



ELEVENTH CIRCUIT GRANTS IMMUNITY FOR OFFICER WHO USED DE MINIMIS FORCE

June 2018

For duplication & redistribution of this article, please contact Law Enforcement Risk Management Group by phone at 317-386-8325.
Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

Article Source: http://llrmi.com/articles/legal_update/2018_horn_v_barron.shtml

©2018 [Brian S. Batterton](#), J.D., Legal & Liability Risk Management Institute

On January 4, 2018, the Eleventh Circuit Court of Appeals decided *Horn v. Barron*, in which the court examined whether it an officer who used a “soft hands, straight arm bar takedown” to arrest a disorderly female at a concert was entitled to qualified immunity from an excessive force lawsuit. The relevant facts of *Horn*, in part, taken directly from the case, are as follows:

On October 13, 2012, Horn attended a Luke Bryan concert with her ex-husband Kevin Horn, her 12-year-old daughter and 18-year old daughter. The concert promoters hired approximately 30 uniformed police officers to assist with security and to enforce the law at the concert that night. Officer Barron was hired by the concert promoters, along with fellow Macon Police Officers Jason Bray ("Officer Bray") and Deborah Taylor ("Officer Taylor"). According to Officer Bray, the concert "was chaotic" with "anywhere between 15,000 to 20,000 people at this event."

Horn and her family arrived at the park around 2:00 p.m. and tailgated until approximately 7:00 p.m., when the gates opened to the concert. She claims that she drank only two beers during that time. After the gates opened, Horn and her family made their way as close to the stage as they could get. By the time Horn and her family made their way to the stage, a large crowd had already amassed together, standing shoulder-to-shoulder. Once the opening act started, three young women (ages 18 or 19) tried to push past Horn and her family in order to move closer to the stage. One of the women pushed Horn into the person in front of her, and Horn shoved the woman back. Horn and that woman then exchanged "heated words," including "bitch" and possibly "the F-word," for one to two minutes. There were young children present. Shortly thereafter, two security officers approached Horn and told her to go with them, but Horn refused to leave. She told them that she had done nothing wrong and that the one young woman, who was nowhere to be found at this point, was the one who had pushed her.

These two security officers then informed Officers Bray and Taylor that Horn had shoved another woman and that Horn was refusing to leave with them. Officers Bray and Taylor

©2018 Article published in the free LLRMI E-Newsletter

Link to article online: http://www.llrmi.com/articles/legal_update/2018_horn_v_barron.shtml
<http://www.llrmi.com> | <http://www.patctech.com>

then approached Horn and she refused to leave with them as well. They testified in their depositions that she stated, "I didn't do any fucking thing. This is bullshit" and then twice said "this is fucking bullshit. I'm not going anywhere." Officer Bray described Horn as being "uncooperative" and "very belligerent," and Officer Taylor described Horn as "loud and belligerent" and "acting a fool." Officer Bray testified that while Horn was using profanity, there were several young kids and several adults around, and that "maybe" three kids were under the age of fourteen. Officer Taylor testified that "probably two or three" children under the age of 12 were around. Kevin Horn testified in his deposition that there were men, women, and children of all ages around...

While Horn was being escorted out of the concert, two of the young women who were involved in the physical altercation with Horn approached Officer Barron and told him they had been assaulted. One said she had been grabbed around the throat and choked. The other had a bloody nose and contusions in her eye area. The women explained that this altercation came about "because they were breaking in line, getting closer to the stage than the suspect was, and that made [the assailant] mad." The women identified Horn as the assailant. Horn's daughters heard the young women identify Horn as the one who had hit them. Officer Barron only knew about Horn's alleged physical altercation because these two women told him about it. He did not witness the event, nor did he speak with Officers Bray and Taylor about why they were escorting Horn from the concert.

