FILED
United States Court of Appeals
Tenth Circuit

July 11, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JESSE WISE,

Plaintiff - Appellee,

v.

DON CAFFEY; BRET BOWLING, in his individual and official capacity as Creek County Sheriff,

Defendants - Appellants.

Nos. 22-5069 and 22-5086

Appeals from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:20-CV-00067-JLK-CDL)

Seth D. Coldiron, Goolsby Proctor, Oklahoma City, Oklahoma, for Defendant-Appellant Don Caffey.

Andy A. Artus (Jamison C. Whitson, Collins, Zorn & Wagner, PLLC, Oklahoma City, Oklahoma, on the brief), for Defendant-Appellant Bret Bowling.

John Warren (Donald E. Smolen, II, Laura L. Hamilton, and Lawrence R. Murphy, Jr., with him on the brief), Tulsa, Oklahoma, for Plaintiff-Appellee Jesse Wise.

Before **TYMKOVICH**, **MATHESON**, and **EID**, Circuit Judges.

TYMKOVICH, Circuit Judge.

While Jesse Wise was a pretrial detainee at Creek County Jail in Oklahoma, Officer Don Caffey performed a knee strike on Mr. Wise when he was seated on the ground and handcuffed. Officer Caffey subsequently resigned his employment at Creek County Jail as a result of an investigation into the incident.

Mr. Wise sued Officer Caffey and Creek County Sheriff Bret Bowling under 42 U.S.C. § 1983, alleging excessive-force and supervisory-liability claims against Officer Caffey and Sheriff Bowling, respectively. At the summary-judgment stage, the court held Officer Caffey's knee strike was excessive as a matter of law and that he and Sheriff Bowling were not entitled to qualified immunity. This consolidated appeal followed.[1]

We affirm the district court's denial of summary judgment as to Officer Caffey's qualified-immunity defense because the "facts that the district court ruled a reasonable jury could find would suffice to show a legal violation." *Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1267 (10th Cir. 2013). Furthermore, we agree with the district court that the law was clearly established.[2]

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[1] Officer Caffey and Sheriff Bowling appealed separately. We consolidated their appeals because they arise from the same district court action and involve the same appellee and issues decided at the same stage of proceedings.

[2] We do not reach the question of whether the district court correctly determined that Officer Caffey's knee strike was excessive as a matter of law. Standing alone Officer Caffey would not be able to appeal this ruling because it is not final—*e.g.*, the court must still determine damages—nor does Officer Caffey appeal it here. Furthermore, even if Officer Caffey had appealed the district court's grant of summary judgment, we could consider such a challenge only through our discretion to exercise jurisdiction pendent to his interlocutory appeal. But the doctrine of pendent jurisdiction is discretionary and disfavored in qualified-immunity appeals. *Cox v. Glanz*, 800 F.3d 1231, 1255 (10th Cir.

But we reverse the lower court's denial of summary judgment as to Sheriff Bowling's qualified-immunity defense. Under the facts alleged, Sheriff Bowling was not clearly on notice that his policies, training, and supervision of Officer Caffey were constitutionally deficient.

I. Background

The following are the facts as recounted by the district court or by the parties in the summary-judgment proceedings.

A. Use of Force

Mr. Wise was arrested for larceny, eluding police, and driving with a cancelled or suspended license and booked as a pretrial detainee at Creek County Jail in Oklahoma. After Mr. Wise reported neck pain, he was treated at the Jail medical unit. Dissatisfied with the medical care he was receiving, Mr. Wise began resisting officer and medical staff commands. He punched a wall, knocked over medical equipment, and threatened medical staff. Because of his behavior, staff sent Mr. Wise to his housing unit and eventually moved him to the Jail's segregation unit.

After he was taken to the segregation cell, Mr. Wise began attempting to cut a lump on his neck with a plastic spork. When officers entered the cell, Mr. Wise dropped the spork and put his hands behind his back to be handcuffed. Mr. Wise was then transported to a booking area for observation, where he was placed in a restraint chair. Eventually, Mr. Wise was removed from the restraint chair and placed in a holding cell,

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2015). Nevertheless, because Officer Caffey has not asked us to, we decline to exercise pendent jurisdiction over this question.

where he again attempted to cut the lump from his neck. As a result, Mr. Wise was once again placed in a restraint chair.

