FILED
United States Court of Appeals
Tenth Circuit

April 5, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BOBACK SABEERIN,

Plaintiff - Appellant,

and

S.S.,

Plaintiff,

v.

ALBUQUERQUE POLICE DEPARTMENT; TIMOTHY FASSLER, Detective, in his individual capacity; JOHN DEAR, Detective, in his individual capacity; CITY OF ALBUQUERQUE; GREGG MARCANTEL, Secretary, in his official and individual capacity; STATE OF NEW MEXICO; NEW MEXICO CORRECTIONS DEPARTMENT,

Defendants - Appellees.

No. 21-2046
(D.C. No. 1:16-CV-00497-JCH-LF)
(D. N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BRISCOE**, and **ROSSMAN**, Circuit Judges.

---

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Boback Sabeerin was convicted in New Mexico state court of crimes related to his involvement in a vehicle-identification-number (VIN) switching operation. The New Mexico Court of Appeals overturned those convictions because it determined, among other things, that a search warrant and the supporting affidavit that led to his arrest failed to establish probable cause. *See State v. Sabeerin*, 336 P.3d 990, 998 (N.M. Ct. App. 2014). After the reversal of his convictions, Mr. Sabeerin, his domestic partner, and their children filed this action, asserting multiple federal claims under 42 U.S.C. § 1983 and assorted state law claims against several defendants. Final judgment was entered in favor of all defendants, but this appeal concerns only the district court's grant of summary judgment in favor of the City of Albuquerque ("City") and two City detectives, Tim Fassler and John Dear (all three collectively, "City Defendants"). The court ruled that Detectives Fassler and Dear were entitled to qualified immunity from Mr. Sabeerin's Fourth Amendment unlawful search and seizure claim and that other claims failed for lack of a constitutional violation. Mr. Sabeerin appeals pro se.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

In 1991, Mr. Sabeerin pled no contest to two counts of unlawfully taking a motor vehicle in violation of New Mexico law. Detective Dear allegedly "made it

[1] Because Mr. Sabeerin is the lone appellant, we refer only to him when discussing the claims and issues.

clear" to Mr. Sabeerin "that after this he should watch his back." R., Vol. 2 at 240, ¶ 18 (internal quotation marks omitted).

In June 2009, police arrested another person, Anjum Tahir, for attempting to steal an automobile. When he was arrested, Mr. Tahir was driving an automobile registered in his name but bearing the VIN of a different automobile, one that he had purchased at an insurance auction as a complete-burn-and-totaled vehicle. Detective Fassler learned that the true VIN of the automobile Mr. Tahir was driving had been reported stolen two months earlier. Investigating further, Detective Fassler learned that Mr. Tahir had purchased a large number of totaled vehicles at auction, and he received a tip that Mr. Tahir did business at a location on Rhode Island St. NE in Albuquerque. After surveilling the Rhode Island property, Detective Fassler concluded that Mr. Tahir had two other vehicles involved in a VIN-switching scheme, so he obtained a search warrant for the Rhode Island property on August 19, 2009. The search uncovered several stolen and VIN-altered vehicles.

Later on August 19, Detective Fassler completed an affidavit in support of an application for another warrant. In that affidavit, he stated that during his investigation, he had "learned" that Mr. Tahir "did business" at 112 General Arnold St. NE in Albuquerque. R., Vol. 4 at 99. As it turned out, the General Arnold property was Mr. Sabeerin's business, which he describes as a "body shop," R., Vol. 2 at 240, ¶ 19. The General Arnold affidavit detailed the results of Detective Fassler's investigation into Mr. Tahir and the Rhode Island property that had led him to seek the Rhode Island warrant, and it set forth several details concerning the

General Arnold property: "The front of the building is set back about 20 feet from the sidewalk where cars are parked and being dismantled." R., Vol. 4 at 98. "There are numerous vehicles visible through [a] fence that have been, or are being dismantled. Also cars with no damage at all are visible." *Id.* Detective Fassler had "sent a unit to watch [the General Arnold property]," and Mr. Tahir "was taken into custody walking around that business." *Id.* at 99. "Several suspicious vehicles can also be seen on that lot." *Id.*

The General Arnold warrant was issued just over two hours after the Rhode Island warrant was issued. According to Mr. Sabeerin, Detective Dear told Mr. Sabeerin's domestic partner that "he had come out of retirement when he had found out that Mr. Sabeerin was part of this investigation." R., Vol. 2 at 240, ¶ 20. And Detective Fassler allegedly told Mr. Sabeerin that two detectives who had worked on the earlier case against him were now working for Detective Fassler "to make sure" Mr. Sabeerin did not "get out this time," and that "[f]oreigners like [Mr. Sabeerin] don't belong in this country." *Id.* ¶ 21 (emphasis omitted). The "search of the General Arnold property revealed a number of stolen vehicles, as well as evidence of a car theft and VIN-switching operation." *Sabeerin*, 336 P.3d at 993.

