

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Circuit

United States Court of Appeals Fifth

No. 18-30362

FILED
July 17, 2019

Lyle W. Cayce

Clerk

BRENDA MASON, Individually & on behalf of Quamaine Dwayne Mason;
BILLY C. MASON, Individually & on behalf of Quamaine Dwayne Mason,

Plaintiffs - Appellants

v.

MARTIN FAUL, Individually & in His Official Capacity,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Louisiana

Before JONES, HO, and OLDHAM, Circuit Judges.

PER CURIAM:

This case arrives before us for the second time, as the panel in a previous appeal denied qualified immunity to Officer Faul, who tragically shot to death Quamaine Mason under circumstances that were the subject of numerous and conflicting witness statements and expert opinions. The shooting was precipitated by a 911 call to the Lafayette, Louisiana police

about a possible armed robbery. Faul arrived at the scene with his canine and saw two other officers with weapons drawn on Mason and his former girlfriend. Faul was within three to six feet of the suspect. Alarmed by what he thought were Mason's sudden movements toward a gun in his waistband, Faul released the dog and began to fire. As the dog attacked him, Mason was hit five times in his side and front, then after a brief pause where he had fallen face down, an additional two times. This court carefully reviewed the evidence on summary judgment, vacated the defense judgment on Faul's first five shots, and found material fact issues concerning the availability of qualified immunity for Faul's final two shots. *See Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 277–78 (5th Cir. 2015) (“Mason I”). The panel held that the district court had failed to credit evidence favorable to the plaintiffs when assessing the officer's conduct and that the disputed, material question for the final two shots, according to the panel, was whether Mason was “clearly incapacitated” by the earlier shots by the time he lay on his stomach. *Id.*

On remand, the case was tried before a jury for several days, at the conclusion of which the jury determined that Officer Faul had used unconstitutionally excessive force against Mason but was nevertheless entitled to qualified immunity. From that verdict, and judgment accordingly, Mason's family appeals. Appellants raise four issues. We discuss each briefly, noting that Appellants pointedly do not contend that the verdict was not supported by sufficient evidence or was against the great weight and preponderance of the evidence.

A. Whether the Trial Court erred in relying on *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985).

Appellants argue the trial court referenced this case improperly for several purposes: to analyze the qualified immunity defense; to exclude

portions of their expert testimony; and to justify jury instructions. The question of jury instructions will be treated in the next section. In *Young*, this court explained what has been consistently reinforced as the basis for law enforcement officers' qualified immunity defense. Such immunity may be sustained even when officers act negligently, or when they could have used another method to subdue a suspect, or when they created the dangerous confrontation, or when the law governing their behavior in particular circumstances is unclear. *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3039–40 (1987) (qualified immunity protects reasonable, if mistaken, judgments by law enforcement); *Mullenix v. Luna*, 136 S. Ct. 305, 310 (2015) (officers are entitled to qualified immunity even where they could have used “alternative means” to subdue the suspect); *Rockwell v. Brown*, 664 F.3d 985, 992–93 (5th Cir. 2011) (“well established” that the qualified immunity analysis in the excessive force context is “confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer’s use of deadly force].”) (citing *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 493 (5th Cir. 2001)); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (to overcome qualified immunity, there must be “clearly established law” that is “particularized to the facts of the case.”) (citations omitted). That is because courts should not hold officers liable from the safety of our “20/20 vision of hindsight” for decisions taken in a split-second under potentially life-threatening conditions. *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872 (1989).

Thus, although the parties might better have relied in their briefs on Supreme Court precedent from the ensuing three decades following *Young*, the trial court’s reliance on that case as a general matter was not misplaced. Contrary to the views expressed by Judge Higginbotham’s dissent in *Mason I*, 806 F.3d at 286-88, and adopted here by Appellants, *Young*’s holding

expresses the law regarding qualified immunity just as accurately for this case, involving both the officer's release of a trained canine and a shooting, as it did for a police encounter involving the shooting alone. It was for the jury to determine, as Judge Higginbotham's dissent acknowledged, *Id.* at 288, whether Mason's actions at any point could have led a reasonable officer to believe that Mason was posing a serious threat to others. Qualified immunity is justified unless *no* reasonable officer could have acted as Officer Faul did here, or *every* reasonable officer faced with the same facts would *not* have shot at Mason. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) ("The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply") (citing *Reichle v. Howards*, 566 U.S. 658, 666, 132 S. Ct. 2088 (2012)).