After Mr. Wise was removed from the restraint chair, he was placed in handcuffs with his hands behind his back. While standing with his back to a wall, he was instructed to remove his clothes[3] so that he could be placed in a turtle suit—a "smock designed to prevent a detainee from injuring themselves." J. App. 343. Mr. Wise did not want to put on the turtle suit, so officers attempted to remove his remaining clothing to place the turtle suit on him. To avoid the turtle suit, Mr. Wise slid down the wall to a seated position on the floor, with his hands still handcuffed behind his back. While Mr. Wise was seated on the ground and handcuffed, Officer Caffey performed a knee strike to Mr. Wise's face. Mr. Wise alleges he suffered physical pain, swelling, and mental anguish.

Following the incident, Sheriff Bowling directed Undersheriff Joe Thompson to undertake an investigation to determine if any Jail policies had been violated. Undersheriff Thompson determined that Officer Caffey should be "terminated immediately and that a separate criminal investigation be completed" related to the knee strike. J. App. 280. Undersheriff Thompson also testified that a knee strike is "serious and dangerous behavior" and the "use of force was unnecessary and violate[d] the Creek County Jail policies and procedures." J. App. 279.

[3] Video footage reveals Mr. Wise was shirtless at this point, wearing only pants and underwear. Pl.'s Ex. 14 at 00:05–00:43.

B. Use-of-force Policies, Creek County Jail Training, Officer Caffey's Disciplinary History

Sheriff Bowling was responsible for "the law enforcement in the entire county." J. App. 2336. His duties extended to implementing and maintaining Creek County Jail's policies and procedures. Sheriff Bowling was responsible for "full oversight" of the Jail and had "full responsibility" for the Jail. *Id.*

At the time of the incident, the Jail had a Use of Force Policy. The Use of Force Policy stated that "[e]very reasonable effort will be made to prevent any situations which require the use of force." J. App. 637. The Policy also explains that "[t]he use of any type of force for punishment or reprisal, or which is unnecessary or excessive, is strictly prohibited." *Id.* The Policy further states that "use of force is justified to maintain or restore safety, security and control. The method(s) of force employed will be most practical and humane under the circumstances." J. App. 638. A detention officer can only use force after he has been trained. The Policy is silent regarding the propriety of specific types of physical force, including knee strikes.

At the time of the incident, Officer Caffey had received 371.5 hours of training through the Council on Law Enforcement Education and Training, a state organization that provides education and training to Oklahoma law enforcement. J. App. 644. Officer Caffey testified that he received training to use the "minimal amount of force necessary." J. App. 648. Officer Caffey also testified that he received training regarding physical use of force, including with respect to knee strikes. J. App. 648–54.

According to Officer Caffey, the training he received at the Jail involved job shadowing and online training. Officer Caffey also testified that "they [meaning Creek County Jail] were trying to put together a training system" during his employment. J. App. 658. He also testified that until the lawsuit was filed, he had only seen an older version of the Jail policies and procedures manual. In July 2018—just months before the incident—Officer Caffey wrote on a form signed by his supervisor that "[a] copy of the handbook would be nice." J. App. 1403. It is unclear whether Officer Caffey had a copy of the Jail Use of Force Policy identified above.

Officer Caffey testified that he did not receive any training at the Jail regarding use of force. Another detention officer testified similarly. That officer testified that prior to his start date, an individual in "the sheriff's office" told him "there's excessive force, don't go too hard." J. App. 1370. Sheriff Bowling testified that use-of-force training is "vital" because "it's an officer safety issue as well as . . . inmate" control issues. J. App. 2114.

By the time of the incident, the Jail had reprimanded Officer Caffey 12 times for a variety of infractions. But the only reprimand related to use of force pertained to improper use of a restraint chair. J. App. 1431–32. The Use of Force Policy, however, makes clear that a restraint chair, properly used, is an appropriate use of force.

