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No. 22-_____

IN THE SUPREME COURT OF THE UNITED STATES

John Turnure

Petitioner

v.

Latrent Redrick

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Sixth Circuit

PETITION APPENDIX

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PETITION APPENDIX

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0517n.06

Case No. 21-3027

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED NOV. 15, 2021
DEBRAH S. HUNT, CLERK

LATRENT REDRICK; JAMON PRUIETT,

Plaintiffs-Appellees,

v.

CITY OF AKRON, OHIO,

Defendant,

JOHN TURNURE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

OPINION

Before: SUTTON, Chief Judge; McKEAGUE and WHITE, Circuit Judges

McKEAGUE, Circuit Judge.

Akron police officer John Turnure appeals the district court's denial of his motion for summary judgment based on qualified immunity. Turnure shot Latrent Redrick and Jamon Pruiett six times each. Redrick and Pruiett brought § 1983 claims alleging unlawful seizure and state-law claims for negligence and assault and battery, among others. The district court held that disputes of material fact preclude summary judgment on these claims. For the reasons that follow, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings.

I. Facts

Brothers Latrent Redrick and Jamon Pruiett were celebrating Redrick's twenty-first birthday in Akron, Ohio on October 1, 2017. The brothers and their friends were ordering food late in the night at a stand outside of Zar Nightclub when a fight broke out nearby. City of Akron police officers instructed those in the vicinity, including Redrick and Pruiett, to move across the street away from the fight. Akron police officers John Turnure and Utomhin Okoh were stationed near the nightclub in a police cruiser. Officer Al Jones was nearby on the street when the fight broke out.

As Redrick, Pruiett, and a friend of theirs walked toward their car to go home, a group of men bumped into the friend. Many of the men wore hoods tied tightly around their faces ostensibly to obscure their identities. The men threatened Redrick, Pruiett, and their friend with physical violence. The brothers

feared they would be harmed. Redrick possessed a Carrying Concealed Weapon (CCW) license and was carrying his gun in his pocket.

At this point, the accounts of what happened diverge. Video, but not audio, of the events was partially captured by a surveillance camera from a nearby Goodwill boutique. The parties dispute the extent to which the video proves their version of the events.

A. Redrick and Pruiett's Account

According to Redrick, when the group threatened them, he announced that he had a weapon and showed it to the group to deescalate the situation, pursuant to his CCW training. He did so by lifting the butt of his gun partially out of his pocket and saying, "I have a license to carry, CCW, get back." R. 19-1, P. 116. After that, many of the men in the group dispersed. He claims that he did not point the gun at anyone, he never raised the gun, and in fact never pulled the gun fully out of his pocket. The testimony of Pruiett, Joseph Brantley (one of the brothers' friends who was at the scene), and Officer Jones all confirm that they never saw Redrick pull out his gun, point it at anyone, or brandish it in any way. Redrick asserts that he never intended to use the gun and his purpose in showing and announcing the weapon was de-escalation. Redrick, Pruiett, and their friend kept walking down the sidewalk toward their car. Redrick's hand was on the butt of his gun. Redrick says he did not know a police officer was behind him. Redrick and Pruiett maintain that Turnure never gave any commands for Redrick to drop the gun. Officer Jones, who was roughly five to ten feet from

Redrick, testified that he never heard anyone yell, "drop the gun." The surveillance video does not show anyone turning to look in Turnure's direction at the time he was allegedly screaming commands to drop the gun. Turnure fired his gun at Redrick from behind. As Turnure shot Redrick in the back, Redrick's elbow jerked up and the gun flew out of his hand. After the gun was out of Redrick's hand, Turnure continued to shoot.

Pruiett testified that, as Redrick was being shot, he saw the gun come out of Redrick's hand. He thought his brother was dead and that he, too, was going to die. Not knowing who was shooting and thinking it was the group of threatening men, he crouched down and reached for the gun, pulling it to his chest. Turnure began shooting at Pruiett and shot him multiple times. Pruiett then, assertedly without knowing who was firing at him, shot once in Turnure's direction. The gunshots ceased. Each brother was shot six times.

B. Turnure's Account

According to Turnure, he was in his police cruiser when he looked across the street and saw a person "with an outstretched arm, with a gun in his hand, pointing it at people on the sidewalk." R. 23-9, P. 322. The testimony of Officer Okoh, Turnure's partner that night, agrees. Turnure exited the police cruiser and walked toward Redrick. Turnure saw another Akron police officer, Al Jones, walking across the street toward Redrick as well. Jones did not appear to see that Redrick was armed, and so Turnure contends that he screamed repeatedly, "Gun, gun. Guy's got a gun." R. 23-9, P. 318. Turnure made his

way across the street and positioned himself behind Redrick with his gun drawn and pointing at Redrick. He saw Redrick with the gun at his side. He claims that he screamed, "Drop the gun. Drop the gun. Drop the gun." R. 23-9, P. 319. Then, Turnure saw the gun "separate[ ] from his body in a manner." *Id.* Turnure fired into Redrick's back. He continued to fire until the gun was no longer in Redrick's possession. Then, Pruiett "dove for the pistol." *Id.* Turnure fired at Pruiett. Pruiett fired back.

