FILED
United States Court of Appeals
Tenth Circuit

August 17, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREGORY BOUDETTE; GARY MICKELSON,

Plaintiffs - Appellants,

v.

MATT BUFFINGTON; GLENN T. GAASCHE; SHAWN SANDERS; TOM QUINNETT; CITY OF CORTEZ

Defendants - Appellees.

No. 20-1329
(D.C. No. 1:18-CV-02420-CMA-MEH)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **BRISCOE** and **BACHARACH**, Circuit Judges.

Plaintiffs Gregory Boudette and Gary Mickelson, proceeding pro se, appeal the district court's dismissal, under Fed. R. Civ. P. 12(b)(6), of their civil claims against city and federal officials and a confidential informant alleging violations of their constitutional rights. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. Background

This factual background is taken from Plaintiffs' complaint and second amended complaint, the non-conclusory allegations of which we, like the district court, take as true when evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Both the district court and the magistrate judge included a more detailed recitation of the facts which we need not restate here.

Mickelson owned a farm in Mancos, Colorado. Boudette lived on the farm. From 2010 to 2016, Mickelson and his son Christopher grew medical marijuana on the farm for their own use and for the use of other medical marijuana patients for whom they were registered caregivers. Beginning in 2016, the Southwest Colorado Drug Task Force of the Drug Enforcement Administration began investigating possible illegal activity on the farm. Defendant Buffington was an investigating DEA officer and Defendant Gaasche was the DEA Resident Agent in Charge of the task force (the "DEA Defendants"). Defendant Quinnett, a detective for the City of Cortez, (collectively, the "City Defendants") was also a member of the task force.

Defendant Sanders served as a confidential informant for the DEA. He lived in Cortez on property abutting the farm and was under indictment in Arizona for felony identity theft. Because he had two prior felony convictions, he faced a minimum sentence of eight years if convicted. It is alleged that in order to improve his own circumstances he offered false information. He reported a marijuana grow in Montezuma County, Colorado where he alleged Mickelson and Christopher were

growing marijuana for sale in interstate commerce in association with criminal gangs. Plaintiffs alleged the DEA Defendants knew, or could easily have discovered, that much of Sanders's information was false, but nonetheless used his tips to secure warrants to search and seize items from the farm. Sanders's information prompted the DEA to obtain three search warrants on December 9, 2016, January 9, 2017, and February 6, 2017, respectively. During the investigation, the DEA Defendants also aerially surveilled the farm without a warrant. The investigation led to Mickelson's arrest, but the district attorney ultimately dismissed the charges against him.

After the dismissal, a state court ordered that "all property seized in the search [of Mr. Mickelson's farm] be returned, unless the return of such property would violate state or federal law." R. Vol. 2 at 295. The seized property included several of Boudette's firearms. When Boudette and Mickelson went to retrieve the firearms in June 2018, Quinnett initially refused to release them. According to Plaintiffs' second amended complaint, when Quinnett refused to release the firearms, he showed them

> a sheet of paper purported to have been sent him from the Colorado Bureau of Investigation. That paper commented "YOUR SUBJECT MAY BE INELIGIBLE TO POSSESS FIREARMS....ARRESTED FOR FELONY DRIVING UNDER INFLUENCE/DOA/20140406/...DISPOSITION UNKNOWN". This was followed by another paragraph[] which stated the subject was ineligible to possess firearms at this time due to: . That sentence was unfinished and no reason for ineligibility was set forth.

Id. at 390–91 (ellipses in original). Plaintiffs alleged the paper Quinnett showed them "was not a CBI Instacheck firearms transfer denial; it was an interagency

communication sent from [the Colorado Crime Information Center ("CCIC")]." *Id.* at 391. Although the City did not release the firearms in June, it ultimately released them in October 2018.

Boudette and Mickelson sued Sanders, the DEA Defendants, and the City Defendants in the United States District Court for the District of Colorado. Their complaint set forth six causes of action. Claims 1 and 2 alleged Fourth Amendment violations stemming from the aerial search and the search following the December 9 warrant. Claim 6 similarly challenged, under the Fourth Amendment, the January 9 and February 6 search warrant applications and resulting searches. Claims 3 and 4, "Illegal Arrest" and "Malicious Prosecution to Deny Rights," against Sanders and the DEA Defendants, alleged Mickelson's arrest warrant was based on false information and the result of a conspiracy to deprive him of constitutional rights. Claim 5, "Illegal Seizure," alleged Quinnett wrongfully withheld some of Boudette's property. Plaintiffs brought their Fourth Amendment claims against the DEA Defendants under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). They brought their claims against the City Defendants under 42 U.S.C. § 1983.

