

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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6 August Term 2007
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8 Argued: October 22, 2007 Decided: April 23, 2008
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10 Docket No. 06-1983-cv
11

12 -----X
13

14 ROBERT MATICAN,
15

16 Plaintiff-Appellant,
17

18 - against -
19

20 CITY OF NEW YORK, JOHN SCHNEIDER,
21 JULIO C. ORDONEZ, and CHRIS ZIMMERMAN,
22

23 Defendants-Appellees.
24

25 -----X
26

27 Before: FEINBERG, WINTER, and STRAUB, Circuit Judges.
28

29
30 Plaintiff-appellant, who participated in a police sting and
31 was later assaulted by the target of the sting, asserted that
32 conduct of defendants-appellees constituted both denial of
33 substantive due process and negligence, and brought claims under
34 42 U.S.C. § 1983 and state common law. The district court granted
35 summary judgment to defendants-appellees on the federal claims
36 and declined to exercise jurisdiction over the state-law claims.
37 Judgment affirmed.
38

39 MICHAEL A. HASKEL, Mineola, N.Y., for Plaintiff-
40 Appellant.
41

42 JOHN HOGROGIAN, Assistant Corporation Counsel
43 (EDWARD F.X. HART, HEIDI GROSSMAN, JENNIFER
44 ROSSAN, of counsel, MICHAEL A. CARDOZO,
45 Corporation Counsel of the City of New York,
46 on the brief), New York, N.Y., for
47 Defendants-Appellees.

1 FEINBERG, Circuit Judge:

2 Plaintiff-appellant Robert Matican participated in a sting
3 to help officers of the New York Police Department ("NYPD")
4 arrest a suspected drug dealer: Matican set up a drug buy, and
5 the police descended on the dealer in force when he arrived
6 about an hour later. After the dealer was released on bail, he
7 assaulted plaintiff Matican with a box cutter, injuring him
8 severely. Matican sued the City of New York ("City") and three
9 individual NYPD officers -- Captain Julio C. Ordonez,
10 Lieutenant John Schneider, and Sergeant Chris Zimmerman
11 (collectively, "the officers") -- arguing that the way they
12 conducted the sting and their failure to alert Matican to the
13 dealer's release gave away Matican's identity and left him in
14 peril. He asserted claims for damages under 42 U.S.C. § 1983
15 and New York state law. By memorandum and order dated March 28,
16 2006, the United States District Court for the Eastern District
17 of New York (Block, J.) granted defendants-appellees' motion
18 for summary judgment on the § 1983 claims and declined to
19 exercise supplemental jurisdiction over the state-law claims.
20 For the reasons stated below, we affirm the judgment of the
21 district court.

22
23 I. BACKGROUND

1 For purposes of Matican's appeal from a grant of summary
2 judgment, we take his allegations as true and draw all
3 reasonable inferences in his favor. Jenkins v. City of New
4 York, 478 F.3d 76, 85 n.4 (2d Cir. 2007).

5 On the evening of September 18, 2001, Matican purchased
6 crack cocaine from a drug dealer he knew as "Mike," who had
7 supplied him with drugs on a number of prior occasions.
8 Undercover NYPD officers then arrested Matican and took him to
9 a precinct house in Bayside, Queens. While Matican was in a
10 holding cell, defendant Zimmerman approached him and offered to
11 make the arrest "go away" if Matican would agree to help the
12 officers arrest Mike. Matican was interested in the offer but
13 expressed concern for his safety if Mike made bail. Matican
14 testified that Zimmerman responded, "Don't worry, Robert, we
15 will look after you. We will protect you." Matican agreed to
16 cooperate based on Zimmerman's promise.

17 According to Matican, Zimmerman then instructed Matican to
18 arrange a drug buy with Mike the following evening in front of
19 the Bayside Jewish Center, a frequent location for prior drug
20 transactions between Matican and Mike. The police would be
21 waiting with two cars and four officers in each car. When Mike
22 executed his customary illegal U-turn in front of the Jewish
23 Center, Matican would identify the car from the safety of a
24 darkened athletic field across the street, and the police would

1 pull over Mike as if for a routine traffic stop. Defendant
2 Schneider asked Matican what quantity of drugs Mike would be
3 carrying; when Matican replied that Mike would have 20 or 30
4 bags of crack, Schneider replied, "[I]f he has that many bags,
5 he is not going to even make bail." After the plan was
6 formulated, the officers released Matican with a desk
7 appearance ticket.

