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No. 18-3139

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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DEBORAH S. HUNT, Clerk

MARCIA PRZYBYSZ, on behalf of herself, individually and as Personal Representative of the Estate of Thomas Allen Przybysz, deceased,	)	
Plaintiff-Appellant,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
v.	)	
CITY OF TOLEDO, et al.,	)	
Defendants-Appellees.	)	

O R D E R

Before: SUHRHEINRICH, GILMAN, and SUTTON, Circuit Judges.

Marcia Przybysz appeals the district court's order awarding summary judgment to Sergeant Karrie Williams, the City of Toledo, and other officers named as defendants, and its order imposing sanctions. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Przybysz initiated these proceedings—alleging 42 U.S.C. § 1983 and state-law wrongful death claims—after the death of her son, Thomas Przybysz. Prior to his death, Thomas had been an unpaid informant and had disclosed the name of his drug dealer, Scott Warnka, to the police. After Thomas told the police about Warnka, an undercover officer made two buys from Warnka, and the second resulted in Warnka's arrest. Shortly after his arrest, Warnka bonded out of custody, and Thomas began receiving threatening text messages from a phone number shared by Warnka and Jessica Kinsey, who had been with Warnka during the second buy. Thomas then told Williams about the text messages, and the two spoke on the phone about other matters. Shortly after that,

an associate of Warnka murdered Thomas. Przybysz asserted that Williams, the City, and the other defendants were responsible for Thomas's death.

The parties filed cross-motions for summary judgment. Finding that Williams, the City, and the remaining defendants were entitled to summary judgment, the district court granted their motion and denied Przybysz's motion. The district court subsequently denied Przybysz's motion to alter or amend its judgment and imposed sanctions because it concluded that the motion was frivolous. This appeal followed.

Przybysz makes four arguments on appeal: (1) Williams was not entitled to summary judgment on Przybysz's § 1983 substantive due process claim; (2) the City was not entitled to summary judgment on Przybysz's *Monell* claim; (3) Williams was not entitled to summary judgment on the state-law wrongful death claim; and (4) the district court erred by imposing sanctions. To the extent she made other arguments below, she has abandoned them by failing to present those arguments on appeal. *See Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir. 1989) ("We normally decline to consider issues not raised in the appellant's opening brief.").

We review her first three arguments—all concerning summary judgment—de novo. *Miller v. Maddox*, 866 F.3d 386, 389 (6th Cir. 2017), *cert. denied*, No. 17-1123, 2018 WL 806189 (U.S. June 11, 2018). And we review the district court's decision to impose sanctions for an abuse of discretion. *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997).

First, Przybysz argues that Williams was not entitled to summary judgment on his § 1983 substantive due process claim. The substantive component of the Due Process Clause generally does not require the State to protect the life, liberty, or property of its citizens from private actors. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). It is a limitation on government action, not a guarantee of a minimal level of safety or security. See *id.*

There are two exceptions to this principle, but neither exception applies to this case. First, "[w]hen the State has so restrained the liberty of the individual that it renders him unable to care for himself, the State has a special relationship with the individual and thus an affirmative duty to protect him." *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006). This special relationship exception requires Przybysz to show that the State restrained him "through incarceration,

institutionalization, or other similar restraint of personal liberty." *Id.* But we have already held that voluntarily serving as a confidential informant does not "impose any constraint on [one's] freedom to act" and thus does not create a special relationship. *Summar v. Bennett*, 157 F.3d 1054, 1059 (6th Cir. 1998).

Second, under the state-created danger exception, a state can be held responsible when it "causes or greatly increases the risk of harm to its citizens . . . through its own affirmative acts." *Jones*, 438 F.3d at 690. This requires Przybysz to show:

> (1) an affirmative act by the state which either created or increased the risk that the [decedent] would be exposed to an act of violence by a third party; (2) a special danger to the [decedent] wherein the state's actions placed the [decedent] specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the [decedent].

Nelson v. City of Madison Heights, 845 F.3d 695, 700 (6th Cir. 2017).

Przybysz argues Williams created the danger that deprived Thomas of his life because Williams arrested Warnka shortly after the second drug purchase and informed Warnka that he had "just sold to an undercover cop." There are two problems with this argument.

