21-1247

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ABADE IRIZARRY,

Plaintiffs-Appellants,

v.

AHMED YEHIA,

Defendants-Appellees.

On Appeal from the United States District Court
For the District of Colorado

The Honorable Nina Y. Wang
United States Magistrate Judge

D.C. No. 20-cv-2881-NYW

APPELLEE'S ANSWER BRIEF

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Appellee joins Appellant's request for oral argument.

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

INTRODUCTION

While Plaintiff and the Amicus briefs encourage this Court to wade into the perceived policy and politics of this case, Defendant argues that this case should be decided on the facts and the law. There is no case within this circuit that establishes the constitutional right to video record police officers. In fact, Plaintiff and the Amicus briefs urge this Court to make this case the case that does so. Defendant has no position as to whether that should occur.

However, the doctrine of qualified immunity requires that a Plaintiff establish that a reasonable officer was on notice, through caselaw within the jurisdiction of both the existence of the right and the contours of the right. Plaintiff cannot, as is required by prevailing law, reference a case on point which would put a reasonable officer on notice that his actions, as alleged, violate a constitutional right, as no such case exists within this Circuit.

STATEMENT OF THE ISSUES

1. Can a Plaintiff overcome the second prong of qualified immunity when the right has not been established through caselaw in the Circuit?
2. Did the district court err in holding that the Defendant was entitled to qualified immunity on the basis that a reasonable officer would not know, at the time of the events in question, that his alleged actions would violate a constitutional right?

STATEMENT OF THE CASE

I. Statement of Facts[1]

Plaintiff Abade Irizarry ("Mr. Irizarry" or "Plaintiff") is a YouTube journalist and blogger who regularly publishes stories about police brutality and police conduct or misconduct. On May 26, 2019, Mr. Irizarry was on the scene of a traffic stop of a third-party being conducted by the Lakewood Police Department in Lakewood, Colorado. Mr. Irizarry was accompanied by three other "journalists/bloggers"—Eric Brandt ("Mr. Brandt"), Elijah Westbrook, and Michael Sexton. Mr. Irizarry andthe three other individuals began using cameras

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[1] The above statement of facts is taken verbatim from the "Memorandum Opinion and Order on Motion to Dismiss" issued by Magistrate Judge Wang (ECF 36). It does not appear, and certainly there has been no legal filing indicating that Plaintiff disagrees with Judge Wang's recitation of the facts.

and cell phones to record the traffic stop "for later broadcast, live-streaming, premier[e]s, and archiving for their respective social media channel[s]."Lakewood Police officers on the scene advised Defendant Ahmed Yehia ("Officer Yehia") that "four males had arrived on the scene and were video recording their D.U.I traffic stop." Officer Yehia then arrived at the scene "in full regalia in a Marked cruiser, with every single light available on the cruiser turned on." Officer Yehia exited his vehicle and positioned himself directly in front of Mr. Irizarry to obstruct Mr. Irizarry's camera's view of the field sobriety test that was occurring as part of the traffic stop.

Mr. Irizarry and Mr. Brandt began to "loudly criticize" Officer Yehia and voiced their disapproval of Officer Yehia's actions. [Officer Yehia then began to shine his flashlight into Mr. Irizarry's and Mr. Brandt's cameras, which "saturat[ed] the camera sensors." Mr. Irizarry alleges that Officer Yehia continued to harass him and Mr. Brandt until a fellow police officer instructed him to stop. Officer Yehia returned to his vehicle,"drove right at [Mr. Irizarry] and Mr. Brandt, and sped away" before turning around and"gunn[ing] his cruiser directly at Mr. Brandt, swerv[ing] around him, stopp[ing], [and] then repeatedly . . . blast[ing] his air horn at Mr. Irizarry and Mr. Brandt." Officer Yehia was then instructed to depart the scene.

