

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2008

4 (Argued: January 6, 2009

Decided: July 28, 2009)

5 Docket No. 07-0964-cv

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8
9 GENEVA FINIGAN,

10
11 Plaintiff-Counter-Defendant-Appellee,

12
13 v.

14
15 WILLIAM E. MARSHALL, Individually and
16 in His Official Capacity as Deputy Sheriff
17 of the County of Saratoga, New York,

18
19 Defendant-Counterclaimant-Appellant.*
20

21 - - - - -
22 B e f o r e: WINTER, KATZMANN, and RAGGI, Circuit Judges.

23
24 Appeal from a denial of qualified immunity by the United
25 States District Court for the Northern District of New York
26 (David N. Hurd, Judge) in a Section 1983 false arrest action.
27 Because the defendant had probable cause for the arrest, the
28 plaintiff suffered no constitutional violation. We therefore
29 vacate the district court's judgment with respect to that claim

*The Clerk of the Court is instructed to amend the official caption in this case to conform to the listing of parties above.

1 and remand for proceedings consistent with this opinion.

2 JOHN D. ASPLAND, JR. (William A.
3 Scott, of counsel), FitzGerald
4 Morris Baker Firth P.C., Glens
5 Falls, New York, for Appellant.
6

7 DENNIS B. SCHLENKER, Law Office of
8 Dennis B. Schlenker, Albany, New
9 York, for Appellee.
10

11 WINTER, Circuit Judge:

12 William E. Marshall, Deputy Sheriff of Saratoga County,
13 appeals from Judge Hurd's denial of qualified immunity from a
14 claim of false arrest. On December 26, 2003, Geneva Finigan went
15 to her former marital residence, where her estranged husband
16 resided, while he was not at home and without his permission, to
17 remove personal property. Marshall, responding to a 911
18 burglary-in-progress report, arrived at the scene and took
19 Finigan into custody. After Finigan was released without having
20 been charged with a crime, she brought a Section 1983 action
21 against Marshall in his individual and official capacity on
22 theories of false arrest and abuse of process in violation of
23 rights secured by the Fourth and Fourteenth Amendments. See 42
24 U.S.C. § 1983. The district court granted Marshall's motion for

1 summary judgment as to the abuse of process claim,¹ but denied it
2 as to the false arrest claim, concluding that Marshall did not
3 have probable cause and was not entitled to qualified immunity.

4 We conclude that, even though appellee shared title to the
5 house with her estranged husband, Marshall had probable cause to
6 arrest Finigan. We therefore vacate the district court's
7 judgment with respect to that claim and remand for proceedings
8 consistent with this opinion.

9 BACKGROUND

10 The relevant events giving rise to this appeal are not in
11 dispute. See Note 2, infra. They took place in the small
12 community of Stillwater in Saratoga County, New York. In April
13 2003, Finigan separated from her husband of twenty-eight years,
14 Robert Finigan, and moved out of their marital home ("the
15 premises"). By the fall of that same year, divorce proceedings
16 had begun. As of December 2003, the divorce proceedings remained
17 pending, and Finigan remained a titled owner of her former
18 residence, there having been no equitable distribution of
19 property.

¹The district court dismissed the abuse of process claim on the ground that the undisputed facts showed that Marshall had not issued any legal process against Finigan. This portion of the district court's decision is not before us on this appeal. The district court also denied Marshall's motion for leave to apply for attorney's fees pursuant to 42 U.S.C. § 1988.

1 As is common in a small community, the major players in the
2 relevant events had overlapping personal histories. Robert
3 Finigan was a member of the town ambulance corps and occasionally
4 interacted socially with Marshall. Robert Wood, Robert Finigan's
5 brother-in-law and neighbor, was Marshall's close friend.
6 Marshall, Robert Finigan, and Geneva Finigan all attended the
7 same high school.

8 On or around December 21, 2003, appellee learned that her
9 future ex-husband would be away for the Christmas holidays.
10 Although aware that her husband had changed the locks, she
11 decided to remove some items without his knowledge.

12 Finigan went to the premises on December 24, 2003, and
13 called a locksmith. She showed him her driver's license listing
14 the premises as her address and falsely told him she had lost her
15 keys. He then opened the back door for her. After removing a
16 few items of personal property, Finigan left the premises,
17 leaving the basement door unlocked.

18 On December 26, 2003, Finigan, accompanied by several family
19 members, including her brother, Everett Folmsbee, returned to the
20 premises with a van to retrieve more personal property such as
21 furniture, appliances, and linens. After about an hour, Finigan
22 loaded the van and drove to a friend's house where she planned to
23 store the property.