All Defendants filed motions to dismiss. Plaintiffs responded and also sought leave to amend their complaint. The district court granted the City Defendants' motion to dismiss, adopting the recommendation of the magistrate judge who concluded Quinnett was entitled to qualified immunity and that the complaint did not plausibly allege municipal liability under *Monell v. Department of Social Services*,

436 U.S. 658, 694 (1978). The district court dismissed Claims 2, 3, 4, and 6 against the DEA Defendants, concluding they were entitled to qualified immunity on the claims challenging the searches and seizures (Claims 2 and 6) and that, in light of *Ziglar v. Abassi*, 137 S. Ct. 1843 (2017), Plaintiffs could not maintain a claim for illegal arrest and malicious prosecution (Claims 3 and 4) under *Bivens*. The district court also dismissed all claims against Sanders because, as a private actor, he was not liable for constitutional violations under § 1983 and, under *Ziglar*, there was no basis to extend *Bivens* liability to a private actor acting as an informant.

The court's dismissal orders allowed Plaintiffs to file an amended complaint addressing some of the defects in the first complaint. Plaintiffs responded with a second amended complaint against the City Defendants and the DEA Defendants. The City Defendants again moved to dismiss, and the court granted the motion, once again affirming the recommendation of the magistrate judge that the claims should be dismissed because of qualified immunity and failure to establish municipal liability under *Monell*. Plaintiffs then filed a motion to voluntarily dismiss their only remaining count (Claim 1, which challenged the aerial search), and then filed this appeal of the contested dismissal orders.

II. Standard of Review

Because plaintiffs proceed pro se, we construe their arguments liberally, but we "cannot take on the responsibility of serving as [their] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). "We review de novo a district court's decision

on a Rule 12(b)(6) motion for dismissal for failure to state a claim. Under this standard, we must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019) (italics, citation, and internal quotation marks omitted). "Conclusory allegations are not entitled to the assumption of truth. In fact, we disregard conclusory statements and look to the remaining factual allegations to see whether Plaintiffs have stated a plausible claim." *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir.) (citation and internal quotation marks omitted), *petition for cert. filed* (U.S. June 25, 2021) (No. 20-1822).

III. Dismissal of Claims Against Sanders

Plaintiffs sought to hold Sanders liable along with the DEA Defendants for their claims alleging unlawful search and seizure (Claims 2, 3, and 6) and malicious prosecution (Claim 4). The district court dismissed the claims against Sanders because as a private citizen, he was not liable for the alleged Fourth Amendment violations under *Bivens*. Plaintiffs dispute this ruling by arguing that Sanders is liable along with the DEA Defendants as a joint actor. In support of this theory, they point to Sanders's explanation for his initial failure to timely answer the complaint, in which he asserted he expected the United States to represent him in this action.

We need not decide whether Sanders could be subject to a *Bivens* claim as a joint actor with the DEA Defendants, because Plaintiffs' claims against him do not allege his *personal* participation caused any of the violations of their constitutional rights. "Liability under . . . *Bivens* requires personal involvement. Plaintiffs must

establish that *each* defendant caused plaintiffs to be subjected to [the challenged constitutional violation]." *Pahls v. Thomas*, 718 F.3d 1210, 1231 (10th Cir. 2013) (citation omitted). According to Plaintiffs' allegations, Sanders did not participate in any of the challenged searches; he merely provided information used in the warrant applications to authorize them, information Plaintiffs allege the DEA Defendants knew was false. But even if those warrant applications contained falsehoods, responsibility would lie with the affiants, and not with Sanders. The district court therefore correctly dismissed the claims against Sanders.

IV. Grant of Qualified Immunity to the DEA Defendants

Plaintiffs argue the district court erred in granting qualified immunity to the DEA Defendants with respect to their illegal search and seizure claims. They assert the searches were based on false affidavits containing knowingly false information and therefore the DEA Defendants violated clearly established law by executing a search and seizure without probable cause.[1]

"An officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment." *Pearson v. Callahan*, 555 U.S. 223, 243–44 (2009). "This inquiry turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Id.* at 244 (internal

[1] Because Plaintiffs voluntarily dismissed Claim 1, which challenged the aerial surveillance of the farm, we consider only the searches stemming from the December 9, 2016, January 9, 2017, and February 6, 2017 warrant applications.

quotation marks omitted). "A neutral magistrate judge's issuance of a warrant is the clearest indication that the officers acted in an objectively reasonable manner or in objective good faith." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) (alteration and internal quotation marks omitted).