C. Procedural History

Redrick and Pruiett filed federal claims under 42 U.S.C. § 1983 and state-law claims against the police officers and the City of Akron. The officers and the city filed a motion for summary judgment, asserting the defenses of qualified immunity and Ohio statutory immunity, among others. When the district court considered the motion for summary judgment, only three claims remained, all against Officer Turnure: unconstitutional seizure, negligence, and assault and battery. The district court denied Turnure immunity on summary judgment based on the existence of genuine disputes of material fact. Turnure appeals.[1]

II. Standard of Review

We review the district court's denial of summary judgment de novo. *Harrison v. Ash*, 539 F.3d 510, 516 (6th Cir. 2008). In doing so, when there

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[1] Neither party contests that we have jurisdiction in this case. The parties raise legal issues as well as factual issues, and so we have jurisdiction to review. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Chappell v. City of Cleveland*, 585 F.3d 901, 906 (6th Cir. 2009).

is video evidence, we view the facts "in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 381 (2007). But if the video "can be interpreted in multiple ways or if [the] videos do not show all relevant facts, such facts should be viewed in the light most favorable to the non-moving party." *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017) (citing *Godawa v. Byrd*, 798 F.3d 457, 463 (6th Cir. 2015)). Viewing the facts in this manner, if "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment should be denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); Fed. R. Civ. P. 56.

III. Qualified Immunity

Qualified immunity is available to public officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The analysis has two components: (1) whether a constitutional violation occurred, and (2) whether the law was clearly established at the time. *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001). We have discretion to consider those two elements in either order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If the right is not clearly established, we may decline to reach the constitutional question. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). The touchstone of the clearly established prong is whether an official had "fair warning" of the illegality of his actions. *Hearring v. Sliwowski*, 712 F.3d 275, 280 (6th Cir. 2013). This inquiry "do[es] not require a case directly on point, but

existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741; *see also Rivas-Villegas v. Cortesluna*, No. 20-1539, 2021 WL 4822662, at *2–3 (U.S. Oct. 18, 2021); *City of Tahlequah v. Bond*, No. 20-1668, 2021 WL 4822664, at *2 (U.S. Oct. 18, 2021). Therefore, "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015)).

Viewing the facts in light of the video and construing the evidence in the manner most favorable to the plaintiffs, disputes of material fact preclude summary judgment to Turnure on Redrick's claims. But there is no clearly established law that places the unconstitutionality of utilizing deadly force against Pruiett beyond debate. Thus, we reverse the district court's denial of qualified immunity as to Pruiett's § 1983 claim but affirm the district court as to Redrick's § 1983 claim and both plaintiffs' state-law claims.

IV. Redrick's Claims

A. Fourth Amendment Claim

1. Constitutional Violation

Redrick claims that Turnure violated his right to be free from excessive force under the Fourth Amendment. In assessing whether a constitutional violation has occurred, we undertake a "fact-specific, case-by-case inquiry," considering whether the force used was reasonable "from the perspective of the reasonable official on the scene." *Marcilis v. Twp. of*

Redford, 693 F.3d 589, 598 (6th Cir. 2012) (quotation omitted). Reasonableness in the context of deadly force is a totality-of-the-circumstances inquiry, based on the three *Graham* factors: (1) the severity of the crime at issue, (2) active resistance to law enforcement, and (3) whether the suspect posed an immediate threat to the safety of officers or others. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The immediate threat factor is a "minimum requirement for the use of deadly force." *Untalan v. City of Lorain*, 430 F.3d 312, 314 (6th Cir. 2005); *see also Chappell v. City of Cleveland*, 585 F.3d 901, 908 (6th Cir. 2009). And if it is feasible to give a warning before resorting to lethal force, an officer must do so. *Tenn. v. Garner*, 471 U.S. 1, 11–12 (1985). Still, our inquiry "contains a built-in measure of deference to the officer's on-the-spot judgment." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002); *Graham*, 490 U.S. at 396–97 (cautioning courts not to look with "the 20/20 vision of hindsight" and to be mindful that officers face "tense, uncertain, and rapidly evolving" situations).

a. Severity of the Crime and Active Resistance

Here, when viewing the facts in the light most favorable to Redrick, the first two *Graham* factors do not support the use of deadly force. On the first factor (severity of the crime), Turnure argues that he had probable cause to believe Redrick was committing a severe crime because he observed Redrick "show" his gun. But it is legal to carry a gun in Ohio. *See* Ohio Rev. Code § 2923.12. Redrick was licensed to carry a concealed weapon. And although Turnure claims Redrick raised his gun to shoulder height and pointed

it at the group in front of him, Redrick's account differs. Redrick maintains that he never raised his gun to shoulder height and instead that he pulled only the butt of his gun out of his pocket to reveal that he possessed a weapon and thus diffuse the situation, pursuant to his CCW training. Accepting Redrick's account, as we must on summary judgment, Redrick did not commit any crime at all, much less one that would justify deadly force. *See Anderson*, 477 U.S. at 255. Turnure attempts to rely on Redrick's later conviction for inducing panic and indictment for felonious assault to support his argument.[2] But the reasonableness of an officer's actions is limited to what the officer could have known at the time. *Bouggess v. Mattingly*, 482 F.3d 886, 889 (6th Cir. 2007). Turnure could not have known about a subsequent indictment and conviction at the time he shot Redrick. Thus, Turnure cannot rely on the severity of any crime to justify his use of force.

