FILED
United States Court of Appeals
Tenth Circuit

July 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ADRIAN MARTINEZ,

Plaintiff - Appellant,

v.

SEAN JENNEIAHN; LAUREN MACDONALD; PETER VORIS,

Defendants - Appellees.

No. 22-1219
(D.C. No. 1:19-CV-03289-RM-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

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

Plaintiff-Appellant Adrian Martinez appeals the district court's order granting summary judgment for Defendant-Appellee police officers on his 42 U.S.C. § 1983 claims that they used excessive force against him in violation of the Fourth Amendment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. BACKGROUND

A. *Factual History*[1]

On February 17, 2018, bail bondsmen shot Mr. Martinez with non-lethal bullets, struck him in the head, and tasered and pepper-sprayed him, sending him to the hospital.[2] The next morning, he left the hospital unannounced, wearing only his underwear and an open gown. Hospital security personnel contacted the Lafayette, Colorado Police Department, which alerted officers that Mr. Martinez had left the hospital and that felony warrants were outstanding for his arrest.

Lafayette police officers arrived at 9:41 a.m. and searched for Mr. Martinez in an apartment complex near the hospital. At 9:50 a.m., two officers briefly spotted Mr. Martinez but did not attempt to talk with him. A witness later reported seeing Mr. Martinez, who looked "confused" and "lost." App., Vol. III at 817. Police dispatch also relayed that a witness saw Mr. Martinez "trying to enter vehicles" in the parking lot, App., Vol. II at 441, and that a "mailman . . . said he witnessed [Mr. Martinez] crawl out of someone's truck and [take] off running," *id.* at 438. While the Officers were searching

[1] The summary judgment record consists of depositions and declarations, document request responses, and officer body camera footage. We present the facts in the light most favorable to Mr. Martinez, resolving all factual disputes and drawing all reasonable inferences in his favor. *See Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014); *Helvie v. Jenkins*, 66 F.4th 1227, 1232 (10th Cir. 2023).

[2] The bondsmen were trying to apprehend Mr. Martinez's girlfriend, not Mr. Martinez.

for him, Mr. Martinez hid in a small closet (2.6 feet deep and 4 feet wide) on the third floor of one of the apartment buildings. He soon passed out.

At 11:48 a.m., two hours into the search, a canine police dog assisting Officer Sean Jenneiahn signaled toward the closet, indicating that Mr. Martinez was inside. Officers Lauren MacDonald and Peter Voris joined Officer Jenneiahn outside the closet, where they stood for 10 to 12 minutes. The Officers decided to employ a "dynamic entry." App., Vol. III at 660. Officers Voris and Jenneiahn would open the door and release the dog to neutralize Mr. Martinez while other officers would provide cover with a taser, a shotgun, and a firearm.

Officer Voris then opened the closet door. Officer Jenneiahn deployed the dog and told the dog to "get him." *Id.* at 828, 831. Mr. Martinez, lying face-down, began screaming when the dog bit his left arm. After 15 to 20 seconds, the dog released its bite-hold when Officer Jenneiahn pulled the dog away. Mr. Martinez suffered a four-centimeter gash on his arm.

B. ***Procedural History***

Mr. Martinez sued Officers Jenneiahn, MacDonald, and Voris ("Officers") under 42 U.S.C. § 1983, alleging that they (1) used excessive force in violation of the Fourth Amendment, (2) conspired to use excessive force, and (3) failed to intervene to protect against the use of excessive force. After discovery, the Officers moved for summary judgment, asserting they were entitled to qualified immunity.

The district court granted the Officers' motion. On excessive force, it determined that Mr. Martinez had not shown the Officers violated clearly established law. The court

said it followed that the Officers were entitled to qualified immunity on all three claims. Mr. Martinez timely appealed.

II. DISCUSSION

A. *Legal Background*

1. Standard of Review

"We review grants of summary judgment based on qualified immunity de novo." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014). Under Federal Rule of Civil Procedure 56(a), "[s]ummary judgment is proper if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Patel v. Hall*, 849 F.3d 970, 978 (10th Cir. 2017) (quotations omitted).

2. Section 1983 and Qualified Immunity

Title 42 U.S.C. § 1983 provides that a person acting under color of state law who "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983.