1 Meanwhile, Marshall, who was on patrol approximately twenty-
2 five miles away in Galway, responded to a report of a burglary-
3 in-progress in Stillwater. Upon arrival, he recognized the
4 premises as the residence of Robert Finigan. He had personal
5 knowledge that Robert Finigan resided there alone, that Geneva
6 Finigan had moved out sometime before, and that divorce
7 proceedings were pending. Marshall also recognized Geneva
8 Finigan's brother, Folmsbee, and asked his purpose for being on
9 the premises. Folmsbee explained that he was helping his sister
10 retrieve some items. Shortly thereafter, Robert Finigan's
11 brother-in-law and neighbor, Robert Wood, arrived on the scene.
12 Wood told Marshall that he was watching the premises for Robert
13 Finigan while Finigan was away for the holidays. Because his
14 brother-in-law had changed the locks, Wood expressed uncertainty
15 as to how Geneva Finigan had obtained access to the premises.

16 After having unloaded the van at her friend's house, Geneva
17 Finigan received a phone call from Folmsbee, who informed her
18 that "Bill Marshall [was at the premises] to arrest [her]."
19 Geneva Finigan returned to the premises where Marshall inquired
20 whether she had removed property. She admitted that she had done
21 so without her husband's knowledge. Marshall then directed her
22 to get into the back seat of his patrol car, whereupon he resumed
23 his questioning. Geneva Finigan informed him that she had legal

1 title to the residence, that she was removing only her own
2 property, and that her divorce attorney told her she could do so.
3 Marshall made no attempt to verify whether Finigan held legal
4 title, nor did he make any other inquiries at the scene.

5 Instead, he transported her to the Stillwater police station
6 where she was read her rights. At some point, either just before
7 Marshall placed Finigan under arrest or at the station, Finigan
8 informed Marshall that she had used the services of a locksmith
9 to enter the premises. Marshall ultimately released Finigan, who
10 was never charged with a crime.

11 Marshall moved for summary judgment asserting the existence
12 of probable cause or qualified immunity. The district court
13 denied the motion. It concluded that Marshall arrested Finigan
14 when, armed and uniformed, he directed Finigan to get into the
15 back seat of his patrol car. As to probable cause, the district
16 court noted that Marshall had failed to investigate whether
17 Finigan was legally entitled to enter the residence by virtue of
18 her title to the property and had failed to corroborate Wood's
19 statements indicating that Finigan did not have permission to
20 enter the premises. Consequently, the court concluded that it
21 was "difficult to envision any crime of which [Finigan] may have
22 been guilty." Therefore, Marshall did not, as a matter of law,

1 have probable cause to arrest Finigan and was therefore not
2 entitled to qualified immunity.

3 DISCUSSION

4 On appeal,² Marshall contends that the district court erred
5 when it denied his motion for summary judgment because he had
6 probable cause to arrest Finigan for burglary, or in the
7 alternative, because he was entitled to qualified immunity.
8 Finigan argues that because she was a titled owner of the real
9 and personal property at issue, Marshall possessed no reliable
10 information that Finigan had committed, or was about to commit, a

²As a general rule, the denial of summary judgment is not immediately appealable. See 28 U.S.C. § 1291. The collateral order doctrine, however, allows review of a district court's denial of summary judgment on the ground that the movant was not entitled to qualified immunity "to the extent that the district court has denied the motion as a matter of law." Moore v. Andreno, 505 F.3d 203, 207 (2d Cir. 2007) (quoting O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d 29, 38 (2d Cir. 2003)). This exception to the ordinary rule of finality effectuates the privilege's underlying purpose, which is not merely to provide a defense to liability, but to provide immunity from suit. Walczyk v. Rio, 496 F.3d 139, 153 (2d Cir. 2007). The existence of probable cause and a defendant's entitlement to qualified immunity may be determined as a matter of law to the extent that the issues may be resolved on undisputed facts establishing the pertinent events and the knowledge of the officer at the time of the arrest. See Cowan ex rel. Estate of Cooper v. Breen, 352 F.3d 756, 760-61 (2d Cir. 2003).

The principal discrepancy between the parties' versions of the events is with respect to whether Finigan told Marshall that she had called a locksmith to let her into the premises before or after she was arrested. Because this issue is irrelevant to Marshall's claims, our jurisdiction is not in question. See Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004) ("[W]e have jurisdiction to review a denial of qualified immunity to the extent it can be resolved 'on stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find.'" (quoting Salim v. Proulx, 93 F.3d 86, 89 (2d Cir. 1996))).