On the second factor (active resistance), the facts are again disputed. Turnure contends that he gave commands for Redrick to drop his gun, and that Redrick refused those commands. Redrick claims that no such commands were given, and he was not aware of officers' presence behind him at all. The surveillance video has no audio and so it does not resolve the dispute. Construing the evidence in the light most favorable to Redrick, we assume Turnure did not issue any commands, and therefore that Redrick was not resisting. *See Anderson*, 477 U.S. at 255; *Baker v. Union Twp.*, 587 F. App'x 229, 235–36 (6th Cir. 2014) ("[B]ecause [the officer] gave no

[2] Facing multiple felony charges, Redrick accepted a plea deal for misdemeanor inducing panic. R. 23-4, P. 207–08.

warnings and issued no commands once inside the house, it would have been impossible for [the plaintiff] to resist at this time."). But even if commands were given, mere noncompliance with an officer's command does not constitute active resistance. *Eldridge v. Warren*, 533 F. App'x. 529, 535 (6th Cir. 2013) ("[N]oncompliance alone does not indicate active resistance; there must be something more.").

b. Immediate Threat

That leaves us with the third factor: whether Redrick posed an immediate threat to officers or others. Turnure argues that Redrick posed an immediate threat because he "show[ed]" his gun, "advance[d]" toward individuals on the sidewalk, did not respond to commands to drop the gun, and then made a movement to raise his gun. R. 23-9, P. 318–19.

As discussed above, the nature of Redrick "showing" his gun is disputed, as is whether Turnure gave any command or warning to drop the gun. That leaves Redrick's alleged movement to raise the gun as the crucial evidence in support of the assertion that Redrick posed an immediate threat. Contrary to Turnure's argument, the video evidence is inconclusive regarding whether Redrick made any movement to raise his gun. The video does not show any definitive movement of Redrick's hand prior to him being shot in the back. Watching the video in real time, it appears that Redrick was simply holding the gun in his pocket or at his side while walking down the sidewalk when he was shot in the back. Redrick stands firm that he was not making any movement to raise his gun. A reasonable jury viewing the video could resolve the dispute in favor of either party.

Therefore, we draw the inferences for purposes of this appeal (1) that Redrick was not raising his gun, and that it was instead in his pocket or at his side prior to his being shot, and (2) that Turnure never gave Redrick any commands to drop his weapon before shooting him. Under this version of the facts, Turnure's actions were unreasonable.

Redrick was in lawful possession of a firearm, which he kept at his side. But mere possession of a weapon without more is insufficient to justify deadly force. *See Bouggess*, 482 F.3d at 896 ("[E]ven when a suspect has a weapon, but the officer has no reasonable belief that the suspect poses a danger of serious physical harm to him or others, deadly force is *not* justified."); *Thomas v. City of Columbus*, 854 F.3d 361, 366 (6th Cir. 2017) ("[W]e do not hold that an officer may shoot a suspect merely because he has a gun in his hand."). Although it is not necessary that a gun be pointed at another person for deadly force to be justified, there must be some indication that the possessor of a weapon is willing to and is about to use the weapon to harm officers or others. *See Bouggess*, 482 F.3d at 896; *Bletz v. Gribble*, 641 F.3d 743, 753–54 (6th Cir. 2011) (unreasonable to shoot when suspect had a gun in his hands but "there was no imputation of past or potential future violence on the part of [the suspect]" and the suspect was complying with police commands); *Brandenburg v. Cureton*, 882 F.2d 211, 213, 215 (6th Cir. 1989) (unreasonable to shoot a suspect who previously threatened violence to officers but was not pointing his gun at the officer or others).

And where it is feasible, non-lethal means must be utilized before resorting to deadly force. *Garner*,

471 U.S. at 11–12; *see also Thomas*, 854 F.3d at 366–67; *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996). For example, in *Yates v. City of Cleveland*, we held that it was unreasonable for an officer who entered a home late at night to shoot without identifying himself when confronted with a suspect who did not pose an immediate threat. 941 F.2d 444, 447 (6th Cir. 1991). In contrast, in *Chappell v. City of Cleveland*, we held that it was reasonable to shoot without warning when the suspect was "quickly advancing toward the officers while holding [a] knife up and refusing to drop it." 585 F.3d at 915.

Here, Turnure was in position behind Redrick as he walked down the sidewalk with his lawfully carried gun in his pocket or at his side. In these circumstances, Turnure's failure to warn Redrick to drop his weapon before shooting was unreasonable. Without any other facts indicating an immediate danger beyond possession of a lawful firearm, it was feasible to attempt non-lethal means of deescalating the situation. Turnure could have ordered Redrick to drop the gun. If a jury finds those warnings were given and ignored, this may be a different case. But if the need for deadly force could have been obviated by a simple command to drop the weapon and the officer failed to attempt such less-than-lethal means, deadly force was unreasonable.

