



ELEVENTH CIRCUIT FINDS NO FOURTH AMENDMENT VIOLATION WHEN DEPUTIES SHOT MAN THEY MISTAKENLY BELIEVED WAS REACHING FOR A GUN

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On November 17, 2017, the Eleventh Circuit Court of Appeals decided *Hammett v. Paulding County et al.*ⁱ, which is instructive regarding the use of deadly force and its reasonableness under the Fourth Amendment. In *Hammett*, deputies conducted an investigation regarding Brenda Van Cleve and her husband, Daniel Hammett. Investigation revealed that Brenda used and sold drugs out of their home. Their 17-year-old son also resided at the residence. Deputies conducted a controlled buy of methamphetamine and subsequently obtained a valid search warrant. There was no information regarding firearms at the residence, and there was not a no-knock provision on the warrant. All of the windows were covered and taped such that it was very dark in the residence, even during the day. Further relevant facts, taken direct from the case are as follows:

The search took place on Wednesday, October 17, 2012. At around 2:15 p.m., Horsley briefed the search team at the Paulding County Sheriff's Office. He advised the agents and deputies that the target of the search was Van Cleve and that there was no intelligence as to whether firearms were present at the house. As they prepared to execute the search warrant, the officers met in the parking lot of a grocery store near the Nebo Road residence. Members of the search team donned tactical bullet-proof vests, each bearing the designation "SHERIFF" or "POLICE" in large letters on the front and back. Among the group of officers were Nathalie Whitener (Whitener) and Joseph Mayfield (Mayfield), defendants-appellees in this case. Whitener wore a vest similar to Horsley's, with identical identifying markers, including the word "SHERIFF" emblazoned on the front and back in large letters. Officers Brian Rutherford (Rutherford), Mike Blackmon, Seth Cook, Scott Veal, and Jimmy Motes, none of whom are defendants in this case, accompanied Horsley, Whitener, and Mayfield to execute the search warrant. All of the officers wore police gear or uniforms easily identifying them as law enforcement. After the briefing, the officers drove to the Nebo Road residence in multiple marked and unmarked police cars and parked the vehicles in the driveway at around 3:15 p.m.

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Horsley did not anticipate any violent resistance from Van Cleve and the warrant did not contain a no-knock clause, so he and the other officers approached the house in an unhurried manner. When Horsley reached the carport door, he began knocking and announcing "Sheriff's Office, search warrant" in a loud but non-yelling voice. See Appendix at 3, 5. The other officers, including Whitener, Mayfield, and Rutherford, lined up behind Horsley next to the door in a "stack" as Horsley repeatedly knocked and announced "Sheriff's Office," which continued for between fifteen and thirty seconds. No one inside the house answered.

Having received no response, Horsley tried the doorknob and found it was unlocked. He called out "Sheriff's Office" again through the open door and asked if anyone was home. Still no one answered, so Horsley entered, followed by the other officers. The police had their firearms drawn and in the low-ready position, which is standard operating procedure in the execution of a search warrant in Paulding County. On entering the residence, the officers found it was very dark because there were no lights on in the kitchen, living room, or hallway, and there was no natural light because all the windows were covered. The officers did not turn on any lights as they moved through the house. The officers continued to call out "Sheriff's Office, search warrant" as they moved through the house. Still they received no answer.

The officers cleared the kitchen. See *id.* at 5-7. Horsley, followed by Whitener and Rutherford, moved through the blanket-covered opening into the living room. See *id.* at 7-8 (showing the blanket on the floor and the doorway in which it hung during the search). Horsley turned to the left toward a hallway leading to the home's bedrooms and bathroom. He waited there facing the hallway for about five seconds, and again announced the officers' presence. See *id.* at 9-10. Whitener turned to the right to face the front door area, see *id.* at 11, 14, and Rutherford turned further to the right to inspect an area in the far right-hand corner of the living room, see *id.* at 13. Horsley heard voices coming from down the hallway.

The events that transpired next are the focus of the present dispute. In determining whether the officers were entitled to summary judgment, we must view the facts and make all reasonable inferences in the light most favorable to Plaintiff. In order to determine whether a material dispute exists, we begin by recounting the relevant evidence from each of the pertinent sources in detail as it appears in the record.