In two separate jury trials, Mr. Sabeerin was convicted of multiple charges. In each case, the trial court denied his motions to suppress evidence obtained through execution of the General Arnold warrant. He was sentenced to a total of twenty-seven years' imprisonment.

Mr. Sabeerin appealed from both criminal judgments. In a split decision, the New Mexico Court of Appeals reversed Mr. Sabeerin's convictions, ruling that the motions to suppress should have been granted because "the General Arnold property search warrant was invalid for lack of probable cause." *Id.* at 998.[2] The majority noted that it appeared most of the facts in the General Arnold affidavit had been copied from the Rhode Island affidavit, except for the few additional facts we have noted above. As to those additional facts, the majority faulted the General Arnold affidavit because Detective Fassler did not explain how he learned that Mr. Tahir did business at the General Arnold property or "the content of the information learned," whether "through a tip, as [Mr. Sabeerin] suggest[ed], or . . . as a result of Detective Fassler's investigation." *Id.* at 996. Consequently, the court concluded, the issuing judge could not have determined whether the source of the information was "reliable or credible," or "whether the circumstances by which Detective Fassler, or his source, obtained this information demonstrated the probability that the criminal activity taking place at the Rhode Island property was also taking place at the General Arnold property." *Id.* at 996-97. The majority further relied on the affidavit's failure to explain why the vehicles on the General Arnold property were "suspicious, other than to say that some of the vehicles looked like they were being dismantled and some did not." *Id.* at 997.

[2] The appeals court also concluded that the warrant was invalid "as an impermissible general warrant," *Sabeerin*, 336 P.3d at 998, but the instant appeal does not implicate whether the warrant was overbroad.

The dissenting judge concluded that probable cause existed:

> The "tip" received [that Mr. Tahir did business at the General Arnold property] and the investigation conducted by Detective Fassler were rendered credible from the information Detective Fassler obtained from the Rhode Island property investigation combined with his independent observation of the General Arnold property. Detective Fassler had probable cause to seek a search warrant the moment he saw Tahir at the General Arnold property with the same sort of suspicious vehicles in sight that he discovered in his investigation of Tahir's activities at the Rhode Island property.

Id. at 999 (Sutin, J., dissenting). The New Mexico Supreme Court declined review.

Following his release from prison, Mr. Sabeerin brought this action. In his operative Second Amended Complaint, filed through counsel, Mr. Sabeerin asserted two constitutional claims against the City Defendants: (1) unlawful search and seizure under the Fourth Amendment, and (2) conspiracy to deprive Mr. Sabeerin of his Fourth Amendment right to be free from unlawful searches and seizures and his substantive due process right under the Fourteenth Amendment to be free of conduct that is outrageous and shocking to the conscience. He also asserted an abuse-of-process claim against Detectives Fassler and Dear, constitutional claims against other defendants, and numerous state law claims.

After extended motions practice, the case narrowed to the City Defendants' motion for summary judgment. By then, Mr. Sabeerin was proceeding pro se. In granting that motion, the district court concluded that Detective Fassler was entitled to qualified immunity on the Fourth Amendment unlawful search and seizure claim under an "arguable probable cause" standard, because Mr. Sabeerin did not establish that Detective Fassler's affidavit contained deliberate falsehoods or recklessly

disregarded the truth. The district court also determined that Mr. Sabeerin had not met his burden to identify a clearly established right that Detective Fassler violated, either as a Fourth Amendment violation or as a matter of substantive due process under the Fourteenth Amendment. For substantially the same reasons, the court held that Detective Dear was entitled to qualified immunity. And because Mr. Sabeerin failed to prove that Detectives Fassler and Dear violated Mr. Sabeerin's constitutional rights, the court ruled that the conspiracy, abuse-of-process, and municipal-liability claims failed. The court declined to exercise supplemental jurisdiction over the state law claims against the City Defendants. Mr. Sabeerin appeals only the entry of summary judgment on his unlawful search and seizure claim.[3]

II. Discussion

As we read Mr. Sabeerin's pro se appellate brief, he raises two issues: (1) issue preclusion (also known as collateral estoppel) bars re-litigation of whether the General Arnold affidavit established probable cause; and (2) the General Arnold affidavit did not establish arguable probable cause. We reject both arguments.[4]

[3] In his opening brief, Mr. Sabeerin does not challenge the district court's rulings regarding his conspiracy or abuse-of-process claims. Consequently, he has waived appellate review of those rulings. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) (explaining that "[i]ssues not raised" and arguments that are "inadequately presented" in an "opening brief are deemed abandoned or waived " (internal quotation marks omitted)).