Prior to the incident involving Mr. Wise, another inmate died in an incident allegedly involving a restraint chair. Sheriff Bowling was aware of this death, which occurred over a year prior to Mr. Wise's detention but did not involve Officer Caffey.

C. Procedural History

Mr. Wise asserted two claims against Officer Caffey: (1) a claim under 42 U.S.C. § 1983 for excessive use of force; and (2) a claim under Article II § 9 of the Oklahoma Constitution. Initially, Mr. Wise brought his excessive use-of-force claim under the Eighth Amendment. But the parties agreed that the claim should be brought under the Fourteenth Amendment because Mr. Wise was a pretrial detainee at the time of the incident.

Mr. Wise moved for partial summary judgment, requesting a determination that Officer Caffey's knee strike was excessive as a matter of law. Officer Caffey moved for summary judgment based on qualified immunity. The district court granted Mr. Wise's motion and denied Officer Caffey's, holding that his knee strike was excessive as a matter of law and that he was not entitled to qualified immunity.

Mr. Wise brought claims against Sheriff Bowling, in his individual and official capacity, under 42 U.S.C. § 1983. Mr. Wise asserts claims based upon municipal liability and supervisor liability. Sheriff Bowling moved for summary judgment in his official and individual capacities.

The district court denied both motions, holding first that Sheriff Bowling was not entitled to qualified immunity in his individual capacity because a reasonable jury could find he violated Mr. Wise's rights and that the law was clearly established at the time that a prison official's failure to protect an inmate by taking reasonable measures to ensure safety violates a constitutional right. Second, the court held that Sheriff Bowling was not entitled to summary judgment on the official capacity (municipal liability) claim against

him because a reasonable jury could find he inadequately trained or supervised employees, and that failure led to Mr. Wise's injuries.[4]

II. Analysis

We review the district court's denial of a summary-judgment motion asserting qualified immunity de novo. *Arnold v. City of Olathe*, 35 F.4th 778, 788 (10th Cir. 2022). "In applying this standard, we view the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016) (quoting *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 997 (10th Cir. 2011)). "In qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts." *Scott v. Harris*, 550 U.S. 372, 378 (2007); *accord Emmett v. Armstrong*, 973 F.3d 1127, 1130 (10th Cir. 2020).

A. Qualified Immunity

"Qualified immunity protects government officials from civil liability so long as 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Arnold*, 35 F.4th at 788 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "The doctrine protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

[4] Sheriff Bowling does not appeal the district court's denial of summary judgment on the municipal-liability/official-capacity claims. Bowling Br. at 1.

A plaintiff can overcome a qualified-immunity defense by "show[ing] that (1) the officers' alleged conduct violated a constitutional right, and (2) it was clearly established at the time of the violation, such that 'every reasonable official would have understood,' that such conduct constituted a violation of that right." *Reavis ex. rel Est. of Coale v. Frost*, 967 F.3d 978, 984 (10th Cir. 2020) (alteration in original) (quoting *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016)). We have discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236.

"Federal appellate courts typically do not have jurisdiction to review denials of summary judgment motions, but the denial of qualified immunity to a public official is immediately appealable to the extent it involves abstract issues of law." *Cox*, 800 F.3d at 1242 (cleaned up). "Specifically, we have jurisdiction to review (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation." *Id.* (cleaned up). "Those facts explicitly found by the district court, combined with those that it likely assumed, [] form the universe of facts upon which we base our legal review of whether defendants are entitled to qualified immunity." *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008).

When "a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, . . . we usually must take them as true—and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law." *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010). A notable exception to this rule is "when

the 'version of events' the district court holds a reasonable jury could credit is 'blatantly contradicted by the record,' [at which point] we may assess the case based on our own *de novo* view of which facts a reasonable jury could accept as true." *Id.* at 1225–26 (quoting *Scott*, 550 U.S. at 380).

B. Officer Caffey

Officer Caffey first argues that the district court's factual findings were erroneously based upon a visible fiction that was blatantly contradicted by the evidence. Yet we need more than a "mere claim that the record blatantly contradicts the district court's factual recitation" in order for "us to look beyond the facts found and inferences drawn by the district court." *Crowson v. Washington Cty.*, 983 F.3d 1166, 1177 (10th Cir. 2020) (internal quotation marks omitted). "Rather, the court's findings must constitute visible fiction." *Id.* (internal quotation marks omitted). "The standard is a very difficult one to satisfy." *Id.* (citation omitted).

