21-10590-JJ

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ERIC K. BROOKS,
Plaintiff-Appellant

v.

OFFICER DAMON MILLER,
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Florida, Tallahassee division

4:19-cv-00524-MW-MAF

APPELLANT'S SUPPLEMENTAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Brooks, Eric K. (Appellant)

City of Tallahassee (Appellee's employer)

Fitzpatrick, Martin A. (U.S. Magistrate Judge)

Miller, Damon (Appellee)

Monroe, Hannah D. (former counsel for Appellee)

Painter, Jennifer M. (counsel for Appellee)

Peteves, Dimitrios A. (counsel for Appellant)

Scanlan, Matthew S. (former counsel for Appellee)

Walker, Mark E. (Chief U.S. District Judge)

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

This Court assigned this appeal to an oral-argument calendar and said it will be reassigned at a later date. Oral argument should be heard because this appeal involves a fact-intensive question that this Court must answer de novo: whether a dashcam recording blatantly contradicts Mr. Brooks's account of events.

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because the underlying case is a "civil action[] arising under the Constitution, laws, or treaties of the United States." Specifically, it is an action under 42 U.S.C. § 1983. Doc. 1 at 1.

This Court has appellate jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final decision of a district court. The district court entered final judgment on January 22, 2021, which disposed of all of Mr. Brooks's claims. Doc. 55. Mr. Brooks timely filed his notice of appeal on February 19, 2021. Doc. 56.

STATEMENT OF THE ISSUES

I. This Court has held that gratuitous use of force by a police officer constitutes excessive force. Did the district court err in granting summary judgment on Mr. Brooks's excessive-force claim where the evidence shows that Officer Miller *gratuitously* slammed Mr. Brooks into a car and overtightened his handcuffs to the point of no circulation?

II. This Court has held that knowledge of the need for medical care and refusal to provide that care constitutes deliberate indifference. Did the district court err in granting summary judgment on Mr. Brooks's claim for denial of medical care where the evidence shows that Officer Miller did *nothing* in response to Mr. Brooks's pleas for medical attention for his broken or damaged wrists?

III. This Court has held that a police officer must have reasonable suspicion of criminal activity to conduct an investigatory stop. Did the district court err in granting summary judgment on Mr. Brooks's claims for false arrest and illegal search and seizure where Officer Miller did not have—or even claim to have—any reasonable suspicion of criminal activity?

STATEMENT OF THE CASE

A police officer stopped Eric Brooks without reasonable suspicion of criminal activity, gratuitously slammed him into a car and overtightened his handcuffs to the point of no circulation, and did nothing in response to Mr. Brooks's pleas for medical attention for his broken or damaged wrists. Doc. 1 at 5–7. Mr. Brooks sued the officer under 42 U.S.C. § 1983 for violating his constitutional rights. *Id.* at 7–10. The district court granted summary judgment for the officer, ruling that a dashcam recording blatantly contradicted Mr. Brooks's account of events even though the key events occurred off camera. Doc. 54.

I. Course of proceedings

Eric Brooks, a pro-se litigant, sued police officer Damon Miller for false arrest, illegal search and seizure, excessive force, and denial of medical care. Doc. 1. In his verified complaint, Mr. Brooks alleged that he was walking away from an area when Officer Miller "stopped him." *Id.* at 5, ¶ 3. Mr. Brooks alleged that Officer Miller then used excessive force in arresting him by slamming him into a car and overtightening his handcuffs to the point of no circulation. *Id.* at 5, ¶¶ 5–6. Mr. Brooks also alleged that he requested medical attention because he thought his

wrists were broken or damaged but Officer Miller refused his requests. *Id.* at 6, ¶¶ 10–11. Officer Miller denied the allegations and raised qualified immunity as a defense. Doc. 12.

Officer Miller later moved for summary judgment based on qualified immunity. Doc. 17. The magistrate judge deferred ruling on the motion so that Mr. Brooks could have "the benefit of the full discovery period before he is required to file a response." Doc. 18 at 1–2. Three days later, however, Officer Miller moved to stay discovery. Doc. 19. He argued that a stay was proper because his summary-judgment motion was "meritorious and dispositive on its face." *Id.* at 3.

Meanwhile, Mr. Brooks was incarcerated, and "all inmate law libraries [were] closed indefinitely" due to the then-nascent pandemic. Doc. 21 at 1. Mr. Brooks asked the district court to send him subpoena forms so he could obtain documents from third parties. *See* Doc. 20.

The magistrate judge denied Mr. Brooks's request for subpoenas. Doc. 22 at 5. The magistrate judge also granted Officer Miller's motion to stay but allowed Mr. Brooks to "demonstrate a specific discovery request that has already been made as of this date which [he] contends he needs to receive before responding to summary judgment." *Id.* at 4.

Mr. Brooks objected to the magistrate judge's order. Doc. 31. Notably, he said he wanted to subpoena the Leon County jail for "medical records" so he could "document [his] injuries and any treatment or persistent complaints." Doc. 32 at 5;[1] *see also* Doc. 31 at 7. The district judge overruled Mr. Brooks's objections. Doc. 35 at 2. Mr. Brooks then responded to the magistrate judge's order with a list of pending discovery requests and gave a reason for each request. Doc. 36; *see also* Doc. 32 at 3–4 (incorporated by reference).

Mr. Brooks later responded to Officer Miller's summary-judgment motion. Doc. 51. He argued that genuine disputes of material fact existed for each of his claims and that Officer Miller was not entitled to qualified immunity. *Id.* at 2–22. Mr. Brooks also attached a supporting declaration signed under penalty of perjury. *Id.* at 25.

