ORAL ARGUMENT – 12/05/01
01-0074
TELTHORSTER V. TENNELL

JEWELL: Officer Telthorster, in this case, is requesting the court to address three issues. The first is, to what extent, if any, the Wadewitz v. Montgomery factors apply to this qualified immunity case, which involves an arrest as opposed to a police pursuit or emergency response? The second, is whether officer Telthorster met his summary judgment burden of establishing his entitlement to qualified immunity in the TC? And third, an issue the CA did not reach is whether Mr. Tennell overcame his burden, overcame summary judgment by creating a fact question?

We think that the TC correctly granted summary judgment in officer Telthorster's favor, and that the evidence shows that Mr. Tennell failed to meet his burden in showing that no reasonable person in officer Telthorster's position could have believed his conduct was appropriate.

I think first our analysis has to begin with what the court did in Lancaster v. Chambers, when the court really for the first time approached the study of the good faith prong of the qualified immunity.

O'NEILL: If we were to adopt your position that Wadewitz doesn't apply to this type of situation, do we have to overrule any case law out there?

JEWELL: Not at all. I think what the court did in Chambers was to begin with the federal qualified immunity rule...

O'NEILL: I know what we did in Chambers. Do we have to overrule some 14th CA opinions that have applied Wadewitz beyond this context?

JEWELL: In that respect, I would say that's probably true. Particularly the CA's opinion in our case I think engages in a very rigid and flexible application of Wadewitz.

O'NEILL: I understand. My question though, are we going to have to overrule other case, and if so, which ones would we have to overrule? There are two cases out of the 14th CA that would appear to go the other way, and those are Geick v. Zigler, and Bridges v. Robinson. Would we have to overrule those case to go your way, or just distinguish them?

JEWELL: The Geick case I think is distinguishable in terms of factually, and in terms of the evidence that was presented in that case. And so I don't think technically the court would have to overrule that.

O'NEILL: But before we get to the factual piece, the summary judgment proof, just the

argument that while this doesn't apply to that situation would we have to overrule those cases?

JEWELL: I would have to say that you would disapprove of them I guess so to speak in terms of their application of Wadewitz. I don't think an outright overruling is necessary. That this court would be in this case really addressing the question for the first time. So I don't think it is necessary to do that.

The court can in our case apply the Wadewitz factors in I guess a limited or more flexible sense than what the CA has done, particularly the 14th CA has done...

BAKER: But isn't your argument that you just don't think those factors that were developed in Wadewitz apply to an arrest situation?

JEWELL: Our first argument is yes that is true. We think the court can begin with the federal rule and look at it and see if it needs to be modified like the court did in Chambers. And I don't think there is any need to modify what could be seen as the federal rule in this case. And if you apply that rule, I don't think there is any doubt here that under that test there is no case that exist that would have put officer Telthorster on notice that his conduct would have been clearly unlawful.

BAKER: You say the federal rule which uses federal gargon was lawful in the light of clearly established law. There is two cases from San Antonio that are articulated in a different way when they talk about basically how you submit...

JEWELL: And that's true. I guess really our real beef is really with the inflexibility as shown by the CA. Although we believe and we urge the court to accept really - it needs to go no further than the federal rule. I certainly acknowledge that since this court has decided Chambers and Wadewitz, the CA cases have sort of fallen along the spectra in terms of how they have characterized the test and stated the standard for good faith, including the cases you discussed.

Even if the court were to apply the rules that were adopted in those cases, we would still be entitled to summary judgment here, and the CA's opinion would still be in error in terms of concluding that our evidence does not meet our summary judgment burden and that we were not entitled to qualified immunity.

ENOCH: It seems to me your argument is that we ought to say Wadewitz and Chambers apply either to police pursuit or police response cases and not to arrest cases. Would there be a basis for saying that a suspect or a criminal defendant is not entitled to the protections of Wadewitz and Chambers as opposed to trying to distinguish them based on pursuit or response cases? Why does that not seem to be your point?

JEWELL: I agree, and I think it has been argued in the argument in the brief somewhat the policy concerns that sort of underlie Chambers...

