No. 101596 – *City of Saint Albans, a West Virginia Municipal Corporation and B. L. Tagayun and A. C. Truitt v. David A. Botkins*

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OF WEST VIRGINIA

Benjamin, Justice, dissenting:

It is not constitutionally permissible for a police officer to severely injure a helpless, physically disabled, unarmed citizen who is on his knees with his arms held up over his head by viciously pistol whipping him and kicking him.[1] No West Virginia citizen should ever be brutalized by a law enforcement officer acting under the color of state authority in the way Mr. Botkins allegedly was. For decades, it has been universally established in the jurisprudence of this country that the type and degree of clearly excessive force used against David Botkins by Officer B. L. Tagayun in this case is unconstitutional. Mr. Botkins was not fleeing. He had no weapons. He was not acting in a provocative manner. He was no threat to the investigating officers. He was submissive and was attempting to surrender in a

[1] In Mr. Botkins' complaint, it is asserted that after the pistol-whipping and kicking, which was confirmed by other witnesses, Officer Tagayun spat upon him. In reviewing the record, I did not again see reference to a "spitting" incident. I cannot conceive of there ever being propriety in a police officer spitting on a citizen, especially when the citizen is already restrained. Although a police officer's patience may be greatly challenged by the conduct of disorderly individuals, the act of spitting and the contempt towards another which the act necessarily communicates is absolutely unacceptable. When done by a law enforcement officer it implies an "official" contempt even if done only out of personal frustration. More ominously though, here, it conveys another message. If true, it tells us that Officer Tagayun was not acting reasonably to "control" Mr. Botkins, but rather that he was acting upon emotion and he was exacting a punishment on Mr. Botkins for not "properly" submitting to him.

manner which protected his broken arm which was in a cast -- something evident to anyone observing. It is shocking that despite having done nothing wrong , Mr. Botkins is now left without recourse by the majority's opinion.[2]

Officer Tagayun is not entitled to qualified immunity. His conduct toward Mr. Bodkins was objectively deplorable, excessive, severe and unnecessary. The impropriety of the type of actions he committed has been "clearly established" for decades in our

[2] This action concerns allegation of violations of civil rights by a governmental actor. On appeal, this Court is bound to accept as true the allegations of fact in the light most favorable to Mr. Botkins. By virtue of this being an action claiming excessive force by a law enforcement officer in his official state capacity, Officer Tagayun will now not have the opportunity in a trial to explain his side of the story. Conversely, civil rights cases are important to the very essence of our society. Where appropriate, it is a good thing for such cases to be reviewed by citizens sitting on juries.

country.[3] There should be no question that this case should proceed to trial with respect to

[3] The majority is simply incorrect on the issue of whether it is "clearly established" that pistol-whipping a surrendering suspect under these circumstances is improper. The following cases are just a portion of those which have established that, absent something far worse than was present herein, the beating of a surrendering suspect with a pistol or other instrument such as a flashlight, a nightstick, a blackjack, is improper under the circumstances present herein: *Sanchez v. Hialeah Police Dept.*, 357 Fed. Appx. 229 (11th Cir. 2009); *Landis v. Baker*, 297 Fed. Appx. 453 (6th Cir. 2008); *Green v. New Jersey State Police*, 246 Fed. Appx. 158 (3rd Cir. 2007); *Sallenger v. Oakes*, 473 F.3d 731 (7th Cir. 2007); *Baker v. City of Hamilton, Ohio*, 471 F.3rd 601 (6th Cir. 2006); *Walker v. City of Riviera Beach*, 212 Fed. Appx. 835 (11th Cir. 2006); *Baltimore v. City of Albany, Ga.*, 183 Fed. Appx. 891 (11th Cir. 2006); *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993); *Murphy v. Lancaster*, 960 F.2d 746 (8th Cir. 1992); *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991); *Lewis v. Downs*, 774 F.2d 711 (6th Cir. 1985); *Linn v. Garcia*, 531 F.2d 855 (8th Cir. 1976); *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965); *Morgan v. Labiak*, 368 F.2d 338 (10th Cir. 1966); *Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963); *Kies ex rel. Kies v. City of Lima Ohio*, 612 F.Supp.2d 888 (N.D. Ohio 2009); *Hudson v. District of Columbia*, 517 F.Supp.2d 40 (D.D.C. 2007); *Landis v. Cardoza*, 515 F.Supp.2d 809 (E.D. Mich 2007); *Clark v. Thomas*, 505 F.Supp.2d 884 (D.Kan 2007); *Alexander v. Newman*, 345 F.Supp.2d 876 (W.D. Tenn 2004); *Johnson v. City of Milwaukee*, 41 F.Supp.2d 917 (E.D. Wisc 1999); *Cornett v. Longois*, 871 F.Supp. 918 (E.D. Tex. 1994); *Schwab v. Wood*, 767 F.Supp. 574 (D. Del. 1991); *Masel v. Barrett*, 707 F.Supp. 4 (D.D.C. 1989); *James v. District of Columbia*, 610 F.Supp. 1027 (D.D.C. 1985); *Demetrius v. Marsh*, 560 F.Supp. 1157 (E.D. Pa. 1983); *Ladnier v. Murray*, 572 F.Supp. 544 (D. Md. 1983); *Schiller v. Strangis*, 540 F.Supp. 605 (D. Mass. 1982); *Pennsylvania v.* Porter, 480 F.Supp. 686 (W.D. Pa 1979), *aff'd in part and rev'd in part on other grounds*, 659 F.2d 306 (3rd Cir. 1980); and Arroyo *v. Walsh*, 317 F.Supp. 869 (D. 420 (E.D. Tenn 1963).

