591 Fed.Appx. 669
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals,
Tenth Circuit.

Britt Joy HAWKER; Craig Dee Hawker, as guardians for C.G.H., a minor, Plaintiffs–Appellants,
v.
SANDY CITY CORPORATION; Officer Tina Maria Albrand, Defendants–Appellees.

No. 13–4139.
|
Dec. 5, 2014.

Synopsis

Background: Grandparents, as guardians for nine-year-old student, brought § 1983 action against city corporation and a police officer employed in youth unit of city's police department, alleging excessive force in arresting student for stealing school property. The United States District Court for the District of Utah, Robert J. Shelby, J., 2013 WL 4736833, granted summary judgment to defendants. Grandparents appealed.

Holding: The Court of Appeals, Terrence L. O'Brien, Circuit Judge, held that use of twist-lock to arrest student was objectively reasonable under Fourth Amendment.

Affirmed.

Carlos F. Lucero, Circuit Judge, filed a concurring opinion, 2014 WL 6844930, to be published in F.3d.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (1)

[1] Infants
Arrest

Use of twist-lock by police officer employed in youth unit of city's police department to arrest a nine-year-old student who was accused of stealing school property was not objectively unreasonable, as would violate the Fourth Amendment prohibition of excessive force, where use of twist-lock was both preceded and precipitated by student grabbing officer's arm, which officer could reasonably have viewed as resisting arrest and escalating a tense situation, though the crime at issue was a relatively minor offense, i.e., class B misdemeanor theft under Utah law. U.S.C.A. Const.Amend. 4; West's U.C.A. §§ 76–6–404, 76–6–412(1)(d).

10 Cases that cite this headnote

Attorneys and Law Firms

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Before LUCERO, O'BRIEN, and GORSUCH, Circuit Judges.

ORDER AND JUDGMENT *

TERRENCE L. O'BRIEN, Circuit Judge.

This case involves the arrest of C.G.H., a nine-year-old child, for stealing an iPad from his school as well as his physical resistance to efforts to constrain his combative behavior. In effectuating the arrest, the officer, Tina Maria Albrand, utilized a twist-lock, a "control hold" in which the officer

twists the suspect's hand to place "tension on the arm to get [him] to comply."[1] (Appellants' App'x, Vol. II at 348.) Claiming the use of the twist-lock constituted excessive force in violation of the Fourth Amendment, C.G.H.'s guardians and grandparents, Britt and Craig Hawker (the Hawkers), brought this civil rights lawsuit against Albrand and her employer, ***671** the Sandy City Corporation (City). The determinative fact is exquisitely narrow: whether Albrand resorted to the twist-lock immediately upon confronting C.G.H. or only after he grabbed her arm. The district judge found the record, viewed in the light most favorable to the Hawkers, to reveal Albrand's use of the twist-lock occurred only after C.G.H. grabbed her arm. He concluded the use of the twist-lock in these circumstances did not constitute excessive force in violation of the Fourth Amendment. We agree on both counts and affirm.

I. BACKGROUND

The parties are familiar with the facts and we need not recite them in depth. Suffice to say, the facts, taken in the light most favorable to the Hawkers, *see* *Scott v. Harris,* 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), reveal the following.[2] Nine-year-old C.G.H. stole an iPad from his elementary school. The principal caught him with the iPad and took it away; C.G.H. was not happy. A struggle ensued between him and three school employees. C.G.H. attempted to hit, bite, and head-butt the employees. They eventually restrained C.G.H. in a Mandt hold, where one employee placed her arms around C.G.H.'s torso while the other two held his legs. In the midst of the struggle, Britt and Albrand[3] were called to come to the school.

Britt arrived first. After she talked with C.G.H., he began to calm down and the employees released their hold on him. Albrand arrived shortly thereafter. Prior to her arrival, Albrand did not know C.G.H. had been physically combative with the school employees, but she had received two phone calls from the secretarial staff requesting her assistance.[4] (Appellants' App'x, Vol. II at 359–60.) Upon arrival, Albrand encountered a peculiar circumstance. C.G.H. was sitting on the floor in the hallway against a wall. The principal, school psychologist, and Britt were sitting on the floor across from him. The principal told Albrand she wanted to file theft charges against C.G.H. Albrand approached C.G.H. and told him: "We can do this the easy way by you talking to me, or we can do this the difficult way or hard way by you not talking to me." (Appellants' App'x, Vol. I at 262.1.) C.G.H. looked up at her but said nothing. Albrand "grabbed" his arm and "yanked" him up off the floor. (*Id.*) In response, C.G.H. grabbed her arm. Albrand put him in a twist-lock, pushed him against the wall, and handcuffed him. C.G.H. kicked at Albrand and cried "You're hurting me." (*Id.*) Albrand escorted him to the principal's office where she issued him a citation for theft. Britt took C.G.H. to the doctor's office later that day; he was treated for a possible hairline fracture to his left clavicle (collarbone). C.G.H. suffered anxiety and post-traumatic stress as a result of his encounter with Albrand.

