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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CARL ANDERSEN, JR.,

Plaintiff - Appellee,

v.

VITO DELCORE, in his individual and official capacity,

Defendant - Appellant,

and

THE CITY OF COLORADO SPRINGS; TELLER COUNTY COLORADO; TODD ECKERT, in his individual and official capacity; CARLOS SANDOVAL, in his official and individual capacity; ANTHONY MATARAZZO, in his individual and official capacity,

Defendants.

No. 22-1130

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CV-02032-RBJ)

Gordon L. Vaughan of Vaughan & DeMuro, Colorado Springs, Colorado, for Defendant-Appellant.

Reid Allison (David A. Lane with him on the brief), of Killmer, Lane & Newman, LLP Denver, Colorado, for Plaintiff-Appellee.

Before **HARTZ**, **EBEL**, and **MATHESON**, Circuit Judges.

EBEL, Circuit Judge.

This case is a civil proceeding under 42 U.S.C. § 1983 in which the plaintiff, Carl Andersen, alleges that defendant Officer Vito DelCore used excessive force against him while securing a cell phone that Officer DelCore believed would contain incriminating evidence that Mr. Andersen or his fiancée had abused their child. The district court denied Officer DelCore's motion for summary judgment on qualified immunity grounds, ruling that Officer DelCore had used excessive force and that there was clearly established law that would have alerted him that the force he used was unreasonable and unconstitutional. Officer DelCore now appeals the denial of summary judgment, arguing that he is entitled to qualified immunity. Exercising jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine, we REVERSE. On the record before us, Officer DelCore used reasonable force under the circumstances, so no Fourth Amendment violation occurred. The district court therefore erred in denying Officer DelCore qualified immunity. We REMAND with instructions for the district court to enter judgment in favor of Officer DelCore.

I. BACKGROUND

A. Appellate Jurisdiction

The procedural posture of this case imposes jurisdictional limits on the scope of our review. Officer DelCore appeals the district court's denial of his motion for summary judgment based on qualified immunity. Under the collateral order doctrine,

we may exercise jurisdiction over an interlocutory appeal from the denial of qualified immunity at the summary judgment stage if the appeal "presents abstract issues of law." Est. of Ceballos v. Husk, 919 F.3d 1204, 1213 (10th Cir. 2019); see Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). Officer DelCore argues that, accepting the district court's factual findings as true, he did not use excessive force against Mr. Andersen. The reasonableness of an officer's use of force is a legal issue that we may resolve on an interlocutory appeal. McWilliams v. DiNapoli, 40 F.4th 1118, 1122, 1124 (10th Cir. 2022).

In this posture, we "defer to the district court's factual determinations and ask only whether those determinations would entail the violation of a clearly established right." Id. at 1122; see also Cox v. Glanz, 800 F.3d 1231, 1242 (10th Cir. 2015) ("The district court's factual findings and reasonable assumptions comprise 'the universe of facts upon which we base our legal review of whether defendants are entitled to qualified immunity.'" (quoting Fogarty v. Gallegos, 523 F.3d 1147, 1154 (10th Cir. 2008))).

In sum, we have jurisdiction to address Officer DelCore's interlocutory appeal because he challenges only the district court's legal conclusion that he used excessive force against Mr. Andersen, based upon the facts found by the district court. Cognizant of our limited jurisdiction, we turn to the district court's factual determinations.

B. Factual Background

This appeal arises from a law enforcement investigation into injuries suffered by Mr. Andersen's nineteen-month-old daughter. As the district court explained:

> On April 17, 2019 Mr. Andersen's pregnant fiancée, Carissa Hiteshew, was pulling her car out of the driveway. Their daughter, who was then nineteen months old, ran after her and was accidentally struck by the moving car. A medical helicopter transported their daughter to Memorial Central Hospital in Colorado Springs while Mr. Andersen and the rest of the family drove to the hospital. At Memorial Hospital their daughter was treated in the pediatric ICU for her serious injuries while members of the family waited in the hospital room and in the hallway. When forensic nurses questioned the family about the child's injuries, the Andersen family was not forthcoming. Suspecting child abuse, the nurses called the [Colorado Springs Police Department ("CSPD")].
>
> CSPD officers found the family similarly uncooperative when they arrived. One family member, not plaintiff or his fiancée, eventually told Officer Eckert a vague story about the child being hit by a car in Woodland Park, an area in the [Teller County Sheriff's Office's ("TCSO")] jurisdiction. The CSPD officers called the TCSO, who dispatched Detective Matarazzo. When he arrived, he too found plaintiff and Ms. Hiteshew unwilling to answer questions.

