



Police Misconduct Update: Front Burner Topics Under Section 1983 *Motions Practice*

Prepared by:
Wayne C. Beyer, Esq.

LORMAN[®]

Published on www.lorman.com - July 2020

Police Misconduct Update: Front Burner Topics Under Section 1983 Motions Practice, ©2020 Lorman Education Services.

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ✓ **Unlimited Live Webinars** - 110+ live webinars added every month
- ✓ **Unlimited OnDemands** - Over 3,900 courses available
- ✓ **Videos** - More than 1,900 available
- ✓ **Slide Decks** - More than 3,300 available
- ✓ **White Papers** - More than 2,000 available
- ✓ **Reports**
- ✓ **Articles**
- ✓ **... and much more!**

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

Police Misconduct Update: Front Burner Topics under Section 1983*

Wayne C. Beyer, Esq.

Motions Practice

Use of Video Evidence on Summary Judgment

The prevalence of dashcam, body worn camera, surveillance, and sometimes even cell phone video gives a source of reliable documentary evidence; sometimes enough to overcome disputed testimonial evidence to grant summary judgment. When reviewing summary judgment decisions, a court generally construes all purported facts in the light most favorable to the non-movant. See, e.g., *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011). However, when there is a videotape that discredits the non-movant's description of facts, the court will consider "the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 381 (2007). See "Practitioner's Guide," Chapter 9, Fourteenth Amendment Due Process and Fourth Amendment: Pursuits, III. The Fourth Amendment, A. Supreme Court; Unreasonable Seizure Analysis (discussing *Harris*). See also "Practitioner's Guide," Chapter 12: First, Fifth, Sixth, Eighth Amendments, and Laws, II. First Amendment, C. Police-Citizen Encounters, 3. Body-Worn Cameras and 2018 Supplement, Police Body Worn Cameras (BWCs).

Shepherd v. City of Shreveport, 920 F.3d 278 (5th 2019) is an illustrative case. A man armed with a knife disregarded a series of instructions, and moved quickly toward a police corporal who continued to back up, until he fatally shot the man using his shotgun. In affirming summary judgment for the defendants, the Circuit panel relied on the corporal's dashcam video to overcome the plaintiff's attempts to create a fact dispute:

(1) "Though the videotape is far from the paragon of clarity, it shows that the distance at the time of the shot was much closer to ten feet than to thirty feet. So, viewing this alleged factual dispute 'in the light depicted by the videotape[.],' *Scott*, 550 U.S. at 381, 127 S.Ct. 1769, we hold that there is no material issue of fact as to the distance between [the man] and [the corporal at the time of the shot]." 920 F.3d at 284.

(2) "The videotape clearly shows that [the corporal] did not command [the man] to leave the garage in the moments before he was shot; to the contrary, the videotape shows that [the corporal] instead ordered him to 'get back.' In addition, the videotape also shows that [the man] was advancing down the driveway at a relatively quick speed in the final moments before being shot—in a motion that looks much more like directed running than errant stumbling. Thus, once again viewing this alleged factual dispute 'in the light depicted by the videotape[.],' *Scott*, 550 U.S. at 381, 127 S.Ct. 1769, we hold that there is no genuine issue of material fact on this issue either." 920 F.3d at 284.

(3) "The videotape does not clearly show how [the man] was holding the knife in the moments leading up to the shot. However, we agree with the district court that this dispute is not material to the outcome of the case. Under the totality of circumstances present in this case, even if we were to accept that [the man] still had the knife at his side at the moment when he was shot, there is ample reason to conclude that he posed a real threat of serious bodily harm to the officer. As such, we hold that [the corporal's] use of deadly force was reasonable." 920 F.3d at 284.

In short, “all of the alleged disputes raised by [the plaintiff] in this appeal are either immaterial or discredited by the videotape[.]” 920 F.3d at 284-85.

Another example is *Davenport v. Borough of Homestead*, 870 F. 3d 273 (3d. Cir 2017). Officers fired to end the flight of a vehicle as it entered a high pedestrian traffic area, striking the passenger who was the driver’s mother. Under the “totality of circumstances,” three of four officers did not violate the Fourth Amendment and were entitled to qualified immunity. The Third Circuit panel relied on video evidence to negate the plaintiff’s claim of a fact dispute:

Based on [the plaintiff’s] version of facts, the District Court concluded that a reasonable jury could find that the officers intentionally shot at [the plaintiff] and that the pursuit posed no serious threat of immediate harm to others. This was error, as these assertions are “blatantly contradicted by the record.” *Scott [v. Harris]*, 550 U.S. [372 (2007) at 380. First, video evidence indisputably shows a heavy pedestrian presence during the course of the pursuit. And second, throughout the pursuit [the driver] continuously swerved between inbound and out-bound lanes, which ultimately led to his colliding with three other vehicles. Considering the serious threat of immediate harm to others, no reasonable jury could conclude that the officers fired at the vehicle for any reason other than to eliminate that threat.

870 F. 3d at 280.

But with regard to a fourth officer, the cab’s dashcam video was inconclusive.

[T]he pursuit ended when [the driver] collided with a taxicab. At or around the same time, [the fourth officer] fired two shots directly into the driver compartment of the vehicle. The parties dispute whether [the fourth officer] fired before or after the final collision. The taxicab’s dash-camera footage shows [fourth officer’s] conduct, but it is not clear from the video when he actually discharged his firearm.