2. Clearly Established

Accepting Redrick's account of the facts, Turnure violated Redrick's clearly established rights when he shot him six times from behind without warning and without any indication that Redrick would use his lawfully carried gun to harm officers or

others. *See Garner*, 471 U.S. at 7, 11–12 (deadly force is unreasonable unless the suspect poses an immediate threat of harm and, if feasible, a warning has been given). In general, cases like *Graham* and *Garner* cannot clearly establish a constitutional violation because they are "cast 'at a high level of generality.' " *Cortesluna*, 2021 WL 4822662 at *2 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). But "in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law." *Brosseau*, 543 U.S. at 199. Under Redrick's facts, this is a case where no reasonable officer could believe deadly force was justified. *See Garner*, 471 U.S. at 7, 11–12. And beyond that, a body of relevant case law from this Circuit supports the denial of qualified immunity here. *See David v. City of Bellevue*, 706 F. App'x 847, 852 (6th Cir. 2017) (denying qualified immunity when there was a dispute of fact whether suspect had his firearm raised); *Brandenburg*, 882 F.2d at 215–216 (same); *Dickerson*, 101 F.3d at 1154, 1163 (denying qualified immunity when officers shot a man who had fired nine shots inside his home and made verbal threats but at that moment was simply "walk[ing] slowly toward his front door ... his arms down by his sides"); *King v. Taylor*, 694 F.3d 650, 653, 663–64 (6th Cir. 2012) (denying qualified immunity when officers shot a man who had threatened to kill someone but had his gun "resting on his right hip" while lying on the couch); *Bletz*, 641 F.3d at 752 (denying qualified immunity when suspect was lowering his gun when he was shot); *Cf. Thornton v. City of Columbus*, 727 F. App'x 829, 831, 837–38 (6th Cir. 2018) (granting qualified immunity when officer shot a man who threatened neighbor children with a

gun and was walking toward officers looking right at them with his gun pointed "upward and slightly to [the officer's] right" and failing to comply with commands). Therefore, summary judgment is inappropriate.

B. State Claims

Redrick asserts an assault and battery claim and a negligence claim against Turnure under Ohio state law. Ohio provides a form of statutory immunity to state employees unless they acted "outside the scope of the employee's employment" or "with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(a)–(b). We have held that "[w]hen federal qualified immunity and Ohio state-law immunity under [Ohio Rev. Code] § 2744.03(A)(6) rest on the same questions of material fact, we may review the state-law immunity defense 'through the lens of federal qualified immunity analysis.' " *Wright v. City of Euclid*, 962 F.3d 852, 878 (6th Cir. 2020) (quoting *Hopper v. Plummer*, 887 F.3d 744, 759 (6th Cir. 2018)). For the same reasons and disputed facts relevant to Redrick's § 1983 claim that compel us to find Turnure's shooting Redrick was objectively unreasonable, a jury could find that Turnure acted in a wanton or reckless manner or with malicious purpose.[3] So, state statutory immunity is unavailable to Turnure on summary judgment.

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[3] After the shooting stopped, Turnure walked over to where Redrick and Pruiett lay on the sidewalk. Redrick said, "pick me up, please." Turnure responded, "f*** you," as confirmed by his own testimony. R. 23-9, P. 338.

V. Pruiett's Claims

Pruiett also claims that Turnure violated his Fourth Amendment rights by shooting him. Holding that using deadly force against Redrick was unreasonable does not dictate that shooting Pruiett was likewise unreasonable. *See Los Angeles v. Mendez*, 137 S.Ct. 1539, 1544 (2017) ("A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure."); *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 406–07 (6th Cir. 2007). But we need not reach the constitutionality of Turnure's actions as related to Pruiett because the law in these circumstances was not clearly established.

A. Fourth Amendment Claim

When the shooting occurred, case law did not clearly establish that Turnure's use of deadly force against Pruiett was unconstitutional. *See Ashcroft*, 563 U.S. at 741; *Cortesluna*, 2021 WL 4822662, at *3; *City of Tahlequah*, 2021 WL 4822664, at *2. The situation was unfolding rapidly. Amidst gunfire, Redrick's firearm came out of his hand and Pruiett lunged for it. This quick movement toward a deadly weapon in the heat of gunfire is different from Redrick's simply holding a lawful weapon at his side. Because Pruiett was grabbing for the gun, the immediacy of the situation makes it less feasible that less-than-lethal force, *i.e.* giving commands to drop the gun, would have sufficed. There was no clearly established law from the Supreme Court or this Circuit that would have informed Turnure that using deadly force against a suspect who lunged for a weapon amidst a dangerous altercation was unlawful.

Plaintiffs cite *Bouggess v. Mattingly* to argue that having and holding a weapon is not enough to make deadly force reasonable, but that case does not squarely govern the facts before us. 482 F.3d at 896. More than mere possession of a weapon, Pruiett made a quick movement to grab the gun as his brother was being fired upon. The immediacy of that movement—and the inference that could reasonably be drawn regarding what a person might do with a gun after they grab it during a gunfight—is a material factual difference between this case and those referenced in Redrick's analysis that may otherwise clearly establish the law.