1. Testimony of principal witnesses

a. Horsley

According to Horsley, as he stood facing the hallway, he could see a light coming from inside the computer room. See Appendix at 9-10. Watching the hallway, he saw a shadow emerge. Horsley announced again that he was from the Paulding County Sheriff's Office. A large man came out of the room and turned toward Horsley. The man, who turned out to be Hammett, stopped for a second and Horsley saw that his hands were tucked into his waistband area. Horsley then saw him move something from his left hand to his right hand in a manner that concealed what he had. The flashlight attached to Horsley's pistol

was illuminated and he pointed it at Hammett's waistband, announcing "Sheriff's Office, let me see your hands" as he did so. Horsley then decided he needed to get Hammett to the ground so the other officers could move through the hallway and secure the rest of the house so that it could be searched. Hammett did not obey Horsley's command to raise his hands, however, and made no verbal reply. Instead, Hammett stepped suddenly toward Horsley, sliding his body against the wall to Horsley's left (Hammett's right) in an apparent attempt to move around him. As he approached, Horsley dropped his firearm slightly, took a small step toward Hammett, and reached out his left hand toward Hammett to begin to subdue him, but he did not touch Hammett. Hammett quickly moved his right hand toward the left side of Horsley's head. As he did so, Horsley caught a brief glimpse of a shiny black object in Hammett's hands. Horsley thought Hammett was ambushing him with a weapon, and he responded by raising his firearm and shooting toward Hammett. Hammett cried out loudly in response to being hit by Horsley's bullet. As Horsley fired, he lurched backward to avoid Hammett's attack and fell. While he was falling, he heard two more shots in rapid succession and he feared that Hammett was the shooter. All of the foregoing occurred in a matter of seconds. After hearing the shots, Horsley scrambled backward, yelled for the other officers to get out of the house, and quickly exited the residence.

b. Whitener

The events unfolded in a similar manner in Whitener's telling. According to Whitener, as Horsley was looking down the hallway, Whitener was facing to the right into the living room. See Appendix at 11-14. Whitener heard Horsley say "show me your hands" or "let me see your hands" and immediately turned to the hallway to see what was happening. As Whitener looked, she saw Hammett facing in the direction of the officers, with his hands down near his waist as if to conceal something, disobeying the command to show his hands. Hammett said nothing in response to Horsley. Whitener also had a flashlight attached to her pistol, which she pointed at Hammett, attempting to determine what Hammett was carrying. After being ordered to do so again, Hammett still did not show his hands. Instead, in Whitener's words, Hammett "stepped over towards the right side of the hall and just started walking at us at a fast pace," still "not showing his hands," and "like hugging, basically hugging the wall." Whitener observed Horsley attempt to grab Hammett, and then saw Hammett suddenly reach up with his hands toward Horsley's face in an aggressive manner. She then heard a gunshot and saw Horsley lurch backward and begin to fall. Whitener immediately fired her weapon toward Hammett, who she feared was attempting to harm Horsley and had possibly shot him. As she fired, Hammett twisted to his right and it appeared to her that the shot hit him in the lower left side of his back. Whitener expressed some uncertainty in her deposition as to whether she or Horsley shot first and whether it was her bullet or Horsley's that struck Hammett's torso. However, she was clear that the shots were nearly simultaneous, within a second or a half-second of one another. As Horsley began yelling for the officers to get out of the house, Whitener fell backward into the living room and hid behind the couch near the front door. See *id.* at 14. She did not exit the residence, but remained hidden, listening to whispers between the remaining occupants and fearing for her life. Later, when the house was secured, Whitener was able to leave the building...

d. Van Cleve

Van Cleve was at home and admits she was under the influence of meth when the officers arrived. She usually smoked meth and marijuana in the computer room, which is where she was when Hammett came home earlier that afternoon. See Appendix at 1 (showing the computer room as "Bedroom #2," the first door in the hall on the right); *id.* at 10, 16 (photographs of the hallway and computer room). Van Cleve and Hammett were sitting in the computer room talking when they heard the officers announce "Paulding County Sheriff's Office, search warrant." The announcement sounded as if it came from the carport area. Van Cleve and Hammett sat in the computer room for thirty seconds or so trying to figure out what to do. Then, Hammett got up and went out into the hallway while Van Cleve dashed straight across the corridor to the bathroom, intending to flush her meth down the toilet. She heard a male voice say "show me your hands" and "put your hands in the air." Van Cleve's deposition testimony is confusing, perhaps because, as she admits, she was under the influence of methamphetamines when the shooting occurred. It is clear, however, she agrees a total of three shots were fired within the span of a few seconds. Van Cleve froze when she heard the first shot, failing to dispose of her drugs.

