STATE OF MICHIGAN

COURT OF APPEALS

CHARLES SAYRE and MARION WOODWARD,

Plaintiffs-Appellants,

v

CITY OF ANN ARBOR, HURON TOWERS APARTMENTS, and DELORES ROGOW,

Defendants,

and

SERGEANT RICHARD KINSEY and DETECTIVE GREGORY STEWART,

Defendants-Appellants.

UNPUBLISHED
February 4, 2000

No. 212632
Washtenaw Circuit Court
LC No. 94-003359-CZ

CHARLES SAYRE and MARION WOODWARD,

Plaintiffs-Appellants,

v

CITY OF ANN ARBOR and ANN ARBOR POLICE DEPARTMENT,

Defendants,

and

SERGEANT RICHARD KINSEY and DETECTIVE GREGORY STEWART,

Defendants-Appellants.

No. 212633
Washtenaw Circuit Court
LC No. 94-002975-CZ

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting summary disposition in favor of defendants on plaintiffs' claim that defendants violated plaintiffs' civil rights under 42 USC 1983 when they conducted an unreasonable search and seizure of plaintiffs' apartment. We affirm.

Facts

On June 30, 1994, the Ann Arbor Police Department received an anonymous tip that someone was going to the top of Huron Towers Apartments with a rifle intending to shoot construction workers. Defendants, Sergeant Richard Kinsey and Detective Gregory Stewart, suspected plaintiff Charles Sayre of being the possible shooter.[1] Defendants went to Sayre's eleventh-floor Huron Towers apartment in an attempt to assess his mental state. Because no one answered the door to Sayre's apartment, defendants spoke with the apartment manager, Delores Rogow, and apprised her of the situation. Without knowing that defendants suspected Sayre, Rogow volunteered that Sayre would be the likely suspect because he was a problem tenant, and because he was scheduled to be evicted the next day.

Notified at this point that an officer at the police station had contacted Sayre by phone, and that Sayre had agreed to answer his door, defendants returned to his apartment. Familiar with Sayre's history of threatening to harm police officers, defendants asked Sayre to leave his apartment with his hands in plain view. Sayre, however, began to leave his apartment with his left hand concealed. Unsure if Sayre was armed, defendants maintained covered positions, aiming their weapons at Sayre, and asked Sayre to show his left hand. Sayre did not comply with the request, and instead retreated into the apartment. As the door closed, Kinsey observed a white female, later identified as plaintiff Marion Woodward, inside the apartment.

In a subsequent conference call involving Sayre, his attorney, and the officer at the station, Sayre indicated that he would leave his apartment if the officers agreed not to point their weapons at him. Sayre then left his apartment, Woodward immediately closing the door behind him. Kinsey ordered Sayre to be handcuffed and taken into protective custody because defendants believed that Sayre posed a threat to the people in his vicinity. Kinsey also explained to Sayre that he was ordering a search of the apartment to ensure that it contained no injured individuals and that no sniper remained inside.[2] Woodward allowed defendants into the apartment, identifying herself as Sayre's live-in girlfriend, but indicated that she did not want defendants to conduct a search. Kinsey explained to Woodward that he and Stewart believed that emergency conditions existed and that they would search the apartment for people in need of medical aid. Although Woodward stated that she was alone in the apartment, that she was not injured, and that she had not seen any firearms in the apartment, Stewart performed a search that lasted approximately thirty minutes. In the course of this search Stewart seized

a knife, and three rifle-length firearms that were in plain view in an umbrella stand in the hallway.[3] Defendants found no one else in the apartment or on the balcony.

Woodward was not taken into custody, and Sayre was later released from protective custody after the psychiatric services staff at the University of Michigan concluded that he displayed no signs of mental illness. No charges were filed against plaintiffs following this incident.

