

In the
Supreme Court of the United States

ERIC WESTRY,

Petitioner,

v.

VICTOR LEON,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit properly hold that there was no genuine dispute as to any material fact that the Defendant-Respondent police officer did not violate any clearly established constitutional right, and that the Defendant-Respondent was entitled to qualified immunity as a matter of law?

RELATED CASES

There are no related cases currently on appeal.

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INTRODUCTION

Police officers from the City of Waterbury, Connecticut, including Defendant-Respondent Victor Leon, responded to a report of domestic violence at the Plaintiff-Petitioner's home. Officer Leon ultimately discharged his Taser into the Plaintiff-Petitioner leading to the instant lawsuit under 42 U.S.C. § 1983. The Second Circuit's Summary Order in this case aptly summarizes the pertinent facts as follows:

Westry does not dispute . . . that when officers arrived at his home in response to an emergency call, his wife reported that Westry had assaulted her and that Westry had locked himself in a bedroom with their one-year-old daughter. Westry also does not dispute that he refused to comply with the officers' instructions to open the bedroom door, or that, when they asked him to get off the bed, Westry responded—as he admitted in his deposition and as was recorded on the cellphone he had activated—that the officers would “have to kill” him. Appellant’s Br. 10. Finally, Westry concedes that he resisted officers’ attempts to “pry [his] arms open” while they asked him to release his daughter. *Id.* at 17. Even viewing these unchallenged facts in the light most favorable to Westry, we agree with the district court that it is fair to characterize Westry as having acted in a threatening and non-compliant manner before Leon deployed a taser on him to effect his arrest. The officers thus did not violate any clearly established right, and they are entitled to summary judgment on the basis of qualified immunity.

Pet.App.A4-A5.



JURISDICTIONAL STATEMENT

Jurisdiction in this Court is not disputed, although Petitioner does not satisfy the standard for review set forth in Supreme Court Rule 10.



COUNTERSTATEMENT OF THE CASE

I. Facts Admitted in the Plaintiff's Local Rule 56 Statement

The following facts were set forth in Defendant-Respondent Officer Victor Leon's Local Rule 56(a)1 Statement of Facts in the District Court (Doc. 33-2) and admitted by the Plaintiff in his Plaintiff's Local Rule 56(a)2 Statement (Doc. 34-1).

Defendant Victor Leon is a police officer with the Waterbury Police Department, a position he has held since April 20, 2006. Docs. 33-2, 34-1 ¶ 11. On April 5, 2016, Officer Leon was dispatched to 61 Brentwood Drive, Apt. 9, in Waterbury, Connecticut, for a domestic disturbance. *Id.* ¶ 13. He was dispatched as a result of a call to the Victims' Services Hotline, stating that a female who resided at that location was hiding under the kitchen table while her husband was locked in the bedroom with their minor child. *Id.* ¶ 13. When Officer Leon arrived at the residence with other officers, they found the Plaintiff's wife, Maria Westry, outside of the apartment and crying hysterically. *Id.* ¶¶ 1, 14. Mrs. Westry stated that her husband, the Plaintiff, had just assaulted her and was locked in the master

bedroom with their daughter. *Id.* ¶ 14. Their daughter had been born fourteen months earlier in February of 2015. Docs. 33-2, 34-1 ¶ 14.

Mrs. Westry told Officer Leon that the altercation started with a verbal argument regarding finances. *Id.* ¶ 15. She told Officer Leon that the Plaintiff became very upset and punched her in the back and right arm. *Id.* She further stated that the Plaintiff began to slap her in the face numerous times and dragged her out of the bedroom. *Id.* Officer Leon observed that Mrs. Westry had numerous red marks all over her face. *Id.* ¶ 16.

Mrs. Westry stated that the Plaintiff had returned to the bedroom and locked himself in with his daughter. *Id.* ¶ 17. After speaking with Mrs. Westry, working with other officers, Officer Leon knocked on the Plaintiff's bedroom door. *Id.* ¶ 18. The Plaintiff refused to open the door. *Id.* The Plaintiff did not respond verbally in any way. *Id.* ¶ 20. Officer Leon and fellow officers then forced open the door. *Id.* ¶ 24.

Officer Leon observed that the Plaintiff was holding the child tightly. *Id.* ¶ 25. The Plaintiff was directed by the police to "get out of the bed," but he replied "no" and said "please leave my house." *Id.* ¶ 26. He told the police several times to leave his house. *Id.* ¶ 27. One of the officers told the Plaintiff that they were going to have to do this one way or another. *Id.* ¶ 33. Officer Leon discharged his Taser into the Plaintiff's stomach once, delivering a single electrical shock of about five seconds. *Id.* ¶ 35. The Plaintiff was then handcuffed, arrested, and charged. *Id.*

II. Other Facts Admitted by the Plaintiff

A. The Plaintiff's Statement to Officers that "You're Going to Have to Kill Me".

In the Plaintiff's Local Rule 56(a)2 Statement, he denies, in its entirety, Officer Leon's assertion that the Plaintiff told the police officers that "you will have to kill me first before I have to go anywhere." *Id.* ¶ 28. In his deposition testimony, however, the Plaintiff had admitted telling officers that "you're going to have to kill me":

- Q. Now, did you just say, "You're going to have to kill me"?
- A. I would defend my house. I did say that.
- Q. Okay. So there's no question on this audio that you said to the police officers, when they asked you to get off the bed, you said "You're going to have to kill me"?
- A. Oh, no, I'm laying on my back with a baby in my arms. I said that.

