



DPS Legal Review

April 2021 | Volume 20 No. 4

Georgia Department of Public Safety | Legal Services Office | (404) 624-7423

11th Circuit Court of Appeals

COURT REJECTS OFFICER'S QUALIFIED IMMUNITY DEFENSE

In March 2017 Deputy Brandon Bennett with the Hamilton County (Tennessee) Sheriff's Department was patrolling in his squad car when he noticed Phillip Wayne Koger driving a white Camaro. The Camaro's tag was partly obscured. Deputy Bennett activated his patrol vehicle's blue lights and attempted to pull over Koger's vehicle for the license plate violation.

Although Koger initially pulled over, he quickly accelerated and fled the scene of the gas station where both he and Deputy Bennett had stopped. Bennett pursued Koger across state lines into Georgia, joined shortly by officers from other agencies. Koger reached speeds of approximately 90 miles per hour during the chase, managing to maintain a high speed even after driving over spike strips.

After Deputy Bennett hit Koger's Camaro, Koger crossed over the highway median and into oncoming traffic. Koger then collided into a guardrail, at which point another officer's vehicle hit Koger's passenger door. At first Koger held his hands outside his driver's side window but pulled his arms back into the Camaro upon the officers' approach. Deputy Bennett saw the backstrap of a handgun in the console of Koger's car at this time.

Officers removed Koger from the car, even as Koger resisted:

Several officers testified that Koger immediately began to resist and that

they had to use force to get Koger to comply with their commands and stop resisting. For instance, Fort Oglethorpe Police Deputy Gebelien testified that Koger engaged in a physical altercation with officers outside Koger's car. Several officers assisted in handcuffing Koger and they eventually had to double-handcuff him due to his level of resistance. Koger testified that he has no memory of any events that occurred between being handcuffed and waking up in the hospital hours later.

Sergeant Carson arrived on the scene after Koger was already handcuffed and lying facedown on the ground. Carson and Deputy Bennett lifted Koger off the ground to escort him to a police car. Both deputies testified that, while they escorted Koger, he tried to evade their grip and "stiff walk[ed]", which compromised their ability to control Koger. Deputy Bennett tried to place Koger over the trunk of the police cruiser to prevent him "from jerking away or pushing back." Koger persisted in resisting, leading Bennett to "lay over Koger's body to attempt to keep him on the trunk."

Carson testified that he "punched Koger in the back twice 'for pain compliance'" as Bennett tried to hold down Koger. Carson testified further that, since the two punches seemed to have no effect on Koger, he "delivered two elbow strikes" to Koger's person: "Although Koger's knees buckled after the first elbow strike, Carson testified that he struck

Koger a second time ‘just from momentum of being in a fight.’”

Sergeant Carson then patted down Koger’s ankles to check for weapons. Both Carson and Deputy Bennett testified that, during the pat down, Koger began pushing himself away from the trunk of the patrol car “and attempted to stand.” Carson testified further that he “put his hand between Koger’s legs to lift him onto the trunk. He says this is a common wrestling move.” Carson also testified that he “did not fear for his life at any point during the arrest.”

After his arrest, Koger was transported to the hospital for treatment: “His medical records indicate that he had decreased color flow to his left testicle and that he was in danger of testicular infarct. He was diagnosed with a scrotal contusion but did not need emergency surgical intervention.”

Koger sued Sergeant Carson, among others, for excessive force in violation of his Fourth Amendment rights under 42 U.S.C. § 1983. Carson asserted a qualified immunity defense, but the district court denied his motion for summary judgment on this ground. Carson appealed the district court’s denial to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit Court of Appeals’ 2020 decision in *Williams v. Aguirre*, 965 F.3d. 1147, provides that, when reviewing the district court’s decision on summary judgment, the Eleventh Circuit Court must “. . . view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party [here, Koger], and resolve all reasonable doubts about the facts in favor of the non-movant.”

