[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13879

D.C. Docket No. 1:17-cv-23940-UU

BRIAN WHITE,

Plaintiff-Appellee,

versus

ANDREW MESA,
an employee of the City of Miami Police Department, in his capacity as an individual,
JOSE PENA,
an employee of the City of Miami Police Department, in his capacity as an individual,

Defendants-Appellants,

JOHN DOE,
an employee of the City of Miami Police Department, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

(June 2, 2020)

Before WILSON, MARCUS, and BUSH,* Circuit Judge.

PER CURIAM:

In this interlocutory appeal, the appellants, Officers Andrew Mesa and Jose Pena, challenge the district court's denial of their motion for summary judgment based on qualified immunity. Because we find that the appellants' challenge rests on factual disputes, we dismiss this appeal for want of appellate jurisdiction.

BACKGROUND

Before reaching the jurisdictional question, we must start with the facts. We have resolved all issues of material fact in favor of the appellee, Brian White, since we must "determine the legal question of whether the defendant[s] [are] entitled to qualified immunity under that version of the facts." *See Bashir v. Rockdale Cty.*, 445 F.3d 1323, 1327 (11th Cir. 2006).

This case arises from a high-speed car chase. In July 2015, a male called 911, reporting "a crime . . . going into effect at the Citibank." He told the operator

---

* Honorable John K. Bush, United States Circuit Judge for the Sixth Circuit, sitting by designation.

that he was "following behind a car . . . that's got the perpetrators."[1] The caller said that they had just stolen $4,000. He also said that there was a single perpetrator who was "white" and "driving in a Mercedes CL 300."

The 911 operator asked if the caller knew whether the perpetrator was armed; the caller said he "could not see if he was armed. He did not . . . pull a weapon out and I didn't see a weapon on him." Several minutes into the call, after the 911 operator confirmed that police were on their way, the operator asked how the perpetrator was able to steal the money. The caller eventually explained that the perpetrator "stole the money from [his] son" through a "fraud" that took place on two prior occasions and about which there was a case already pending.[2]

Meanwhile, City of Miami police officers spotted a car matching the caller's description. The officers engaged their lights and sirens; a high-speed chase ensued. They eventually caught up to the car at a dead-end street. The car stopped. The driver immediately opened his door and laid on the ground, face down and with his heads above his head.

While the driver was handcuffed and taken into custody, White—who was in the passenger seat—stayed in the car with his hands up, staying still. White

[1] At different points in the call, the caller refers to both a single perpetrator ("he" and "him") and multiple perpetrators ("they" and "them"). The parties dispute whether the appellants reasonably expected to encounter more than one person in the car.

[2] It is unclear when, if at all, the officers learned this fact. In their briefs, the appellants refer to dispatching information they received, but neither party provides evidence about what the police officers were told.

claims that officers told him to stay in the car. Pena was the first officer to approach the car, but multiple officers soon joined him. Mesa pulled White out of the car by his arms and threw him to the ground. According to White, the cadre of officers then proceeded to kick, choke, and punch him. Mesa (at minimum) punched him five times and "knee[d]" him. Pena (at minimum) punched White seven or eight times. White also claims that the officers lifted him from the ground and slammed him back down again. After the assault, the officers handcuffed White and took him into custody. White came away from the encounter with substantial facial injuries.

Surveillance video captured both the driver's and White's arrests. The entire incident, from when the car stopped to when White was handcuffed, took approximately 97 seconds. Unfortunately, the surveillance camera was a considerable distance away from the events that took place, making it difficult to decipher specific actions.

White sued Mesa and Pena in the Southern District of Florida. In addition to a 42 U.S.C. § 1983 claim, White sued for battery under Florida law. The defendants sought summary judgment. They argued that they were entitled to qualified immunity because neither officer used excessive force under the circumstances. And, for similar reasons, they argued that their actions did not rise to bad faith or maliciousness and therefore did not fall outside of the protection

afforded to them under Florida law. The district court denied summary judgment, holding that the defendants failed to show that there were no genuine issues of material fact.

DISCUSSION

I.

"[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319–20 (1995). We have thus reminded parties that our jurisdiction in such cases "depends on the type of issue involved." *Koch v. Rugg*, 221 F.3d 1283, 1295 (11th Cir. 2000). Where there are "legal issues underlying the qualified immunity determination," we have jurisdiction over the appeal. *Id.* at 1295–96 (internal quotation mark omitted).

However, we may not exercise jurisdiction when the "issue presented in the qualified immunity context challenges only sufficiency of the evidence relative to a predicate factual element of the underlying constitutional tort." *Id.* at 1296. (internal quotation mark omitted). We lack jurisdiction in that circumstance because it "involve[s] the determination of 'facts a party may, or may not, be able to prove at trial'" and therefore cannot be an "immediately appealable final decision[]." *Id.* (quoting *Johnson*, 515 U.S. at 313).