Long ago, it was "clearly established" in the jurisprudence of this country that the type of brutality meted out by Officer Tagayun in these circumstances was objectively unreasonable and unconstitutional. Even if it were not, there are basic, fundamental, universally held precepts of acceptable behavior in a civilized society which compel a court to conclude that certain types of despicable conduct by a state actor are "clearly established" as wrong and understood to be improper simply by that actor being a member of that society. In other words, courts ought not permit bad state actors to escape accountability for certain unconstitutional acts visited upon innocent citizens by allowing that state actor to hide behind the doctrine of qualified immunity under the claim that no court has theretofore ruled improper the precise bad act done by the state actor in the unique circumstance encountered. The United States Supreme Court has explained that, for "clearly established" purposes, the focus is on the "contours of the right," not on whether a citizen can somewhere find the exact

Officer Tagayun.[4] Therefore, I dissent.

At the outset, I am in total agreement with my colleagues that we must be careful not to "Monday-morning" quarterback difficult split-second decisions about the amount of force necessary in particular situations made in circumstances that are tense, uncertain, and rapidly evolving,. *Bell v. Dawson*, 144 F.Supp.2d 454 (W.D. N.C. 2001). This Court recognizes that police officers confront dynamic situations which require immediate decision-making about the amount of force to use – decisions which, in calmer reflection afterwards, might have been made differently. We need to insulate our law enforcement officers to a large extent from the constant fear that they will unnecessarily have to defend themselves from excessive force claims in every tough situation in which they find themselves, thereby risking that such officers will be unable to act quickly when it is

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same conduct ruled improper in a given jurisdiction. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

[4] I do not believe there to be sufficient evidence or allegations herein to proceed against Officer Truitt. The essence of Mr. Botkins' claims herein are grounded in allegations of excessive force by Officer Tagayun. Initially, the claims made against Officer Truitt sound in "negligence," not "deliberation." Further, a thorough review of the record fails to find any factual support, save pure speculation, that Officer Truitt did anything wrong or that he could have stopped Officer Tagayun *even if he had known what might happen – which he didn't*. I do find it instructive that Officer Truitt testified to his training which included "non-lethal" means of control. Non-lethal control includes pepper spray, Tasers, etc. This raises the question not considered anywhere in the majority opinion: "If Officer Truitt, as a volunteer, was trained in non-lethal control techniques and had such techniques available to him that night, why did Officer Tagayun so greatly over-react and immediately resort to using a deadly weapon to pistol-whip Mr. Botkins when Mr. Botkins was being submissive to the extent he could given his physical incapacities at the time?"

necessary to protect themselves or the public. However, we must also not surrender our duty as a court to protect the public from unconstitutional acts by state actors against citizens.

The facts, taken in the light most favorable to David Botkins, the party asserting injury, indicate that once Officers Tagayun and Truitt arrived on the scene, the threat of violence from the confrontation between the two groups had dissipated. Mr. Botkins and the other individuals simply were standing around by this time because two of the potential adversaries had discovered that they knew each other. Nevertheless, Officer Tagayun, with his gun drawn, ordered everyone to get on the ground. This order was not improper. Mr. Botkins dutifully complied the best that he could but was hampered by his injured arm. As a result, he got down on his knees and put his arms in the air to show Officer Tagayun that he was wearing an arm cast. At that point, Officer Tagayun ran up to Mr. Botkins, threw Mr. Botkins' hands behind his back, put his knee in Mr. Botkins' back, and hit Mr. Botkins in the head with the butt of his gun. Mr. Botkins stated below that after the first hit with the butt of the gun, he could feel blood running down his head. Officer Tagayun then struck Mr. Botkins two more times with the butt of his gun, kicked him, and then, according to the complaint, spat on him. As a result of the savage beating, Mr. Botkins was transported to a hospital for treatment which included the application of seven staples to one head wound and three staples to another head wound. Importantly, Mr. Botkins was never prosecuted for, nor convicted of, any crime, including resisting arrest.

I disagree with the majority that a bright line does not exist here. It does without question. There is a big difference between a suspect who is physically challenged by a broken arm in a cast and is trying to communicate that inability to a police office (as Mr. Botkins was doing here) and a suspect who is "refusing" to comply and who therefore reasonably poses a risk to the officer and to the situation.[5] By using the term, "refusal," to inaccurately describe Mr. Botkins' actions, one can understand how the majority got to the wrong result -- it relied on an inaccurate conclusion of the facts. That is a risk when an appellate court involves itself in finding facts, an endeavor better left to juries. Mr. Botkins did not refuse to comply. Rather, he failed to get down on his belly, as ordered, because of his injured arm, a fact which was obvious, or should have been obvious, from the fact that he was wearing a cast. At the very least, Mr. Botkins' position was clearly one of submission. When Mr. Botkins was beaten by Officer Tagayun, he had committed no crime, was not actively resisting arrest or attempting to evade arrest by flight, and posed no immediate threat to the safety of the police officers or others.