"Individual defendants named in a § 1983 action may raise a defense of qualified immunity." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (quotations omitted). "Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." *Wilkins v. City of Tulsa*, 33 F.4th 1265, 1272 (10th Cir. 2022) (quotations omitted). "Put simply, qualified immunity protects all but the plainly

incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (quotations omitted). "This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments . . . .'" *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

"When a defendant asserts qualified immunity in a summary judgment motion, the plaintiff must show that (1) a reasonable jury could find facts supporting a violation of a constitutional right and (2) the right was clearly established at the time of the violation." *Wilkins*, 33 F.4th at 1272; *see also Duda v. Elder*, 7 F.4th 899, 909 (10th Cir. 2021). A defendant is entitled to qualified immunity if the plaintiff fails to satisfy either prong. *See Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009); *Soza v. Demsich*, 13 F.4th 1094, 1099 (10th Cir. 2021).

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 577 U.S. at 11 (quotations omitted). "The law is clearly established when a Supreme Court or Tenth Circuit precedent is on point or the alleged right is clearly established from case law in other circuits." *Irizarry v. Yehia*, 38 F.4th 1282, 1293 (10th Cir. 2022) (quotations omitted). The relevant "precedent is considered on point if it involves *materially similar conduct* or applies with *obvious clarity* to the conduct at issue." *Lowe v. Raemisch*, 864 F.3d 1205, 1208 (10th Cir. 2017) (quotations omitted). "[A] case directly on point" is not necessary if "existing precedent [has] placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017)

(per curiam) (quotations omitted). Thus, "[g]eneral statements of the law can clearly establish a right for qualified immunity purposes if they apply with obvious clarity to the specific conduct in question." *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018) (quotations omitted).

3. **Excessive Force**

"When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotations omitted). This balancing "requires careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Although "general statements of the law are not inherently incapable of giving fair and clear warning to officers," "*Graham* does not by itself create clearly established law outside an obvious case." *Hemry v. Ross*, 62 F.4th 1248, 1258 (10th Cir. 2023) (alterations omitted) (quoting *White*, 580 U.S. at 80). Instead, to show clearly established law, the burden is on the plaintiff "to identify a case where an officer acting under similar

circumstances as [the defendants] was held to have violated the Fourth Amendment." *White*, 580 U.S. at 79.

The Supreme Court has repeatedly said that "[t]he dispositive question [for qualified immunity] is whether the violative nature of *particular* conduct is clearly established," and "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 577 U.S. at 12 (quotations omitted). "It is particularly important that a Fourth Amendment right be clearly established in a specific factual scenario because it can be difficult for an officer to determine how the prohibition against excessive force will apply in novel situations." *Arnold v. City of Olathe*, 35 F.4th 778, 793 (10th Cir. 2022).

B. ***Application***

We affirm because Mr. Martinez has failed to show that the Officers violated a right that was clearly established.

1. **Excessive Force**

Mr. Martinez has presented no Supreme Court or Tenth Circuit case "where an officer acting under similar circumstances as [the defendants] was held to have violated the Fourth Amendment." *White*, 580 U.S. at 79. Nor has he shown that "the alleged right is clearly established from case law in other circuits." *Irizarry*, 38 F.4th at 1293 (quotations omitted).[3]

[3] Mr. Martinez cites district court cases to show clearly established law. *See* Aplt. Br. at 23. But district court cases do not establish clear law for qualified immunity purposes. *See Ullery v. Bradley*, 949 F.3d 1282, 1300 (10th Cir. 2020) ("[W]e decline to

a. *Tenth Circuit cases*

i. *Perea*, *Dixon*, *Weigel*, *McCoy*, *McCowan*, and *Vette*—force used on subdued individuals

Mr. Martinez relies on cases in which we found a constitutional violation for the use of force against a subdued individual when officers:

- Tased an individual multiple times "after the point [he] was subdued." *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016);
- Kicked, choked, and beat an individual with a flashlight who was not suspected of a crime, had already been frisked, and had his hands on the police van. *Dixon v. Richer*, 922 F.2d 1456, 1462-63 (10th Cir. 1991);
- Asphyxiated a suspect who was handcuffed and in leg restraints. *Weigel v. Broad*, 544 F.3d 1143, 1153 (10th Cir. 2008);
- "[R]epeatedly [struck] a suspect—who [was] handcuffed, zip-tied, and just regaining consciousness—and subject[ed] him to a carotid restraint." *McCoy v. Meyers*, 887 F.3d 1034, 1052 (10th Cir. 2018); and
- Engaged in "rough" driving after placing a handcuffed and unrestrained suspect in the caged backseat of a patrol car. *McCowan v. Morales*, 945 F.3d 1276, 1286-87 (10th Cir. 2019).

