POSEY,

Plaintiff,

v.

Civil Action No. 10-C-48
Honorable Thomas H. Keadle

DEPUTY ROBERT E. DAVIS, individually and as a member of the Lewis County Sheriff's Department; LEWIS COUNTY SHERIFF'S DEPARTMENT; CORPORAL D.L. CLAYTON; individually and as a member of the West Virginia State Police Department; and WEST VIRGINIA STATE POLICE DEPARTMENT,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

On May 4, 2011, Deputy Robert E. Davis and the Lewis County Sheriff's Department filed a motion for summary judgment with this Court. On June 7, 2011, Trooper D.L. Cayton and the West Virginia State Police Department ("WVSP") filed a motion for summary judgment with this Court. Floid R. Posey ("Plaintiff") responded to these respective responses on June 20, 2011 and June 28, 2011. The Lewis County Defendants replied on June 29, 2011 and the WVSP Defendants replied on July 6, 2011. The Court heard oral arguments in support of, and in opposition to, the defendants' motions on July 12, 2011.

Upon mature consideration the Court hereby GRANTS the defendants' motions, making the following findings of fact and conclusions of law based on the evidence viewed in the light most favorable to Plaintiff:

FINDINGS OF FACT

1. On the morning of May 29, 2009, Plaintiff's doctor's office called the Upshur County Sheriff's Department to report that Plaintiff was suicidal.

2. That same morning, Plaintiff's daughter, Susan Stafford, called Lewis County 911 and reported that her father had threatened to commit suicide with a firearm.

3. This information was relayed to both Deputy Davis and Trooper Cayton.

4. Trooper Cayton, who had experience responding to such calls, including a situation wherein the subject shot himself in full view of the responding police officers and another in which an apparently unarmed suspect pulled a screwdriver out of a pocket and stabbed a police officer, left his detachment to meet Deputy Davis.

5. Upon arriving outside Plaintiff's property, Ms. Stafford confirmed to the officers that her father had threatened to shoot himself.

6. The officers approached Plaintiff, who made it clear that he could do what he wanted to with his life and that he would physically assault anyone who attempted to touch him.

7. Deputy Davis spoke with Plaintiff for approximately five minutes, at which point the officers concurred that something more should be done.

8. Trooper Cayton, who was standing behind Plaintiff, reached around Plaintiff's chest and grabbed Plaintiff with his arm. Trooper Cayton and Plaintiff fell to the ground and the physical altercation ceased.

9. Plaintiff suffered a broken ankle that, according to his physician, was consistent with a fall.

10. Plaintiff's Complaint alleges the following causes of action: (1) violations of 42 U.S.C. § 1981 and 1983 and various state and federal constitutional rights; (2) negligent hiring, training and supervision, as well as the adoption and/or implementation of unlawful policies and customs against the WVSP and the Lewis County Sheriff's Department; and (3) the common law torts of intentional infliction of emotional distress, assault, and battery.

11. Plaintiff, both in response to the defendants' motions for summary judgment and at oral argument, conceded that the defendants are entitled to summary judgment on every claim other than those for excessive force under the United States and West Virginia Constitutions and those common law claims for assault, battery, and the intentional infliction of emotion distress.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate if, from the totality of the evidence presented, the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syl. Pt. 2, Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).

2. Plaintiffs must satisfy a non-trivial burden when opposing a motion for summary judgment:

> [T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere "scintilla of evidence" and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. The evidence illustrating the factual controversy cannot be conjectural or problematic. It must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve. The evidence must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a "trialworthy" issue.

Id. at 60, 337 (emphasis supplied, footnote omitted).

3. Police officers are authorized to exert physical force in seizing a suspect. See Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); see also Sutherland v. Allison, 2011 U.S. App. LEXIS 2410 (11th Cir. 2011) (""Fourth Amendment jurisprudence has long recognized that the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.") (citing Graham v. Connor); Durruthy v. Pastor, 351 F.3d 1080 (11th Cir. 2003) ("[S]ome use of force by a police

officer when making a custodial arrest is necessary and altogether lawful, regardless of the severity of the alleged offense. . . Quite simply, the police were allowed to use some force in effecting the Plaintiff's arrest.").