See Ex. C (Doc. 33-5) at 23.

Moreover, as the District Court noted, on a recording of the encounter submitted by the Plaintiff in opposition to Officer Leon's Motion for Summary Judgment, "Mr. Westry also can be heard telling the police officers, 'you're going to have to kill me,' when asked to comply with the police officer's instructions." *Ruling and Order* (Doc. 39) at 14; *see also* Ex. 1 to *Br. in Opp'n to Mot. for Summary Judgment* (cell phone video) (Doc. 34-2). In the Plaintiff's Petition for Certiorari ("Pet.") the Plaintiff acknowledges having made this statement. *See* Pet.6 ("This comment, to protect his home, from an unannounced, unwelcome invasive force in

NON-EXIGENT CIRCUMSTANCES was heard from the plaintiff before the 00:27 seconds mark of 02:31.”).

B. The Plaintiff's Resistance to Officers' Efforts to Take His Daughter from His Arms

In his Local Rule 56(a)1 Statement, Officer Leon asserted that the following facts were not subject to genuine dispute:

31. As the officers approached Eric Westry, he began to push and pull away from the officers. Officer Leon advised Eric Westry several times to stop resisting but he ignored all of his comments and continued to hold his daughter Amelia tightly in his grasp. (Exhibit A, Affidavit-Victor Leon ¶ 15; Exhibit C, Deposition transcript-Eric Westry pp.72-73.)

32. Eric Westry admits that the officers were trying to wrestle his daughter away from him because he had his arms wrapped around her and as they were pulling on his daughter they were also pulling on his arms and he was pulling back. (Exhibit C, Deposition transcript-Eric Westry pp.71-73.)

Doc. 33-2 ¶¶ 31-32. In his own Local Rule 56(a)2 Statement, the Plaintiff denied these allegations. Doc. 34-1 ¶¶ 31-32.

At his deposition, however, Mr. Westry testified that “ . . . I know I had my arms around and people were pulling me, so there may have been some pace [sic] that was created, so that's the best I can tell you. I know they were trying to wrestle her away from me—” *Ex. C* (Doc. 33-5) at 72. He further confirmed resisting the officers' efforts to take his daughter form him in the following testimony:

Q. Right. But as they were pulling, you were also pulling, correct?

A. If they were pulling my arms, I was pulling back.

Id. at 73.

III. Officer Leon’s Motion for Summary Judgment

The Plaintiff’s Complaint asserted that Officer Leon violated his constitutional rights by discharging his Taser into the Plaintiff. *See Compl.* (Doc. 1). Officer Leon filed a Motion for Summary Judgment, asserting that no constitutional violation occurred and that he was entitled to qualified immunity as a matter of law. *See Mot. for Summary Judgment* (Doc. 33). The District Court concluded that there was an issue of fact as to whether a constitutional violation occurred,¹ but further held that Officer Leon was entitled to qualified immunity as a matter of law because he did not violate a clearly established right of which a reasonable person would have been aware. *Ruling* at 9, 15. The District Court granted Officer Leon’s Motion for Summary Judgment on that basis and entered judgment accordingly. *Id* at 15; *Judgment* (Doc. 40).

The Second Circuit affirmed.

¹ Contrary to the Plaintiff-Petitioner’s claim, the District Court did not find that his constitutional rights were violated. *Cf. Pet.25.*



REASONS FOR DENYING THE PETITION

Where a police officer is alleged to have used excessive force in effectuating an arrest, qualified immunity will shield that officer from liability for damages if his or her “conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015)(internal quotation marks omitted). A defendant is therefore “entitled to qualified immunity if ‘(1) [the defendant’s] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or (2) it was objectively reasonable for [the defendant] to believe that his actions were lawful at the time of the challenged act.’” *Brandon v. Kinter*, 938 F.3d 21, 39 (2d Cir. 2019) (citation omitted).

In the present case, the District Court held that “if Mr. Westry was non-compliant or threatening, then the use of a TASER was objectively reasonable.” *See Ruling* at 13; *cf. Muschette v. Gionfriddo*, 910 F.3d 65, 70 (2d Cir. 2018)(“[T]he right to be free from a taser when one is compliant with an officer’s instructions and non-threatening . . . is clearly established”). This conclusion is not disputed by the Plaintiff.²

² This conclusion also comports with common sense. While the Plaintiff told officers that they would have to kill him before he complied with their orders, he was incorrect. Officer Leon also had the option of using a Taser as a means of subduing him. It is objectively reasonable for a police officer to use this non-lethal means when faced with a non-compliant or threatening suspect.