None of these cases involved use of a dog to subdue a suspect. Conversely, the Officers here did not use a taser or a carotid restraint, nor did they beat, kick, choke, or asphyxiate Mr. Martinez. And unlike these cases, Mr. Martinez was inside the closet with the door closed before the Officers deployed the dog, so the Officers could not know whether he was subdued or hostile. They removed the dog when Mr. Martinez was subdued.

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consider district court opinions in evaluating the legal landscape for purposes of qualified immunity.").

Mr. Martinez cites one Tenth Circuit case involving the use of a dog on a subdued individual, *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154 (10th Cir. 2021). But Mr. Martinez's reliance on *Vette* is unavailing. It was decided after the incident in this case and therefore cannot on its own serve as clearly established law. *See Swanson v. Town of Mountain View*, 577 F.3d 1196, 1200 (10th Cir. 2009) ("Because the law must be clearly established at the time of the incident, cases published before the incident govern our analysis." (quotations and citations omitted)).[4] Also, it is factually distinguishable. In *Vette*, officers used excessive force when they allowed a police dog to bite a suspect who had "already been apprehended by two officers" and was unarmed. *Id.* at 1170. Citing *Perea*, we wrote that the suspect "posed a minimal safety threat" and that justification for the use of force "disappeared when the suspect was under the officers' control." *Id.* at 1170-71 (citing *Perea,* 817 F.3d at 1204). Because Mr. Martinez was not under the officers' control when the dog was deployed, *Vette* is inapposite.

ii. *Casey*, *Morris*, *Cordova*, *Cavanaugh*, and *Buck*—force used on unsubdued individuals

Mr. Martinez also cites cases in which we found constitutional violations where individuals were not subdued:

[4] In *Vette*, we said the right at issue there "was clearly established by December 2017," 989 F.3d at 1171, but as explained above, *Vette* is factually distinguishable from this case.

- *Casey v. City of Federal Heights*, 509 F.3d 1278, 1282 (10th Cir. 2007) ("an arm-lock, a tackling, a Tasering, and a beating" that occurred during an arrest for a non-violent misdemeanor);
- *Morris v. Noe*, 672 F.3d 1185, 1195 (10th Cir. 2012) (use of force in a takedown maneuver);
- *Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009) (a high-speed police pursuit and gunfire);
- *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010) (use of a taser); and
- *Buck v. City of Albuquerque*, 549 F.3d 1269, 1289 (10th Cir. 2008) (force used against street protesters who were arrested for misdemeanors).

These cases are not sufficiently on-point. None involved a dog, outstanding felony arrest warrants, a suspect who had hidden in a small closet out of officers' view, or a suspect who had evaded police for over two hours. These cases would not have put reasonable officers in the Officers' position here on notice that they were violating Mr. Martinez's Fourth Amendment rights. *See Mullenix*, 577 U.S. at 11. They therefore cannot clearly establish the violative nature of the conduct here. *See id.* at 12 ("The dispositive question [for qualified immunity] is whether the violative nature of *particular* conduct is clearly established," and "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." (quotations omitted)).

b. *Out-of-circuit cases*

Mr. Martinez contends that other circuits have clearly established that the Officers used excessive force against him. He cites cases that involved dogs, but they are either factually distinguishable or insufficient to demonstrate that "the alleged right is clearly

established from case law in other circuits." *Irizarry*, 38 F.4th at 1293 (quotations omitted).[5]

i. *Cooper v. Brown*, 844 F.3d 517 (5th Cir. 2016)

