

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

**For the Seventh Circuit
Chicago, Illinois 60604**

Submitted January 16, 2025*

Decided January 21, 2025

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 23-2546

WAINER SOUSA ANCHETA,
Plaintiff-Appellant,

v.

FRED JONES, *et. al.,*
Defendants-Appellees.

Appeal from the United States District
Court for the Northern District of
Illinois, Western Division.

No. 21 CV 50095

Philip G. Reinhard,
Judge.

ORDER

Wainer Sousa Ancheta, who was shot six times by local police officers before he was arrested, sued the officers for using excessive force in violation of his Fourth Amendment rights. *See* 42 U.S.C. § 1983. The district judge entered summary judgment

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

for the officers, determining that no reasonable jury could find that the officers acted unreasonably in shooting at Ancheta. We affirm.

We recount the facts in the light most favorable to Ancheta, the party opposing summary judgment. *Moore v. W. Ill. Corr. Ctr.*, 89 F.4th 582, 590 (7th Cir. 2023). In October 2018, officers with the Winnebago County, Illinois, Sheriff's Department prepared to arrest Ancheta, whom they suspected of trafficking drugs. The officers were briefed on Ancheta's background, including his history of gang affiliation and firearm possession. A surveillance team in an unmarked SUV staked out a home where they believed Ancheta was staying, hoping to arrest him if he emerged. Ancheta eventually left the home and stepped inside a white sedan that whisked him away. The officers tailed the sedan, calling for backup on the way. When the sedan pulled up to the center pump at a gas station, five police cars—including the unmarked SUV—converged at the scene and boxed in the sedan. Officer Jacob Marino, dressed in plain clothes, sprung out of the back seat of the SUV and drew his weapon. Almost simultaneously, a marked police car behind the sedan turned on its emergency flashers.

Ancheta, who had recently been shot multiple times by gang members, believed he was being ambushed. Though Marino testified that he shouted "Police. Police. Hands up," Ancheta denies that he heard those words, adding that nothing about Marino's clothes or car identified him as an officer. Within moments of seeing Marino, Ancheta drew his own weapon and fired it in the air (Marino says Ancheta fired at him), and Marino fired back. Other officers on the scene testified that they heard Marino yell, "Gun!" or saw Marino react to Ancheta's weapon, and so they too fired at Ancheta. Ancheta was hit six times. The shooting is captured on video from two vantage points—the gas station and a dash camera from the marked SUV that pulled up behind the white sedan. (The details, however, are difficult to make out, as Ancheta is barely visible inside the car, and the timing and direction of his fire is unclear.)

Ancheta brought his suit under 42 U.S.C. § 1983, asserting that the officers violated his Fourth Amendment rights by using excessive force when they shot him, and that the officers acted unreasonably by failing to announce their presence with a loudspeaker or marked police cars and uniforms. He also asserted that the arresting officer, James Abate, used excessive force by punching him repeatedly in the face before handcuffing him, and that the Winnebago Sheriff's Department and Winnebago County were deliberately indifferent to his serious medical needs.

The district judge entered summary judgment for the defendants. The judge found the evidence uncontested that Ancheta fired at Marino first. Regardless of

whether Ancheta fired in the air or directly at Marino, the judge ruled, an officer under the circumstances could reasonably conclude that Ancheta posed a threat to the other officers and bystanders. The judge added that Marino's testimony that he announced "Police. Police," paired with the emergency flashers on the marked police car behind Ancheta, were sufficient to apprise Ancheta of the officers' presence. The judge then determined that Abate's use of non-deadly force was justified based on his uncontested testimony that Ancheta was reaching for what Abate believed to be a knife, and that Ancheta had failed to identify anyone personally involved in his allegedly deficient medical care. (Ancheta has abandoned these latter two claims on appeal, and we say nothing more about them.)

On appeal, Ancheta first challenges the summary judgment rejecting his claim that the officers used excessive force when they shot him. He argues that a fact question exists over whether the officers acted unreasonably in creating the conditions that precipitated the encounter—that is, by approaching him with weapons drawn and without sufficiently identifying themselves as officers. He also contends that Marino's testimony of shouting "Police. Police," is contradicted by the dash camera video evidence in which no such announcement is audible.

But even if we assume that Marino did not announce himself as an officer, it does not follow that his actions violated the Fourth Amendment. Tactical mistakes that result in an avoidable use of deadly force do not usually amount to a Fourth Amendment violation. *Est. of Biegert by Biegert v. Molitor*, 968 F.3d 693, 698 (7th Cir. 2020) (citing *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 615 (2015)). In general, an officer does not act unreasonable simply "because he created a situation where deadly force [becomes] essentially inevitable." *Id.* (concluding that the officers' failure to plan for encountering the suspect, failure to secure a knife block, and aggressive questioning of the suspect did not render their "subsequent use of force unreasonable"). Even if the defendants' actions exacerbated the possibility of a dangerous confrontation, Ancheta's action—the use of his gun—was an "intervening cause of the deadly force." *Id.* The defendants "escalated the force that they applied in response to the force with which [Ancheta] resisted; the situation requiring them to use deadly force was not primarily of their own making." *Id.*; see also *Horton v. Pobjecky*, 883 F.3d 941, 953 (7th Cir. 2018) (officer's response with deadly force—"under immense pressure, and with limited time"—to an encounter with a suspected armed robbery subject was "reasonable, appropriate and justified ... in compliance with the Fourth Amendment").

Ancheta also challenges the district judge's Fourth Amendment analysis by arguing, for the first time, that there is a fact question over who fired the first shot. The judge found that the first shot had been fired by Ancheta, but Ancheta contends that this finding is contradicted by the video evidence, which, he maintains, shows that he was merely reaching for his weapon when Marino fired. Ancheta did not make this argument at summary judgment, however, and arguments made for the first time on appeal are waived. *See Milwaukee Ctr. for Indep., Inc. v. Milwaukee Health Care, LLC*, 929 F.3d 489, 493 (7th Cir. 2019); *see also Sanzone v. Gray*, 884 F.3d 736, 739 (7th Cir. 2018) (plaintiff may not dispute a finding of fact for the first time on appeal).

AFFIRMED