First, there is no evidence that Williams was the police officer that told Warnka that he had "just sold to an undercover cop." The only thing on point in the record is Warnka's testimony. Here it is: "When the undercovers arrested me, after I was sitting in the back of the cop car, they told me you know you just sold to an undercover cop, and I said, yeah, obviously, I mean, look what just happened." R. 39 at 13.

Put aside the fact that the statement apparently made no difference to Warnka. Section 1983 is an individual liability statute and thus Przybysz bears the burden of "specifically link[ing] the officer's involvement to the constitutional infirmity." *Burley v. Gagacki*, 834 F.3d 606, 615 (6th Cir. 2016). It is not sufficient to claim that *some* police officer indicated that Warnka had just sold drugs to a confidential informant. The only person that matters is the subject of the § 1983 claim, Officer Williams.

That leaves the fact that Officer Williams arrested Warnka shortly after the second drug sale, which took place in the parking lot of Thomas's workplace, allegedly allowing Warnka to figure out that Thomas was a confidential informant. But we have only applied the state-created danger exception when the officer has named the confidential informant by name, *see Nelson*, 845 F.3d at 698, not when the totality-of-the-circumstances helps a private actor correctly guess his identity. We should not lightly extend this line of authority, in view of the many circumstances in which criminal suspects and criminal defendants cooperate with the government.

Przybysz also relies on *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). That case involved the disclosure of undercover police officers, not confidential informants. In any case, the police officers disclosed the undercover agents by name, just like in *Nelson*. In fact, the police revealed much more in *Kallstrom*: "The officers' personnel files include the officers' addresses and phone numbers; the names, addresses, and phone numbers of immediate family members; the names and addresses of personal references; the officers' banking institutions and corresponding account information, including account balances; their social security numbers; responses to questions regarding their personal life asked during the course of polygraph examinations; and copies of their drivers' licenses, including pictures and home addresses." *Id.* at 1059. Both *Nelson* and *Kallstrom* are readily distinguishable from this case.

That is dispositive for our purposes because qualified immunity shields an officer from liability unless "the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). As the Supreme Court recently admonished, this standard protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* The constitutional rule must be "settled law," placing the "constitutionality of the officer's conduct beyond debate." *Id.* Because there is no legal authority on point (let alone clear legal authority), Przybysz's claim fails to clear this hurdle.

Second, Przybysz claims that Toledo was not entitled to summary judgment on her claim under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). To succeed on this claim, Przybysz had to establish "that the alleged federal violation occurred because of a

municipal policy or custom." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). She could make that showing by demonstrating one of the following:

> (1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations.

Id.

Przybysz alleges Toledo did not adequately train its officers but this claim fails for several reasons. As a threshold matter, there can be no municipal liability under *Monell* when there is no constitutional violation. *See Schroder v. City of Fort Thomas*, 412 F.3d 724, 727 (6th Cir. 2005).

In any case, Toledo's training of Officer Williams was constitutionally adequate. Officer Williams joined the vice unit in 2013. In her first year, she received on-the-job training with a more experienced officer, Officer Bragg. Officer Bragg taught her "everything that was involved within the vice unit" including "what to look for" when "working with CIs." R. 40 at 5. Officer Williams also completed an "undercover survival" training course, "designed to allow students to observe and review undercover operations that culminated with violence against the undercover officer and arrest teams." R. 37-5 at 1. The course included cases studies "specifically selected for their relevance to the types of narcotic investigation[s] . . . typically conducted" by Toledo Police Officers. *Id.* Przybysz fails to demonstrate that this training was inadequate. "Showing merely that additional training would have been helpful in making difficult decisions" is not enough. *Connick v. Thompson*, 563 U.S. 51, 68 (2011).

Finally, Przybysz is required to point us to "prior instances of unconstitutional conduct demonstrating that [Toledo] ha[d] ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Burgess v. Fischer*, 735 F.3d at 478. But Przybysz has failed to point to even a single other instance in which the Toledo police has worked with a confidential informant who has been subsequently murdered by the target of the investigation.

