



Excessive Force: Constitutional vs. State Law

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On July 6, 2017, the Eleventh Circuit Court of Appeals decided *Avery v. Davis et al.*ⁱ, in which the court discussed whether an officer was entitled to immunity under federal law and state law for punching a person in the face while he appeared to be chasing another man at a large, chaotic fight. The relevant facts of *Avery*, taken directly from the case, are as follows:

Avery attended a party at a Birmingham YMCA that became violent. After the police came and shut down the party, Avery and two of his friends went across the street to a Walmart parking lot to wait for someone to pick them up. Meanwhile, other partygoers — not including Avery or his two friends — went inside the Walmart and started knocking over shelves and stealing merchandise, and Walmart asked the police to help clear the store. Davis was one of the officers who responded to that request.

After helping clear the store, Davis returned to his police car in the Walmart parking lot, which had its flashing blue lights illuminated. While there, Davis saw a group of unknown young men approach Avery's group and attack one of Avery's friends. Moments later, gunshots rang out from an unknown location, and Avery's group and the assailants scattered. In the chaos that followed, Avery happened to be running behind one of the assailants. Although he was simply trying to escape the gunfire, Avery admits that it could have appeared to Davis that he was chasing the assailant to continue the fight.

Avery and the assailant ran in Davis' direction. As they approached, Davis, wearing his police uniform, attempted to get between them. Avery was in the midst of an adrenaline rush and did not notice Davis' presence until Davis leveled him with a punch to the jaw. The punch briefly knocked Avery out. When Avery regained consciousness, he attempted to stand up but Davis took him back to the ground, put his knee on Avery's back, and handcuffed Avery. Avery was arrested for committing an "affray," which is a criminal misdemeanor for fighting in public. Avery later needed surgery to repair his jaw.ⁱⁱ

Avery filed suit in federal court and alleged that Officer Davis violated the Fourth Amendment and an Alabama state law tort in his arrest and use of force. The district court denied immunity for the officer

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on both the constitutional and state law claims. Officer Davis appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit first discussed when an officer is entitled to qualified immunity on constitutional claims. To determine if a government official is entitled to qualified immunity, the court must decide (1) whether a constitution right was violated, and (2) whether, at the time of the incident, the constitutional right that was allegedly violated was “clearly established” such that a reasonable officer in the same situation would have known that his conduct was unlawful. The law is considered “clearly established” when there is case law from the Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the state where the incident occurred that is sufficiently similar to put the officer on notice. Additionally, the court can decide the second part of the analysis prior to deciding whether a constitutional right was violated.

On appeal, Avery first alleged that Davis arrested him without probable cause. The court examined the relevant legal principals associated with this issue and stated

Probable cause exists where the facts within the collective knowledge of law enforcement officials, derived from reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that a criminal offense has been or is being committed." **Id. But to be entitled to qualified immunity, an arresting officer need only have "arguable" probable cause, which exists where "reasonable officers in the same circumstances and possessing the same knowledge as the [defendant] could have believed that probable cause existed to arrest [p]laintiff," whether or not there was actually probable cause to do so. Id. at 734-35.**

Determining whether an officer had arguable probable cause to arrest someone requires us to look to "the elements of the alleged crime and the operative fact pattern." Id. at 735. Avery was arrested for committing an affray. The Birmingham City Code section that defines "affray" provides that:

*It shall be unlawful for two (2) or more persons to engage in any fight or use any blows or violence towards each other in any public place to the disturbance of others.*ⁱⁱⁱ [emphasis added]

The court then looked at the specific facts upon which a reasonable officer could conclude that there was probable cause to arrest Avery for “Affray.” The court noted that (1) there was a large fight in the Walmart parking lot, (2) gunshots were fired, (3) Avery was “closely following” another male as they ran, and (4) Avery admitted that it could have looked to Davis like he was trying to continue the fight. In light of these facts, the court of appeals held that a reasonable officer in Davis’ position could have believed that probable cause existed to arrest Avery for “affray.” Therefore, Officer Davis is entitled to qualified immunity on the false arrest claim.

Second, Avery argued that Officer Davis committed excessive force in violation of the Fourth Amendment when he punched him in the jaw to effect the arrest. The court examined the legal principals that control this issue and stated

To decide whether a use of force was excessive, courts determine whether it was "objectively reasonable," as judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 1267. **But even if an officer's use of force was excessive, he is shielded by qualified immunity "if an objectively reasonable officer in the same situation could have believed the use of force was not excessive."** *Brown*, 608 F.3d at 738; see also *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 821 (11th Cir. 2010) (explaining that an officer is entitled to qualified immunity unless application of the objective excessive force standard "would inevitably lead every reasonable officer in [his] position to conclude the force was unlawful")...**But "broad general proposition[s]" like that one are not enough to clearly establish the law; instead, the "question is whether the violative nature of particular conduct [was] clearly established."** *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 308 (2015).