Appellant's Appendix Vol. 2 at 296.

By the time Detective Matarazzo arrived, he had learned that Ms. Hiteshaw had been texting a friend about the child's injuries and Detective Matarazzo asked her about those messages. She denied sending any such messages, insisting "that she had talked to nobody beyond calling out of work." Id. at 297. Detective Matarazzo insisted on obtaining her cell phone to prevent her from deleting any text messages. Mr. Andersen, however, took the phone from Ms. Hiteshaw and refused to hand it over to the detective.

To get the phone from Mr. Andersen, Detective Matarazzo went into the hall and summoned three CSPD officers: Vito DelCore, Todd Eckert, and Carlos Sandoval. Detective Matarazzo told them that he needed the phone to prevent the possible deletion of data. The three officers entered the hospital room.[1]

> Immediately, Officer DelCore attempted to snatch the cell phone from plaintiff's back pocket. ECF No. 68-14 (Eckert BWC) at 0:24. Plaintiff jumped back and said, "excuse me, you do not grab anything from my pockets." Id. Officer DelCore responded with a threat: "you are going to hit the ground real hard." Id. at 0:29. Officer Eckert intervened to suggest they discuss in the hallway. Id. at 0:32. Plaintiff refused, insisting that he would not leave his daughter's side. Plaintiff and Officer Eckert engaged in a brief back-and-forth in which Officer Eckert asserted a right to take the cell phone pursuant to "the investigation" and plaintiff calmly but firmly disagreed. Officer DelCore, now standing off to the side, cut this exchange short when he pulled out his taser, causing plaintiff to ask, "you are going to tase me because I'm not going to give you my wife's cell phone?" Id. at 0:48.
>
> Officer Eckert tried again, asking plaintiff to either give him the phone "and we're done" or go to the hallway to "talk about it." Id. at 1:01. Plaintiff again insisted that the officers had no right to take the cell phone and informed them that his father, who was standing right next to him, was on the phone with the Teller County Sherriff to resolve the situation. Id. Everyone was silent for about thirty seconds while plaintiff's father spoke with the Sheriff. Officer Eckert then said, "we're just trying to keep this simple," to which plaintiff calmly responded, "so am I, and you don't need to take the cell phone." Id. at 1:47. Officer DelCore then interjected with another threat: "you will be charged with obstruction." Id. at 1:51. Plaintiff objected, saying "I'm not going to be charged with anything because you don't have a right to take her cell phone." Id. The officers disagreed, and plaintiff asked them to "show [him] where you have the right to take her personal property." Id. at 2:03.
>
> Plaintiff had remained calm yet firm throughout this conversation. He had not raised his voice or made any verbal or physical threats. Officer DelCore nonetheless decided to circle behind plaintiff, explaining that he

[1] All three officers had activated their body-worn cameras ("BWC") and recorded the entire encounter between Officer DelCore and Mr. Andersen. Their BWC footage was in the record below and was considered by the district court.

> "[didn't] want anyone behind [plaintiff] getting hurt." Id. at 2:08. Plaintiff said "excuse me," retreated half a step, and turned to talk with Officer DelCore. Id. Officer DelCore immediately grabbed plaintiff's arm and tried to twist it behind his back, saying "I will tase you" and then ordering "get out of the room right now." Id. at 2:15. At this point, Officer Eckert had grabbed plaintiff's other arm and took the cell phone out of his pocket. Id. Plaintiff said, "are you serious" and then officer DelCore tased him in the back. Id. at 2:20. Plaintiff struggled as all four officers, led by Officers Eckert and DelCore, forced him to the ground where Officer DelCore then tased him again. Id. at 2:35. The officers handcuffed plaintiff and led him out of the room.

Id. at 297–98. Mr. Andersen was subsequently charged with obstruction and resisting arrest, but both charges were dropped.

