EN BANC CASE

ORIGINAL BRIEF SUBMITTED TO PANEL

DOCKET NO. 02-16424-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DENIS STEPHENS, Defendant/Appellant

vs.

PETER EVANS and DETREE JORDAN, Plaintiffs/Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

REPLY BRIEF OF APPELLANT

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that this brief is composed with 14 point Times New Roman font.

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I. ARGUMENT AND CITATION OF AUTHORITY

A. Officer Stephens Had Discretionary Authority to Conduct a Strip Search of the Appellees.

Appellees first argue that Stephens did not have discretionary authority to conduct a strip search of the Appellees. They rely on a misleadingly selective citation of Chief Lummus' testimony.

The District Court correctly found "though Plaintiffs contend otherwise, Stephens acted within his discretionary authority in performing a strip search on Plaintiffs as the Zebulon Police Department policy manual allows officers to conduct strip searches in certain situations." (R.53-14 through 15). That policy is found in the City of Zebulon police manual attached to Defendants' Joint Exhibits, and states "a strip search may be conducted if it is reasonable in light of the circumstances." (R.42-JDE-4-82).

Appellees contend that Lummus had verbally overridden this policy. However, contrary to Appellees' assertions, Lummus testified as follows:

> Q Okay, and I want to be clear about this in that the verbal warning you gave Denis [Stephens] as a result of the strip search on the side of the road, did I understand you correctly when you said earlier that you told Denis he was not to do any more strip searches under any circumstances?
>
> A Right, on the road.

Q On the road?

A Right.

Q What about strip searches at the jail?

A Well, he shouldn't have to do any in the jail because the jailers take over from there.

Q Okay. So would your verbal warning of Denis have included Denis, don't do any strip searches on the road and strip searches at the jail too?

A I didn't say anything about the jail because usually when a person is arrested and patted down on the road and then brought in, they're automatically turned over to the jail.

Q So as the chief of police had you known that one of your officers had conducted strip searches at the jail would that have been a violation of your policy?

A It'd have been a violation of what I said.

Q Do you believe it would've been a violation of your written policy?

A Yes.

(R.45 (Lummus Depo.) pp. 40-41 (emphasis supplied)).

Earlier in his deposition, Appellees' counsel asked Chief Lummus:

Q And as a result of that conversation you had with Denis before January 22, 1999 what did you instruct Denis to do?

A I told him not to be doing any strip searching at all.

Q Ever.

A Period, not on the road.

(R.45 (Lummus Depo.) pp. 38-39 (emphasis supplied)).

Each time Chief Lummus was questioned about his directions to Officer Stephens he specified that they pertained to strip searches "on the road." Chief Lummus' belief that strip searches at the jail, but before the prisoners were turned over to the jailers, violates the policy may be his current opinion, but it does not eliminate Officer Stephens' discretionary authority granted by the policy. Therefore, the District Court's conclusion that Officer Stephens did have discretionary authority in this matter is correct.

Officer Stephens did not understand Chief Lummus' directive to be a blanket prohibition on all strip searches. (R.45 (Stephens Depo.) pp. 101, 114). Chief Lummus never specifically directed him not to conduct reasonable strip searches in the privacy of a room at the jail. It never occurred to Chief Lummus that the officers might do that. That it did not occur to Chief Lummus, and he now believes it violates policy, is a far cry from it being a violation of his verbal orders to Officer Stephens. More importantly, it does not remove Officer Stephens' discretionary authority to conduct reasonable strip searches.

B. Officer Stephens Has Qualified Immunity for His Alleged Actions at the Pike County Jail.

As argued in the original brief, Officer Stephens did not violate Appellees' constitutional rights. He had reasonable suspicion for the strip searches and conducted them in an objectively reasonable manner.

1. Officer Stephens had reasonable suspicion to believe, or, in the alternative, arguable reasonable suspicion to believe, that the Appellees were concealing drugs on their persons.

Appellees only argue that the District Court correctly concluded that Officer Stephens' suspicions were based on nothing more than a rental car and a hunch. They invite this Court to review the tape. The facts and the law supporting Officer Stephens' reasonable suspicion of the Appellees is found on pages 12 - 16 of his original brief. Appellees fail to address any of the specific objective facts or distinguish any of the cases cited there.

Furthermore, and more importantly, Appellees fail to address the issue that the arguable reasonable suspicion analysis is an objective one. "In determining whether arguable probable cause exists, '[w]e apply an objective standard, asking "whether the officer's actions are objectively reasonable ... regardless of the officer's underlying intent or motivation."'" Lee v. Ferraro, 284 F.3d 1188, 1195 (11th Cir. 2002) (citing Vaughan v. Cox, 264 F.3d 1027, 1036 (11th Cir.2001)(quoting Montoute v. Carr, 114 F.3d 181, 184 (11th Cir.1997)), re'aff'd after remand 316 F.3d 1210 (11th Cir., Jan. 23, 2003)). This Court has held, in the context of a probable cause to arrest case, that

if reasonable people can disagree based on previous law about the existence of probable cause, that qualified immunity attaches to the officer's actions. Marsh v. Butler County, Alabama, 268 F.3d 1014, 1031 n.8 (11th Cir. 2001).