8 The following evening, Matican met the officers at the
9 prearranged location and paged Mike to arrange a large drug
10 buy. Mike arrived and Matican identified his car, as planned.
11 According to Matican, the officers then cut Mike off with two
12 police vehicles, pulled him from the driver's seat, and pinned
13 him against his car. The officers searched Mike's person and
14 car, discovered drugs, and arrested him. Matican remained
15 hidden and unseen in the darkened field.

16 Mike, whose real name was Steven Delvalle, was found to be
17 in possession of 16 bags of crack cocaine, two bags of
18 marijuana, and about \$2,000 in cash. Delvalle was charged with
19 two counts of criminal possession of a controlled substance, as
20 well as various moving violations. A criminal check performed
21 at the precinct revealed that Delvalle had six prior arrests,
22 including arrests for possession of a handgun and assault with
23 a box cutter. On September 28, 2001, Delvalle was released on
24 bail. Matican was not informed of Delvalle's arrest history,

1 his release, or his real name, and he alleges that had he known
2 these facts, he would have moved to California to live with his
3 brother.

4 Matican never contacted Delvalle again after the sting
5 operation. He acknowledges that he discussed his participation
6 in the sting with his parents and a close friend, and that at
7 least one other person knew about his role. On December 8,
8 2001, Delvalle approached Matican on a street in Queens.
9 Delvalle said, "You ratted me. Why did you rat me?" He slashed
10 Matican's face twice with a box cutter, then fled. Delvalle was
11 arrested several days later; he eventually pled guilty to one
12 count of attempted assault and one count of attempted criminal
13 possession of a controlled substance, and was sentenced to
14 eight years in prison.

15 Matican filed his suit in the Eastern District in November
16 2002, stating causes of action under 42 U.S.C. § 1983 and New
17 York common law. Defendants moved for summary judgment on all
18 claims. The district court granted summary judgment on the
19 § 1983 claims and declined to exercise supplemental
20 jurisdiction over the state claims. Matican v. City of New
21 York, 424 F. Supp. 2d 497 (E.D.N.Y. 2006). This appeal
22 followed.

24 II. DISCUSSION

1 We review de novo the district court's grant of summary
2 judgment, construing the evidence in the light most favorable
3 to Matican, the nonmoving party, and drawing all inferences and
4 resolving all ambiguities in his favor. Doro v. Sheet Metal
5 Workers' Int'l Ass'n, 498 F.3d 152, 155 (2d Cir. 2007). Summary
6 judgment is appropriate "if the pleadings, the discovery and
7 disclosure materials on file, and any affidavits show that
8 there is no genuine issue as to any material fact and that the
9 movant is entitled to judgment as a matter of law." Fed. R.
10 Civ. P. 56(c).

11 Matican asserted the following causes of action: (1) a
12 claim under 42 U.S.C. § 1983 that the officers violated his
13 right to substantive due process under the Fourteenth Amendment
14 by failing to protect him from Delvalle's assault; (2) a § 1983
15 claim against the City for failing to train its officers to
16 protect confidential informants from harm; and (3) claims
17 sounding in state law against all defendants asserting that the
18 officers behaved negligently, and that the City is vicariously
19 liable for their actions under the doctrine of respondeat
20 superior.

21 The first two claims depend on a single threshold
22 question: did the officers' actions violate Matican's
23 constitutional rights? If they did not, then the City cannot be
24 liable to Matican under § 1983, regardless of whether the

1 officers acted pursuant to a municipal policy or custom. City
2 of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per
3 curiam). Furthermore, if Matican has no valid claim under
4 § 1983 against any defendant, it is within the district court's
5 discretion to decline to exercise supplemental jurisdiction
6 over the pendent state-law claims. See Kolari v. New
7 York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006)
8 (citing 28 U.S.C. § 1367(c)(3)).¹ We therefore begin with the
9 threshold question of whether the officers' conduct infringed
10 Matican's constitutional rights.