Third, Przybysz asserts that Williams was not entitled to summary judgment on the state-law wrongful death claim. For this claim, Przybysz had to prove that Williams acted "with

malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(b). And that requires more than showing that Williams's conduct was "not as thorough as it could have been." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 316 (6th Cir. 2005) (quoting *Boyd v. Village of Lexington*, No. 01-CA-64, 2002 WL 416016, at *6 (Ohio Ct. App. Mar. 14, 2002)).

To support this claim, Przybysz directed the district court to Williams's conversations with Thomas shortly before the latter's death; in her view, Thomas made cries for help during those conversations, but Williams deliberately ignored his plight. But the evidence paints a different picture. In his text messages to Williams, Thomas did not cry for help. Instead, he told Williams that Warnka had been released, that Warnka was making threats, that he thought Warnka would not know about his involvement, that he had a child and a house, that the police were at his place of work the night before, and that he wanted to talk to Williams about an upcoming urine test at work and another buy he could arrange. Williams then called Thomas, and, according to Williams, Thomas again told her about Warnka's threats but advised that "he could take care of his self." They also discussed the upcoming urine test and "a couple of buys and set something up for Monday." Put simply, Thomas did not express any fear that Warnka would act on his threats, so there were no cries for help that Williams ignored. Even more, the remainder of the record discloses no evidence of bad faith or recklessness on Williams's part. Accordingly, Williams was entitled to summary judgment.

Finally, Przybysz challenges the district court's imposition of sanctions. Rule 11(c) of the Federal Rules of Civil Procedure provides that a district court may impose sanctions on its own for violations of Rule 11(b). *See* Fed. R. Civ. P. 11(b)(1)-(2) (explaining that, by filing a motion, a party or her counsel represents that it is proper and nonfrivolous, among other things). Before doing so, however, a district court must first issue a show-cause order. Fed. R. Civ. P. 11(c)(3); *Oakstone Cmty. Sch. v. Williams*, 615 F. App'x 284, 288 (6th Cir. 2015) ("Under Rule 11(c) . . . issuing a show-cause order is a mandatory prerequisite to imposing monetary sanctions sua sponte." (emphasis omitted)). Here, the district court did not enter a show-cause order. Although

it emailed the parties about its concerns, that did not satisfy the "mandatory prerequisite" of Rule 11(c). And for that reason, we must vacate the district court's order imposing sanctions.

For these reasons, we **AFFIRM** the district court's order awarding summary judgment, but we **VACATE** its order imposing sanctions.

RONALD LEE GILMAN, Circuit Judge, concurring in part and concurring in the judgment. I fully concur in my colleague's disposition of Marcia Przybysz's *Monell* and state-law claims, as well as their decision to vacate the district court's sanction order. Where we part company is over their disposition of Marcia's § 1983 claim against Sgt. Karrie Williams, although in the end I agree (for different reasons) that we should affirm the judgment of the district court.

The lead opinion holds that no clearly established law governs Marcia's claim against Sgt. Williams. Lead Op. at 4. I respectfully disagree. Although the facts of this case differ from those of *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), that case sets out a clear standard for constitutional torts premised on the state-created-danger theory. I believe that my colleagues' qualified-immunity analysis is overly rigid because it relies too heavily on factual differences between Marcia's claim and state-created-danger cases in which plaintiffs have prevailed. Nevertheless, I share my colleague's ultimate conclusion because the record contains insufficient evidence to show that Sgt. Williams acted with deliberate indifference to Thomas's safety.

Under the state-created-danger theory, state actors are liable for affirmative acts that (1) "either create or increase the risk that an individual will be exposed to private acts of violence," (2) and "place the victim specifically at risk, as distinguished from a risk that affects the public at large," where (3) the actor "kn[e]w[] or clearly should have known that [her] actions specifically endangered" the victim. *Kallstrom*, 136 F.3d at 1066. In *McQueen v. Beecher Community Schools*, 433 F.3d 460 (6th Cir. 2006), this court clarified that in circumstances similar to those in this case, which allow for "reflection and unhurried judgment," the third element requires proof that the state actor demonstrated deliberate indifference to the victim's safety. *Id.* at 469 (quoting *Bukowski v. City of Akron*, 326 F.3d 702, 710 (6th Cir. 2003)). Deliberate indifference equates to "'subjective recklessness,' which means that 'the official must both be aware of facts from which

the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference.'" *Id.* (citation omitted) (quoting *Sperle v. Mich. Dep't of Corr.*, 297 F.3d 483, 493 (6th Cir. 2002)).