II. Procedural history

On September 23, 2020, Mr. Irizarry filed this lawsuit against Officer Yehia, raising one claim under 42 U.S.C. § 1983 alleging a First Amendment violation. Mr. Irizarry asserts that Officer Yehia's actions "deprived [Plaintiff of] his right[] to freedom of the press secured by the [F]irst [A]mendment of the United States Constitution" and that Officer Yehia's conduct "constituted a blatant prior restraint on [Plaintiff's] right to free speech and free press." On December 9, 2020, Officer Yehia filed the instant Motion to Dismiss, arguing that Mr. Irizarry fails to state a claim upon which relief could be granted because Officer Yehia is entitled to qualified immunity. Mr. Irizarry responded in opposition to the Motion to Dismiss and Defendant has since replied. On June 8, 2021, Magistrate Judge Wang issued an order (ECF 36) granting Defendant's Motion to Dismiss on qualified immunity grounds. Plaintiff appeals said Order.

SUMMARY OF ARGUMENT

The district court correctly held that Agent Yehia is entitled to qualified immunity. As has been demonstrated by the numerous Amicus briefs filed in this case, the constitutional right in question, the right to film police officers while

engaged in their duties, has not been previously established within this circuit[2] and was, therefore, certainly in dispute at the time of the alleged deprivation. Therefore, Plaintiff cannot, as is required by prevailing law, reference a case on point which would put a reasonable officer on notice that his actions may violate a constitutional right, as no such case exists within this Circuit.

Additionally, even if the constitutional right had been established by caselaw within this circuit on the date in which the events in dispute took place, Plaintiff cannot cite to caselaw which establishes the contours of right thus putting Defendant on notice that his actions violate said right.

ARGUMENT

I. Standard of Review

This Court reviews a district court's ruling on the sufficiency of a complaint de novo. *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010).

II. To overcome qualified immunity, Plaintiff has the burden to (1) show that there was a constitutional violation, and, (2) show that the existence of the constitutional right was clearly established such that a reasonable officer would be aware that his actions breached the right.

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[2] Numerous amicus briefs, from parties as disparate as the United States of America, the "First Amendment Scholars", and the "National Police accountability Project" all urge this Court to recognize, through the instant case, that the Constitutional right to record police officers while engaged in their duties exists in the 10th Circuit, affirming that portion of the Order of the district court. Defendant is not appealing the district court ruling on any grounds and takes no position as to whether this Court should recognize the right prior to a ruling on this case.

When a defendant asserts qualified immunity, the burden shifts to the plaintiff, who must: (1) show facts that "make out a violation of a constitutional right," and (2) show that, at the time of the conduct at issue, it was clearly established under existing law that the defendant's conduct breached the constitutional right. *Pearson v. Callahan*, 555 U.S. 223, 232, (2009). Thus, there are two prongs to qualified immunity:

a. Is there a constitutional right? (prong 1).

b. Was the constitutional right clearly established such that the contours of the constitutional right were so well-settled in the context of the particular circumstances that a reasonable officer would have understood that what he is doing violates that right"? (prong 2). *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

The second prong depends on a <u>prior</u> case within the jurisdiction establishing the right such that a reasonable officer can understand his conduct is violating said right. *Schwartz v. Booker*, 702 F.3d 573, 587-88 (10th Cir. 2012); Absent such a case, there is no way for said officer to have any notice.

The U.S. Supreme Court, in *White,* stated as much finding that, in denying the second prong of qualified immunity, a court must identify a controlling case within the jurisdiction where there was a clearly established constitutional violation on the

part of a defendant. *White v. Pauly*, 137 S. Ct. 548 (2017). *White* chided the lower court for not identifying a case to put the officer on notice stating:

"The panel majority misunderstood the "clearly established" analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the majority relied on Graham, Garner and their Court of Appeals progeny, which – as noted above- lay out excessive-force principles at only a general level."

Id. at 552. (Citing *Graham v. Connor*, 490 U.S. 386, (1989); *Tennessee v. Garner*, 471 U.S. 1, (1985)). *White* noted that, if the clearly established rule is not applied with particularity to the facts of an instant case, "[p]laintiffs would be able to convert the rule of qualified immunity…into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).).

