Dissent and Opinion Filed July 18, 2023

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00911-CV

ROGELIO SANTANDER SR. AND JULIA GARCIA, INDIVIDUALLY AND AS CO-ADMINISTRATORS OF THE ESTATE OF ROGELIO SANTANDER JR., AND CRYSTAL ALMEIDA, Appellants
V.
CHAD SEWARD, HOME DEPOT U.S.A., INC., AND POINT 2 POINT GLOBAL SECURITY, INC., Appellees

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-07132

DISSENTING OPINION

Before Justices Carlyle, Garcia, and Rosenberg[1]
Dissenting Opinion by Justice Rosenberg

The trial court granted Chad Seward's motion to dismiss plaintiffs' claims on the ground that he was acting in the scope of his employment as a police officer when he detained Armando Juarez on suspicion of a crime, performed a pat down search, and communicated with police dispatchers and other police officers during Juarez's detention. Because I conclude that Seward met his burden to establish that

[1] The Hon. Barbara Rosenberg, Justice, Assigned

his conduct was within the general scope of his employment as a police officer, I would affirm the trial court's order dismissing Seward from this suit. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(f). Accordingly, I respectfully dissent from the Court's partial reversal of the trial court's ruling.

The Court carefully and thoroughly reviews the facts and discusses the record in detail. I will not repeat that discussion here because my opinion diverges from the Court's only in the application of the law to those facts. Seward moved to dismiss appellants' claims under civil practice and remedies code § 101.106(f), which provides:

> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. CIV. PRAC. & REM. CODE § 101.106(f).

The Court concludes that Seward failed to meet his burden under § 101.106(f) in part, holding that "the trial court erred by dismissing appellants' claims against Seward to the extent that those claims are based on Seward's acts and omissions that occurred before Seward attempted to confirm via radio whether Juarez had any outstanding warrants." The Court relies on *Garza v. Harrison*, 574 S.W.3d 389, 400 (Tex. 2019), in support of its conclusion that "[a] reasonable factfinder could

conclude that, before that moment, Seward was merely assisting a private employer in enforcing the employer's policies and in ejecting a potential trespasser." Op. at 8 (citing *Garza*, 574 S.W.3d at 403).

My reading of *Garza* is broader. The court explained that "[c]onduct falls outside the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve *any* purposes of the [police department] employer." *Garza*, 574 S.W.3d at 400 (emphasis original) (internal quotation and citation omitted). I would conclude that Seward's conduct prior to using his police radio also served the police department's purposes and was within the scope of his duties as a police officer.

Seward testified that he was employed by the Dallas Police Department at all relevant times, and that his employment at Home Depot had been previously approved by his DPD supervisor. He described certain conduct and duties that "were authorized by my employment as a Dallas police officer and/or were incidental to conduct authorized by that employment," including:

- "Oral questioning of a suspect of a possible past or imminent crime,"
- "Issuing a criminal trespass warning and filling out Dallas Police Department paperwork for same,"
- "Deciding whether to determine whether a suspect has an outstanding warrant,"
- "Communicating with police dispatch to evaluate whether a suspect might have an outstanding warrant,"
- "Detaining a suspect while awaiting confirmation of a warrant,"

- "Performing a *Terry* search or pat down on the outside of a suspect's clothes;
- "Deciding whether to perform a full search within a suspect's clothing for weapons and/or contraband given the circumstances,"
- "Requesting back-up from other police officers based on the circumstances,"
- "Communicating the level of priority of a call to police dispatch,"
- "Choosing whether or not to handcuff a suspect based on the circumstances," and
- "Communicating with other Dallas Police officers about one's own prior interactions with a suspect."

Seward testified that he "participated in each of [these] activities on April 24, 2018 during [his] interactions with police dispatch, Armondo Juarez, Officer Santander, and Officer Almeida," and explained that he was trained on how to conduct each of these activities through his employment with the police department. He also testified that he was in uniform on the day in question. *Cf. Garza*, 574 S.W.3d at 395 (Officer Garza "was dressed casually in plain clothes").

Seward relied on his statutory duties and the police department's general orders to support his motion to dismiss under § 101.106(f). Article 2.13(b)(1) of the Texas Code of Criminal Procedure imposes a duty on every police officer, whether on or off duty, to "interfere without warrant to prevent or suppress crime." TEX. CODE CRIM. PROC. art. 2.13(b)(1); *see also City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374, 377 (Tex. App.—Dallas 1994, no writ) ("An off-duty police officer who observes a crime immediately becomes an on-duty

police officer."). Police officers may arrest, without warrant, "persons found in suspicious places and under circumstances which reasonably show that such persons . . . are about to commit some offense against the laws." TEX. CODE CRIM. PROC. art. 14.03(a)(1). Dallas Police Department General Order 421.03.A.1 requires its officers who serve in off-duty employment to "respond to crimes in progress or to prevent breaches of the peace."

