[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 20-11318

KATELYN EBNER,
PRINCESS MBAMARA,
AYOKUNLE ORIYOMI,
BRITTANY PENWELL,

Plaintiffs-Appellants,

versus

COBB COUNTY,
through its instrumentality the Cobb County Police Department,
TRACY CARROLL,
in his individual capacity,
a.k.a.as T.T. Carroll,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:17-cv-03722-MLB

Before WILLIAM PRYOR, Chief Judge, GRANT, and HULL, Circuit Judges.

PER CURIAM:

Katelyn Ebner, Princess Mbamara, Brittany Penwell, and Ayokunle Oriyomi were four drivers who were arrested in Cobb County, Georgia, on different occasions by the same police officer for driving under the influence of cannabis. The drivers sued the county for violating their rights to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments because the officer based his probable-cause determinations on unreliable eye examinations. *See* 42 U.S.C. § 1983; *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). The district court granted the county summary judgment because it found that there was no underlying constitutional violation. After *de novo* review, *see Kingsland v. City of Miami*, 382 F.3d 1220, 1225 (11th Cir. 2004), we affirm.

On each occasion, the drivers failed to maintain their lane and then performed poorly on eye examinations and other field sobriety tests the officer was trained by the county to perform. As a

result, the officer concluded that he had probable cause to believe that the drivers committed an offense and arrested them for driving under the influence of cannabis. *See* GA. CODE. ANN. § 40-6-391(a)(2). Each driver's blood was drawn under Georgia's implied consent law, *see id.* § 40-5-67.1, each driver was detained in jail, and each driver was charged with driving under the influence of cannabis, *id.* § 40-6-391(a)(2), and failure to maintain a lane, *id.* § 40-6-48. Prosecutors later dismissed the charges for driving under the influence of cannabis after the blood examinations returned negative results for cannabis ingestion.

The drivers argue that the county violated their rights because the blood draws, their detentions, and the prosecutions against them were not based on probable cause. The drivers base their argument on "expert testimony about the untrustworthiness of the six eye examinations undisputedly conducted on the Plaintiffs." And the drivers argue that the county is liable because the county, "under color of [its] official policy" of training officers to use the unreliable eye examinations, "cause[d] [the officer] to violate [their] constitutional rights." *Monell*, 436 U.S. at 692 (internal quotation marks omitted).

We disagree. Each of the drivers' claims fails because there was other, independent evidence in each incident from which "a reasonable officer could conclude . . . that there was a substantial chance," *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018) (internal quotation marks omitted), that each driver was under the influence of cannabis in violation of Georgia law, *see* GA. CODE.

ANN. § 40-6-391(a)(2). Without considering the results of the disputed eye examinations, the officer knew that each driver failed to maintain their lane and that each driver displayed numerous clues of impairment from the non-eye-related field sobriety examinations. The clues of impairment ranged from turning incorrectly, missing heel-to-toe, taking an incorrect number of steps, walking off the line, and raising arms for balance. The drivers concede that "[t]he results of those remaining tests for each Plaintiff were mixed." Based on these facts alone, "a reasonable officer could conclude . . . that there was a substantial chance" that the individuals were driving under the influence of cannabis. *See Wesby*, 138 S. Ct. at 588 (internal quotation marks omitted). Because the drivers "ha[ve] failed to establish that [their] constitutional rights were violated, [they] ha[ve] necessarily failed to establish the C[ounty]'s liability." *Miller v. Harget*, 458 F.3d 1251, 1261 (11th Cir. 2006).

In their reply brief, the drivers respond to this reasoning by citing the testimony of another expert that questioned the validity of the non-eye-related field sobriety tests "because they have never been studied for th[e] purpose" of detecting cannabis impairment and "it's really up in the air as to what the results of each individual test should mean to an officer as to [whether there is] probable cause." But the expert conceded that the tests reliably suggest driving under the influence of alcohol. Counsel for the drivers repeated this point at oral argument.

Any challenge to the inherent unreliability of the non-eye-related field sobriety tests was forfeited because the drivers "fail[ed]

to list or otherwise state it as an issue on appeal." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012). The drivers made only "passing references" to the other expert's testimony in their opening brief and did not "devot[e] a discrete section of [their] argument to" the alleged unreliability of the other field sobriety tests. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). The drivers' only argument for municipal liability in their initial brief was that "a reasonable juror could find that [the county] trained officers . . . on how to perform the *six eye examinations* that were specifically criticized by [the drivers' expert] and were undisputedly performed on Plaintiffs in this case." (Emphasis added.)

In any event, the attack on the field sobriety tests is unavailing because the expert's testimony supports only the proposition that the tests' ability to detect cannabis impairment has "never been studied." That assertion fails to support the claim that the field sobriety tests are not "reasonably trustworthy." *See Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009).

Before concluding, we must raise a concern about a false representation that counsel for the drivers made to the Court at oral argument where the following exchange took place:

> The Court: But didn't the expert say that for a lack of convergence, bloodshot eyes, eyelid tremors, pupil dilation, and . . . nystagmus, each was associated with cannabis use?

> Counsel: No, our first expert . . . says that each of those things . . . do not reliably indicate the presence of drugs.

Counsel's representation to the Court was false. The Court correctly recounted that the expert report stated that, "[i]n regard to convergence, cannabis may indeed impair convergence"; "[i]n regard to pupillary size and abnormalities, cannabis may indeed affect pupillary size and function"; and "[i]n regard to eyelid tremors and conjunctival injection[,] . . . cannabis may indeed cause eyelid tremors and or conjunctival injection." The expert went on to state that there are other possible causes of these symptoms, and that the eye examinations are "unable to distinguish between" a "cannabis origin or other drug origin or other non-drug origin."

The Court later gave counsel an opportunity to correct his erroneous response to the Court's question. After expressing "hope" that the Court "misheard" counsel, the Court quoted the above excerpts from the report verbatim. Instead of expressly correcting his earlier error, counsel once again failed to admit that the report included the quoted information. Counsel merely reiterated the separate point that the report also included a conclusion that the symptoms are not "a reliable sign of the presence of drugs."

We admonish counsel to take care that all representations to the Court are accurate, especially when, as in this appeal, the representation concerned a material fact. If—as the drivers' expert reported—these symptoms can be caused by cannabis, then their presence is relevant evidence because it "has [some] tendency to

make" the hypothesis that the drivers ingested cannabis "more . . . probable than it would be without the evidence," FED. R. EVID. 401(a), even if those symptoms are compatible with other causes. And probable cause does not require that officers have enough evidence to make a correct medical diagnosis or that they investigate and rule out all other possible innocent causes of suspicious facts. *See Wesby*, 138 S. Ct. at 588.

We **AFFIRM** the judgment in favor of the County.