



ELEVENTH CIRCUIT UPHOLDS IMMUNITY FOR DETECTIVE AND OFFICER ON MALICIOUS PROSECUTION AND EXCESSIVE FORCE SUIT

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On June 2, 2017, the Eleventh Circuit Court of Appeals decided *Reed v. Cough et al.*ⁱ, in which the court discussed whether a detective violated the Fourth Amendment when he arrested a suspect who, while fleeing as the victim of an attack, ran over his assailant with his car, and whether the patrol officer who shot at the fleeing suspect, but did not hit him, committed excessive force in violation of the Fourth and Fourteenth Amendments.

The incident that is the basis for the suit took place on New Year's Day 2010. Reed was leaving a club in Orlando, Florida when he was attacked by a group of drunk males that had been kicked out of the club for fighting. Before the assailants attacked Reed, they had attacked a homeless man and targeted Reed afterwards. Allegedly, Reed did nothing to provoke the fight.

Reed fled to his vehicle as the assailants punched and kicked him. As he was trying to get in his vehicle to flee, they continued to attack him. As he fled in his vehicle, Reed struck some of the assailants with his vehicle, and allegedly turned around in the parking lot and ran over one assailant, Torres, a second time. A police officer was flagged down and responded to the parking lot. Officer Clough saw Reed run over Torres and flee when he ordered him to stop; the officer fired two shots at Reed. The bullets struck Reed's windshield but did not hit him, and Reed admitted later that he did not know that the officer shot at him. Reed was later arrested.

Detective Moreschi responded to the scene to investigate the incident. He first spoke to a witness, Hicks, who said he saw a fight, and saw Reed flee and strike several people with his vehicle. He saw him strike one person a second time and saw Officer Clough fire two shots at him. Second, Detective Moreschi interviewed Alexandra Bilboa, who was Torres' girlfriend and a witness. She admitted that Torres' friends attacked Reed for no reason but said Torres tried to break up the fight. She also said that Reed ran over Torres twice. Third, Detective Moreschi spoke to some of the assailants who admitted that the fight took place but claimed that Reed started the fight. Fourth, the detective interviewed Reed who had an abrasion on his forehead and reported lung and kidney failure. Lastly,

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Detective Moreschi inspected the parking lot and noted that Reed could have exited the lot without turning around and running over Torres a second time. Detective Moreschi then arrested Reed on four counts of attempted murder.

Reed later filed suit against Officer Clough and Detective Moreschi for a variety of alleged state law and constitutional violations. The district court dismissed most of Reed's claims. The three that were the subject of Reed's appeal are as follows:

- Whether Detective Moreschi violated the Fourth Amendment for malicious prosecution when he charged and initiated prosecution of Reed for attempted murder;
- Whether Officer Clough violated the Fourth Amendment's prohibition on excessive force when he shot at Reed; and
- Whether Officer Clough violated the Fourteenth Amendment's prohibition on excessive force when he shot at Reed.

Issue One: Did Detective Moreschi violate the Fourth Amendment for malicious prosecution when he charged and initiated prosecution of Reed for attempted murder?

The court first examined what Reed needed to prove in order to hold the detective liable for malicious prosecution under the Fourth Amendment. The court stated

To establish a federal malicious prosecution claim under § 1983, the plaintiff must prove a violation of his Fourth Amendment right to be free from unreasonable seizures in addition to the elements of the common law tort of malicious prosecution. *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003). **These elements are: "(1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and *without probable cause*; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused."** *Id.* at 881-82 (emphasis added).ⁱⁱ

The court also looked at Florida's murder statute because they needed to determine whether probable cause or arguable probable cause was present to believe that Reed committed a crime. Regarding the murder statute and probable cause the court stated

Under Florida law, first degree murder is "[t]he unlawful killing of a human being . . . [w]hen perpetrated from a premeditated design to effect the death of the person killed" Fla. Stat. § 782.04(1)(a)(1). And "[a] person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense . . . commits the offense of criminal attempt." Fla. Stat. § 777.04(1). "Probable cause exists where the facts and totality of the circumstances, as collectively known to the law enforcement officers and based on reasonably trustworthy information, are sufficient to cause a person of reasonabl[e] caution to believe an offense has been or is being committed." *Parker v. Allen*, 565 F.3d 1258, 1289 (11th Cir. 2009) (internal quotation marks omitted).ⁱⁱⁱ

Reed argued on appeal that he did not intend to assault anyone with his vehicle; rather, he was merely trying to escape a violent assault. He argued that at this stage of the litigation, the court is required to accept the facts in a light most favorable to him.

The Eleventh Circuit stated that, while Reed is correct that they must accept disputed facts in light most favorable to the plaintiff at this stage of the litigation, the facts that form the basis of Detective Moreschi's probable cause are not in dispute. Rather, Reed is arguing that the court must accept his subjective intent as true. However, the court, quoting *Jordan v. Mosely*^v, stated

[Reed's] subjective intent does not negate probable cause. As this Court stated in a case involving the far less serious crime of committing criminal damage to a backhoe:

Plaintiff . . . contends that [the officer] lacked probable cause to arrest Plaintiff because [the officer] had no reason to believe that Plaintiff "intentionally" damaged the backhoe. Of course, no police officer can truly know another person's subjective intent. But that Plaintiff did, in fact, damage the backhoe is undisputed. And that fact provides some evidence to believe that Plaintiff intended to damage the backhoe. Beyond that, an officer would need no further evidence of Plaintiff's intent to cause Plaintiff's arrest. No officer has a duty to prove every element of a crime before making an arrest.