The magistrate judge entered a report recommending summary judgment for Officer Miller. Doc. 52. Contrary to the factual assertions in Mr. Brooks's verified complaint and declaration, the magistrate judge determined that "[Mr. Brooks] was not slammed into a patrol vehicle,"

[1] Doc. 32 includes two appendices that were part of Mr. Brooks's objections. *See* Doc. 31 at 8 ("[E]nclosures: Appendices 1 and 2.").

"did not have any serious medical need, was not injured[,] and did not ask [Officer Miller] for medical care." *Id.* at 19, 22. The magistrate judge rejected Mr. Brooks's account of events because, in the magistrate judge's view, it was "blatantly contradicted" by a dashcam recording of the incident. *Id.* at 22; *see also id.* at 19.

The magistrate judge also determined that Mr. Brooks failed to state claims for false arrest and illegal search and seizure because Officer Miller had probable cause to arrest him and could search him incident to arrest. *Id.* at 12–16. The magistrate judge did not, however, address whether the initial investigatory stop of Mr. Brooks was lawful. *Id.* Nor did the magistrate judge address whether any of the principles of law at issue were clearly established for purposes of qualified immunity. *Id.* at 21–23. Instead, the magistrate judge merely ruled that Officer Miller did not commit any constitutional violations. *Id.* at 22.

Mr. Brooks objected to the magistrate judge's report. Doc. 53. He argued that the magistrate judge failed to view the record in his favor and that the dashcam recording did not blatantly contradict his account. *Id.* at 1–3. In particular, Mr. Brooks noted that Officer Miller's excessive force happened "off camera" but was still "clearly audible." *Id.* at 2, ¶ 6;

6, ¶ 21. Similarly, Mr. Brooks explained that Officer Miller "turn[ed] up the radio to cover [his] complaints of injury." *Id.* at 3, ¶ 9.

The district court accepted the magistrate judge's report and granted summary judgment. Doc. 54. Critically, the district court recognized that Mr. Brooks's "verified complaint is properly treated as testimony" and that "[w]hen there is a battle between sworn allegations and video evidence, '[f]acts not captured on camera are viewed in the light most favorable to plaintiff.'" *Id.* at 2 (citation omitted). Ignoring Mr. Brooks's claims to the contrary, the district court then said "there is no allegation that key events unfolded outside the view of the camera . . . to raise a genuine dispute of material fact." *Id.* at 3. The district court's ruling rested on that fundamental misunderstanding—the court noted that if there had been no recording, "a jury would have to determine the credibility of the parties and their differing accounts." *See id.* at 2.

II. Statement of facts

On November 12, 2016, Officer Miller was driving on patrol behind a black Kia and another police car. Doc. 51 at 29; Doc. 17-3 at 00:00–00:20. The Kia parked at the end of a residential street, the other police car parked behind it, and Officer Miller parked further back. Doc. 17-3 at

00:20–00:53. Mr. Brooks got out of the Kia through the driver's-side door and walked away. *Id.* at 00:54–01:03. Officer Miller then got out of his car and walked to a group of people near the Kia, outside the view of his dashcam. *Id.* at 01:03–01:25. Mr. Brooks was among the group. Doc. 1 at 5, ¶ 1.

Mr. Brooks started to walk away from the area, but Officer Miller "stopped him" and asked for his driver's license. *Id.* at 5, ¶ 3; Doc. 17-3 at 01:53–01:55. Mr. Brooks said he did not have a driver's license. Doc. 17-3 at 01:55–02:00. Officer Miller then "grabbed [Mr. Brooks] by the shirt and slammed him into the patrol vehicle." Doc. 1 at 5, ¶ 5.

Officer Miller's slam was not captured on video, but it is audible on his dashcam recording. *See* Doc. 17-3 at 02:13–02:19. At the same time, a bystander can be heard reacting with a raised voice. *See id.* Mr. Brooks "suffered additional pain and inflammation of a pre-existing shoulder injury" because of the slam. Doc. 51 at 25, ¶ 8.

Officer Miller arrested Mr. Brooks for driving a motor vehicle without having a valid driver's license in violation of section 322.03(1), Florida Statutes (2016). Doc. 51 at 26, 29; *see also* Doc. 17-3 at 02:19–02:23. Officer Miller handcuffed Mr. Brooks "so tight that sharp pain shot

through his arms before losing all circulation in his wrists and arms." Doc. 1 at 5, ¶ 6 (cleaned up). Officer Miller then searched Mr. Brooks and found cocaine in his pocket. Doc. 17-3 at 03:40–06:34.

Mr. Brooks told Officer Miller that the handcuffs were too tight and he could not feel his hands. Doc. 1 at 6, ¶ 9. He also told Officer Miller that he "needed medical attention" because he thought his wrists were broken or damaged. *Id.* at 6, ¶ 10. Officer Miller "refused to allow [Mr. Brooks] medical attention and proceeded to transport [him] to the Leon County jail." *Id.* at 6, ¶ 11. Although Mr. Brooks's pleas and Officer Miller's refusal of care are not clearly audible on the dashcam recording, much of the recording is muddied by ambient noise, and Mr. Brooks's statements are hard to discern. *See* Doc. 17-3 at 02:28–51:22. The majority of the recording—including almost the entirety of the drive to the jail—is of such poor quality that nothing is visible. *Id.* at 08:25–51:22.

When he got to the jail, Mr. Brooks "complained of pain inflicted upon his body" by Officer Miller. Doc. 1 at 6, ¶ 12. A nurse at the jail eventually gave Mr. Brooks pain medication. *Id.* at 6, ¶ 13. Mr. Brooks's pain persisted for almost two months after the arrest, "including episodes of numbness in [his] hands, wrist pain, and elbow pain." Doc. 51 at 25,

¶ 9. He regularly took over-the-counter pain medication at the jail, and he sought medical treatment when the medication was ineffective. *Id.* at 25, ¶¶ 10–11.