C. Procedural Background

Mr. Andersen sued the three officers, Detective Matarazzo, and the municipalities of Colorado Springs and Teller County under 42 U.S.C. § 1983, asserting six claims: (1) unlawful seizure of his person, (2) unlawful search, (3) unlawful seizure of his property, (4) excessive force, (5) malicious prosecution, and (6) First Amendment retaliation. At summary judgment, the district court dismissed all claims except for a claim for excessive force against Officer DelCore alone. The court concluded that the other officers did not use excessive force, reasoning that Mr. Andersen was resisting arrest at the time they grabbed him and "appeared to be overpowering" Officer DelCore. Appellant's Appendix Vol. 2 at 305. Weighing the Graham factors,[2] the court concluded that while Mr. Andersen had committed at best a misdemeanor, "he potentially posed a threat to officer safety and was actively

[2] Graham v. Connor, 490 U.S. 386, 396 (1989).

resisting Officer DelCore's attempts to control him." Id. Therefore, the court concluded that it was reasonable for the officers to bring Mr. Andersen to the ground and handcuff him.[3]

However, the district court drew a distinction with Officer DelCore and concluded that he used excessive force against Mr. Andersen. The court assessed the Graham factors from the moment Officer DelCore first grabbed Mr. Andersen to subdue him and seize the phone, concluding that they weighed against the officer's initial use of force. The district court criticized Officer DelCore for his conduct before using force, noting that he "created the need to use force by escalating the interaction at every turn" by interrupting "civil conversation[s]" with threats of violence and arrest. Appellant's Appendix Vol. 2 at 306. The court concluded that Officer DelCore "encircled plaintiff, taser drawn, in order to initiate a physical alteration," and did so without giving Mr. Andersen any chance to comply before grabbing him. Id. at 307. The district court then concluded that Mr. Andersen's right to be free from excessive force was clearly established "even though he has cited no identical case." Id. Instead, the court ruled that the right was clearly established by

[3] Importantly, in this interlocutory appeal, Mr. Andersen does not challenge the district court's factual findings that, as the encounter evolved, Mr. Andersen did pose a risk of overpowering Officer DelCore at the moment the other officers used force to subdue him, which occurred immediately before the initial tase. Nor does he challenge the specific factual finding that, immediately before Officer DelCore tased Mr. Anderson for a second time while he was being forced to the ground, Mr. Andersen was struggling against the officers—e.g., he had not yet submitted to arrest. The other officers did not tase Mr. Andersen, so the district court did not discuss the tasing when discussing whether they used excessive force.

Graham itself. According to the district court, "[e]ven after Officer DelCore's actions had needlessly escalated the situation, the Graham factors still counseled against his application of force." Id. So, the district court denied qualified immunity to Officer DelCore.

II. DISCUSSION

Officer DelCore argues on appeal that on this summary judgment record he did not use excessive force against Mr. Andersen and he is entitled to qualified immunity. We agree. We conclude on the record before us that Officer DelCore used reasonable force under the circumstances when he grabbed Mr. Andersen's arm as part of the officers' efforts to secure Ms. Hiteshaw's cell phone. We also conclude that Officer DelCore later used reasonable force when he tased Mr. Andersen twice. Even though the officers' initial objective had been accomplished when Officer Eckert seized the cell phone from Mr. Andersen's back pocket moments after Officer DelCore grabbed his arm, Mr. Andersen strenuously resisted arrest and posed a threat to officer safety, as found by the district court. Under these circumstances, Officer DelCore reasonably thereafter used his taser to subdue Mr. Andersen and to obtain peace and control over the situation. Therefore, Officer DelCore did not violate Mr. Andersen's Fourth Amendment right to be free from excessive force when he arrested Mr. Andersen.[4]

[4] The lawfulness of the arrest is not before us in this interlocutory appeal because Officer DelCore appeals only the district court's ruling on Mr. Andersen's claim for excessive force. Below, Mr. Andersen also asserted a claim under § 1983 for false

A. Qualified Immunity

We review de novo the district court's denial of summary judgment to Officer DelCore on qualified immunity grounds. Medina v. Cram, 252 F.3d 1124, 1128 (10th Cir. 2001). "The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)). Where, as here, "a § 1983 defendant asserts qualified immunity, this affirmative defense 'creates a presumption that [the defendant is] immune from suit.'" Est. of Smart by Smart v. City of Wichita, 951 F.3d 1161, 1168 (10th Cir. 2020) (quoting Perea v. Baca, 817 F.3d 1198, 1202 (10th Cir. 2016)) (alteration in original). So, "we review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions." Est. of Ceballos, 919 F.3d at 1212 (quoting Medina, 252 F.3d at 1128). To overcome the presumption of immunity, the plaintiff bears the burden to establish that (1) the defendant violated