870 F. 3d at 277.

Because the pretrial record established a genuine issue of disputed fact as to that officer, the Circuit did not have jurisdiction to consider the interlocutory appeal. 870 F. 3d at 278.

In *Shaw v. City of Selma*, 884 F.3d 1093 (11th Cir. 2018), the subject was armed with a hatchet and had ignored more than two dozen orders to drop it. At the time he was shot, he was advancing toward the officer with the hatchet still in hand. He closed the gap to within a few feet and was yelling at the officer to “Shoot it!” Most of the events were captured on the officer’s body worn camera. Citing *Harris*, the Circuit panel noted:

Because this is an appeal from summary judgment, we review the evidence in the light most favorable to the estate as the non-moving party, and draw all justifiable inferences in its favor. *Tolan v. Cotton*, 572 U.S. ___, 134 S.Ct. 1861, 1863, 188 L.Ed.2d 895 (2014). We will, however, accept facts clearly depicted in a video recording even if there would otherwise be a genuine issue about the existence of those facts. See *Scott v. Harris*, 550 U.S. 372, 380-81, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007). But where the recording does not clearly depict an event or action, and there is evidence going both ways on it, we take the estate’s version of what happened.

884 F.3d at 1097, n 1.

Whether the subject was raising the hatchet when he was shot is not clear from the video, so the Circuit panel assumed he did not raise it. Even so,

[The subject] could have raised the hatchet in another second or two and struck [the officer] with it. Whether the hatchet was at [the subject's] side, behind his back, or above his head doesn't change that fact. Given those circumstances, a reasonable officer could have believed that [the subject] posed a threat of serious physical injury or death at that moment. A reasonable officer could have also concluded, as [the officer] apparently did, that the law did not require him to wait until the hatchet was being swung toward him before firing in self-defense.

884 F.3d at 1100.

Accordingly, the Circuit panel affirmed summary judgment for the defendants.

For additional authorities, see, e.g., *Garza v. Briones*, No. 18-40982 (5th Cir. 11/25/2019) (just before shooting, [decedent] was behaving erratically, refusing to comply with police orders, and waving around what officers presumed to be deadly weapon, although it was later determined to be BB gun; “We need not accept a plaintiff’s version of the facts for purposes of qualified immunity when it is blatantly contradicted and utterly discredited by video recordings. . . . The video evidence from the dashcams of two patrol vehicles confirms that, just before defendants fired, [decedent] raised the gun above the tabletop, pointed the barrel in [shooting officer’s] direction, and lowered his eyeline seemingly to aim the firearm. It was then that [shooting officer] fired his weapon[.] . . . [A witness’s] statements that [decedent] ‘did not at any time point the gun to cops’ and that ‘the gun was pointing down when he picked up his hand and the first shot was fired’ cannot alter what’s on the videos[;]” affirming summary judgment for defendants.);

Lane v. District of Columbia, 887 F.3d 480, 487 (D.C. Cir. 2018) (officers were part of gun recovery unit and encountered subject in apartment parking lot; when officer asked subject if he was carrying gun, he fled, with two officers pursuing on foot and two in police vehicle; portion of chase was captured on police department video camera; officer testified that he saw subject’s right hand moving toward his waistband, causing officer to fear that he was reaching for gun; subject repeatedly looked over his left shoulder, toward pursuing officers, and turned toward police vehicle, pointing what appeared to officer to be gun; “[t]he jury was shown the video and was able to make their own determination regarding the credibility of the officers’ testimony and whether [subject] appeared to have in his hand a cell phone, a shadow, or a gun. The district court did not abuse its discretion in denying [plaintiff’s] motion for a new trial and we affirm.”);

Frederick v. Motsinger, 873 F.3d 641, 647 (8th Cir. 2017) (woman entered convenience store with four-inch folding knife and told store clerk to call 911; when she refused to drop knife, officer with taser deployed it, but it did not take effect; at that point, she charged officer with taser, and another officer fired three shots; store surveillance video confirmed that woman charged with knife in stabbing position; “[w]hile [the woman] did not lunge at the officers prior to being tased, [officers] reasonably perceived she was ready to use her knife against them or others. As in *Scott v. Harris*, ‘it is clear from the videotape that [the woman] posed an actual and imminent threat’ of harm to the officers and others in the store. 550 U.S. 372, 384, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).”);

Dooley v. Tharp, 856 F.3d 1177, 1183 (8th Cir. 2017) (man in army uniform walking along side of highway, carrying rifle, and “flipping off” passing cars; frame-by-frame review of deputy’s dashboard camera showed that man was apparently attempting to comply with shooting deputy’s order to drop gun; but, affirming district court’s grant of summary judgment because “[v]iewing the dash-cam video at regular speed and considering the facts of this case . . . , we conclude that [officer’s] mistaken perception that [man] posed a threat of serious physical harm to [officer] was objectively reasonable.”).

Practice Tip: Video evidence may be helpful to the defense when it is used defensively, in support of a defense motion for summary judgment to defeat a plaintiff’s attempt to create a fact dispute. But the offensive use of that evidence may not be as useful to a plaintiff in support of a plaintiff’s dispositive motion. The reason is that an officer’s perception of the incident, particularly in terms of the time and distance involved, may differ from the video evidence. And the defense is entitled to argue that the incident should be viewed from the perception of a reasonable officer on the scene.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.