IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal Number: 17-15566-DD

MICHAEL VICKERS,
Appellant/Defendant Below

v.

AMY CORBITT,
Appellee/Plaintiff Below

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION
USDC CASE NUMBER: 5:16-CV-51

BRIEF OF APPELLEE

ASHLEIGH R. MADISON
SOUTHEAST LAW, LLC
2107 BULL STREET
SAVANNAH, GEORGIA 31401
912-662-6612 (O)
877-417-2943 (F)
southeastlaw@gmail.com

ATTORNEY FOR APPELLEE AMY CORBITT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned Counsel of Record for Plaintiff/Appellee Amy Corbitt, in accordance with Rule 26.1 of the United States Court of Appeals, Eleventh Circuit, certifies that the following is a full and complete list of all persons, firms, associations, partnerships, and corporations, including subsidiaries, conglomerates, affiliates, parent corporations, and other legal entities having an interest in the outcome of this case:

Association of County Commissioners of Georgia-Interlocal Risk Management Agency ("ACCG-IRMA")	Risk Management Pool Fund Administrator for Coffee County
Bowen, Elizabeth	Plaintiff Below
Brown, Readdick, Bumgartner, Carter, Strickland & Watkins, LLP	Attorneys for Appellant/Defendant
Coffee County, Georgia	Defendant Below
Corbitt, Amy	Appellee/Plaintiff
Johnson, Tonya	Plaintiff Below
Madison, Ashleigh R.	Attorney for Appellee/Plaintiff
Mills, Jr., Ben B.	Attorney for Plaintiffs Below

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Rich, Jerry	Plaintiff Below
Scally, Sean K.	Attorney for Appellant/Defendant
Southeast Law, LLC	Attorneys for Appellee/Plaintiff
Stewart, Damion	Plaintiff Below
Strickland, Richard K.	Attorney for Appellant/Defendant
Vickers, Michael	Appellant/Defendant
Wood, Honorable Lisa G.	Judge, U.S. District Court for the Southern District of Georgia
Wooten, Doyle	Defendant Below

This twenty-first day of February, 2018.

/s/ Ashleigh R. Madison
Ashleigh R. Madison
Georgia Bar Number: 346027
Attorney for Appellee
Southeast Law, LLC
2107 Bull Street
Savannah, Georgia 31401
912-622-6612 (O)
877-417-2943 (F)
southeastlaw@gmail.com

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STATEMENT REGARDING ORAL ARGUMENT

Appellee does not request oral argument.

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STATEMENT OF JURISDICTION

This action was authorized and instituted pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 1983 under the 4th and 14th Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331, 28 U.S.C. §1343, and 28 U.S.C. § 1391, and the aforementioned constitutional and statutory provisions. Plaintiff/Appellee and the Plaintiffs below brought this suit against Defendant in both his individual and official capacities. This Court has pendent jurisdiction to hear the related claims set forth herein.

STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

1. For qualified immunity to attach, Defendant Vickers must show that: 1) he did not violate clearly established constitutional rights of the Plaintiff (including SDC)[1], and 2) under the circumstances, a reasonable officer would not have known that the alleged conduct violated those rights. Plaintiff (including SDC) will show the Court that Defendant violated Plaintiff's (including SDC) constitutional rights as protected by the Fourth and Fourteenth Amendments to the United States Constitution and that a reasonable officer should have known that the conduct exhibited would violate those rights.

STATEMENT OF THE CASE

I. *Statement of Facts*

On July 10, 2014, Defendant Vickers, along with other officers of the Coffee County Sheriff's Department and agents of the Georgia Bureau of Investigation, participated in an operation to apprehend a criminal suspect, Christopher Barnett, whom Plaintiff had never met. Dkt. No. 1, ¶ 23. Defendant entered Plaintiff's property, located at 145 Burton Road, Lot 19, and demanded that all persons in the area, including children, get down on the ground. Defendant then proceeded to draw his firearm and held it in the direction of Plaintiffs, Dkt. No. 1, ¶ 24. The children of

[1] There were originally multiple Plaintiffs in this case. The District Court found that the properly pleaded case in this instance allowed a viable complaint only for Plaintiff's minor child, SDC.

Plaintiffs were frightened and ultimately traumatized by these events. At no time did Plaintiffs or their children feel secure in their persons or free to leave the area, Dkt. No. 1, ¶ 25. The Defendant, fellow officers, and children were approached by Plaintiff's family pet, a dog named Bruce. Defendant shot at the animal twice, striking SDC, a minor child of Plaintiff Amy Corbitt, in the back of the leg with the second shot. Dkt. No. 1, ¶¶ 28, 29, 31. Defendant was grossly negligent when he unreasonably shot at the family pet while restraining Plaintiff's minor child with excessive force. Defendant Vickers has a history of excessive force which includes ten separate occurrences within the three years prior to the incident in question. Defendant Vickers shot and killed a dog during the execution of a search warrant just one month prior to the incident with Plaintiffs. Dkt. No. 1, ¶¶ 38, 39. Defendant did knowingly, wantonly, recklessly, and excessively use unnecessary force against Plaintiffs without any justification or probable cause. Dkt. No. 1, ¶ 42.

II. *Course of Proceedings*

Plaintiff does not contest the statement of Defendant.

III. *Standard of Review*

Whether Defendant Vickers is entitled to qualified immunity is a denominated question of law and is reviewable *de novo*. See Simmons v. Indian Rivers Mental Health Ctr., 652 F. App'x 809, 815 (11th Cir. 2016).

The correct standard to determine whether a police officer used excessive force in a particular search or seizure is the objective reasonableness standard. As the Supreme Court noted in Graham v. Connor, "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." Graham v. Connor, 490 U.S. 386, 397 (1989). Additionally, this Court recently decided that: "[t]he seizure of a person can be rendered unconstitutional when officers unreasonably infringe on the person's 'right to bodily privacy,'" Brand v. Casal, 877 F.3d 1253 (11th Cir. 2017).

SUMMARY OF THE ARGUMENT

Defendant Vickers unreasonably used unnecessary excessive force where there was no crime involved to reasonably seize SDC, SDC posed no immediate threat to the safety of the officers or others, and SDC was not resisting arrest nor attempting to evade arrest by flight. Corbitt has brought claims against Defendant Vickers individually and on behalf of SDC. Defendant argues that the trial court did the research work of Plaintiff with respect to qualified immunity, however, this Court will find her argument in Plaintiff's Supplemental Brief to the District Court.

ARGUMENT AND CITATION OF AUTHORITY

A. Fourth Amendment

Defendant Vickers did knowingly violate Plaintiff's (including SDC) constitutional rights as protected by the Fourth Amendment. The Fourth Amendment to the United States Constitution provides, in part, that: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." The United States Supreme Court has held that "[t]he Fourth Amendment's freedom from unreasonable searches and seizures includes the right to be free from excessive force during a criminal apprehension." Mercado v. City of Orlando, 407 F.3d 1152, 1156 (11th Cir. 2005) (citing Graham v. Conner, 109 S.Ct. 1865). It has been clearly established that the use of excessive force in carrying out an arrest and carrying out an arrest without probable cause both constitute violations of the Fourth Amendment. See Thornton v. City of Macon, 132 F.3d 1395 (11th Cir. 1998) (cites omitted). In addition, district courts in this Circuit have determined that "an individual's interest in his or her pet dog does fall within the Fourth Amendment's protection against unreasonable seizures. Injury to a pet dog is the type of property damage that would be protected under the Fourth Amendment from an unreasonable seizure." Esterson v. Broward County Sheriff's Dep't, 2010 U.S.Dist. LEXIS 117490, *10 (S.D.Fla. 2010); see also Schutt v. Lewis, 2014 U.S.Dist. LEXIS 110633 (M.D.Fla. 2014). Defendant Vickers violated

Plaintiff's clearly established constitutional rights against unreasonable seizure and excessive force under the Fourth Amendment. As the District Court realized, "the accidental discharge of a firearm resulting in the unintentional shooting during the course of an arrest may constitute excessive force under the Fourth Amendment if the officer's course of conduct preceding the shooting is unreasonable under the circumstances," (referencing Speights v. Griggs, 13 F. Supp. 3d. 1298, 1319 (N.D. Ga. 2013)), Dkt. No. 19, 11. Additionally, the District Court found that "while the result of discharging the weapon may be an accident, the actual discharge was intentional. And the force he exerted intentionally is certainly capable of excess," (referencing Vaughan v. Cox, 343 F.3d 1323, 1328 (11th Cir, 2003) (emphasis in Order)), Id. at 12. This is not a case of an arrest (probable cause) but a case of unconstitutional seizure of SDC in which Plaintiff's minor child was injured because of the unnecessary excessive force of Defendant.