B. State Claims

Although Ohio statutory immunity often fails when federal qualified immunity is denied, the same is not necessarily true in reverse. *See Martin v. City of Broadview Heights*, 712 F.3d 951, 963 (6th Cir. 2013) (citing *Chappell*, 585 F.3d at 916 n.3) (stating that "officers may be entitled to state-law immunity if qualified immunity shields them from liability on federal claims"); *see also Wilson v. Gregory*, 3 F.4th 844, 860 (6th Cir. 2021) ("But in this case, our federal qualified immunity analysis turns on the 'clearly established' prong. As a result, 'the availability of both federal qualified immunity and state law immunity' does not entirely 'depend[ ] on the correctness of the district court's finding of the existence of the very same questions of fact' because Ohio statutory immunity does not turn on whether a particular right was clearly established.") (quoting *Chappell*, 585 F.3d at 907 n.1, 916 n.3). The statute contains no explicit "clearly established" law requirement. *See* Ohio Rev. Code § 2744.03. Because Turnure's qualified

immunity defense is granted here on "clearly established" grounds and we do not decide the constitutionality of his conduct in relation to Pruiett, the state-law claims are not foreclosed. A reasonable jury could find that Turnure acted "with malicious purpose, in bad faith, or in a wanton or reckless manner" when he shot Pruiett after Pruiett picked up the gun but before he ever fired a shot, especially considering this incident was precipitated by his unconstitutional shooting of Redrick. Ohio Rev. Code § 2744.03(A)(6)(a); *see King v. City of Columbus*, No. 2:18-CV-1060, 2021 WL 3367507, at *5, *8 (S.D. Ohio Aug. 3, 2021) (denying statutory immunity because a jury could find that an officer's use of deadly force was wanton and reckless when the suspect had a gun but did not pose a threat to officers). Therefore, summary judgment as to Pruiett's state-law claims is inappropriate.

VI. Conclusion

For these reasons, we AFFIRM the district court's denial of summary judgment to Turnure as to Redrick's federal and state claims and as to Pruiett's state claims, REVERSE the district court's denial as to Pruiett's federal claim, and REMAND to the district court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:18-CV-2523

Judge John R. Adams

Latrent Redrick, et al.,

Plaintiffs,

v.

City of Akron, Ohio, et al.

Defendants.

MEMORANDUM OF OPINION

This matter comes before the Court on a motion for summary judgment filed by Defendants John Turnure, Utomhin Okoh and Scott Lietke.[4] Plaintiffs Latrent Redrick and Jamon Pruiett have opposed the

[4] Within their response, Plaintiffs note: "Plaintiffs do not proceed on claims against Okuh [sic] or Leitke [sic], and dismiss all claims against them. Plaintiffs further limit their claims against Turnure to Unconstitutional Seizure (Sixth Claim for Relief), Assault and Battery (First Claim for Relief), and Negligence – Willful, Wanton, and/or Reckless Conduct (Second Claim for Relief)." Doc. 26 at 20. Accordingly, the claims against Defendants Okoh and Lietke are hereby dismissed, and the Court will solely analyze the remains counts against Defendant Turnure – counts one, two, and six.

motion, and Defendants have replied. Plaintiffs have also sought leave to file a sur-reply, and Defendants have opposed that motion. The motion for leave (Doc. 29) is GRANTED. The Court will consider the sur-reply in reviewing the pending motion for summary judgment. For the reasons that follow, Defendants' motion is DENIED.

I. Facts & Procedure

On October 1, 2017, Redrick and his brother Pruiett were in downtown Akron, Ohio to celebrate Redrick's 21st birthday. Eventually, Redrick and Pruiett and several others ended up outside Zar Nightclub near closing time. While Redrick's group was attempting to place a food order with a nearby food stand, a fight broke out at the exit of Zar. Turnure and Okoh were stationed downtown due to prior criminal activity that had occurred at or around the closing time of the downtown bars and nightclubs and observed this initial scuffle. At that time, the officers decided not to intervene unless matters escalated.

According to Redrick, a short time later, a group of individuals crossed paths with his group of friends and bumped into one of Redrick's friends. Redrick indicated that the other group was saying "a bunch of junk." Specifically, Redrick asserts that the other group was making threatening remarks to his friend, T.J. Redrick contends that in an attempt to de-escalate the situation, he revealed to the other group that he was carrying a conceal weapon.[5] At the time,

[5] As discussed below, the parties do not agree to what extent Redrick did or did not remove the firearm from his pocket.

Redrick possessed a concealed carry permit for the weapon.

Okoh contends that around this time he witnessed an individual, later identified as Redrick, raise a pistol to shoulder level and continue to approach another group of people. At that time, Okoh yelled to Turnure, "Gun, gun. He's got a gun." Turnure claimed to witness the same activity: "I look across the street to – on the other side of Main Street, and I see a suspect with an outstretched arm, with a gun in his hand, pointing it at people on the sidewalk." Turnure then exited his cruiser to cross the street to approach the suspect he claims to have witnessed holding a firearm. At that time, Turnure observes Officer Al Jones also approaching this same group of individuals.

