NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 22, 2023*
Decided April 10, 2023

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2051

CHRISTOPHER L. JACKSON,
Plaintiff-Appellant,

v.

CHAD VARTANIAN and RICHARD BILSON,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 20-C-1148

Lynn Adelman,
Judge.

O R D E R

Christopher Jackson injured himself while fleeing from what he believed was a home invasion but turned out to be the execution of a "no-knock" warrant. He sued two

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

law enforcement officers, asserting that the no-knock entry violated his rights under the Fourth Amendment because it was based on false information in the affidavit supporting the warrant application. Relying on a state-court determination that a no-knock entry was justified irrespective of any false information, the district court entered judgment on the pleadings for the defendants. We affirm.

We recount the facts as Jackson describes them in his operative complaint. *See Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). We also consider materials central to and referred to in the complaint, and information subject to judicial notice. *See Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012); *Adams v. City of Indianapolis*, 742 F.3d 720, 729 (7th Cir. 2014).

In October 2015, someone shot at a moving car in Brookfield, Wisconsin, injuring one of the three passengers. Just before the shooting, the victim—who did not see the shooter—had met with a man known as "C." Local police officers learned that the phone number listed under "C" in the victim's phone was Jackson's, and the victim gave a physical description of "C" and identified Jackson as "C" in a photo lineup.

Brookfield police officers also solicited information about "C" from officers in Milwaukee's Violent Crimes Group. Milwaukee police detective Chad Vartanian, a member of the FBI's regional multijurisdictional gang task force, replied that in a previous narcotics investigation, reliable confidential informants had identified Jackson as "C," and that "C" was known to sell narcotics and was a member of HPT/ATK, a street gang. Jackson says this was false: the task force had previously identified at least one other man known as "C" who was involved with HPT/ATK, but no one with a description matching Jackson. Jackson has never been a member of that gang.

A Brookfield detective sought a warrant to search the house where Jackson resided to recover evidence related to the shooting. The detective also sought authorization to execute the warrant without knocking, citing concerns that Jackson or others in the home might be armed. To support the no-knock request, the detective's affidavit emphasized that Jackson was a suspect in a shooting—an attempted homicide of three people. The detective attested that there was "reliable information from Law Enforcement" that Jackson was "affiliated with the known street gang HPT/ATK," and that HPT/ATK members are known to be armed, have committed shootings, and are involved in the sale of illegal narcotics. The application appended Jackson's criminal record, which included several drug trafficking offenses. A Wisconsin judge approved the warrant and authorized it to be executed without knocking or announcing.

Jackson was asleep when local and federal officers executed the warrant at 5:30 a.m. on November 5, 2015; he was startled by the loud noises and, fearing the house was being burglarized, smashed a window, jumped through it, and fled. He was later arrested and taken into custody. In the house, officers discovered a handgun (later identified as the one used in the shooting), two magazines, and ammunition.

Detective Vartanian and his partner on the gang task force, FBI Special Agent Richard Bilson, were present when the warrant was executed and participated in the search. Jackson says that Bilson was also present at a briefing about the search before the warrant's execution. From his previous work, Bilson knew that Jackson was not the same "C" the task force previously investigated, who was a member of HPT/ATK. Despite knowing that the warrant contained false information about Jackson, Bilson failed to stop the warrant's execution.

The State charged Jackson with two counts of attempted first degree intentional homicide, and one count each of recklessly endangering safety and possessing a firearm as a felon. A jury found Jackson guilty on all counts. Before appealing, Jackson moved for a new trial, *see* WIS. STAT. §§ 974.02, 809.30, arguing that he received ineffective assistance of counsel because his attorneys had not challenged the validity of the search warrant and no-knock authorization by moving to suppress the evidence found during the search or seeking a *Mann* hearing—the Wisconsin equivalent of a *Franks* hearing. *See generally Franks v. Delaware*, 438 U.S. 154, 155–56 (1978); *State v. Mann*, 367 N.W.2d 209 (Wis. 1985). He contended that the warrant affidavit falsely stated that he was a member of HPT/ATK and that this supposed gang membership was material to the authorization of the no-knock entry.