However, the existence of a warrant "does not end the inquiry into objective reasonableness." *Id.* at 1142 (internal quotation marks omitted). "Qualified immunity will not be granted where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. . . . Nor will a warrant protect officers who misrepresent or omit material facts to the magistrate judge." *Id.* (internal quotation marks omitted). The probable cause inquiry is objective: "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996). When reviewing a warrant application, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The district court examined the affidavits for the December 9, January 9, and February 6 warrants.[2] Excising all portions of the affidavits which Plaintiffs alleged

[2] The contested affidavits were central to Plaintiffs' claims and Plaintiffs did not dispute their authenticity. The district court could therefore consider them without converting the Fed. R. Civ. P. 12(b)(6) motion into a motion for summary judgment. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010).

were false and including the information Plaintiffs alleged the DEA Defendants improperly omitted, the court concluded the searches were all still supported by probable cause. *See Franks v. Delaware*, 438 U.S. 154, 156 (1978) (holding a search warrant is void only if "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause"). The district court's conclusion rested on several facts set forth in the affidavits that Plaintiffs did not dispute, including Mickelson's ownership and operation of a large-scale marijuana grow at the farm, his criminal history with multiple drug charges, his lack of wage information listed with his social security number in Colorado, Arizona, and California as of February 16 and November 10, 2016, his apparent involvement in a May 2016 conspiracy to distribute marijuana out of a hotel in Oklahoma, and his son's illegal marijuana sales from the farm to undercover officers.

Plaintiffs argue the district court's probable cause analysis under *Franks* invaded the province of the jury, citing *DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990). But in *DeLoach* we recognized probable cause presents an issue of fact for a jury only "if there is room for a difference of opinion." *Id.* (internal quotation marks omitted). And we have recognized in the qualified immunity context that the test of whether an officer acted reasonably in relying on a search warrant issued by a neutral magistrate judge "is an objective one: when there is no dispute over the material facts, a court may determine as a matter of law whether a reasonable officer would have found probable cause under the circumstances." *Stonecipher*, 759 F.3d at 1142. Although Plaintiffs argue generally that, under the

notice pleading standards of Federal Rule of Civil Procedure 8, they did not need to detail every false statement in the warrant affidavits in their complaint, they never contest the district court's conclusion that unchallenged portions of the affidavits were still sufficient to support probable cause for the searches. Because the remaining unchallenged portions of the affidavits provided probable cause for the searches, the district court correctly dismissed Plaintiffs' Claims 2 and 6.

V. Dismissal of *Bivens* Claims for Illegal Arrest and Malicious Prosecution

Plaintiffs brought their illegal arrest and malicious prosecution claims against the DEA Defendants under *Bivens*. In *Ziglar*, the Supreme Court recognized "expanding the *Bivens* remedy is now a disfavored judicial activity." 137 S. Ct. at 1857 (internal quotation marks omitted). Before extending *Bivens*, courts must now determine (1) if a claim presents a "new *Bivens* context," *id.* at 1859, and (2) if so, whether there are "special factors counseling hesitation in the absence of affirmative action by Congress," *id.* at 1857 (internal quotation marks omitted).

At the first step, "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court, then the context is new." *Id.* at 1859. "A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020). Plainly, Plaintiffs' claims here, which allege the DEA Defendants conspired to create false evidence against them to initiate unjustified criminal proceedings,

> bear little resemblance to the three *Bivens* claims the Court has approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma.

Ziglar, 137 S. Ct. at 1860.

At the second step, special factors counselling hesitation exist "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong." *Id.* at 1858. This test is also broad: "[T]o be a 'special factor counselling hesitation,' a factor must cause a court to hesitate before answering that question in the affirmative." *Id.* The district court here considered the risk that expanding a *Bivens* remedy to Plaintiffs' claims "would interfere with prosecutorial discretion, disincentivize law enforcement from sharing information with prosecutors, and disincentivize private citizens from sharing information with law enforcement." R. Vol. 2 at 353. Because these concerns provide sound reasons to think Congress *might* doubt whether to create a damages remedy in this instance, they were sufficient to reject extending *Bivens* here.

Plaintiffs argue the district court's reading of *Ziglar* impermissibly shrinks the scope of the *Bivens* remedy, pointing to language in *Ziglar* that it "is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Ziglar*, 137 S. Ct. at 1856. But Plaintiffs' claims do not take place "in the search-and-seizure context in which

[*Bivens*] arose," *id.*; as a result, the district court correctly declined to judicially create a damages remedy where Congress has not.

And even if Plaintiffs were correct that *Ziglar* did not limit the extension of a *Bivens* remedy for their illegal arrest and malicious prosecution claims against the DEA Defendants, any error in the district court's order was harmless because qualified immunity would apply to those claims for the same reasons it applied to Claims 2 and 6. That is, just as probable cause supported the challenged searches, it also supported Mickelson's arrest and prosecutions based on the same information.