Officer Caffey's efforts to meet this standard so that we can assess de novo the factual disputes are unavailing. After reviewing the videos in question, the district court's factual recitation is not at odds with the record. Consequently, we do not have jurisdiction to review Officer Caffey's arguments as to factual disputes. Instead, we move on to the abstract legal questions that are germane to the two-pronged qualified-immunity inquiry.

1. Violation of a constitutional right

For those in pretrial confinement, like Mr. Wise, claims regarding mistreatment while in custody fall within the ambit of "the due process clauses of the Fifth or

Fourteenth Amendment and their protection against arbitrary governmental action by federal or state authorities." *Porro v. Barnes*, 624 F.3d 1322, 1326 (10th Cir. 2010). Because Mr. Wise was in state custody, we assess his claim under the Fourteenth Amendment.

"[A] pretrial detainee can establish a due-process violation by 'providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." *Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019) (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015)). For Fourteenth Amendment excessive-force claims, we use those factors set out in *Kingsley* to determine "the reasonableness or unreasonableness of the force used." 576 U.S. at 397.

These considerations include "[1] the relationship between the need for the use of force and the amount of force used; [2] the extent of the plaintiff's injury; [3] any effort made by the officer to temper or to limit the amount of force; [4] the severity of the security problem at issue; [5] the threat reasonably perceived by the officer; and [6] whether the plaintiff was actively resisting." *Id.* Like the *Graham v. Connor*, 490 U.S. 386, 396 (1989), factors that we traditionally use for Fourth Amendment excessive-force claims, these considerations are not exclusive but merely "illustrate the types of objective circumstances potentially relevant to a determination of excessive force," *Kingsley*, 576 U.S. at 397.

Applying these factors to this case, a reasonable factfinder could find that Officer Caffey's use of force was objectively unreasonable under *Kingsley*.

a. Relationship between the need for use of force and the amount of force used

At the time Officer Caffey deployed the knee strike, Mr. Wise was seated on the floor with his hands cuffed behind his back. He was no longer resisting when Officer Caffey kneed him in the face. The other officers in the room with Officer Caffey and Mr. Wise all agreed that Officer Caffey's knee strike was unreasonable and a disproportionate response given that Mr. Wise was no longer resisting. Officer Caffey argues that his force was justified because he had a legitimate interest in maintaining order. While abstractly true, a reasonable factfinder could find he struck Mr. Wise while he was handcuffed, not resisting, and seated on the ground; that did not further the legitimate penological interest of maintaining order and preventing Mr. Wise from injuring himself.

This factor weighs in Mr. Wise's favor.

b. Extent of injury

This second factor focuses on the extent of Mr. Wise's injury. As a result of Officer Caffey's knee strike, Mr. Wise alleges he suffered physical pain, swelling, and mental anguish. In contrast, a witness testified that Mr. Wise had no visible injuries after the knee strike. The district court found that there were disputed issues of fact regarding the extent of Mr. Wise's physical injuries and thus concluded that this factor was neutral and thus favored neither party on summary judgment. We agree, this factor is neutral as to Mr. Wise and Officer Caffey.

c. Effort made by the officer to temper or to limit the amount of force

The third factor asks whether the officer made any effort to temper or limit the amount of force used. The district court found Officer Caffey did nothing to temper the use of force but "[r]ather, Mr. Caffey kneed Mr. Wise in the face while he was seated on the ground, with his back to the wall, hands handcuffed behind his back, and not actively resisting." J. App. 2285.

Officer Caffey argues that he, and the other officers, began by using deterrence such as placing Mr. Wise in isolation or observation cells, or applying modest force, such as handcuffs, pain compliance techniques, and a restraint chair. Furthermore, Officer Caffey argues, only after Mr. Wise continued his attempts at self-harm, including his refusal to don the turtle suit and after repeated warnings from the officers, did he strike Mr. Wise once with his knee to pin him to the wall.