In violating Plaintiffs' protected constitutional rights, Defendant Vickers did not act in a "reasonable manner" as required by law. As the Supreme Court noted, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." Bell v. Wolfish, 441 U.S. 520, 559 (1979). That Court later elaborated the test to determine whether excessive force should be considered, stating: "however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime

at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham v. Connor, 109 S.Ct. 1865, 1872 (1989); See Thorton, 132 F.3d at 1400 (11th Cir. 1998) (denying qualified immunity for police officers when the suspect did not commit a serious crime, pose a threat to the officers or others, or actively resist arrest). In addition, "[t]he '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, 109 S.Ct. at 1865. The Eleventh Circuit Court of Appeals considers, "[i]n determining whether the officers' force was reasonable, . . . 'whether a reasonable officer would believe that this level of force is necessary in the situation at hand.'" Mercado v. City of Orlando, 407 F.3d 1152, 1157 (11th Cir. 2005). The Eleventh Circuit has recently recognized that the simple decision of "[a]n officer . . . to point a gun at an unarmed civilian who objectively poses no threat to the officer or the public can certainly sustain a claim of excessive force." Croom v. Balkwill, 645 F.3d 1240, n. 17 (11th Cir. 2011) (emphasis added). Here, SDC was never a suspect of any crime. Rather, he was a child who was a mere victim of his circumstance. SDC at no time posed an immediate threat to the safety of the officers or others. SDC did not resist arrest nor attempt to evade arrest by flight. Additionally, the family pet did not pose any justifiable threat to Defendant Vickers nor the other officers. The dog was not approaching Defendant,

was not acting aggressively, and by all accounts, was attempting to make contact with its family members. Therefore, Defendant cannot reasonably justify his use of excessive force against SDC. The District Court determined that "Vickers shot towards Bruce in furtherance of the seizure of the Plaintiffs," Dkt. No. 19, at 14.

Defendant Vickers's actions were well outside a reasonable use of force, so as to amount to extreme and excessive force upon SDC. Defendant Vickers's use of excessive force upon an unarmed, unsuspected child is behavior that cannot be tolerated in a civilized society.

> The district court properly denied the officers' motions for summary judgment on these claims. Neither [Plaintiff was] suspected of having committed a serious crime, neither posed an immediate threat to anyone, and neither actively resisted arrest. Under the circumstances, the officers were not justified in using *any* force, and a reasonable officer thus would have recognized that the force used was excessive. Therefore, the district court properly denied the officers' motions for summary judgment," (emphasis in original).

Thornton, 132 F.3d 1395 at 1400. The Supreme Court has acknowledged that there are cases of excessive force that simply "shock the conscience," stating: "[w]e first put the test this way in Rochin v. California, where we found the forced pumping of a suspect's stomach enough to offend due process as conduct 'that shocks the conscience' and violates the 'decencies of civilized conduct.'" County of Sacramento v. Lewis, 118 S.Ct. 1708, 1717 (1998). The Supreme Court acknowledged that "'[s]eizure alone is not enough for § 1983 liability; the seizure

must be 'unreasonable,'" Brower v. County of Inyo, 109 S.Ct. 1378, 1382-83 (1989). When children are playing outside, left to their own devises and are accosted by armed men, forced to the ground with guns in their backs, and who open fire on a non-threatening family pet, we as a civilized society ought to be shocked that our public officials feel this behavior is acceptable. In this situation, as in Thornton, no force was necessary. Therefore, the Court should truly have a "shocked conscience" and deny Defendant qualified immunity in this case.

The District Court relied on the Supreme Court ruling that: "[a] person is 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," Dkt. No. 19, at 7, (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

The District Court also relied on the Eleventh Circuit ruling in Vaughn v. Cox when it determined that "a seizure occurs when an officer intentionally sets into motion an instrumentality that has the effect of restricting the plaintiff's movement. When an officer intends to stop or seize a person, and does so, it does not matter that he does so in a way other than the way in which he intended," Dkt. No. 19, at 9.

Defendant Vickers describes the incident as an accidental shooting, however, this is not accurate. As the District Court correctly summarized, whether "the officer shot a person he was not aiming to hit did not stop the Eleventh Circuit from

conducting an excessive force analysis. In doing so, the Eleventh Circuit was examining the excessiveness of the force that the officer had intentionally applied," Id. at 16 (emphasis in Order)(relying on Vaughn v. Cox).