ENOCH: In May 1983, if it's an abusing situation well it's going to have that protection. But why should they get a negligence protection when they are the suspect being apprehended ______ chase __________?

JEWELL: I agree the concerns that sort of form the basis of the first articulation of need verses risk in Chambers are not present here. Not only is this not a pursuit case, but as you mentioned, the suspect himself is the one who was injured.

ENOCH: I could see a situation where the police - there is a high speed chase. And the police intentionally rammed the suspect's car to bring it to a sudden and abrupt halt. And the car spins out of control and hits a telephone pole, the telephone pole falls over and some civilian is injured. It seems to me the civilian's injury might be subject to Chambers and Wadewitz. But that would be a pursuit and a response case and it would apply in those circumstances. But then why shouldn't the suspect be excluded from that kind of reasoning simply because the police were trying to apprehend...

JEWELL: The hypothetical that you present is just a little bit different in that the police officer has intentionally used his car to create some use and force.

ENOCH: But all police pursuit cases are intentional conduct on the part of the police officer. They make an intent to pursue. And the question is, somehow was that good faith or bad faith? These are all not negligence cases.

JEWELL: Our case really I think does fall into a negligence arena because the allegation here is that officer Telthorster's weapon accidentally discharged during the arrest procedure, not that officer Telthorster made a conscious decision to intentionally fire his weapon and therefore would have made it a risk verses need assessment.

BAKER: How was this pled in the TC?

JEWELL: It is pled as I am presenting it to you. There is one claim in the plaintiff's petition, which is that for negligence - the discharge of the gun.

BAKER: So a claim under the tort claims act?

JEWELL: I believe that's the pleading.

BAKER: And the use of tangible personal property that causes an injury to a person?

JEWELL: Yes, I believe that's correct. And the only claim is negligence, and there is no dispute here that there was no intent to discharge the weapon.

I think the flexibility if the court were inclined to apply a risk verses need type

analysis or as a component of good faith in this type of case is supplied by the court's opinion in Clark in which it recognized that there does have to be some room for flexibility. You judge the varying circumstances that are at play in different types of cases, and just because an officer does not necessarily, specifically mention each and every element or factor in the risk verses need analysis under Wadewitz does not necessarily mean that that officer is not entitled to summary judgment because the needs and the risks may alter according to the case.

Our affidavit absolutely could withstand summary judgment assuming best case scenario for the plaintiff is that he did not resist arrest at all.

PHILLIPS: Now why isn't there a problem?

JEWELL: There is not a problem. As the court can see from officer Patton's expert affidavit, he has read the depositions, particularly the deposition of Mr. Tennell and Mr. Telthorster, he was aware of the contentions of everyone. He references in his affidavit the undisputed facts regarding the plaintiff's evasion from officers, which as we all know in this case, he led officer Telthorster on a 30 mile chase at speeds exceeding 100 mph. Officer Telthorster testified in his deposition that he saw Mr. Tennell driving with one arm and moving his other arm through the cab of the truck either in motions to attempt to throw things out of the cab, or reaching his arm across the other side of the car, so as he might be reaching for the glove box for a weapon. And the concern that Officer Patton has in his affidavit, and the basis for his opinion is that a reasonably prudent officer could have believed that it was appropriate for at least one of the arresting officers to have a weapon drawn because of the possibility that Mr. Tennell was armed.

PHILLIPS: And move in to assist?

JEWELL: Yes, I think that's true. Mr. Patton, of course, as you can see from the affidavit, is in charge of a police academy. He teaches officers and trains them. And clearly when you look at his opinion, you can see that his conclusion that it was appropriate for officer Telthorster's conduct is supported by the undisputed facts that are - he does not base his opinion on an assumption or an assertion that Mr. Tennell was resisting arrest.

O'NEILL: Didn't he plead guilty here?

JEWELL: He pled guilty to evading the police.

BAKER: But that was for the chase not for the arrest. Is that correct?