Subjective recklessness, however, can also "be proven circumstantially by evidence that the risk was so obvious that the official had to have known about it." *Id.* (quoting *Bukowski*, 326 F.3d at 710). *Kallstrom* and its progeny thus stand for the clearly established proposition that state actors cannot act with total impunity to the risks that their affirmative acts impose upon individual members of the public.

True enough, the only similarly situated plaintiffs who have prevailed under the state-created-danger theory in our circuit are those in cases where the state official directly disclosed confidential information. *See Nelson v. City of Madison Heights*, 845 F.3d 695, 698, 703 (6th Cir. 2017) (denying qualified immunity to an officer who allegedly disclosed the identity of a confidential informant to a drug dealer's associate); *Kallstrom*, 136 F.3d at 1059, 1067 (holding the City of Columbus liable for releasing undercover officers' personnel and preemployment files to defense counsel for alleged members of a violent gang). In contrast, Sgt. Williams did not directly disclose Thomas's identity to his supplier, Scott Warnka, or to Warnka's associates. This fact alone appears to be enough, in my colleagues' view, to shield Sgt. Williams from liability. Lead Op. at 4. I disagree.

The Supreme Court has warned the lower courts against placing too "rigid [a] gloss on the qualified immunity standard" by "requir[ing] that the facts of previous cases be 'materially similar'" to those at hand. *Hope v. Pelzer*, 536 U.S. 730, 739, 741–44 (2002) (holding that the Supreme Court's and the Eleventh Circuit's Eighth Amendment jurisprudence clearly established the unconstitutionality of a prison's policy of punishing prisoners by handcuffing them to "hitching

posts," despite the lack of prior cases holding that specific practice unconstitutional). The unlawfulness of an official act "must be apparent" to give rise to individual liability, but the doctrine of qualified immunity does not require that "the very action in question ha[ve] previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Moreover, "general statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *United States v. Lanier*, 520 U.S. 259, 271 (1997).

If a state actor is on notice that directly disclosing a confidential informant's name to violent third parties can give rise to liability, then I see no reason why that same actor lacks sufficient notice that affirmative acts that indirectly but unmistakably identify a confidential informant can do the same. *Kallstrom* and its progeny set forth "a general constitutional rule" that "appl[ies] with obvious clarity to the specific conduct in question" here. *See id.* Accordingly, I would find that clearly established law is at issue in this case.

But that is not the end of the qualified-immunity analysis. We must also consider whether the facts of the case, "[t]aken in the light most favorable to the party asserting the injury, . . . show [that] the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In my view, this prong of *Saucier*'s two-part framework, not the clearly-established-law prong, is the insurmountable barrier to Marcia's claim against Sgt. Williams.

Marcia's claim depends upon her contention that the way in which the police arrested Warnka revealed Thomas as a confidential informant in a manner that was the functional equivalent of identifying him by name. Her argument is not specious. Thomas worked at a Jeep assembly plant and had previously permitted Warnka to sell drugs to Jeep workers using his unlocked car in the plant's parking lot as a drop-off point. (R. 33, PageID 418; R. 40, PageID 847)

Accordingly, at Sgt. Williams's direction, Thomas introduced an undercover officer to Warnka and arranged for an initial cocaine sale using Thomas's car. (R. 33, PageID 415–18) The undercover officer contacted Warnka directly to set up a second controlled buy, arranging to meet Warnka at the Jeep parking lot. (R. 33, PageID 418–25) After Warnka and the undercover officer completed the second controlled buy in Warnka's car, police officers arrested Warnka then and there at the scene of the sale. (R. 33, PageID 425–29)