In *Cooper*, a misdemeanor DUI suspect fled a traffic stop and hid in "a small wood-fenced area used to store trash bins between two houses." 844 F.3d at 521. An officer called for backup. *Id*. Another officer arrived with a police dog. *Id.* The officers said they did not know whether the suspect was armed. *Id.* The dog found the suspect and bit him for "one to two minutes." *Id.* One officer "testified that he could see [the suspect's] hands and could appreciate that he had no weapon" while the dog maintained its bite. *Id.* The officer then ordered the suspect to roll onto his stomach to be handcuffed. *Id.* Only then did the officer order the dog to release the bite. *Id.*

Cooper is distinguishable. Here, the bite lasted roughly twenty seconds. And in contrast to a closed closet, the officers in *Cooper* had more opportunity to ascertain the threat posed by the suspect. Finally, the officers arrested the *Cooper* suspect for a misdemeanor, whereas Mr. Martinez was arrested for felonies.

ii. *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012)

In *Campbell*, the Sixth Circuit considered two dog-bite incidents. The first occurred when the police dog engaged an individual as he "was lying face down on the ground with his hands out to the side." 700 F.3d at 785. "[The dog] bit [the individual]

[5] Mr. Martinez also cites unpublished decisions from other circuits. But "[a]n unpublished opinion cannot clearly establish the law . . . ." *Thompson v. Ragland*, 23 F.4th 1252, 1260 n.3 (10th Cir. 2022).

on the left leg and continued to bite [him] at different places on his leg for some period of time, possibly thirty to forty-five seconds." *Id.* In the second incident, police arrested an individual for underage drinking. She became "belligerent" and "later slid her right hand out of the handcuffs, lowered the window of the car and escaped." *Id.* at 785. She "fled down the street and hid in a children's plastic playhouse." *Id.* An officer deployed a police dog. *Id.* at 785-86. The dog located the individual and bit her multiple times. *Id.* at 786. The Sixth Circuit found a constitutional violation because the officer "used an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing." *Id.* at 789.

Campbell is distinguishable. Unlike both instances in *Campbell*, the Officers here could not see Mr. Martinez or otherwise assess the threat that he posed before using the dog.

iii. *Priester v. City of Riviera Beach*, 208 F.3d 919 (11th Cir. 2000)

In *Priester,* officers responded to a burglar alarm at a store. 208 F.3d at 923. They observed that the store had been burglarized and saw footprints leading away from the store. *Id.* An officer then called for a police dog to track the scent and another officer arrived with a dog on a twelve-foot leash. *Id.* When the officer and dog caught up to him, the plaintiff stood up with his hands in the air. *Id.* The officer then told the plaintiff "to lie down on the ground." *Id.* The plaintiff asked why. "[The officer] said that [the plaintiff] should either lie down or [the officer] would release the dog on him. [The plaintiff] did lie down, but then [the officer] ordered the dog to attack him anyway." *Id.* The dog bit the plaintiff and maintained the bite for two minutes. *Id.* at 925. The

Priester court found that there was an "obvious" Fourth Amendment violation because "[t]here was no confusion" and plaintiff did not "pose a threat of bodily harm to the officers or to anyone else." *Id.* at 927.

Priester is distinguishable because the police were able to speak with the plaintiff and observe his demeanor before exerting force. Also, the length and manner of the force, a grip-hold for two minutes, was more extreme than here.

iv. *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994); *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998)

Mr. Martinez cites two Ninth Circuit cases that are closer factual comparators to this case than the other out-of-circuit cases. But they are insufficient to demonstrate that the "constitutional question [is] beyond debate." *White*, 580 U.S. at 79.

In *Chew*, the police stopped the § 1983 plaintiff for a traffic violation. 27 F.3d at 1442. He fled and hid in a scrapyard. *Id.* Officers discovered there were three outstanding felony warrants for his arrest. *Id.* They established a perimeter and called a helicopter and canine units to search for the plaintiff. *Id.* at 1436. Two hours later, a dog found the plaintiff "crouching between two metal bins." *Id.* The plaintiff called out to the police to "call off the dog." *Id.* The dog then bit the plaintiff "several times." *Id.* The Ninth Circuit found that because the plaintiff did not pose an immediate threat, the force used was unreasonable. *Id.* at 1443.