11 Among the liberties protected by the Due Process Clause of
12 the Fourteenth Amendment is "a right to be free from . . .
13 unjustified intrusions on personal security." Ingraham v.
14 Wright, 430 U.S. 651, 673 (1977). But in DeShaney v. Winnebago
15 County Department of Social Services, 489 U.S. 189 (1989), the
16 Supreme Court observed that "nothing in the language of the Due
17 Process Clause itself requires the State to protect the life,
18 liberty, and property of its citizens against invasion by
19 private actors." Id. at 195. As a result, the Court held that
20 the Clause "generally confer[s] no affirmative right to
21 governmental aid, even where such aid may be necessary to

¹ We must also determine the existence of a constitutional violation before we may consider the officers' defense of qualified immunity. Sira v. Morton, 380 F.3d 57, 68-69 (2d Cir. 2004) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).

1 secure life, liberty, or property interests of which the
2 government itself may not deprive the individual." Id. at 196.

3 We have recognized two exceptions to this general
4 principle, rooted in the Supreme Court's analysis in DeShaney.
5 First, the state or its agents may owe a constitutional
6 obligation to the victim of private violence if the state had a
7 "special relationship" with the victim. See Ying Jing Gan v.
8 City of New York, 996 F.2d 522, 533 (2d Cir. 1993) (citing
9 DeShaney, 489 U.S. at 198). Second, the state may owe such an
10 obligation if its agents "in some way had assisted in creating
11 or increasing the danger to the victim." Dwares v. City of New
12 York, 985 F.2d 94, 98-99 (2d Cir. 1993) (citing DeShaney, 489
13 U.S. at 201, 203), overruled on other grounds by Leatherman v.
14 Tarrant County Narcotics Intelligence & Coordination Unit, 507
15 U.S. 163, 164 (1993).

16 Even if Matican's claim falls within one of these two
17 exceptions, and the officers' behavior violated a
18 constitutional obligation, Matican faces a further hurdle: he
19 must show that the officers' behavior was "so egregious, so
20 outrageous, that it may fairly be said to shock the
21 contemporary conscience." County of Sacramento v. Lewis, 523
22 U.S. 833, 848 n.8 (1998). This requirement screens out all but
23 the most significant constitutional violations, "lest the

1 Constitution be demoted to . . . a font of tort law." Id.; see
2 Paul v. Davis, 424 U.S. 693, 701 (1976).

3 We consider (1) whether Matican's claims fall within
4 either of the two DeShaney exceptions and (2) whether the
5 officers' behavior can be said to shock the contemporary
6 conscience.

7
8 A. Special relationship exception.

9 The special relationship exception grows from the DeShaney
10 Court's observation that "in certain limited circumstances the
11 Constitution imposes upon the State affirmative duties of care
12 and protection with respect to particular individuals."
13 DeShaney, 489 U.S. at 198.² The Court gave, as examples, the
14 obligations of states to incarcerated prisoners and
15 involuntarily committed mental patients, and concluded that
16 "when the State takes a person into its custody and holds him
17 there against his will, the Constitution imposes upon it a
18 corresponding duty to assume some responsibility for his safety
19 and general well-being." Id. at 199-200.³ Under these limited

² We recognized this principle before DeShaney, in Doe v. New York City Department of Social Services, 649 F.2d 134, 141 (2d Cir. 1981).

³ The Court noted that the situation of a child placed in foster care might be sufficiently analogous to those of prisoners or mental patients to trigger the exception, but it did not decide the question. Id. at 201 n.9.

1 circumstances, the state may owe the incarcerated person an
2 affirmative duty to protect against harms to his liberties
3 inflicted by third parties. But the duty arises solely from
4 "the State's affirmative act of restraining the individual's
5 freedom to act on his own behalf [] through incarceration,
6 institutionalization, or other similar restraint of personal
7 liberty." Id. at 200.