When the officers exited the building, Van Cleve ran back and forth between the bathroom and the computer room in a state of shock. She was still carrying her meth when she was placed in a patrol car outside, but she was able to free her hands and swallow the drug while she was in the police car so that it would not be found.

Van Cleve's testimony shed little light on what Hammett may have had in his hands when he left the computer room. In an interview conducted the day of the incident, of which the record contains only a summary, Van Cleve stated that Hammett was holding a clipboard when he left the computer room. At her deposition, however, she was unable to recall whether Hammett had anything in his hands, speculating that he may still have been carrying paperwork with which he had entered the room. When shown a picture of a bottle of pepper spray found in the hallway after the shooting, Van Cleve neither confirmed nor denied it was Hammett's. See *id.* at 20. She acknowledged Hammett owned pepper spray but she was not sure if he had it in his hands when he went out into the hallway, and she did not remember seeing the pepper spray in the hallway after the shooting.

e. Clyde

At the time of the shooting, Clyde was in his bedroom at the end of the hallway playing video games with headphones on one ear and his bedroom door shut. See Appendix at 1 (showing Clyde's room as "Bedroom #3"); *id.* at 10, 17, 19 (photographs of the hallway, the end of the hallway, and Clyde's room). He had come home from school about forty-five minutes earlier and gone straight into his room and closed the door. Clyde did not hear his father arrive at the house, nor did he hear any police pull up. While he was playing, he heard a male voice yell "Sheriff's Office." Clyde threw off his headphones, and then later heard a voice say "show me your hands." Then he heard two gunshots "one right after another," within a second or two of each other. He did not hear Hammett, Van Cleve, or anyone else say anything during this time period. After hearing the shots, Clyde

opened his door and went out into the hallway. He saw Hammett lying against the wall in the hallway next to the computer room about midway between the door opening and the corner of the living room, with his legs toward the living room and his head toward the bedrooms. See *id.* at 10 (showing a bloodstain on the right wall of the hallway). Clyde did not see anything in his father's hands. Hammett was not able to say anything to Clyde. Clyde saw blood coming from his father's shirt, so he knew he had been shot. At that point, because he was scared, Clyde returned to his bedroom. He later emerged at the command of a police officer and was briefly placed into custody.

Clyde confirmed that Hammett usually carried a can of pepper spray for use in his repossession work and that he would keep the pepper spray in his pocket. He also agreed that the can of pepper spray shown in the incident photographs was Hammett's and that it was found by Hammett's body, though he did not see it there when he first went into the hallway. See *id.* at 20.ⁱⁱⁱ

Further, the autopsy report was consistent with the deputies' version of events, and inconsistent with the plaintiff's allegations.

Hammett's estate sued Paulding County and Deputies Horsley, Whitener, and Mayfield for excessive force under the Fourth Amendment. The district court held that the deputies that shot Hammett (Horsley and Whitener) did not violate the Fourth Amendment in their use of force and were therefore entitled to summary judgment. Further, the court granted summary judgment to Deputy Mayfield because his shot did not hit Hammett, therefore, he did not seize him.

The estate appealed the grant of summary judgment to the Eleventh Circuit Court of Appeals.

Government officials, such as deputies, are entitled to qualified immunity from suit when they are acting in their discretionary capacity. The use of force is a discretionary function. Therefore, in order for the plaintiff to defeat qualified immunity the plaintiff must show (1) that the deputies violated the Fourth Amendment in their use of force, and (2) that the law was clearly established such that a reasonable deputy in the same situation would have known that his conduct was unlawful. The law is clearly established when a case from the highest court in the state (here, the Supreme Court of Georgia), the Eleventh Circuit Court of Appeals, or the U.S. Supreme Court is factually similar enough to provide fair warning to the deputies of the unlawfulness of particular conduct.