Clearly, based upon the cases cited in Appellant's original brief, Officer Stephens had reasonable suspicion sufficient to support his actions. As noted in footnote nine of the initial brief, the Second Circuit in United States v. Asbury, 586 F.2d 973, 976-77 (2nd Cir. 1978), set forth 12 factors that may establish reasonable suspicion. Eight of those factors arguably apply in this case. Appellees simply fail to address this issue at all. Officer Stephens' testimony regarding his reasonable suspicion is as follows:

Q Now you did not find any bulges, you did not find any suspicious objects, you did not find anything suspicious as a result of your pat down search of either of these individuals at the scene of the arrest, correct?

A I did not check his crotch area at the scene of the arrest.

Q All right. What reason did you have to believe after conducting your pat down search of either of these suspects that they may be concealing contraband within their clothes?

A As I said earlier before, sir; the demeanor of which they was acting–

Q Their nervousness?

A And the stories they was coming from.

Q And their story?

A Coming from Atlanta and going to Statesboro on 85 don't – it won't go there.

Q So because they were nervous and because they told you the direction that they had been traveling to get to Concord, it is your testimony that you formed a reasonable suspicion to believe that one or both of them were concealing illegal drugs inside their clothing?

A Also Mr. Evans' conduct, the way he was acting, his demeanor in which he was acting.

Q Those are the only two reasons that you formed your reasonable suspicion, correct?

A That's correct.

Q So would it be fair to say that based on those two reasons you claim to have suspected before you got to the Pike County Jail that one or both of these individuals may have illegal drugs concealed underneath their clothing, correct?

A That's correct.

(R.45 (Stephens Depo.) pp. 88-89). Earlier in his deposition, Officer Stephens had detailed why the Appellees' nervousness and story made him suspicious. (R.45 (Stephens Depo.) pp. 70-71; R.42-JDE-5, 20:03 through 20:14).

If the facts do not establish reasonable suspicion as a matter of law, Officer

Stephens clearly had arguable reasonable suspicion. As noted in the previous brief, if no case clearly establishes that the factors within the reasonable officer's knowledge would not provide reasonable suspicion, then the Court should conclude that he had arguable reasonable suspicion. See Marsh, supra. Appellees fail to point to any such case, and qualified immunity should attach to the search.

2. Officer Stephens' Strip Search of the Plaintiffs Did Not Violate Clearly Established Law.

The Appellees argue that Officer Stephens' strip search of the Appellees was abusive, and, therefore, Officer Stephens is not entitled to qualified immunity. The Appellees, however, fail to address the critical issue of the qualified immunity analysis: whether the clearly established law gave a reasonable officer in Stephens' position fair warning that his objective actions violated the constitutional rights of the Appellees. This is an objective analysis. Appellees want to focus on Officer Stephens' alleged words and the alleged force used. Officer Stephens' alleged subjective intent, however, is irrelevant to the qualified immunity analysis.

The alleged words are completely irrelevant to the qualified immunity analysis for the asserted constitutional violation, that being the alleged body cavity search while using a baton to spread Appellees' cheeks and lift their genitals. As noted in the previous brief, racial slurs and threats of prison rape do not amount to constitutional violations. See Edwards v. Gilbert, 867 F.2d 1271, 1273 n.1 (11th Cir. 1989); McFadden v. Lucas, 713 F.2d 143, 145-46 (5th Cir. 1983); Hopson v. Frederickson, 961 F.2d 1374, 1378 (8th Cir. 1992); Oltarzewski v. Ruggiero, 830 F.2d 136 (9th Cir.

1987); Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979); see also Hudson v. McMillan, 503 U.S. 1, ___, 112 S. Ct. 995 1004, 117 L. Ed.2d 156 (1992) (Blackmun, J., concurring opinion) (de minimus infliction of psychological pain is not actionable under the Eighth Amendment). Appellees fail to point to any authority to the contrary.

With regard to the force, as Appellees' factual recitations establish, the Appellees were being noncompliant. In this context Officer Stephens was entitled to use force and there is no clearly established law that would give a reasonable officer fair warning that the objective force used by Officer Stephens violated clearly established law.

a. This Is Not an "Obvious Clarity" Case.

