[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17454

D.C. Docket No. 2:15-cv-00182-WHA-WC

GLADIS CALLWOOD,
Administratrix of the Estate of Khari
Neville Illidge,

Plaintiff-Appellant,

versus

JAY JONES,
CHARLES H. JENKINS, JR.,
individually and in his official capacity as
Lee County Deputy Sheriff,
STEVEN M. MILLS,
individually and in his official capacity as
Lee County Deputy Sheriff,
RAY SMITH,
individually and in his official capacity as
Lee County Deputy Sheriff,
PHENIX CITY, ALABAMA,
a municipal corporation, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(February 20, 2018)

Before ED CARNES, Chief Judge, BLACK, Circuit Judge, and MAY,* District Judge.

ED CARNES, Chief Judge:

Khari Illidge died during an encounter with six law enforcement officers. His mother and administratrix of his estate, Gladis Callwood, filed this suit under 42 U.S.C. § 1983 and related state laws, alleging that each of the officers violated Illidge's Fourth Amendment right to be free from excessive force by either applying excessive force themselves or failing to intervene in another officer's use of excessive force. The district court ruled that the officers are protected by qualified immunity and granted summary judgment in their favor. This is Callwood's appeal.

I. FACTS AND PROCEDURAL HISTORY

A. Police Officers Encounter Illidge

On the night that Illidge died, Lee County Sheriff Deputies Steven Mills and

---

* Honorable Leigh Martin May, United States District Judge for the Northern District of Georgia, sitting by designation.

Ray Smith received a radio dispatch reporting that a naked man was running down Lee County Road 314.[1] The deputies, who were in separate cars and on separate patrols at the time, began to search for him. An hour later dispatch radioed both deputies a second time, reporting that the same man had entered a house on Lee County Road 308.

Deputy Mills found Illidge walking down that street naked and covered in scratches. He approached Illidge and tried to speak with him. But Illidge "appeared not to recognize that [Mills] was a deputy sheriff and continued to walk with a purpose, past [him], down the road." Illidge then crossed the road, cutting in front of oncoming traffic, and began walking toward a house that was just off the road. Mills radioed for backup, telling dispatch that Illidge was mentally ill and possibly under the influence. He then followed Illidge, asking Illidge to stop and speak to him.

Illidge ignored his requests and continued forward until he suddenly turned and began walking back toward Mills. Mills warned Illidge that if he did not stop, Mills would tase him. Illidge continued forward, and Mills fired his taser. Illidge did not drop to the ground after being tased, but instead began walking away

[1] Because the officers moved for summary judgment, we recite the facts in the light most favorable to Callwood. See Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1242–43 (11th Cir. 2001).

toward the porch of a nearby home.

Mills used the taser a second time, touching Illidge's side with it, and Illidge fell to the ground. Mills then attempted to pin Illidge, but Illidge "exhibited superhuman strength" and overpowered him. Mills used his taser three more times, but it appeared to have no effect. He states that he was "fighting for [his] life" when Illidge threw him at least ten feet and then ran away.

"After catching [his] breath," Deputy Mills radioed dispatch the code for "need[s] assistance." Deputy Smith arrived at the scene, joined Mills, and the two followed Illidge to the residence of William and Gloria Warr, where Phenix City Police Officer David Butler joined them. The deputies repeatedly called for Illidge to stop, but he ignored them. Smith testified that he believed Illidge may have suffered from excited delirium.[2]

Illidge tried to open the rear door of the Warrs' house, but it was locked. He then turned back toward the officers, and Deputy Smith discharged his taser, striking Illidge in the chest. Illidge fell to the ground on his stomach, and Deputy Mills and Officer Butler tried to handcuff him. Both officers testified that he began to "resist violently." As the two men wrestled with Illidge, Smith tased him thirteen more times. Despite being tased fourteen times by Smith alone, Illidge

[2] "Excited delirium" is a condition where the sufferer is in a "state of agitation, excitability, [and] paranoia." Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1299 n.4 (11th Cir. 2009). Symptoms include "imperviousness to pain, great strength, bizarre behavior, aggression, and hallucinations." Hoyt v. Cooks, 672 F.3d 972, 979 n.7 (11th Cir. 2012).

continued to resist the officers.

Deputy Smith placed the taser on the ground and helped Mills and Butler pull Illidge's arms close enough together to handcuff him. Smith then placed his metal baton between the handcuffs and Illidge's spine for leverage. Although he was handcuffed, Illidge continued to struggle. Gloria Warr, who witnessed parts of the encounter from inside her home, stated "[Illidge] was trying to move, and [the officers] were trying to get him to stop." Warr also testified that she heard the officers telling Illidge, "Man, please calm down. Calm down."