The first step in a court’s consideration of a qualified immunity defense is whether the officer shows that he was acting within his discretionary authority. Once the Eleventh Circuit Court determined that it was “undisputed” that Sergeant Carson was acting within his discretionary authority during the incident, the burden shifted to Koger to demonstrate that qualified immunity should not

apply: “To do so, Koger must show both (1) that Carson violated a constitutional right; and (2) that the relevant right was “clearly established” at the time of the alleged misconduct.”

Among the factors the Eleventh Circuit considers in reviewing a Fourth Amendment excessive force claim are:

- (1) the severity of the crime; (2) whether the individual poses an immediate threat to the safety of the officers or others; (3) whether the individual actively resists or tries to evade arrest by flight; (4) the need for force to be applied; (5) the amount of force applied in light of the nature of the need; and (6) the severity of the injury.**

The Eleventh Circuit court found that, viewing the facts in the light most favorable to Koger, as required by the Federal Rules of Civil Procedure, a jury could conclude that Carson’s use of force violated a constitutional right, i.e., the Fourth Amendment. The Court reasoned:

According to Koger’s version of the facts, he was resisting immediately following the stop but by the time Carson arrived he was lying face down, prone, and double-handcuffed. Carson and Bennett then lifted Koger (bringing him from handcuffed and prone to handcuffed and standing), marched him to the back of the patrol vehicle, and leaned him over the vehicle in order to conduct a search. At this point, Carson punched Koger twice and delivered an elbow strike to his lower back, which caused Koger’s knees to buckle. Due to fight momentum, Carson struck Koger in the back with

his elbow a second time. Carson then placed his arm between Koger's legs and thrusted upwards in an uppercut motion, striking Koger's testicles and lifting him off the ground and onto the trunk of the patrol vehicle. During this time, Koger was screaming that he could not breathe. Upon the conclusion of the search, Koger slid off the trunk onto the ground. Koger maintains that he was compliant and non-resisting during his interactions with Carson at the rear of the patrol vehicle. If Koger was indeed compliant and non-resisting, as we must accept here, Carson's use of force was objectively unreasonable.

The Court then considered the "critical question" of "whether Koger was resisting." The Court concluded that there was "a genuine dispute of fact" regarding "whether Koger was resisting when Carson delivered the second elbow strike and the uppercut strike to Koger's groin." In reaching this determination, the Court considered that neither dashcam video of the arrest nor witness testimony resolved this question: "Although there are dashcam videos that recorded the incident, we agree with the district court that none clearly depicts whether Koger was resisting." The Court also pointed out the inconsistency between the testimony of Deputy Floyd and that of Koger's expert witness regarding the video: "For instance, Deputy Floyd testified that the videos show Koger resisting the search by 'jerking around' while Patrick Looper (Koger's expert) testified that, based on his review of the video, Koger 'doesn't appear to be resisting.'"

The Court concluded that eyewitness testimony regarding whether Koger was resisting was also inconclusive: "Neither does eyewitness testimony answer the question. Four officers—Carson,

Bennett, Smith, and Floyd—testified that Koger was resisting at the rear of the patrol vehicle. On the other hand, another officer, Cook, testified that in his opinion Koger was not resisting."

For these reasons, the Court found:

[U]nder Koger's version of the facts, he was handcuffed and not resisting at least when Carson delivered the second elbow strike and used an uppercut strike to his groin to lift him onto the trunk of the patrol vehicle. Assuming this to be true, such conduct amounts to a clearly established constitutional violation.

For these reasons, the Eleventh Circuit held that Sergeant Carson was not entitled to qualified immunity and affirmed the district court's denial of Carson's summary judgment motion. *Koger v. Carson*, No. 20-12078, 2021 WL 1206065 (11th Cir. March 30, 2021).

OFFICER'S USE OF TASER DID NOT CONSTITUTE EXCESSIVE FORCE

An officer initiated a traffic stop on a car driven by Ricky Duncan. His cousin, Samantha Duncan, was a passenger in his vehicle at the time of the stop. (Ricky Duncan is hereinafter referred to as "Ricky" and Samantha Duncan is referred to as "Duncan".) The officer found out that there was a warrant for Ricky's arrest and, when directed to exit his vehicle, Ricky instead fled the scene. Other officers, including Deputy Ward, joined the pursuit.