[4] We construe Mr. Sabeerin's pro se filings liberally, but we may not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

A. Issue preclusion is inapplicable

Mr. Sabeerin argues that the New Mexico Court of Appeals' opinion in his direct criminal appeal ("*Sabeerin*") precludes Detectives Fassler and Dear from succeeding on their qualified immunity defense because the Court of Appeals decided that the General Arnold affidavit did not establish probable cause. The district court ruled that Mr. Sabeerin insufficiently argued issue preclusion and therefore had not met his burden to establish *Sabeerin*'s preclusive effect. Mr. Sabeerin contests that ruling and urges us to apply issue preclusion. We need not decide whether the district court was correct regarding the sufficiency of Mr. Sabeerin's argument because the argument fails on the merits.

New Mexico law governs whether *Sabeerin* is entitled to preclusive effect. *See McFarland v. Childers*, 212 F.3d 1178, 1185 (10th Cir. 2000) (applying Oklahoma law to determine preclusive effect on qualified immunity defense of ruling by Oklahoma state court). Under New Mexico law, issue preclusion (also known as collateral estoppel) applies if, among other things, the issue in the present case "was necessarily determined in the prior litigation." *Ideal v. Burlington Res. Oil & Gas Co.*, 233 P.3d 362, 366 (N.M. 2010) (internal quotation marks omitted). As we explain more fully below, the qualified immunity issue we focus on in this case is whether Detectives Fassler and Dear had *arguable* probable cause to obtain and execute the warrant, whereas the issue in *Sabeerin* was whether the General Arnold

affidavit established *actual* probable cause to support issuance of the warrant.[5] This difference is critical.

"[I]n the § 1983 qualified-immunity context, an officer may be mistaken about whether he possesses *actual* probable cause to effect an arrest, so long as the officer's mistake is reasonable—*viz.*, so long as he possesses *arguable* probable cause." *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1140 (10th Cir. 2016) (second emphasis added) (internal quotation marks omitted); *see also id.* ("'Arguable probable cause, not the higher standard of actual probable cause, governs the qualified immunity inquiry.'" (parenthetically quoting *Jones v. Cannon*, 174 F.3d 1271, 1283 n.3 (11th Cir. 1999))). *Sabeerin*, therefore, did not necessarily determine the qualified immunity issue we address in this case, so issue preclusion does not apply. *See McFarland*, 212 F.3d at 1185-86 & n.2 (explaining that the qualified immunity issue in the plaintiff's federal case was "whether a reasonable officer could have concluded that there was probable cause," which, for purposes of issue preclusion, was different than the state court's ruling in the plaintiff's prior criminal case that "probable cause affidavits were legally insufficient to support the . . . charge").

[5] The *Sabeerin* majority focused on the issuing judge's perspective when it described the probable cause issues as (1) "whether there are sufficient underlying circumstances in the General Arnold property search warrant affidavit from which the issuing judge could conclude that the information learned by Detective Fassler, no matter the source, was credible or reliable," 336 P.3d at 996; and (2) "whether there are sufficient underlying circumstances in the search warrant affidavit from which the issuing judge could conclude that the 'suspicious' vehicles were reasonable grounds to believe that a crime had been committed at the General Arnold property or that evidence of a crime would be found there," *id.* at 997.

B. Qualified Immunity

1. Standard of review and background legal principles

"We review de novo a grant of summary judgment on the basis of qualified immunity." *Puller v. Baca*, 781 F.3d 1190, 1196 (10th Cir. 2015). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted). Because the "doctrine not only protects public employees from liability" but also "from the burdens of litigation, . . . we review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions." *F.M.*, 830 F.3d at 1134 (internal quotation marks omitted). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir. 2009) (internal quotation marks omitted). We may decide which of these prongs to address first, and we need not address both. *See id.* at 1312 n.2. We elect to center our analysis on the second prong—whether any constitutional right allegedly violated was clearly established.

"Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly

established at the time it was taken." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) (brackets and internal quotation marks omitted). The foundational legal rule for purposes of our qualified immunity analysis is the Fourth Amendment, which protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV.

"An affidavit establishes probable cause for a search warrant if the totality of the information it contains establishes the fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Knox*, 883 F.3d 1262, 1275 (10th Cir. 2018) (internal quotation marks omitted). Thus, *actual* probable cause requires something "more than a bare suspicion." *Stonecipher*, 759 F.3d at 1141 (internal quotation marks omitted). But "[i]n the context of a qualified immunity defense on an unlawful search or arrest claim, we ascertain whether a defendant violated clearly established law by asking whether there was *arguable* probable cause for the challenged conduct." *Id.* (emphasis added) (internal quotation marks omitted); *see also F.M.*, 830 F.3d at 1139 (recognizing that the "arguable probable cause" inquiry is part of qualified immunity's second prong—whether the law was clearly established). "Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists." *Stonecipher*, 759 F.3d at 1141. "A defendant is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed . . . ." *Id.* (internal quotation marks omitted).

Where an "alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012). But "the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness or, as [the Supreme Court has] sometimes put it, in objective good faith." *Id.* (internal quotation marks omitted). "If it is obvious that no reasonably competent officer would have concluded that a warrant should issue, the warrant offers no protection." *Stonecipher*, 759 F.3d at 1142 (internal quotation marks omitted). "Qualified immunity will not be granted where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* (internal quotation marks omitted).

"Nor will a warrant protect officers who misrepresent or omit material facts to the magistrate judge." *Id.* But "[t]he burden is on the plaintiff to make a substantial showing of deliberate falsehood or reckless disregard for truth by the officer seeking the warrant." *Id.* (internal quotation marks omitted). The "test is an objective one." *Id.* "To establish reckless disregard in the presentation of information to a magistrate judge, there must exist evidence that the officer in fact entertained serious doubts as to the truth of his allegations," which may be inferred "from circumstances evincing obvious reasons to doubt the veracity of the allegations." *Id.* (internal quotation marks omitted). "The failure to investigate a matter fully, to exhaust every possible

lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence rarely suggests a knowing or reckless disregard for the truth. To the contrary, it is generally considered to betoken negligence at most." *Id.* (brackets and internal quotation marks omitted).

2. Analysis

Against the foregoing background principles, we now address Mr. Sabeerin's arguments. Foremost, he contends that because Mr. Tahir had been arrested at the Rhode Island property before the General Arnold warrant issued, Detective Fassler knowingly misrepresented in the General Arnold affidavit that Mr. Tahir was arrested at the General Arnold property. In support, he points to a criminal report appearing to indicate that Mr. Tahir was arrested at the Rhode Island property on the same day both properties were searched. *See* R., Vol. IV at 265. We assume for purposes of argument that this report accurately reflects that Mr. Tahir was arrested at the Rhode Island property and not at the General Arnold property. But Mr. Sabeerin has not pointed to any evidence, or any circumstances from which it might be inferred, that Detective Fassler knowing or recklessly disregarded the truth or "in fact entertained serious doubts as to the truth" of his statement in the affidavit that Mr. Tahir was taken into custody at the General Arnold property. *Stonecipher*, 759 F.3d at 1142 (internal quotation marks omitted). The affidavit makes clear that Detective Fassler learned that Mr. Tahir was arrested at the General Arnold property from the officers he sent to watch that property. We therefore need not exclude the statement from our arguable probable cause analysis. *See Puller*, 781 F.3d at 1197 (explaining that when

examining an alleged Fourth Amendment violation based on inclusion of "false statements in an affidavit" that the officer included "knowingly, or with reckless disregard for the truth . . . we measure probable cause by . . . removing any false information from the affidavit . . . and then . . . inquiring whether the modified affidavit establishes probable cause for the warrant").

Based on the information set forth in the affidavit, a reasonable officer could conclude there was probable cause to search the General Arnold property. The affidavit detailed criminal activity at the Rhode Island property (stolen and VIN-switched vehicles) that was confirmed upon execution of the Rhode Island warrant. It described knowledge of a business link between Mr. Tahir and the General Arnold property and reported Detective Fassler's observations of an apparently similar stolen-vehicle and VIN-switching operation at the General Arnold property, where Mr. Tahir was taken into custody. Certainly, when viewed in isolation, the presence of vehicles that had been or were being dismantled at Mr. Sabeerin's body shop on the General Arnold property might be considered consistent with only lawful activity. But when combined with the other information presented in the affidavit, the observation of dismantled vehicles at the General Arnold property supports arguable probable cause.

