

CAUSE NUMBER 09-10076

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CARMEN CEBALLOS, Individually and as the Representative of the Estate of
JOSE PACHECO CEBALLOS, Deceased, LUZ M. REYES Individually and as
Guardian of A. R., Minor Child.

Plaintiffs/Appellants,

V.

WILLIAM BRIDGWATER, JOSE PORRAS, AND WILLIAM MULL, CHIEF
OF POLICE,

Defendants/Appellees.

REPLY BRIEF FOR INTERLOCUTORY APPEAL
FROM CAUSE NO. 5:08-CV-56 FROM UNITED DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, LUBBOCK DIVISION

PLAINTIFFS/APPELLANTS REPLY BRIEF

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A. INTRODUCTION

The district court, when deciding Defendant--Appellees' motions for summary judgment on the issues of Qualified Immunity, failed to properly weigh factual disputes and disputes regarding believability of the witness in favor of the nonmovant. The district court's conclusions are in error.

B. THE DISTRICT COURT'S FINDINGS & CONCLUSIONS:

1. Defendant/Appellee's Resisting Arrest Arguments

Defendant-Appellee's painted a false picture of Jose by trumping-up empty and false allegations of crimes. Defendant-Appellee alleges that Jose was resisting arrest. Appellees cites in their brief on page 24., ... that the district court found that the suspect had actively resisted arrest by refusing to open the door or immediately drop the weapon upon the officers's orders." And these facts do not show that the use of force was objectively unreasonable. However, a person does not resist arrest by not cooperating with the police.

The Defendant-Appellee's arguments and the district court's ruling on this

issue is contrary to the law of resisting arrest. A person commits the offense of resisting arrest if he intentionally prevents or obstructs a person he knows is a peace officer from effecting an arrest *by using force against the peace officer*. TEX. PEN.CODE ANN. § 38.03(a) (Vernon 2003). Thus, refusing to cooperate with being arrested does not constitute resisting arrest by force. *Sheehan v. State*, 201 S.W.3d 820, 823 (Tex.App-Waco 2006). The Courts have decided that non-cooperation with an arrest is not an act of “use of force against” a peace officer under the resisting arrest statute. For example,

- the State agrees that the shaking off an arresting officer's detaining grip is not resisting arrest, *Anderson v. State*, 707 S.W.2d 267, 269 (Tex.App.-Houston [1st Dist.] 1986, no pet.);
- court reversed conviction for resisting arrest by pulling away from an arresting officer after being arrested, *Young v. State*, 622 S.W.2d 99, 100-01 (Tex.Crim.App. [Panel Op.] 1981);
- court reverses and renders on holding no rational trier of fact could convict on resisting arrest by crawling away from an arresting officer. *Leos v. State*,

880 S.W.2d 180, 181 (Tex.App.-Corpus Christi 1994, no pet).

Even if¹ Jose was under arrest and even if he was not cooperating with the Bridgwater or Porras, Jose's mere non-cooperation with officers is not enough to support the any argument or conclusion that Jose resisted arrest. Also, before the district court concludes that Jose committed any crime, the court should allow Jose his full measure of constitutional rights, including trial by a jury.

Additionally, Jose was in his own home². Being at home affords him certain protections against search and seizures. The Fourth Amendment of the United States Constitution and article I, section 9 of the Texas Constitution forbids unreasonable searches and seizures. “ ‘(P)hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’ ” *Spring v. State*, 626 S.W.2d 37, 41 (Tex.Crim.App.1981) (quoting *United States v. United States Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972)); see *State v. Steelman*, 16 S.W.3d 483, 488 (Tex.App.-Eastland 2000), aff'd, 93 S.W.3d 102 (Tex.Crim.App.2002) (a private dwelling is a sacrosanct

¹ Plaintiff–Appellant's presents speaks to the validity of the arrest and any possible non-cooperation only in arguendo.

²[USCA5 978, Affidavit of Mr. Gaut].

place in search and seizure law). Thus, the Fourth Amendment draws a firm line at the entrance to the house. *Green v. State*, 78 S.W.3d 604, 608-09 (Tex.App.-Fort Worth 2002, no pet.)(citing *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). At the time of the incident, Jose was at home cooking chicken with chillies, tomatoes and onions. [USCA5 pg. 967, Deposition of Carmen Ceballos].

2. COMMANDER ALBERT RODRIGUEZ

a. FAILURE TO CONSIDER ALL THE FACTS

Commander Albert Rodriguez (“Rodriguez”), states that he reviewed personnel files of Officer Bridgwater and related documents produced to Plaintiff-Appellants. [USCA5 pg. 965]. He did not, however, specify what documents he reviewed that were produced to Plaintiff-Appellants. Rodriguez also fails to mention that he reviewed Bridgwater’s employment records from Texas Department of Corrections and Potter County.

And, in Defendant--Appellees’s brief, on page 38, they claim that Rodriguez

reviewed all the records associate with the case. They also lack specificity.

Rodriguez's opinion is based on an incomplete investigation of the facts and should be given no weight, if any.

In contrast, William Gaut, bases his opinion on a review of all the records, including Bridgwater personnel records as a corrections officer and his records from Potter County. [USCA5 976-977].

b. RODRIGUEZ MEDICAL QUALIFICATIONS

In addition, Appellants object to Commander Rodriguez giving any medical testimony³. [USCA5 pg.386-387, Affidavit of Commander Rodriguez]. There is nothing in the affidavit or resume of Commander Rodriguez that makes him qualified as a medical expert, or that would show the degree of medical expertise

³ Rodriguez claims that the overall path of the bullet is consistent with Jose lunging /moving forward with his right foot as indicated by Officer Bridgwater. And, Jose stepping forward would have created a slightly right to left path of the bullet and the slightly downward path would have been created by Jose leaning slightly forward as he moved towards Bridgwater and Porras.[USCA5 pg.386-387, Affidavit of Commander Rodriguez].

that he possesses. The law enforcement expert witness is not qualified to render an expert medical opinion. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93, 113 S.Ct. 2786, 2796-9791993).

c. CREDIBILITY OF OFFICERS

i. Bridgwater vs Porras

On page 23 of Defendant--Appellees's brief, Defendant--Appellees attempt to bolster the credibility of Bridgwater by enlisting the testimony of Porras, the audio recordings, the Texas Rangers Report and the autopsy report. Porras' testimony and his incident report tracks Bridgwater's statements. However there is a material statement that is contradictory. Bridgwater reports that Jose never came across the threshold of the door.[USCA5 pg. 949, Deposition of Bridgwater L.2-18]. Officer Porras states that Jose came across the threshold towards him. [USCA5 pg. 1004, Deposition of Porras 1-25].

ii. Bridgwater vs Porras vs Eye Witnesses

And, neither Bridgwater⁴ nor Sgt. Porras⁵ statements or their reports mention Mrs. Reyes whereabouts at the time of the shooting. The Texas Rangers Report made an admission that the reports of Bridgwater and Porras were inaccurate. Trooper Thomas had to obtain this information from a third parties because Bridgwater and Porras would not disclose it.[USCA5 pg.970-971Trooper Marshall Thomas P.52,L.21-P.53,L23]. The two policemen failed to list one of the most important facts of the case. Id. The position of Mrs. Reyes, an eye witness, is crucial to determining the veracity of the police officers. Id.

By the police officers failing to give accurate statements the Appellees created a credibility issue and Appellees have created a genuine fact question.

iii. Bridgwater vs Bridgwater

Also, Officer Bridgwater past is filled with questionable events that destroy his character and credibility. While employed in a previous correctional position Bridgwater was charged with making a false report, insubordination, and the use of

⁴[USCA5 pg.894-990, Bridgwater's Statement].

⁵[USCA5 pg.1005-1006, Porras' Statement].

excessive force. [USCA5 pg.983, Affidavit of William Gaut]. Officer Bridgwater was allowed to “resign for personal reasons” rather than being terminated for violations. Id. The record reflects that this was a force resignation, and had Officer Bridgwater failed to resign, he would have ben terminated. Id.

During Bridgwater’s background interview, at Potter County, Sgt. Brad Early noted: The only blemish on his work record is an incident that occurred at the TDCJ Clements unit in 2003. [USCA5 pg.933, Employment Records produced by Defendant]. When I questioned William about the incident he said that he was leading a team on a cell extraction in the infirmary on an inmate that kept covering up the observation camera. Id. He was instructed to take everything out of the cell that could be used to cover the camera or window. Id. He said that inmate was compliant until he entered the cell and the inmate tried to come up off of his knees and assault him. Id. This is the event listed about by Mr. Gaut that Bridgwater was charged with filing false reports and using excessive force.

Once Bridgwater was hired by Potter County, he was terminated for lying and ineligible for rehire due to the nature of his termination. Id. [USCA5 pg.934-935, Employment Records produced by Defendant]. When applying for

employment with The City of Plainview, Bridgwater stated his reason for leaving Potter County Sheriffs Department: Seeking employment as a patrol officer.[USCA5 pg.938, Employment Records produced by Defendant]. When asked if Bridgwater pushed any body out of the way to fire a shot at Jose he responded by saying: No.[USCA5 pg. 956, Deposition of Bridgwater L.12-17].

Because of Bridgwater's past history of falsifying government documents and excessive force a jury may not believe him or Porras any credibility. See [USCA5 983]. The district judge did not have to credit the testimony of the lay witnesses "for the truth asserted." *Brown v. Lippard*, 472 F.3d 384, 387, (5th Cir. 2006) (Quoting) *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir.1998). The district court only had to notice that such testimony existed, because the testimony's very existence raises an issue of fact sufficient to overcome summary judgment. *Id.*

C. THE POLICE CAN SHOOT INNOCENT PEOPLE?

Defendant--Appellees rely on *Ramirez v. Knoulton*, 542 F.3d 124, 129-130 (5th Cir.2008) to say that absence of an aggressive movement by the suspect

justifies qualified immunity when the police shoot someone. Ramirez, however, is distinguishable from the case at hand.

Foremost, the facts Ramirez were not controverted. In Ramirez, the court had three videos of the incident, showing the car chase and the shooting, that were in the court's records that confirmed the facts of the case. FN 3. at 128. However, in the case at hand, the evidence consists of audio tapes, disputes regarding the veracity of the officers, and controverted testimony from eye witnesses.

The Ramirez court concluded by stating, "The totality of Ramirez's conduct could reasonably be interpreted as defiant and threatening. He repeatedly refused the officers' commands and ultimately stood, armed, several yards from the officers." Ramirez brought his hands together in what we believe could reasonably be interpreted as a threatening gesture, as if to grip the handgun with both hands in preparation to aim it at the officers. *Id.* Here, however, Jose never lifted his hand or made an aggressive move towards the police officers. [USCA5 pg.962 Deposition of Luz Maria Reyes] & [USCA5 pg.966-967, Deposition of Carmen Ceballos].

The Ramirez court continues its closing by stating: Finally, the officers were

already on notice that Ramirez was armed, emotionally unstable, and potentially suicidal. ... Id.131. Ramirez was mentally ill and led police to believe that he was about to commit suicide. Id at 126-127. Although Defendant--Appellants presented evidence in their initial brief that Bridgwater was informed, upon his arrival at the scene, that Ceballos was mentally ill. Bridgwater, however, denies any knowledge of mental illness; and, Defendant--Appellant's expert states that: The issue of Ceballos, Jr. being mentally ill, in my opinion, is not an issue in that Officer Bridgwater did not know of any information related to Ceballos, Jr.'s medical status or mental illness at the time of the incident. The information became known to Officer Bridgwater after the fact which should not be considered in the analysis because it would be evaluation Officer Bridgwater's action from a 20/20 hindsight perspective. [USCA5 pg. 709, Affidavit of Albert Rodriguez].

CONCLUSION

Plaintiff-Appellants request that the court consider the totality of circumstances by considering: that upon arrival on the scene Bridgwater learned that there was no domestic violence. Jose was in his house cooking, he refused to open the door, Bridgwater became outraged and kicked in the door. Jose came to the

door holding a knife. Bridgwater and Porras started yelling at Jose. Reyes came and stood beside Jose and requested him to put down the knife. As Jose was talking to Reyes, Bridgwater fired the fatal shot. Jose was never a threat to the police. His sister, Reyes was standing beside him during the entire time that he appear at the door. Bridgwater was the disruptive person that was crazed and overbearing. The force used by Bridgwater caused an injury (death), resulted directly and only from the use of force that was clearly excessive to the need, and the excessiveness of was objectively unreasonable.

Appellants request that the case be reversed and remand to the district court for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 10, 2009, a copy of the above document was served on the person named below who is the attorney in charge for Defendant-Appellee and whose address is stated below:

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