At that point, Lee County Sheriff Deputy Charles Jenkins and Phenix City Police Officers Joey Williams and Shawn Sheely arrived. Williams, who weighed 385 pounds at the time, replaced Smith and placed one knee between Illidge's shoulder blades and the other in the middle of Illidge's back with the balls of his feet on the ground. Sheely replaced Butler and held the upper portion of Illidge's legs while Jenkins held the lower portion. Because Illidge continued to struggle and kick, the other officers placed Illidge in leg irons and flex cuffs, in effect "hog-tying" him.[3] Even with those restraints in place, Illidge continued to struggle until he suddenly went limp.

When Illidge became unresponsive, the officers turned him over and saw a

[3] "[T]he hogtie position is one where the hands and feet are strapped relatively closely together behind the back, rendering the subject immobile." Lewis v. City of W. Palm Beach, 561 F.3d 1288, 1290 n.2 (11th Cir. 2009).

white, frothy substance and blood coming from his mouth. Not long after that, paramedics arrived and transported Illidge to a hospital where he was pronounced dead.

B. Callwood Sues the Officers

In her second amended complaint, Callwood alleged multiple § 1983 claims, contending that the officers deprived Illidge of his constitutional right to be free from the use of excessive force.[4] She also asserted related state law claims. After discovery, the officers filed motions for summary judgment, contending that they were entitled to qualified immunity.

Before responding to their motions, Callwood moved for leave to add a claim for deliberate indifference to medical needs based on evidence that allegedly came to light after the officers' summary judgment motions were filed. The district court denied Callwood's motion because she failed to show good cause for extending the scheduling order deadline to amend the pleadings.

Callwood then filed her corrected opposition to the officers' motions for summary judgment. The district court concluded that the officers were entitled to qualified immunity and granted summary judgment in their favor. Having

[4] Callwood also brought claims for failure to train and supervise against Phenix City, Phenix City Police Chief Raymond Smith, and Lee County Sheriff Jay Jones. Because Callwood does not challenge the district court's resolution of those claims, they are deemed abandoned. AT&T Broadband v. Tech Commc'ns, Inc., 381 F.3d 1309, 1320 n.14 (11th Cir. 2004) ("Issues not raised on appeal are considered abandoned.").

dismissed Callwood's federal claims, the court declined to exercise jurisdiction over her related state law claims. This is Callwood's appeal.

II. DISCUSSION

We review for abuse of discretion the district court's denial of a motion for leave to amend the pleadings. Maynard v. Bd. of Regents of Div. of Univs. of Fla. Dept. of Educ. ex rel. Univ. of S. Fla., 342 F.3d 1281, 1286 (11th Cir. 2003).

We review de novo the grant of summary judgment on the basis of qualified immunity. Oliver v. Fiorino, 586 F.3d 898, 901 (11th Cir. 2009). "Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Johnson, 263 F.3d at 1242 (quotation marks omitted). The moving party bears the burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Once the moving party has met its burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). The nonmoving party must "come forward with specific facts showing that there is a genuine issue for trial." Id. at 587, 106 S. Ct. at 1356 (quotation marks omitted).

A. Callwood Failed to Show Good Cause to Modify the Scheduling Order

Callwood contends that the district court erred by denying her motion for

leave to amend to add a claim for deliberate indifference to medical needs. She alleges that after the deadline to amend the pleadings had passed, she discovered evidence that shows the officers failed to properly treat Illidge. That evidence was: (1) deposition testimony by Misty White, the first paramedic at the scene, that Illidge was handcuffed and shackled when she arrived, making effective CPR impossible, and (2) deposition testimony by Gloria Warr that, contrary to statements in her declaration, Warr did not witness the officers perform CPR on Illidge because she quit watching the encounter before Illidge became unresponsive.[5] The district court denied Callwood's motion because she failed to show good cause to modify the pretrial scheduling order. That ruling was not an abuse of discretion.

Federal Rule of Civil Procedure 16(b) states that the pretrial scheduling order "must limit the time to join other parties, amend the pleadings, complete discovery, and file motions." Fed. R. Civ. P. 16(b)(3)(A) (emphases added). The scheduling order in this case set the deadline for amending the pleadings as

[5] Callwood also contends that Dr. William Warr, Gloria Warr's husband, is a medical doctor, who was present on the night Illidge died, offered his services when Illidge became unresponsive, and was refused by the officers. Because she did not present that theory on argument in the district court, we will not consider it. See Fils v. City of Aventura, 647 F.3d 1272, 1284 (11th Cir. 2011) ("To prevail on a particular theory of liability, a party must present that argument to the district court."); Smith v. Sec'y, Dep't of Corr., 572 F.3d 1327, 1352 (11th Cir. 2009) (Where "[t]he district court did not consider that argument because it was not fairly presented . . . . we will not decide it."); Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam) ("[I]ssues not raised below are normally deemed waived."); Skinner v. City of Miami, 62 F.3d 344, 348 (11th Cir. 1995) ("[A]s a general rule, an appellate court will not consider a legal issue or theory raised for the first time on appeal.").

October 9, 2015 — 10 months before Callwood moved for leave to amend. Under Rule 16(b) a party may modify a scheduling order "only for good cause and with the judge's consent." Id. 16(b)(4); see also Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1418 (11th Cir. 1998) ("This good cause standard precludes modification unless the schedule cannot be met despite the diligence of the party seeking the extension.") (quotation marks omitted). As the district court ruled, Callwood cannot meet that standard because she had the information to support her additional claim before the October deadline. See Sosa, 133 F.3d at 1419 (concluding that a plaintiff failed to show good cause because "the information supporting the proposed amendment to the complaint was available to [her] even before she filed suit").[6]

Before filing the lawsuit that led to this appeal, Callwood reviewed the Alabama Bureau of Investigation file. That file contained the Care Ambulance Patient Care Report, which includes statements by Paramedic White and Kyle Butler, the second paramedic at the scene, that Illidge was handcuffed and shackled when they arrived. In light of the paramedics' report, White's deposition testimony to the same effect did not present new information sufficient to show good cause. See id. The paramedics' report also states that the officers were

[6] The parties focus on Federal Rule of Civil Procedure 15(a). But when a plaintiff, like Callwood, files a "motion to amend . . . after the scheduling order's deadline, she must first demonstrate good cause under Rule 16(b) before we will consider whether amendment is proper under Rule 15(a)." Sosa, 133 F.3d at 1419.

performing CPR when the paramedics arrived, showing that Callwood had evidence, independent of Warr's incorrect affidavit testimony, that the officers performed CPR. Because Callwood had "the information supporting the proposed amendment to the complaint . . . before she filed suit," she has not demonstrated good cause to modify the scheduling order deadline, and the district court did not abuse its discretion by denying her motion to amend.[7] See id.

B. The Officers Are Entitled to Qualified Immunity

Callwood next contends that the officers are not entitled to qualified immunity.[8] "Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (quotation

[7] In her motion to amend Callwood also asserted that after the scheduling order deadline had passed, she found evidence that when the officers encountered Illidge they thought he suffered from excited delirium. Callwood did not argue that to us as a ground for modifying the scheduling order, so it is deemed abandoned. See AT&T Broadband, 381 F.3d at 1320 n.14.

[8] In challenging the summary judgment in favor of the officers, Callwood asserts that the district court failed to consider discrepancies in the testimony of Gloria Warr and Norman and Leigh Ann Woodham, which raise a genuine issue of fact about the officers' credibility. But Callwood moved the court to strike from the record the allegedly false or inconsistent testimony in Warr's declaration and in the Woodhams' affidavits. The district court granted that motion and for that reason did not consider any discrepancies in those documents in its summary judgment ruling. Because Callwood's motion to strike kept the court from considering the inconsistent statements, she may not now argue that it erred by not considering them. Cf. United States v. Harris, 443 F.3d 822, 823–24 (11th Cir. 2006) ("The doctrine of invited error is implicated when a party induces or invites the district court into making an error. Where a party invites error, the Court is precluded from reviewing that error on appeal.") (quotation marks and citations omitted).

marks omitted).

Our qualified immunity analysis proceeds in two steps. First, the government official must "establish that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." Oliver, 586 F.3d at 905 (quotation marks omitted). Callwood does not dispute that point, so the burden shifts to her to show that qualified immunity is inappropriate. Id. Qualified immunity is inappropriate if Callwood establishes that the officers violated a constitutional right and that the right was "'clearly established' at the time of the incident." Id. We have the discretion to "decide these two issues in either order," Wate v. Kubler, 839 F.3d 1012, 1018–19 (11th Cir. 2016), meaning "discussion of a constitutional violation may become unnecessary for qualified immunity purposes when the right was not clearly established," Lewis, 561 F.3d at 1291.

Callwood argues that each officer violated Illidge's Fourth Amendment right to be free from excessive force by either using excessive force himself or failing to intervene in a fellow officer's use of excessive force. She asserts those claims in relation to three distinct instances of force: (1) when Deputy Mills tased Illidge, (2) when Deputy Smith tased Illidge, and (3) when the officers used restraints and

their body weight collectively to secure Illidge.[9]

We begin by analyzing whether those actions violated clearly established law. To be clearly established, the right must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Mikko v. City of Atlanta, 857 F.3d 1136, 1146 (11th Cir. 2017) (quotation marks omitted). "The salient question is whether the state of the law at the time of an incident provided 'fair warning' to the defendants that their alleged conduct was unconstitutional." Salvato v. Miley, 790 F.3d 1286, 1292 (11th Cir. 2015) (quotation marks omitted and alterations adopted). That standard does not require "[e]xact factual identity with a previously decided case[,] . . . but the unlawfulness of the conduct must be apparent from pre-existing law." Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011) (en banc). When analyzing previous cases, we look to binding decisions of the Supreme Court, this Court, and the highest court of the pertinent state. Wate, 839 F.3d at 1018.

1. Deputies Mills and Smith Did Not Violate Clearly Established Law When They Tased Illidge

Callwood argues that Deputies Mills and Smith, the first two officers on the

[9] Callwood discusses those three instances together in her briefs, suggesting that the officers' actions throughout the night collectively rise to the level of "excessive force." We could find no decisions analyzing the qualified immunity defense in that way. And some of our decisions address the issue much more narrowly, analyzing each taser strike by an individual officer as its own instance of "force." See, e.g., Oliver, 586 F.3d at 906 (holding that the officer's "initial, single Taser shock to calm the suspect may have been justified," but the seven shocks after that were excessive).

scene, violated Illidge's clearly established right when they tased him. In support of her arguments, she relies heavily on our opinion in Oliver, which held that officers were not entitled to qualified immunity when they tased a suspect seven times while he lay clenched up on the hot asphalt pavement. 586 F.3d at 903. We concluded that despite the lack of fact-specific, on point precedent, "any reasonable officer would have recognized that his actions were unlawful" because "the force employed was so utterly disproportionate to the level of force reasonably necessary." Id. at 908. The repeated use of the taser in that case was clearly unlawful because the suspect:

> was not accused of or suspected of any crime, ... was not threatened with arrest or apprehension at any time prior to (or after) the use of force[,] . . . . posed no immediate threat of danger to officers[,] . . . . did not act belligerently[,] . . . . was largely compliant and cooperative[,] . . . . did not pose a grave danger to others[,] . . . . [and] was not actively resisting arrest nor attempting to evade arrest by flight.

Id. at 906–07.

This case does not present the "obvious clarity" type of situation that was present in Oliver. Throughout the night Illidge acted erratically, ignored commands to stop, and tried to enter homes. Deputy Mills used the taser initially because Illidge ignored his command and kept coming toward Mills, and he continued to use the taser because Illidge resisted so violently that Mills was convinced he was "fighting for [his] life." When Deputy Smith tased him, Illidge

was fighting three officers' attempts to restrain him. In those circumstances, neither Mills' nor Smith's use of force was so "utterly disproportionate" that "any reasonable officer would have recognized that his actions were unlawful." Id. at 908.

Callwood also argues that Oliver clearly established that "repeatedly shocking Illidge[,] who exhibited . . . symptoms of 'Excited Delirium[,]' . . . after he had fallen to the ground was unlawful." Although the point at which a suspect falls to the ground is relevant to the analysis because it may suggest he is no longer resisting, see id. at 901 (suspect "was lying on the hot pavement, immobilized and clenched up"), it is not the dividing point between excessive and non-excessive force. Instead that point usually turns on whether the suspect is completely restrained or otherwise resisting arrest. See Mobley v. Palm Beach Cty. Sheriff Dep't, 783 F.3d 1347, 1356 (11th Cir. 2015) ("[F]orce applied while the suspect has not given up and stopped resisting and may still pose a danger to the arresting officers, even when that force is severe, is not necessarily excessive."); see also Hoyt, 672 F.3d at 978–80 (refusing to extend Oliver's holding when officers tased the suspect after he fell to the ground because he "continued to pose a danger" and "never ceased his vigorous resistance to the attempts to handcuff him"); Mann, 588 F.3d at 1306 (concluding that the "use of a [t]aser[ ] was appropriate" when the suspect's "behavior was violent, aggressive, and prolonged").

When Deputies Mills and Smith tased Illidge, he was unrestrained and aggressively resisting the officers' attempts to stop and secure him. Given those facts and our holdings in Mobley, Hoyt, and Mann, the use of a taser by the two deputies did not violate clearly established law.[10] Both officers are entitled to qualified immunity.

In addition to arguing that Deputy Smith's taser use was itself a constitutional violation, Callwood argues that the other officers violated Illidge's constitutional right by not intervening in Smith's use of force.[11] An officer's duty to intervene is triggered when he sees a fellow officer use excessive force. See Riley v. Newton, 94 F.3d 632, 635 (11th Cir. 1996) (finding the officer had no duty to intervene because he "observed no use of excessive force"). Because the law does not clearly establish that Smith used excessive force, the other officers had no duty to intervene. See Barton v. Norrod, 106 F.3d 1289, 1299 (6th Cir. 1997) (concluding that an observing officer was entitled to qualified immunity because "there was no clearly established right being violated for which [he] had a duty to intervene and protect").

[10] Because we conclude that neither Mills nor Smith violated clearly established law, we do not decide whether they violated Illidge's constitutional right. See Lewis, 561 F.3d at 1291.

[11] Deputy Mills' use of a taser occurred when no other officer was present, so there could be no duty to intervene at that time.

2. The Officers Did Not Violate Clearly Established Law When They Restrained Illidge

Callwood next argues that all of the officers used excessive force when they hogtied and "appl[ied] their body weight" to Illidge.[12] The officers assert that they held Illidge down and called for additional restraints after he was handcuffed because Illidge continued to kick and resist. Callwood responds that a jury could reasonably infer that Illidge continued to move not because he was resisting but because he was struggling to breathe. Tragically that may be so, but for qualified immunity purposes we must take the facts as a reasonable officer on the scene could have viewed them. See Vinyard, 311 F.3d at 1347. Throughout the incident, Illidge resisted all of the officers' attempts to subdue him and ignored their repeated requests to calm down. A reasonable officer could have believed that Illidge continued to resist arrest and that he posed a danger to the officers and himself by resisting. For that reason, we cannot say that the officers' use of force was so "utterly disproportionate" that "any reasonable officer would have recognized that his actions were unlawful." Oliver, 586 F.3d at 908.

Nor does our binding precedent clearly establish that physically restraining Illidge in those circumstances was unlawful. Callwood cites our conclusion in Lee

[12] Callwood asserts the officers "dogpile[d]" on top of Illidge, but she points to no evidence that the six of them were holding or on top of Illidge at the same time. The record shows that, at most, three officers held him down at any given time. And although Williams weighed 385 pounds at the time, the evidence shows that he remained on the balls of his feet throughout the encounter and never placed his full body weight on Illidge.

v. Ferraro, 284 F.3d 1188 (11th Cir. 2002), arguing that it clearly establishes the general principle that any use of force after a suspect is completely secured and the danger to the arresting officer has passed constitutes excessive force.

Although the point at which a suspect is handcuffed will also often be the point at which he no longer poses a danger, that is not always the case. See Lewis, 561 F.3d at 1292. In Lewis we held that officers did not violate clearly established law when they physically restrained and hogtied a suspect because he repeatedly ignored their requests to calm down and continued to resist even after being placed in handcuffs and leg restraints. Id. The suspect was "an agitated and uncooperative man with only a tenuous grasp on reality." Id. (quotation marks omitted). And he "remained a safety risk to himself and others" because he continued to kick and struggle and refused to remain calm. Id.; see also Garrett v. Athens-Clarke County, 378 F.3d 1274, 1280 (11th Cir. 2004) (holding that officers were entitled to qualified immunity when they held a suspect to the ground, sprayed him with pepper spray, and hogtied him because the suspect "consistently put his life and the lives of others in danger" and showed "that he ha[d] every intention of fighting and forcibly escaping arrest if possible").

Like the suspect in Lewis, Illidge resisted the officers' attempts to stop him, ignored their commands to calm down, and appeared to suffer from excited delirium, suggesting that he also had "only a tenuous grasp on reality." See Lewis,

561 F.3d at 1292. Multiple officers testified that Illidge exhibited "superhuman" strength and that he struggled and kicked even after he was restrained. Given those facts and our holding in Lewis, the officers' actions did not violate clearly established law, and as a result, they are entitled to qualified immunity.[13] And because the officers did not violate clearly established law, none of the officers had a duty to intervene in the other officers' use of restraints. See Riley, 94 F.3d at 635; Barton, 106 F.3d at 1299.

AFFIRMED.[14]

[13] Because we conclude that the officers did not violate clearly established law, we do not decide whether they violated Illidge's constitutional right to be free from excessive force. See Lewis, 561 F.3d at 1291.

[14] The district court did not abuse its discretion by declining to exercise supplemental jurisdiction over the remaining state law claims. See Raney v. Allstate Ins. Co., 370 F.3d 1086, 1088–89 (11th Cir. 2004).