Procedural History

On July 29, 1994, plaintiffs filed an action under the Michigan Freedom of Information Act, MCL 15.231; MSA 4.1801, against the City of Ann Arbor and the City of Ann Arbor Police Department. Plaintiffs sought injunctive relief to compel defendants to disclose the documents relating to the search of plaintiffs' apartment on June 30, 1994. Plaintiffs additionally sought punitive damages, costs, and attorney fees. Then on October 12, 1994, plaintiffs filed an eight-count complaint against the City of Ann Arbor, Kinsey, Stewart, Huron Towers Apartment, and Rogow, alleging a Freedom of Information Act violation (count I), assault and battery and intentional infliction of emotional distress (count II), false arrest and false imprisonment (count III), police defendants' negligence, gross negligence, and excessive force (count IV), violation of civil rights (count V), failure to properly train, supervise and/or control (count VI), slander (count VII), and defendant's Huron Towers Apartments and Rogow's negligence (count VIII).

On September 2, 1994, plaintiffs filed a first amended complaint to their July 29, 1994, complaint. Because plaintiffs' amended complaint in the first lawsuit is identical to the complaint for the second lawsuit, the circuit court consolidated the cases. On April 9, 1996, the court entered an order granting defendants' motion for summary disposition regarding all of the claims except for the count V violation of civil rights claim. This claim, brought pursuant to 42 USC 1983, was based in pertinent part on an allegation that defendants conducted an illegal search and seizure. The court sua sponte entertained reconsideration of its denial of summary disposition on this claim. The parties submitted additional materials on the issue of the legality of the search, and on May 14, 1998, after the court heard oral argument, the court granted defendants' motion for summary disposition on this claim also. Finally, on June 10, 1998, the court filed an order denying plaintiffs' motion for reconsideration of the May 14, 1998, order. Plaintiffs' appeal as of right, raising only the issue of denial of the civil rights claim as based on their allegation that defendants conducted an illegal search.

Standard of Review

This Court reviews the grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id.* This Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76-77; 597 NW2d 517 (1999).

Discussion

In granting summary disposition in favor of defendants on plaintiffs' 42 USC 1983 claim, the circuit court found that "the reasons articulated by the officers set forth a reasonable belief that a warrantless search was necessary to protect the occupant or occupants and/or others." Plaintiffs now argue that the court erred in finding defendants' search constitutional pursuant to exceptions to the warrant requirement. Plaintiffs further contend that the controlling issue of the reasonableness of defendants' conduct raised a question that should have been presented to the jury. Defendants, meanwhile, contend that summary disposition was appropriate on the ground that they are entitled to qualified immunity, an affirmative defense raised in defendants' motion for summary disposition.

Although it is not clear in the circuit court's order that the court specifically reached the issue of qualified immunity, we note that the language of the court's ruling, i.e., " . . .set forth a reasonable belief that . . ." is less a finding that the exceptions were satisfied, and more a finding that assuming a constitutional violation, defendants were entitled to qualified immunity because their conduct was reasonable. Because on our review of the record we likewise conclude that defendants were entitled to qualified immunity under these circumstances, we affirm the circuit court's grant of summary disposition.

In *Guider v Smith*, 431 Mich 559, 565; 431 NW2d 810 (1988), our Supreme Court held that the test announced in *Harlow v Fitzgerald*, 457 US 800; 102 S Ct 2727; 73 L Ed 2d 396 (1982), was the proper test regarding claims of qualified immunity under 42 USC 1983 actions.[4] Under this test, a government official performing discretionary functions is entitled to immunity from damages "insofar as [his] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Guider, supra* at 565. In determining if there is qualified immunity, a court must consider: "1) whether the alleged conduct establishes a constitutional violation, and 2) whether the constitutional standard was clearly established at the time in question. [*Harlow, supra* at 818.] If the undisputed facts show that the defendant's conduct violated no clearly established constitutional standards, qualified immunity applies as a matter of law." *Guider, supra* at 568. Assuming, however, that there was a violation of a clearly established constitutional right, "the next inquiry under the *Harlow* standard is whether a reasonable man in the defendant's position could have believed his actions were consistent with the law." *Guider, supra* at 570; see also *Anderson v Creighton*, 483 US 635, 641; 107 S Ct 3034; 97 L Ed 2d 523 (1987). As with a favorable finding on the initial inquiry, if it is determined that a reasonable officer would have believed defendants' conduct to be lawful, defendants are entitled to qualified immunity. *Anderson, supra* at 641.