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arrest, arguing that the officers lacked a basis to arrest or seize him for obstructing a police officer. But the district court granted summary judgment for the officers on this claim, concluding that any Fourth Amendment violation was not clearly established. Excessive force claims are distinct from false arrest claims. See Cortez v. McCauley, 478 F.3d 1108, 1127 (10th Cir. 2007) (en banc). Unlike false arrest claims, which require proof that the officers lacked probable cause to arrest the plaintiff, an excessive force claim requires the plaintiff to "prove that the officers used greater force than would have been reasonably necessary to effect a lawful arrest." Id. Thus, on the issue before us, we proceed under the assumption that Officer DelCore's arrest of Mr. Andersen was lawful and ask only whether he used excessive force in conducting the arrest.

his or her constitutional or statutory rights, and (2) "that the right was clearly established at the time of the defendant's conduct." Arnold v. City of Olathe, 35 F.4th 778, 788 (10th Cir. 2022).

We have discretion "'to decide the order in which to engage the[] two prongs' of the qualified immunity standard." Est. of Taylor v. Salt Lake City, 16 F.4th 744, 758 (10th Cir. 2021) (quoting Tolan v. Cotton, 572 U.S. 650, 656 (2014)), cert. denied, 143 S. Ct. 83 (2022). If we conclude that the plaintiff has not met his burden as to either part of the two-prong inquiry, we must grant qualified immunity to the defendant. Medina, 252 F.3d at 1128.

B. The Graham factors support Officer DelCore's use of force.

Excessive force claims arising out of a law enforcement investigation implicate the Fourth Amendment and its protections against unreasonable seizures. Graham v. Connor, 490 U.S. 386, 394 (1989). As with all seizures, "[t]o establish a constitutional violation, the plaintiff must demonstrate the force used was objectively unreasonable." Est. of Taylor, 16 F.4th at 759 (quoting Est. of Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255, 1259 (10th Cir. 2008)). Under this standard, we "carefully balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Cavanaugh v. Woods Cross City, 625 F.3d 661, 664 (10th Cir. 2010) (quoting Graham, 490 U.S. at 396) (cleaned up).

We assess the reasonableness of an officer's use of force by applying the three nonexclusive factors first set forth by the Supreme Court in Graham v. Connor: "[1]

the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396; Est. of Valverde, 967 F.3d at 1060. Our "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396–97. So, we assess the reasonableness of "a particular use of force" from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. at 396; see also Tenorio v. Pitzer, 802 F.3d 1160, 1164 (10th Cir. 2015) ("The belief need not be correct—in retrospect the force may seem unnecessary—as long as it is reasonable."). "Our review . . . looks at the facts and circumstances as they existed at the moment the force was used, while also taking into consideration the events leading up to that moment." Emmett v. Armstrong, 973 F.3d 1127, 1135 (10th Cir. 2020).

In applying the Graham factors, we must be conscious that in an evolving situation, different degrees of force may be appropriate at different points during an encounter between an officer and an individual. Here, we divide the encounter between Officer DelCore and Mr. Andersen into two phases: (1) Officer DelCore's initial attempt to arrest Mr. Andersen, which was not immediately successful, and (2) Officer DelCore's subsequent use of his taser to subdue Mr. Andersen once he began resisting arrest. We therefore apply the Graham factors twice—first to determine

whether Officer DelCore used reasonable force when he grabbed Mr. Andersen's wrist and twisted his arm behind his back, and second to determine whether Officer DelCore's decision to fire his taser two times during the ensuing course of the arrest was reasonable in light of Mr. Andersen's subsequent resistance.

1. The initial attempt to arrest Mr. Andersen

Applying the Graham factors to Officer DelCore's initial attempt to arrest Mr. Andersen, we conclude that he used reasonable force under the circumstances.

a. Severity of the crime

The first Graham factor—the severity of the crime at issue—weighs in Officer DelCore's favor. In their briefs, both parties contend that the misdemeanor crime of obstructing a peace officer is the relevant crime for this prong of the analysis, see Colo. Rev. Stat. § 18-8-104(1)(a), (4), but we cannot ignore the fact that the officers were investigating the far more serious crime of child abuse. Child abuse can be a felony under Colorado law. See Colo. Rev. Stat. § 18-6-401(1)(a), (7)(a). Under our precedent, "the first Graham factor weighs against the plaintiff when the crime at issue is a felony, irrespective of whether that felony is violent or nonviolent." Vette v. K-9 Unit Deputy Sanders, 989 F.3d 1154, 1170 (10th Cir. 2021).

