IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-10231

KATHLYN SORENSON,

Plaintiff-Appellant,

VERSUS

STEVE FERRIE and JAMES M. WALLING,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

February 11, 1998

Before WISDOM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Kathlyn Sorenson sued police officers Steve Ferrie and James Walling under 42 U.S.C. § 1983 after they arrested her for carrying a handgun in the trunk of her car. The district court granted summary judgment for the officers on the basis of qualified immunity. We affirm.

I.

A.

Ferrie stopped Sorenson as she drove away from a darkened stable in Rowlett, Texas, around 3:00 a.m. on May 13, 1995.

30 Thinking the stable was closed at this wee hour and aware of recent
31 vandalism at nearby stables, Ferrie asked Sorenson to explain her
32 business. She said she had been feeding her horses and was on her
33 way to work as a security guard.

34 Sorenson then volunteered to open her trunk to show Ferrie her
35 horse equipment. She pointed to an empty feed bucket, but the
36 officer focused on another object in the trunk: Sorenson's pistol,
37 nestled in a holster attached to a belt. Ferrie asked Sorenson why
38 she carried a pistol in her trunk; she replied that she needed it
39 for her job, adding that in Texas, it is not unlawful to transport
40 a pistol in the trunk of one's car. She also produced photo
41 identification indicating that she was a licensed security guard.[1]

42 Sergeant James Walling soon arrived on the scene. The
43 officers conferred, then attempted to confirm Sorenson's story by
44 calling the Dallas nightclub where she said she was headed to pick
45 up the evening's receipts. No one answered, so Ferrie directed
46 Sorenson to call her supervisor. Instead, Sorenson called her
47 husband, who told Walling that he, Mr. Sorenson, was a certified
48 firearms instructor and that it was legal for Texans to carry
49 handguns in automobile trunks. Walling disputed Mr. Sorenson's
50 reading of the Texas Penal Code, and the call ended.

51 Ferrie and Walling decided to arrest Sorenson. They asked her
52 whether she was carrying any more firearms, and she directed them
53 to another gun inside a purse in the spare-tire compartment of the

[1] Although Texas law allows a licensed security guard to carry a handgun, this exception applies only when he is wearing a distinctive uniform and the gun is in plain view. *See* TEX. PENAL CODE ANN. § 46.02(b)(5).

trunk. The officers brought Sorenson to the station and filed criminal charges.

B.

Sorenson was charged with unlawfully carrying a weapon in violation of TEX. PENAL CODE ANN. § 46.02(a), which provides that "[a] person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club." Several months later, the Dallas County prosecutor dismissed the charge, conceding that "the state is unable to make a prima facie case."

II.

In seeking summary judgment, the officers argued that § 46.02(a) is ambiguous and that their interpretation of the statute was reasonable. They introduced affidavits stating that (1) officers were taught during training that carrying a handgun in the trunk may be unlawful; (2) Ferrie had participated in the arrest of another suspect for carrying a handgun in the trunk; and (3) the officers knew of prosecutions in Dallas County for carrying handguns in the trunk. The magistrate judge's report, adopted by the district court, concluded that the legality of carrying a handgun in one's trunk was not clearly established under Texas law at the time of the incident.

76 III.

77 Government officials performing discretionary functions are
78 protected from civil liability under the doctrine of qualified
79 immunity if their conduct violates no "clearly established
80 statutory or constitutional rights of which a reasonable person
81 would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
82 Claims of qualified immunity are reviewed under a two-step
83 analysis. The first question is whether the plaintiff has asserted
84 the violation of a clearly established constitutional right. If
85 so, the court decides whether the defendants' conduct was
86 objectively reasonable. *Coleman v. Houston Indep. Sch. Dist.*, 113
87 F.3d 528, 533 (5th Cir. 1997) (applying the two-pronged test of
88 *Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991)).

89 IV.

90 Sorenson charges that the officers violated her right to be
91 free from illegal arrest, as secured by the Fourth and Fourteenth
92 Amendments. This is a clearly established constitutional right.[2]
93 Whether an arrest is illegal, however, hinges on the absence of
94 probable cause. *Baker v. McCollan*, 443 U.S. 137, 144-45 (1979).[3]

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[2] *See Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1305 (5th Cir. 1995) (acknowledging the "right under the Fourth and Fourteenth Amendments to be free from . . . false arrest"); *Duckett v. City of Cedar Park*, 950 F.2d 272, 278 (5th Cir. 1992) ("An individual has a federally protected right to be free from unlawful arrest and detention resulting in a significant restraint of liberty and violation of this right may be grounds for suit under 42 U.S.C. § 1983.").