JEWELL: From the record that is correct. The record only indicates that he pled guilty for evading the police officers. But the cases that I have found that discuss fact questions involving a resistance of a suspect are cases where the officer testifies that his use of force or her use of force was brought about directly as a result of the suspect's conduct, whether it be resistance or aggravated behavior or whatever. And that's the key issue in the case. And here it's totally different because

we have an expert opinion that meets the standard, who bases his opinion on undisputed evidence that had nothing to do with Mr. Tennell's resistance. And assuming Mr. Tennell did not resist at all, it was certainly reasonable for the officer to have believed.

ENOCH: You talk about that standard. The problem with the Wadewitz and Chamber's standard is it's not really clear, and the court has never been able to articulate at what point you measure the police officer's discretion. And the problem with this is that Tennell's going to argue: well now wait a minute, you know I might have been doing all sorts of things at 100 mph, but when I'm face down on the ground with my hands tied behind my back, at that point the officer is required to exercise a discretion and holding a cocked gun at my back was not reasonable. And the affidavit seems to me doesn't address that discrete moment in time. So now what happens?

JEWELL: I think it does in the sense that officer Patton has opined that it was appropriate, a reasonably prudent officer could have believed that it was necessary to have his weapon drawn until Mr. Tennell had been secured and searched to make sure that he had no weapon on his person. Telthorster testified that he did not see Mr. Tennell on the ground, and could not have seen in his belt for instance whether he had a gun in his belt or in his pocket and did not know at that time until he was cuffed and searched that he in fact was not armed. And I think that concern is covered by the affidavit.

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RESPONDENT

PREBEG: The TC in this case was not presented with a question of whether or not Mr. Tennell needed to be arrested. Clearly he did. He made a mistake. He was a young, inexperienced, uneducated black man being pulled over to his mind for no apparent reason in a community he feared. He did something stupid: he ran home, beeped the horn in his driveway, and wanted to be arrested in the presence of his family members. That's exactly what happened.

The question for the TC was not whether he needed to be arrested. It's the manner of the arrest. Was that necessary? What were the risks involved, and the manner of the arrest? You can take the example to the extreme. A pregnant woman reaches in her purse, and drops a gum wrapper. She's littered. Perhaps she needs to be arrested and she starts to move away. Does an officer need to bold her over, knock her down and hog tie her and hurt her? That's the extreme. That's why the Wadewitz factors are very convenient...

O'NEILL: If we decline to apply the need and risk Wadewitz factors, if we were to hold that they didn't apply in the arrest situation, would you lose?

PREBEG: No. Absolutely not.

O'NEILL: Could you explain why?

PREBEG: The Wadewitz factors do not change the law at all. The Wadewitz factors merely provide TC with tools, a guideline for evaluating whether an officer acted in good faith during an arrest situation: chasing a vehicle or doing other things. A number of CA's, the 14th CA three times, the Corpus Christi CA as well as the Dallas CA have used the Wadewitz risk factors in judging whether an officer acted in good faith in a non-vehicular chase case. Wadewitz factors don't change Texas law one bit.

The standard is the standard for good faith. It's been enunciated by the federal courts and redefined...

OWEN: Justice Enoch had a question. It relates to the suspect as opposed to innocent third parties. Would we apply Wadewitz in a chase case to the suspect?

PREBEG: Certainly. There is no public policy argument for differentiating between a suspect or anyone else.

OWEN: Have we ever said that we would apply Wadewitz or ______ to the suspect?

PREBEG: This court has not. A number of CA's have.

O'NEILL: You say there's no public policy?

PREBEG: They are not applying Wadewitz, the need and risk factors. In fact, there's no public policy reason for not requiring an officer to act in good faith during any kind of interaction with the public.

O'NEILL: But the public policy reason not to apply it to a suspect isn't it, is that the suspect is creating the dangerous situation? The public policy it seems that Wadewitz addressed was danger to the innocent bystander or to the public. Wasn't that an undercurrent of public policy we were recognizing in there that we're not really focusing on the suspect, but we're are focusing on who could be injured in the process.

