



## FIFTH CIRCUIT DENIES IMMUNITY FOR OFFICER IN STOP, ARREST AND FORCE CASE

August 2017

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On April 18, 2017, the Fifth Circuit Court of Appeals decided *Alexander v. Garza et al.*, in which the court discussed the whether an officer was entitled to qualified immunity for the stop, arrest, and use of force against Alexander. It is important to note that the facts of this case, at the qualified immunity stage of the litigation, must be viewed by the court in a light most favorable to the plaintiff. As such, evidence obtained during the later stages of the litigation may change the facts from the version used by the court of appeals for qualified immunity purposes. That said, at this time, the relevant facts of *Alexander*, taken directly from the case, are as follows:

Alexander was staying at a hotel in Round Rock, Texas. At approximately 9:15 p.m. he returned to the hotel from a trip to the grocery store and saw a stray cat in the hotel parking lot. He stopped his car, exited, and peered into the grass near his vehicle looking for the cat, intending to feed it. He could not find the cat and so turned to get back into his car, planning to park it in a spot nearer his hotel room. Upon turning to reenter his car, he noticed a police car in the parking lot but, not knowing why the police car was there and assuming it was unrelated to him, Alexander got back in his vehicle and proceeded to drive toward his room.

While Alexander was moving his car, Garza, who was driving the police car in the parking lot, activated his emergency lights and pulled Alexander over. Garza approached Alexander's vehicle and told Alexander that he was curious as to what Alexander had been doing. Alexander gave Garza his driver's license and informed Garza that he would not answer any of the officer's questions. At this point, Garza radioed for backup, citing "noncompliance." While he was waiting for backup to arrive, Garza stood by the window of Alexander's car, told Alexander to keep his hands on the steering wheel, and continued to question him.

After some time, backup arrived in the form of Sergeant Greg Brunson, Sergeant Sampson Connell, Officer Tracy Staggs, and unidentified John Does (together with

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Garza, the "officers"). Garza then asked Alexander to exit his car. Alexander responded by asking Garza why he wanted him to get out of the car, and Garza responded, "Because I asked you to." Alexander began to reply that he did not believe he was legally required to exit. Before he finished, Garza and the other officers pulled Alexander from the car and pinned him face down onto the ground. One officer pressed a boot or knee on the back of Alexander's neck as his face was "mashed into the concrete." Alexander felt at least three officers on top of his body, "manipulating his limbs and putting pressure on his torso, neck, and head."

The officers handcuffed Alexander and sat him on a curb. Garza asked Alexander, "[a]re you ready to talk to me now?" Alexander refused, using an unidentified expletive. The officers then shackled Alexander's legs. At some point, either during the forcible removal from his car or while he was on the curb, Alexander sustained "injuries to his body . . . including injuries to his mouth." He "sustained emotional and psychological injuries as well." Throughout this ordeal, Alexander did not physically resist the officers in any way.

Garza informed Alexander that he was under arrest "for uttering an expletive where the public could hear him, which [Garza] asserted was a violation of the [Texas] disorderly conduct statute." The officers then searched Alexander's person and vehicle, finding nothing illegal or suspicious. Alexander was placed handcuffed into the back of one of the officers' police cars and taken to the Round Rock police station. He was then transported to the Williamson County Jail, where he remained for approximately twenty hours. In his formal police report, Garza wrote that Alexander was arrested not for disorderly conduct, but for resisting a search in violation of Texas Penal Code ("TPC") § 38.03(a). Alexander was eventually released. No criminal charges were brought.<sup>ii</sup>

Alexander filed suit against the city and the officers and alleged (1) that Garza did not have reasonable suspicion to stop him, (2) that there was no probable cause for his arrest, (3) that the arrest was retaliation for his profanity, and (4) that the officers used excessive force during his arrest. The officer filed a motion for qualified immunity from suit and the district court granted the officer's motions and dismissed the suit. Alexander appealed to the Fifth Circuit Court of Appeals.

There were four issues on appeal. The first issue was whether Officer Garza had sufficient reasonable suspicion to stop Alexander. The second issue was whether the officers had probable cause to believe Alexander violated a Texas criminal statute that prohibits obstructing police. The third issue was whether officers retaliated against Alexander for remaining silent and using profanity. The fourth issue was whether the officers used excessive force on Alexander.

*Issue One: Did Officer Garza have sufficient reasonable suspicion to stop Alexander?*

The court first set out to determine if Officer Garza had reasonable suspicion under the Fourth Amendment to justify stopping Alexander. The court first examined the law related to this issue and stated

**Under *Terry*, if a law enforcement officer can point to specific and articulable facts that lead him to reasonably suspect that a particular person is committing, or is about to commit, a crime, the officer may briefly detain—that is, 'seize'—the person**

**to investigate."** *Hill*, 752 F.3d at 1033 (citing *United States v. Jordan*, 232 F.3d 447, 448 (5th Cir. 2000))...

**Our circuit has further interpreted *Wardlow*; we held in *Hill* that *Wardlow* did not establish a "bright-line rule that flight by itself establishes reasonable suspicion."** *Hill*, 752 F.3d at 1036.<sup>iii</sup> [emphasis added]

The Fifth Circuit also noted that they look to some specific factors in making a determination of whether reasonable suspicion was present. The court stated these additional factors are (1) whether the officers were responding to a tip of criminal activity, (2) the suspects presence in a high crime area and (3) the time of day.<sup>iv</sup>

The court noted that they had no evidence about whether Alexander's stop happened in a high crime area. Further, it took place at approximately 9:30pm, which is not unusually late. The court further inferred that the parking lot was well lit, and Alexander was not trying to flee or escape. The court then held

Based on these facts alone, we cannot conclude as a matter of law that Garza had reasonable suspicion to detain Alexander pursuant to the Fourth Amendment. Moreover, taking the facts as alleged, the lack of reasonable suspicion was clearly established—the factors we laid out as relevant in *Hill*, *Martinez*, *Rideau*, and *Micheletti*, as well as the Supreme Court's decision in *Wardlow*, do not support reasonable suspicion here.

