FILED
United States Court of Appeals
Tenth Circuit

June 14, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ZACH SABUS,

Plaintiff - Appellant,

v.

PAWNEE COUNTY BOARD OF COUNTY COMMISSIONERS; MIKE WATERS, former Pawnee County Sheriff, in his individual capacity; JIM MEEKS, former Pawnee County Deputy Sheriff, in his individual capacity; JOHN DOE, others as yet unknown; PAWNEE COUNTY SHERIFF, in his official capacity,

Defendants - Appellees.

No. 22-6095
(D.C. No. 5:21-CV-00846-J)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **BACHARACH**, Circuit Judges.

In 2020 the Pawnee County, Oklahoma Sheriff's Office conducted an operation that allegedly targeted gay men who had used a dating app to communicate

* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

with a minor. As a result of this operation, Zach Sabus was arrested, detained, and charged with sex offenses. The State later dismissed the charges against him. He then filed this civil-rights suit under 42 U.S.C. § 1983 and the Oklahoma Governmental Tort Claims Act, alleging he had been subjected to unlawful discrimination; violation of his rights to expression, speech, and privacy; unlawful arrest and imprisonment; search, seizure, and due-process violations; and state-law torts. The district court dismissed his claims and the action. Mr. Sabus appealed. We have jurisdiction, *see* 28 U.S.C. § 1291, and we affirm the dismissal.

BACKGROUND

Mr. Sabus's amended complaint alleges his injuries arose from his use of the dating app "Grindr," which is marketed to gay individuals above the age of 18. Grindr's terms of service require users to be legal adults. Notwithstanding this restriction, a male minor, aged 17, created a profile by claiming to be at least 18 years old and began exchanging messages and photos with adult men using the app. One of these men was Mr. Sabus.

At the outset of their conversations, Mr. Sabus engaged in the following brief colloquy with the minor concerning his age:

Sabus:	"are you really 18"
Individual:	"Maybe why"
Sabus:	"I don't want to be a pedophile"
Individual:	"don't worry you won't be"
Sabus:	"Gud!" [sic]

Aplt. App. at 14.

Mr. Sabus then began exchanging messages with the minor.[1] Defendant Jim Meeks learned of Mr. Sabus's contacts with the minor and, based on those contacts, arrested Mr. Sabus at his home without a warrant. He also obtained a warrant for Mr. Sabus's phone and searched the phone.

Mr. Sabus was charged with three felony counts: soliciting sexual contact with a minor using technology, showing obscene material to a minor, and possession of child pornography. He was jailed for 97 days. After the State dismissed the charges, Mr. Sabus filed this action.

Relevant to this appeal, Mr. Sabus contended that Deputy Meeks lacked probable cause to arrest him or to search his phone, and that the arrest, search, and later detention were unreasonable "without evidence of [Mr. Sabus's] knowledge that the individual was a minor." *Id.* at 16. The Sheriff and Deputy Meeks filed motions to dismiss the amended complaint for failure to state a claim against them. The district court granted Deputy Meeks's motion, reasoning that (1) the complaint did not contain specific factual allegations referencing any conduct by Deputy Meeks that would support the claims against him of unlawful discrimination and violation of

[1] The amended complaint does not describe the content of those messages. But as the Sheriff has noted, the amended complaint "does not deny that [Mr. Sabus] used text messages and the Grindr app to solicit sexual activity from the minor, to send obscene images to the minor, or to receive sexually explicit images of the minor." Aplt. App. at 58. For his part, Mr. Sabus's district-court pleadings admitted that he engaged in "lewd communication with a minor." *Id.* at 104. And in his appeal brief he concedes that many of the photos he exchanged with the minor were explicit. *See* Aplt. Opening Br. at 5 ("Many of the photos were elicit [sic].").

Mr. Sabus's rights to expression, speech, and privacy; (2) the complaint did not allege facts sufficient to show Deputy Meeks lacked probable cause to arrest Mr. Sabus; and (3) Mr. Sabus conceded his state-law claims were not asserted against Deputy Meeks as an individual. The court granted the Sheriff's motion, reasoning that the § 1983 and state-law false-arrest claims failed because Mr. Sabus had not alleged sufficient facts to show he was arrested or detained without probable cause. And the court dismissed the claims against defendant Mike Waters without prejudice because he had never been served with process and dismissed the County Board of Commissioners from the case.

DISCUSSION

1. Our standard of review is de novo.

We review de novo the district court's dismissal of Mr. Sabus's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *See Lucas v. Turn Key Health Clinics, LLC*, 58 F.4th 1127, 1136 (10th Cir. 2023). In conducting this review, "[w]e accept a complaint's well-pleaded allegations as true, viewing all reasonable inferences in favor of the nonmoving party, and liberally construe the pleadings." *Id.* "To survive a motion to dismiss, the complaint must allege sufficient facts to state a claim for relief plausible on its face." *Id.*

2. Mr. Sabus failed to adequately allege facts showing he was arrested or detained without probable cause.

Mr. Sabus asserts that the amended complaint states a Fourth Amendment claim because he adequately alleged that he was arrested and detained without probable cause. We disagree.