Horn testified in her deposition that while she was at the park's exit gate, she was "pissed off" that no one ever asked her what happened or explained why she had been removed from the concert. Officer Barron testified in his deposition that Horn, who was 10 feet away from him, "was telling [him] to 'fuck off and 'fuck you' and 'I didn't do a fucking thing'" and pointing her finger to him. He also testified that he "didn't know if [Horn] was going to attack [him] when she started throwing the profanities out at [him]" and "walk[ing] toward [him]." Horn admits that while she cannot remember every word she said, she did use profanity and said "don't y'all want to know what f'ing happened; why am I the one that can't stay in the concert; there's two sides to the story; where's the girl; don't y'all want to know what my side of the story is; don't y'all want to know what happened." She stated that she was "25, 30" feet away from Officer Barron at this time. Kevin Horn testified in his deposition that Horn said, "why the fuck do I got to be thrown out?" and "why do we got to fucking leave?" Officer Taylor was also in the area, but she testified in her deposition that she did not recall hearing Horn use any profanity while she was yelling from the gate.

Officer Barron decided to arrest Horn for disorderly conduct and, thus, approached her and took hold of her left arm. Officer Barron did not announce to Horn that she was under arrest or that he was going to handcuff her. As Officer Barron was attempting to arrest Horn, she pulled her arm away from him. Officer Barron then used a soft hands, straight arm bar takedown technique in order to gain control of Horn, by which he took hold of her left arm, put his right arm over it, and brought her to the ground using gravity and his own weight. Horn claims that a bone in her arm snapped when she hit the ground...

At booking, Horn never requested medical care, but after being released, she went to the emergency room and underwent a CT scan that revealed she had a broken left humerus, for which she then underwent surgery.

During his Internal Affairs interview regarding the incident, Officer Barron stated that as a result of Horn cussing and pointing at him, he "went and placed . . . [Horn] into custody for disorderly conduct [and] grabbed her left arm." He later testified in his deposition that he was initially unable to place her in handcuffs because "[s]he jerked away and started walking away from [him]," and she got 14-15 feet away from him before he was able to grab her arm again and take her to the ground. Officer Taylor told Internal Affairs that she saw Horn "actively resisting" Officer Barron and testified in her deposition that she saw Horn "intentionally br[eak] out of his hold so she could walk in the opposite direction." Horn's older daughter stated in her Internal Affairs interview that Horn "snatched back or moved back from him" when Officer Barron "put his hands on" Horn, and her 12-year-old daughter said Horn "hit back" after Officer Barron "put his hands on" her and "kind of pushed her." Horn disputes her daughters' accounts of the events. She stated to Internal Affairs that she would have complied with Officer Barron had he told her she was under arrest, but then later testified in her deposition that she did not resist and was "totally compliant."ⁱⁱⁱ

Horn later filed suit against the City of Macon and the involved officers for several federal and state law claims. The district court denied qualified immunity as it pertained to Officer Barron for his use of force on Horn which resulted in her broken arm. The district court reasoned that there were conflicting versions of events, and, if a jury credited Horn's version, then the use of force was excessive under the Fourth Amendment. Officer Barron appealed the denial of qualified immunity to the Eleventh Circuit Court of Appeals.

At the outset, the court discussed the standard for granting qualified immunity. Initially, for an officer to receive qualified immunity, he must be acting within the scope of his discretionary authority, or exercising choices such as to arrest or not arrest, use force or not, and how much force to use. Once this has been asserted, the burden shifts to the plaintiff to satisfy a two-prong test to defeat the officers qualified immunity. First, the plaintiff must establish facts that show the officer violated the plaintiff's constitutional rights. Second, the plaintiff must demonstrate that the right was "clearly established" at the time of the violation such that another reasonable officer in the same situation would have known that his conduct was unlawful.

