

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2008

4 (Argued: March 9, 2009

Decided: September 14, 2009

5 Amended: October 7, 2009)

6 Docket No. 08-0241-cv

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8 MARTIN DROZ,

9 Plaintiff-Appellee,

10 - v. -

11 P.J. MCCADDEN, State Trooper,

12 Defendant-Appellant,

13 SHIRLEY B. HERDER, MARK MURRAY, ESTATE OF JOHN C. ANDERSON, TOWN
14 OF VIENNA, NEW YORK, DANIEL G. MIDDAUGH, SCOTT BURNOP, MICHAEL
15 DURANT, SHAWN MALONE, MICHAEL MULKY, MARK SLAWSON, and UNKNOWN
16 SOWITCH,

17 Defendants.*

18 -----
19 Before: WINTER and SACK, Circuit Judges, and COGAN, District
20 Judge.**

21 Appeal from an order of the United States District
22 Court for the Northern District of New York (David N. Hurd,
23 Judge) denying Defendant-Appellant State Trooper P.J. McCadden's

* The Clerk of the Court is instructed to amend the official caption in this case to conform to the listing of the parties above.

** The Honorable Brian M. Cogan, United States District Judge for the Eastern District of New York, sitting by designation.

1 motion for summary judgment. We conclude that the stipulated
2 facts establish that McCadden reasonably believed that he was
3 acting at the behest of Judge Shirley Herder, and, therefore, he
4 had arguable probable cause to arrest Plaintiff Droz for criminal
5 contempt and probable cause to commence a criminal contempt
6 proceeding against him. We therefore conclude, contrary to the
7 district court's ruling, that McCadden is entitled to qualified
8 immunity with respect to the claims made against him for false
9 arrest and malicious prosecution under 42 U.S.C. § 1983.

10 Reversed.

11 DENISE A. HARTMAN, Assistant Solicitor
12 General, for Andrew Cuomo, Attorney
13 General of the State of New York,
14 (Barbara D. Underwood, Solicitor
15 General, Andrea Oser, Deputy Solicitor
16 General, of counsel), Albany, NY, for
17 Defendant-Appellant.

18 EDWARD KOPKO, Wiggins & Kopko, LLP,
19 Ithaca, NY, for Plaintiff-Appellee.

20 PER CURIAM:

21 Defendant-Appellant State Trooper P.J. McCadden appeals
22 from an order of the district court (David N. Hurd, Judge)
23 denying his motion for summary judgment in this action against
24 him under 42 U.S.C. § 1983 based on allegations of false arrest
25 and malicious prosecution. The grounds for the motion are that
26 McCadden was entitled to qualified immunity. We conclude that
27 the stipulated facts establish that McCadden reasonably believed
28 he was acting at the behest of Judge Shirley Herder. McCadden
29 therefore had arguable probable cause to arrest Plaintiff Droz

1 for criminal contempt. In addition, in light of this reasonable
2 belief and McCadden's conversation with Judge Herder following
3 Droz's arrest regarding the offense with which Droz would be
4 charged, McCadden had probable cause to institute proceedings
5 against him. We therefore reverse the order of the district
6 court and remand the cause with instructions to grant the summary
7 judgment motion and dismiss the claims.

8 **BACKGROUND**

9 Plaintiff Droz was arrested and charged with violating
10 N.Y. Penal L. § 215.50(1) for "disorderly, contemptuous or
11 insolent behavior, committed during the sitting of a court, in
12 its immediate view and presence and directly tending to interrupt
13 its proceedings," after arriving at a courthouse and refusing to
14 show to Code Enforcement Officer John C. Anderson what was in a
15 brown paper bag he was carrying. Anderson told Judge Shirley
16 Herder about the incident. The police were then summoned, and
17 arrived, in the person of McCadden. McCadden then arrested Droz.
18 The subsequent contempt charge against Droz was eventually
19 dismissed. Droz then brought this action pursuant to 42 U.S.C. §
20 1983 against Herder and McCadden asserting, inter alia, causes of
21 action sounding in false arrest, malicious prosecution, and
22 conspiracy to commit false arrest and malicious prosecution.
23 Herder, having settled the claims against her, is no longer a
24 party to this appeal.

25 McCadden moved for summary judgment on qualified
26 immunity grounds, arguing that he had arguable probable cause to

1 arrest Droz inasmuch as he had been told by Herder -- a town
2 judge whose instruction would be sufficient to give probable
3 cause to arrest someone for contempt of court -- that he should
4 arrest Droz for contempt. McCadden also argued that he was
5 entitled to qualified immunity with respect to the malicious
6 prosecution claim because it was undisputed that he spoke with
7 Herder about what statute to charge Droz under following Droz's
8 arrest.

9 The district court denied McCadden's motion for summary
10 judgment, concluding that there was a material issue of fact as
11 to whether Herder personally instructed McCadden to arrest Droz,
12 and that, therefore, probable cause for the arrest had not been
13 established as a matter of law. The court also decided that
14 malice might be established to support the malicious prosecution
15 claim because McCadden had no other evidence that Droz had
16 committed criminal contempt, the charge that was brought against
17 him and then dismissed. McCadden brings this interlocutory
18 appeal from the denial of his motion for summary judgment.

19 DISCUSSION

20 I. Standard of review

21 "We review a district court's denial of summary
22 judgment de novo" Travelers Ins. Co. v. Carpenter, 313
23 F.3d 97, 102 (2d Cir. 2002) (noting, however, that unlike appeals
24 on qualified immunity issues, we typically undertake such review
25 only "when a final decision or other distinct district court
26 action has rendered the case appealable"). Summary judgment must

1 be granted to the movant "if the pleadings, the discovery and
2 disclosure materials on file, and any affidavits show that there
3 is no genuine issue as to any material fact and that the movant
4 is entitled to judgment as a matter of law." Fed. R. Civ. P.
5 56(c); Roe v. City of Waterbury, 542 F.3d 31, 35 (2d Cir. 2008).
6 In an interlocutory appeal such as this one, "we may not review
7 whether a dispute of fact identified by the district court is
8 'genuine.'" Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004).
9 We may only resolve the summary judgment motion insofar as we
10 rely "on stipulated facts, or on the facts that the plaintiff
11 alleges are true, or on the facts favorable to the plaintiff that
12 the trial judge concluded the jury might find." Id. "A district
13 court's mere assertion that disputed facts exist . . . is[,
14 however,] not enough to preclude an immediate appeal." Id.

15 II. Analysis

16 Irrespective of whether Herder and McCadden actually
17 spoke to one another before Droz's arrest -- a fact the district
18 court found was "genuinely" in dispute -- McCadden is entitled to
19 qualified immunity, because we conclude, as a matter of law, that
20 he reasonably believed he was acting at Herder's behest. While
21 Droz contests whether such a personal conversation between Herder
22 and McCadden ever took place, he admits that "McCadden . . .
23 relied upon his alleged understanding of Herder's direction to
24 him to arrest Droz for criminal contempt." Droz Statement of

1 Material Facts ¶ 4.¹ Droz concedes, then, that McCadden thought
2 he was operating at the direction of Herder when he arrested
3 Droz.

4 The stipulated facts also establish as a matter of law
5 that this belief was reasonable. Droz concedes that Herder
6 agreed with Code Enforcement Officer Anderson that Droz's actions
7 in the courthouse should be reported to the police. Id. at ¶ 12.
8 The police department, in the person of McCadden, were then
9 summoned by telephone to the courthouse by the town supervisor,
10 Mark Murray. Id. at ¶ 13. While Droz does not explicitly agree
11 that McCadden was told during or as a result of that phone call
12 that Herder was instructing him to come to the courthouse to
13 arrest Droz, for McCadden to have had any "alleged
14 understanding," Droz Statement of Material Facts ¶ 4, that Herder
15 had directed him to arrest Droz -- assuming as we must that he
16 did not have a direct conversation with Herder -- McCadden could
17 only have been told that as a result of what the town supervisor
18 told the police. Regardless of whether there is a triable issue
19 of fact as to whether McCadden had a personal conversation with
20 Herder prior to the arrest, then, for McCadden to have understood
21 that Herder directed him to arrest Droz, he must have been told
22 so directly or indirectly on or as a result of the call -- the
23 basis for a reasonable belief that it was so.

¹ While it is hard to know what to make of the use of the word "alleged" in Droz's Statement of Material Facts, we conclude that it does not take away from Droz's admission that McCadden had some understanding that Herder had instructed him to arrest Droz.

1 "Arguable probable cause [which establishes qualified
2 immunity with respect to a false arrest claim] exists when a
3 reasonable police officer in the same circumstances and
4 possessing the same knowledge as the officer in question
5 could have reasonably believed that probable cause existed in the
6 light of well established law." Zellner v. Summerlin, 494 F.3d
7 344, 369 (2d Cir. 2007) (internal quotation marks omitted)
8 (emphasis in original). Based on the stipulated facts, as a
9 matter of law, McCadden reasonably believed Herder instructed him
10 to arrest Droz. This belief was sufficient to establish arguable
11 probable cause for the arrest. McCadden is therefore entitled to
12 qualified immunity on the false arrest charge.

13 Similarly, McCadden is entitled to qualified immunity
14 on the malicious prosecution claim. "To state a claim . . . for
15 malicious prosecution, a plaintiff must show: (1) that the
16 defendant commenced or continued a criminal proceeding against
17 him; (2) that the proceeding was terminated in the plaintiff's
18 favor; (3) that there was no probable cause for the proceeding;
19 and (4) that the proceeding was instituted with malice." Kinzer
20 v. Jackson, 316 F.3d 139, 143 (2d Cir. 2003). It is undisputed
21 that after having arrested Droz, McCadden spoke with Herder to
22 determine what charges were to be brought. Inasmuch as McCadden
23 arrested Droz on the reasonable belief that Herder instructed him
24 to do so, and he spoke with Herder to determine the charge to be
25 brought against Droz, we conclude that there was probable cause

1 as a matter of law for instituting the proceeding. McCadden is
2 therefore entitled to qualified immunity.

3 Because neither of the underlying section 1983 causes
4 of action can be established, the claim for conspiracy also
5 fails. See Singer v. Fulton County Sheriff, 63 F.3d 110, 119 (2d
6 Cir. 1995).

7 **CONCLUSION**

8 For the foregoing reasons, the judgment of the district
9 court is reversed and the cause remanded to the court with
10 instructions that the motion for summary judgment be granted and
11 Droz's remaining claims against McCadden be dismissed.