8 Our own opinions have also focused on involuntary custody
9 as the linchpin of any special relationship exception. See
10 Lombardi v. Whitman, 485 F.3d 73, 79 n.3 (2d Cir. 2007)
11 ("Special relationships arise ordinarily if a government actor
12 has assumed an obligation to protect an individual by
13 restricting the individual's freedom in some manner, as by
14 imprisonment."); Suffolk Parents of Handicapped Adults v.
15 Wingate, 101 F.3d 818, 824 (2d Cir. 1996) (holding that
16 plaintiffs' claim did not fall within DeShaney exception
17 because "the plaintiffs here . . . are not involuntarily
18 institutionalized"); see also Doe v. N.Y.C. Dep't of Soc.
19 Servs., 649 F.2d 134, 141 (2d Cir. 1981) (holding that state is
20 liable under Due Process Clause for abuse suffered by child in
21 foster care, and emphasizing custodial nature of foster care
22 placement).

23 The relationship between defendants and Matican does not
24 resemble those that have been found to lie within the bounds of

1 the special relationship exception. Matican freely agreed to
2 serve as a confidential informant in exchange for more lenient
3 treatment. He was not in custody at the time of the sting or of
4 Delvalle's assault. The state did not "render[] him unable to
5 care for himself," DeShaney, 489 U.S. at 200; after all,
6 Matican argues that, had defendants warned him of Delvalle's
7 release, he would have moved to California to live with his
8 brother. That he was in custody when he agreed to become a
9 confidential informant is of no moment: he does not allege that
10 he was coerced, and his former incarceration did not exacerbate
11 his injury. See id. at 201 ("That the State once took temporary
12 custody of [petitioner] does not alter the analysis, for when
13 it returned him to his father's custody, it placed him in no
14 worse position than that in which he would have been had it not
15 acted at all; the State does not become the permanent guarantor
16 of an individual's safety by having once offered him
17 shelter.").

18 We therefore join several of our sister circuits in
19 holding that a noncustodial relationship between a confidential
20 informant and police, absent more, is not a special
21 relationship. Accord Velez-Diaz v. Vega-Irizarry, 421 F.3d 71,
22 80 (1st Cir. 2005); Dykema v. Skoumal, 261 F.3d 701, 706 (7th
23 Cir. 2001); Butera v. District of Columbia, 235 F.3d 637, 648

1 (D.C. Cir. 2001); Summar v. Bennett, 157 F.3d 1054, 1059 (6th
2 Cir. 1998).⁴

3
4 B. State-created danger exception.

5 Like the special relationship exception, the state-created
6 danger exception arises from the Court's analysis in DeShaney.⁵
7 After explaining that no special relationship existed between
8 the state and petitioner, the Court further noted that,
9 "[w]hile the State may have been aware of the dangers that
10 [petitioner] faced in the free world, it played no part in
11 their creation, nor did it do anything to render him any more
12 vulnerable to them." DeShaney, 489 U.S. at 201. The Court
13 emphasized that government officers had done nothing worse than
14 failing to take action even though suspicious circumstances may
15 have counseled an active role. Id. at 203. These statements led

⁴ Matican encourages us to adopt the reasoning of G-69 v. Degnan, 745 F. Supp. 254 (D.N.J. 1990), which held that a special relationship exists between the state and a confidential informant whose safety depends on confidentiality. Id. at 265. But G-69 fails to distinguish between the special relationship and state-created danger exceptions, a distinction that may not have been obvious in DeShaney's immediate aftermath. See id. (finding special relationship because plaintiff's service to state "increased by a corresponding proportion the risk to his life"). As such, we do not find the decision to be particularly persuasive, and choose instead to follow the more recent analysis from our sister circuits.

⁵ The doctrine had been recognized in some circuits prior to DeShaney. See Kennedy v. City of Ridgefield, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006) (collecting cases).

1 us to conclude that, by negative implication, the state does
2 infringe a victim's due process rights when its officers assist
3 in creating or increasing the danger that the victim faced at
4 the hands of a third party. Dwares, 985 F.2d at 99.