A plaintiff can show that a right is "clearly established" in three ways. First, the plaintiff can show that a materially similar case has already been decided. The case must be from the Supreme Court of the United States, the Eleventh Circuit Court of Appeals, or the Supreme Court of Georgia. Second, the plaintiff can show that broader, clearly established principle controls the facts of the situation at hand. Third, a plaintiff can show that an officer's conduct "so obviously violated the constitution" such that prior case law is not necessary.ⁱⁱⁱ

In Horn's case, she does not dispute the fact that Officer Barron had probable cause to arrest her for disorderly conduct; rather, she argued that the amount of force Officer Barron used was excessive under the Fourth Amendment. Thus, the issue before the court of appeals was "*whether the officer's conduct is objectively reasonable in light of the facts confronting the officer.*"^{iv}

The court then discussed the law regarding use of force under the Fourth Amendment. The court stated

We begin by observing that "[w]hen an officer lawfully arrests an individual for the commission of a crime, no matter how minor the offense, the officer is entitled under controlling Supreme Court precedent to effectuate a full custodial arrest." *Ferarro*, 284 F.3d at 1196 (internal quotation marks and citation omitted).

Because the "objective reasonableness" standard applied to an officer's conduct is not capable of precise definition or mechanical application, factors to be considered "includ[e] the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [s]he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872. Courts should also consider "the need for the application of force, . . . the relationship between the need and amount of force used, and . . . the extent of the injury inflicted." *Mobley*, 783 F.3d at 1353 (omissions in original) (quoting *Ferraro*, 284 F.3d at 1198). "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." *Graham*, 490 U.S. at 396, 396 S. Ct. at 1872 (citation omitted). Courts must keep in mind that "[o]fficers facing disturbances 'are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly-evolving.'" *Kingsley v. Hendrickson*, ___ U.S. ___, ___, 135 S. Ct. 2466, 2474, 192 L. Ed. 2d 416 (2015) (quoting *Graham*, 490 U.S. at 397, 109 S. Ct. 1865).

The use of gratuitous force when a suspect is not resisting arrest violates the Fourth Amendment. See *Hadley v. Gutierrez*, 526 F.3d 1324, 1330 (11th Cir. 2008). However, "the application of *de minimis* force, without more, will not support an excessive force claim" and "will not defeat an officer's qualified immunity." *Nolin v. Isbell*, 207 F.3d 1253, 1257-58 (11th Cir. 2000).^v [emphasis added]

In denying qualified immunity for the officer, the district court found that, under Horn's version of events, she did not resist and was "totally compliant." The district court held that, if this were the case, then a jury could find that the officer used excessive force.

The court of appeals, however, noted that that originally in her interview by internal affairs, Horn stated that "she would have complied with Officer Barron had he told her she was under arrest;" this seems to concede that she resisted the officer. Then later, in deposition, she said she was "totally compliant." Further, Horn's daughters who were present during the incident, both described the facts to confirm that Horn resisted the officer. The court further stated

Even assuming that Horn was totally compliant with Officer Barron, he was allowed to use some force in effecting her arrest. And, **even if the force applied by Officer Barron in effecting Horn's arrest—a soft hands, straight arm bar takedown technique, by which he gained control of her by taking hold of her left arm, putting his right arm over her left arm, and using gravity and his own weight to bring her to the ground—was unnecessary, it was not unlawful. Horn was not restrained at the time the force**

was applied by Officer Barron. For that reason, the cases on which the district court relied for its denial of summary judgment on qualified immunity are distinguishable from Horn's case.^{vi} [emphasis added]

Horn cited several cases to attempt to establish that the law was “clearly established” such that a reasonable officer would have known that the arm bar in Horn’s case was excessive. However, the court of appeals observed that these cases all involved “gratuitous and sadistic force” used against restrained and/or compliant suspects.^{vii} In contrast, the court of appeals observed that, based on undisputed evidence, Horn was not restrained and “pulled her arm away from Officer Barron.”^{viii} Therefore, the court of appeals stated that the cases relied upon the plaintiff would not be sufficient to put Officer Barron on notice that his soft hands, straight arm bar takedown would violate the Fourth Amendment. Thus, the law was not “clearly established.”