[3] "The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquittedSSindeed, for every suspect released." *Id.* at 145. Instead, "Police officers are . . . required under the Fourth Amendment to make a determination
(continued...)

95 Thus, if Sorenson cannot show that the officers lacked probable
96 cause, she has failed to state the violation of a constitutional
97 right, and the officers are entitled to qualified immunity.

98 Probable cause depends on whether the officers "possess[ed]
99 knowledge that would warrant a prudent person's belief that [the
100 suspect] had already committed or was committing a crime." *Eugene*,
101 65 F.3d at 1305.[4] Thus, the central question in our qualified
102 immunity inquiry is "the objective (albeit fact-specific) question
103 whether a reasonable officer could have believed [the arrest] to be
104 lawful, in light of clearly established law and the information the
105 [arresting] officers possessed." *Anderson v. Creighton*, 483 U.S.
106 635, 641 (1987).[5]

107 Sorenson cannot satisfy *Siegert*'s first prongSSthe need
108 to allege the violation of a clearly established constitutional
109 rightSSmerely by asserting that the right not to be arrested
110 without probable cause is clearly established. Instead, she must
111 show that *the legality of her conduct* was clearly established.

(...continued)
of probable cause before any significant pretrial restraint of liberty." *Duckett*, 950 F.2d at 278.

[4] *See also Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) ("[W]e must look to whether [the plaintiff] has alleged sufficient facts from which it can be discerned that no reasonable officer could have believed that probable cause existed to arrest him . . . ." (Citation omitted.)).

[5] Although the officers' subjective intent is irrelevant to our qualified immunity analysis, *Anderson*, 483 U.S. at 631, we note the evidence supporting Sorenson's claim that Ferrie and Walling acted with improper motives in arresting her. Sorenson's husband stated that the officers told him they were arresting his wife "to prove a point" and that he needed a "new" copy of the Texas Penal Code. At oral argument, the officers' counsel conceded his familiarity with the saying, "You can beat the rap, but you can't beat the ride," but insisted that Sorenson's night in jail was not the result of a personal grudge.

112 That is to say, she must demonstrate that, at the time of her
113 arrest, it was clearly established in Texas that one may lawfully
114 possess a handgun in one's trunk. If the law was not clearly
115 established, "a reasonable officer could have believed the arrest
116 to be lawful." *Anderson*, 483 U.S. at 641. Particularly in
117 situations whereSSas hereSSthe statutory language is vague, the
118 caselaw must draw a bright line in order for the law to be
119 classified as "clearly established." *See Kelly v. Curtis*, 21 F.3d
120 1544, 1554 (11th Cir. 1994).[6]

121 V.

122 A.

123 The law at issue here is TEX. PENAL CODE ANN. § 46.02(a), which,
124 subject to listed exceptions in § 46.02(b), (c), and (d), punishes
125 anyone who "carries on or about his person a handgun." The
126 relevant question is whether, at the time of Sorenson's arrest, the
127 courts' interpretation of § 46.02 had clearly established the law
128 as applied to guns carried in the trunk of a car. We conclude that
129 the state law in that regard was *not* clearly established.
130 Accordingly, Sorenson fails under *Siegert*'s first prong, because
131 she has not shown that the officers lacked probable cause to arrest
132 her. The Fourth Amendment's protections are triggered only in the

[6] We do not mean to suggest that all conduct is presumptively illegal unless proven otherwise. For example, a plaintiff arrested for innocently walking down a public street need not identify a statute or case in order to validate his conduct. What distinguishes this case is that Sorenson's conduct arguably falls within the statutory language and the surrounding caselaw. That is why we require her to demonstrate the legality of her conduct to establish the absence of probable cause.

133 *absence* of probable cause; the officers therefore did not violate
134 a constitutional right.