III. Standards of review and decision

This Court "review[s] *de novo* the videotape evidence that was presented to the district court at the summary judgment stage." *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1290 n.3 (11th Cir. 2009); *accord Johnson v. City of Miami Beach*, 18 F.4th 1267, 1269 (11th Cir. 2021). Further, this Court views such video evidence "in the light most favorable to the non-moving party." *Johnson*, 18 F.4th at 1269.

This Court reviews de novo a district court's grant of summary judgment, "construing the facts and drawing all inferences in the light most favorable to the nonmoving party." *Powell v. Snook*, 25 F.4th 912, 920 (11th Cir. 2022).

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment. The court improperly ruled that a dashcam recording blatantly contradicted Mr. Brooks's account of events. Because the key events occurred off camera, Mr. Brooks's account must be accepted for summary-judgment purposes.

Viewing the evidence in the light most favorable to Mr. Brooks, there are genuine disputes of material fact for each of his claims. The evidence shows that Officer Miller *gratuitously* slammed Mr. Brooks into a car and overtightened his handcuffs to the point of no circulation. The evidence further shows that Officer Miller did *nothing* in response to Mr. Brooks's pleas for medical attention for his broken or damaged wrists. Finally, the evidence shows that Officer Miller stopped Mr. Brooks without reasonable suspicion of criminal activity. It was clearly established at the time of the incident that Officer Miller's conduct was unconstitutional, so he is not entitled to qualified immunity.

To the extent that Mr. Brooks was required to file medical records to substantiate his injuries and serious medical need, he should be given an opportunity to do so on remand. Mr. Brooks tried to subpoena the jail for medical records, but the district court improperly denied his request.

ARGUMENT

I. The district court erred in granting summary judgment on Mr. Brooks's claim of excessive force.

There are two reasons why the district court erred in granting summary judgment on Mr. Brooks's claim of excessive force. First, the court improperly treated a dashcam recording as dispositive and did not view the evidence in the light most favorable to Mr. Brooks. Second, when the evidence is properly viewed, it shows that there are genuine disputes of material fact both as to whether Officer Miller used excessive force and whether he is entitled to qualified immunity.

A. Because Officer Miller's use of excessive force occurred off camera, his dashcam recording did not blatantly contradict Mr. Brooks's account.

Sometimes a piece of evidence is so persuasive that no reasonable jury would believe testimony to the contrary. For example, in *Scott v. Harris*, 550 U.S. 372, 378–81 (2007), the plaintiff's testimony was "blatantly contradicted" by a video recording such "that no reasonable jury could have believed him." His testimony was therefore rejected for purposes of summary judgment. *Id.*

Recordings, however, are not perfect. A recording might present "ambiguities and lack of clarity about some of the details." *Cantu v. City*

of Dothan, 974 F.3d 1217, 1226 (11th Cir. 2020). It might include only "unintelligible utterances." *Youmans v. Gagnon*, 626 F.3d 557, 561 n.3 (11th Cir. 2010). It might "fail[] to provide an unobstructed view of the events." *Pourmoghani-Esfahani v. Gee*, 625 F.3d 1313, 1315 (11th Cir. 2010). And often, like here, a recording just "does not show how" a key event transpired. *See Charles v. Johnson*, 18 F.4th 686, 692 n.1 (11th Cir. 2021).

The Court in *Scott* understood these limitations. It emphasized that there was no contention "that what [the videotape] depicts differs from what actually happened." *Scott*, 550 U.S. at 378. "This sentence indicates the Court's awareness that a videotape may not tell the complete story." Edward Brunet et al., *Summary Judgment: Federal Law and Practice* § 6:5(c)(2) (2022 ed.); *see also Coble v. City of White House*, 634 F.3d 865, 869 (6th Cir. 2011) (distinguishing *Scott* because, unlike in *Scott*, the plaintiff "insist[ed] that the facts differed from what was recorded").

Recognizing the inherent limitations of recordings, this Court has held that where a "recording does not clearly depict an event or action, and there is evidence going both ways on it," this Court must accept the nonmovant's account for purposes of summary-judgment. *Shaw v. City of*

Selma, 884 F.3d 1093, 1097 n.1 (11th Cir. 2018). Stated differently, only when a recording "completely and clearly contradicts" a party's testimony may that testimony be rejected. *See Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013). Other courts agree. *E.g.*, *Eagan v. Dempsey*, 987 F.3d 667, 691 n.56 (7th Cir. 2021) ("Courts, including ours, have declined to extend *Scott* treatment when video evidence is of poor quality or fails to capture the full event in question.") (collecting cases).

Here, Officer Miller's dashcam recording does not completely and clearly contradict Mr. Brooks's account because the key events occurred off camera. Neither Officer Miller nor Mr. Brooks are visible at the time of arrest. Doc. 17-3 at 02:10–02:24. The recording thus does not contradict Mr. Brooks's assertion that Officer Miller handcuffed him "so tight that sharp pain shot through his arms before losing all circulation in his wrists and arms." Doc. 1 at 5, ¶ 6 (cleaned up). Nor does it contradict Mr. Brooks's assertion that Officer Miller "grabbed [him] by the shirt and slammed him into the patrol vehicle." *Id.* at 5, ¶ 5. In fact, the recording *supports* Mr. Brooks's assertion because the slam is audible and a bystander can be heard reacting with a raised voice. Doc. 17-3 at 02:13–

02:19; Doc. 53 at 2, ¶ 6; *cf. also Cantu*, 974 F.3d at 1230 (viewing a video "in the light most favorable to [the nonmovant]").