The video evidence belies Officer Caffey's claims regarding Mr. Wise's actions and his attempts at limiting or tempering his use of force. Officer Caffey did not attempt to speak with Mr. Wise, nor did he attempt to remove Mr. Wise's clothing while he was seated. Instead, Officer Caffey barreled past the two officers in the room and delivered a knee strike to Mr. Wise's face/upper body. Pl.'s Ex. 14 at 00:36–00:49. This factor weighs in Mr. Wise's favor.

d. Severity of the security problem at issue

There was no security problem at issue here. Mr. Wise was handcuffed and on the floor of a detox cell, surrounded by three officers. Officer Caffey's argument to the contrary—that Mr. Wise's self-harm posed a security risk—is unpersuasive. Even if we

were to credit Officer Caffey's argument that the potential risk of Mr. Wise's suicide necessitated force, a factfinder could conclude Officer Caffey's use of force was disproportionate to the security threat he perceived. This factor weighs in Mr. Wise's favor.

e. Threat reasonably perceived by the officer

For the same reasons, a factfinder could conclude Mr. Wise was not a threat while seated, handcuffed, and outnumbered by officers in the detox cell. The two other officers in the cell at the time both testified that they did not perceive Mr. Wise as a threat. J. App. 1176 (Officer Dixon "did not feel threatened by [Mr. Wise] at the time of the knee strike and did not believe that the knee strike was necessary."); J. App. 422 ("[A]t no time did [Officer Lundstrom] feel threatened and at no time did [he] ever feel like [he] needed to go hands-on with [Mr. Wise] at all."). This factor favors Mr. Wise.

f. Active resistance by the plaintiff

The final *Kingsley* factor asks whether Mr. Wise was actively resisting. Officer Caffey argues that Mr. Wise was actively resisting by failing to follow commands and not putting on the turtle suit when he performed his knee strike. Officer Caffey's assertions are contradicted by the video evidence and the testimony from the other officers in the room. The district court found that "[e]ven if Mr. Wise's refusal to take off his clothes (while handcuffed) amounted to resistance, he was no longer resisting once he was seated on the ground with his hands handcuffed behind his back." J. App. 2286. When even that level of resistance ended, so too did the justification for Officer Caffey's use of force. *See McCoy v. Meyers*, 887 F.3d 1034, 1045 (10th Cir.

2018) ("[T]he justification for using force ceased once Mr. Weigel was handcuffed and his legs were bound." (internal quotation marks omitted)).[5] This factor favors Mr. Wise.

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The *Kingsley* factors favor Mr. Wise. A reasonable factfinder could conclude Officer Caffey's use of force was objectively unreasonable under the circumstances and therefore represents a violation of Mr. Wise's Fourteenth Amendment rights. *See generally Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012) (holding that where a suspect is noncompliant but not attempting to fight or flee, the immediate resort to physical force "without attempting to use physical skill, negotiation, or even commands" is objectively unreasonable).

2. Clearly-established law

The second prong of the qualified-immunity inquiry requires Mr. Wise to show that "the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." *Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000) (quoting *Albright v. Rodriguez*, 51 F.3d 1531, 1534–35 (10th Cir. 1995)). "A constitutional right is clearly established if it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Doe v. Woodard*, 912 F.3d 1278, 1289 (10th Cir. 2019) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)).

[5] While Officer Caffey takes issue with the district court's use of Fourth Amendment caselaw, we have previously said that Fourth Amendment caselaw is "highly relevant" in the Fourteenth Amendment context. *Estate of Booker v. Gomez*, 745 F.3d 405, 424 n.26 (10th Cir. 2014).

"To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 577 U.S. at 12 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). "The plaintiff must show there is a 'Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" *Doe*, 912 F.3d at 1289 (quoting *Klen v. City of Loveland*, 661 F.3d 498, 511 (10th Cir. 2011)).