Exactly what portion of *Young* was erroneously relied on by the trial court for evidentiary purposes is unclear from Appellants' brief, but as noted, that case correctly concluded that officer negligence is not a basis to deny qualified immunity. Further, expert testimony concerning police procedure violations by a defendant officer are not relevant to the circumstances that confronted the officer at the moment he used deadly force. We have reviewed the record pertaining to the court's exclusions of proffered expert evidence and do not find those rulings that were based on *Young* in error under the circumstances of this case. In particular, the court permitted the expert to testify about proper dog handling procedures, and whether Faul's actions were consistent with those procedures, but not to what Faul could or should have done prior to his encounter with Mason.

B. JURY INSTRUCTION AND VERDICT ERRORS

Appellants contend that the trial court erred by submitting to the jury two jury interrogatories, one on unconstitutional excessive force and one on qualified immunity. They contend that this alleged error, fortified by the

court's misplaced reliance on *Young*, led to an inconsistent jury verdict on the issues. There is no error. The court's charges on the constitutional issue and qualified immunity separated the two questions and were precisely and almost verbatim stated according to the Fifth Circuit Pattern Jury Instructions (Civil) 10.1 and 10.3. The pattern instructions, in turn, represent an admirable summary, based on Supreme Court and Fifth Circuit precedent, of the elements of a plaintiff's claim that must be proven at trial. We find no error in the court's use of the pattern charges. *See United States v. Andaverde-Tinoco*, 741 F.3d 509, 516 (5th Cir. 2013) (alleged jury-charge error was not "clear or obvious" when it was "almost identical to the charge found in the . . . Pattern Jury Instructions"); *see also Harrison v. Otis Elevator Co.*, 935 F.2d 714, 717 (5th Cir. 1991) ("No harmful error is committed if the charge viewed as a whole correctly instructs the jury on the law, even though a portion is technically imperfect.") (citing *Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 261–62 (5th Cir. 1985)).

The court also did not err in rejecting a plaintiff-proffered charge founded on the Second Amendment, because no question was litigated about Mason's legal carrying of a firearm. Plaintiffs' evidence that Mason could legally carry a pistol went unaddressed by the defense, because although the defense performed a records search and found no concealed weapons permit, the defense was not confident enough in their search efforts to establish that Mason absolutely did not have a permit. For this reason, the court resolved the factual dispute in favor of Mason to the extent it was disputed. In any event, the case cited by Appellants for the Second Amendment argument is unpublished and therefore non-precedential in this court. *See Graves v. Zachary*, 277 F. App'x 344 (5th Cir. 2008) (unpublished); *see* Fifth Circuit Rule 47.5.4 ("[u]npublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law

of the case”). Further, *Graves* arose from a summary judgment appeal, which bears little usefulness for instructions at a trial on the merits, and the court there made clear that it “express[ed] no view on the ultimate merits of the claim.” *Graves*, 277 F. App’x at 350.

C. INCONSISTENT JURY VERDICTS

Because the jury found that Officer Faul used “objectively unreasonable” excessive force (Issue One) but was also entitled to qualified immunity (Issue Two), Appellants contend the verdict is fatally inconsistent. We disagree. That these two issues were framed according to governing law and the pattern jury instructions has already been pointed out. It is therefore inherently difficult to credit an argument of legal inconsistency, much less redundancy. To be sure, an officer’s conduct must be objectively unreasonable to find a Fourth Amendment violation. *Graham*, 490 U.S. at 397, 109 S. Ct. at 1865. And qualified immunity must be rejected where the facts found by the jury demonstrate not only a constitutional violation but also that the law was clearly established such that the officer’s conduct was objectively unreasonable according to that law. *Anderson*, 483 U.S. at 641, 107 S. Ct. at 3039–40. It was not clearly established at the time of this shooting that an officer armed with a pistol and a trained canine could not release the canine on a suspect and nearly simultaneously begin to shoot to incapacitate Mason, unless *no* reasonable officer could have believed that Mason continued to pose a danger.