The court first set out to determine if Deputies Horsley and Whitener used excessive force when they shot Hammett.

The court of appeals first noted the constitutional standards that apply regarding the use of force. The court stated

"Any claim that a law enforcement officer used excessive force—whether deadly or not—during a seizure of a free citizen must be analyzed under the Fourth Amendment's 'reasonableness' standard." *Garczynski v. Bradshaw*, 573 F.3d 1158, 1166 (11th Cir. 2009) (citing *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989)). **Determining whether the force used is reasonable "requires balancing of the individual's Fourth Amendment interests against the relevant government**

interests." *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (citing *Graham*, 490 U.S. at 396, 109 S. Ct. at 1871). **"The operative question in excessive force cases is 'whether the totality of the circumstances justify[s] a particular sort of search or seizure.'" *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9, 105 S. Ct. 1694, 1700 (1985)).** As the Supreme Court recently summarized,

The reasonableness of the use of force is evaluated under an objective inquiry that pays careful attention to the facts and circumstances of each particular case. And the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Excessive force claims . . . are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred. That inquiry is dispositive: When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim.

Id. at 1546-47 (citations and quotations omitted). **Reasonableness is the touchstone for all excessive force claims, regardless of whether the force used was deadly. See *Garczynski*, 573 F.3d at 1166. "As to deadly force, a police officer may use such force to dispel a threat of serious physical harm to either the officer or others, or to prevent the escape of a suspect who threatens this harm." *Singletary v. Vargas*, 804 F.3d 1174, 1181 (11th Cir. 2015). "We have held that it is reasonable, and therefore constitutionally permissible, for an officer to use deadly force when he has 'probable cause to believe that his own life is in peril.'" *Id.* (quoting *Robinson v. Arrugeta*, 415 F.3d 1252, 1256 (11th Cir. 2005)); see also *Morton v. Kirkwood*, 707 F.3d 1276, 1281 (11th Cir. 2013) ("In the deadly force context, we have observed that a police officer may constitutionally use deadly force when the officer . . . has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others" (quotation omitted)).ⁱⁱⁱ [emphasis added]**

The plaintiff argued that Hammett raised his hands when ordered to do so and was shot by Whitener without justification. Then Hammett, scared, began to retreat down the hall and was shot in the back by Horsley. At this stage of litigation, the court is required to view the facts in a light most favorable to the plaintiff, *unless* the plaintiff's argument is "blatantly contradicted" by the evidence such that "no reasonable jury could believe it."^{iv}

The court then examined the undisputed relevant evidence in this case, regarding Horsley and Whitener's decision to shoot Hammett. The court stated

In this case, voluminous uncontradicted evidence stands completely at odds with Plaintiff's theory of surrender and retreat. Taking all facts and making all reasonable inferences in the light most favorable to Plaintiff, the following facts remain undisputed. The officers knocked and announced before entering the residence but no one responded. Then, while moving through the house, they continually announced their identity and their purpose, still to no response. Clyde confirmed he heard the police identify themselves. In addition, Van Cleve testified and it is undisputed that she and

Hammett heard the police announce themselves and remained in the computer room for some time trying to decide what to do. The officers moved through the house, which was very dark even at the height of the afternoon because there were no lights on and all of the windows were covered with opaque materials. When Hammett came out of the computer room, Horsley clearly and audibly ordered him to show his hands. This, too, was confirmed by Van Cleve. Both officer eyewitnesses testified Hammett refused to comply, and there is no evidence to suggest otherwise—Van Cleve did not hear Hammett say anything in response to Horsley to indicate submission, nor did Clyde or any of the other officers. Instead, Hammett aggressively approached Horsley with an unidentified object in his hands, which he moved toward Horsley's face. Whether the object ultimately turned out to be Hammett's clipboard or his pepper spray is immaterial; in the tense and uncertain moments leading up to the shooting, a reasonable officer could have believed it to be a weapon, especially given dim lighting and the way Hammett handled it. Horsley and Whitener fired in response, and regardless of who shot first, the sounds of the gunshots occurred in rapid succession. Finally, the bullet that killed Hammett entered the back-left side of his torso and caused a bruise on the right side of his stomach, traveling diagonally through his body.

