



ELEVENTH CIRCUIT DISCUSSES PEDESTRIAN STOPS, ARREST AND USE OF FORCE

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On February 2, 2017, the Eleventh Circuit Court of Appeals of decided *Montanez v. Parker et al.*ⁱ, in which the court discussed the Fourth Amendment as it relates to stopping a bicyclist, arrest, and the use of canine as a use of force. The relevant facts of *Montanez*, taken directly from the case, are as follows:

After gathering with family to celebrate Easter, Montanez and his cousin, Joshua Mejia, rode their bicycles back home on the Cady Way Trail in Orlando, Florida. Although it was evening and the sun had set, neither bicycle had a light affixed to it, and Montanez's lacked working brakes. Montanez and Mejia were hurrying because the Cady Way Trail is known for robberies and other criminal activity. Parker and another police officer, Michael Turner, were nearby searching for an attempted robbery suspect.

At this point, the parties' narratives begin to diverge partially. Montanez testified by deposition that it was too dark to see that the officers were police and that he did not hear Parker identify himself as a police officer or give an order to stop. Parker suddenly "yoked" Montanez, forcibly knocking him off of his bicycle onto the ground, then Joker began to bite Montanez. In his deposition, Mejia testified that immediately before the attack Turner had control of Joker. As a result of being knocked from the bicycle and bitten by Joker, Montanez suffered various injuries, including scrapes, scarring, puncture wounds, a gash, and numbness in his arm, as well as anxiety and depression.

Parker offered a different account of the encounter. In his affidavits, he testified that he saw two bicyclists riding toward the officers but could not see them clearly in the darkness. Parker was wearing his Police K-9 uniform, which said "Police K-9" on large patches on his chest and back. He shined a flashlight so that the riders could see that he and Turner were officers, identified themselves as "Police K-9," and ordered the riders to stop. Mejia stopped his bicycle, but Montanez kept riding. To Parker, Montanez appeared to be attempting to flee by maneuvering his bicycle around the two officers. Parker was holding Joker's leash in one hand as Montanez approached; as Montanez rode by, Parker

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reached out and forcibly pulled him off of the bicycle. To prevent Joker from biting Montanez, Parker grabbed the dog's harness and lifted him off the ground. But Parker fell on top of Montanez, whom Joker then bit, apparently perceiving his handler to be under attack. Parker immediately commanded Joker to release his bite, and the dog complied. Parker arrested Montanez for resisting an officer without violence under Fla. Stat. § 843.02. The State later dropped the charges.ⁱⁱ

Montanez sued Officer Parker, K9 Joker, and the City of Orlando for violating his rights under the Fourth Amendment and alleged that the stop, arrest and bite from Joker were unreasonable seizures. The district court granted summary judgment to all defendants and Montanez appealed to the Eleventh Circuit Court of Appeals.

The first issue the court examined on appeal was whether the Officer Parker violated Montanez's rights under the Fourth Amendment when he stopped him.

The court first examined the law pertaining to this issue and stated

Consistent with the Fourth Amendment, "law enforcement officers may seize a suspect for a brief, investigatory stop where (1) the officers have a reasonable suspicion that the suspect was involved in, or is about to be involved in, criminal activity, and (2) the stop 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). An officer may be entitled to qualified immunity even if there was no actual reasonable suspicion for a stop so long as there was arguable reasonable suspicion. See *Whittier v. Kobayashi*, 581 F.3d 1304, 1308-09 (11th Cir. 2009).

"While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). The Supreme Court has held that "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision." *Whren v. United States*, 517 U.S. 806, 809-10 (1996). "An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* at 10. This is true even in the context of a violation of a "civil traffic regulation." *Id.*ⁱⁱⁱ [emphasis added]

The court then applied the facts of this case to the law above. They noted that Officer Parker saw that Montanez was riding his bicycle after dark without the reflector required under the Florida law. Thus, the court stated that this observation provided Officer Parker with probable cause (even more than reasonable suspicion) that Montanez was committing an offense, even though it was just civil traffic law. As such, the court held that the stop was legal under the Fourth Amendment.

The court next set out to determine if Montanez's arrest was legal under the Fourth Amendment.