According to Turnure, he attempted in vain to inform Jones of the imminent threat posed by the firearm: I am screaming at Al, "Gun, gun. Guy's got a gun." I was screaming it repeatedly. The only way I can describe it, it's a nightmare that when you scream, nothing comes out; or you're screaming and no one can hear you. It was along those lines. I'm just screaming, screaming, "Al, he's got a gun. Al. he's got a gun." Doc. 23-9 at 5-6. Jones, however, never heard any such statement from Turnure. Turnure then finished crossing the street and came up behind Redrick and his group of friends. According to Turnure, he was repeatedly screaming "Drop the gun" as he approached the group.

> I find myself behind the suspect with the gun in hand. I can now locate he's got a gun down at his side. I can see the butt

> of the gun in his hand, and I'm walking behind him. I had my gun drawn. My gun is pointed at him. And I'm screaming now [ ] at the suspect. I'm screaming, "Drop the gun. Drop the gun. Drop the gun."

Doc. 23-9 at 6. However, no one in the group or elsewhere on the street that night testified to hearing any statement from Turnure at any time.

Turnure's version of events continued:

> I'm following him, and the gun separates from his body in a manner. So I know there's potential victims in front of him. And he goes -- he begins the motion to raise the pistol. At that point, I begin to fire into the suspect's back.

Doc. 23-9 at 6. Turnure contends that he continued to fire his weapon only until Redrick was no longer in possession of the firearm. He then scanned the area and saw Pruiett diving for the firearm. At that time, he began firing at Pruiett. Pruiett returned a single shot in Turnure's direction. At that time, Turnure retreated. However, his initial actions resulted in Redrick being shot in the back four times, and Pruiett being shot as well.

Redrick's version of the events surrounding him being shot vary significantly from Turnure's account. As noted above, Redrick contends that he attempted to use the visibility of his firearm to deescalate the confrontation that was occurring with the second group of individuals.

> In an effort to deescalate the situation pursuant to my CCW training, I showed the gun to the group of menacing men by holding the butt of the gun, and lifting it partially out of my pocket so they could see the handle of the gun, while I announcing to them that I carried a gun.

Doc. 26-4 at 1. Redrick contends that he never fully removed the firearm from his pocket, never raised his arm holding the firearm, and never pointed the firearm at anyone. Describing the precise time of the shooting, Redrick offered the following in his affidavit:

> 17. I again placed my hand on the butt of my gun-but did not remove the gun from my pocket-when Turnure began to shoot me.
>
> 18. Prior to shooting me, Officer Turnure did not give any orders or commands to drop the gun.
>
> 19. Prior to shooting me, Officer Turnure did not announce his presence.
>
> 20. Prior to being shot, I did not know Officer Turnure was behind me.
>
> 21. When Officer Turnure shot me in the back, my elbow went up involuntarily and the gun flew out of my hand.

Doc. 26-4 at 2. Redrick further asserts that Turnure continued to shoot at him after he lost possession of the firearm and was on the ground with his hands in the air.

Based upon this version of events, Redrick and Pruiett filed a slew of claims against Turnure, Okoh, Leitke, and the City of Akron. As noted above, only three claims – all against Turnure – remain for this Court to consider in this motion for summary judgment: Unconstitutional Seizure (Sixth Claim for Relief), Assault and Battery (First Claim for Relief), and Negligence – Willful, Wanton, and/or Reckless Conduct (Second Claim for Relief). The Court now examines those claims.

II. Legal Standard

Summary judgment is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The moving party must demonstrate to the court through reference to pleadings and discovery responses the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. at 323. This is so that summary judgment can be used to dispose of claims and defenses which are factually unsupported. *Id.* at 324. The burden on the nonmoving party is to show, through the use of evidentiary materials, the existence of a material fact which must be tried. *Id.* The court's inquiry at the summary judgment stage is "the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in

favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 250.

The court's treatment of facts and inferences in a light favorable to the nonmoving party does not relieve that party of its obligation "to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). *See Celotex Corp. v. Catrett,* 477 U.S. at 324. The nonmoving party must oppose a proper summary judgment motion "by any kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves..." *Id.* Rule 56(c) states, "...[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." A scintilla of evidence in favor of the nonmoving party is not sufficient.

III. Law and Analysis

§ 1983 claim for unlawful seizure

Redrick and Pruiett raise a claim under 42 U.S.C. § 1983, alleging a constitutional violation of their Fourth Amendment rights to be free from unlawful seizure. To state a claim under § 1983, a plaintiff must set "forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law." *Burley v. Gagacki*, 729 F.3d 610, 619 (6th Cir. 2013) (internal citation omitted). No one disputes that Turnure was acting under the color of state law. Rather, this motion challenges whether the rights of

Redrick and Pruiett were indeed violated and if so whether the Turnure is entitled to qualified immunity.

Qualified immunity is appropriate when an official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11(2015) (internal citation omitted). 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." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (internal quotation marks and alteration omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011). Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The Court's qualified immunity analysis contains two components, which courts may analyze in any order: (1) whether the plaintiff has established with the requisite proof the violation of a constitutional right, and (2) whether the particularized right at issue was "clearly established" at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232- 236 (2009). When a defendant invokes qualified immunity in a motion for summary judgment, the plaintiff must offer sufficient evidence to create a genuine dispute of fact that the defendant violated a clearly established right. *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 608–09 (6th Cir. 2015).

"Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Tennessee v. Garner*, 471 U.S. 1, 11–12, (1985). "This Circuit has employed a non-exhaustive list of three factors to evaluate whether an officer's actions are reasonable: '(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 the suspect is actively resisting arrest or attempting to evade arrest by flight.' *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015) (quoting *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir. 2006)). But the ultimate inquiry is always whether the totality of the circumstances justified the use of force." *Littlejohn v. Myers*, 684 F. App'x 563, 567 (6th Cir. 2017). With respect to deadly force, the Sixth Circuit has further explained:

> With that said, this Court has explicitly stated—regardless of the other factors—that with respect to the use of deadly force, there is a minimum requirement that the officer have "probable cause to believe that the suspect poses a threat of severe physical harm, either to the officer or others." *Untalan v. City of*

> *Lorain*, 430 F.3d 312, 314 (6th Cir. 2005). Our analysis turns on whether Myers had probable cause to believe that Littlejohn presented a serious danger to either himself or others at the moment Myers discharged his firearm. *See Bouggess v. Mattingly*, 482 F.3d 886, 890 (6th Cir. 2007) (the relevant time for purposes of this inquiry "is the moment immediately preceding the shooting"). As a general note, the mere fact that Littlejohn was a felon fleeing from police is not sufficient to justify the use of deadly force. *Tennessee v. Garner*, 471 U.S. 1 (1985) ("It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). On the other hand, if a suspect threatens either an officer or any other person with serious physical harm during flight, deadly force is authorized. *Dickerson*, 101 F.3d at 1163.

Id. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). As such, the Court must undertake its analysis "in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation." *Id.* at 397.

A. Redrick

With respect to Redrick, Turnure's arguments that his force was reasonable as premised upon numerous *disputed* facts:

> With respect to the severity of the crime at issue, Turnure observed Redrick raise a gun in the direction of two individuals standing in the middle of a crowd at bar closing time, causing people to panic.
>
> ...
>
> With respect to active resistance and evasion by flight, there can be no serious dispute that Turnure did not observe Redrick respond to the officers' commands to drop the gun.
>
> ...
>
> With respect to the immediacy of the threat, the following undisputed facts establish that a reasonable officer on scene would have believed that Redrick's actions posed a significant physical threat to Turnure or the individuals on the sidewalk: (1) Turnure observed Redrick pull a handgun on a crowd of people outside a bar in the midst of an altercation; (2) moments later, Redrick was moving in the direction of the same group of individuals on the sidewalk with the gun at his side; (3) Redrick does not respond to Turnure or Okoh's commands to drop the gun; (4) there are several individuals at or around the

> sidewalk/street area near Redrick; (5) Redrick maintains the handgun at his side with Turnure, Okoh, Jones and others in close proximity and without protective cover; and (6) the handgun separates from Redrick's body[.]

Doc. 23 at 18-19.

As noted above, Redrick denies ever raising the firearm and pointing it at anyone. In fact, Redrick contends that the firearm never fully left his pocket prior to him being shot by Turnure. While Turnure contends that Redrick's prior sworn testimony contradicts this assertion, the Court disagrees. Rather, Redrick's prior sworn testimony indicated that Redrick "showed" the firearm to the opposing group of individuals. Contrary to Turnure's contention, that is not an admission by Redrick that he fully removed the firearm from his pocket or raised it to shoulder level. As such, there remains an issue of fact surrounding whether Redrick engaged in *any* crime prior to the use of deadly force.

Turnure's contention that Redrick actively or passively resisted his command to drop the firearm fares no better. Turnure appears to contend that because his sworn testimony includes that he gave the command, this fact must be established as true. However, the record contains numerous examples of individuals that note that they never heard Turnure give any commands. This list includes Officer Jones who was in close proximity to the shooting and never heard any of things that Turnure allegedly shouted over and over. Thus, while the Court may be required to accept Turnure's assertion that he gave the

command, it must also accept that whatever command Turnure gave was given in a manner that Redrick was unable to hear it. As such, at best, there exists a question of fact regarding whether Redrick ignored commands.

Finally, Turnure alleges that the firearm separated from Redrick's body in the split second before he opened fire. Meanwhile, Redrick contends that he never made such a movement. Turnure asserts that this particular factual dispute can be resolved by virtue of the surveillance video that caught portions of the events at issue. In that regard, Turnure is correct that when evaluating the circumstances of Turnure's use of deadly force, "where, as here, there is 'a videotape capturing the events in question,' the court must 'view[ ] the facts in the light depicted by the videotape.' " *Green v. Throckmorton*, 681 F.3d 853, 859 (6th Cir. 2012)(quoting *Scott v. Harris*, 550 U.S. 372, 381 (2007). At the summary judgment stage, *Scott* "instructs [courts] to determine as a matter of law whether the events depicted on the video... show that the Officer's conduct was objectively reasonable." *Dunn v. Matatall*, 594 F.3d 348, 353 (6th Cir. 2008).

