

No. 17-1160

IN THE
Supreme Court of the United States

MICHAEL PRICE, INDIVIDUALLY AND IN
HIS OFFICIAL CAPACITY AS LIEUTENANT
OF HAYWOOD COUNTY SHERIFF'S
DEPARTMENT, *et al.*,

Petitioners,

v.

TERESA ANN HENSLEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

- I. Material disputed issues of fact preclude a judicial determination of the Defendant police officers use of the reasonably objective standard of deadly force at this stage of the proceedings.

CORPORATE DISCLOSURE STATEMENT

Respondents, The Estate of David Lee Hensley, by and through his Administratrix, Teresa Ann Hensley, H.H., and Rachelle Fergsuon (“Respondents”). Pursuant to Rule 26.1 the Respondents have no ownership interest of 10% or greater of any interest of a publicly held corporation.

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STATEMENT OF THE CASE

The facts of this case are hotly contested and in conflict with each other regarding the critical issue surrounding qualified immunity. The decedent David Lee Hensley did not at any time greet the two Haywood County Deputies on the morning of August 9, 2012. The decedent and his two daughters were in the kitchen when vehicles could be seen approaching the road leading to their home. At that point, the Plaintiffs went to the living room where the two vehicles were seen pulling into the driveway at the Plaintiffs' home. The decedent then went into the bedroom and retrieved a key and unlocked a small gun safe and removed a pistol and with it, he and his two daughters returned to the living room and they exited the door to the front porch. While Rachelle Ferguson, the older daughter, was standing at the rail, her father struck her in the back of her head at least one time with the pistol in his hand and her and Hailee (H.H. the then minor daughter), struggled to attempt to remove the pistol from his hand. At that point, the Plaintiffs maintain that the Officers did not respond to them calling out to the Officers and after the deceased pulled away from the girls, he crossed the porch and walked down the stairs. At that point, both Beasley and Price acknowledged that the gun was not visible, was not pointed at anyone, neither Officer identified themselves or made any communication or command to the decedent while he descended the stairs. Once he was in the yard, he moved from the sidewalk toward Officer Beasley's car, again the Officers failed to identify themselves or make any commands to the decedent to do anything because Price and Beasley were unable to speak because of their fear of the circumstance.

The Officers however, maintain as the decedent walked through the yard toward Beasley's patrol car, he was walking at a more rapid pace, while the Plaintiffs maintain that that was not the case. The facts then become more in dispute because the Officers maintain that the decedent raised the weapon with his right arm, extended his right hand, pointed it at Beasley's car and started either fanning the top of the gun or manipulating the top of the hammer as he walked at an accelerated pace toward that vehicle. Both Officers however admit that once the decedent was struck in the brain with a bullet, he locked up and fell face forward to the ground on his chest. Beasley maintained that he is the one that shot David Hensley; however, it is clear from Price's deposition that his second shot struck the decedent causing him to lock up and fall face forward and that he then reached for and communicated to Dispatch that shots were fired and he needed help. During this period of time, two additional shots can be heard on the dispatch tape while David Hensley was on the ground.

The Plaintiffs, from the moment of this incident, have never altered their story. The Plaintiffs both stated that the decedent's arms were down, that the pistol was in his left hand pointed to the ground, and that he was not walking toward the vehicle in an aggressive manner. In fact, he took the time before walking toward Beasley's vehicle, to turn to the girls and speak to them as Hailee said, telling them that he loved them. Both Plaintiffs maintain that the pistol was never pointed at the direction of either law enforcement officer and that the decedent was shot without any command or order by the Officers or any identification by the Officers of who they were and why they were there.

The physical evidence collected by the State Bureau of Investigation at the scene clearly establishes that the decedent's right arm was extended, that no pistol was located near his hand and that as he was rolled over to be removed that his left hand was in a pistol grip position with the pistol under the belly button of the body of Hensley. It was these facts in dispute which gave rise to the Trial Court denying Summary Judgment.

REASONS TO DENY THE PETITION

I. MATERIAL DISPUTED ISSUES OF FACT PRECLUDE A JUDICIAL DETERMINATION OF THE DEFENDANT POLICE OFFICERS' USE OF THE REASONABLY OBJECTIVE STANDARD OF DEADLY FORCE AT THIS STAGE OF THE PROCEEDINGS.

Until such time as the facts are found by the jury, no court can conclude that the Deputies use of force met the objectively reasonable standard under the totality of the circumstance, because a person has the right to be on their own property with a pistol, not otherwise pointed at an officer, and that such conduct is only a potential for harm. Even giving the facts known to the Officers at the moment of the shooting of the decedent, these facts would not rise to a level of imminent fear of death or serious injury. The only information given to Beasley was a civil disturbance by the dispatcher. The only other information which Price had was a statement by an individual that a "Henson" man kept the neighborhood up all night. It is also disputed whether Shirley Ferguson, the grandmother of the Plaintiffs Rachelle and Hailee informed dispatch that she was concerned for her granddaughter.