Here, after properly resolving the disputed facts in White's favor, the district court carefully explained how the disputed facts and evidence could lead a jury to reasonably conclude that the officers violated White's Fourth Amendment rights. But the appellants argue that the record supports qualified immunity under the circumstances they faced and that there are thus no disputed issues of material fact. Specifically, they claim that after White was removed from the car, he struggled with officers and even got up from the ground and took several steps to evade the officers around him. Given that they supposedly suspected both White and the driver of armed robbery, the appellants contend that they used only necessary force to subdue White. The defendants also argue that White's claim—that he did not get up off the ground but rather was picked up from the ground—is undermined by video evidence.

These are not legal challenges; they are challenges to the district court's determination of which facts were adequately supported by the evidence. *See id.*; *cf. Moniz v. City of Fort Lauderdale*, 145 F.3d 1278, 1281 (11th Cir. 1998) (holding that when "the appeal is based on an assertion that, even on the plaintiff's version of the facts, the defendants are entitled to qualified immunity as a matter of law, we have jurisdiction to review the denial of summary judgment interlocutorily"). Since the appellants' arguments depend on a determination of

facts that they may, or may not, be able to prove at trial, we lack jurisdiction. *See Koch*, 221 F.3d at 1296.

Still, the appellants insist that our precedent entitles them to challenge the district court's factual determinations because the surveillance video obviously contradicts those factual determinations. *See Shaw v. City of Selma*, 884 F.3d 1093, 1098 (11th Cir. 2018) ("But in cases where a video in evidence 'obviously contradicts the nonmovant's version of the facts, we accept the video's depiction instead of the nonmovant's account,' and 'view the facts in the light depicted by the videotape.'" (alterations adopted) (citation omitted)). We need not consider this argument, because the surveillance video here does not *obviously* contradict White's version of the facts. [3]

II.

We turn next to the appellants' challenge to the district court's denial of summary judgment on the Florida state law claim. "[W]hile state law governs the applicability of immunity to state law claims, federal law determines the appealability of the district court's order denying summary judgment." *Sheth v. Webster*, 145 F.3d 1231, 1236 (11th Cir. 1998) (per curiam) (internal quotation mark omitted); *see also Griesel v. Hamlin*, 963 F.2d 338, 340 (11th Cir. 1992) (per

[3] We express no opinion as to whether *Shaw* would allow a party, who claims video evidence obviously contradicts the district court's factual determinations, to challenge those factual determinations on interlocutory appeal.

curiam) (stating a substantially similar rule from a Second Circuit case and adopting that case's subsequent analysis).

"[A]n order denying state official or sovereign immunity is immediately appealable if state law defines the immunity at issue to provide immunity from suit rather than just a defense to liability." *Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1367 (11th Cir. 2016); *see also Griesel*, 963 F.2d at 341 (holding that, "[b]ecause sovereign immunity under Georgia law is an immunity from suit," we had jurisdiction to review a "district court's order denying summary judgment based on sovereign immunity under Georgia law"). Under Florida law,

> [n]o officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or *named as a party defendant* in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Fla. Stat. § 768.28(9)(a) (emphasis added). This statute plainly provides immunity from suit. *See Keck v. Eminisor*, 104 So. 3d 359, 366 (Fla. 2012) (per curiam) ("[I]f a defendant who is entitled to the immunity granted in section 768.28(9)(a) is erroneously named as a party defendant and is required to stand trial, that individual has effectively lost the right bestowed by statute to be protected from even being named as a defendant."); *cf. Griesel*, 963 F.2d at 340 (concluding "that sovereign immunity under Georgia law is an immunity from suit" based on this

language: "*a suit cannot be maintained* against the State without its consent"). Therefore, we presumably would have jurisdiction over this claim. *Griesel*, 963 F.2d at 341.

Except we run into the same problem that robbed us of jurisdiction over the federal claim: the appellants merely seek to challenge the district court's factual conclusions. So, for the same reasons we dismiss the federal claim, we must also dismiss the state law claim.[4] *See supra* Section I. The district court carefully considered the factual disputes in this case and determined that those disputes precluded the granting of qualified immunity and summary judgment. Rather than challenging the district's court application of the law to the facts, the appellants only challenge the district court's identification of genuinely disputed issues of material fact.

* * *

For those reasons, we lack jurisdiction to consider this interlocutory appeal, and its dismissal is warranted. We remand the case for further proceedings in the district court.

DISMISSED.

[4] We also note that, even under Florida law, the appeal of the state law claim would be dismissed. *See Keck*, 104 So. 3d at 366 (holding that interlocutory review of orders denying immunity under § 768.28(9)(a) would be permitted "where the issue turns on a question of law").