The trial court denied Jackson's motion without a hearing on counsel's effectiveness because the assertions about the falsehoods in the warrant application were insufficient to require one. The court also stated that even without the supposed gang affiliation, the no-knock provision was sufficiently justified. The state appellate court affirmed. Applying a deferential standard of review to the question whether a hearing on ineffective assistance of counsel was required, the appellate court agreed that Jackson's assertions were too conclusory. It further stated that the record demonstrated conclusively that he could not have succeeded on a challenge to the no-knock authorization even if his lawyers had brought one:

> Setting aside the disputed gang affiliation, police still had "a reasonable suspicion that knocking and announcing their presence, under the

> particular circumstances, would be dangerous." *State v. Eason*, 2001 WI 98, ¶18, 245 Wis. 2d 206, 629 N.W.2d 625 (citation omitted). As detailed in the affidavit, Jackson was a convicted felon who police believed had tried to kill multiple people with a firearm. Because there was a sufficient independent basis to authorize the no-knock provision, Jackson's trial counsel was not ineffective for failing to file a motion to suppress. *See State v. Allen*, 2017 WI 7, ¶46, 373 Wis. 2d 98, 890 N.W.2d 245 (trial counsel cannot be ineffective for failing to make a meritless argument).

State v. Jackson, No. 2018 AP 1820-CR at 6–7 (Wis. Ct. App. Jan. 2, 2020).

Jackson then brought this suit against Vartanian, Bilson, and the task force. He alleged that the false gang-affiliation information enabled the no-knock execution, which caused him to jump through the window and resulted in injuries including neurological problems, long-term damage, and ongoing pain, and economic harm. After screening under 28 U.S.C. § 1915A, and resolution of Bilson's first motion to dismiss, Jackson proceeded on Fourth Amendment claims against Vartanian for providing the false information and against Bilson for conspiring with Vartanian and executing the warrant despite knowing of the false information. *See* 42 U.S.C. § 1983.[1]

The defendants separately moved for judgment on the pleadings. Bilson argued that issue preclusion blocked the Fourth Amendment claims because the state court had ruled there were sufficient grounds for the no-knock authorization even without the attestation that Jackson was part of a dangerous gang. Both defendants also argued that they were entitled to qualified immunity. As exhibits to their motions, they provided the search warrant and affidavit, Jackson's new-trial motion, and the transcript of the oral ruling denying an evidentiary hearing on that motion.

The district court granted the motions, concluding as to both defendants that issue preclusion applied to the ruling that the gang affiliation was not material to the warrant's no-knock authorization; therefore, Jackson could not show that the officers violated his constitutional rights when they entered his home unannounced. With Jackson unable to make that showing, the court continued, the defendants were entitled

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[1] The district court, hesitant to rely on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as a vehicle for the claim, allowed a § 1983 claim against Bilson, a federal officer, based on an alleged conspiracy with Vartanian.

to qualified immunity. Jackson timely moved for reconsideration under Federal Rule of Civil Procedure 59(e), arguing that the court incorrectly applied Wisconsin issue-preclusion law and should not have entered judgment for Vartanian, who had not argued issue preclusion. The court denied the motion, and Jackson appeals.

The defendants assert, incorrectly, that only the denial of the Rule 59(e) motion is within the scope of this appeal, but Jackson filed his motion within 28 days of the court's judgment, tolling his time to appeal the judgment. *See Banks v. Chicago Bd. of Educ.*, 750 F.3d 663, 666 (7th Cir. 2014); FED. R. APP. P. 4(a)(4)(A)(iv). We review the court's entry of judgment on the pleadings de novo. *Buchanan-Moore*, 570 F.3d at 827.

Jackson primarily contends that issue preclusion does not foreclose him from trying to prove that the no-knock authorization was based on the false gang information and was therefore unreasonable. We apply Wisconsin's issue-preclusion law because federal courts must give state-court judgments the same effect that the issuing court would. *See* 28 U.S.C. § 1738; *DeGuelle v. Camilli*, 724 F.3d 933, 937 (7th Cir. 2013). "In order for issue preclusion to be a potential limit on subsequent litigation, the question of fact or law that is sought to be precluded actually must have been litigated in a previous action and be necessary to the judgment." *Mrozek v. Intra Fin. Corp.*, 699 N.W.2d 54, 61 (Wis. 2005). Applying preclusion also must be "fundamentally fair." *Id.* Here, the state appellate court ruled that Jackson was not entitled to a hearing on his new-trial motion because he did not support his assertion that the warrant application contained knowingly false information that was material to the no-knock authorization. *See Jackson*, No. 2018 AP 1820-CR at 6. But it also went on to say outright that he *could not* show that his lawyers should have challenged the evidence on this ground because the no-knock entry was justified even without the "disputed gang affiliation." *Id.* at 6–7. That issue—the materiality of the supposedly false information to the no-knock authorization—is what Jackson's suit would require the federal courts to revisit.

Jackson insists that this is permissible because the conditions for applying issue preclusion are not met. He does not contest whether the issue was actually litigated, decided, and necessary to a final judgment. But he argues that the district court did not address whether applying preclusion is fundamentally fair here, and he contends that it is not. We agree with Jackson that the district court did not address the multitude of factors that Wisconsin law identifies as part of the fairness inquiry. *See DeGuelle*, 724 F.3d at 936–37. Jackson points to several factors that, in his view, make preclusion unfair here: the difference in burdens of proof, differences in the quality of the proceedings (including that he never received an evidentiary hearing on his new-trial

motion), and the distinct nature of the two actions—one seeking a new criminal trial and one seeking damages for Fourth Amendment violations that preceded his arrest.

But the sum of the fundamental-fairness factors does not weigh against applying preclusion: Jackson could—and did—seek review of the ineffective-assistance decision, and he has not given us reason to doubt the quality of the state-court proceedings. *See Mrozek*, 699 N.W.2d at 61–62. And if anything, Jackson had a lower burden of persuasion in the state proceeding. *See Paige K.B. ex rel Peterson v. Steven G.B.*, 594 N.W.2d 370, 375 (Wis. 1999) (fairness concern arises when burden shift favors party seeking preclusion). To obtain a hearing on his new-trial motion in state court, he did not have to *prove* anything: he had to *allege* sufficient facts that, if true, would entitle him to a new trial. To win this federal suit, he would have to prove his assertions by a preponderance of the evidence. Finally, there is nothing unusual about applying preclusion to an issue in a civil rights case that was first litigated in a criminal proceeding. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90 (1980).

Jackson makes one more argument against preclusion: that the district court should not have applied its ruling to his claim against Vartanian, who did not raise the defense in his Rule 12(c) motion or his answer. But given that courts may raise issue preclusion sua sponte in the interest of judicial economy, *see Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996), and that Jackson had the opportunity to fully brief issue preclusion in response to Bilson's motion, we agree with the district court's sensible decision not to distinguish between the defendants in applying issue preclusion. Nor do we fault the court for applying preclusion even though neither defendant first pleaded the defense in his answer. We typically consider failure to raise an affirmative defense in one's pleading a forfeiture only if the plaintiff was prejudiced by the delay. *See Reed v. Columbia St. Mary's Hosp.*, 915 F.3d 473, 478 (7th Cir. 2019). The delay here was minimal, and Jackson has not shown any prejudice: he had early notice of the preclusion defense—the case never passed the pleadings stage—and he fully briefed his opposition. *See Burton v. Ghosh*, 961 F.3d 960, 966 (7th Cir. 2020).

Because Jackson is precluded from disputing that the no-knock authorization was justified even without the gang information, he cannot show that the defendants violated the Fourth Amendment. *See Richards v. Wisconsin*, 520 U.S. 385, 394 (1997); *Rainsberger v. Benner*, 913 F.3d 640, 653 (7th Cir. 2019) (officers not liable for including false information in warrant affidavit when information not material). He therefore loses on the merits, though it is also true, as the district court concluded, that without

the violation of a constitutional right, the defendants are entitled to qualified immunity. *See Muhammad v. Pearson*, 900 F.3d 898, 903–04 (7th Cir. 2018).

We have considered Jackson's other arguments, but none merits discussion.

AFFIRMED