5 In applying the state-created danger principle, "we have
6 sought to tread a fine line between conduct that is 'passive'"
7 (and therefore outside the exception) "and that which is
8 'affirmative'" (and therefore covered by the exception). Pena
9 v. DePrisco, 432 F.3d 98, 109 (2d Cir. 2005). Thus, we have
10 found state-created dangers (or denied summary judgment where
11 state-created danger theories were alleged) where police
12 officers told skinheads that they would not prevent them from
13 beating up protesters in a park, Dwares, 985 F.2d at 99; where
14 police officers gave a handgun to a retired officer who then
15 shot a fleeing robber, Hemphill v. Schott, 141 F.3d 412, 419
16 (2d Cir. 1998); where a prison guard told inmates that it was
17 "open season" on a prisoner, and the inmates beat up the
18 prisoner, Snider v. Dylaq, 188 F.3d 51, 55 (2d Cir. 1999); and
19 where police officials encouraged an off-duty colleague to
20 drink excessively, after which he killed three pedestrians in a
21 car accident, Pena, 432 F.3d at 110-11. By contrast, we held
22 that no state-created danger existed where a police officer
23 failed to intervene to prevent a colleague from shooting

1 someone during an altercation. Pitchell v. Callan, 13 F.3d 545,
2 549 (2d Cir. 1994).⁶

3 As the district court recognized, Matican's allegation
4 that the officers failed to learn about, or inform him of,
5 Delvalle's violent criminal history or his release on bail fall
6 on the passive side of the line. "Under DeShaney, allegations
7 that the defendant officers merely stood by and did nothing are
8 insufficient to state a constitutional violation." Pena, 432
9 F.3d at 110 (internal quotation marks omitted); see also
10 Lombardi, 485 F.3d at 79 ("It is not enough to allege that a
11 government actor failed to protect an individual from a known
12 danger of bodily harm or failed to warn the individual of that
13 danger."). This is so notwithstanding Matican's assertion that
14 the officers promised to protect him. See DeShaney, 489 U.S. at
15 200 ("The affirmative duty to protect arises not from the
16 State's knowledge of the individual's predicament or from its
17 expressions of intent to help him").

18 By contrast, Matican's allegation that the officers
19 planned the sting in a manner that would lead Delvalle to learn
20 about Matican's involvement is sufficiently affirmative to
21 qualify as a state-created danger. See Kennedy v. City of

⁶ We declined to decide whether a state-created danger existed where, after the terrorist attacks of September 11, 2001, federal officials informed rescue workers that the air near the World Trade Center site was safe to breathe, causing the workers to forego protective gear. Lombardi, 485 F.3d at 81.

1 Ridgefield, 439 F.3d 1055, 1063 (9th Cir. 2006) (finding that,
2 where police officer informed assailant that victim had filed
3 report against him, and assailant then shot victim, officer
4 "affirmatively created an actual, particularized danger" to
5 victim).⁷

6
7 C. Shocking the conscience.

8 Until recently, Supreme Court and Second Circuit precedent
9 gave little objective guidance as to whether a particular state
10 action does or does not shock the contemporary conscience. In
11 Lewis, the Supreme Court noted one set of parameters:

⁷ The defendant law enforcement officers in Dwares, Hemphill, Snider, and Pena all had personal relationships with the third-party assailants, and they either actively facilitated the assaults or personally communicated that assaults would go unpunished. Here, by contrast, the officers' conduct might have indirectly alerted Delvalle to Matican's identity, but the officers had no personal relationship with Delvalle other than the arrest itself. We have thus far found state-created dangers only where there is such a relationship. See Pena, 432 F.3d at 109 ("Our distinction between these categories of cases suggests that 'special relationship' liability arises from the relationship between the state and a particular victim, whereas 'state created danger' liability arises from the relationship between the state and the private assailant."); see also Dwares, 985 F.2d at 99 (describing officers' liability in terms of "aid[ing] and abett[ing]"). However, other circuits have found state-created dangers where state officials had no relationship with the individual causing harm, e.g., Wood v. Ostrander, 879 F.2d 583, 590 (9th Cir. 1989), or where the victim was not harmed by an individual at all, e.g., Kneipp ex rel. Cusack v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996). Because the officers' affirmative conduct did not shock the conscience (as explained below), we need not decide whether the state-created danger exception is limited to cases where state officials had a direct relationship with the third party who caused injury.