With respect to the initial inquiry whether defendants' conduct violated a clearly established constitutional standard, plaintiffs argue that defendants' search was unconstitutional under the Fourth Amendment. Plaintiffs contend that the facts fail to satisfy the requirements of either proffered exception to the Fourth Amendment's protection against unreasonable searches and seizures - the exigent circumstances and the emergency aid exceptions to the warrant requirement.

Under the exigent circumstances exception, a police officer may conduct a warrantless search of a dwelling if the officer possesses probable cause to believe that a crime was recently committed on the premises, as well as probable cause to believe that the premises contain

evidence of the suspected crime. *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993). Further, the police must show the existence of an actual emergency on the basis of specific and objective facts that reveal the necessity for immediate action—i.e., to protect the officers or others. *People v Cartwright*, 454 Mich 550, 557; 563 NW2d 208 (1997). Unlike the exigent circumstances exception, the emergency aid exception allows a police officer to conduct a warrantless search of a dwelling without probable cause if the officer reasonably believes that a person within the dwelling requires emergency aid. *People v Davis*, 442 Mich 1, 20, 25-26; 497 NW2d 910 (1993). Also, police may seize any evidence that is in plain view while the police search the dwelling for a person in need of emergency aid. *City of Troy v Ohlinger*, 438 Mich 477, 481, 483; 475 NW2d 54 (1991).

Arising in a different posture, we would consider it a close question whether defendants' conduct passed constitutional muster. We need not, however, make that determination in this case. Assuming that a constitutional violation did occur, we nevertheless conclude that reasonable officers in defendants' position would have believed that their conduct was consistent with the law. *Guider, supra* at 570.

"The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v Bryant*, 502 US 224, 229; 112 S Ct 534; 116 L Ed 2d 589 (1991), quoting *Malley v Briggs*, 475 US 335, 343; 106 S Ct 1092; 89 L Ed 2d 271 (1986). The uncontested facts of this case demonstrate that defendants were acting with extreme caution throughout this incident. Based on the tip, defendants were concerned that a legitimate threat was posed to construction workers in the vicinity of the apartment complex. Aware, as the result of past experience and contact, of Sayre's threats to police officers and city officials, defendants believed that Sayre was potentially violent. Defendants were also informed by the building manager, without prompting, that Sayre was a potential threat. The circumstances surrounding defendants' initial contact with Sayre further heightened their concern, as having initially failed to acknowledge or respond to defendants' attempts to contact him, upon Sayre's eventual agreement to communicate he refused to comply with defendants' direction that he show both hands to prove that he was unarmed.

Given the nature of the anonymous tip, invoking considerations regarding the presence and use of deadly weapons, we find defendants' cautious approach to this situation understandable. Defendants' asserted concern for potential injured victims was an arguably logical inference drawn from the tip's threat. Moreover, that Sayre was concededly in protective custody at the time of defendants' entry into plaintiffs' apartment is of no moment. Through observations made during the brief confrontation outside plaintiffs' apartment, defendants were aware that at least one other person, Woodward, was present in the apartment. Defendants had no way to know whether an additional individual, and possible sniper, was also present. In fact, until further inquiry ruled her out, Woodward was as much a potential threat as Sayre or such other unidentified individual.