The term “objective reasonableness” pertains independently to the determination of a constitutional violation and also to the immunity issue. *Saucier v. Katz*, 533 U.S. 194, 205, 121 S. Ct. 2151, 2158 (“The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct). While Officer Faul, according to the jury, used objectively unreasonable excessive force in

deploying the canine and shooting Mason, this is not fatally inconsistent with a factual finding of immunity. The jury must have found that although Officer Faul's belief that Mason posed and continued to pose a serious threat was incorrect, it was excusable or, at most, negligent in the heat and immediacy of the confrontation. Put otherwise, for immunity purposes, the jury need not have accepted the contention, advanced in Judge Higginbotham's dissent, that Mason posed no "sufficient threat" before or during the confrontation.¹ In that situation, qualified immunity was required. It is this court's duty to resolve any facial conflict in a jury's verdict. *Gallick v. Baltimore and Ohio Railroad Co.*, 327 U.S. 108, 119, 83 S. Ct. 659, 666 (1963) ("it is the duty of the courts to attempt to harmonize the answers . . . to reconcile the jury's findings, by exegesis, if necessary . . . before we are free to disregard the jury's verdict and remand the case for a new trial."). Here, given the numerous witnesses and conflicting versions of the encounter, we cannot conclude that the facts found by the jury could not support both of its findings.

D. WHETHER THE CASE FOR QUALIFIED IMMUNITY "FAILS."

Appellants' final contention is that as a matter of law Officer Faul could not sustain a qualified immunity defense. To support this proposition, which seems inconsistent with their preliminary assertion that they do not challenge sufficiency of the evidence, they provide a rendition of trial evidence much of which was contradicted or questioned by other testimony. This multi-day trial, after all, evoked a great deal more evidence, or evidence more compellingly presented, than was available at the summary judgment stage. The jury were entitled to judge witness credibility in a way not permitted on the earlier appeal. In brief, the hotly disputed evidence centered on how violently Mason

¹ If this kind of quick dismissal of qualified immunity, based solely on the general test set forth in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985), was ever good law, it is clearly no longer good law in light of *Mullenix*, which called such over-reliance on *Garner* a "mistake." *Mullenix*, 136 S. Ct. at 305.

had acted when he went to his former girlfriend's apartment; how threatened the other witnesses present in the apartment felt by Mason's behavior; whether, as three officers and Babino (in an early statement to police) said, he reached for his waistband where the pistol was hitched; and whether he continued to move his arm after falling to the ground. Appellants point to alleged contradictions in Faul's statements and testimony, but the jury no doubt assessed these along with the rest of the evidence. Following a properly conducted trial, this court is required to sustain the jury's verdict on the fact issues.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is **AFFIRMED**.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

Brenda Mason, et al.

Civil Action No. 6:12-CV-2939

versus

Judge Rebecca F. Doherty

Martin Faul, et al.

Magistrate Judge Carol B. Whitehurst

REPORT AND RECOMMENDATION

Pending before the Court, on referral from the district judge, is a request for determination of a qualified immunity issue which was remanded to this Court in the Fifth Circuit's Judgment.

I. Background

On December 9, 2011, Officer Martin Faul fatally shot Quamaine Mason while responding to a reported armed robbery. Plaintiffs subsequently filed this action against Officer Faul, Lafayette City-Parish Consolidated Government ("LCG"), and Chief James P. Craft (collectively "Defendants"). Plaintiffs asserted claims against Officer Faul under the Fourth, Fifth, Eighth, and Fourteenth Amendments. They also asserted claims pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) against Officer Faul's employers, LCG and Chief Craft. Plaintiffs included state law claims against all three Defendants.

On December 10, 2013, the district court granted Defendants' motion for summary judgment and dismissed all of Plaintiffs' claims with prejudice. (Doc. 72.)

On appeal, however, the Fifth Circuit Court of Appeals reversed summary judgment as to Officer Faul on Plaintiffs' Fourth Amendment and related state law claims.

Mason v. Lafayette City-Parish Consolidated Gov't, 806 F.3d 268, 277 (5th Cir. 2015). Specifically, the Fifth Circuit: (1) reversed the granting of qualified immunity in favor of Officer Faul with regard to the last two shots that he fired at Quamaine Mason; and (2) remanded the case to this Court for a ruling on whether Officer Faul is entitled to qualified immunity with respect to the first five shots fired at Quamaine Mason. *Id.* at 277, 282. The Fifth Circuit affirmed the district court's ruling in all other respects. *Id.* at 282.

