IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
January 21, 2020

Lyle W. Cayce
Clerk

No. 19-50602
Summary Calendar

SARA HOKE; AMANDA HOKE,

Plaintiffs–Appellants

versus

ROBERT ANDERSON; LEWIS HOLLAND; SETH MODEL; JON BUNDICK; QUINT SEBEK; CELESTINE ADAMS,

Defendants–Appellees.

Appeal from the United States District Court
for the Western District of Texas
No. 1:18-CV-232

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Twin sisters Amanda and Sara Hoke attended the 2016 South by

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Southwest Festival in Austin, Texas. They went out one evening on Sixth Street. The bars closed at 2:00am, at once depositing thousands of people onto the street, at which point the sisters became involved in a fight.

Members of the Austin Police Department, including the defendants, responded. Several used pepper spray to subdue the Hokes and other participants. The Hokes were arrested, taken to a staging area, and promptly given water to wash off the pepper spray.

The Hokes sued under 42 U.S.C. § 1983 for alleged violations of their Fourth and Eighth Amendment rights. They claimed the use of pepper spray and the alleged failure to provide enough water to wash off the spray amounted to excessive force. They also contested the legality of their arrest. The district court granted the defendants summary judgment on the basis of qualified immunity ("QI").

On appeal, the Hokes contend only[1] that the defendants' attempts at decontamination were insufficient and constituted excessive force in violation of the Fourth Amendment. We affirm, because there is no clearly established law to support their various theories.

I.

The Hokes challenge the grant of QI mainly on the ground that the defendants' attempts to decontaminate them after the spray were insufficient. Because the Hokes fail to unearth clearly established law regarding decontamination of pepper spray, we affirm.

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[1] The Hokes briefly state that they intend to appeal the decision that the defendants didn't use excessive force in spraying them. But they fail to brief any argument related to that contention, so it's waived. *See United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010) ("A party that asserts an argument on appeal, but fails [adequately to] brief it, is deemed to have waived it. It is not enough [merely to] mention or allude to a legal theory." (citation omitted)).

A.

"Once an official pleads [QI], the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact [dispute] as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). The QI inquiry has two prongs, and we can rely on either or both. *See id.*

First, we ask "whether an official's conduct violated a constitutional right of the plaintiff." *Id.* Second, we inquire "whether the right was clearly established at the time of the violation." *Id.* In deciding whether the law was clearly established, we define the context narrowly. "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quotation marks omitted).

1.

The Hokes first suggest that it was unreasonable for the defendants to fail to pour water on *every part* of their bodies that the spray had contacted. But there is no clearly established law that required the officers to do so. No binding case requires immediate and total decontamination of every affected area of an arrestee's body. Instead, as the district court recognized, the only Fifth Circuit case that addresses pepper-spray decontamination states that "[d]econtamination consists primarily of flushing the eyes with water." *Wagner v. Bay City*, 227 F.3d 316, 319 n.1 (5th Cir. 2000). As the Hokes concede, and videos in evidence undeniably show, the defendants washed their eyes after escorting them to the staging area.

2.

The Hokes' next contention is that the defendants supposedly failed to

decontaminate them adequately by not (1) using enough water when more was available, (2) informing the Hokes that they should remove their contact lenses to lessen the sting, (3) telling them that rubbing the affected areas would worsen the pain, and (4) calling an ambulance. The Hokes even contend that the defendants failed to decontaminate them at all.

The Hokes's claims suffer from a number of defects. First, and most importantly, the Hokes misstate the record in contending that the defendants failed to decontaminate them. Instead, a body-camera video unmistakably shows an officer washing off one of the sisters' eyes and even offering more water if she needed it. The video also shows that the officer immediately summoned an EMT to make sure she was okay.[2]

The Hokes also fail to cite any binding caselaw that required the defendants to take the specific measures they say were required. And the cases they do cite are beside the point. Some involve officers who fail to provide *any* decontamination for a long period following the spray.[3] Others don't involve decontamination claims at all.[4] Still others involve defendants' allowing dogs to bite arrestees after they're subdued, not decontamination of pepper spray.[5] There is no clearly established law.

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[2] *See Bourne*, 921 F.3d at 490 ("[A] plaintiff's version of the facts should not be accepted for purposes of QI when it is blatantly contradicted and utterly discredited by video recordings." (cleaned up)).

[3] *See Headwaters Forest Def. v. Cty. of Humboldt*, 276 F.3d 1125, 1128 (9th Cir. 2002), *as amended* (Jan. 30, 2002); *LaLonde v. Cty. of Riverside*, 204 F.3d 947, 952 (9th Cir. 2000).

[4] *See Singleton v. Darby*, 609 F. App'x 190 (5th Cir. 2015) (per curiam); *Anderson v. McCaleb*, 480 F. App'x 768 (5th Cir. 2012) (per curiam); *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002); *Park v. Shiflett*, 250 F.3d 843 (4th Cir. 2001); *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994).

[5] *See Campbell v. City of Springboro*, 788 F. Supp. 2d 637, 671–72 (S.D. Ohio 2011), *aff'd*, 700 F.3d 779, 787 (6th Cir. 2012); *Trammell v. Thomason*, 335 F. App'x 835, 844 (11th Cir. 2009); *Priester v. City of Riviera Beach*, 208 F.3d 919, 925 (11th Cir. 2000); *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998).

3.

The Hokes also seem to contend that the defendants acted inconsistently with their training and hence violated the Constitution. But even if we accepted the (questionable) premise that the defendants didn't follow their training, "that does not itself negate [QI] where it would otherwise be warranted." *City and Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015).

B.

The Hokes also contend that the district court erred in dismissing their claim for declaratory relief under 28 U.S.C. § 2201.[6] But "[t]o obtain declaratory relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future." *Waller v. Hanlon*, 922 F.3d 590, 603 (5th Cir. 2019) (brackets removed). The Hokes demonstrate neither, so they lack standing for that claim.

* * * * *

The summary judgment is AFFIRMED, except as to the Hokes' claim for declaratory relief, for which we REVERSE and RENDER a judgment of dismissal for want of jurisdiction.

[6] The district court did not mention the claim for declaratory relief in its order granting summary judgment, but the parties apparently agree that the court granted summary judgment on that claim as well. So we construe the order as such.