

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANKIE DAVIS,

Plaintiff-Appellant,

v.

CITY OF LAS VEGAS, a political subdivision of the State of Nevada; LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a political subdivision of the State of Nevada; DAVID D. MILLER, individually and in his official capacity as a Las Vegas Metropolitan Police Officer; LEONARD MARSHALL, individually and in his official capacity as a Las Vegas Metropolitan Police Officer; EXBER, INC., a Nevada corporation, dba Las Vegas Club; ALFRED LIBBY, individually and in his official capacity as an employee of the Las Vegas Club; PATRICK LAPERA, individually and in his capacity as Director of Security for the Las Vegas Club; JOHN ORR, individually and in his capacity as an employee of the Las Vegas Club; RICHARD MABE, individually and in his capacity as an employee

No. 04-17284

D.C. No.
CV-02-00007-
JCM/PAL

OPINION

of the Las Vegas Club; SHANE
MUNDELL, individually and in his
capacity as an employee of the
Las Vegas Club,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted
October 19, 2006—San Francisco, California

Filed February 28, 2007

Before: Stephen Reinhardt, John T. Noonan, and
Sidney R. Thomas, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

Barry Levinson, Las Vegas, Nevada, for the plaintiff-appellant.

Lyssa M. Simonelli & Robert McPeak, Las Vegas, Nevada, for defendant-appellee David Miller.

OPINION

REINHARDT, Circuit Judge:

Once again we confront the question whether a police officer's use of force during the arrest of an unarmed citizen was sufficiently excessive to violate the citizen's clearly-established constitutional rights. Officer David Miller of the Las Vegas Metropolitan Police Department responded to a call from the Las Vegas Club Hotel & Casino informing him

that security personnel had encountered Frankie Davis reading a magazine in an area of the Casino not open to the public. After Davis, who had been handcuffed by Casino employees and remained handcuffed throughout his encounter with Officer Miller, refused to consent to being searched by the officer, Miller slammed him head-first into a wall several times, pinned him against the floor, and punched him in the face. At some point during this encounter, Miller fractured Davis's neck. Davis was unarmed at all times.¹

Davis filed suit against Officer Miller and other defendants under 42 U.S.C. § 1983, alleging that Miller used excessive force in violation of the Fourth Amendment in effecting his arrest. He also brought a claim against Miller under Nevada's battery statute. The district court granted Miller's motion for summary judgment as to both claims on the basis of qualified immunity and Davis appealed. We reverse the district court's grant of summary judgment as to both claims and remand for a trial on the merits.

I. BACKGROUND

The facts, according to Davis and the independent witnesses who support his version of the events, are as follows: On November 7, 2001, Security Officer Shane Mundell, a Casino employee, found Frankie Davis reading a magazine while sitting atop a stairwell in a non-public area of the establishment. Mundell radioed for backup and fellow Security Officer Richard Mabe responded shortly thereafter. Mabe instructed Davis to descend two flights of stairs and to approach the security officers. Davis complied.

While Davis was coming down the stairs, Mabe pulled out

¹“Because we review a grant of summary judgment, we view the evidence in the light most favorable to [Davis,] the nonmoving party, and accept the version of all disputed facts most favorable to him.” *Drummond v. City of Anaheim*, 343 F.3d 1052, 1054 n. 1 (9th Cir. 2003).

a set of handcuffs. Davis initially protested that handcuffs were unnecessary, but after Mabe and Mundell informed him that the handcuffs were for “everyone’s safety” and that they intended to merely escort him off the property, Davis voluntarily placed his hands behind his back and was handcuffed by Mundell.

Davis was then escorted to the Casino’s security office and placed in a holding area. A Casino employee contacted the Las Vegas Metropolitan Police Department, informed the dispatcher that they had someone in custody, and requested that an officer be sent to the scene. Officer Miller eventually arrived at the Casino’s security office in response to the call, walked into the holding area, ordered Davis to stand, and confirmed that he was in handcuffs. Miller then patted Davis down and asked him if he could search his pockets. Davis declined to consent, but informed Miller that he was unarmed, a fact that Miller was already aware of as the result of the pat-down.

Notwithstanding Davis’s refusal to consent to a search, Miller attempted to reach inside Davis’s left pocket to retrieve Davis’s wallet. Davis rotated his hips away from Miller in an attempt to prevent him from grabbing the wallet. Miller then pushed Davis into a corner, pinning him face-first against the wall, and again reached for the wallet. Davis pushed off the wall toward Miller, and the two engaged in a brief pushing and pulling match. Officer Miller then spun Davis around and pushed him out of the holding area and into an adjacent hallway. He then slammed Davis head-first against the wall opposite the holding area, and then swung him into another wall, also head-first. One of these head-first impacts left a sizable dent in the wall’s sheet rock. Miller then threw Davis face-down onto the floor causing Davis’s teeth to strike the floor. He landed on top of Davis, and placed his knee on Davis’s back. Davis began wiggling and attempted to slide out from underneath Miller because he was in pain. Miller then turned

Davis over and punched him in the face. In the course of Miller's actions, he fractured Davis's neck.

Ultimately, Davis stopped moving. Officer Miller completed his search, pulled Davis up from the floor, escorted him off the property, placed him in a patrol car, and transported him to the Las Vegas City Jail. During the ride to the jail, Davis told Miller that he was in a great deal of pain. Upon arrival at the jail, Miller arranged for Davis to be held pending the filing of charges for obstructing a police officer. Davis was subsequently transported to University Medical Center by jail personnel, where he was diagnosed with a neck fracture.

The Police Department's Internal Affairs Bureau conducted an investigation of the incident and issued a report in which it concluded that Officer Miller "did not use the minimal amount of force necessary and had options other than punching the suspect in the face who was on the ground in handcuffs." Accordingly, the Department suspended Officer Miller for ten hours and ordered him to participate in "Use of Force Training."²

In January of 2002, Davis filed suit against Miller and other defendants, asserting, *inter alia*, a 42 U.S.C. § 1983 claim for use of excessive force and a state law battery claim against Miller. Miller and other defendants filed motions for summary judgment. The district court granted Miller's motion for summary judgment in full. Ruling from the bench, the court reasoned that summary judgment should be granted as to Davis's excessive force claim because "it's not clearly excessive force," and thus "it's not so clear that Officer Miller is not entitled to qualified immunity. He's entitled to qualified immunity, and he's, therefore, dismissed from the case." As to Davis's state law battery claim, the court ruled as follows: "let's see, Officer Miller, the state law claims, they were all

²Officer Miller had been called before Internal Affairs on at least four prior occasions, twice for complaints alleging excessive use of force.