4. Moreover, the law only requires that the force, viewed from the perspective of a "reasonable" police officer at the time, be "reasonable." See e.g. Graham at 396-97; see also Waterman v. Batton, 393 F.3d 471, 476-77 (4th Cir. 2005) ("Because police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving, the facts must be evaluated from the perspective of a reasonable officer on the scene, and the use of hindsight must be avoided.") (citations, internal quotations omitted); Elliott v. Leavitt, 99 F.3d 640, 642 (4th Cir. 1996) ("The court's focus should be on the circumstances at the moment force was used and on the fact that officers on the beat are not often afforded the luxury of armchair reflection."); Andrews v. City of Calais, 2005 U.S. Dist. LEXIS 34778 (D. Me. 2005) ("With the right to arrest comes the right to use a reasonable degree of force to effect that arrest."); Shulgan v. Noetzel, 2008 U.S. Dist. LEXIS 106369 (E.D. Wash. 2008) ("Claims of excessive force are analyzed under the Fourth Amendment's objective reasonableness standard.").

5. Furthermore, there is no requirement that a suspect be warned that he is being arrested. See e.g. Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004).

6. In this case, the officers were presented with information that Plaintiff had threatened to kill himself with a firearm. When they confronted him, Plaintiff yelled at the officers, told them that he could do he wanted with his life, indicated that he would not leave with Deputy Davis, and threatened to inflict physical violence on anyone who attempted to take him into custody.

7. Based on the information presented to these officers at the time that they confronted Plaintiff, it was reasonable for them to conclude that force was necessary in order to protect Plaintiff and themselves.

8. In addition, the record is clear that Trooper Cayton's act of grabbing Plaintiff across the chest from behind, which was done in an attempt to secure him and with the knowledge that Plaintiff threatened violence against himself and anyone who touched him, was a reasonable application of force.

9. The issue in the analysis of the use of force is whether the force was reasonable. Plaintiff herein retained an expert who opined that there were other reasonable alternatives which were less likely to injure Plaintiff. Because this Court finds the use of force herein, as a matter of law, to be reasonable, it is irrelevant that Plaintiff's expert came forward with other reasonable alternatives. There is no requirement that the force used be the minimal amount of force available, only that it be reasonable. See e.g. Graham at 396-97; Andrews v. City of Calais, 2005 U.S. Dist. LEXIS 34778 (D. Me. 2005) (noting that the standard is whether a "reasonable degree of force" was used).

10. The officers were justified in their use of force and therefore the defendants are entitled to summary judgment as to any claims of excessive force, regardless of whether such a claim is made pursuant to the United States' Constitution or the Constitution of the State of West Virginia, as the analysis is the same under both constitutions.

11. Moreover, since the law recognizes that police are entitled to use a reasonable amount of force when lawfully seizing a suspect, and the use of force against Plaintiff was reasonable, the defendants are entitled to summary judgment as to any cause of action for assault and battery.

12. In Syllabus Point 3 of Travis v. Alcon Laboratories, Inc., 202 W. Va. 369, 504 S.E.2d 419 (1998), our Supreme Court of Appeals recognized that:

> In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established. It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

13. Since the officers' conduct – in both seizing Plaintiff and using a reasonable amount of force to do so – was lawful, they cannot possibly be found to have acted in an atrocious and intolerable manner.

14. Nor is there any evidence in the record that the officers intended to inflict emotional distress on Plaintiff or that Plaintiff suffered any emotional distress as a result of his interactions with the police and, as a result, these defendants are entitled to summary judgment as to Plaintiff's cause of action for intentional infliction of emotional distress.

15. Based upon the foregoing Findings of Fact and Conclusions of Law, which the Court examined and construed in a light most favorable to the plaintiff, Floid Posey, the Court finds that there are no genuine issues as to any material facts necessary to withstand a motion for summary judgment, and, therefore the Court concludes that the defendants, Deputy Robert Davis, the Lewis County Sheriff's Department, Corporal D.L. Cayton, and the West Virginia State Police, are entitled to Summary Judgment in their favor as a matter of law. Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that the Defendants' respective Motions for Summary Judgment are GRANTED and that this case is dismissed from this Court's docket, with prejudice, with each side responsible for its own costs.

The objections and exceptions of each party are duly noted, and the Clerk of this Court is directed to provide a copy of this Order to all counsel of record upon its entry.

Entered this 21 th day of July, 2011.

Hon. Thomas H. Keadle, Judge

Prepared and submitted by:

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STATE OF WEST VIRGINIA, COUNTY OF LEWIS, TO-WIT:
I, JOHN B. HINZMAN, Clerk of the Circuit Court of Lewis County, do hereby certify that the foregoing is a true copy of an Order entered in the above styled action on the 21 day of July, 20 11.
Given under my hand and official seal this the 25 day of July, 20 11.

JOHN B. HINZMAN
Clerk of the Circuit Court of
Lewis County, West Virginia