

Oral Argument for Ferguson v. McDonough by LDF Assistant Counsel Kevin E. Jason

Argued on April 14, 2021

Full audio: <https://www.courtlistener.com/audio/75888/joseph-ferguson-v-ryan-mcdonough/>

Transcript

As the panel was addressing earlier in *Gant*, this court did find that to appeal a denial of qualified immunity an appellant must refrain from contesting any fact that a reasonable jury could resolve against him. But here, a reasonable jury could find the following: that during his arrest, Mr. Ferguson was shoved and given contradictory instructions on where to place his hands. That Officer McDonough pushed and pulled Mr. Ferguson until his clothes came off and Mr. Ferguson was not physically resisting arrest.

He was not aggressive. He never indicated that he would try to flee.

A reasonable jury could also find that the facts surrounding his surrender left no doubt that he wasn't a threat when he was tased.

As you alluded to Judge St. Eve, he was standing motionless with his hands visible in the air. They were in plain view of the officer. His pants were at his knees. His shirt was on the ground. The waistband of his underwear was visible. This all occurred in broad daylight.

And a reasonable jury could conclude that Mr. Ferguson was not arguing at the time. And notably, a second officer was mere feet away, while all this was occurring. And, while Mr. Ferguson had his hands in the air, Officer McDonough took a step back, unholstered his weapon, aimed it at Mr. Ferguson's chest, and fired. Given all these facts, there is no jurisdiction to hear this appeal.

The appellant's argument is entirely premised on his own version of facts, despite the fact that the record not only does not utterly discredit the plaintiff's version, but it's actually consistent with it. He primarily relies on *Dockery v. Blackburn*, but that case is wholly distinguishable. There, the plaintiff said that he was not physically aggressive on tape. Meanwhile, video showed he took a number of actions. He pointed aggressively at officers. He punched, he kicked, he wildly flailed. He jumped up on his feet and there was a number of things that took place even after the taser was drawn on him that showed that the use of force ultimately was justified, and there the court took it as appropriate to reopen the record.

That is not the case here. And that makes this wholly distinguishable from other cases, like *Plumhoff and Scott v. Harris*, which the appellant is relying on.

Ultimately, this case should just be denied on the question of jurisdiction is given the limited question, or rather, the limited jurisdiction before the Court.

As you all know, it could only look at questions of law. It shouldn't be interjecting in creating new factual determinations, and also this video does not resolve all of the questions. Even though it captures the incident, it does not capture all the facts. For instance, the audio quality isn't pristine. You can't tell if

Mr. Ferguson...you can't tell what he was saying and he maintains that he wasn't arguing at a time he was tased.

The backs of both Officer and Mr. Ferguson were to the camera at the time where Mr. Ferguson's clothes were being removed and [...] rather Officer McDonough's moving him around forcefully. And in his officer report, Officer McDonough says that Mr. Ferguson provided tension to his arms, and notably, that's the extent to which he says that the struggle was occurring.

Of course, a video can't decide whether or not tension is being provided at a level, especially given that Mr. Ferguson is saying that Officer McDonough was the aggressor and the movant of all the force.

And also, it should be noted that even if Mr. Ferguson was providing tension to his arms, that's not active resistance.

Cyrus showed that for an individual is refraining from putting his hands behind his back, that is not a heightened form of resistance. In *Abbott*, the Court found that if a person is refusing to roll over, that's also not active resistance.

The Court has been clear and consistent in that manner, and in order to find jurisdiction, the Court will first have to find active resistance.

And just to move quickly to the surrender, because I do think that is a separate basis here. In fact, there are two others. First, the lower court noted, and the appellant doesn't seem to disagree... that the court has been clear that you can't use significant force on an individual who is not actively resisting arrest.

So even if this Court were to reach the merits that would be one basis to deny this appeal. And notably on the question of surrender. Even if an individual were actively resisting prior to surrender, which again was not occurring in this case, officers still may not use significant force at that point.

Strand v. Minchuk is instructive here. There, an individual actually punched, placed his hand on the throat of officer, and was in a full-blown fight. Even there, this court found that the operative question was, "what were the facts surrounding the surrender? Was there a reasonable basis to believe that this individual posed a threat?"

And there, the question was whether or not the officer re-calibrated, and the principle still applied, notwithstanding all of the violence that preceded the surrender. And there, the court denied qualified immunity. The Court has also held a similar principle in *Alicea v. Thomas* as well as *Miller v. Gonzalez* and has been consistent throughout.