PREBEG: Indeed, Wadewitz involved an innocent bystander as far as we know. As far as any of us know the bystander wasn't doing something wrong at the time. But to change the law to say that Wadewitz doesn't apply to a suspect is to say that an officer does not need to act in good faith when apprehending a suspect. Because that's all that Wadewitz does is help ensure that an officer acts in good faith when arresting a suspect.

RODRIGUEZ: Why isn't the recourse under §1983 satisfy your concerns?

PREBEG: I don't believe it does. If you were to hold that there is no good faith standard for an officer in apprehending a suspect, then you would change Texas law. There would be no state court action at all for a suspect, such as a woman that litters and is bold over and hogtied. The

officer clearly and truly did not want to harm this woman. He did something extremely foolish. Something that no reasonable officer who was similarly situated would have done. That's a state court action. That's negligence and it's acting in bad faith. If you were to take that away, if this woman honestly admitted he didn't do that on purpose, it was an accident, it was an extremely bad choice on the officer's part, but it wasn't intentional. She might not have an 1983 cause of action. She might have no other forum to redress her complaint. If you were to say that Wadewitz does not apply to a suspect, you would be overruling four CA's. You would be saying in essence that the good faith standard does not apply...

O'NEILL: Which one of those CA's decisions applied it to a suspect?

PREBEG: Well the Geek, Bridges, Ramirez opinions all applied it..

O'NEILL: Those were suits brought by the suspect?

PREBEG: Folks being arrested, being searched. And Coppell of course did not mention Wadewitz; however, it applied Wadewitz without mentioning it. And that again was a suspect. So applying Wadewitz in no way changes Texas law. What it does do is provides a consistent guideline for Texas courts throughout the state in order to determine whether an officer acts in good faith during an arrest situation. And the 14th CA recognized that the need and the risk for what Telthorster did was not addressed by the summary judgment proof.

RODRIGUEZ: Let's assume that Wadewitz does apply here. The victim here is arguably not cooperating in the handcuffing. It's apparently needing two officers now to effectuate the handcuff. Why isn't there a need and a risk present?

PREBEG: That is a fact issue for the TC and the jury to decide. But in this case there were two officers involved: Bailey and Telthorster both from the same jurisdiction. Officer Bailey unequivocally testified as did Tennell that he did nothing whatsoever to resist. He complied with the officer's orders exactly to the tee, got out with his hands up. When the officer said get down on the ground, he got down on the ground. He was not combative or resisted at all. Those are the words of officer Bailey. The officer in truth, we believe, was the only one actually arresting this young man. Officer Bailey was handcuffing him, and stated that he did nothing whatsoever to deserve being shot in the back, or having a drawn weapon pulled out with a bullet in the chamber and a finger around the trigger with an officer making physical contact with him in that situation when the man wasn't resistive or combative whatsoever. That's the summary judgment evidence that the plaintiff has brought.

And so if the Wadewitz factors apply, the 14th CA correctly stated that Telthorster did not even put the plaintiff on his proof. But let's assume worse case that they did. The plaintiff in this case, Tennell brought ample summary judgment arguably to prove as a matter of law that Telthorster did not act in good faith. Tennell did not go out and get high paid experts. He went to the source of the expertise. He went to the supervisors of Telthorster and asked them what they

thought about this. And they unequivocally testified, and this is part of the summary judgment record, that Lt. ________ said you cannot use a gun, you cannot draw a gun and be reasonable about it unless there is a suspicion of seriously bodily injury about to happen. Lt. List, a principal in the Navasota police dept testified that they had policies and procedures that explained the only time you can act reasonably and pull a weapon. He testified that it is not reasonable under any circumstances to use any force whatsoever. Any force if the suspect is complying. And the summary judgment evidence shows that the suspect was 100% compliant. He was never even cited for resisting arrest. He clearly evaded by not pulling over when he should have. He never resisted arrest. Wasn't even cited for it.

The superintendent of the Navasota PD testified after being qualified that just drawing a gun, not having your finger on the trigger, not having a bullet in the chambers, but merely drawing the gun is using not only force but deadly force, and that it's not reasonable to do that under these circumstances when someone is complying.