However, even if we assume for the sake of argument that the officers suspected Mr. Andersen of only misdemeanor crimes, the first Graham factor nevertheless supports Officer DelCore's use of force. It is true that misdemeanor crimes ordinarily "weigh against the use of significant force." Wilkins v. City of Tulsa, 33 F.4th 1265, 1274 (10th Cir. 2022) (quoting Lee v. Tucker, 904 F.3d 1145,

1149 (10th Cir. 2018)). But this factor requires us to consider more than just whether the crime was a misdemeanor or a felony. It also requires a broader assessment of the reasons why the officers initiated an encounter. As part of that inquiry, we may properly consider whether exigent circumstances supported the need for prompt action by law enforcement. See Pauly v. White, 874 F.3d 1197, 1215 (10th Cir. 2017) (first Graham factor weighed against officers' use of force when crimes at issue were minor, officers lacked evidence or probable cause to make an arrest, and officers did not believe exigent circumstances existed), cert. denied, 138 S. Ct. 2650 (2018).[5]

Here, exigent circumstances existed because Mr. Andersen refused to hand over a cell phone that Detective Matarazzo had reason to believe contained probative evidence relating to an ongoing investigation into child abuse. And based on Mr. Andersen and Ms. Hiteshaw's uncooperative behavior in the hospital room, Detective Matarazzo reasonably could have believed that Mr. Andersen would delete any relevant evidence of child abuse from the phone if the officers allowed him to keep it.

[5] Other circuits also acknowledge that the existence of exigent circumstances is relevant to determining the reasonableness of an officer's use of force. See, e.g., Berube v. Conley, 506 F.3d 79, 83 (1st Cir. 2007) ("[T]he Supreme Court's standard of reasonableness is comparatively generous to the police in cases where potential danger, emergency conditions, or other exigent circumstances are present." (quoting Roy v. Inhabitants of City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994))); Deorle v. Rutherford, 272 F.3d 1272, 1280 (9th Cir. 2001) (considering "any other exigent circumstances that existed at the time of the arrest," as part of the Graham analysis (quoting Headwaters Forest Def. v. Cnty. of Humboldt, 240 F.3d 1185, 1198–99 (9th Cir. 2000), vacated and remanded on other grounds sub nom. Cnty of Humbolt v. Headwaters Forest Def., 534 U.S. 801 (2001))).

So, a reasonable officer could have believed that prompt investigation and action was required to counteract Mr. Andersen's obstruction and to secure the cell phone while a search warrant was obtained. We therefore conclude that, even if Mr. Andersen was suspected of only misdemeanor crimes, this factor weighs in Officer DelCore's favor given the concerns that Mr. Andersen would delete evidence relevant to an investigation into child abuse.

b. Threat to the officers or others

The second Graham factor applied to Officer DelCore's initial attempt to arrest Mr. Anderson—"whether the suspect pose[d] an immediate threat to the safety of the officers or others"—is neutral. Graham, 490 U.S. at 396. This factor requires us to "look at 'whether the officers [or others] were in danger at the precise moment that they used force."[6] Emmett, 973 F.3d at 1136 (quoting Pauly, 874 F.3d at 1219)

[6] In analyzing whether the second Graham factor supports the use of force, courts may consider whether an officer's reckless or deliberate conduct immediately connected with the use of force unreasonably created the need to use force. Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995); McWilliams, 40 F.4th at 1126. We reject Officer DelCore's argument that the Supreme Court's recent decision in City of Tahlequah v. Bond, 142 S. Ct. 9 (2021), undermined this well-settled aspect of our Fourth Amendment jurisprudence. See Est. of Taylor, 16 F.4th at 761 n.9. This inquiry remains appropriate when an officer incites an individual into posing a threat that would ordinarily justify the use of force. See McWilliams, 40 F.4th at 1126 (officer who intentionally or recklessly incited plaintiff could not use plaintiff's reaction to justify subsequent use of force); Pauly, 874 F.3d at 1220–21 (finding an officer's use of force unreasonable because "the threat made by the [plaintiffs], which would normally justify the use of force, was precipitated by the officer's own actions"). But this analysis is not appropriate in this case. Crediting the district court's factual determinations in full, Officer DelCore did not incite Mr. Andersen into posing a threat before he used force. To the contrary, Officer DelCore's efforts to advise Mr. Anderson of the potential consequences of his continued refusal to turn

(alteration in Emmett). Here, the challenged use of force is Officer DelCore's initial attempts to arrest Mr. Andersen, where he grabbed and twisted Mr. Andersen's arm.

