FILED
United States Court of Appeals
Tenth Circuit

November 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GABRIEL BECERRA,

Plaintiff - Appellant,

v.

THE CITY OF ALBUQUERQUE; DAVID HENRY, Albuquerque Police Officer; WAYNE MCCUMBER, Albuquerque Police Officer; ERIN ONEAL, Civilian Police Oversight Agency Investigator; EDWARD HARNESS, Civilian Police Oversight Agency Executive Director; MIKE GEIER, Albuquerque Police Chief; SARITA NAIR, Albuquerque Chief Administrator Officer,

Defendants - Appellees.

No. 23-2053
(D.C. No. 1:20-CV-01260-KG-GJF)
(D. N.M.)

ORDER AND JUDGMENT[*]

Before **PHILLIPS**, **KELLY**, and **McHUGH**, Circuit Judges.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Gabriel Becerra, proceeding pro se,[1] appeals the district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of his civil rights claims against the City of Albuquerque, several city employees, and two police officers. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Mr. Becerra lives at 928 Crane Dr. SW in Albuquerque, New Mexico. His next-door neighbors, with whom he had a deteriorating relationship since 2008, called the police three times in 2018 alleging he was using a speaker to play sounds of a barking dog. Mr. Becerra was away from his home during all three calls. Nothing came of the first two, but officers responded to the third on December 6, 2018.

The officers wore lapel cameras that recorded the entire interaction. When they responded to the call, the officers spoke with Mr. Becerra's neighbors and walked across Mr. Becerra's driveway. Mr. Becerra's truck was in the driveway with its front facing the street and its rear facing his closed garage door. His front door was screened-in. The officers were able to view Mr. Becerra's license plate from their vantage point in his driveway. They knocked on the garage door in an (unsuccessful) attempt to contact Mr. Becerra. They called in the license plate

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[1] Because Mr. Becerra proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

number for ownership information, and Mr. Becerra received a criminal summons in the mail when he returned home.

Mr. Becerra sued the officers, alleging a 42 U.S.C. § 1983 claim for false arrest and illegal search in violation of the Fourth Amendment. He also sued the City of Albuquerque and four individual city employees for their failure to promulgate policies that would have prevented the alleged search and arrest of his person. He also brought a claim under the New Mexico Tort Claims Act (NMTCA), N.M. Stat. Ann. § 41-4-2. Mr. Becerra amended his complaint once and submitted the lapel cam video with his amended complaint. The defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), which the district court granted. After the grant of the motion, Mr. Becerra filed a motion for leave to file a second amended complaint and for the court to alter or amend its final judgment under Fed. R. Civ. P. 59(e) or 60(b). The district court denied this motion, and this appeal followed.

DISCUSSION

"We review de novo a district court's decision on a Rule 12(b)(6) motion for dismissal for failure to state a claim. Under this standard, we must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019) (internal quotation marks, italics, and citations omitted). "In evaluating a motion to dismiss, we may consider not only the complaint, but also the attached exhibits . . . incorporated into the complaint by reference." *Commw. Prop. Advocs., LLC v. Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1201

(10th Cir. 2011). Here, the reviewable attached exhibits include the lapel cam videos. "[A] complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). To meet this standard, the plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

We affirm the district court's dismissal of Mr. Becerra's Fourth Amendment claims stemming from the officers obtaining his license plate information because the officers did not conduct a Fourth Amendment search when they did so. Instead, the lapel cam evidence establishes conclusively that the officers accessed only those portions of Mr. Becerra's driveway plainly accessible to private citizens, and his license plate number was clearly visible from such a point. "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (internal quotation marks omitted). But "a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do." *Id.* at 8 (internal quotation marks omitted).

We also reject Mr. Becerra's argument that the officers violated his legitimate expectation of privacy by running his license plate number through a database to learn information such as his name and address. We have previously held that, "because they are in plain view, no privacy interest exists in license plates." *United*

States v. Walraven, 892 F.2d 972, 974 (10th Cir. 1989). And, with reference to a vehicle identification number (VIN), the Supreme Court has held:

> it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile. The VIN's mandated visibility makes it more similar to the exterior of the car than to the trunk or glove compartment. The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a "search."

