

**FILED**

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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

LEIF A.H. WERNER,

Plaintiff - Appellee,

v.

CITY OF POULSBO, municipality and  
CITY OF POULSBO POLICE  
DEPARTMENT, department of  
municipality,

Defendants,

And

DARRELL MOORE,

Defendant - Appellant.

No. 12-35875

D.C. No. 3:11-cv-05608-BHS

MEMORANDUM\*

Appeal from the United States District Court  
for the Western District of Washington  
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted November 4, 2013  
Seattle, Washington

Before: SCHROEDER, PAEZ, and BERZON, Circuit Judges.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Officer Darrell Moore of the City of Poulsbo Police Department appeals the denial of qualified immunity in an action pursuant to 42 U.S.C. § 1983.

We review de novo a district court's order denying summary judgment on the ground of qualified immunity. *Rodis v. City & Cnty. of S.F.*, 558 F.3d 964, 968 (9th Cir. 2009). "[O]ur review is limited to the 'purely legal issue whether the facts alleged . . . support a claim of clearly established law.'" *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011) (citations omitted).

(1) We affirm the district court's denial of qualified immunity with respect to Officer Moore's application of a chokehold. Drawing all inferences in favor of Plaintiff Leif Werner, a reasonable jury could conclude that Officer Moore placed Werner in a chokehold *before* Werner engaged in any conduct justifying the use of force, and that, by grabbing Werner around the neck, Officer Moore made it difficult for Werner to breath. The district court properly relied for this purpose on Werner's sworn testimony that he was returning to his car, as directed, when Officer Moore grabbed Werner from behind and applied a chokehold around his neck.

It was clearly established at the time that such an unprovoked use of force was unlawful and unreasonable. Indeed, "[i]n assessing the state of the law at the time of [Werner]'s arrest, we need look no further than *Graham's* holding that

force is only justified when there is a need for force.” *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 (9th Cir. 2007) (citing *Graham v. Connor*, 490 U.S. 386 (1989)).

Werner’s admission that he resisted arrest does not change this result. As the district court noted, that Werner “*later* resisted arrest” does not preclude a finding that Officer Moore violated Werner’s constitutional rights “if and when Werner was returning to his vehicle as instructed by Moore, and Moore proceeded to put a chokehold on Werner and arrest him.” *Cf. Smith v. City of Hemet*, 394 F.3d 689, 696 (9th Cir. 2005) (“[E]xcessive force used *after* a defendant has been arrested may properly be the subject of a § 1983 action notwithstanding the defendant’s conviction on a charge of resisting an arrest that was itself lawfully conducted” (emphasis in original)).

(2) The district court’s order does not specifically address whether it was granting or denying qualified immunity with regard to the taser applications. As the order denies qualified immunity to Officer Moore generally, rather than in part, we shall construe it as denying immunity for the taser use as well. We reverse the denial of qualified immunity insofar as it pertains to the taser usage.

Adopting Werner’s version of the events, and drawing all inferences in his favor, a reasonable jury could conclude that the multiple taser applications

exceeded the amount of force justified under the circumstances, notwithstanding Werner's admission that he resisted arrest during the altercation. *See Mattos v. Agarano*, 661 F.3d 433, 445–46 (9th Cir. 2011) (en banc). At the time of the incident, however, the law governing taser usage for resisting arrest was not yet clearly defined. *See id.* at 448. Officer Moore is therefore entitled to qualified immunity under the second prong of *Saucier v. Katz*, 533 U.S. 194, 201 (2001), as to the taser usage.

(3) Werner seeks attorneys' fees pursuant to 42 U.S.C. § 1988 for this appeal. "A party may be awarded attorney fees as a prevailing party at an interlocutory stage of the proceeding if the party 'prevails on the merits as to one or more of his or her claims.'" *Marks v. Clarke*, 102 F.3d 1012, 1034 (9th Cir. 1996) (citation omitted). Since Werner has "won [no] more than the mere right to proceed to trial," *id.*, we deny his request for fees at this stage of the litigation.

Defendant shall bear the costs on appeal.

**AFFIRMED in part; REVERSED in part; and REMANDED.**

**United States Court of Appeals for the Ninth Circuit**

**Office of the Clerk**  
95 Seventh Street  
San Francisco, CA 94103

**Information Regarding Judgment and Post-Judgment Proceedings**

**Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

**Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

**Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**

**Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)**

**(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

**B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

#### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

#### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

#### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

#### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter in writing within 10 days to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**United States Court of Appeals for the Ninth Circuit**

**BILL OF COSTS**

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

\_\_\_\_\_ v. \_\_\_\_\_ 9th Cir. No. \_\_\_\_\_

The Clerk is requested to tax the following costs against: \_\_\_\_\_

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
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Excerpt of Record			\$	\$			\$	\$	
Opening Brief			\$	\$			\$	\$	
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Reply Brief			\$	\$			\$	\$	
Other**			\$	\$			\$	\$	
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\* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

*Continue to next page.*



I, \_\_\_\_\_, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature \_\_\_\_\_  
("s/" plus attorney's name if submitted electronically)

Date \_\_\_\_\_

Name of Counsel: \_\_\_\_\_

Attorney for: \_\_\_\_\_

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Costs are taxed in the amount of \$ \_\_\_\_\_

Clerk of Court

By: \_\_\_\_\_, Deputy Clerk