JEFFERSON: Why, even under the Wadewitz factors couldn't we conclude that the defendant here satisfied summary judgment proof?

PREBEG: For two reasons. First, officer Patton's affidavit is conclusory. He mentions as a predicate to his conclusions, that Tennell had resistive activities. The summary judgment evidence shows that there was no resisted activity at all. The bulk of the summary judgment evidence shows that. But even if you were to believe officer Patton, even if officer Patton had gone in and cited not only generalized things, but actual specific facts that prove that there was some resistive activity, or some reason to suspect that there was a weapon, even if that were present, Tennell has provided summary judgment evidence to controvert that. There is a fact issue. If the court were to hold otherwise, that would mean that Texas law would be changed in all police arrest cases. If Tennell had to prove as a matter of law that Telthorster acted in bad faith, did not act in good faith, but if he had to prove that during a summary judgment proceeding, then there would never be - and I think he has -, but that's not his burden, and if it was these cases could never ever go to a jury. They would always be a matter of law for the court to decide.

HECHT: Isn't his burden though under settled law that he must show some evidence that no reasonable officer could have done what was done in the circumstance?

PREBEG: Yes.

HECHT: How has he done it?

PREBEG: Tennell had a burden to provide summary judgment evidence so that a trier of fact could reasonably infer that the officer did not act in good faith. That was his proof.

HECHT: He must show, we've been very definite about this in Chambers, that no reasonable officer could have done what was done under the circumstances. He has to have some

evidence of that. Isn't that right?

PREBEG: Yes, and he has provided some evidence of that.

HECHT: What is that evidence? That no reasonable officer could have done what was done here. That's a pretty high standard.

PREBEG: It is a tough standard, and at the TC during the trial, Tennell would have to prevail on that. In a summary judgment proceeding Tennell would have to provide evidence from which that could be reasonably inferred and he has done that. He has provided the evidence from the other officer that was there that he did nothing whatsoever to resist anything.

HECHT: But that doesn't do it it seems to me because he had been fleeing for 30 miles. Somebody does everything he can to, in this case just say evade arrest, and then all of a sudden says, I give up. If you're standing there, you don't know whether he's given up or not. This may be a ruse. He may have a gun somewhere on his body. Who knows what ______________. Looking back, yes, he wanted to give up, but the officer wouldn't know that at the time.

PREBEG: The evidence was that officer Bailey knew that, and officer Bailey testified unequivocally that it was obvious that Tennell had no weapon and was not resisting at all.

OWEN: That's not the standard. Did anybody testify that no reasonable officer could have believed that this force was necessary?

PREBEG: Through the policy procedures of the Navasota PD themselves. The officers testified that it is never reasonable, it cannot be reasonable for anybody to...

O'NEILL: But then they came back and they said, he was imminently reasonable under these circumstances to have his weapon drawn when covering another officer during an arrest.

PREBEG: That's true.

O'NEILL: How do you deal with that?

PREBEG: Once the plaintiff responded to the defendant's summary judgment evidence, within a couple of days of the summary judgment hearing date the Navasota PD got those same officers that gave all this testimony that it could never be reasonable to draw a gun unless a suspect was combatant. They went ahead and said, essentially controverted their own testimony within 2 days of the summary judgment hearing and submitted an affidavit to the court that said, but in this case it was reasonable. That really creates a fact issue. And I believe a jury would know what to do with that.

O'NEILL: Well it just sounds as if two different situations were posed. In one, the

question was posed, a hypothetical. In a nonresistant arrest situation would it be reasonable to draw a weapon. And no, hypothetically no. But they were not asked to opine on this situation particularly. When they were asked to opine on this situation particularly, they said it is reasonable if you're covering another officer during arrest to have a weapon drawn.

PREBEG: They were asked about covering another officer during an arrest. But you are correct, the question was never presented to either one of those officers in this particular circumstance: Did officer Telthorster act in bad faith? That question was never asked of them.