To be sure, the recording offers some support for Officer Miller's account: both he and Mr. Brooks seem to be walking calmly after the arrest. Doc. 17-3 at 03:30–03:46. But "*Scott* does not hold that courts should reject a plaintiff's account . . . whenever documentary evidence, such as a video, offers *some* support for a governmental officer's version of events." *Witt v. W. Va. State Police, Troop 2*, 633 F.3d 272, 276 (4th Cir. 2011); *accord Gant v. Hartman*, 924 F.3d 445, 450 (7th Cir. 2019). Rather, the question is whether the recording blatantly contradicts—or, as this Court put it, "completely and clearly contradicts"—Mr. Brooks's account. *Morton*, 707 F.3d at 1284. The recording here does not.

Nonetheless, Mr. Brooks explained his seemingly calm demeanor. "Having just been battered by [Officer Miller], who is a foot taller and one hundred pounds heavier than [him], [Mr. Brooks's] seeming calm can be understood as a well-founded fear of another unprovoked attack . . . ." Doc. 53 at 3, ¶ 8. This explanation is supported by Mr. Brooks's later telling Officer Miller that he "[did not] want to upset" him. *Id.*; Doc. 17-3 at 07:18–07:22.

Accordingly, the district court erred in ruling that Officer Miller's dashcam recording blatantly contradicted Mr. Brooks's account. Because the recording "does not clearly depict" the key events and there "is evidence going both ways," the district court was required to view the evidence in the light most favorable to Mr. Brooks. *Shaw*, 884 F.3d at 1097 n.1. That evidence includes the assertions in Mr. Brooks's verified complaint and the declaration attached to his summary-judgment response. *Sears v. Roberts*, 922 F.3d 1199, 1206 (11th Cir. 2019) (crediting factual assertions in a verified complaint); 28 U.S.C. § 1746 (treating unsworn declarations the same as sworn declarations); Fed. R. Civ. P. 56(c)(1)(A) (providing that parties may cite declarations to support their factual positions at summary judgment).

B. Properly viewed, the evidence presents genuine disputes of material fact.

1. Officer Miller's use of force was excessive because he gratuitously slammed Mr. Brooks into a car and overtightened his handcuffs to the point of no circulation.

A "free citizen's claim that law enforcement officials used excessive force in the course of making an arrest" must be analyzed "under the Fourth Amendment's 'objective reasonableness' standard." *Graham v.*

Connor, 490 U.S. 386, 388 (1989). This analysis "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." *Id.* at 396. All three *Graham* factors show that Officer Miller's use of force was not objectively reasonable.

First, "[t]his case occurs at the far or lowest misdemeanor side of the spectrum, alleged driving without a driver's license." *Stephens v. DeGiovanni*, 852 F.3d 1298, 1320–21 (11th Cir. 2017). As this Court recognized in a case involving the same crime at issue here—a violation of section 322.03(1), Florida Statutes—the investigation of this crime does not "rise[] to the level of criminal conduct that should have required the use of force." *Stephens*, 852 F.3d at 1322.

Second, Mr. Brooks posed no immediate threat to the safety of Officer Miller or others. Officer Miller is "a foot taller and one hundred pounds heavier" than Mr. Brooks. Doc. 53 at 3, ¶ 8; *see also* Doc. 17-3 at 03:36. And, as the magistrate judge put it, both Officer Miller and Mr. Brooks appear to be walking "calmly" after the arrest. Doc. 52 at 9; *see*

also Doc. 17-3 at 03:30–03:46. There is no evidence that Mr. Brooks was anything but calm throughout the incident.

Third, Mr. Brooks did not resist arrest or try to flee. Officer Miller "stopped" Mr. Brooks to ask for his driver's license. Doc. 1 at 5, ¶ 3; Doc. 17-3 at 01:53–01:56. Mr. Brooks then stayed in speaking distance throughout the incident as other police officers stood idly by. Doc. 17-3 at 01:52–02:24. A jury could reasonably infer from this that Mr. Brooks did not resist arrest or try to flee.

In summary, this was not a case where Officer Miller had to "make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary." *Graham*, 490 U.S. at 397. Instead, Officer Miller had plenty of time to think—in circumstances that were relaxed, certain, and stable—such that his use of force was excessive. Slamming Mr. Brooks into a car and overtightening his handcuffs to the point of no circulation was wholly gratuitous.

Granted, "the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof *to effect it*." *Id.* at 396 (emphasis added). But the use of force still must be

objectively reasonable under the circumstances. *Id.* The *Graham* factors show that Officer Miller did not need to use any force—let alone slam Mr. Brooks into a car and overtighten his handcuffs to the point of no circulation.

2. Officer Miller is not entitled to qualified immunity because it was clearly established that gratuitous force is excessive.

The "basic constitutional law governing excessive force in arrest situations was well established" before Mr. Brooks's arrest on November 12, 2016. *Stephens*, 852 F.3d at 1316. And because "the *Graham* analysis yields an answer that is clear beyond all doubt," qualified immunity "is not appropriate." *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002). Simply put, this an "obvious clarity" case where a "broader, clearly established principle should control the novel facts" or one that "fits within the exception of conduct which so obviously violates the constitution that prior case law is unnecessary." *Cf. Powell*, 25 F.4th at 921 (citation omitted) (alteration adopted) (listing the "three ways" a plaintiff can "meet the clearly established requirement").