[5] One wonders if Officer Tagayun would have also properly acted, within the reasoning of the majority, if he had pistol-whipped and kicked a pregnant woman who was attempting to communicate to him her condition while her hands were held up in a submissive position. In its attempt to extend protections to insulate police officers from liability for making tough decisions in "gray" areas on this appeal, the majority has gone too far and now excuses away clearly deplorable conduct by a state actor against a citizen.

Claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other "seizure" of a citizen are properly analyzed under the Fourth Amendment and its "reasonableness" standard. *Albright v. Oliver*, 510 U.S. 266, 276, 114 S.Ct. 807, 814, 127 L.Ed.2d 114 (1994). Courts have explained that

> [d]etermining whether acts [of a police officer] are reasonable requires careful attention to the facts and circumstances of the case. Three important factors to consider are the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others and whether he is actively resisting arrest or attempting to evade arrest by flight.

Johnson v. City of Milwaukee, 41 F.Supp.2d 917, 925 (E.D.Wis. 1999) (citations omitted), *see also, Morales v. City of Oklahoma City*, 230 P.3d 869 (OK. 2010) (same); *Flynn v. Mills*, 361 F.Supp.2d 866 (S.D. Ind. 2005) (same); *Heyward v. Christmas*, 357 S.C. 202, 593 S.E.2d; 141 (S.C. 2004) (same); *Campbell v. City of Leavenworth*, 28 Kan.App.2d 120, 13 P.3d 917 (2000) (same); *Limbert v. Twin Falls County*, 131 Idaho 344, 955 P.2d 1123 (Idaho.App. 1998) (same). That is, the question is whether the police officer's actions were "objectively reasonable" in light of the facts and circumstances confronting the officer.[6]

[6] In doing so, a court must devote "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 392, 109 S.C. 1865, 1872, 104 L.Ed.2d 443 (1989).

Under these circumstances, the use of a deadly weapon to pistol-whip Mr. Botkins and the kicking of Mr. Botkins were not objectively reasonable for the situation and were clearly excessive. Officer Tagayun's conduct speaks more to punishment than an attempt to control a dynamic situation. *See Kokinda v. Breiner*, 557 F.Supp.2d 581 (M.D. Pa. 2008) (officer's actions were allegedly taken to punish arrestee rather than for legitimate purposes).

According to Syllabus Point 6 of the majority opinion, in part, a public officer is not entitled to qualified immunity from civil damages for performance of discretionary functions where the court finds that the submissions of the parties could establish the officer's conduct violated a constitutional right. As noted by the majority opinion, a constitutional violation may occur based simply on the general rule prohibiting excessive force. Mr. Botkins' constitutional rights were violated when Officer Tagayun used excessive force on him by viciously beating him on the head with the butt of his gun causing wounds which required ten staples to close.

Syllabus Point 6 of the majority opinion additionally provides that a public officer is not entitled to qualified immunity where it would be clear to a reasonable officer that such conduct is unlawful in the situation confronted. As referenced in footnote 3 herein, this country's jurisprudence in the last 50 years completely dispels any notion that a reasonable officer might consider what Officer Tagayun did in this case to be acceptable.

This is not 1963 Birmingham, Alabama. This is not a modern-day third-world police state. This is the 21st Century and this is West Virginia. We stand for more. What Officer Tagayun did to Mr. Botkins was unjustified and unacceptable by any definition of acceptable behavior in this state or in this country and I am disappointed that this Court now immunizes him from the consequences of such actions.

All first responders, especially police officers, are professionals who courageously go about the business of protecting society in a responsible manner. They deserve our respect and appreciation. Unfortunately, actions such as those of Office Tagayun unfairly cause people to suspect and resent police officers. This suspicion and resentment can result in a lack of cooperation between civilians and police officers that frustrates law enforcement efforts. Further, actions such as those of Officer Tagayun may increase violent confrontations between police officers and suspects by causing some suspects to choose flight or resistance rather than compliance with a police officer's lawful commands.

I reiterate, while I agree with the majority opinion that a police officer may use lawful force to compel a recalcitrant suspect to adhere to the officer's commands, it should be obvious to any reasonable police officer and to this Court that lawful police conduct does not include brutally beating with the butt of a gun a helpless, nonthreatening, person who is on his knees with his arms above his head. It does not condone thereafter kicking the

helpless individual. Officer Tagayun's use of force was excessive. It was wrongful. And, as any reasonable police officer would reasonably know, it was improper and unconstitutional. For these reasons, I would find that Officer Tagayun does not enjoy qualified immunity from civil damages because of the senseless harm done to Mr. Botkins. Accordingly, I dissent.