When Ricky eventually stopped driving, he held a gun over his head as he exited his car. Officers on the scene fired their weapons. When Duncan, who was unarmed, exited Ricky's car, she walked to the rear of Ricky's car. At this point, Duncan was standing between eight to twelve feet from Deputy Ward. Deputy Ward commanded Duncan to "get down." In response Duncan "immediately raised

her hands above her head and stepped back.” Deputy Ward then instructed Duncan—two more times—to “get on the ground.” Before Duncan could respond, Ward “tased her in the chest, and she fell to the ground convulsing.” Within a few minutes, Duncan was able to walk unassisted to Ward’s police cruiser.

Duncan filed a 42 U.S.C. § 1983 lawsuit, alleging that (among other things), Ward used excessive force in violation of the Fourth Amendment. The district court granted Deputy Ward’s motion for summary judgment, finding that he was entitled to qualified immunity. The court then dismissed Duncan’s case, and she appealed to the Eleventh Circuit Court of Appeals.

Eleventh Circuit precedent in *King v. Pridmore*, 961 F.3d 1135, holds that “[s]ummary judgment is appropriate ‘if the movant [here, Duncan] shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” Among the totality of the circumstances the Eleventh Circuit considered in determining the reasonableness of the force used were: “(1) the need for the application of force, (2) the relationship between the need and amount of force used, and (3) the extent of the injury inflicted.”

The Court concluded that Deputy Ward’s use of force was reasonable, despite Duncan’s contention that she did not hear Deputy Ward’s commands to “get on the ground”. The Court’s review of bodycam footage confirmed that Ward did, indeed, command Duncan to do so. In addition to Duncan’s not following Deputy Ward’s instructions, the Court recognized that:

[I]t was not just the fact that Duncan did not follow Deputy Ward’s orders that led to Deputy Ward’s need to exercise force—it was also the “tense, uncertain, and rapidly evolving” series of dangerous events. . . What started as a routine traffic

stop quickly escalated: Duncan had been the passenger in a vehicle that had just led Deputy Ward and other law-enforcement officers on a chase that ended with Ricky getting out of the car with a gun in his hand, causing the officers to shoot.

The Court reasoned that the force used by Ward was “proportional to the need given the circumstances. We accept as true that Duncan was not resisting. Still, given the ‘tense and difficult’ nature of the situation, an attempt to restrain Duncan could have escalated into a physical struggle that might have resulted in Duncan or Deputy Ward being injured.”

The Court distinguished the cases relied upon by Duncan from the facts of Duncan’s case, including cases in which the Eleventh Circuit has “repeatedly ruled that a police officer violates the Fourth Amendment, and is denied qualified immunity, if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands.” The Court concluded that those cases were dissimilar from Duncan’s since they involved an officer’s use of force “when the suspects were already under the officer’s control.” In one of the cases Duncan cited, “plaintiff was handcuffed and under arrest” and, in the other, “plaintiff was laying down on the ground.”

The Eleventh Circuit held that Deputy Ward’s use of the taser was not excessive force in violation of Duncan’s Fourth Amendment rights. Therefore, the Court affirmed the district court’s order granting summary judgment to Deputy Ward based on qualified immunity. *Duncan v. Wade and Ward*, No. 20-13004, 2021 WL 1235721 (11th Cir. Apr. 2, 2021).

ALS REMINDER

If you need assistance with an ALS Continuance Motion, email **both** Dee (dbrophy@gsp.net) and Grace (gmatthews@gsp.net). Provide the court date, location, and case name in your email. Continuance motions must be filed with the Court at least ten days prior to the ALS Hearing date, so please notify us **before** the ten-day deadline to allow sufficient time for the motion to be filed.

Published with the approval of
Colonel Christopher C. Wright

Legal Services

Joan Crumpler, Director
Clare McGuire, Deputy Director
Dee Brophy, ALS Attorney

Send questions/comments to cmcguire@gsp.net