1 crime. Thus, Finigan argues that Marshall did not have probable
2 cause for the arrest and is not entitled to qualified immunity.

3 For the reasons that follow, we conclude that Marshall had
4 probable cause to arrest Finigan.

5 We review the district court's denial of a summary judgment
6 motion based on a defense of qualified immunity de novo. Jones
7 v. Parmley, 465 F.3d 46, 55 (2d Cir. 2006). We limit ourselves
8 to undisputed facts establishing the defense as a matter of law.
9 Id. (citing Cartier v. Lussier, 955 F.2d 841, 844 (2d Cir.
10 1992)).

11 Before deciding whether Marshall is entitled to qualified
12 immunity, we must decide whether Finigan "has alleged a
13 constitutional violation at all."³ Kerman v. City of New York,
14 261 F.3d 229, 235 (2d Cir. 2001); see also Jones, 465 F.3d at 55.
15 Finigan cannot recover for false arrest if Marshall had probable
16 cause to arrest her. See Singer v. Fulton County Sheriff, 63
17 F.3d 110, 118 (2d Cir. 1995). If facts supporting probable cause
18 to arrest are ultimately found not to have existed, an arresting
19 officer will nonetheless be entitled to immunity from suit based

³A plaintiff must also show that the right violated was clearly established. The Supreme Court recently held that while lower courts are no longer required to address these prongs in any particular order, it recognized that it is "often beneficial" to do so. Pearson v. Callahan, 555 U.S. ----, ----, 129 S. Ct. 808, 818 (2009). Doing so here is beneficial because the plaintiff is unable to establish the violation of a constitutional right, and thus, we need not reach the second prong.

1 on "arguable probable cause," which requires that he or she show
2 that it was objectively reasonable to believe that probable cause
3 existed or that "'officers of reasonable competence could
4 disagree on whether the probable cause test was met.'" *Escalera*
5 *v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (quoting *Golino v. City*
6 *of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991)).

7 In determining whether there was probable cause, our inquiry
8 is an objective one that focuses on the facts available to the
9 arresting officer at the time of the arrest. *Jaegly v. Couch*,
10 439 F.3d 149, 154 (2d Cir. 2006). Probable cause exists when,
11 based on the totality of circumstances, the officer has
12 "knowledge of, or reasonably trustworthy information as to, facts
13 and circumstances that are sufficient to warrant a person of
14 reasonable caution in the belief that an offense has been or is
15 being committed by the person to be arrested." *Zellner v.*
16 *Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007); see also *Panetta v.*
17 *Crowley*, 460 F.3d 388, 395 (2d Cir. 2006). Such is the case
18 here.

19 Under New York law, a person is guilty of burglary in the
20 second degree when he or she "knowingly enters or remains
21 unlawfully in a [dwelling] with [the] intent to commit a crime
22 therein." N.Y. Penal Law § 140.25. Criminal trespass is a
23 lesser included offense of burglary. *People v. Devonish*, 843

1 N.E.2d 1120, 1120 (N.Y. 2005). A person commits criminal
2 trespass in the second degree "when he [or she] knowingly enters
3 or remains unlawfully in a dwelling." N.Y. Penal Law § 140.15.
4 "A person 'enters or remains unlawfully' in or upon premises when
5 he [or she] is not licensed or privileged to do so." Id. §
6 140.00(5).

7 In our view, there was probable cause to arrest Geneva
8 Finigan for criminal trespass in the second degree. At the time
9 of the arrest, Marshall knew the following: a report of a
10 burglary at the address of the premises had been made; Geneva
11 Finigan no longer resided at the premises; a divorce proceeding
12 between Robert and Geneva Finigan was pending; Robert Finigan had
13 changed the locks; Robert Finigan was away; Geneva Finigan had
14 entered the premises and had removed property; and a neighbor,
15 who was watching the house for Robert, had no idea how Geneva
16 entered the premises. It was evident from the neighbor's
17 statements, and from Geneva's own statements that her entry was
18 based on her own legal rights, that Robert had not consented to
19 her entry into the premises. See Panetta, 460 F.3d at 396. That
20 information constituted probable cause for an arrest for criminal
21 trespass.

22 Appellee's argument rests heavily on her having shared title
23 to the home and ownership of the items removed and on Marshall's

1 failure to verify that claim of title. However, the issue is her
2 right of entry under the circumstances described above, and title
3 does not provide an absolute right to enter at times of one's
4 choosing without the permission of an occupant.