Warnka testified at a deposition following Thomas's murder that the circumstances of Warnka's arrest made it "obvious" to him that he had been set up by Thomas. (R. 39, PageID 812) In Warnka's words, the betrayal was evident because Thomas "called me [Warnka] from his phone and had me meet this guy [the undercover officer]. I meet this guy and they busted me right in the parking lot and the same person I met prior [to] that [the undercover officer] was sitting in Tom's car, so that tells me right there that he set me up. He knew it was an undercover cop." (R. 39, PageID 814)

Plaintiff's expert, Michael D. Lyman, Ph.D., a certified police instructor and a college professor who teaches and researches in the area of policing, concluded in his report that Sgt. Williams's controlled-buy and arrest plan created obvious and avoidable risks to Thomas's safety. (R. 63-3) Dr. Lyman opined that Sgt. Williams "knew or should have known that (1) [Thomas] would be readily identified by Warnka because Warnka's arrest took place close to the time that [Thomas] made his initial introductions to Warnka and (2) Warnka would likely seek retribution against [Thomas] once released from jail." (R. 63-3, PageID 1651)

According to Dr. Lyman, a "reasonable investigator would [(1)] assume their duty as a public servant and not arrest Warnka so close to the time period of [Thomas's] initial introduction where he would logically be identified as a police informant; would (2) monitor Warnka's release

from jail; and (3) would take immediate action to provide physical security and safety for [Thomas] upon learning that Warnka was threatening him. Williams failed to perform all three of these." (*Id.*) Dr. Lyman further opined that "when Scott Warnka was arrested at [Thomas's] place of employment, [Warnka] was immediately able to conclude that it was [Thomas] who was working with the police to facilitate the drug transaction." (R. 63-3 at PageID 1653)

As Warnka's testimony and Dr. Lyman's report suggest, Sgt. Williams could have done more to protect Thomas by arresting Warnka at a later time and at a different location. Indeed, during the trial of Thomas's murderer, John Haugh, Sgt. Williams testified that the Toledo Police Department ordinarily executes arrests two to four days after a controlled buy. (R. 63-1, PageID 1632) Even arresting Warnka a short time after the controlled buy following, say, a traffic stop would have offered greater protection to Thomas's identity than the plan orchestrated by Sgt. Williams.

But more extensive protections for Thomas's identity would not necessarily have prevented Warnka or his associates from suspecting that Thomas had served as a confidential informant. For example, Warnka might have surmised that Thomas had set him up from the undercover officer's trial testimony or from the fact that Thomas was not charged despite his car being used as a drop-off point. Thomas voluntarily assumed those risks, however, when he agreed to serve as a confidential informant. *See Summar ex rel. Summar v. Bennett*, 157 F.3d 1054, 1058–59 (6th Cir. 1998) (granting qualified immunity to a police officer where the disclosure of a confidential informant's identity flowed from his voluntary agreement to serve in that capacity).

In contrast, Sgt. Williams's decision to arrest Warnka immediately after the controlled buy on the premises of Thomas's workplace was not among the inherent risks that Thomas assumed by serving as a confidential informant. I therefore believe that a reasonable jury could find that

the manner in which Sgt. Williams ordered the police to arrest Warnka showed a lack of due care; i.e., that it negligently increased Thomas's risk of serious harm. But negligence is not enough to establish deliberate indifference. *Aldredge v. Franklin County*, 509 F.3d 258, 263–64 (6th Cir. 2007) (holding that evidence of negligence is insufficient to sustain a § 1983 claim under the state-created-danger theory).

The record in fact shows that Sgt. Williams took precautions to minimize Thomas's degree of exposure. Among those precautions was having the undercover officer who conducted the controlled buys pose as a Jeep employee, wearing the protective glasses that plant workers wear. (R. 33, PageID 417) The police also pretended to arrest the undercover officer to minimize the suspicion that a controlled buy had occurred, although Warnka's deposition testimony raises some doubt as to how convincingly the arresting officers executed the fake arrest. (R. 33, PageID 428–29; R. 39, PageID 810–11) All of this tends to negate any credible showing of deliberate indifference to Thomas's safety by Sgt. Williams. Accordingly, I agree with the district court and with my colleagues that Sgt. Williams is entitled to summary judgment, but only because negligence is not enough to satisfy the constitutional standard at issue here. *See id.*

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk