

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00642-CV

**Travis County Sheriff's Office Senior Certified Peace Officer
Dennis Tumlinson, Appellant**

v.

Carolyn Barnes, Appellee

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419th JUDICIAL DISTRICT
NO. D-1-GN-15-000877, HONORABLE ORLINDA NARANJO, JUDGE PRESIDING**

MEMORANDUM OPINION

This is an interlocutory appeal from the district court's denial of Travis County Sheriff's Office Senior Certified Peace Officer Dennis Tumlinson's assertion of official immunity. Because Tumlinson failed to establish the good-faith element of his official-immunity defense, we will affirm the district court's order.

Background

In January 2010, Officer Tumlinson arrested Barnes for assaulting Officer Tumlinson at the security-screening area of the Travis County Criminal Justice Center where Tumlinson was employed. Barnes was charged with assault on a public servant.¹

¹ The assault charge against Barnes was later dismissed and Barnes was charged with interference with the duties of a public officer, but Barnes was found to be incompetent to stand trial

While Barnes was out on bond from the assault charge, she was arrested by Williamson County Sheriff's Office deputies for shooting at a United States Census worker. Barnes was charged with and later found guilty of aggravated assault with a deadly weapon and sentenced to three years in connection with this shooting.²

In January 2011, Barnes filed suit against various individuals, including Officer Tumlinson, for various claims purportedly stemming from the above-related events, but her suit was ultimately dismissed for want of prosecution. Thereafter, Barnes filed a federal lawsuit in the Western District of Texas, Austin Division, against many of the same individuals, again including Officer Tumlinson, but the federal district court dismissed the case with prejudice after Barnes failed to comply with a court order to clarify and shorten her pleadings.³

In March 2015, Barnes filed the underlying lawsuit against Officer Tumlinson and approximately 78 other individuals asserting more than 200 causes of action purportedly arising from the events described above, including her 2010 arrest for assaulting Officer Tumlinson. The causes of action asserted in Barnes's 127-page original petition, which Barnes supplemented six times, include various types of conspiracy, malicious prosecution, fraud, violation of civil and constitutional rights, assault, aggravated perjury, gross abuses of power, acts of violence, fraud on

and was committed to the Kerville State Hospital for mental-health services. The interference charge against Barnes was ultimately dismissed under Code of Criminal Procedure Article 46B.009, which provides time credits towards sentencing for persons who are confined in a mental-health facility.

² See *Barnes v. State*, No. 03-13-00434-CR, 2016 WL 3917126 (Tex. App.—Austin July 13, 2016, pet. ref'd) (mem. op., not designated for publication) (affirming conviction for aggravated assault with a deadly weapon).

³ See *Barnes v. Travis Cty. Sheriff's Dep't*, No. A-12-CV-028-LY, 2013 WL 1773618 (W.D. Tex. April 25, 2013), *aff'd* 597 Fed. Appx. 798 (5th Cir. 2015), *cert. denied* 136 S. Ct. 485 (2015).

the court, obstruction of justice, usurpation of power, global conspiracy, violations of public trust and unwarranted impositions of cruel and unusual punishment. Regarding Officer Tumlinson and his 2010 arrest of her, Barnes asserted in her pleadings that Officer Tumlinson had “attacked B[arnes] from behind as she exited the building in order to knock her phone out of her hand to prevent and interrupt her call to 911 to report his drunken state and abusive behavior.” Barnes further alleged that Officer Tumlinson perjured himself when he testified about this incident in the census-worker case against Barnes in Williamson County.

In response to the suit against him, Officer Tumlinson filed motions to dismiss and a plea to the jurisdiction, asserting that, stated generally, he was entitled to official immunity in connection with the acts that are the basis of Barnes’s claims against him because those acts “were conducted within [Officer Tumlinson’s] official capacity as [an] employee[] of Travis County” and that Officer Tumlinson was “performing discretionary duties within the course and scope of [his] employment.”⁴ After a hearing on the matter, the district court denied, without elaboration, Officer Tumlinson’s motion to dismiss and his plea to the jurisdiction. It is from this interlocutory order that Tumlinson appeals, raising two issues challenging the district court’s order: (1) “Subject matter jurisdiction precludes [Barnes]’s claims against a government official because [Barnes] failed to establish jurisdiction”; and (2) “affirmative defenses of official immunity, statute of limitations, and res judicata are dispositive on the question of the court’s jurisdiction, notwithstanding the merits of any potential claim.”⁵

⁴ See *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653–58 (Tex. 1994) (describing elements of official immunity).

⁵ (Unnecessary and excessive capitalization omitted.)

Discussion

Texas Civil Practice and Remedies Code section 51.014(a)(5) authorizes an appeal from an interlocutory order that “denies a motion for summary judgment that is based on an assertion of official immunity by an individual who is an officer or employee of the state or a political subdivision of the state.”⁶ Although Officer Tumlinson did not file a motion for summary judgment based on an assertion of official immunity, he did file a motion to dismiss and a plea to the jurisdiction that were both predicated, in part, on his claim of official immunity. The Texas Supreme Court has held that an appeal may be taken from an order denying an assertion of immunity, as provided in section 51.014(a)(5), regardless of the procedural vehicle used.⁷ Accordingly, we have jurisdiction over the district court’s order here to the extent that it denies Officer Tumlinson’s assertion of official immunity.⁸

Official immunity is an affirmative defense that protects government employees from personal liability.⁹ A government employee is entitled to official immunity (1) for the performance of discretionary duties; (2) within the scope of the employee’s authority; (3) provided the employee acts in good faith.¹⁰ Official immunity can apply in cases such as this that involve allegations of

⁶ Tex. Civ. Prac. & Rem. Code § 51.014(a)(5).