135 B.

136 There is a dearth of reported cases directly addressing the
137 legality, under Texas law, of carrying a handgun in one's trunk.[7]
138 Nonetheless, Texas courts have set down general principles
139 governing when a handgun is carried "on or about" one's person.

140 The general rule in Texas is that "on or about" the person
141 means "close at hand" or "within reach." This rule was first
142 articulated in *Wagner v. State*, 188 S.W. 1001, 1002 (Tex. Crim.
143 App. 1916), in which the court construed a predecessor to § 46.02,
144 holding:

> 145 The Legislature must have meant something when it used
> 146 the words, "or about the person," and, on principle,
> 147 using the word "about" in its ordinary meaning, taking
> 148 into consideration the context and subject-matter
> 149 relative to which it is employed, the word, not being
> 150 specially defined, must, as we believe, be held to mean,
> 151 within the pistol statute, near by, close at hand,
> 152 convenient of access, and within such distance of the
> 153 party so having it as that such party could, without
> 154 materially changing his position, get his hand on
> 155 it. . . .

156 Over the years, Texas courts have echoed this formulation and
157 have applied it to a variety of factual settings. In *Boles v.*

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[7] Sorenson directs us to a 1988 civil forfeiture case, *$2067 in U.S. Currency v. State*, 745 S.W.2d 109, 112 (Tex. App.SSFort Worth 1988, no writ). In discussing an officer's seizure of a purse from the trunk of a car, the court noted, "[u]pon opening the vehicle's trunk the officer observed a handgun. Although we can find nothing illegal per se about carrying a handgun in a vehicle's trunk, once the officer saw the gun in the trunk he was justified in taking appellant's purse to see if it contained another weapon." The court's language, concerning a peripheral issue in a civil forfeiture case, is *dictum* that hardly constitutes clearly established law.

158 *State*, 416 S.W.2d 431, 433 (Tex. Crim. App. 1967), the court held
159 that a knife under the car's floorboard was carried "on or about
160 the person." Similarly, a pistol in the glove compartment was held
161 to violate the statute in *Franklin v. State*, 183 S.W.2d 573, 573-74
162 (Tex. Crim. App. 1944). And in *Spears v. State*, 17 S.W.2d 809, 810
163 (Tex. Crim. App. 1929), the court concluded that a pistol stored in
164 the side pocket of the passenger-side door was carried on or about
165 the driver's person.[8]

166 Our review of the caselaw construing § 46.02 reveals that,
167 over time, most areas of a car's interior have been swept within
168 the statute's ambit. With the exception of a handful of decisions
169 from the turn of the century,[9] the majority of courts have
170 concluded that the statute is violated whenever a gun is found
171 inside the passenger compartment of a carSSeven though, in many
172 such instances, a person would "materially chang[e] his position,"
173 *Wagner*, 188 S.W. at 1002, in order to reach the gun.

174 Sorenson correctly notes that no court has applied the statute
175 specifically to guns carried in the trunk. In *Contreras v. State*,
176 853 S.W.2d 694 (Tex. App.SSHouston [1st Dist.] 1993), however, the
177 court remarked that the wording of the statute (in this case,
178 another predecessor of § 46.02) "clearly reflected the

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[8] *See also Flores v. State*, 895 S.W.2d 435, 446 (Tex. App. 1995) (holding that handgun in unlocked console by driver's seat violates statute); *Courtney v. State*, 424 S.W.2d 440, 441 (Tex. Crim. App. 1968) (concluding that handgun in glove compartment violates statute).

[9] The most recent of these cases was decided in 1905; all three involved wagons, not motor vehicles. *See Thompson v. State*, 86 S.W. 1033 (Tex. Crim. App. 1905); *Hardy v. State*, 40 S.W. 299 (Tex. Crim. App. 1897); *George v. State*, 29 S.W. 386 (Tex. Crim. App. 1895).

179 legislature's view that carrying on or about the person included
180 weapons present *on or within one's personal means of*
181 *transportation.*" *Id.* at 696 (emphasis added). It is not an
182 unreasonable reading of *Contreras* to conclude that a handgun in the
183 trunk is "within the driver's means of transportation." This
184 language only underscores the uncertainty in the law regarding guns
185 in trunks.