Jordan v. Mosley, 487 F.3d 1350, 1355 (11th Cir. 2007) (citations omitted).^v [emphasis added]

The court then noted that the statements of the witnesses interviewed by Detective Moreschi as well as his inspection of the parking lot was sufficient to provide him a reasonable belief that Reed intended and attempted to kill Torres. The court then stated

So even if we assume that Reed's actual intention was to escape a vicious attack, that assumption does not negate Moreschi's probable cause to arrest him for attempted murder.^{vi} [emphasis added]

Therefore, the court affirmed the grant of summary judgment on behalf of Detective Moreschi in the malicious prosecution claim because he had probable cause to believe Reed committed a crime, therefore negating an element of Reed's claim.

Issue Two: Did Officer Clough violate the Fourth Amendment's prohibition on excessive force when he shot at Reed?

Regarding this issue, the court first noted the law on what is required to establish a "seizure" under the Fourth Amendment. This is necessary because to have excessive force, a seizure must have occurred since excessive force is simply an unreasonable seizure of a person by force. The court stated

To assert a Fourth Amendment claim based on the use of excessive force, the plaintiff must allege (1) that a seizure occurred and (2) that the force used to effect

the seizure was unreasonable." *Troupe v. Sarasota Cty.*, 419 F.3d 1160, 1166 (11th Cir. 2005). **A seizure occurs when an officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen."** *California v. Hodari D.*, 499 U.S. 621, 625 (1991) (internal quotation marks and emphasis omitted). **"Neither usage nor common-law tradition makes an attempted seizure a seizure."** *Troupe*, 419 F.3d at 1167 (alteration omitted) (quoting *Hodari D.*, 499 U.S. at 626 n.2).^{vii} [emphasis added]

Here, Reed was not seized when the officer fired his gun at him, but did not hit him. While he alleged that initially that glass from the windshield hit him when the bullets hit the windshield, he later stated in deposition that the glass that hit him came when officers used batons to break his window when he was arrested. Thus, the Eleventh Circuit held that the district court was correct in its determination that a seizure did not occur because the officer did not shoot Reed and Reed later stated the injury from the broken glass was not from the gunshots. The court did note that it would be a "novel" question if the broken glass from the gunshots had injured him; however, that is not the facts in evidence from which they base their decision and they did not offer an opinion on that version of events.

Therefore, the court of appeals affirmed the grant of summary judgment to Officer Clough on the Fourth Amendment claim.

Issue Three: Did Officer Clough violate the Fourteenth Amendment's prohibition on excessive force when he shot at Reed?

Regarding "excessive force" based on the Fourteenth Amendment, the court of appeals noted that the officers conduct must "shock the conscience", which is a higher legal standard than that required under the Fourth Amendment. Specifically, the court stated

The Fourteenth Amendment's "substantive due process guarantee protects against government power arbitrarily and oppressively exercised." *Carr v. Tatangelo*, 338 F.3d 1259, 1271 (11th Cir. 2003) (internal quotation marks omitted). **"The Supreme Court has explained that the cognizable level of executive abuse of power is that which shocks the conscience."** *Id.* (alteration and internal quotation marks omitted). **"The standard for showing excessive force in violation of the Fourteenth Amendment, therefore, is higher than that required to show excessive force in violation of the Fourth Amendment."** *Fennell v. Gilstrap*, 559 F.3d 1212, 1217 (11th Cir. 2009).

The Supreme Court has stated that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (emphasis added); *see also Maddox v. Stephens*, 727 F.3d 1109, 1119-23 (11th Cir. 2013) (applying this standard). **We evaluate a number of factors in determining whether a defendant had a justifiable government interest in using force, including "the need for force and the amount of force used, the extent of injury inflicted, and whether force was applied in a good faith effort . . . or maliciously and sadistically for the very purpose of causing harm."** *Carr*, 338 F.3d at 1271 (quoting *Jones v. City of Dothan*, 121 F.3d 1456, 1461 (11th Cir. 1997)) (internal quotation marks omitted).^{viii} [emphasis added]

The court examined the first factor above, particularly the “need for force and the amount used.” They noted that the officer had just seen Reed run over a male and flee, ignoring his command to stop. Because Officer Clough was acting on a legitimate interest (apprehending Reed and protecting the public from danger), the court of appeals held that Reed failed to meet the heightened Fourteenth Amendment standard.

The court also examined the second factor, the “extent of the injury.” They noted that Reed was not injured from the gunshots so this element factor weighed in the officer’s favor.

Lastly, they examined the third factor, “whether the force was applied in a good faith effort or maliciously and sadistically” to cause harm. The court stated that there was no evidence to support Reed’s allegation that the officer acted maliciously and sadistically, even if the shooting may have been ill advised.

The court then held that that Officer Clough’s conduct in shooting at Reed did not “shock the conscience” and was not a Fourteenth Amendment violation. Thus, they affirmed the grant of summary judgment to Officer Clough on this claim.

ⁱ No. 16-11659 (11th Cir. Decided June 5, 2017 Unpublished)

ⁱⁱ Id. at 11-12

ⁱⁱⁱ Id. at 12

^{iv} 487 F.3d 1350, 1355 (11th Cir. 2007)

^v Id. at 13-14

^{vi} Id. at 14

^{vii} Id. at 17

^{viii} Id. at 19-20