

Hernandez v. Town of Gilbert

United States Court of Appeals for the Ninth
Circuit

No. 19-15811, Filed March 4, 2021

K-9 Use Found Reasonable During Arrest of Suspect

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Following a brief police pursuit, Scott Hernandez fled to his home where he activated the remote-controlled garage door opener and entered the garage. Hernandez then tried to close the garage door remotely. Officer Robinson stopped the door from closing. Hernandez remained inside his vehicle and Officer Robinson waited for back-up officers to arrive. Responding back-up were Officer Leach and Officer Gilbert and his police k-9 partner, “Murphy”. Robinson gave at least 13 verbal orders for Hernandez to step out of the vehicle (for over 2 minutes) and warned Hernandez that he would be arrested for failing to obey a police officer if he did not. Hernandez refused, repeatedly saying, “No, I’m right here.” Officers Robinson and Leach approached the car and, for over a minute, tried to force Hernandez to get out of the car by using

control holds. Hernandez resisted and repeatedly said, “No, I’m not under arrest.” Officer Robinson observed Hernandez to have bloodshot eyes, slurred speech and that his breath smelled of alcohol. Robinson deployed pepper spray without effect. He then warned Hernandez eight more times that he was under arrest and needed to get out of the car. He also warned Hernandez at least five times that a police dog would bite him if he did not step out of the car. Hernandez responded, “No, I am not”, “I’m not going nowhere, dude”, and “You’re on my property, bro. You can’t do this shit”.

Officer Gilbert approached the car with Murphy on a leash. Officer Gilbert warned Hernandez that the dog would bite him if he did not step out of the car. Instead of getting out of the car, Hernandez closed the driver’s side door and leaned to his right to close the passenger door. Before Hernandez could close the door, Murphy entered and bit Hernandez on the arm. While Murphy was holding onto Hernandez, Officer Gilbert yelled at Hernandez to get out of the car. Hernandez repeatedly yelled “alright” and did not move. 36 seconds into the bite, Gilbert commanded Murphy to release the hold. 14 seconds later, Murphy obeyed and release his bite on Hernandez’s arm, but held onto his shirt. While Murphy hung onto his shirt, Hernandez grabbed and began holding the passenger headrest.

After the K-9 released his bite, Hernandez continued to cling to the headrest despite the officers' repeated orders for him to get out of the car. When Hernandez refused to comply, Officer Robinson asked him, "should we let the dog go again?" Officers Robinson and Leach again instructed Hernandez to step out of the car. Although Hernandez replied "alright," he continued to hang onto the headrest. The officers then forcibly pulled Hernandez from his car. Hernandez ultimately pled guilty to a misdemeanor charge.

Hernandez sued the city and Officer Gilbert for excessive force under 42 U.S.C. §1983, claiming the duration of the bite was unreasonable because he "surrendered". Gilbert moved for summary judgment on the excessive force claim. The district court granted qualified immunity to Officer Gilbert.

The Court found deploying the dog and the duration of the bite did not violate "clearly established law" governing the reasonableness of using a k-9 to subdue a noncompliant suspect who resisted other types of force and refused to surrender. The Court noted the officers used an escalating array of control techniques, including pepper spray; none of which were effective.

Caselaw is clear that an officer cannot direct a police dog to continue biting a suspect who has fully surrendered and is under the

officer's control. But in this case, Hernandez did not actually surrender at any point during the encounter; rather, the officers had to physically drag him from his car after Murphy released his bite. The Court found that Officer Gilbert is entitled to qualified immunity.

Take Away

This case underscores the importance of bodycam video in the defense of what you do. Without BWC evidence, there would undoubtedly be discrepancies between the officers and suspect's description of events and ultimately on the determination of qualified immunity.

Stay Safe and Healthy!

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