However, the dispute raised by the parties – whether Redrick began to remove the firearm from his pocket at the moment immediately before Turnure began to fire at him – cannot be resolved by viewing the grainy video from the nearby surveillance camera. The Court has viewed the video and closely reviewed the individual frames pulled from the video by the parties. The competing positions of the parties are both reasonable interpretations of the view. A jury

could review the video and find Turnure's version of events to be credible – that he did not open fire until he saw movement from Redrick. Likewise, a reasonable juror could conclude that any movement from Redrick was the result of him being shot by Turnure. In other words, the frame-by-frame pictures presented to the Court simply do not provide a definitive view of the disputed event. Moreover, when evaluating the video of the event, this Court and "the jury might reasonably consider why the other [ ] officers did not fire shots if it was quite obvious that they were being threatened with imminent bodily harm." *Brandenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989).

Accordingly, every substantial aspect of the Court's totality-of-the-circumstances review is clouded by a dispute of facts. Viewing those facts in a light most favorable to Redrick, he committed no crime, resisted no lawful commands, and was shot from behind. Accordingly, his § 1983 claim survives.

For similar reasons, Turnure is not entitled to qualified immunity for this claim. In this respect, the Court agrees with a colleague from the Southern District of Ohio who noted:

> [T]he law is clearly established that, even when officers respond to a report that a suspect is brandishing a loaded gun, the use of deadly force is not justified unless the suspect either points the gun at the officers or makes some other kind of movement, gesture or verbal statement giving rise to a reasonable belief that the officers or

> others were in imminent danger of serious bodily harm.

Sherrod v. Williams, No. 3:14-CV-454, 2019 WL 267175, at *15 (S.D. Ohio Jan. 15, 2019).[6] *Sherrod* went on to review the holding in *King v. Taylor*, 694 F.3d 650 (6th Cir. 2012). *King* noted that "we have little trouble concluding that if Taylor shot King while he was lying on his couch and not pointing a gun at the officers, Taylor violated King's clearly-established right to be free from deadly force." *Id.* at 664. In that regard, *King* noted that there was a genuine issue of material fact surrounding whether the gun was pointed at the officer at the time of the shooting. The same dispute exists here. Until the details surrounding Redrick's alleged movements at the time of the shooting are resolved by a jury, Turnure cannot demonstrate that he is entitled to qualified immunity.

For these same reasons, Redrick's state law claims also survive summary judgment. The heart of each claim centers upon the same disputed facts set forth above and must be resolved by a jury.

B. Pruiett

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[6] Turnure's attempt to cast doubt on this holding in *Sherrod* is unavailing. Turnure is correct that other cases have found that the use of deadly force was valid without a firearm being aimed at an officer. However, *Sherrod* and the case it cites, *King,* do not make such a finding a prerequisite to the use of deadly force. Rather, it simply requires a "movement, gesture or verbal statement." In other words, a defendant must do *something* more than simply lawfully possess a firearm. Here, when the facts are viewed in a light most favorable to Redrick, he did not engage in that *something* more.

There are undoubtedly aspects of Pruiett's excessive force claim that directly overlap with the Court's analysis of Redrick's claims. For example, there is no evidence that Pruiett ever heard any of the commands allegedly issued by Turnure. As such, Turnure cannot demonstrate, at this stage of the litigation, any active resistance by Pruiett. Similarly, given the dispute over whether Turnure ever identified himself, there remains a question of fact surrounding the alleged crime Pruiett is to have committed. Without Turnure identifying himself as a police officer, Pruiett could have reasonably believed that shots were being fired at him and his brother by a member of the opposing group. At that point, Pruiett would have been permitted to lawfully return fire in defense of himself and others. As a result, it cannot simply be said that Pruiett engaged in felonious conduct by firing the firearm – or threatening to – at Turnure.

*7 However, unlike Redrick's shooting, there can be dispute that there was an immediacy attached to Pruiett's shooting. When Turnure opened fire at Pruiett, it was immediately after Pruiett had lunged to the ground to grab the firearm that had fallen from Redrick's grasp. While Pruiett contends that he did not then aim the firearm at Turnure, it was entirely reasonable for Turnure to assume that Pruiett dove for the firearm with every intent to use it. As such, there was an immediate threat.

Upon reviewing the totality of the circumstances, the Court finds that the existing genuine issues of material fact on the issues leading to Pruiett's shooting preclude summary judgment. It would be a somewhat remarkable result for a jury to

conclude that Redrick's shooting was an excessive use of force and for this Court to have concluded that Turnure could rely on that excessive use of force to justify Pruiett's shooting. In other words, the jury's resolution of the disputed facts surrounding Redrick's shooting will serve to determine the reasonableness of the shooting of Pruiett as well as the two events are inextricably intertwined. Pruiett's claims, therefore, must also be considered by a jury.

IV. Conclusion

Defendants' motion for summary judgment DENIED. Consistent with Plaintiffs' pleadings, all remaining claims against Defendants Okoh and Lietke are hereby dismissed. The remaining claims shall be heard be a jury. A telephone status conference for counsel only is hereby scheduled for January 7, 2021 at 3:00 p.m. Plaintiffs' counsel shall provide the Court a call-in number to utilize for the conference.

IT IS SO ORDERED.

APPENDIX C

APPENDIX D