The court then discussed “de minimis” force, which essentially means “too minor to merit consideration.” The court stated

The force used here by Officer Barron was no more severe than the force that we have described as *de minimis* and lawful in other materially similar cases. For example, in *Durruthy v. Pastor*, 351 F.3d 1080 (11th Cir. 2003), the plaintiff brought a claim of excessive force against a police officer who “force[d] [the plaintiff] down to the ground and plac[ed] him in handcuffs.” *Id.* at 1094. We reversed the denial of qualified immunity because we concluded that the officer used only *de minimis* force to arrest the plaintiff. *Id.* In *Croom v. Balkwill*, 645 F.3d 1240 (11th Cir. 2011), the plaintiff brought a claim of excessive force against a deputy sheriff who forced the plaintiff to the ground from a squatting position and held her there with a foot (or knee) in the back for up to ten minutes. We affirmed the district court’s grant of summary judgment in favor of the defendant on the basis that the force used against the plaintiff, even if unnecessary, was *de minimis*. *Id.* And, in *Myers v. Bowman*, 713 F.3d 1319 (11th Cir. 2013), the plaintiff brought a claim of excessive force against a deputy sheriff who “grabbed [the plaintiff] by the arm, forced him to the ground, placed him in handcuffs” and “held [him] to the ground for less than one minute before he helped [him] to his feet.” *Id.* at 1328. We affirmed the district court’s grant of summary judgment in favor of the defendant because the force used against the plaintiff was *de minimis*. *Id.*

The court of appeals then observed that during the incident at hand, Horn was admittedly “pissed off” and cursing at officers and others. The court analyzed her case in light of the factors from *Graham v. Connor*. First, they noted that the crime, disorderly conduct, was not very severe. However, the second factor, the threat posed, indicated that a reasonable officer could believe that Horn posed a threat to him and to others, based on her anger and her previous conduct involving the women she assaulted. Further, as to the third factor, the officer could reasonably believe that she was resisting when she pulled away from him as he attempted to arrest her. The court noted that this took place during “tense, uncertain, and rapidly evolving” circumstances.

The court of appeals then held

Therefore, Officer Barron was entitled to use some degree of force to put her in the handcuffing posture. Officer Barron used a minimal level of force—a soft hands,

straight-arm bar takedown technique—to do so. He did not use a weapon, he did not hit, punch, or kick her, he did not have assistance from multiple officers, he did not "throw" Horn to the ground with intentional, or gratuitous, unwarranted force, nor did he use any force against her after she was on the ground. He did not use any force intended to cause injury; rather, Horn's injury was the unfortunate result of Officer Barron's reasonable use of force.^{ix} [emphasis added]

The court then reversed the denial of qualified immunity and remanded the case back to the district court with instructions to grant the officers motion.

ⁱ No. 16-16166 (11th Cir. Decided January 4, 2018 Unpublished)

ⁱⁱ Id. at 2-8

ⁱⁱⁱ Id. at 12

^{iv} Id. at 13

^v Id. at 13-15

^{vi} Id. at 16-17

^{vii} Id. at 17 (citing *Hadley*, for example, the suspect had already been securely handcuffed when the officers punched him in the stomach. 526 F.3d at 1327. In *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000), the officers slammed the suspect's head into the pavement and kicked him repeatedly *after* he was handcuffed and not resisting. *Id.* In *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002), an officer deployed pepper spray against a suspect who was already restrained in the back of a patrol car. *Id.* In *Fils*, the suspect raised his hands and took a step back from the officer when he saw the officer was pointing a taser at him. 647 F.3d at 1277. Two officers then tased him, and, after he was compliant and lying on the floor, one of them then grinded a contact taser into his neck. *Id.* And, finally, in *Popham v. City of Kennesaw*, 820 F.2d 1570 (11th Cir. 1987), the case that is the most factually similar to Horn's, the plaintiff was shoved to the floor by one officer when he pulled his arm away, tackled by another officer, and then, after he was on the floor, not fighting back, officers choked him, kned him in the groin, yanked his legs, and bent back his wrists. *Id.*)

^{viii} Id. at 18

^{ix} Id. at 19-20