The Hawkers brought this 42 U.S.C. § 1983 lawsuit on behalf of C.G.H. against Albrand and the City. Albrand moved for summary judgment, arguing no constitutional ***672** violation occurred [redacted] The City also moved for summary judgment contending it could not be liable because there was no underlying constitutional violation.

The district judge granted summary judgment to both Albrand and the City. [redacted] Relevant here, he determined the record did not support the Hawkers' claim that Albrand immediately placed C.G.H. in a twist-lock upon confronting him. Rather, the evidence showed C.G.H. (at the very least) grabbed for Albrand's arm before she placed him in the twist-lock. Under these circumstances, the judge decided, the use of the twist-lock was objectively reasonable under the Fourth Amendment [redacted]

II. STANDARD OF REVIEW

Our review of this summary judgment is de novo. *Jiron v. City of Lakewood,* 392 F.3d 410, 414 (10th Cir.2004). In general, a summary judgment may be entered only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter

of law." Fed.R.Civ.P. 56(a). But a summary judgment in this context differs from that generally applied. *Martinez v. Beggs,* 563 F.3d 1082, 1088 (10th Cir.2009).

[redacted]

III. DISCUSSION

The Hawkers are not claiming Albrand's yanking C.G.H. from the floor by his arm constitutes excessive force. Nor are they challenging the existence of probable cause to arrest him for theft or the use of handcuffs in the arrest. The only issue is whether Albrand's use of a twist-lock to effectuate the arrest constitutes excessive force under the Fourth Amendment.

As the Hawkers would have it, the facts viewed in their favor show Albrand immediately ***673** resorted to use of the twist-lock upon confronting C.G.H. [6] Because he was not resisting at that time, they say, the use of the twist-lock was objectively unreasonable.

But, according to Britt, Albrand only resorted to use of the twist-lock *after C.G.H grabbed her arm:*

> [W]hen [Albrand] did get there, she come down the hallway and she looked, and [the principal] told her she wanted to file charges. And [Albrand] said, "Okay." And so [Albrand] walked over to [C.G.H.], and she looked down at [him], and she told [him], "We can do this the easy way by you talking to me, or we can do this the difficult way or hard way by you not talking to me."
>
> [C.G.H.] looked up at her. She grabbed [his] arm, yanked him up off the floor, put him in a twist lock. When she grabbed his arm—when *she yanked him off the floor, he grabbed her arm, she put him in a twist lock, she put him against the wall, put him in handcuffs and marched him down the hall.* [C.G.H.] was kicking and he was crying, "You're hurting me."

(Appellants' App'x, Vol. I at 262.1 (emphasis added).) Later in her deposition, she reiterated (twice) that when Albrand grabbed C.G.H.'s arm, *he immediately grabbed her arm.*

Despite Britt's clear testimony, the Hawkers attempt to create a genuine dispute of material fact by pointing to Albrand's answer to a Request for Admission and a report of the officer who investigated the incident. According to the Hawkers, both show Albrand applied the twist-lock when C.G.H. would not comply with her verbal commands to stand up. But neither Albrand's "admission" nor the investigating officer's report reveal a legal factual dispute.

In the Request for Admission, the Hawkers asked Albrand to admit she used excessive force against C.G.H. Albrand denied using excessive force explaining, in relevant part: "When C.G.H. did not comply with [her] verbal commands to accompany her to [the] school's office, she attempted to use a light twist lock technique to achieve C.G.H.'s compliance. C.G.H. resisted [her] efforts and began to kick and grab at Defendant, and at one point grabbed hold of [her] gun...." (Appellants' App'x, Vol. II at 375.) The Hawkers place more weight on this "admission" than it can reasonably bear. It merely states Albrand "attempted" to use a light twist-lock to gain C.G.H.'s compliance but C.G.H. resisted her efforts. [7]

***674** Similarly, the Hawkers take the investigating officer's report out of context. In his report, the officer provides a synopsis of the incident, taken from his reading of Albrand's police report and the school employees' witness statements. That synopsis states: "Because [C.G.H.] was refusing to stand up or go to the Principals office, Officer Albrand placed him in a control hold and lifted him to a position where she could place him in handcuffs." (*Id.* at 400.) But, prior to the quote, the investigator reports that not only did C.G.H. refuse to stand up, "[h]e was also physically resisting Officer Albrand." (*Id.*) The report goes on: "In an attempt to lift [C.G.H.] to a position to place cuffs on him, [C.G.H.] was physically resisting and struggling in an attempt to escape custody." (*Id.*) The investigator did not say Albrand resorted to use of the twist-lock only because C.G.H. was not complying with her verbal commands but also because he was physically resisting.