1 negligently inflicted harm "is categorically beneath the
2 threshold of constitutional due process," 523 U.S. at 849
3 (citing Daniels v. Williams, 474 U.S. 327, 328 (1986)), whereas
4 the intentional infliction of injury is the conduct "most
5 likely to rise to the conscience-shocking level," id. As for
6 conduct between these poles, the Court held only that harm
7 inflicted recklessly or with deliberate indifference does not
8 shock the conscience in the context of a time-sensitive
9 emergency, such as a high-speed chase. Id. at 853-54. Here,
10 though, the officers had ample opportunity to plan the sting in
11 advance. Matican argues that the district court erred in
12 holding that the officers did not act with deliberate
13 indifference. He proposes a balancing test to help factfinders
14 determine when the conscience is shocked by reckless or
15 deliberately indifferent state action that creates or increases
16 a danger.

17 We need not consider Matican's proposed test, because this
18 court's decision last year in Lombardi provides sufficient
19 guidance to resolve this issue. In that case, we considered the
20 claims of rescue and cleanup workers at the World Trade Center
21 site following the 9/11 attacks. The workers in that case
22 alleged that the defendants, federal environmental and
23 workplace-safety officials, issued intentionally false press
24 releases stating that the air in Lower Manhattan was safe to

1 breathe, and that in reliance on those statements, the workers
2 did not use protective gear. Lombardi, 485 F.3d at 75. We held
3 that, regardless of whether the situation was a time-sensitive
4 emergency, plaintiffs' allegations of deliberate indifference
5 did not shock the conscience. Id. at 85. "Hurried or unhurried,
6 the defendants were subjected to the 'pull of competing
7 obligations.'" Id. at 83 (quoting Lewis, 523 U.S. at 834). We
8 reasoned that those competing obligations counseled against
9 broad constitutional liability for the government officials,
10 whose decisionmaking might be inhibited by the threat of
11 lawsuits. Id. at 84. We concluded that "[w]hen great harm is
12 likely to befall someone no matter what a government official
13 does, the allocation of risk may be a burden on the conscience
14 of the one who must make such decisions, but does not shock the
15 contemporary conscience." Id. at 85.

16 The same considerations lead us to conclude that Matican's
17 allegations of affirmative conduct by the officers, even if
18 true, do not shock the contemporary conscience. In designing
19 the sting, the officers here had two serious competing
20 obligations: Matican's safety and their own. They could
21 reasonably have concluded that the arrest of a potentially
22 violent drug dealer demanded the use of overwhelming force,
23 even if that show of force might jeopardize the informant's
24 identity in the future. We are loath to dictate to the police

1 how best to protect themselves and the public, especially when
2 our ruling could be taken to require officers to use riskier
3 methods than their professional judgment demands.

4 As we explained in Lombardi, the defendants in our prior
5 state-created danger cases were not subject to “the pull of
6 competing obligations.” See id. at 83 (discussing Pena and
7 Dwares). Butera v. District of Columbia, 235 F.3d 637 (D.C.
8 Cir. 2001), which Matican cites, is distinguishable for the
9 same reason: the officers in that case sent an informant into
10 an undercover drug buy while monitoring from the safety of
11 their cars, id. at 642, and thus would have incurred no risk
12 had they fitted the informant with wires or agreed in advance
13 on danger signals, id. at 644.

14 Because the officers were obliged to protect their own
15 safety as well as Matican’s, their design of the sting in this
16 case does not shock the conscience.⁸ Matican therefore suffered
17 no violation of his rights under the Due Process Clause.

18 19 III. CONCLUSION

20 We find that no constitutional violation occurred. We see
21 no need to consider whether the officers enjoyed the benefit of
22 qualified immunity, or whether Matican had a claim against the

⁸ We need not resolve the vexing questions raised by defendants about the proximate cause of Matican’s injuries.

1 City for a practice or custom of failing to protect
2 confidential informants. Furthermore, because Matican has no
3 valid federal claims, the district court did not exceed its
4 allowable discretion in declining to exercise jurisdiction over
5 his state claims. 28 U.S.C. § 1367(c). We have considered all
6 of Matican's other arguments for reversal of summary judgment
7 and find them to be without merit.

8 Judgment affirmed.