

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13986
Non-Argument Calendar

D.C. Docket No. 7:17-cv-00198-LSC

ESSIE BANKS,

Plaintiff-Appellant,

versus

ANTONIO BOSTIC,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(January 10, 2018)

Before MARTIN, JILL PRYOR, and NEWSOM, Circuit Judges.

PER CURIAM:

Essie Banks brought this malicious-prosecution action against Officer Antonio Bostic under 42 U.S.C. § 1983, alleging that Bostic violated her Fourth Amendment right to be free from unreasonable seizure by seeking a warrant for her arrest without probable cause. The district court granted Bostic's motion to dismiss, finding that he is entitled to qualified immunity. Banks then filed a Rule 59 Motion to Alter, Amend, or Vacate, which the district court denied. Banks now appeals the order dismissing her complaint and denying her motion to alter or amend. We affirm.

I

In 2015, Bostic swore an affidavit before a magistrate judge describing the burglary of a home in Tuscaloosa, Alabama by a black female posing as a perfume saleswoman. The affidavit indicated that Banks was developed as a suspect and that the victim, who personally encountered the burglar at her front door, identified Banks as the perpetrator from a 6-person photo line-up. The victim also signed a sworn complaint before the magistrate judge identifying Banks as the burglar. The magistrate judge issued a warrant for Banks's arrest for the offense of First Degree Burglary. Banks was subsequently arrested and booked in the Tuscaloosa County Jail where she was detained until she could post bail. The charge against Banks was later dismissed when it was determined (with Banks's assistance) that she was not, in fact, the perpetrator. Banks brought this action against Bostic, alleging

malicious prosecution in violation of her Fourth Amendment rights. This is Banks's appeal from the district court's orders dismissing her complaint on qualified-immunity grounds and thereafter denying her motion to alter or amend.

On appeal, Banks argues that the district court (1) erroneously concluded that Bostic had probable cause to arrest Banks and (2) failed to address her argument that Bostic misled the magistrate judge in order to obtain the arrest warrant. As to the former, Banks contends that Bostic lacked probable cause because, as an experienced investigator, he knew that testimony from the victim—a 77-year-old white female—was “inherently unreliable because of the stressful encounter, the age of the victim, and the racial difference between the victim and the intruder.” And as to the latter, Banks alleges that Bostic misled the magistrate by misusing the term “photo line-up”—which, according to Banks, is a term of art used to describe a photo array in which one already-identified suspect is included alongside multiple “filler” photos. In this case, Banks argues, the photos shown to the victim did not properly constitute a “photo line-up” because they did not include a photo of an already-identified suspect. Rather, Banks claims, she did not become a suspect until the victim selected her photo from the array. For these reasons, Banks contends that Bostic obtained the arrest warrant in violation of her constitutional rights and that the district court improperly determined that Bostic is entitled to qualified immunity.

Despite our sympathy for Banks and our regret for her ordeal, we must disagree with her contention that the district court erred. Under the governing law, the district court properly dismissed Banks's action (and thereafter denied her motion to alter or amend) on qualified-immunity grounds.

II

“Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.” *Andujar v. Rodriguez*, 486 F.3d 1199, 1202 (11th Cir. 2007) (citation omitted). To receive the protection of qualified immunity, a defendant must first establish that he was acting within the scope of his discretionary authority. *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003). Here, there is no dispute that Bostic was acting within his discretionary authority in obtaining the arrest warrant. Accordingly, the burden shifts to Banks to show that qualified immunity is not appropriate by demonstrating that “(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation.” *Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). We may consider the two prongs of the qualified-immunity analysis—the merits of the underlying constitutional issue and the question whether the alleged right was “clearly established”—in any order. *Pearson v. Callahan*, 555 U.S. 223, 236

(2009). Here, we begin and end our analysis with the second prong because we are satisfied that, at the very least, the law was not sufficiently clearly established to put Bostic on notice that his conduct violated the Fourth Amendment.

The parties agree that, to be entitled to qualified immunity in a malicious prosecution case, a police officer need not have actual probable cause, but only “arguable probable cause.” *See Wood v. Kesler*, 323 F.3d 872, 878–83 (11th Cir. 2003); *see also* Br. of Appellant at 29–32, 38; Br. of Appellee at 4, 6–7. Arguable probable cause exists where “reasonable officers in the same circumstances and possessing the same knowledge as the [d]efendant could have believed that probable cause existed to arrest” the plaintiff. *Rushing v. Parker*, 599 F.3d 1263, 1266 (11th Cir. 2010). Mistakes of the sort that seems to have occurred here are regrettable, but inevitable, and do not defeat qualified immunity. Rather, as the Supreme Court has emphasized, “[e]ven law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

All seem to agree that a police officer “cannot be liable for malicious prosecution if the arrest warrant was supported by probable cause.” *Black v. Wigington*, 811 F.3d 1259, 1267 (11th Cir. 2016). Banks alleges, though, that Bostic lacked probable cause to seek a warrant for her arrest. But the undisputed facts here demonstrate that the warrant was based, at least in part, on the victim’s

eyewitness identification of Banks as the perpetrator of the burglary. Under our case law, an eyewitness's identification of a perpetrator is ordinarily sufficient to establish probable cause for an arrest. *See, e.g., Rushing*, 599 F.3d at 1268; *accord, e.g., United States v. Burbridge*, 252 F.3d 775, 778 (5th Cir. 2001) (“An ordinary citizen’s eyewitness account of criminal activity and identification of a perpetrator is normally sufficient to supply probable cause to stop the suspect.”).

Banks asserts that the victim’s identification here was insufficient because the victim was elderly and because, as a white woman, she suffered from “cross race bias” that rendered unreliable her identification of a black suspect. But Banks cites no cases—from this court or any other—to support her theory. Banks also contends that Bostic “misled” the magistrate to obtain the warrant because he knew that the statement in his affidavit that he had conducted a “photo line-up” was untrue. But the only Eleventh Circuit decision that Banks cites in support of that contention, *Tillman v. Coley*, 886 F.2d 317 (11th Cir. 1989), is off point. In that case, an arrest warrant was issued for an individual based solely on the similarity of her name to the suspect’s, without any investigation and despite an “age discrepancy of a generation” between her and the actual suspect. *Id.* at 321.

Tillman would not have clearly established for Bostic that his conduct was unlawful.¹

III

For the foregoing reasons, we conclude that the law was not sufficiently clearly established to put Bostic on notice that his conduct violated the Fourth Amendment. Accordingly, we hold that the district court correctly concluded that Bostic is entitled to qualified immunity on Banks's malicious-prosecution claim, and we affirm the district court's dismissal of Banks's complaint and the denial of her motion to alter or amend.

AFFIRMED.

¹ Banks's out-of-circuit and unpublished decisions—incapable of clearly establishing law for qualified-immunity purposes, in any event—are likewise distinguishable. *See, e.g., Daniels v. Bango*, 487 F. App'x 532 (11th Cir. 2012); *Humbert v. O'Malley*, No. WDQ-11-0440, 2014 WL 1266673 (D. Md. Mar. 25, 2014); *Williams v. City of New York*, No. 10-CV-2676 JG LB, 2012 WL 511533 (E.D.N.Y. Feb. 15, 2012).