Since Albrand's use of the twist-lock was both preceded and precipitated by C.G.H. grabbing her arm, we now turn to

whether her acts support a Fourth Amendment violation. Both parties agree to this: the issue turns on whether Albrand's use of the twist-lock was " 'objectively reasonable' in light of the facts and circumstances confronting [her], without regard to [her] underlying intent or motivation." [8] *See* *Graham v. Connor,* 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "In considering this question, we are mindful that the Fourth Amendment does not require police to use the least intrusive means in the course of a detention, only reasonable ones." *Fisher v. City of Las Cruces,* 584 F.3d 888, 894 (10th Cir.2009) (quotations omitted). "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Graham,* 490 U.S. at 396, 109 S.Ct. 1865. We must judge the situation "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97, 109 S.Ct. 1865. "Though the Fourth Amendment's reasonableness inquiry notoriously eludes easy formula or bright line rules, the Supreme Court has delineated three, non-exclusive factors relevant to our excessive force inquiry: [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Fisher,* 584 F.3d at 894 (quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865).

The first *Graham* factor weighs in favor of the Hawkers. The crime at issue was Class B misdemeanor theft, a relatively minor offense. *See* Utah Code Ann. §§ 76–6–404, 76–6–412(1)(d); *see also* *Fogarty v. Gallegos,* 523 F.3d 1147, 1160 (10th Cir.2008) (because the offense involved was only a petty misdemeanor, the least serious crime in New Mexico, "the ***675** amount of force should have been reduced accordingly"); *Casey v. City of Fed. Heights,* 509 F.3d 1278, 1281 (10th Cir.2007) (because the officer confronted suspect "who had committed a misdemeanor in a particularly harmless manner, ... the level of force that was reasonable for him to use" was reduced).

The second and third factors, however, weigh against the Hawkers. Albrand could objectively and reasonably view C.G.H.'s grabbing her arm as resisting arrest and escalating a tense situation. For safety, it was objectively reasonable for Albrand to deescalate the situation and command C.G.H.'s compliance by using a twist-lock. *See* *Gallegos v. City of Colo. Springs,* 114 F.3d 1024, 1031 (10th Cir.1997) (use of arm bar maneuver and take-down on aggressive suspect during *Terry* stop reasonable to protect officers' safety); *Hinton v. City of Elwood, Kan.,* 997 F.2d 774, 781–82 (10th Cir.1993) (wrestling suspect to ground and using a stun gun not unreasonable where suspect was resisting arrest).

C.G.H. was only nine-years-old and weighed 67 pounds at the time of the incident. His age and size are certainly factors in the totality-of-the-circumstances reasonableness calculation. *See* *Holland ex rel. Overdorff v. Harrington,* 268 F.3d 1179, 1193 (10th Cir.2001) ("Pointing a firearm directly at a child calls for even greater sensitivity to what may be justified or what may be excessive under all the circumstances."). However, these factors alone do not render force used against him unreasonable per se. In fact, we need not look far for proof that even a young child is capable of physical violence —C.G.H. had been physically combative towards the school employees prior to Albrand's arrival, requiring the efforts of three individuals to restrain him. Indeed, it is with alarming frequency that we are confronted with stories in the news of acts of violence at the hands of minors. An arrestee's age and small demeanor do not necessarily undermine an officer's concern for safety and need to control the situation.

The cases relied on by the Hawkers are inapposite. *See* *Morris v. Noe,* 672 F.3d 1185 (10th Cir.2012); *Novitsky v. City of Aurora,* 491 F.3d 1244 (10th Cir.2007). Each involved the use of force on an individual posing no immediate threat to the officer. *Morris,* 672 F.3d at 1196 (forceful "throw down" of non-resisting unarmed individual); *Novitsky,* 491 F.3d at 1255 (use of twist-lock maneuver on non-resisting individual lying in fetal position in parked car during a welfare check). Here, in contrast, C.G.H grabbed Albrand's arm, an action a reasonable officer could objectively view as an act of violent resistance. [9]

The facts in this case are unfortunate in all respects. It is regrettable that a police officer feels a need to resort to physical force, handcuffs, and arrest in order to gain control of and reason with a nine-year-old child. Equally regrettable is the disrespectful, obdurate, and combative behavior of that nine-year-old child. In any event, given C.G.H.'s resistance, Albrand's actions in this case simply do not rise to the level of a constitutional violation.

AFFIRMED.

All Citations

591 Fed.Appx. 669, 313 Ed. Law Rep. 507

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313 Ed. Law Rep. 507

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