⁷ See *Austin State Hosp. v. Graham*, 347 S.W.3d 298, 301 (Tex. 2011) (holding “that an appeal may be taken from orders denying an assertion of immunity, as provided in section 51.014(a)(5), regardless of the procedural vehicle used”)

⁸ See *id.*

⁹ *University of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000) (citing *Chambers*, 883 S.W.2d at 653).

¹⁰ *Id.* (*Chambers*, 883 S.W.2d at 653).

intentional torts such as assault arising from police activity, including arrests.¹¹ An act is discretionary if it requires personal deliberation, decision, and judgment.¹² A law-enforcement officer's decision regarding "if, how, and when to arrest a person" is a discretionary function.¹³ An officer acts within the scope of his authority if he is discharging the duties generally assigned to him.¹⁴ Even if a specific action is wrong or negligent, the officer still acts within the scope of this authority.¹⁵ A police officer acts in good faith in connection with an arrest if a reasonably prudent police officer, under similar might have reached the same decision.¹⁶

Here, Barnes has alleged that Officer Tumlinson assaulted her in January 2010 in the Travis County Criminal Justice complex where Tumlinson was employed.¹⁷ In response, Tumlinson

¹¹ See *Telthorster v. Tennell*, 92 S.W.3d 457, 467 (Tex. 2002) (holding that law-enforcement officer was entitled to official immunity from liability for injuries inflicted during an arrest).

¹² *Chambers*, 883 S.W.2d at 654.

¹³ *Dent v. City of Dallas*, 729 S.W.2d 114, 116 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), cert. denied, 485 U.S. 977 (1988)); see *Quinn v. Roach*, 326 Fed. Appx. 280, 289 (5th Cir. 2009) (citing *id.* for same proposition).

¹⁴ See *Chambers*, 883 S.W.2d at 650.

¹⁵ See *Harris Cty. v. Ochoa*, 881 S.W.2d 884, 888 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

¹⁶ *Telthorster*, 92 S.W.3d at 465 (citing *Chambers*, 883 S.W.2d at 656–57).

¹⁷ Barnes relatedly alleged that Officer Tumlinson perjured himself regarding this assault incident when he testified in Williamson County's prosecution of Barnes for her assault on the census working. Texas does not recognize a civil cause of action for perjury and that witnesses and parties who testify in judicial proceedings are entitled to absolute immunity from subsequent civil liability for their testimony, even perjured testimony. See *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998) (acknowledging that separate civil causes of action for perjury does not exist); see also *Moore v. McDonald*, 30 F.3d 616, 618 (5th Cir. 1994) (holding that officer's testimony, which was subject to perjury penalty, was "absolutely immune from" civil perjury claim); *Spurlock v. Johnson*,

asserts that when he arrested Barnes he was performing discretionary duties within the course and scope of his employment with Travis County and that he acted in good faith in doing so. In support of his assertions, Officer Tumlinson offered the following affidavit testimony:

During the period of time I was involved with the case (beginning on about May, 2010 through October 23, 2012) my role consisted of routine, usual and customary official duties of an employee of the Travis County Court House Security. I handled this matter in the same manner as I would have handled any other security matter in my position with Travis County Court House Security. All of my duties and actions regarding Carolyn Barnes were within my official role as an employee of the Travis County Court House Security.

Although this undisputed testimony very well may establish that Officer Tumlinson was performing discretionary duties within the scope of his employment,¹⁸ it does not establish the good-faith element of an official-immunity defense. To establish the good-faith element, Officer Tumlinson must offer evidence that a reasonably prudent officer, under similar circumstances, might have reached the same decision.¹⁹ While Officer Tumlinson makes a conclusory statement in his pleadings that he acted in good faith, he does not offer any evidence or even factual assertions in his affidavit or elsewhere to support that conclusion. Although good faith may be established by an

94 S.W.3d 655, 658 (Tex. App.—San Antonio 2002, no pet.) (“the Texas Penal Code does not create private causes of action”).

¹⁸ See *Chambers*, 883 S.W.2d at 650 (noting officer acts within the scope of his authority if he is discharging duties generally assigned to him); *Dent*, 729 S.W.2d at 116 (holding that law-enforcement officer’s decision regarding “if, how, and when to arrest a person” is discretionary function); see *Quinn v. Roach*, 326 Fed. Appx. 280, 289 (5th Cir. 2009) (citing *id.* for same proposition).

¹⁹ See *Telthorster*, 92 S.W.3d at 465 (citing *Chambers*, 883 S.W.2d at 656–57).

officer's own affidavit,²⁰ a conclusory assertion of good faith in pleadings is insufficient,²¹ whether urged in a plea to the jurisdiction, a summary judgment, or a motion to dismiss.²² Accordingly, the district court did not err in denying Officer Tumlinson's assertion of official immunity.

Conclusion

We affirm the district court's order.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: May 5, 2017

²⁰ See *Smith v. Davis*, 999 S.W.2d 409, 414 (Tex. Civ. App.—Dallas 1999, no pet.); *Vela v. Rocha*, 52 S.W.3d 398, 405 (Tex. App.—Corpus Christi 2001, no pet. (citing *Barker v. City of Galveston*, 907 S.W.2d 879, 888 (Tex. App.—Houston [1st Dist.] 1995, writ denied)).

²¹ See *Smith*, 999 S.W.2d at 414.

²² See *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004) (applying summary-judgment-like standard to pleas to jurisdiction); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam) (holding that if defendant meets initial burden of conclusively establishing the elements of affirmative defense, he is entitled to summary judgment unless the non-movant presents summary-judgment evidence raising genuine issue of material fact as to one of elements at issue); see also *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997) (holding that expert's conclusory statements regarding officer's good faith were insufficient to support or defeat summary judgment).