"There 'need not be a case precisely on point.'" *Id.* (quoting *Redmond v. Crowther*, 882 F.3d 927, 935 (10th Cir. 2018)). But the Supreme Court "ha[s] repeatedly told courts not to define clearly established law at too high a level of generality." *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021). "It is not enough that a rule be suggested by then-existing precedent; the rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* (internal quotation marks omitted). Indeed, "the salient question is whether the state of the law gave the defendants fair warning that their alleged treatment of the plaintiffs was unconstitutional." *Doe*, 912 F.3d at 1289 (cleaned up) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *see also Colbruno v. Kessler*, 928 F.3d 1155, 1160 (10th Cir. 2019) ("The law was 'clearly established' if it 'was sufficiently clear that every reasonable official would understand that what he is doing is unlawful.'" (quoting *Wesby*, 138 S. Ct. at 589)).

Officer Caffey argues that the law within this circuit, as it relates to a resisting detainee under the Fourteenth Amendment, was not clearly established on the date of the incident (October 14, 2018) as opposed to the Fourth Amendment context. Officer Caffey frames the evaluation regarding whether a right is clearly established far more literally than we require. According to Officer Caffey, the only cases that could have provided him notice that kneeing a subdued inmate in the face was a violation of the inmate's constitutional rights would have to come after the Supreme Court's holding in *Kingsley* (2015) and before the subject incident (2018). *See* Caffey Br. at 38–39. But as we explained above, the notice requirement can be discerned from a range of excessive-force cases that "illustrate the types of objective circumstances potentially relevant to a determination of excessive force." *Kingsley*, 576 U.S. at 397; *see also Colbruno*, 928 F.3d at 1161 ("Ultimately, we consider whether our precedents render the [il]legality of the conduct undebatable." (alteration in original) (internal quotation marks omitted)).

Our precedent clearly establishes that in this circuit "officers may not continue to use force against a suspect who is effectively subdued." *Perea*, 817 F.3d at 1204. This clearly-established principle is confirmed by a number of our cases. In *Perea* in 2016, we held that "[a]lthough use of some force against a resisting arrestee may be justified, continued and increased use of force against a subdued detainee is not." 817 F.3d at 1203. In *Estate of Booker* in 2014, we noted that regardless of which constitutional amendment applies, the officer-defendant was "on notice that use of such force on a person who is not resisting and who is restrained in handcuffs is disproportionate." 745 F.3d at 429.

Likewise, in *McCoy* in 2018, we held that the officer-defendant violated the plaintiff's "clearly established right to be free from continued force after he was effectively subdued." 887 F.3d at 1048. In that case, we also noted that a suspect's initial resistance does not justify continued use of force once resistance ceases. *Id.* at 1051. Furthermore, in *Dixon v. Richer*, we held that an officer-defendant's continued striking of a detainee after he had been subdued was clearly unconstitutional. 922 F.2d 1456, 1463 (10th Cir. 1991).

Because the law was clearly established when Officer Caffey used objectively unreasonable force in striking Mr. Wise—a subdued pretrial detainee who posed no immediate security threat—Officer Caffey is not entitled to qualified immunity.

C. Sheriff Bowling

Sheriff Bowling contends that he is entitled to qualified immunity as a matter of law. We agree.

1. Violation of a constitutional right

Mr. Wise asserts his § 1983 claim against Sheriff Bowling in his individual capacity under a theory of supervisor liability. Supervisor status alone is insufficient to hold a defendant liable. *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996). To impose liability, a plaintiff must first establish that a subordinate violated a constitutional right. This much we have already concluded above. Next, a plaintiff must establish three elements to hold a supervisor liable personally: (1) personal involvement; (2) causation; and (3) state of mind. *Estate of Booker*, 745 F.3d at 435.

For the purposes of this opinion, we assume that Mr. Wise can establish that Sheriff Bowling violated his constitutional rights through a theory of supervisor liability predicated on one or more of Sheriff Bowling's acts or omissions, namely: (1) deficient written policies; (2) lack of training at Creek County Jail on the use of force; and (3) lack of supervision of Officer Caffey. Therefore, we turn to whether the law was clearly established that these actions constituted a violation of Mr. Wise's rights.

2. Clearly-established law

The district court relied solely on *Keith v. Koerner*, 843 F.3d 833 (10th Cir. 2016), to hold that it was clearly established that Sheriff Bowling's conduct violated Mr. Wise's constitutional rights as of October 14, 2018.