Thus, the court reversed the grant of qualified immunity on the unlawful stop claim.

*Issue Two: Did the officers have probable cause to arrest Alexander for violating the Texas obstruction statute?*

The court first discussed the application of the statute at issue. The court stated

Alexander was ultimately arrested for resisting a search under TPC § 38.03(a). **TPC § 38.03(a) provides that a person commits an offense "if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another."** (emphasis added). **Texas courts have stressed that this section "applies only to resistance by the use of force."** *Washington v. State*, 525 S.W.2d 189, 190 (Tex. Crim. App. 1975). Thus, under Texas law, simply "refusing to cooperate with being arrested" is *not* sufficient to support an arrest for resisting a search—there must be some use of force. *Sheehan v. State*, 201 S.W.3d 820, 823 (Tex. App.—Waco 2006)<sup>v</sup>

In applying the facts of this case to the statute, the court first noted that, since Alexander did not resist with violence there was not probable cause to arrest him for this. The court then noted that the plain meaning of the statute indicates that, absent some physical force, there can be no violation of this statute.

Thus, the court reversed the decision of the district court that granted the officers immunity.

*Issue Three: Did the officers commit retaliation under the Fifth and First Amendment when they arrested Alexander?*

Alexander first alleges that the police retaliated against him under the Fifth Amendment because he refused to answer questions when he was first stopped.

The court noted the legal principals that apply to this issue. The court stated

As this court has noted on multiple occasions, "**[a]n individual's Fifth Amendment right against self-incrimination is implicated only during a custodial interrogation.**" *Murray v. Earle*, 405 F.3d 278, 286 (5th Cir. 2005) (internal quotation marks omitted); see also *United States v. Wright*, 777 F.3d 769, 777 (5th Cir. 2015) (same). **Indeed, "[t]he Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial."** *Murray*, 405 F.3d at 285; see also *Winn v. New Orleans City*, 919 F. Supp. 2d 743, 752 (E.D. La. 2013) (same). **In other words, the Fifth Amendment protects a defendant from being coerced into making an incriminating statement, and then having that statement used against him at trial.**<sup>vi</sup> [emphasis added]

Since Alexander was never tried for these charges, there was no violation of his Fifth Amendment rights.

The second part of the retaliation claim was for Alexander's allegation that he was arrested in violation of the First Amendment for using profanity.

The court first examined the law related to First Amendment retaliation claims. The court stated

**"[T]o prevail on a First Amendment retaliation claim, Plaintiff must demonstrate that (1) he was engaged in constitutionally protected activity, (2) the officers' action caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the officers' adverse actions were substantially motivated against Plaintiff's exercise of constitutionally protected conduct."** *Alexander v. City of Round Rock*, No. A-15-CA-00617-SS, 2016 WL 3360530, at \*6 (W.D. Tex. June 14, 2016) (citing *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002)).<sup>vii</sup>

The court then stated that Alexander's claim that he was arrested for using profanity must fail because of the lack of evidence, particularly that he was handcuffed before he ever used profanity, therefore this First Amendment claim must fail.

*Issue Four: Did the officer use excessive force in Alexander's arrest?*

During the arrest, Alexander alleges that officers "used excessive force in violation of his Fourth Amendment rights when they "mashed" his face "into the concrete," "pinned him by pressing [a] boot or knee on the back of his neck," and "manipulate[ed] his limbs and put[] pressure on his torso, neck,

and head."<sup>viii</sup> However, he alleged very minor injuries, particularly an injury to his mouth and emotional trauma.

The court examined the law related to excessive force injuries and stated

In short, **"as long as a plaintiff has suffered 'some injury,' even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force."** *Brown*, 524 F. App'x at 79 (footnotes omitted) (quoting *Ikerd*, 101 F.3d at 434).<sup>ix</sup> [emphasis added]

The court emphasized that this must be decided based on viewing the facts in a light most favorable to plaintiff at this stage of the litigation and then, when viewing the facts as such, stated

On the facts alleged, we conclude that the officers' use of force was objectively unreasonable. Nothing in Alexander's statements or actions indicated that he posed any risk of harm to the officers. Nor did he pose any flight risk—indeed, he stayed in his vehicle and made no attempt to leave while Garza awaited backup. Perhaps Alexander's refusal to exit his vehicle on Garza's command warranted physical removal from the car, but it did not warrant throwing Alexander onto the ground, kneeling him in the back, and pushing his face into the concrete. The officers' use of force once Alexander was safely removed from the vehicle was not objectively reasonable. Consequently, Alexander's alleged injuries—though perhaps not sufficient on their own to satisfy the *de minimis* requirement—are enough to support a claim for excessive force at the motion to dismiss stage.<sup>x</sup>

Thus, the court reversed the grant of qualified immunity as to the excessive force claim.

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<sup>i</sup> No. 16-50839 (5<sup>th</sup> Cir. Decided April 18, 2017)

<sup>ii</sup> Id. at 2-3

<sup>iii</sup> Id. at 5-6

<sup>iv</sup> Id. at 7

<sup>v</sup> Id. at 9

<sup>vi</sup> Id. at 12

<sup>vii</sup> Id. at 13

<sup>viii</sup> Id. at 15

<sup>ix</sup> Id.

<sup>x</sup> Id. at 15-16