5 The principal purpose of New York's burglary statute is the
6 protection of habitation rights, and the right of entry does not
7 turn solely on the existence of an ownership interest. Where
8 title to a property is jointly held as tenants by the entirety
9 but one spouse is the sole resident, the consent of the non-
10 resident spouse alone does not, as a matter of law, establish a
11 license or privilege to enter. To the contrary, under New York
12 law, a non-resident spouse who is a titled owner of a house and
13 enters without the permission of the resident spouse may be
14 convicted of burglarizing his or her own property. People v.
15 Glanda, 774 N.Y.S.2d 576, 581-82 (N.Y. App. Div. 2004) ("an owner
16 can properly be convicted of burglarizing premises he owns but
17 which are occupied by another") (collecting cases); cf. Milillo
18 v. Milillo, 748 N.Y.S.2d 850, 851, 853-54 (N.Y. Fam. Ct. 2002)
19 (rejecting husband's argument that as former resident and joint
20 tenant by the entirety of marital residence, he was legally
21 entitled to enter at will, on facts that "essentially
22 constitute[d] a burglary or trespass" in a family offense
23 action); People v. Cheyne, 402 N.Y.S.2d 971, 972 (N.Y. Dist. Ct.

1 1978) (upholding trespass conviction of divorced husband despite
2 honest belief of license or privilege to remain after exclusive
3 possession of premises awarded to divorced wife). This is the
4 case even though tenants by the entirety usually share equal
5 rights to possess and enjoy the property. Glanda, 774 N.Y.S.2d
6 at 581. Therefore, while title might have enabled Finigan to
7 obtain a court order affording supervised entry and removal of
8 the property, her resort to self-help stands on a different
9 footing.

10 However paradoxical such a legal rule may seem at first
11 blush, a contrary rule could lead to circumstances fraught with
12 danger.⁴ Geneva Finigan's particular entry into the premises
13 might have been without great danger, but other spouses in
14 divorce proceedings may have less reliable guarantees that the
15 estranged spouse will be absent from the premises and will not
16 use force to resist entry. And angry title-holding spouses may
17 attempt to enter precisely because the other spouse is on the
18 premises. The rule would also seem to permit looting of the
19 premises by non-resident spouses by requiring officials to stay

⁴The New York Court of Appeals has emphasized the strong public policy against self-help by forcible means to enter premises by one who believes them wrongfully closed. See People v. Horelick, 285 N.E.2d 864, 865 (N.Y. 1972) (“[U]ltimately, analyses related to claims of right by owners and others entitled to rights of entry under property law [are immaterial]. Even such property rights, by still being subject to restrictions on the use of force, emphasize the policy against self-help by force or other illegal methods.”).

1 their hand while checking on title to real estate or personal
2 property. See People v. Hudson, 658 N.Y.S.2d 800, 801 (N.Y. Co.
3 Ct. 1997).⁵

4 Appellee also argues that, for probable cause to exist,
5 Marshall needed to conclude at the time of the arrest that
6 Finigan had entered the premises knowing that she had no license
7 or privilege to enter. As a corollary, because a reasonable
8 belief of license or privilege to enter negates the "knowing"
9 unlawful entry element of the criminal trespass statute, Finigan
10 argues that her belief that her legal title conferred a right of
11 entry to the premises defeats a finding of probable cause as a
12 matter of law.

13 These arguments incorrectly assume that an officer must have
14 proof of each element of a crime and negate any defense before an
15 arrest. However, even if the total sum of evidence here might
16 not persuade a jury to convict for criminal trespass because of
17 Finigan's belief in her right of entry, "[o]nce officers possess
18 facts sufficient to establish probable cause, they are neither
19 required nor allowed to sit as prosecutor, judge or jury. Their

⁵Finigan makes much of the myriad connections between Marshall and the various actors in this small town drama. To the extent that this concern is intended to allege an improper motive for the arrest, we note that our inquiry here is an objective one. When an officer confronted with a claim of unlawful arrest establishes probable cause, we do not consider his motivation in making the arrest. See Singer, 63 F.3d at 120. This is not to suggest that, apart from the various relationships, there is any evidence of an improper motive.

1 function is to apprehend those suspected of wrongdoing, and not
2 to finally determine guilt through a weighing of the evidence."
3 Krause v. Bennett, 887 F.2d 362, 372 (2d Cir. 1989). The facts
4 available at the time of the arrest need only cause a person of
5 reasonable caution to believe that a crime had been or was about
6 to be committed, a threshold that was easily met here.

7 CONCLUSION

8 For the foregoing reasons, we conclude Marshall had probable
9 cause to arrest Finigan. We therefore vacate the district
10 court's judgment with respect to that claim and remand for
11 proceedings consistent with this opinion.