The court first examined the law related this issue and stated

"[A]n arrest made without probable cause is a violation of an arrestee's clearly established Fourth Amendment rights." *Valderrama*, 780 F.3d at 1113. "**[H]owever, a police officer may be entitled to qualified immunity even if there was no actual probable cause for an arrest," so long as "there was arguable probable cause for the arrest."** *Id.* **Arguable probable cause 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."** *Scarborough v. Myles*, 245 F.3d 1299, 1302 (11th Cir. 2001) (internal quotation marks omitted). The existence of arguable probable cause is determined using an objective standard. *Lee*, 284 F.3d at 1195.^{iv} [emphasis added]

Officer Parker arrested Montanez for resisting an officer without violence under Florida law. The court noted that Montanez stated that he did not realize that Parker was an officer and could not stop because he did not have good brakes on his bike. However, the court noted that the correct standard to apply is whether a reasonable officer in the same situation could have believe that Montanez was resisting by trying to flee from the attempted stop. The court then noted that that Montanez's companion, Mejia heard the officers tell them to stop, and he complied. Further, there is no way that Officer Parker would have known Montanez had bad brakes (crediting his version of events at this stage of the case). As such, a reasonable officer in this situation could have believed that Montanez was attempting resist by fleeing in violation of Florida law; therefore, arguable probable cause existed for the arrest, and Officer Parker is entitled to qualified immunity.

The third issue on appeal was whether Officer Parker used excessive force when he forcibly removed Montanez from his bicycle. The court first noted that Officer Parker had at least arguable probable cause to believe that Montanez was resisting by fleeing. In examining the law related to use of force, the court stated

"**[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.**" *Lee*, 284 F.3d at 1197 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Nonetheless, "[t]he Fourth Amendment's freedom from unreasonable searches and seizures encompasses the plain right to be free from the use of excessive force in the course of an arrest." *Id.*

In assessing whether an officer used excessive force, we "must ask whether a reasonable officer would believe that this level of force is necessary in the situation at hand." *Id.* (internal quotation marks omitted). Put another way, "the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force." *Id.* at 1198. To determine whether the use of force was reasonably proportionate, we "must examine (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." *Id.* And to evaluate the need for force, we consider

"the severity of the crime, the danger to the officer, and the risk of flight." *Id.*^v
[emphasis added]

The court then set out to apply the facts of Montanez's case to the factors above. First, the court noted that under the first factor from *Lee*, particularly, the need for the application of force, since Officer Parker reasonably believed that Montanez was resisting, he was entitled to use some degree of force to effect the arrest. In other words, a reasonable officer in the same position could have believed that Montanez was fleeing; therefore, this supports the application of some degree of force.

The second factor requires balancing the amount of force used and the need for force. The court stated that Officer Parker used no more force than was needed to stop Montanez. The court noted that Parker only had a split second to decide how to stop Montanez, who appeared to have been trying to flee. Therefore, the decision to forcibly remove Montanez was not unreasonable.

The third factor looks to the extent of the injuries sustained by Montanez. Montanez had abrasions on this elbows and knees, occasional numbness in his arm and anxiety and depression. The court stated that these injuries are consistent with being forcibly removed off of a bicycle and do not rise to the level of severity that would suggest unreasonable force. The court then held

In sum, *Graham* and *Lee* require that in determining whether a use of force is reasonable, we look to the particular circumstances of each case. Here, Parker reasonably could have believed that Montanez was resisting, obstructing, or opposing an officer and attempting to flee. He responded by pulling Montanez off of his bicycle, which caused Montanez to suffer relatively minor injuries. Given the need for the use of force, including the severity of resisting an officer and the risk of flight; the proportionality of the force used to the exigencies of the situation as Parker perceived it to be; and the nature of Montanez's injuries, we hold that under the circumstances of this case, Parker's use of force in removing Montanez from the bicycle was not excessive. The district court properly granted summary judgment to Parker on Montanez's excessive force claim based on removal from the bicycle.

The last issue before the court we will discuss is whether the bite by Joker constituted excessive force under the Fourth Amendment. Regarding this issue, the court noted that Montanez must identify an intentional action on the part of Officer Parker that caused the bite or he must identify some evidence that Parker intentionally failed to protect him from the bite. After examining the various versions of events, the court stated

[T]he undisputed evidence shows that Joker began to bite when Parker fell on top of Montanez after pulling him off the bicycle. Further, no evidence contradicts Parker's testimony that he tried to restrain Joker before he fell. To hold Parker liable, Montanez must identify an intentional action that Parker took or something that he should have done but intentionally did not do to protect Montanez. See *Brower v. Cty. Of Inyo*, 489 U.S. 593, 596-97 (1989) ("Violation of the Fourth Amendment requires an intentional acquisition of physical control."); *Vaughan v. Cox*, 343 F.3d 1323, 1328 (11th Cir. 2003) (holding that an excessive force claim requires intentional conduct). Montanez has failed to do so under either Meija's or Parker's versions of the facts.^{vi}

Thus, the court of appeals affirmed the grant of summary judgment to all defendants in this case.

ⁱ No. 15-15211 (11th Cir. Decided February 2, 2017 Unpublished)

ⁱⁱ Id. at 2-3

ⁱⁱⁱ Id. at 6-7

^{iv} Id. at 8-9

^v Id. at 10-11

^{vi} Id. at 15

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