Upon arriving at the scene, giving the facts maintained by the Plaintiffs, the Officers only saw the three people on the porch and observed only the fact that their father struck Rachelle at least one time; however, at the conclusion of that struggle any aggression toward the girls had ended and as the decedent moved toward the porch and down the stairs, the Officers could have at any time during that period identified themselves and placed him on notice to respond to their commands. That opportunity for the Officers to act continued as he reached the sidewalk and cut across the yard walking toward Defendant Beasley's car; however no commands were ever given.

If the fact finder should conclude that the pistol was in the position that the Plaintiffs maintained it to be, there was no imminent threat against the Officers or anyone at or immediately before the firing of the fatal shot. However, even after the decedent died, the Officers continued to shoot in the direction of the daughters of the decedent creating a state claim for assault as found by the Trial Court. Until such time as the fact finder resolves the underlying disputed facts, a court may not reach its own conclusion of facts in order to determine that the Officers are entitled to qualified immunity as a matter of law.

In fact, the Fourth Circuit in this case has held that the Petitioners' waived the two-step process analysis required by this Court in *Saucier v. Katz*, 533 U.S. 194 (2001) for a determination of whether the right at issue was clearly established. The Fourth Circuit Court of Appeals in this action held that the Petitioners' waived the issue by the following language... "See Fed. R. App. P. 28(a)(8)(A), [T]he argument...must contain...appellants contentions and the reasons for them[.]; *Edwards v. City*

of *Goldsboro*, 178 F. 3d 231, 241 n.6 (4th Cir. 1999) (noting failure to comply with Rule 28 results in abandonment on appeal). Consequently, we examine only the first *Saucier* prong, whether a Constitutional violation occurred.” See Appendix page 9a-10a. Therefore, the Petitioners in this Petition cannot now ask this Court to ignore this waiver and to decide whether the right was clearly established.

The issue addressed by the Lower Court in this case was whether the Petitioners waived the right to determine whether that right was clearly established. By the Petitioner’s waiver, that argument should not now be addressed. “[T]his is a court of final review and not first view, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001). This Court’s traditional rule “precludes a grant of certiorari....when the question presented was not pressed or passed upon below” *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). As such “[n]o procedural principle is more familiar to this Court than that of a Constitutional Right, or a right of any other sort, may be more forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it” *Henderson v. United States*, 586 U.S. 266, 274 (2013) (Internal quotation marks omitted). Thus this Court should not consider the review of this issue.

II. PETITIONERS HAVE MISSTATED THE HOLDING OF THE FOURTH CIRCUIT COURT OF APPEALS

The majority opinion did not impose upon the Petitioners a duty to give a verbal command before the use of deadly force. The majority opinion only considered

that as a factor in the actions of the Defendants at or immediately prior to the time of the shooting. The Petitioners have misstated the opinion of the Fourth Circuit in this case. The majority opinion never required a *per se* rule that a verbal command *must* be given before the use of deadly force. What the Court looked at was, if sufficient time elapsed, absence of verbal commands and not communicating with the decedent was a factor to be considered under the totality of circumstances rule; along with all other factors which a jury must receive in a jury charge, in determining the facts of the case. The other significant factor that the Court looked at was whether the decedent kept the gun to his side and by not pointing it at the Officers they concluded that under the totality of the circumstances the Officers were not at this stage of the proceedings entitled to qualified immunity as a matter of law. That is the holding of *Tennessee v. Garner*, 471 U.S. 1 (1985), at 11-2 .. “[I]f the suspect threatened the officer with a weapon and there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”

This is exactly the position that the Plaintiffs have been maintaining. If the gun was not pointed at the Defendants, they had several seconds to issue commands or instructions on what to do with the gun and his person. In fact nowhere in the evidence or Briefs have these Petitioners ever said they didn’t have time to issue any commands. Officer Beasley, in his deposition at page 85, made the following quote, “I developed I guess what they call tunnel vision.” Officer Price on the other hand stated in his deposition, “at that time I couldn’t say anything...”

I guess you could say your sensories. I mean, I could not physically at that time say anything. I couldn't." As the Court went on to say in the Fourth Circuit opinion in this case that a warning *should* be given *unless* there is an immediate threat of danger and it must be clear that the issue be settled. See p. 57(a)-58(a).

Until such time as the finders of fact establish facts on which the Trial Division can rely through special interrogatories, the Trial Court cannot conclude as a matter of law the two step proposition outlined by this Court in *Saucier v. Katz*, 533 U.S. 194, (2001) has been met. For a right to be clearly established, it must be sufficiently established to a reasonable official that what he was doing does not violate the right and it must be determined that the conduct of the officer concluded that a Constitutional violation had not occurred. Here such inquiry may not be concluded until such time as the facts are established.

It is for this reason that until the Court concludes that the facts are resolved in either the Plaintiffs or the Defendants favor then the Court may not analyze those facts under the standard of whether a reasonable officer given those disputed facts would have acted accordingly. Since the Plaintiffs maintain that the Officers never identified themselves, the Officers never made any command, and that Hensley did not point a firearm at them, these facts, until resolved, would not give rise to a dispositive source of clearly established law.

CONCLUSION

For the foregoing reasons the Court should deny the Defendants Petition for Writ of Certiorari.

Respectfully submitted this the 20th day of March, 2018.

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