186 C.

187 The absence of a specific holding on the issue does not
188 preclude qualified immunity. That is because Sorenson, as the
189 plaintiff in a false arrest suit arising under § 1983, bears the
190 burden of proving that the officers lacked probable cause, which in
191 this case means she must show that the legality of her conduct was
192 clearly established. The officers, in contrast, are not required
193 to prove the reverse in order to win qualified immunitySSthat is,
194 the officers do not bear the burden of demonstrating that the
195 *illegality* of the suspect's conduct was clearly established at the
196 time of arrest.[10]

197 Were officers to bear the burden of proving clearly
198 established law, the first officer to make an arrest under a newly-
199 passed statute could be subjected to personal liability if the
200 prosecutor chose not to press charges. Similarly, the first
201 officer to conclude that an existing statute applies to a new form

[10] "The Fifth Circuit does not require that an official demonstrate that he did not violate clearly established federal rights; our precedent places that burden upon plaintiffs." *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992).

202 of criminal conduct would risk personal liability by making the
203 arrest. "The qualified immunity doctrine recognizes that officials
204 can act without fear of harassing litigation only if they
205 reasonably can anticipate when their conduct may give rise to
206 liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195
207 (1984).[11]

208 As we noted in *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997),
209 "[f]or qualified immunity to be surrendered, pre-existing law must
210 dictate, that is, truly compel (not just suggest or allow or raise
211 a question about), the conclusion for every like-situated,
212 reasonable government agent that what defendant is doing violates
213 federal law *in the circumstances*." *Id.* at 882 (quoting *Lassiter v.*
214 *Alabama A & M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994)
215 (en banc)). Given the ambiguity of the statute[12] and the
216 surrounding caselaw, the officers violated no clearly established
217 right, and, accordingly, they are entitled to qualified immunity.

[11] We do not suggest, of course, that an officer is automatically entitled to qualified immunity just because no court has specifically held the plaintiff's conduct legal. "[I]n order to preclude qualified immunity it is not necessary that the very action in question has previously been held unlawful, or that the plaintiff point to a previous case that differs only *trivially* from his case. However, the facts of the previous case do need to be *materially* similar." *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997) (internal citations and quotation marks omitted). The Supreme Court has said as much in construing liability for a warrantless search. *See Mitchell v. Forsyth*, 472 U.S. 511, 535 n. 12 ("We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.").

[12] We hold only that, for purposes of qualified immunity in this civil case, the law was not clearly established on this question as of the date of this incident. We do not mean to express a view as to whether § 46.02 does or does not prohibit the possession of a weapon in one's trunk. That is for the state courts to decide. Nor do we opine on whether the statute is so vague as to trigger the rule of lenity or any other similar defense.

218 AFFIRMED.

219 ENDRECORD

220 DeMOSS, Circuit Judge, specially concurring.

221 I concur in the result but not the reasoning of this opinion.
222 In my view, this case involves an arrest that should never have
223 been made and a suit that should never have been filed. First of
224 all, Officers Ferrie and Walling should know precisely what
225 evidence is required by the prosecuting attorney for their
226 jurisdiction in order to accept a borderline case for prosecution.
227 This is a borderline case because there has never been a decision
228 in any Texas court which held that carrying a handgun in the trunk
229 of a car is a violation of Texas Penal Code Ann. § 46.02(a). What
230 Officers Ferrie and Walling could have done (and in my opinion
231 should have done) was to have made detailed notations as to all of
232 the factual information and circumstances presented by this
233 incident and then discussed the facts involved with the prosecuting
234 attorney as to whether he would accept the case for prosecution.
235 If the prosecutor had said yes, they then could have sworn out an
236 arrest warrant based on the facts which they noted down and
237 arrested Ms. Sorenson pursuant to that warrant. There were not in
238 my mind any exigent circumstances necessitating an arrest on the
239 spot.

240 On the other hand, Sorenson really did not suffer any
241 significant injury or damage as a result of this unnecessary
242 arrest. While her claim is phrased in the language of a
243 constitutional violation, the absence of any real or lasting injury
244 puts her claim in a class which does not warrant consideration by

245 the federal courts. I sympathize with Sorenson's feelings of
246 aggravation about this incident, but life is full of aggravations
247 of all sorts and the Constitution cannot possibly provide relief in
248 all such cases.