When Officer DelCore first grabbed Mr. Andersen's wrist, he was unarmed, outnumbered by the officers in the hospital suite, and had only verbally objected to the officers' request that he surrender the cell phone. At that moment, a reasonable officer would have had no reason to believe that Mr. Andersen posed a threat. Even so, at that moment, the amount of force that Officer DelCore employed against Mr. Andersen was relatively small and consistent with his right to take reasonable measures to effect an arrest. See Cortez v. McCauley, 478 F.3d 1108, 1131 (10th Cir. 2007) (en banc) ("We have little difficulty concluding that a small amount of force, like grabbing [the plaintiff] and placing him in the patrol car, is permissible in effecting an arrest under the Fourth Amendment."). Thus, this factor appears to be neutral.

c. Active resistance or evasion of threat

We turn next to the third Graham factor, where we evaluate whether the suspect attempted to flee or actively resisted arrest. Graham, 490 U.S. at 396. "Like the second factor, when evaluating the third factor we consider whether the plaintiff was fleeing or actively resisting at the 'precise moment' the officer employed the

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over his fiancée's cell phone was a reasonable effort to persuade Mr. Anderson to comply with the officer's request.

challenged use[] of force." Vette, 989 F.3d at 1171 (quoting Emmett, 973 F.3d at 1136).

When Officer DelCore first grabbed Mr. Andersen's arm, he was not physically resisting or fleeing. But resistance need not be physical. We have found this third factor to weigh in favor of "some degree of physical coercion or threat," Graham, 490 U.S. at 396, when an individual refuses to obey an officer's lawful orders, see Mecham v. Frazier, 500 F.3d 1200, 1204–05 (10th Cir. 2007) (officers' use of pepper spray was not unreasonable when plaintiff refused to obey repeated officer instructions to exit her car during a fifty-minute standoff). Officers must be able to employ force to enforce their lawful orders. Otherwise, an officer's power to give lawful orders "would be hollow." Helvie v. Jenkins, 66 F.4th 1227, 1238 (10th Cir. 2023).

Officer DelCore had a lawful basis to request that Mr. Andersen hand over the cell phone. When officers "have probable cause to believe that a container holds . . . evidence of a crime," they may seize it without a warrant if exigent circumstances exist.[7] United States v. Place, 462 U.S. 696, 701 (1983). Those exigent circumstances include the need to preserve the evidence of a crime. Roaden v. Kentucky, 413 U.S. 496, 505 (1973) ("Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without[t] prior judicial evaluation."). For the

[7] We assume, without deciding, that Mr. Andersen had a reasonable expectation of privacy in Ms. Hiteshaw's cell phone even though it did not belong to him.

exigent circumstances exception to apply, the officers must have a particularized basis to conclude that seizure is necessary to prevent the immediate destruction of evidence. Cf. Crocker v. Beatty, 886 F.3d 1132, 1136–37 (11th Cir. 2018) (declining to apply exigent circumstances exception to permit seizure of an iPhone from a bystander when officer had no basis to conclude that the bystander intended to delete photos and videos that he had taken).

We believe that the rule from Place allows the warrantless seizure of a cell phone to prevent the deletion of incriminating evidence that the officer had probable cause to believe existed on the cell phone. That is consistent with the Supreme Court's decision in Riley v. California, 573 U.S. 373 (2014). In Riley, the Court required officers to obtain a warrant before searching a cell phone seized incident to arrest. Rejecting the argument that warrantless cell-phone searches were sometimes necessary to review evidence that might be deleted, the Court noted that seizing and immobilizing a cell phone would just as effectively prevent suspects from deleting any "incriminating data." Id. at 388 ("[O]nce law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone."). Consistent with Riley, we believe that a warrantless seizure is permitted under Place when there is probable cause that the phone contains incriminating information and exigent circumstances exist.[8] Id. at

[8] We stress that we are addressing only a warrantless seizure of a cell phone. Because this case did not implicate a warrantless search, we do not address the circumstances under which a warrantless search of a cell phone may or may not be

393. So long as an officer has probable cause that a cell phone contains evidence of a crime, he may seize the phone without a warrant if a reasonable officer would conclude that the seizure is necessary to prevent the destruction of evidence.