Mr. Sabeerin maintains that it was a tipster who told Detective Fassler of a business link between Mr. Tahir and the General Arnold property, and because the City Defendants have never disclosed the tipster's identity, he concludes there was

no tipster.[6] He also appears to take issue with the district court's refusal to allow him discovery to probe the issue; the court ruled that information was unnecessary for answering the legal question in this case.

We agree with the district court and reject Mr. Sabeerin's arguments. At the time Detective Fassler completed the affidavit in 2009, "[s]ettled law" had made "it clear that probable cause . . . must derive from facts and circumstances based on reasonably trustworthy information." *Cortez v. McCauley*, 478 F.3d 1108, 1121 (10th Cir. 2007) (en banc) (citing *Hunter v. Bryant*, 502 U.S. 224, 228 (1991), and *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). But a reasonable officer could have concluded (even if mistakenly) that this standard was met here. Having learned of a possible business connection between Mr. Tahir's criminal conduct and the General Arnold property, a reasonable officer could conclude that the information was "reasonably trustworthy," *id.*, based on (1) the results of the execution of the Rhode Island warrant, which confirmed stolen-vehicle and VIN-switching criminal activity there; (2) observation of circumstances at the General Arnold property consistent with the same type of criminal activity; and (3) receipt of information that Mr. Tahir was taken into custody at the General Arnold property. Hence, a reasonable officer could conclude he had "more than a bare suspicion," *Stonecipher*, 759 F.3d at 1141

[6] Although Detective Fassler testified at Mr. Sabeerin's second criminal trial that he obtained this information from a confidential informant, "we confine our review to the [General Arnold affidavit]," because the City Defendants "do not contend that facts outside the affidavit, but known to the issuing judge, supported [the General Arnold warrant's] issuance." *Poolaw v. Marcantel*, 565 F.3d 721, 729 (10th Cir. 2009).

(internal quotation marks omitted), that there was a connection between the General Arnold property and the confirmed criminal activity at the Rhode Island property. Given the totality of the circumstances, we conclude it is not "obvious that no reasonably competent officer would have concluded that a warrant should [have] issue[d]." *Id.* at 1142 (internal quotation marks omitted). The fact that the dissenting judge in *Sabeerin* concluded that there was *actual* probable cause, *see* 336 P.3d at 999 (Sutin, J., dissenting), lends further support for our conclusion that a reasonable officer could have thought, even mistakenly, that there was probable cause.

Mr. Sabeerin's other arguments are unpersuasive. He contends the bulk of the General Arnold affidavit was copied from the Rhode Island affidavit and accordingly misrepresented that specific vehicles identified in the General Arnold affidavit were located at the General Arnold property. This argument rests on a misreading of the General Arnold affidavit, which makes clear that the described vehicles were found at the Rhode Island property. We therefore afford no significance to any copying that might have occurred (neither party has directed us to where the Rhode Island affidavit may be found in the record that was before the district court, nor have we uncovered it). Mr. Sabeerin also argues that Detectives Fassler and Dear acted with an improper motive, as revealed by Detective Fassler's comment that he and two other detectives who had worked on a case against him twenty years earlier (apparently including Detective Dear) were working "to make sure" Mr. Sabeerin did not "get out this time," and that "[f]oreigners like [Mr. Sabeerin] don't belong in this

country." R., Vol. 2 at 240, ¶ 21 (emphasis omitted). But in evaluating arguable probable cause, we apply an objective standard, so any subjective intentions are irrelevant. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 925 (10th Cir. 2015) (explaining that an "officer's subjective intent" is not part of an arguable probable cause inquiry).

In conclusion, Detectives Fassler and Dear had arguable probable cause, so they did not violate Mr. Sabeerin's clearly established constitutional rights, and the district court properly granted them summary judgment based on qualified immunity on the Fourth Amendment claim.

C. Mr. Sabeerin has waived review of the grant of summary judgment on his municipal-liability claim

Mr. Sabeerin has developed no argument regarding the grant of summary judgment to the City on his municipal-liability claim. He has therefore waived appellate review of the issue. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) (arguments that are "inadequately presented" in an "opening brief are deemed abandoned or waived" (internal quotation marks omitted)).

III. Conclusion

The district court's judgment is affirmed.

Entered for the Court

Mary Beck Briscoe
Circuit Judge