Even if this Court disagrees that this is an "obvious clarity" case, materially similar decisions from this Court clearly established that Officer Miller's use of force was excessive:

- In 2000, this Court held that ordering and allowing a dog to attack a person was excessive force where the person was suspected of stealing "$20 of snacks and crackers" in a burglary, complied with instructions, was not a threat, and did not resist or try to flee. *Priester v. City of Riviera Beach*, 208 F.3d 919, 923–24, 927 (11th Cir. 2000).
- Also in 2000, this Court held that kicking a person in the ribs and beating his head on the ground was excessive force where he was arrested for disorderly conduct and did not resist or try to flee. *See Slicker v. Jackson*, 215 F.3d 1225, 1227, 1233 (11th Cir. 2000).
- In 2002, this Court held that slamming a person's head on a car was excessive force where she was arrested for unnecessarily honking a car horn, posed no threat, and did not resist or try to flee. *Lee*, 284 F.3d at 1191, 1198.

- In 2008, this Court held that a "single punch" to a person's stomach was excessive force where he did not pose a threat or resist. *Hadley v. Gutierrez*, 526 F.3d 1324, 1327–28, 1330 (11th Cir. 2008).
- In 2010, this Court held that pepper-spraying and slamming a person to the pavement was excessive force where the person was arrested for playing loud music, did not pose a threat, and did not resist or try to flee. *Brown v. City of Huntsville*, 608 F.3d 724, 730–31, 739 (11th Cir. 2010).
- In 2012, this Court held that allowing a dog to attack a person was excessive force where the person was begging to surrender and the police officer could safely give effect to that surrender. *Edwards v. Shanley*, 666 F.3d 1289, 1296 (11th Cir. 2012).
- In 2014, this Court held that slamming a person's head against the pavement was excessive force where the person was not a threat and did not resist or try to flee. *Saunders v. Duke*, 766 F.3d 1262, 1267–69 (11th Cir. 2014).

Of course, there are differences between the listed cases and this case. But "every fact need not be identical" for qualified-immunity

purposes. *Merricks v. Adkisson*, 785 F.3d 553, 559 (11th Cir. 2015) (citation omitted); *see also Piazza v. Jefferson County*, 923 F.3d 947, 956 (11th Cir. 2019) (holding that cases involving "pepper spray," "kicks and punches," and "four-point restraints" clearly established that the gratuitous use of a taser was excessive). The material similarity is that force was used on a person who was not a threat and did not resist or try to flee—in other words, the use of force was gratuitous. The lesson learned is that "[g]ratuitous force used during the course of an arrest is excessive." *Manners v. Cannella*, 891 F.3d 959, 973 (11th Cir. 2018) (citing *Lee, Hadley*, and *Saunders*).

Although some of the listed cases involved the use of force on handcuffed arrestees, several of the cases involved suspects who were not yet handcuffed. *See Priester*, 208 F.3d at 923; *Brown*, 608 F.3d at 730–31; *Edwards*, 666 F.3d at 1293. Regardless, "the same rationale applies to the use of gratuitous force when the excessive force is applied prior to the handcuffing but in the course of the investigation and arrest." *Stephens*, 852 F.3d at 1328 n.33; *see also Patel v. City of Madison*, 959 F.3d 1330, 1340 (11th Cir. 2020) (rejecting the argument that "[this Court's] precedent prohibiting the use of gratuitous and excessive force against

non-resisting suspects applies only when the suspect is handcuffed"); *accord Ingram v. Kubik*, — F.4th —, No. 20-11310, 2022 WL 1042688, at *5 (11th Cir. Apr. 7, 2022).

Similarly, although some of the listed cases involved serious injuries, "[i]njury and force . . . are only imperfectly correlated, and it is the latter that ultimately counts." *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010). "[O]bjectively unreasonable force does not become reasonable simply because the fortuity of the circumstances protected the plaintiff from suffering more severe physical harm." *Lee*, 284 F.3d at 1200. Nevertheless, Mr. Brooks's injuries are sufficiently serious: his pain persisted for almost two months after his arrest, "including episodes of numbness in [his] hands, wrist pain, and elbow pain." Doc. 51 at 25, ¶ 9. To the extent that Mr. Brooks was required to file medical records to substantiate his injuries, the district court improperly precluded him from obtaining such records. *Infra* § I.B.3, at 25–26.

This Court has suggested in dictum that even gratuitous force is not excessive if it is de minimis. *Merricks*, 785 F.3d at 563.[2] But Officer

[2] A statement is dictum if it is "not necessary to deciding the case." *United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (citation omitted). The statement in *Merricks* about gratuitous force was not

Miller's use of force was not de minimis. He "grabbed [Mr. Brooks] by the shirt and slammed him into the patrol vehicle." Doc. 1 at 5, ¶ 5. He then handcuffed Mr. Brooks "so tight that sharp pain shot through his arms before losing all circulation in his wrists and arms." *Id.* at 5, ¶ 6 (cleaned up). All of this caused "excruciating pain," and Mr. Brooks "could not feel his hands and [wrists]." *See id.* at 8, ¶ 33; 9, ¶ 36. It was more than a de minimis use of force. *Compare Sebastian v. Ortiz*, 918 F.3d 1301, 1308–09 (11th Cir. 2019) (gratuitously painful handcuffing was not a de minimis use of force), *with Nolin v. Isbell*, 207 F.3d 1253, 1258 n.4 (11th Cir. 2000) ("merely grabbing" a person, "shov[ing] him a few feet against a vehicle," pushing a knee into his back, and pushing his head against a van was a de minimis use of force where the person "had minor bruising which quickly disappeared without treatment").