That is what the officers sought to do here. They had probable cause to believe Ms. Hiteshaw's cell phone contained evidence relevant to their investigation into child abuse, based on the following facts:

- Mr. Andersen and Ms. Hiteshaw's daughter had suffered severe injuries,
- The family was not forthcoming about the circumstances of the accident,
- The forensic nurses at the NICU suspected that child abuse was at play,
- Detective Matarazzo had learned that Ms. Hiteshaw had sent text messages about the accident but she denied sending any messages, and
- Mr. Andersen took the phone when Detective Matarazzo asked for it and Mr. Andersen refused to turn it over.

Taken together, these facts would have given a reasonable officer probable cause to believe that the cell phone contained relevant evidence of child abuse that Mr. Andersen and Ms. Hiteshaw were eager to keep from the officers. Therefore, a reasonable officer could also have believed that they would have deleted that evidence from the cell phone if given the chance.

The officers consequently had a lawful basis to order Mr. Andersen to turn over the cell phone so they could secure it pending a search warrant. When Mr. Andersen refused to surrender custody of the cell phone, Officer DelCore was entitled to use an appropriately tailored amount of force to enforce compliance with the officers' lawful order. Under these circumstances, we conclude that this factor

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reasonable. See Riley, 573 U.S. at 401–02 (suggesting that a warrantless search of a cell phone may be permissible in certain, extreme, situations).

supports Officer DelCore's decision to initiate what at first was a relatively minor degree of force in order to take Mr. Andersen into custody.

* * *

In sum, we conclude that Officer DelCore used objectively reasonable force when he initiated arrest procedures by grabbing Mr. Anderson's wrist and twisting his arm behind his back. Considering the totality of the circumstances, Officer DelCore used a minor degree of force that was appropriately tailored to the circumstances. Even though Mr. Andersen did not pose a threat to the officers, he was suspected of a serious crime. And most importantly, Officer DelCore had a lawful basis to demand that Mr. Andersen turn over the cell phone to prevent the destruction of evidence and was entitled to use some force when he refused to comply. Therefore, no constitutional violation occurred at that point of the arrest.

2. The subsequent use of the taser to effectuate the attempted arrest

We now turn to Officer DelCore's decision to tase Mr. Andersen twice. We conclude that this use of force was also reasonable, but for somewhat different reasons. As before, we apply the Graham factors to the "facts and circumstances as they existed at the moment the force was used"; here, the two uses of the taser. Emmett, 973 F.3d at 1135. A new Graham analysis is appropriate because the facts and circumstances had changed in two key respects. First, Mr. Andersen no longer had control over Ms. Hiteshaw's cell phone. The district court found that moments after Officer DelCore grabbed Mr. Andersen's arm, Officer Eckert took the phone

from Mr. Andersen's back pocket.[9] In other words, just a few seconds after Officer DelCore first applied force, the officers had accomplished their primary objective. Any subsequent use of force could not have been justified by a need to secure the cell phone.

Second, as the district court found when assessing the conduct of the other officers, Mr. Andersen began strenuously resisting arrest in the moments after Officer DelCore grabbed him and Officer Eckert took the phone:

> Plaintiff was physically struggling against Officer DelCore and appeared to be overpowering the officer. Even though plaintiff had not committed anything more than a misdemeanor, he potentially posed a threat to officer safety and was actively resisting Officer DelCore's attempts to control him.

Appellant's Appendix Vol. 2 at 305. It was at this moment that Officer DelCore first tased Mr. Andersen. Even though the electric shock brought Mr. Andersen to his knees, the district court concluded that he continued to struggle in the moments before Officer DelCore fired his taser for the second time. After the second use of the taser, the officers were able to handcuff Mr. Andersen and led him from the room.

We begin again with the first Graham factor—the severity of the crime. As before, this factor weighs in Officer DelCore's favor. Not only was Mr. Andersen

[9] We have carefully studied the factual record, including the body-worn camera footage from all three officers, and see no reason to disturb the district court's factual finding on this issue. Cf. Scott v. Harris, 550 U.S. 372, 380 (2007) (explaining that courts of appeal may disregard a district court's factual findings on a interlocutory appeal based on qualified immunity when the record "blatantly contradict[s]" those findings).

still suspected of the serious crime of child abuse and the misdemeanor offense of obstructing a peace officer, he was also resisting arrest, another misdemeanor. Even though any exigent circumstances motivated by the need to secure the cell phone had passed, we conclude this factor nevertheless still favors Officer DelCore.

