Highest Court Refuses to Review 6th Circuit's Grant of Immunity to Officer

Description

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The Supreme Court recently declined to take up an appeal sought by the widow of Antonio Gordon, pertaining to the 6th Circuit's decision in *Gordon v. Bierenga*, which granted immunity to the police officer who fatally shot Gordon in a drive-through line during vehicular flight.

The test that governs inquiries of **qualified immunity** maintains that: Public Officials are afforded **immunity** from civil damages unless the plaintiff can establish both: **(1)** *a constitutional violation*; and **(2)** *that the right at issue was* ***clearly established*** *when the event occurred*. In today's case, the 6th Circuit analyzed the *second prong* of the **qualified immunity test**, as applied to an officer's use of excessive force on an individual who is actively committing vehicular flight. To meet the ***clearly established*** requirement of the *second prong*, "a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right."

Legal Procedural Posture

Before we consider the High Court's refusal to address a challenge to the qualified immunity defense for police officers, we must first analyze the prior procedural posture and relevant findings in *Gordon v. Bierenga*. This case arises from an action brought by the (Plaintiff) Widow of Antonio Gordon, alleging **excessive use of force** by (Defendant) Police Officer Keith Bierenga. In response, Officer Bierenga moved for summary judgement, asserting the **defense of qualified immunity**. The district court denied the officer's motion, finding in favor of the plaintiff. The court held that Officer Bierenga's **use of deadly** force during the vehicular flight violated Gordon's Fourth Amendment right, and that such violation was **clearly established** by the 6th Circuit's 2017 decision in *Latits v. Phillips*. Officer Bierenga appealed to the U.S. Circuit Court of Appeals for the 6th Circuit.

Facts

While on duty during April of 2018, Michigan Police officer, Keith Bierenga, watched a BMW drive recklessly through the streets of Royal Oak. The operator of the vehicle, the late Antonio Gordon, merged quickly from a center turning lane into a westbound lane, causing an oncoming vehicle to abruptly stop to avoid an accident. Considering this dangerous encounter, Bierenga proceeded to commence a traffic stop by turning on his cruiser's lights and following the BMW for some blocks. Footage from the officer's Dash camera depicted a crowded road and showed that the BMW failed to pull over after the officer had commanded him to do so. After following the car for multiple blocks, the driver approached a red light in the middle of a congested intersection and was forced to a standstill. Bierenga acted on this opportunity and stepped out of his cruiser, approached the BMW and initiated a conversation with Gordon. Testimony provided by the officer noted that although the driver's window was only cracked, Bierenga noticed that the driver was pale with glossy eyes which indicated the

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possibility of Gordon being under the influence of some substance. When the traffic light turned green, Gordon sped off and left the officer standing in the road. The officer sprinted back to his patrol car and reported to dispatch that the driver of the BMW had fled the scene. After fleeing the scene, further video footage from the officer's Dash camera showed Gordon continuing to drive recklessly. The clips showed the driver switching lanes and braking sporadically, turning his vehicle in front of oncoming traffic, entering the parking lot of a White Castle restaurant from the wrong direction, and driving his vehicle in the opposite direction of the specified flow of the drive-through. The officer attempted to search the lot for Gordon but when he was unable to locate him, Bieregna entered back into the crowded street and continued to search the area, eventually phoning dispatch to report a physical description of Gordon and his car.

Shortly after, Gordon was spotted ordering in the line of the White Castle. The officer pulled into the White Castle lot and positioned his vehicle at a diagonal angle, just a few feet in-front of Gordon's BMW. The officer approached the passenger side of the BMW, eventually making his way to the front of Gordon's car with his weapon drawn. Gordon quickly reversed into the car behind him and proceeded to accelerate forward with his wheels turned towards the rear of the officer's vehicle. Bieregna jumped out of the direct path of the BMW while continuously yelling, "stop!" and Gordon eventually crashed into the squad car, pinning Bieregna between his vehicle, the police car, and the White Castle wall. The officer approached the BWM again with his gun pointed. The driver attempted to flee and accelerated towards Bieregna, causing the officer to fire four shots through the driver's side window of the BMW. Bierenga's dash cam captured Gordon's car driving around the White Castle and toward the street after he was shot. Bierenga followed Gordon out of the White Castle and onto the street, headed back toward the direction of the original traffic stop. As Bierenga followed, Gordon picked up speed and then began to slow down after a block. Gordon then presumably began to lose consciousness, drifted across the center lane, and crashed into a car travelling the opposite direction.

Sixth Circuit Court Opinion

An officer is permitted to shoot when the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car. No prior case law clearly establishes that it was unlawful for Officer Bierenga to shoot Gordon in this factual scenario. Because the second prong of the "clearly established" test is not met here, the officer is entitled to qualified immunity.

To evaluate the reasonableness of deadly force in the context of a fleeing driver, the 6th Circuit looked to both, whether anyone was in the immediate path of the vehicle at the time of the shooting and to the officer's prior interactions with the driver. These two considerations act as a possible indicator for the presence of imminent danger to other officers or members of the public if the driver continues to flee. The Sixth Circuit distinguished their findings in a prior case, *Latits.* Specifically, because the facts surrounding the driver's conduct prior to the moments of the shooting in *Latits*, are materially different from the case at bar, it follows that not every reasonable officer in Bierenga's position would be on notice that shooting Gordon, rather than permitting him to flee and potentially endanger the public, would violate the defendant's Fourth Amendment rights. Furthermore, Gordon's conduct in this case exceeds the recklessness of the defendant in *Latits*, thus posing a materially higher risk to the public.

TAKEAWAYS

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The significance of this case lies not in the facts or the holding, but rather in the Court's refusal to grant review of this case when viewed in light of recent SCOTUS jurisprudence on qualified immunity.[1] Two recent decisions issued by the Supreme Court, coupled with the Court's routine refusal to review qualified immunity illustrates where the High Court stands on this issue. It seems evident that the Court will continue to protect law enforcement by upholding the Qualified Immunity Doctrine as it stands.

[1]. *See* City of Tahlequah v. Bond., 595 U.S._(2021); Rivas-Villegas v. Cortesluna, 595 U.S._(2021).

Gordon v. Bierenga, 20 F.4th 1077 (6th Cir. 2021)

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