In any event, the de minimis principle "has never been used to immunize officers who use excessive and gratuitous force after a suspect has been subdued, is not resisting, and poses no threat." *Saunders*, 766 F.3d at 1269–70. This Court's cases concerning de minimis use of force

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necessary to deciding the case because the use of force in *Merricks* was not gratuitous—it "was applied when the officer was trying to take control of the suspect or the situation confronting him." 785 F.3d at 563.

are also distinguishable because they involved crimes more significant than the crime at issue here—driving without having a valid license. *See Lee*, 284 F.3d at 1199 (distinguishing this Court's "de minimis" force cases because "the crime at issue . . . was undeniably less significant than the crimes in [those] cases"). Accordingly, the de minimis principle does not apply under the circumstances.

One last note: in addressing Mr. Brooks's excessive-force claim, the magistrate judge (and, by adoption, the district court) cited inapposite caselaw on the use of force in prisons. Doc. 52 at 16–18. Officer Miller cites the same caselaw on appeal. RedBr. 20–23. However, as Mr. Brooks noted in his objections to the magistrate judge's report, that caselaw is distinguishable. Doc. 53 at 6, ¶ 19. Although Eighth Amendment claims of excessive force in prisons involve a subjective analysis of the actor's intent, Fourth Amendment claims of excessive force in arrests do not. *Compare Sconiers v. Lockhart*, 946 F.3d 1256, 1265 (11th Cir. 2020) ("[T]o have a valid claim on the merits of excessive force in violation of the Eighth Amendment, the excessive force must have been sadistically and maliciously applied for the very purpose of causing harm." (citation omitted) (alteration adopted)), *with Mobley v. Palm Beach Cnty. Sheriff*

Dep't, 783 F.3d 1347, 1254 (11th Cir. 2015) (holding that, in a Fourth Amendment case, "[t]he test is not a subjective one but asks whether the officer's actions in applying the force were *objectively* reasonable" and thus this Court does "not consider whether an officer acted in good faith or sadistically and maliciously").

3. To the extent that Mr. Brooks was required to file medical records to substantiate his injuries, the district court improperly precluded him from obtaining such records.

Mr. Brooks initially requested Officer Miller to produce "[m]edical complaints and record[s] from the Leon County Jail from this incident," but Officer Miller responded that he had no such documents in his possession. Doc. 51 at 39, ¶ 10. Mr. Brooks then sought to subpoena those records from the jail so he could "document [his] injuries and any treatment or persistent complaints." Doc. 32 at 5, ¶ 3. Specifically, he sought to obtain:

> All medical records of Eric K. Brooks at Leon County Jail from November 12, 2016, to November 11, 2017, including any contract health-care providers, to include but not limited to pharmacy prescriptions, sick-call slips, nurse visits to Brooks' housing unit, doctor referrals, and mental health consultations.

Id.

The district court denied Mr. Brooks's request without explanation. Doc. 22 at 5; Doc. 35 at 2. However, the governing rule plainly states: "The clerk *must* issue a subpoena, signed but otherwise in blank, to a party who requests it." Fed. R. Civ. P. 45(a)(3) (emphasis added). The word "must" is mandatory. Bryan A. Garner, *Garner's Dictionary of Legal Usage* 953 (3d ed. 2011) (explaining that "must" means "is required to"); *see also Estate of Romain v. City of Grosse Pointe Farms*, No. 14-12289, 2016 WL 9077688, at *2 (E.D. Mich. Oct. 13, 2016) (holding that the language of rule 45(a)(3) is "mandatory").

As a pro-se litigant, Mr. Brooks could not issue a subpoena on his own because the rule allows only the clerk and authorized attorneys to issue subpoenas. Fed. R. Civ. P. 45(a)(3); *see also, e.g.*, *United States v. Meredith*, 182 F.3d 934, at *1 (10th Cir. 1999) (unpublished) ("A pro se litigant who is not a licensed attorney with the appropriate federal district court has no power to issue subpoenas."). Thus, to the extent this Court concludes that Mr. Brooks did not sufficiently establish his injuries due to the lack of medical records, Mr. Brooks was prejudiced by the district court's improper refusal to issue a subpoena. Mr. Brooks should be given an opportunity to obtain those records on remand.

II. The district court erred in granting summary judgment on Mr. Brooks's claim of denial of medical care.

The district court made the same two mistakes in granting summary judgment on Mr. Brooks's claim of denial of medical care. Again, the court improperly treated the dashcam recording as dispositive and did not view the evidence in the light most favorable to Mr. Brooks. Second, when the evidence is properly viewed, it shows that there are genuine disputes of material fact both as to whether Officer Miller was deliberately indifferent to Mr. Brooks's serious medical need and whether Officer Miller is entitled to qualified immunity.

A. Because Officer Miller's denial of medical care occurred off camera, his dashcam recording did not blatantly contradict Mr. Brooks's account.

As discussed *supra*, § I.A., at 11–15, the district court was required to accept Mr. Brooks's account unless it was blatantly contradicted by Officer Miller's dashcam recording. Because Officer Miller's denial of medical care occurred off camera, his dashcam recording did not blatantly contradict Mr. Brooks's assertions that he requested medical care and Officer Miller refused those requests.

The majority of the recording—including almost the entirety of the drive to the jail—is of such poor quality that nothing is visible. Doc. 17-3

at 08:25–51:22. And even though Mr. Brooks's pleas for care and Officer Miller's refusals are not audible, "[m]any factors could affect what sounds are recorded, including the volume of the sound, the nature of the activity at issue, the location of the microphone, whether the microphone was on or off, and whether the microphone was covered." *Coble*, 634 F.3d at 869. Much of the recording is muddied by ambient noise, and Mr. Brooks's statements are hard to discern. *See* Doc. 17-3 at 02:28–51:22. Mr. Brooks further explained that Officer Miller "turn[ed] up the radio to cover [his] complaints of injury." Doc. 53 at 3, ¶ 9; *see also* Doc. 17-3 at 40:52–43:16.