None of these critical facts is disputed by affirmative evidence. Several are inconsistent with the surrender-and-retreat theory, most obviously, the officers' testimony that Hammett charged at Horsley. In addition, the two shots that struck Hammett occurred in rapid succession, which would not leave time for a retreat in the split second between them. Furthermore, if Hammett were retreating back down the hallway when he was shot, the bullet would have traveled straight through him, not diagonally from left to right, which would have been impossible. "Though factual inferences are made in [Plaintiff's] favor, this rule applies only '*to the extent supportable by the record*,'" *Penley v. Eslinger*, 605 F.3d 843, 853 (11th Cir. 2010) (quoting *Scott*, 550 U.S. at 381 n.8, 127 S. Ct. at 1776 n.8), and Plaintiff's theory cannot be reconciled with it.^v

The court also emphasized that the deputies were under tense, rapidly evolving circumstance as they were executing a search warrant at drug dealer's residence, which was very dark and cluttered. They properly knocked and announced their purpose and nobody responded. Then all of a sudden a large man appeared in the hallway. He did not say anything to the deputies but rather he refused commands to show his hands, rapidly approached the deputies and reached for and drew an unknown dark object up toward Deputy Horsley's face. The court then held

[G]iven the foregoing circumstances, the officers had probable cause to believe it was a weapon and that Hammett intended to use it...It was not unreasonable of them to believe Hammett posed a threat of serious physical harm and to respond accordingly. *Singletary*, 804 F.3d at 1181. We are "loath to second-guess decisions made by police officers in the field," *Penley*, 605 F.3d at 854 (quotation omitted), and we will not do so here.^{vi}

The court also discussed the fact that, even though it turned out that Hammett was not armed with a deadly weapon (likely it was pepper spray), that it was still reasonable under those tense circumstances, darkness, and the large male rapidly approaching and failing to comply with commands, to believe that Hammett was armed with a deadly weapon. The court stated

We acknowledge that here, . . . , it turned out that Hammett was not armed with a deadly weapon. Nevertheless, we must view the situation from the perspective of a reasonable officer in Horsley's and Whitener's position. See *Mendez*, 137 S. Ct. at 1546. From that vantage point, after the officers repeatedly announced their presence to no response in a dark house occupied by a known meth dealer, Hammett's actions easily could have appeared to be an ambush. Under these circumstances, Horsley and Whitener had probable cause to believe Hammett posed a threat of serious physical harm to Horsley.^{vii}

Since the court held that there was no constitutional violation, summary judgment for Deputies Horsley and Whitener was appropriate and the decision of the district court was affirmed.

The court then set out to determine if Deputy Mayfield committed excessive force under the Fourth Amendment when he shot at Hammett. It is undisputed that Mayfield shot at Hammett, but his bullet did not hit him. In order to state a claim for excessive force, the officer who allegedly used the excessive force must have seized the plaintiff. However, the court, noting previous Eleventh Circuit precedent, stated

We held in *Carr v. Tatangelo* that **where police officers fire on an individual in alleged self-defense, but do not hit him or otherwise touch him, the individual has not been seized**. 338 F.3d 1259, 1270-71 (11th Cir. 2003).^{viii} [emphasis added]

Since Mayfield did not hit Hammett when he shot at him, he was not seized and thus there can be no Fourth Amendment violation. Therefore, the decision of the district was affirmed.

It is noted that under the totality of the circumstances, Mayfield was reasonable in believing that his fellow officers lives were in danger so even had he hit Hammett, his actions would have been reasonable.

Thus, the Eleventh Circuit affirmed grant of summary judgment for Deputies Horsley, Whitener and Mayfield as their conduct did not violate the Fourth Amendment.

ⁱ No. 16-15764 (11th Cir. Decided November 17, 2017)

ⁱⁱ Id. at 2-4

ⁱⁱⁱ Id. at 23-24

^{iv} Id. at 26

^v Id. at 26-28

^{vi} Id. at 29-30

^{vii} Id.

^{viii} Id. at 35