VI. Dismissal of claims against the City Defendants

Plaintiffs argue the district court should not have dismissed their claims against Quinnett and the City of Cortez challenging the post-dismissal seizure of Boudette's firearms because a jury question existed whether probable cause supported the seizure. Initially, we affirm the district court's dismissal of the claims against the City of Cortez, which was based on Plaintiffs' failure to adequately plead *Monell* liability. Because Plaintiffs do not address this issue in their opening brief, we deem any arguments related to *Monell* liability waived. *See Folks v. State Farm Mut. Auto. Ins. Co.*, 784 F.3d 730, 737 (10th Cir. 2015).

Regarding the claims against Quinnett,[3] as alleged in the second amended complaint, Quinnett seized the firearms at the police station when, after initially

[3] Before the district court, Plaintiffs challenged the seizure of the firearms under both the Fourth and Second Amendments. Because their opening brief addresses only the Fourth Amendment issues, we limit our analysis to that issue. *See United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019) ("Ordinarily, a party's

returning them to Boudette to place in carrying cases and after Boudette signed a receipt for them, he told Boudette he could not remove the firearms due to the CCIC communication. We therefore analyze the reasonableness of the seizure under the plain view doctrine:

> To justify a warrantless seizure based on plain view, three conditions must be satisfied. First, the seizing officer must not have violated the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. Second, the item must not only be in plain sight, but its incriminating character must also be immediately apparent. Finally, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.

United States v. Naugle, 997 F.2d 819, 822 (10th Cir. 1993) (citations and internal quotation marks omitted). The first and third elements of the doctrine were easily met because Quinnett did not violate the Fourth Amendment by his presence at the police station and he had a lawful right of access to the firearms. As to the second element, the incriminating character of the firearms was immediately apparent if there existed probable cause for their seizure. *See United States v. Tucker*, 305 F.3d 1193, 1202–03 (10th Cir. 2002). Probable cause for a plain-view seizure "merely requires that the facts available to the officer would warrant a [person] of reasonable caution in the belief that certain items may be contraband . . . or useful as evidence of

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failure to address an issue in its opening brief results in that issue being deemed waived.").

a crime." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (citation and internal quotation marks omitted). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." *Id.* The facts available to Quinnett at the time of the seizure—a CCIC communication stating Boudette "MAY BE INELIGIBLE TO POSSESS FIREARMS" due to a prior felony charge—clearly satisfies this standard.

Plaintiffs argue there existed "a factual dispute as to the meaning of the [CCIC communication]" that was inappropriate to resolve at the motion-to-dismiss stage, Aplts. Opening Br. at 24, and that "[w]hether the CCIC communication was probable cause or merely a pretext to seize Boudette's firearms is a question reserved for a jury to decide," *id.* But we have already rejected Plaintiffs' contention that issues of probable cause *always* present a jury question, *see supra* Part IV, and the terms of the communication here were set forth in Plaintiffs' second amended complaint itself. The district court correctly concluded that communication would "warrant a [person] of reasonable caution in the belief" Boudette could not legally possess firearms, as a result Quinnett was entitled to qualified immunity.

VII. **Analysis of the warrant affidavits**

In Plaintiffs' final issue, they contend the district court "conducted a premature *Franks* review and then accepted the affidavit as sufficient without consideration of additional deficiencies which would render the search warrants as legal nullities in Colorado and deny a defendant qualified immunity," Aplts. Opening Br. at 25. They argue the warrant affidavits lacked sufficient detail establishing

Sanders' reliability as a source of information and that without the improper information he provided,

> all that remains is two wage checks showing a 71 year old man has no reported income, a telephone call from Sanders to Mickelson in May of 2016 in which there is no mention of marijuana, . . . and a trip Buffington made to Mickelson['s] farm where he omitted telling the magistrate that he observed a greenhouse with no roof.

Id. at 26. But the record does not support this characterization. The district court set aside the portions of the affidavits Plaintiffs alleged were false and considered several facts Plaintiffs alleged the affidavits improperly omitted. That analysis left several pieces of information Plaintiffs did not contest in their second amended complaint, including Mickelson's renting a hotel room in Oklahoma used for an illegal marijuana-distribution conspiracy and two controlled buys in which Mickelson's son illegally sold marijuana from the farm to government officers. The court correctly concluded the warrants were not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Stonecipher*, 759 F.3d at 1142 (internal quotation marks omitted). Based on that conclusion, the DEA Defendants were entitled to qualified immunity.[4]

[4] Plaintiffs also make passing references to the nexus between the items seized and evidence of criminal activity, staleness, and geographic scope of the searches. *See* Aplts. Opening Br. at 26–27. These arguments are insufficiently developed, so we deem them waived. *See United States v. Martinez*, 518 F.3d 763, 768 (10th Cir. 2008).

VIII. **Conclusion**

We affirm the district court's dismissal of this case.

Entered for the Court

Mary Beck Briscoe
Circuit Judge