On March 29, 2017, the undersigned conducted a telephone status conference to address the issues remaining after the Fifth Circuit's decision. (Doc. 95.) At that conference, the parties agreed that the matter is ripe for a ruling on the qualified immunity issue remanded from the Fifth Circuit, specifically, the issue of whether Officer Faul is entitled to qualified immunity on summary judgment as to the first five shots, with appropriate weight in the analysis to be given to the testimony of Rachel Babino.

II. Law and Analysis

In the judgment rendered on appeal of this action, the Fifth Circuit advised “[w]hen addressing excessive-force claims, courts have an obligation to slosh our way through the fact bound morass of ‘reasonableness.’” *Id.* at 276.

The Court noted that “the Supreme Court has recently emphasized that in an excessive-force case on summary judgment, like any other case, a court must accept as true the evidence of the nonmoving party and draw all justifiable inferences in that party’s favor.” *Id.* The Court observed that, in this case, “the district court failed to give credence to, or even make note of, Babino’s conflicting account of the shooting which perhaps constitutes the Masons’ strongest evidence.” *Id.*

Judge Higginbotham, concurring in part and dissenting in part, applied the appropriate standard and, accepting as Babino’s testimony as true, recited the following narrative of events, which this Court adopts:

On December 9, 2011, Officer Martin Faul—a canine officer—was working the night shift. Responding to a reported armed robbery at a department store, Officer Faul heard a report of another armed robbery at Racquel Babino’s apartment complex. Officer Faul immediately “volunteered for the call.” Arriving on the scene at the same time as two other officers, all three officers ran toward the apartment with guns drawn. When the other officers gained the lead, he quickly took charge, yelling, “Y’all behind the dog.”

The officers arrived at the apartment complex to see Quamaine Mason walking out the front door of an apartment with a young woman. Quamaine matched the description of the suspect, and the police call had stated that he was armed. When the officers saw him, he was not

fleeing or threatening anyone; he was walking quietly out the front door with a female companion. The young woman with him, upon seeing the police officers with already-drawn weapons, immediately shouted out that Quamaine had done nothing wrong. Quamaine, who wanted to be a police officer and was actively applying to agencies in the area, had a gun on his waistband. He had a permit to carry this gun.

Quamaine stood still with his hands up and empty, complying with all police instructions. But holding his dog by its collar, Officer Faul and the dog charged Quamaine—the two were separated by less than the length of the dog's thirty-six-inch tether. Officer Faul shouted "Gun!" and launched the dog onto Quamaine. When the dog hit Quamaine, he began falling to the ground reflexively trying to fend off the attack with his hands. As Quamaine fell, Officer Faul began shooting him. Indeed, Officer Faul began firing nearly simultaneously with his deployment of the dog, which continued attacking throughout the shooting. This means that Officer Faul was firing at point-blank range and that the assault was of man and dog, not dog then man. Neither of the other two officers on the scene fired a single shot.

The autopsy confirms that the paths of the shots which hit Quamaine are explained only by his struggle with the dog as he falls to his left and to the ground. None of the seven shots hit Quamaine head-on, instead striking him in downward paths from the side and back. The closest to head-on is the shot which hit Quamaine's chin at a sharp downward angle, then traveled through his neck (never exiting his body) to his chest. Dr. Traylor, who gave a "plausible order of shots fired based on the [witness] statements," believed this shot was the first to hit. However, this account is contradicted by other evidence; indeed, Babino stated that she believed the first shot hit Quamaine's chest or shoulder rather than his chin. Whenever the chin shot struck, its downward trajectory can be explained only by Quamaine's struggle with the dog.

While the dog was on Quamaine, Officer Faul shot Quamaine seven times at point-blank range (recall that the dog was on a thirty-six-inch tether held by Officer Faul's left hand and his gun was being fired with his right). If Quamaine did move on the ground prior to Officer Faul firing the last two shots, it may have been due to the dog, which was still "tearing at" Quamaine's hip, "grabbing him and pulling him

back.” However, there is evidence that Quamaine did not move during the pause between the first five and the last two shots to hit him. Babino’s deposition indicates that her attention was fixed on Quamaine throughout the shooting, and officer accounts provide further support—she was watching Quamaine.

When asked if she saw Quamaine move once he was on the ground, she stated that he picked up his head, but she did not see him “move his body, the trunk of his body.” She also stated that she did not see Quamaine make “any threatening action . . . towards anyone” once the apartment door opened or make “any effort whatsoever . . . to fight back against the police.”

Id. at 289.