The District Court concluded that, “[e]ven viewing the circumstances under Mr. Westry’s version of the events, as this Court must at this stage, Mr. Westry was both non-compliant and threatening.” *Ruling* at 13. As the District Court explained:

As an initial matter, Officer Leon and the other police officers came to Mr. Westry’s home because Mr. Westry had physically assaulted his wife and locked himself in their bedroom with his minor child—none of which is disputed by Mr. Westry. *Compare* Def.’s SMF ¶¶ 13-17, with Pl.’s SMF ¶¶ 13-17 (admitting the preceding facts, including that Officer Leon observed Mrs. Westry had “numerous red marks all over her face”).

Mr. Westry also concedes “refusing to comply with the [police officers’] instructions” when they came into his bedroom. Pl.’s Opp. at 3; *see also* Westry Dep. at 71:6-8 (“Q: . . . Were you advised several time [sic] to stop resisting? A: Um, one time I heard that phrase.”). Mr. Westry also admits that in the exchange with police officers, if they were attempting to grab his infant daughter Amelia, he was also “pulling back.” Westry Dep. at 73:3-6 (“Q: . . . as they were pulling [on Amelia], you were also pulling, correct? A: If they were pulling my arms, I was pulling back.”). Mr. Westry also can be heard telling the police officers, “you’re going to have to kill me,” when asked to comply with the police officer’s instructions. The undisputed facts thus indicate that Mr. Westry was both non-compliant and threatening.

Id. at 13-14.

There can be no serious dispute that the Plaintiff was, in fact, non-compliant. In his Brief in Opposition to Motion for Summary Judgment, the Plaintiff himself affirmatively argued that he “was doing nothing more than refusing to comply with the defendant’s instructions.” *Br. in Opp’n to Mot for Summary Judgment* (Doc. 34) at 3. The Plaintiff’s refusal to comply with officers’ instructions to open the door and to get out of bed, and his physical resistance to handing over his daughter, conclusively establish that he was non-compliant; indeed, it is the very definition of non-compliance.

In addition, the Plaintiff's statement that officers would have to kill him before he would comply could only be viewed as a threat.³ This statement was a definitive indication that the Plaintiff was adamant that he would not get up off of the bed as instructed. The Plaintiff's statement that he would sooner die than comply was also an implicit threat to resist the use of force to the fullest extent of his ability.

Nonetheless, the Plaintiff asserted in the Second Circuit that, because he allegedly attempted to hand his infant daughter to police, he was necessarily "compliant and non-threatening." *E.g., Pl.'s Br.* at 24. The Plaintiff also concedes in contravention to this claim that he attempted to hand over his daughter, that the officers were trying to wrestle his daughter from him as he had his arms wrapped around her, and that he was "pulling back" on his daughter as the officers were attempted to grab her. *Id.* at 13-14; Defendant's Local Rule 56(a)1 Statement ¶¶ 31, 32; *Plaintiff's Deposition Transcript* (No. 33-5) pp. 71-73. These facts demonstrate that the Plaintiff was not complying, but was in fact resisting the officers' efforts to remove his daughter from the Plaintiff's grasp as he held her tightly to his body.

In his Petition for Certiorari, the Plaintiff denies having assaulted his wife. However, he does not deny that an officer in Officer Leon's position could reasonably have believed that the Plaintiff had assaulted his wife. As set forth above, the

³ At least one Circuit Court has expressly noted that a statement of this type is a threat. *See Campbell v. Sikes*, 169 F.3d 1353, 1376 (11th Cir. 1999)(noting that, in *Sims v. Mashburn*, 25 F.3d 980 (11th Cir. 1994), an inmate "threatened that if officials entered his cell, 'I'll buck; you'll have to kill me.'").

Plaintiff admitted in the District Court that Officer Leon was dispatched to the scene in response to a report of domestic violence, that upon arrival Officer Leon saw Mrs. Westry crying hysterically and with red marks on her face, and that Mrs. Westry stated at the scene that the Plaintiff punched her in the back and right arm, slapped her in the face numerous times, and dragged her out of the bedroom. More importantly, whether the Plaintiff assaulted his wife before the police arrived is irrelevant to whether he was non-compliant or threatening in response to their instructions.

In summary, the District Court and the Second Circuit correctly concluded that there was no genuine issue as to whether the Plaintiff was non-compliant or threatening. As a matter of law, the fact that the Plaintiff told officers “you’re going to have to kill me” rather than complying with their instructions precludes any finding that, by discharging his Taser, Officer Leon violated any “clearly established statutory or constitutional rights of which a reasonable person would have known.” *See Mullenix*, 136 S. Ct. at 308 (internal quotation marks omitted). Officer Leon was therefore entitled to qualified immunity as a matter of law.



CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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