The Court concludes that these provisions are inapplicable to Seward's "participation in the initial encounter and detention" and any "protective frisk" Seward may—or may not—have made. The Court reasons that article 2.13(b)(1) does not apply because "a reasonable factfinder could conclude that, at this point in the incident, Seward was neither preserving the peace nor preventing or suppressing crime." *See* TEX. CODE CRIM. PROC. art. 2.13(b)(1). The Court further concludes that article 14.03(a)(1) does not apply because "Seward did not decide that Juarez should be arrested until he confirmed the existence of a warrant, which happened only after Santander and Almeida arrived." *See id.* art. 14.03(a)(1). And to support its conclusion that General Order 421.03.A.1 does not apply, the Court quotes subsection J.1.d. of that order: "An officer providing off-duty services shall not: . . . Assist in an investigation by a private security and/or investigative agency or private individual."

The Court's opinion, however, focuses on the facts relating to the criminal trespass warning rather than the evidence showing the reason for the warning—

potential theft. Seward argues that he "learned from a reliable source," Home Depot's asset protection specialist Scott Painter, "that Juarez was shoplifting." As the Court's opinion recites, Painter observed Juarez "quickly grab" various items, put them in a bucket, put the lid back on the bucket, and proceed to an area of the store described as a "big gap of empty space behind the insulation." Seward contends Painter's information "triggered a mandatory duty to prevent and suppress that crime and required that [Seward] investigate the theft or attempted theft by Juarez." *See* TEX. PENAL CODE § 31.03 (defining offense of theft).

Seward argues that although Painter also wanted to issue a criminal trespass warning to Juarez, Painter's "desires did not—and could not—change Officer Seward's obligations as a peace officer." Those obligations included "interfer[ing] without warrant to prevent or suppress crime," TEX. CODE CRIM. PROC. art. 2.13(b)(1), arresting, without warrant, "persons found in suspicious places and under circumstances which reasonably show that such persons . . . are about to commit some offense against the laws," *id.* art. 14.03(a)(1), and "respond[ing] to crimes in progress or to prevent breaches of the peace," under General Order 421.03.A.1. I agree with Seward that the record supports application of each of these provisions on these facts.

The Court further concludes that there is "a genuine fact question about whether Seward performed a protective frisk at all." I disagree that this factual dispute precludes § 101.106(f)'s application here. The alleged negligence at issue is

Seward's failure to discover Juarez's gun, whether by failing to search at all or by conducting the search negligently. Either way, Seward's failure to discover that Juarez was armed fell within the scope of Seward's duties as a police officer. *See U.S. v. Sokolow*, 490 U.S. 1, 7 (1989) ("In *Terry v. Ohio,* [392 U.S. 1 (1968)], we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause."). Whether or not a frisk was appropriate and how to conduct any frisk were matters within Seward's discretion as a police officer, not part of any investigation undertaken by a private agency or individual. *Soklow*, 490 U.S. at 7; *cf.* General Order 421.03.J.1.d.

While I agree that the supreme court's *Garza* opinion does indeed include the statement that "a fact question *may* arise as to whether the officer's conduct is in a private or official capacity" "if an officer is protecting a private employer's property, ejecting trespassers, or enforcing rules and regulations promulgated by a private employer," 574 S.W.3d at 403 (emphasis added), the court in *Garza* was not presented with those facts. Instead, the court explained that once officer Garza saw Jonathen Santanella in possession of marijuana, "he immediately became an on-duty peace officer enforcing general laws under article 14.03(g)(2)." *See* TEX. CODE CRIM. PROC. art. 14.03(g) (regarding arrests outside the officer's jurisdiction). The court unambiguously stated that "[a]n officer enforcing general laws in accordance with a statutory grant of authority is acting in the course and scope of employment

as a peace officer." *Garza*, 574 S.W.3d at 303. The court concluded that "[f]or purposes of dismissal under section 101.106(f), a nexus must exist between the conduct giving rise to the alleged tort and the officer's job responsibilities." *Id.* at 405. I would hold that Seward established this nexus through the evidence he offered in support of his motion to dismiss.

As in *Garza*, "[t]he facts of this case are heart-wrenching, but the legal issue is discrete." *Id.* "Under section 101.106(f), we are not tasked with passing judgment on [Seward]'s skill or the manner in which he attempted to enforce the law. Our analysis is strictly limited to whether he was doing the job of a peace officer to stop crime when and where it happens." *Id.* at 405–06. Because I would conclude Seward's actions fell within the scope of his employment with the police department, I would affirm the trial court's order dismissing appellants' claims against him under civil practice and remedies code § 101.106(f). *See Garza*, 574 S.W.3d at 400 (conduct "falls outside the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve *any* purposes of the employer"). Because the Court concludes otherwise, I respectfully dissent.

In sum, I would affirm the trial court's order dismissing Seward from this suit and I dissent from the Court's disposition of appellants' first issue. Accordingly, I also dissent from the disposition of appellants' remaining issues where it relies on the Court's conclusion that fact issues preclude Seward's dismissal under

§ 101.106(f). To the extent it does not, I concur in the Court's judgment.

210911df.p05

/Barbara E. Rosenberg/
BARBARA ROSENBERG
JUSTICE, ASSIGNED