Consequently, the lack of audible requests on the recording does not blatantly contradict Mr. Brooks's assertion that he made and was refused such requests. *Coble*, 634 F.3d at 869 (concluding that a plaintiff's testimony was "not 'blatantly contradicted' by the lack of corroborating sound on [an] audio recording"). This Court must therefore accept Mr. Brooks's account for purposes of summary judgment. *Shaw*, 884 F.3d at 1097 n.1

B. Properly viewed, the evidence presents genuine disputes of material fact.

1. Officer Miller was deliberately indifferent to Mr. Brooks's serious medical need because he did nothing in response to Mr. Brooks's pleas for medical attention for his broken or damaged wrists.

"The Due Process Clause of the Fourteenth Amendment requires government officials to provide medical care to individuals who have been injured during apprehension by the police." *Valderrama v. Rousseau*, 780 F.3d 1108, 1116 (11th Cir. 2015). To prevail on his claim for denial of medical care, Mr. Brooks had to show that he had a serious medical need and that Officer Miller was deliberately indifferent to that need. *Id.*

A serious medical need is "one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) (citation omitted). Here, Mr. Brooks told Officer Miller that he "needed medical attention" because he thought his wrists were "broke[n] or damaged." Doc. 1 at 6, ¶ 9. Mr. Brooks also told Officer Miller that he was "hurt and needed medical attention" because he could not feel his hands and wrists. *Id.* at 9, ¶ 36. Mr. Brooks's condition presented a serious medical need. *Compare Brown v. Hughes*, 894 F.2d 1533, 1538 (11th Cir. 1990)

(a "broken foot" presented a serious medical need), *with Shabazz v. Barnauskas*, 790 F.2d 1536, 1538 (11th Cir. 1986) ("shaving bumps" did not present a serious medical need), *superseded by statute on other grounds as stated in Harris v. Chapman*, 97 F.3d 499, 503 (11th Cir. 1996). To the extent that Mr. Brooks was required to file medical records to substantiate his serious medical need, the district court improperly precluded him from obtaining such records, and Mr. Brooks should be given an opportunity to obtain those records on remand. *See supra* § I.B.3., at 25–26.

To establish deliberate indifference, Mr. Brooks had to show "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct that is more than mere negligence." *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004). The evidence supports each of these elements.

First, there is evidence that Officer Miller subjectively knew of a risk of serious harm because Mr. Brooks told him about his serious medical need and Officer Miller "refuse[d]" to help. Doc. 1 at 6, ¶¶ 9–11; 9, ¶¶ 36–37. "A party cannot be said to refuse to do a thing of which he

knows nothing. Refusal implies demand, knowledge, or notice." *Mut. Life. Ins. Co. of N.Y. v. Hill*, 178 U.S. 347, 350 (1900).

Second, there is evidence that Officer Miller disregarded the risk of serious harm to Mr. Brooks because he "refuse[d] to allow [Mr. Brooks] medical attention." Doc. 1 at 6, ¶ 11. "[A]n official acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate." *Lancaster v. Monroe County*, 116 F.3d 1419, 1425 (11th Cir. 1997), *overruled in part on other grounds as stated in LeFrere v. Quezada*, 588 F.3d 1317 (11th Cir. 2009).

Third, there is evidence that Officer Miller's conduct was intentional—and, thus, more than mere negligence—because he "refuse[d]" Mr. Brooks's explicit requests. Doc. 1 at 6, ¶ 11. A refusal "implies something more than a mere passive failure"; "[i]t means more than mere inert default by neglect." *Cnty. Canvassing Bd. of Primary Elections v. Lester*, 118 So. 201, 203 (Fla. 1928); *accord People v. Akerley*, 251 N.W.2d 309, 310–311 (Mich. Ct. App. 1977) ("The term 'refuse' implies in the ordinary meaning an intentional, willful declination to perform an expected or required act." (citing *Black's Law Dictionary* 1447

(4th ed.))). Even if the word "refuse" does not imply intentional conduct, a jury could reasonably infer that Officer Miller's conduct was intentional. Mr. Brooks made "several" requests for medical care—Doc. 1 at 9, ¶ 36—so it is reasonable to infer that Officer Miller intentionally denied those requests and did not neglect them.

In short, Mr. Brooks had a serious medical need because he thought he had broken or damaged wrists. Officer Miller acted with deliberate indifference because he knew of Mr. Brooks's serious medical need and refused his requests for medical attention.

Finally, this Court sometimes lists causation as a third requirement to state a claim for denial of medical care. *E.g.*, *Gilmore v. Hodges*, 738 F.3d 266, 273–74 (11th Cir. 2013). Indeed, every § 1983 claim "requires proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation." *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986). But causation is typically an issue only where liability is alleged based on something other than personal participation. *See, e.g.*, *Henley v. Payne*, 945 F.3d 1320, 1331 (11th Cir. 2019) (addressing supervisory liability).

Causation is established where, as here, the defendant personally participated in the acts or omissions at issue. *Zatler*, 802 F.2d at 401 ("A causal connection may be established by proving that the official was personally involved in the acts that resulted in the constitutional deprivation."); *accord Brooks v. Warden*, 800 F.3d 1295, 1305 (11th Cir. 2015) (no issue of causation where the defendant's actions "directly resulted" in the constitutional violation). Any inability to link a particular physical or mental injury to the constitutional deprivation "would go not to liability, but rather to the amount of damages." *Hale v. Tallapoosa County*, 50 F.3d 1579, 1585 n.5 (11th Cir. 1995). To hold otherwise would contradict longstanding precedent acknowledging that a plaintiff may recover nominal damages without a showing of actual injury. *Cf. Brooks*, 800 F.3d at 1308 ("It has long been recognized in the caselaw of the Supreme Court and our Circuit that nominal damages serve to vindicate deprivations of certain absolute rights that are not shown to have caused actual injury." (citation and quotation marks omitted) (alteration adopted)).