This is further echoed in *Bishop v. Szuba*, 739 Fed. Appx. 941 (10th Cir. 2018). In *Bishop*, this Court cited *White* and held that when a particular legal authority postdates the conduct in question, that authority is necessarily incapable of giving fair notice. To be clearly established, the law must be so clear that it would put every reasonable official on notice that certain conduct violates a constitutional right. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

A. There is no prior case in this jurisdiction establishing the right to film officers.

There have been many amicus briefs filed in this case requesting that this Court recognize the constitutional right to record police officers while engaged in their duties. And, Plaintiff concedes, in the first sentence of the "Introduction" sentence of his brief, that the right has yet to be recognized in this Circuit. Thus, it is undisputed that the right has not previously been established within the jurisdiction. While there is certainly a motivation among Plaintiff and the Amicus brief filers to establish the right within the jurisdiction and make it clear to a reasonable officer that the right exists and allow for litigation against future officers who violate said right, this also shows that a reasonable officer would have no notice of the right. And, if a reasonable officer does not know that the right exists, he cannot understand that he is violating said right.

A case recently decided by this Court, *Frasier v. Evans*, 992 F.3d 1003, 1019 (10th Cir. 2021), also indicates the state of the constitutional right to record officers in the 10th Circuit. *Frazier* concluded that the defendant was entitled to qualified immunity as such a right was not clearly established in 2014. *Id*. at 1023. The court did not opine on whether the plaintiff actually had a First Amendment right to record the police performing their official duties in public spaces in 2021, as that prong (prong 1) was not disputed by either party. Further and significantly, the Court indicated

that it sought to avoid the risk of "glibly announcing **new** constitutional rights in dictum." (emphasis added) *Id.* at 1020. Thus, *Frazier* is a concession, by this court, that as of 2021, the First Amendment right to record officers would be a new right within the 10th Circuit and would have been recognized for the first time in 2021. *Id.*

Additionally, as *Frazier* is the lone case within the jurisdiction addressing the constitutional right, the only information a reasonable officer would get by reading caselaw within the jurisdiction, in 2021, would be that the right had not been clearly established as of 2014. Certainly this would not put a reasonable officer on notice that the right had been clearly established in 2021, much less in 2019.

B. As a matter of law, Plaintiff cannot overcome qualified immunity on the first case establishing the right within a jurisdiction.

Therefore, based on *White* and existing Supreme Court precedent, a plaintiff on the first case establishing a constitutional right within a jurisdiction cannot overcome the second prong of qualified immunity. Stated plainly, if, at the time of the alleged constitutional violation, a dispute existed as to whether the constitutional right existed, certainly a reasonable officer cannot be aware that his/her conduct violates the right. If this is *THE* case that establishes the right in the 10th circuit, how would a reasonable officer in this case know that he was violating said right?

Plaintiff argues that the district court's analysis myopically misapplied the law of qualified immunity in finding that Defendant was entitled to qualified immunity

as this Circuit had not addressed police retaliation in these precise circumstances. Plaintiff's reasoning appears to be that if the method (retaliation) of violation of the right is clearly established and there is a constitutional violation, qualified immunity does not apply. However, in making this argument Plaintiff simply glosses over the fact that the right has not, to date, been established within the jurisdiction. Plaintiff does not, as he cannot, address the obvious question of how a reasonable officer can violate a right of which he has no notice. If there exists, at the time of the alleged constitutional deprivation, an open question as to whether there in fact was a constitutional right, a reasonable officer surely cannot know that his actions violate said right.

C. Even if the constitutional right been established prior to the instant case, Plaintiff cannot overcome qualified immunity as there is no caselaw within the jurisdiction establishing the contours of the right.

The second prong of qualified immunity is a particularized, fact-specific analysis as it presents an inquiry into whether a reasonable officer would have known, under the then-prevailing conditions, that his conduct violated Plaintiff's clearly established rights, and thus a court must take care not to define the right in too general of terms. *Leiser v. Moore*, 903 F.3d 1137, 1140 (10th Cir. 2018). "For a constitutional right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing

violates that right." *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013). A plaintiff may satisfy this burden "when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains." *Washington v. Unified Gov't of Wyandotte Cnty.*, 847 F.3d 1192, 1197 (10th Cir. 2017) (quoting *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014) (internal quotation marks omitted)). The right must be defined with specificity and not defined at a high level of generality. *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019).

Importantly, "[t]he clearly-established inquiry focuses on whether the contours of the constitutional right were so well-settled in the context of the particular circumstances that a 'reasonable official *would have understood that what he is doing violates that right*.'" *Estate of Carrigan v. Park Cty. Sherriff's Office*, 381 F. Supp. 3d 1316, 1327 (D. Colo. 2019) (quoting *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (emphasis added)). Although a "precise factual correlation between the then-existing law and the case at hand" is not necessary, *Patrick v. Miller*, 953 F.2d 1240, 1249 (10th Cir. 1992) (citation and internal quotation marks omitted), "there must be a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were

clearly prohibited." *Duncan v. Gunter*, 15 F.3d 989, 992 (10th Cir. 1994) (quotation omitted).