Regarding this issue, Avery argued that the law was clearly established because in *Brown v. City of Huntsville*^{iv}, the Eleventh Circuit held that a "gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force."^v However, the court distinguished *Brown* and other "gratuitous use of force" cases from Avery's case because, in *Brown* and the other cases, the suspect was complying with the officer's orders.^{vi} In contrast, Avery was running through a parking lot and not compliant.

The court of appeals then analyzed the facts of this case in light of the law above. The court noted

Davis saw a brawl break out between two groups of young men. He saw one of them, Avery, chasing someone from the other group, apparently in an effort to continue the brawl. Davis saw Avery continuing to run full speed in his direction despite the fact that his police car's blue lights were illuminated, and despite the fact that he was wearing a police uniform.

The Eleventh Circuit then held that, in light of the above, another reasonable officer could have believed that the use of force against Avery was not excessive. Therefore, Officer Davis was entitled to qualified immunity on the excessive force claim.

Lastly, the Eleventh Circuit examined Avery's state law claim under Alabama law. The court examined relevant Alabama law and stated

State-agent immunity provides that officers are immune from civil suits for acts "arising from the enforcement of the criminal laws of [Alabama], including . . . arresting or attempting to arrest persons." *Morton v. Kirkwood*, 707 F.3d 1276, 1285 (11th Cir. 2013) (quoting *Ex parte Butts*, 775 So. 2d 173, 178 (Ala. 2000)). **Davis was in the course of arresting Avery when he punched him, so ordinarily that immunity would apply. However, "a police officer loses [state-agent] immunity when he 'acts willfully, maliciously, fraudulently, in bad faith, beyond his . . . authority, or under a mistaken interpretation of the law.'" *Id.* (quoting *Butts*, 775 So. 2d at 178).**

...[D]etermining whether an officer's use of force was willful for state-agent immunity purposes is a subjective inquiry that requires assessing the officer's state of mind at the moment of the use of force. See *Ex parte Essary*, 992 So. 2d 5,

9 (Ala. 2007) ("[W]anton or willful misconduct is characterized as such by the state of mind with which the act or omission is done or omitted."). Alabama courts have explained that for a defendant's actions to rise to the level of willfulness, "[t]here must be a knowledge of the danger together with a design or purpose to inflict injury"; that is, "it must be shown that [the act] was intentionally and designedly done." Sutherland v. Roth, 407 So. 2d 139, 140 (Ala. Civ. App. 1981); see also Graham v. State, 210 So. 3d 1148, 1156 (Ala. Crim. App. 2016) ("'Willful' has been defined as '[p]roceeding from a conscious motion of the will.'" (quoting Phelps v. State, 439 So. 2d 727, 733 (Ala. Crim. App. 1983)).^{vii} [emphasis added]

This is where the contrast between qualified immunity for federal constitutional claims and state agent immunity in Alabama, for state torts, becomes important. Qualified immunity is based on an "objective," or "reasonable officer" standard. The personal intent, state of mind, or motive of the officer has no bearing on qualified immunity, so long as the officer acted "objectively" reasonable, meaning in a manner that another reasonable officer may have acted.

However, under state agent immunity, in Alabama, the courts will look at the officer's "subjective" intent, meaning the specific officer's state of mind.

The court then stated

The facts are disputed, but based on the record, a reasonable jury could find that Davis stepped into Avery's path as he was running and punched him in the face without any warning. It could also find that before striking Avery, Davis did not attempt to avoid using force, for example by telling Avery that he was under arrest, and that he did not attempt to use some lesser amount of force. If the jury makes those factual findings, Davis' use of excessive force was "willful[]" under Alabama law because he "intentionally and designedly" inflicted injury on Avery. See Sutherland, 407 So. 2d at 140. That a reasonable jury could find facts that support a conclusion that Davis acted with a "willful[]" subjective intent precludes, at this stage, Alabama state-agent immunity from Avery's state law claims of excessive force.

Thus, the court held that Officer Davis was not entitled to immunity at this stage of the suit on the state law claim.

ⁱ No. 16-16937 (11th Cir. Decided July 6, 2017 Unpublished)

ⁱⁱ Id. at 2-3

ⁱⁱⁱ Id. at 6-7

^{iv} 608 F.3d 724 (11th Cir. 2010)

^v Avery at 8 (quoting Brown, 608 F.3d at 738)

^{vi} Id. at 9 (See Brown, 608 F.3d at 739 (noting that the plaintiff "had submitted to [the defendant's] authority, was getting out of the car to be arrested, and posed no threat" when the defendant pepper sprayed her and then "slam[med] her to the pavement"); Hadley v. Gutierrez, 526 F.3d 1324, 1330 (11th Cir. 2008) (denying qualified immunity to an officer who punched the plaintiff while the plaintiff "was

handcuffed and not struggling or resisting"); Lee v. Ferraro, 284 F.3d 1188, 1199 (11th Cir. 2002) ("[A] reasonable officer could not possibly have believed that he . . . had the lawful authority to take [the plaintiff] to the back of her car and slam her head against the trunk after she was arrested, handcuffed, and completely secured, and after any danger to the arresting officer as well as any risk of flight had passed.").

vii Id. at 11-12

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