Facing the danger and uncertainty inherent in the above described circumstances, defendants were not incompetent, their conduct unquestionably prudent and reasonable. The Supreme Court has noted that law enforcement officials should not be held personally liable in the

inevitable event that they reasonably but mistakenly conclude that exigent circumstances are present. *Anderson, supra* at 641. As the Court itself indicated, while the general constitutional protection against warantless searches is clearly established, the many cases addressing this issue of exceptions demonstrate "the difficulty of determining whether particular searches and seizures comport with the Fourth Amendment." *Id.* at 644. In this case, we find reasonable any mistake in judgment on the part of defendants regarding whether these circumstances satisfied the exigent circumstances or emergency aid exceptions. We hold, accordingly, that defendants are entitled to qualified immunity.

Implicitly addressing this secondary inquiry, albeit apparently within the context of the basic constitutional question rather than in consideration of the applicability of qualified immunity, plaintiffs briefly contend that the question whether defendants' conduct was reasonable was one for the jury. The courts have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Hunter, supra* at 227; *Anderson, supra* at 646, n 6; *Harlow, supra* at 818; *Guider, supra* at 568, n 6. Although in rare instances it may be appropriate to permit limited discovery in order to resolve a narrowly tailored factual question on which reasonableness turns, the question of immunity is still one for the court. *Anderson, supra* at 646, n 6; see also *Guider, supra* at 570-572. Thus, immunity is ordinarily not an appropriate issue for the jury, and should instead be decided by the court on summary disposition, avoiding the time and expense of extensive discovery. *Hunter, supra* at 228; *Guider, supra* at 571-572.

Plaintiffs cite *Alexander v Riccinto,* 192 Mich App 65; 481 NW2d 6 (1991), in support of their argument that the issue of reasonableness was improperly taken from the jury. *Alexander* involved a determination whether an officer's use of force when making an arrest was reasonable. *Id.* at 69. The defendant-officer in question allegedly shot the plaintiff-burglar in self defense. Holding that the issue whether the defendant possessed a reasonable belief that he was in great danger, such that would justify his use of force, was one for the jury, this Court reversed a grant of summary disposition in favor of the defendant on the plaintiff's assault and battery and negligence claims. *Id.* at 68-69. This Court then addressed the plaintiff's additional claim that the defendant violated his civil rights under § 1983. In ruling that the defendant's entitlement to the defense of qualified immunity hinged on the jury's determination whether his use of force was reasonable, this Court also reversed that portion of the grant of summary disposition. *Id.* at 72-73.

We find *Alexander* distinguishable on two bases. First, in this case the underlying facts on which applicability of the warrant exceptions turned were both undisputed and objectively verifiable. In contrast, the question presented in *Alexander* turned on disputed facts regarding the aggressive nature of the plaintiff's acts, and the reasonableness of the defendant's alleged subjective belief that he was in great danger. *Id.* at 68-69. Second, the § 1983 claim here at issue is all that remains from plaintiffs' complaint. In *Alexander*, the count alleging violation of §1983 was but one of many claims, the remainder of which this Court found to survive summary disposition on other grounds. Consequently, the procedural argument favoring swift disposal of civil rights claims where the critical facts are undisputed was of lesser impact in *Alexander*.

Notwithstanding plaintiffs' limited argument, given the posture and facts of this case, we find nothing in *Alexander* compelling a shift away from the well-established policy supporting determination of the reasonableness of an official's conduct as a matter of law. *Hunter, supra*; *Anderson, supra*; *Guider, supra*.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff

[1] Defendants based this suspicion on their past official contact with Sayre, which included threats to officers' and city officials' safety; their knowledge that Sayre lived on the eleventh floor of Huron Tower Apartments; and their belief that the anonymous tipster's voice was Sayre's, a belief supported when defendants telephoned Sayre and identified the same voice in the outgoing message of Sayre's answering machine.

[2] In Kinsey's deposition he explained that he did not obtain a search warrant because "[t]here was urgency . . . . I thought somebody may be injured in there."

[3] Woodward admitted at her deposition that she knew that there were guns in the apartment, and that she intentionally lied to the police officers.

[4] As noted by our Supreme Court, "our responsibility when resolving claims brought under § 1983 is to adhere to the federal standard." *Guider, supra* at 565, n 5.