In *Watkins*, police were called to a silent alarm at a commercial warehouse. 145 F.3d at 1090. The officers saw someone running within the warehouse but had no indication whether the person was armed. *Id.* When the suspect failed to surrender, an

officer released his dog. *Id.* The dog found the suspect and bit him. *Id.* The officer did not remove the dog until the suspect complied with the officer's "orders to show his hands." *Id.* The officer reported that the biting lasted "about thirty seconds." *Id.* The Ninth Circuit found that the officer who released the dog exerted excessive force, reasoning that it was "clearly established that excessive duration of the bite and improper encouragement of a continuation of the attack by officers could constitute excessive force that would be a constitutional violation." *Id.* at 1093.

Even if these cases arguably are factually analogous to ours,[6] two cases from one other circuit are insufficient to clearly establish the law. *See Irizarry*, 38 F.4th at 1294-95 (finding clearly established law where six other circuits had agreed on the issue and a previous Tenth Circuit opinion had "indicated [] without reservation" the same agreement); *Ullery v. Bradley*, 949 F.3d 1282, 1294 (10th Cir. 2020) (law clearly established by cases in six other circuits); *Robbins v. Wilkie*, 433 F.3d 755, 770 (10th Cir. 2006) *rev'd and remanded on other grounds*, 551 U.S. 537 (2007) (law clearly established by cases in five other circuits); *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 595 (10th Cir. 1999) (law clearly established by cases in six other circuits).[7]

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[6] In *Chew*, the suspect was hiding in an open scrapyard. 27 F.3d at 1436. The police used both a dog and a helicopter to assist in the search. *Id.* Because the suspect was hiding in the open and the police were able to use a helicopter to assist in the search, the officers had more opportunity to assess the danger the suspect posed than the Officers had here.

[7] Mr. Martinez cites two out-of-circuit cases that did not involve dogs. *See* Aplt. Br. at 49.

* * * *

Because Mr. Martinez has not shown that the Officers' actions violated the clearly established law of this circuit or that "the alleged right is clearly established from case law in other circuits," we affirm the district court's grant of qualified immunity and summary judgment on Mr. Martinez's excessive force claim. *Irizarry*, 38 F.4th at 1293 (quotations omitted).

2. **Conspiracy**

Mr. Martinez claims that, when the Officers formulated the plan to deploy the police dog, they conspired to deprive him of his constitutional rights. Where "there [is] no clearly established law that the alleged object of the officers' conspiracy was actually unconstitutional . . . officers are entitled to qualified immunity for [an alleged] conspiracy." *Frasier v. Evans*, 992 F.3d 1003, 1024 (10th Cir. 2021). Because Mr. Martinez has not shown that the Officers' actions violated clearly established law, he cannot show that the object of their alleged conspiracy violated clearly established law.

First, in *Sample v. Bailey*, 409 F.3d 689 (6th Cir. 2005), the police located a suspected burglar who had hidden in a cabinet. *Id.* at 692. They opened the cabinet door and told him to "come out with your hands out." *Id.* at 693. As the suspect put his foot outside the cabinet, the police shot him multiple times. *Id.* The *Sample* court said that the deadly force was unreasonable because "[h]is movement was [] limited and he could not quickly charge the officers" and "[h]is hands were visible and empty." *Id.* at 697. Here, the Officers deployed the dog as the door to the closet was opened and before they saw Mr. Martinez's hands.

Second, in *Thornton v. City of Macon*, 132 F.3d 1395 (11th Cir. 1998), two officers charged into a suspect's apartment and roughly arrested him. *Id.* at 1398. The case did not involve a dog and is otherwise insufficiently related to the facts presented here.

We therefore affirm the district court's grant of summary judgment on his conspiracy claim.

3. **Failure to Intervene**

"An officer who fails to intervene to prevent a fellow officer's excessive use of force may be liable under § 1983." *Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008). Because we conclude it was not clearly established that the Officers' use of force was unlawful, it follows that none of them had a clearly established obligation to intervene. *See Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 129 (2d Cir. 1997) (observing that an officer "cannot be held liable in damages for failure to intercede unless such failure permitted fellow officers to violate a suspect's clearly established statutory or constitutional rights of which a reasonable person would have known" (quotations omitted)); *see also Grissom v. Palm*, No. 21-3194, 2022 WL 3571410, at *7 (10th Cir. Aug. 19, 2022) (unpublished) (same) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)). We thus affirm the district court's grant of summary judgment on Mr. Martinez's failure-to-intervene claim.

III. CONCLUSION

We affirm the district court.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge