No. 19-13808

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Mamberto Real,

Plaintiff-Appellant,

v.

Michael Perry, in his individual capacity, et al.,

Defendants-Appellees,

On Appeal from a Final Judgment of the
United States District Court for the Middle District of Florida
Case No. 2:18-cv-331-JES-NPM, Hon. John E. Steele

REPLY BRIEF FOR APPELLANT MAMBERTO REAL

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April 2, 2020

No. 19-13808

Mamberto Real, Plaintiff-Appellant

v.

Michael Perry, et al., Defendants-Appellees

CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 26.1-1, Appellant Mamberto Real states that the following people and entities have an interest in the outcome of this appeal:

Alley, Grant Williams

Builes, Ana

Burandt, Adamski, Feitchthaler & Sanchez, PLLC

Burandt, Robert B.

City of Fort Myers

Coscia, Monica

Chappell, Sheri Polster, U.S. District Judge

Culhane, Timothy

Frazier, Douglas N., U.S. Magistrate Judge

Georgetown Law Appellate Courts Immersion Clinic

Girard, Bradley

Mirando, Carol, U.S. Magistrate Judge

Mizell, Nicholas P., U.S. Magistrate Judge

Perry, Michael

Purinton, Tyler

Real, Mamberto

Steele, John E., Senior U.S. District Judge

Teague, Jackson

Wolfman, Brian

April 2, 2020

Respectfully submitted,

/s/Brian Wolfman

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Appellant Mamberto Real relies principally on his opening brief. He addresses here only Officer Perry's contentions that warrant a brief reply.[1]

ARGUMENT

I. The district court erred in dismissing Real's Fourth Amendment claim.

A. Officer Perry seized Real.

1. Officer Perry's Fourth Amendment seizure of Real was "accomplished in an instant," *West v. Davis*, 767 F.3d 1063, 1070 (11th Cir. 2014), when he pointed his gun at Real because, under the circumstances pleaded here, a reasonable person would understand "that he was not at liberty to ignore the police presence and go about his business." *United States v. Baker*, 290 F.3d 1276, 1278-79 (11th Cir. 2002) (quotation marks omitted) (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)). An officer effectuates a seizure when he makes a show of authority and an individual submits to that authority. *United States v. House*, 684 F.3d 1173, 1199 (11th Cir. 2012) (citing *California v. Hodari D.*, 499 U.S. 621, 628-29 (1991)). "[T]he display of a weapon by an officer" is a seizure when it "indicat[es] that compliance with the officer's request might be compelled." *Id.* (quotation marks omitted) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). That is what happened here. When Perry turned his gun on Real, Real felt he had no choice but to comply and raise his hands in surrender.

2. Perry's argument (at 5) that there was no seizure because he did not arrest, detain, or touch Real is wrong. It is well established that "the Fourth Amendment governs

[1] Real has not pursued his municipal-liability claim against the City of Fort Myers on appeal, so he does not address the City's arguments on that issue. *See* Def. Br. 6-8.

'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—[i.e.,] 'arrests.'" *Corbitt v. Vickers*, 929 F.3d 1304, 1313 (11th Cir. 2019) (quoting *Michigan v. Summers*, 452 U.S. 692, 696 n.5 (1981)). An officer need not apply physical contact to a person to effectuate a seizure; rather, a seizure may occur "even though the complaint does not allege [the officer] applied any physical force." *Id.* And that Real did not allege any "intention by the officers to detain" him, Def. Br. 5, is irrelevant. The Fourth Amendment considers only whether a reasonable person would believe he was not free to go about his business, and it provides "no invitation to look to [the officer's] subjective intent when determining who is seized." *See Brendlin v. California*, 551 U.S. 249, 259-61 (2007).

B. Officer Perry's seizure of Real was unreasonable because he used excessive force.

Perry concludes (at 5) that his seizure was lawful based on *United States v. Gibbs*, which held that the "mere fact that an officer drew his weapon" does not "vitiate[]" the "antecedent basis" for a seizure. *United States v. Gibbs*, 917 F.3d 1289, 1297 (11th Cir. 2019). But *Gibbs* is irrelevant here. Real never argued, one way or the other, that this seizure was unreasonable because drawing a gun vitiated the *basis* for the seizure; rather, Real argues that, under the circumstances here, the *manner* of the seizure was unreasonable. Pointing a gun, yelling a virulent racial slur historically tied to imminent violence, Opening Br. 17, and threatening the life of a fully compliant individual posing no threat to anyone is an excessive use of force.

II. Officer Perry violated Real's Fourteenth Amendment due-process right by using excessive force against him.

A. In his opening brief (at 19-26), Real established that Officer Perry arbitrarily and unjustifiably infringed on his Fourteenth Amendment right to due process through Perry's use of excessive force. In response, Perry just parrots the four-factor balancing test from *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), and then summarily concludes that it tilts in Perry's favor because Perry neither arrested, injured, nor touched Real. Def. Br. 6. Perry misapprehends the Fourteenth Amendment due-process guarantee.

That guarantee protects a person from a police officer's excessive force during a nonseizure encounter. *Wilson v. Northcutt*, 987 F.2d 719, 722 (11th Cir. 1993). And, as Perry acknowledges (at 4-5), *only* nonseizure encounters can give rise to excessive-force claims under the Fourteenth Amendment, and, so, when a seizure does occur, excessive-force claims must proceed under the Fourth Amendment instead. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). Therefore, if Perry had arrested Real (which would indisputably be a seizure), that would actually preclude a Fourteenth Amendment excessive-force claim altogether. That no arrest occurred thus cuts against Perry on the Fourteenth Amendment claim.

Further, Perry's conclusory assertion (at 6) that the *Johnson* test absolves him because he did not injure Real cannot be squared with Real's detailed account of his injuries: the emotional and physical trauma he suffered and continues to suffer due to Perry's wrongdoings. *See* Opening Br. 23-34. The *Johnson* test looks, among other things, to "the extent of injury inflicted," 481 F.2d at 1033, and Real's pleadings—which describe

his anxiety, distress, humiliation, and automatic defecation when around police officers—are more than sufficient at this stage. App. 45, 47.

Finally, that Perry did not touch Real during the encounter is beside the point. The Fourteenth Amendment "protects against government power arbitrarily and oppressively exercised," *Carr v. Tatangelo*, 338 F.3d 1259, 1271 (11th Cir. 2003), regardless of whether that exercise of power involves physical contact. Perry's threat of lethal violence against a compliant person for what (at most) was a misdemeanor trespass, *see* Opening Br. 15, is precisely the type of arbitrary and oppressive conduct forbidden by the Constitution. *See id.* at 20-26.

B. Perry's reliance on *Jackson v. Sauls*, 206 F.3d 1156 (11th Cir. 2000), is misguided. Def. Br. 6. *Jackson* noted that an officer's drawing of a weapon does not necessarily constitute excessive force when the officer is "acting under the exigencies of the immediate situation." *Id.* at 1171-72, 1172 n.21 (quoting *Courson v. McMillian*, 939 F.2d 1479, 1496 (11th Cir. 1991)). But Perry did not face any exigencies. To the contrary, Perry created the controversy: With two other officers providing backup protection, Perry approached a sleeping, unarmed homeless man, woke him with his flashlight, and after counting to five, aimed a loaded weapon at his face. Opening Br. 3. At no time did Real attempt to flee or make physical or verbal threats. Quite the opposite: Real displayed his empty hands to the officers in a sign of surrender. Opening Br. 3, 21, 29-30; *see Merricks v. Adkisson*, 785 F.3d 553, 563 (11th Cir. 2015).[2]

[2] Perry incorrectly states that he directed Real to exit his vehicle. Def. Br. 6. That assertion appears nowhere in Real's pleadings, which control at this stage. *West v. Warden, Comm'r*, 869 F.3d 1289, 1296 (11th Cir. 2017). In any event, if Perry's misstatement were true, that in no way would undercut Real's claim that his Fourth and

CONCLUSION

The district court's judgment should be reversed and the case remanded for further proceedings on the merits.

Respectfully submitted,*

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April 3, 2020

Fourteenth Amendment rights were violated when Perry aimed a loaded gun at his head, called him a virulent racial slur, and threatened to shoot him for no reason other than to intimidate him. *See* Opening Br. 19-26.

* Counsel gratefully acknowledge the work of Ana Builes and Tyler Purinton, students in Georgetown Law's Appellate Courts Immersion Clinic, who played key roles in researching and writing this brief.

CERTIFICATE OF COMPLIANCE

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/s/Brian Wolfman

April 2, 2020

CERTIFICATE OF SERVICE

I certify that, on April 2, 2020, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/Brian Wolfman