[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10550
Non-Argument Calendar

D.C. Docket No. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff - Appellant,

versus

CITY OF RIVIERA BEACH,
a Florida municipal corporation,

Defendant - Appellee,

MICHAEL BROWN,
an individual, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

(December 3, 2019)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before MARCUS, MARTIN, and HULL, Circuit Judges.

PER CURIAM:

This case is back before us on remand from the Supreme Court. In Lozman v. City of Riviera Beach, 681 F. App'x 746 (11th Cir. 2017) (per curiam), we confronted the question of whether Fane Lozman could succeed on his First Amendment retaliatory arrest claim against the City of Riviera Beach (the "City"). We held that the jury reasonably could have found there was probable cause to arrest Lozman for disturbing a lawful assembly. Id. at 750–51. Because, under our precedent at the time, the existence of probable cause to arrest Lozman defeated his First Amendment retaliatory arrest claim as a matter of law, we affirmed the district court's denial of his motion for a new trial. Id. at 752 (citing Dahl v. Holley, 312 F.3d 1228, 1236 (11th Cir. 2002)).

The Supreme Court reversed, holding that "Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City." Lozman v. City of Riviera Beach, 585 U.S. ___, 138 S. Ct. 1945, 1955 (2018). We are mindful of what facts the Supreme Court relied on and assumed in reaching this holding. The Court especially noted the fact that Lozman did not bring his First Amendment claim against an individual officer. See id. at 1954. Instead, Lozman sued the City, alleging that it "retaliated against him pursuant to

an 'official municipal policy' of intimidation." Id. (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036 (1978)). And Lozman alleged that the City executed that official policy of intimidation by ordering his arrest. Id. "The fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim." Id. The Court also made note that Lozman's claim was in a "unique class of retaliatory arrest claims" in that "the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made." Id. Finally, the Court "underscored" that the right that Lozman says was infringed—"the right to petition"—is "one of the most precious of the liberties safeguarded by the Bill of Rights" and "high in the hierarchy of First Amendment values." Id. at 1954–55 (quotation marks omitted).

On these facts, the Supreme Court held that the proper standard for assessing whether Lozman could succeed on his First Amendment claim is found in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977). See Lozman, 138 S. Ct. at 1954–55. Under Mt. Healthy, a "plaintiff must show that the retaliation was a substantial or motivating factor behind the prosecution, and, if that showing is made, the defendant can prevail only by showing that the prosecution would have been initiated without respect to retaliation." Id. at 1952 (citing Hartman v. Moore, 547 U.S. 250, 265–66, 126 S.

Ct. 1695, 1706–07 (2006)). Although application of Mt. Healthy is usually predicated on the absence of probable cause, the Court concluded that "Mt. Healthy should apply without a threshold inquiry into probable cause." Id. at 1952–53. In other words, Lozman can succeed on his claim by showing that his arrest was motivated by retaliation even if there was probable cause to arrest him, and the City can defeat Lozman's claim by showing that he would have been arrested no matter what. But the Court made clear that Lozman's arrest having been made pursuant to an official City policy to retaliate against him was a prerequisite for application of Mt. Healthy. See id. at 1954–55. The Court assumed, but did not decide, that this was the case. See id. at 1951 ("[W]hether there was such a policy and what its content may have been are issues not decided here.").

Further, the Supreme Court instructed: "This is not to say, of course, that Lozman is ultimately entitled to relief or even a new trial." Id. at 1955. In this regard, the Supreme Court advised that the lower court, "applying Mt. Healthy and other relevant precedents, may consider any arguments in support of the District Court's judgment that have been preserved by the City." Id. The Supreme Court then stated, "among other matters," these three questions may be considered on remand:

> (1) whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006

> closed-door session; (2) whether any reasonable juror could find that the November 2006 arrest constituted an official act by the City; and (3) whether, under Mt. Healthy, the City has proved that it would have arrested Lozman regardless of any retaliatory animus—for example, if Lozman's conduct during prior city council meetings had also violated valid rules as to proper subjects of discussion, thus explaining his arrest here.

Id. The district court has not had occasion to answer these questions. Nor has the district court had the chance to assess additional arguments made by the parties in their post-remand briefing, including, for example, Lozman's argument that the offense of disturbing a lawful assembly, Fla. Stat. § 871.01(1), is unconstitutional and the City's various arguments.

Given how much the success of Lozman's retaliation claim turns on the "unusual" facts of his arrest, see Nieves v. Bartlett, 587 U.S. ___, 139 S. Ct. 1715, 1722 (2019) (citing Lozman, 138 S. Ct. at 1954), we think it appropriate to give the district court the first opportunity to scrutinize the record in light of the Supreme Court's instructions. We therefore remand this case to the district court to decide, in the first instance, whether Lozman is owed a new trial.

VACATED AND REMANDED with instructions.