"A warrantless arrest violates the Fourth Amendment unless it was supported by probable cause." *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1216 (10th Cir. 2008). "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." *Id.* (internal quotation marks omitted). To justify a warrantless arrest, an officer must develop probable cause for each element of the offense. *Hinkle v. Beckham Cnty. Bd. of Comm'rs*, 962 F.3d 1204, 1224 (10th Cir. 2020). That said, probable cause "is not a high bar" and an officer need only have "the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Id.* at 1220 (internal quotation marks omitted).

In this civil-rights action, it was Mr. Sabus's burden to plead specific facts that plausibly showed why probable cause was absent. *See Erikson v. Pawnee Cnty. Bd. of Comm'rs*, 263 F.3d 1151, 1154 (10th Cir. 2001) (to establish a lack of probable cause for an arrest or prosecution, the plaintiff must go beyond making conclusory allegations that no probable cause existed and must plead specific facts that plausibly support his claim.) Attempting to satisfy this burden, Mr. Sabus contends his

complaint plausibly asserted lack of probable cause concerning the knowledge element because (1) Grindr's terms of service did not permit individuals to use the service unless they were over 18; (2) the victim's Grindr profile listed him as being 18 years old; and (3) Officer Meeks knew Mr. Sabus had attempted to verify that the victim was over 18 and that in response the victim did not tell him he was a minor and stated instead that by becoming involved with him, Mr. Sabus would not be a pedophile. But these allegations are insufficient to show a lack of probable cause.[2]

[2] Mr. Sabus also makes a vague and contextless argument that Officer Meeks "interfered with the constitutional process by which a neutral magistrate determines whether there is probable cause" by "selecting only the most salacious communications for disclosure, failing to disclose the potentially exculpatory messages, and by mis-ordering the exhibits in his probable cause affidavit." Aplt. Opening Br. at 6. But the amended complaint asserts that Officer Meeks performed a *warrantless* arrest of Mr. Sabus, not an arrest based on a warrant issued by a magistrate. The amended complaint does further assert that Officer Meeks obtained a warrant *to search Mr. Sabus's cellphone*, and that he withheld or mis-ordered the information provided to a court in connection with *that* search. But to the extent Mr. Sabus's arguments about Officer Meeks withholding information from a "probable cause affidavit" indicate that he wishes to raise a separate Fourth Amendment argument about the accuracy of Officer Meeks' affidavit used to obtain the search warrant for his cellphone, his argument is conclusory and insufficient to present such an issue for our review. Among other things, he does not discuss the legal analysis that applies to information omitted from a search warrant affidavit or adequately explain why we should conclude that the alleged omission in this case resulted in a constitutional violation. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to tell us why the district court's decision was wrong."). Moreover, Mr. Sabus's appellate brief confusingly asserts both that Officer Meeks *provided* the allegedly exculpatory information in an attachment to his affidavit (albeit out of chronological order), and that he *lied about* or *withheld* the information from the affidavit. We decline to consider such poorly developed and conclusory appellate argument. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief.").

Probable cause exists if an officer could objectively and reasonably have concluded the suspect committed a crime. *See Culver v. Armstrong*, 832 F.3d 1213, 1218 (10th Cir. 2016). At least one of the Oklahoma statutes under which Mr. Sabus was arrested and charged does not require proof that the defendant knew his victim was a minor.[3] The Oklahoma statute that, among other things, prohibits showing obscene material to a minor provides:

> A. Every person who willfully and knowingly either:
>
> 1. Lewdly exposes his or her person or genitals in any public place, or in any place where there are present other persons to be offended or annoyed thereby; provided, however, for purposes of this section, a person alleged to have committed an act of public urination shall be prosecuted pursuant to Section 22 of this title unless such act was accompanied with another act that violates paragraphs 2 through 4 of this subsection and shall not be subject to registration under the Sex Offenders Registration Act;
>
> 2. Procures, counsels, or assists any person to expose such person, or to make any other exhibition of such person to public view or to the view of any number of persons, for the purpose of sexual stimulation of the viewer;
>
> 3. Writes, composes, stereotypes, prints, photographs, designs, copies, draws, engraves, paints, molds, cuts, or otherwise prepares, publishes, sells, distributes, keeps for sale, knowingly downloads on a computer, or exhibits any obscene material or child pornography; or
>
> 4. Makes, prepares, cuts, sells, gives, loans, distributes, keeps for sale, or exhibits any disc record, metal, plastic, or wax, wire or tape recording, or any type of obscene material or child pornography,
>
> shall be guilty, upon conviction, of a felony . . . .
>
> B. Every person who:

[3] "In Oklahoma, the age of majority has been set at the age of 18 years by the Constitution." *Arganbright v. State*, 328 P.3d 1212, 1219 (Okla. Crim. App. 2014).