New York v. Class, 475 U.S. 106, 114 (1986). We agree with the Sixth Circuit that "[l]ogically, this reasoning extends to a legally-required identifier located *outside* the vehicle," such as a license plate number. *United States v. Ellison*, 462 F.3d 557, 561 (6th Cir. 2006). Because Mr. Becerra had no expectation of privacy in his license plate information, the officers did not conduct a Fourth Amendment "search" by examining it.

Mr. Becerra also asserts the district court erroneously ignored factual allegations

> that [he] used the top portion of his driveway as an extension of his home and life; that [he] would use the tailgates of his backed [-]up trucks as workbenches; [and] that [he] hung privacy curtains across the entrance of his garage preventing anyone from seeing inside and added a peephole for . . . privacy[] protection.

Aplt. Opening Br. at 10. But the lapel cam video plainly refutes any suggestion his driveway was arranged in such a way during the officers' investigation. And, when evaluating a motion to dismiss, "although we accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the plaintiff, if there is a conflict between the allegations in the complaint and the content of the attached exhibit, the

exhibit controls." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1105 (10th Cir. 2017). So, the district court did not err in concluding Mr. Becerra failed to state a plausible Fourth Amendment violation stemming from the officers' investigation, through which they obtained his license plate number.

We agree with the district court that Mr. Becerra failed to state a claim for "false arrest"—i.e., an alleged seizure of his person due to the issuance of the summons. Mr. Becerra asserts that "[e]ven though [he] received the 'Criminal Summons' and 'Criminal Complaint' by mail and was not 'seized' in the traditional sense, [he] was still 'seized' in the non-traditional sense and was subject to a series of significant liberty deprivations related to the issuance of the 'Criminal Summons' and 'Criminal Complaint.'" Aplt. Opening Br. at 36. But this court has rejected this line of argument before, holding "the issuance of a citation . . . does not rise to the level of a Fourth Amendment seizure." *Martinez v. Carr*, 479 F.3d 1292, 1299 (10th Cir. 2007). So, the district court was also correct to dismiss Mr. Becerra's constitutional claims to the extent they stemmed from an alleged false arrest.

Because we agree with the district court that neither officer violated Mr. Becerra's constitutional rights, we affirm the dismissal of Mr. Becerra's municipal liability and NMTCA claims, both of which were derivative of his § 1983 claims.

We also affirm the district court's denial of Mr. Becerra's motion for leave to file a second amended complaint and his motion for post-judgment relief. We review each for abuse of discretion. *See SCO Grp., Inc. v. Int'l Bus. Machs. Corp.*, 879 F.3d

1062, 1085 (10th Cir. 2018) (motions for leave to amend); *Hill v. J.B. Hunt Transp., Inc.*, 815 F.3d 651, 657 (10th Cir. 2016) (post-judgment relief under Fed. R. Civ. P. 59); *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000) (post-judgment relief under Fed. R. Civ. P. 60). "A district court abuses its discretion if its decision is arbitrary, capricious, whimsical, or manifestly unreasonable." *Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009) (internal quotation marks omitted).

The district court denied the motion to amend "on the basis of futility," R. vol. 3 at 146, which is a legitimate basis to deny such a motion, *see Bylin*, 568 F.3d at 1229. Mr. Becerra does not set forth any facts he pleaded in the proposed second amended complaint that would change the analysis regarding his underlying claims of constitutional violations. To the contrary, he asserts "all he did in all his differing 'versions' . . . was simply update the language to conform to evidence, to encompass [the] issues raised by Appellees, to prevent manifest injustice and to give notice to the screening judge and underlying Defendants of the updates." Aplt. Opening Br. at 6. Likewise, Mr. Becerra's Rule 59 and 60 motions simply reiterated his disagreement with the district court's underlying dismissal order, which we have reviewed and affirmed. So, he falls well short of showing the district court acted arbitrarily, capriciously, whimsically, or manifestly unreasonably in denying his motions.[2]

[2] Construing Mr. Becerra's opening brief liberally, as we must, he also appears to challenge the district court's entry of an order staying discovery pending adjudication of the defendants' motions to dismiss. The record indicates the court lifted the stay, in part at Mr. Becerra's request, so it is unclear how Mr. Becerra could

CONCLUSION

We affirm the judgment of the district court.

Entered for the Court

Gregory A. Phillips
Circuit Judge

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obtain any further relief from this court over this now-moot issue. Even if we concluded Mr. Becerra's argument had merit, it would not change the soundness of the court's underlying dismissal of his claims under Fed. R. Civ. P. 12(b)(6).