Appellees point to this Court's recent decision in Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002), and argue that the force used by Officer Stephens was unconstitutional and that the Fourth Amendment applies with obvious clarity to Stephens' actions. The facts of Vinyard are not in any way similar to the facts of this case. In that case, the female arrested was handcuffed in the back of a patrol car and then was dragged out by her hair and pepper sprayed simply because she was verbally abusing the officer. In this case, the Appellees were not handcuffed, Officer Stephens was attempting to perform a strip search for which he had reasonable suspicion, and, according to the Appellees, they were clearly noncompliant.

The obvious clarity analysis still requires that the case relied upon provide some guidance on the issue at hand. As the Court noted in a recently decided case, "Whether Deputy Cox had arguable probable cause, whether deadly force was necessary to

prevent Vaughan's escape, and whether a warning was feasible in the instant case are all questions that the general rule [of Tennessee v. Garner] does not clearly answer." Vaughan v. Cox, 316 F.3d 1210, 1213 (11th Cir. 2003). Likewise, the general rule of Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed.2d 447 (1979), and even Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992), do not answer the question of permissible actions with a noncompliant searchee.

b. This Is Not a Case in Which Broad Statements Provide Fair Warning.

Appellees next argue that the broad statements in Bell v. Wolfish give fair warning to the reasonable officer. Appellees' argument misses the point. The only two cases decided at the time of Officer Stephens' strip search of the Appellees (Bell and Justice) had approved the strip searches at issue. Neither case addresses the issue of what an officer may or may not lawfully do with a noncompliant arrestee. The general legal principles of Bell and Justice do not give clear and fair warning in this case. The legal principle of Bell is that a reasonable strip search to protect the safety and integrity of a prison is lawful if based on reasonable suspicion. The general legal principle of Justice is that the limited search of that female juvenile was reasonable under the circumstances. The general legal principles of these cases address what is permitted, not what actions are unlawful. Appellees seek to detach the qualified immunity analysis from any review of the cases, which eviscerates the central purpose of the clearly established law analysis of qualified immunity.

This Court's recent decision in Vaughan v. Cox, 316 F.3d 1210 (11th Cir. 2003)

after a remand by the United States Supreme Court for reconsideration in light of Hope v. Pelzer, 122 S. Ct. 2508, 153 L. Ed.2d 666 (2002), is instructive. Writing over the vigorous dissent of Ninth Circuit Judge Noonan, Judges Carnes and Cox properly applied the qualified immunity rule of this Circuit. In that case, notwithstanding that there existed possible jury questions regarding the officers' use of deadly force, the Court held that the officers had qualified immunity for their actions. The Court noted that the rule of Tennessee v. Garner regarding the use of deadly force standing alone did not apply with obvious clarity so as to give the officers fair warning that the alleged conduct was unconstitutional. The Court went on to review the cases applying Garner in similar factual scenarios and concluded that the law was not clearly established.

Likewise in this case, the rule of Bell, holding that strip searches based on reasonable suspicion may be conducted on compliant prisoners to protect the integrity of the prison system, simply does not inform a reasonable officer in Stephens' circumstances that what he was doing would violate the law.

c. The Specific Previously Decided Cases Do Not Give Fair Warning.

Finally, Appellees argue that "fact specific precedent cases give fair and clear warning." Such an argument, however, is clearly without merit. In this section, Appellees cite force cases and not strip search cases. These do not clearly establish the law with regard to the strip search conducted by Officer Stephens. Fortunately, Appellees provide parentheticals summarizing the facts of the cases upon which they rely. All the cases involve arrestees who were handcuffed and not resisting. Under

Appellees' alleged facts, this case does not present the same circumstance. These Appellees were not handcuffed and were admittedly noncompliant.

d. Summary.

Clearly, if the Court looks for any factual specific cases for purposes of this qualified immunity analysis, there are none and Officer Stephens is entitled to qualified immunity. If this Court reviews Bell and Justice to determine if the general legal principles enunciated therein apply with obvious clarity to these facts, Officer Stephens is entitled to qualified immunity. For a case to apply with obvious clarity, it must have at least have held that the activities alleged therein were unlawful. In other words, there must have been some case decided at the time of the instant search that held the search to be unlawful and thereby provide some parameters that would apply with "obvious clarity" to facts faced by Officer Stephens. There is no such case. Finally, clearly this type of case cannot be decided based on the mere words of the Fourth Amendment. Especially in light of the cases decided at the time that upheld the searches at issue, Officer Stephens is entitled to qualified immunity.

II. CONCLUSION

Officer Stephens has qualified immunity because his actions were constitutionally reasonable and no case clearly established on January 22, 1999 that a strip search in which he used a baton to separate the noncompliant detainees' buttocks and lift the non-complaint detainees' genitals violated the detainees' rights. Therefore, Officer Stephens would be entitled to qualified immunity from Appellees' claims arising out of the strip search.

RESPECTFULLY SUBMITTED this 21 day of February, 2003.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the above and foregoing **REPLY BRIEF OF APPELLANT** by depositing same, postage prepaid, in the United States mail addressed as follows:

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