> 1. Willfully solicits or aids a minor child to perform; or
>
> 2. Shows, exhibits, loans, or distributes to a minor child any obscene material or child pornography for the purpose of inducing said minor to participate in,
>
> any act specified in paragraphs 1, 2, 3 or 4 of subsection A of this section shall be guilty of a felony . . . .

Okla. Stat. tit. 21, § 1021.

Although subsection (A) refers to willful and knowing conduct, subsection (B)(2), which describes Mr. Sabus's alleged misconduct, does not. Notwithstanding this, Mr. Sabus insists that knowledge of the victim's age is required even under subsection (B)(2). But he cites no Oklahoma case that directly supports his argument. Nor have we located such a case.[4]

Moreover, even if this subsection is ambiguous concerning whether the defendant must have actual knowledge that the victim was a minor, Deputy Meeks would still have had probable cause to arrest Mr. Sabus, provided his interpretation of the statute was reasonable—even if mistaken. *See Heien v. North Carolina*, 574 U.S. 54, 66 (2014) (in affirming that officer had reasonable suspicion to conduct traffic stop, Court states that if an officer's mistake of law concerning whether the defendant's conduct violated an ambiguous statute was a reasonable one, "there was no violation of the Fourth Amendment"). Given the language of § 1021, the

[4] Mr. Sabus also cites Okla. Uniform Jury Instructions for the offenses of exhibition of obscene material to minor and buying/possessing/procuring child pornography —Criminal 4-135 and 4-135A. Although both of these instructions require the defendant to act willfully, they define *willfully* to mean that "the defendant knew the nature and character of the contents" of the material. They say nothing about knowledge of the minor victim's age.

language of the uniform jury instructions, and the lack of pertinent authority requiring knowledge of the victim's age for a conviction under subsection (B)(2), Deputy Meeks's interpretation was not unreasonable.

Mr. Sabus further asserts, however, that to pass constitutional muster, a statute like § 1021 must criminalize only obscene communications that are *knowingly* made to minors. As we understand his argument, it would be unreasonable, given First Amendment constraints, for an officer to conclude that any portion of § 1021 lacks an age-related scienter requirement. But the law does not support that argument. As the Supreme Court has noted, "many sex crimes involving minors do not ordinarily require that a perpetrator know that his victim is a minor." *Flores-Figueroa v. United States*, 556 U.S. 646, 653 (2009). In cases of statutory rape, for example, Oklahoma does not require that the defendant know the victim's age. *See Starkey v. Okla. Dep't of Corrs.*, 305 P.3d 1004, 1026-27 (Okla. 2013) ("Statutory rape does not require scienter because it is not a defense that a defendant did not know the victim was under the age of consent."); *see Reid v. State*, 290 P.2d 775, 784 (Okla. Crim. App. 1955) (rejecting "mistake-of-age" defense).

In addition, in discussing a federal statute criminalizing certain sexual conduct with a minor, *see* 18 U.S.C. § 2251(a), the Supreme Court stated that "it is not a necessary element of a prosecution that the defendant knew the actual age of the child." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 (1994) (internal quotation marks omitted). Nor, according to most circuits that have considered the issue, does the First Amendment require proof that the defendant had such

knowledge. *See United States v. Humphrey*, 608 F.3d 955, 960 (6th Cir. 2010) (noting that "the Ninth Circuit stands alone in its determination that the First Amendment requires a reasonable mistake-of-age defense under § 2251(a)."). Thus, even assuming a court might ultimately conclude that a conviction under § 1021(B) without a showing of scienter violated the First Amendment, Mr. Sabus fails to show that Deputy Meeks unreasonably interpreted the statute in assessing probable cause.

We agree with the district court that Mr. Sabus failed to plead specific facts that plausibly asserted Officer Meeks arrested him without probable cause.

3. The amended complaint also fails to state a claim against the Sheriff in his official capacity.

Mr. Sabus also sued the Pawnee County Sheriff in his official capacity, which was equivalent to suing the County itself, *see Cox v. Glanz*, 800 F.3d 1231, 1254 (10th Cir. 2015). To establish municipal liability under § 1983, a plaintiff must show both that his harm was caused by a constitutional violation, and that the municipality (here, Pawnee County) was responsible for that violation. *See Crowson v. Washington Cnty.*, 983 F.3d 1166, 1186 (10th Cir. 2020). Where, as in this case, the plaintiff has failed to establish a constitutional violation, his claim against the municipal defendant necessarily fails. *See id.* ("[A] claim under § 1983 against either an individual actor or a municipality cannot survive a determination that there has been no constitutional violation."). We therefore affirm the dismissal of Mr. Sabus's official-capacity claim against the Pawnee County Sheriff.

4. The district court did not err in dismissing Mr. Sabus's state-law claims.

Mr. Sabus asserts that his state-law claims against Pawnee County for unlawful arrest and detention turn on the same assertions of lack of probable cause that undergird his wrongful-arrest claim under § 1983. Because the complaint fails to allege facts plausibly showing a lack of probable cause, the district court properly dismissed these claims as well.

Entered for the Court

Harris L Hartz
Circuit Judge