The circumstances, all these circumstances around this arrest and Mr. Tennell were all presented to these officers. And the officers were asked, under these circumstances would this be reasonable? No. Under these circumstances would this be reasonable? No. What if the gentleman is running away, but he's not trying to hurt anyone? No.

JEFFERSON: There is one thing that we have to consider here, and that is let's say we write an opinion that says, there's a fact issue in this case. Then when police officers are going through training tomorrow or the day after this case is released, are they going to be instructed that in situations like this, after a high-speed chase, over 30 miles, you don't know what that suspect was doing, that an officer has to keep everything holstered until or throughout the whole process so long as there is no resistence. If that's the case, what happens in those situations where because an officer didn't act quickly enough someone died or is shot because of a concealed weapon? I'm just trying to look at this from a broader perspective.

PREBEG: If this court were to hold that when an officer chases a suspect, the suspect gets out, the officer should consider the reasonableness of his actions...

JEFFERSON: And unfortunate enough, he's got to stop right there and say, should I or should I not withdraw my weapon? Maybe not because I might be held liable if something goes wrong. And so that factor is going to come into play...

PREBEG: He would never have to worry about drawing his weapon, because the officer would be able to follow what officers do all throughout this state. They draw their weapon when it's reasonable to do so, and they do it in a safe manner. In other words, if they are going to arrest a suspect in a circumstance where two officers are present, in this case there were at least 5 officers present, one is completing a handcuffing of the subject, an officer would know it is unreasonable under any circumstances for me to take my gun out, put a round in my chamber, put my finger on the trigger and bump it in to the guy's back. He would know that. Absolutely, because of this case. But officers throughout the state wouldn't know it just because of this case. They would know it because they all know that, that that's an absolute and unreasonable thing to do because it exposes someone who had done nothing but drive right to his home to be arrested, to being shot in the back. And that's what happened here. And the gun as well went through officer Bailey's hand. It should never happen. And this officer acted unreasonably.

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REBUTTAL

JEWELL: The question was asked, if the Wadewitz factors apply does the plaintiff win or does the plaintiff lose? And I think that here even if the Wadewitz factor applies, Tennell has not met his burden to overcome summary judgment. His evidence does not rise to what this court described as an elevated standard in the Chambers case, because he does not have any evidence that no reasonable person in the officer's position with the facts at that time could have thought that the facts were such that the action was justified.

OWEN: What standard did you argue in the TC should apply?

LAWYER: In the TC when this case was being developed, our motion for summary judgment really relied primarily upon Chambers and argued - well it was really the federal standard.

OWEN: What did you tell the TC the standard should be?

LAWYER: As to whether any reasonable officer could have under the facts known at that time could have thought the action was lawful in light of clearly established law I think was the standard that we used. And in response to that, Mr. Tennell didn't argue anything different. In fact, no one ever cited the Wadewitz opinion in this case until the CA did when it issued its opinion.

So the first time we see this is when the CA issued its opinion. Again, Mr. Tennell has not met his burden because he does not show that no reasonable person could have thought the facts were such as to warrant the conduct. The officers' deposition testimony that he attached to his response simply provide opinion testimony on their part that create a dispute between reasonable officers, or officers of reasonable competence, which does not rise to the level necessary to defeat summary judgment.

The other problems I suppose exist with Mr. Tennell's proof is that the officers testimony in the depositions is rather subjective, and we know that this test is an objective test when you determine qualified immunity. And also, I would note that they were being asked about the city's policy manual and were simply testifying from what their interpretation was of the city of Navasota's policy manual. They did not give the quality or quantity of evidence that is necessary to overcome summary judgment in this type of case.

Those are the points that I wanted to emphasize this morning. We believe that our summary judgment motion was correctly granted by the TC, the CA has erroneously reversed it, and even if this court were to apply the Wadewitz factors, to some extent that we are entitled to summary judgment as even Justice Hudson decided in the dissent from the CA, and that the plaintiff has not under any articulated test that could be adopted by this court overcome this summary judgment, and we ask the court to reverse the CA and affirm the summary judgment of the TC.