The second Graham factor—whether Mr. Andersen posed an immediate threat to the officer or others—now weighs decisively in Officer DelCore's favor. As the district court found, Mr. Andersen appeared to be overpowering Officer DelCore and therefore posed a threat to Officer DelCore and his colleagues. Under these circumstances, the second Graham factor supports Officer DelCore's decision to use his taser to subdue Mr. Andersen. See Coronado v. Olsen, No. 20-4118, 2022 WL 152124, at *4 (10th Cir. Jan. 18, 2022) (unpublished) (finding second Graham factor weighed in favor of officers' use of a taser when suspect posed an immediate threat);[10] Meyers v. Baltimore Cnty., 713 F.3d 723, 733 (4th Cir. 2013) (same).

Finally, the third Graham factor—whether Mr. Andersen was resisting arrest—strongly supports officer DelCore's decision to fire his taser twice. Encounters between law enforcement and civilians can be "tense, uncertain, and rapidly evolving." Graham, 490 U.S. at 397. When an officer lawfully uses force but an individual resists that initial use of force, we think it obvious that the officer may use a greater degree of force than would have initially been appropriate to subdue the individual, obtain peace, and ensure that the officers had control over the situation.

[10] Though unpublished, this court's reasoning in Coronado is persuasive. See 10th Cir. R. 32.1(A).

See Hinton v. City of Elwood, 997 F.2d 774, 781 (10th Cir. 1993) (officers who used taser to subdue suspect who began "kicking his feet, flailing his arms, and biting the officer" during the course of an arrest used reasonable force); Rudlaff v. Gillespie, 791 F.3d 638, 643 (6th Cir. 2015) ("When a person resists arrest—say, by swinging his arms in the officer's direction, balling up, and refusing to comply with verbal commands—the officers can use the amount of force necessary to ensure submission.").

It therefore follows that Officer DelCore was entitled to respond to Mr. Andersen's forceful resistance with reasonable measures to subdue him and reassert control over the situation, even though Officer Eckert already had possession of the cell phone. Consider the alternative. Had Officer DelCore released Mr. Andersen as soon as Officer Eckert had secured the phone, the officers would have been trapped in a small hospital room with a visibly upset and powerful Mr. Andersen. We need not ponder this hypothetical situation long to realize the risks the officers could have faced: The body-worn camera footage in the record reflects that as soon as Officer Eckert took the phone, Mr. Andersen tried to lunge at him, screaming "Give me the cell phone." Sandoval BWC at 2:15; Eckert BWC at 2:16. Had Officer DelCore and his colleagues released him at that moment, we think it clear that Officer Eckert would have faced a certain and immediate threat from Mr. Andersen as he tried to recover the cell phone. Therefore, the need to subdue Mr. Andersen and reassert control over the situation tilts the third Graham factor strongly in favor of Officer

DelCore's decision to fire his taser twice. So, we conclude that all three Graham factors support both uses of the taser to subdue Mr. Andersen.[11]

III. CONCLUSION

We conclude that Officer DelCore did not violate Mr. Andersen's Fourth Amendment right to be free from excessive force at any point in the encounter. Because no constitutional violation occurred, we need not reach the second prong of the qualified immunity inquiry. Officer DelCore is entitled to qualified immunity. We **REVERSE** the district court's order denying summary judgment and **REMAND** with instructions for the district court to enter judgment in favor of Officer DelCore.

[11] It may have been an unreasonable use of force had Officer DelCore tased Mr. Andersen without warning at the inception of the encounter, see Casey v. City of Fed. Heights, 509 F.3d 1278, 1285 (10th Cir. 2007) (officer used excessive force when she tased a nonviolent misdemeanant immediately after arriving on scene and without providing any warnings), or after Mr. Andersen had been subdued, see Perea, 817 F.3d at 1203. But Mr. Andersen was warned that he faced arrest if he did not comply with the officers' instructions, Officer DelCore first attempted to use a less-intrusive degree of force, and Mr. Andersen was not subdued until after the second use of the taser. Therefore, Officer DelCore's use of the taser was consistent with the limits imposed by our prior precedent.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

August 18, 2023

To Counsel of Record

RE: 22-1130, Andersen v. DelCore, et al
Dist/Ag docket: 1:20-CV-02032-RBJ

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

CMW/klp