On direction from the Fifth Circuit, the undersigned must address whether, based on the above version of events, genuine issues of material fact exist as to whether or not Officer Faul is entitled to qualified immunity with regard to the first five shots fired upon Quamaine Mason. “Qualified immunity shields government officials acting within their discretionary authority from liability when their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known.” *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009)(quoting *Wallace v. County of Comal*, 400 F.3d 284, 289 (5th Cir. 2005)). A defendant’s assertion of qualified immunity is analyzed under a two-pronged test: (1) whether the plaintiff has shown sufficient facts to “make out a violation of a constitutional right” and (2) “whether the right at issue was ‘clearly established’ at the time of the defendant’s alleged misconduct.” *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

When an officer uses force to make a “seizure,” the Fifth Circuit instructs that a claim against the officer under the Fourth Amendment be analyzed for “objective reasonableness.” *Mason*, 806 F.3d at 275 (citing *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). To prevail on an excessive-force claim, a plaintiff must show “(1) an injury (2) which resulted from the use of force that was clearly excessive to the need and (3) the excessiveness of which was objectively unreasonable.” *Id.* (citing *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011)).

An officer’s reasonableness in using force – deadly or non-deadly – is analyzed under an objective standard “in light of the facts and circumstances confronting [the officer], without regard to [his or her] underlying intent or motivation.” *Id.* (citing *Graham*, 490 U.S. at 397). In determining an officer’s reasonableness, courts are to pay “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 and others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.” *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 20/20 vision hindsight,” and “must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular

situation.” *Graham*, 490 U.S. at 396-97, 109 S.Ct. 1865. The inquiry is limited to whether the officer “was in danger at the moment of the threat” that resulted in the use of force. *Mason*, 806 F.3d at 276 (citing *Rockwell v. Brown*, 664 F.3d 985, 001 (5th Cir. 2011)).

Giving full credence to the testimony of Rachel Babino, the Court finds that a reasonable jury, considering the totality of circumstances and balancing the severity of the threat against the officers, could conclude that Mr. Mason, objectively posed no immediate threat, such that Officer Faul violated the Fourth Amendment in firing the first five shots. Although Officer Faul indicated that Mr. Mason’s hand went toward the gun in his waistband before Faul released his canine, Ms. Babino’s testimony contradicts Officer Faul’s account. According to Ms. Babino, Mr. Mason made no threatening move toward the officers and stood still with his hands up, complying with police instructions. Ms. Babino claims that Officer Faul and his police dog simultaneously attacked Mr. Mason, Officer Faul shooting him seven times at point blank range as he fell down struggling to fend off the dog. Ms. Babino asserts that Mr. Mason only dropped hands to his crotch after the dog attacked him. She further asserts that Mr. Mason never did anything to require Officer Faul to release the dog for an attack, that Mr. Mason never touched the gun, and that Mr. Mason never attempted to resist, assault or fire upon the police.

With regard the second inquiry regarding qualified immunity – whether the violated constitutional right was clearly established at the time of the violation –

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TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE, LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Mason

Civil Action 12-02939

versus

Judge Rebecca F. Doherty

Lafayette, et al

Magistrate Judge Carol B. Whitehurst

JUDGMENT

For the reasons contained in the Report and Recommendation of the Magistrate Judge filed previously herein, *R. 122*, noting the absence ^{of} objections thereto, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that the Motion For Summary Judgment [Rec. Doc. 44] on the basis of qualified immunity as to the remanded issue of the first five shots is **DENIED**.

THUS DONE AND SIGNED in Lafayette, Louisiana, on this 15 day of

June, 2017.

Handwritten signature of Rebecca F. Doherty
Rebecca F. Doherty
United States District Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

Brenda Mason, et al.

Civil Action No. 12-2939

versus

Magistrate Judge Carol B. Whitehurst

Martin Faul

BY CONSENT OF THE PARTIES

JUDGMENT

The trial of this matter was conducted before a jury from March 5 - 12, 2018. The jury returned a verdict for defendant, Martin Faul, and against plaintiffs, Brenda and Billy Mason. Considering the foregoing,

IT IS HEREBY ORDERED that judgment be and is hereby entered in favor of defendant Martin Faul and against plaintiffs Brenda and Billy Mason.

IT IS FURTHER ORDERED that plaintiffs are taxed with costs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.

Thus done and signed in Lafayette, Louisiana, this 16th day of March, 2018.



CAROL B. WHITEHURST
UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**