For the unreasonable seizure claim under the Fourth Amendment, "an officer is entitled to qualified immunity where the officer had arguable probable cause, that is, where reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[] could have believed that probable cause existed to arrest the [P]laintiffs." Thornton, 132 F.3d at 1399 (cites omitted). Defendant Vickers ordered SDC – a non-suspect - to the ground, with his weapon drawn. He remained seized at gunpoint for an extended period of time. The subject of his directive was a child. Defendant Vickers had been fully briefed on the suspect's identity. Defendant cannot show there was any arguable probable cause to effectuate SDC's seizure. There is simply no justifiable reason Defendant Vickers had to seize this child. The family pet showed no signs of aggression and there is no indication that Defendant faced any imminent threat from the dog. Similarly, Defendant Vickers can show no arguable probable cause for discharging his firearm at the family dog. In the light most favorable to SDC, a reasonable officer would or should have known that the alleged conduct would violate SDC's right to be free from unreasonable seizure.

The ruling of the District Court was correct because there was no probable cause to seize SDC and "that [his] Fourth Amendment seizures were effected [sic] by the placement of gun barrels in their backs," Dkt. No. 19, at 9. The District Court found that the Eleventh Circuit has yet to determine liability where there is an accidental discharge of a weapon and that the circuits are split on the issue. The case at bar, however, is not a question of accidental discharge of a weapon but the intentional discharge of a weapon while SDC was unreasonably seized without probable cause.

In addition, Plaintiff argues that public policy demands that state officials ought to be accountable for constitutional violations against free individuals who have committed no crime, are not suspected of having committed a crime, and yet are seized against their will without probable cause and are subsequently injured by the unnecessary actions of a duly sworn officer of the law. As such, Defendant Vickers should be denied qualified immunity.

B. Fourteenth Amendment

Defendant Vickers did knowingly violate Plaintiffs' constitutional right as protected by the Fourteenth Amendment. The Fourteenth Amendment declares, in part, that "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws." The Supreme Court of the United States declared that "[t]he security of

one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause," Wolf v. Colorado, 69 S.Ct. 1359, 1361 (1949) (overruled on other grounds). Defendant Vickers did violate Plaintiffs' rights under the Fourteenth Amendment by forcibly seizing SDC at gunpoint and attempting to deprive Plaintiffs of their property by shooting at the family dog without accusation or proper due process of law. Therefore, Defendant Vickers did knowingly and intentionally violate Plaintiffs' constitutional rights against arbitrary intrusion upon their privacy and property.

CONCLUSION

Plaintiff has shown that Defendant Vickers used unnecessary excessive force where there was no crime committed by the Plaintiff for a reasonable probable cause seizure, Plaintiff (including SDC) posed no immediate threat to the safety of the officers or others, and Plaintiff was not resisting arrest nor attempting to evade arrest by flight. In addition, Defendant Vickers has not shown that: 1) he did not violate clearly established constitutional rights of the Plaintiff (including SDC), and 2) under the circumstances, a reasonable officer would not have known that the alleged conduct violated those rights. Therefore, Plaintiff prays this Court finds Defendant Vickers is not entitled to qualified immunity.

CERTIFICATE OF COMPLIANCE

The undersigned attorney, counsel for Appellee, certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A). The undersigned further certifies that the foregoing brief contains 2,716 words, excluding the portions of the document exempted by Fed. R. App. P. 32(f), as measured by the word count of the word processing system used to prepare the brief (Microsoft Word). The type size used in this brief is 14-point and the font is Times New Roman.

Respectfully submitted, this twenty-first day of February, 2018.

/s/ Ashleigh R. Madison
Ashleigh R. Madison
Georgia Bar Number: 346027
Attorney for Appellee
Southeast Law, LLC
2107 Bull Street
Savannah, Georgia 31401
912-622-6612 (O)
877-417-2943 (F)
southeastlaw@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served the above and foregoing pleading upon all counsel of record through the Court's Electronic Case Filing System, or by placing the same in the United States mail, properly addressed and postage prepaid, this the twenty-first day of February, 2018.

/s/ Ashleigh R. Madison
Ashleigh R. Madison
Georgia Bar Number: 346027
Attorney for Appellee
Southeast Law, LLC
2107 Bull Street
Savannah, Georgia 31401
912-622-6612 (O)
877-417-2943 (F)
southeastlaw@gmail.com