In *Keith*, a female inmate who had been raped by a prison employee brought a § 1983 action against the warden alleging supervisory liability based on the prison's insufficient training and policies, thereby creating an environment in which sexual misconduct was likely to occur. *Id.* at 836. We noted in *Keith* that "it is clearly established that a prison official's deliberate indifference to sexual abuse by prison employees violates the Eighth Amendment." *Id.* at 849 (quoting *Keith v. Koerner* (*Keith I*), 707 F.3d 1185, 1188 (10th Cir. 2013)). We also noted similar cases where there were allegations of sexual misconduct by prison employees toward inmates. *See, e.g.*, *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993) (finding "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards," and "acknowledg[ing] that a prison official's failure to protect an inmate from a known harm may constitute a constitutional violation."); *Tafoya v. Salazar*, 516 F.3d 912,

917, 920 (10th Cir. 2008) (holding that "reasonable measures" include "serious investigation and response" when a prison official becomes aware of a risk to inmates, including sexual misconduct by prison employees).

We also made mention of *Farmer v. Brennan* in our language that "prison officials . . . must 'take reasonable measures to guarantee the safety of the inmates.'" *See Keith*, 843 F.3d at 850 (quoting *Farmer*, 511 U.S. 825, 832 (1994)). In *Farmer*, a transsexual prisoner projecting feminine characteristics brought a *Bivens* suit against prison officials, claiming that officials showed deliberate indifference by placing the prisoner in general prison population, and thus failing to keep the prisoner from harm allegedly inflicted by other inmates. *Id.* at 829–32. The Court held that prison officials may be held liable under the Eighth Amendment for denying humane conditions of confinement, but only if they knew that the inmate faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it. *Id.* at 847.

The Supreme Court has repeatedly admonished courts of appeals "not to define clearly established law at a high level of generality." *Ashcroft*, 563 U.S. at 742. The relevant inquiry is "whether the violative nature of particular conduct is clearly established." *Id.* And this inquiry must be answered "in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Having looked at *Keith*, we cannot say that it outlined the "contours" of the constitutional right such that it would have put Sheriff Bowling on notice that his conduct was a violation of clearly-

established law. *See Perry v. Durborow*, 892 F.3d 1116, 1122–23 (10th Cir. 2018) ("'The contours of' the constitutional right at issue 'must be sufficiently clear that a reasonable official would understand what he is doing violates that right." (quoting *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013))).

We would have to look at *Keith* at far too high a level of generality to come away with a proposition of clearly-established law that Sheriff Bowling's conduct violated. *Keith* involved a prison with a pattern of widespread and persistent abuse similar to that which the plaintiff complained of and which created a substantial risk of similar harm to inmates. This stands in stark contrast to the facts here, where there is no evidence of any persistent pattern of use-of-force violations against inmates by Jail staff generally, or by Officer Caffey in particular.

Comparing the two, we find that *Keith* does not clearly establish that a sheriff or supervisor has violated the constitutional rights of a pretrial detainee when a subordinate officer uses blatantly unreasonable force against the detainee in contravention to an allegedly "deficient" use-of-force policy. Nor does *Keith* clearly establish that a supervisor has violated the constitutional rights of a detainee when he employs an officer with several hundred hours of state-certified training, including in use of force of the same type as the violation itself, despite the lack of formal training at the correctional facility itself. And finally, we cannot say that *Keith* clearly established that a supervisor violates the rights of a detainee when he continues to employ an officer who receives repeated reprimands for violations of the jail's policies, but only a single use-of-force

reprimand that was itself remote in time from the underlying violation and qualitatively different.

Keith could not have placed Sheriff Bowling on notice that his particular conduct in this case was in violation of inmates' constitutional rights. Because the law was not clearly established at the time of the violation, Sheriff Bowling is entitled to qualified immunity.

III. Conclusion

We AFFIRM the district court's denial of summary judgment as to Officer Caffey's qualified-immunity defense. We REVERSE the district court's denial of summary judgment as to Sheriff Bowling's qualified-immunity defense and REMAND with directions to enter summary judgment in his favor.