Here, there is simply no relevant precedent to give notice of the contours of the right. Plaintiff cannot point to a single case that even establishes the right, which, of course, is why the Amicus briefs implore this Court to make this the case that does just that, establishes the right. While there may be arguments about whether this Court should do that, there is no argument that, heretofore, there is no precedent within the jurisdiction to provide notice to a reasonable police officer.

As the district court stated plainly: the court finds that Mr. Irizarry has failed to direct the court to a case which demonstrates that Officer Yehia was on notice that his conduct—standing in front of and shining a flashlight into Plaintiff's camera for an unknown period of time—violated Mr. Irizarry's First Amendment rights. In other words, the court correctly concluded that the cases cited by Plaintiff do not demonstrate "that a reasonable official would understand that what he is doing violates [the constitutional] right." *Wilson*, 715 F.3d at 852. Simply, as there is no existing caselaw within the circuit detailing the contours of the right, and no existing caselaw of any kind on point, there is no way for a reasonable officer to assess whether his particular conduct violates or impairs the right.

Plaintiff argues that, as the district court found that the right had been established, Defendant's alleged actions - positioning himself directly in front of Plaintiff, shining his flashlight at Plaintiff, driving right at Plaintiff and Mr. Brandt, speeding away, gunning his cruiser directly at Mr. Brandt, swerving around him, stopping and then repeatedly blasting his air horn at Plaintiff and Mr. Brandt – survive a qualified immunity challenge for the exercise of a first amendment right is clearly established within the 10th Circuit. However, that changes a specific inquiry to a general inquiry. Plaintiff argues that this Court should ignore the specific facts and contours of the right for a general principle – that all alleged retaliation for exercise of a first amendment right overcomes a qualified immunity defense. This approach would, to quote *Ashcroft*, render qualified immunity more of a pleading standard than a jurisdictional immunity defense. *Ashcroft* at 741.

D. The district court did not err in dismissing the complaint with prejudice despite Plaintiff's argument, presented for the first time before this Court, that this is also a retaliation case.

Apparently fearing that his other arguments are inadequate and fail, Plaintiff argues that he should have been given leave to amend his complaint as he believes he may be able to establish a valid cause of action for a 1983 case based on retaliation. However, there must be binding precedent that gave defendant "fair

notice that [his] conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

As previously established, in the 10th Circuit, there is no existing authority holding that there is a constitutional right to film police officers. Thus, there is no 'binding precedent' giving Defendant fair notice that his conduct was unlawful.

CONCLUSION

As stated previously, Defendant takes no position on whether this Court should 'recognize the right' to record officers.

However, regardless of that decision, Defendant asks this Court to first rule on the general legal principal that a Plaintiff cannot overcome qualified immunity when the case in question establishes the right for the first time within a circuit. Should the Court so rule, that settles the issue.

Should the Court not so rule, the Court should then rule on whether, in this particular case, a reasonable officer in Defendant's position was put on notice that his specific actions would violate the articulated constitutional right.

Finally, Plaintiff has requested that this Court address whether the district court erred in dismissing Plaintiff's case with prejudice. However, as argued, if the

right has not previously been established, there is no way for a reasonable officer to be put on notice that his actions may violate the right.

Thus, this Court should affirm the ruling of the district court, finding that the Defendant is entitled to qualified immunity.

For the reasons set forth above, this Court should affirm the district court's orders dismissing Plaintiffs-Appellants' claims in their entirety.

Respectfully submitted this 18th day of January, 2022.

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I hereby certify the following with respect to the foregoing brief:

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I hereby certify the following with respect to the foregoing brief:

1. All required privacy redactions have been made, as required by 10th Circuit Rule 25.5.

2. If required to file additional hard copies, the ECF submission is an exact copy of those documents;

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Alexander James Dorotik

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I certify that on January 18, 2022, a copy of the forgoing was electronically filed with the Clerk of the Court using the appellate CM/ECF system.

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