2. Officer Miller is not entitled to qualified immunity because it was clearly established that doing nothing is deliberate indifference.

It was "clearly established" at the time of Mr. Brooks's arrest "that knowledge of the need for medical care and intentional refusal to provide that care constituted deliberate indifference." *Harris v. Coweta County*, 21 F.3d 388, 393 (11th Cir. 1994). "This broad principle has put all law-enforcement officials on notice that if they actually know about a condition that poses a substantial risk of serious harm and yet do *nothing* to address it, they violate the Constitution." *Patel v. Lanier County*, 969 F.3d 1173, 1190 (11th Cir. 2020). Accordingly, this is an obvious-clarity case, and Officer Miller is not entitled to qualified immunity. *See id.*

Of course, a nurse at the jail gave eventually gave Mr. Brooks pain medication. Doc. 1 at 6, ¶ 13. But the record does not reveal when that medication was provided. *See id.* Nor is there any evidence that Officer Miller intended or planned for Mr. Brooks to receive medical attention at the jail.

In any event, the fact that *someone else* eventually cared for Mr. Brooks does not excuse Officer Miller's refusal of care. *See Patel*, 969 F.3d at 1180, 1188–91 (holding that the defendant was deliberately indifferent

for doing "nothing" even though he drove the plaintiff to jail where he eventually received care); *see also Estate of Booker v. Gomez*, 745 F.3d 405, 433 (10th Cir. 2014) ("Because deliberate indifference is assessed at the time of the alleged omission, the Defendants' eventual provision of medical care does not insulate them from liability."). At bottom, Officer Miller did nothing, and it was clearly established that doing nothing constitutes deliberate indifference.

III. The district court erred in granting summary judgment on Mr. Brooks's claims of false arrest and illegal search and seizure because the preceding investigatory stop was illegal.

The district court granted summary judgment on Mr. Brooks's claims of false arrest and illegal search and seizure because it concluded that Officer Miller had probable cause to arrest Mr. Brooks and could search him incident to arrest. Doc. 52 at 12–16. However, the district court ignored that Mr. Brooks challenged the preceding investigatory stop that led to his arrest. *See id.* If the stop was illegal, then the ensuing arrest and search were likewise illegal. *See, e.g.*, *United States v. Tomaszewski*, 833 F.2d 1532, 1534 n.2 (11th Cir. 1987) ("If a stop is such that a reasonable person would not feel free to leave, then the encounter will be considered at least a seizure, and cause for reasonable suspicion

prior to the seizure will be required to validate what happens thereafter.").

In his verified complaint, Mr. Brooks asserted that he "started to walk away" from the scene of the incident when Officer Miller "stopped him" to ask for his driver's license. Doc. 1 at 5, ¶ 3. Mr. Brooks also asserted that Officer Miller "refuse[d] to allow [him] to go about his business." *Id.* at 7, ¶ 21. It was clearly established that a police officer may not stop a person unless the officer has "reasonable suspicion that the suspect was involved in, or is about to be involved in, criminal activity." *United States v. Lewis*, 674 F.3d 1298, 1303 (11th Cir. 2012) (citation omitted). Here, Officer Miller did not have—or even claim to have—any reasonable suspicion of criminal activity. To the contrary, Officer Miller maintained that the parties' encounter was "consensual." Doc. 51 at 32–34.

Officer Miller did not even have *arguable* reasonable suspicion. At the time of the stop, there was no reason for Officer Miller to suspect Mr. Brooks of any criminal activity because Mr. Brooks had not yet revealed that he did not have a driver's license. Doc. 17-3 at 01:52–02:00; *see also Lewis*, 674 F.3d at 1305 ("[T]he reasonable suspicion inquiry

focuses on the information available to the officers at the time of the stop . . . [,] not information that the officers might later discover."). Accordingly, Officer Miller is not entitled to qualified immunity. *See Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000) ("When an officer asserts qualified immunity, the issue is not whether reasonable suspicion existed in fact, but whether the officer had 'arguable' reasonable suspicion to support an investigatory stop.").

This issue was adequately preserved. It was raised in Mr. Brooks's response in opposition to summary judgment. *See* Doc. 51 at 9–11. It was also addressed in Mr. Brooks's objections to the magistrate judge's report. *See* Doc. 53 at 3, ¶ 10; *id.* at 4–5, ¶ 14. And it was addressed in Mr. Brooks's principal brief on appeal. BlueBr. 14, 21–24. *See also, e.g.*, *Geter v. Baldwin State Prison*, 974 F.3d 1348, 1367 (11th Cir. 2020) (noting that this Court must construe "*pro se* filings" liberally).

To the extent this Court concludes that the issue was not preserved, this Court should review the issue for plain error. The issue involves a pure question of law: whether an investigatory stop requires reasonable suspicion of criminal activity. And refusal to consider the issue would result in a miscarriage of justice because the improper stop caused Mr.

Brooks to spend almost a year in jail.[3] Mr. Brooks would therefore meet the requirements for plain-error review in a civil case. *See Burch v. P.J. Cheese, Inc.*, 861 F.3d 1338, 1352 (11th Cir. 2017) ("Under the civil plain error standard, we will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice." (citation and quotation marks omitted)).

CONCLUSION

This Court should reverse the final judgment for Officer Miller and remand for further proceedings.

[3] The arrest happened on November 12, 2016. Doc. 17-1 at 2. The resulting charges were not dropped until October 27, 2017. *See* Doc. 17-2 at 2.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 7,816 words, not including items excluded under rule 32(f).

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