IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2882

Summary Calendar

BARRIE DEON SHELTON,

Plaintiff-Appellant,

versus

C. RIVERA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-90-1304)

(November 30, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I.

Barrie Shelton filed this 42 U.S.C. § 1983 suit against C. Rivera, a Houston police officer, Lee Brown, a former Houston police chief, and Johnny Klevenhagen, the Harris County sheriff. Shelton alleged that these individuals, in their official and

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

individual capacities, undertook to deprive him of his constitutional rights.

The suit relates to events the night Rivera stopped Shelton for riding a bicycle without a headlight and searched him. After finding a homemade pipe on Shelton, Rivera arrested him. Rivera did not give Shelton a citation for the headlight offense. Police released Shelton after approximately five hours in custody.

About a month later, Rivera again arrested Shelton. Rivera had submitted the pipe seized during the first arrest for drug testing. The pipe had tested positive for cocaine, and Rivera had intended to secure an arrest warrant for Shelton, but had not done so at the time of the second arrest. Evidently, Rivera arrested Shelton based on the earlier incident anyway.

After Shelton was convicted for possession of a controlled substance, the conviction was dismissed "on the ground of an illegal search and seizures [sic] and arrest." Shelton then filed this Section 1983 claim in federal district court. The court first dismissed Brown and Klevenhagen as defendants, and then dismissed the complaint as frivolous.

The court noted that the second arrest may have been improper: "Shelton's testimony, and the records themselves, indicate that Shelton had committed no crime and possessed no contraband when he was arrested for the second time." The court, however, concluded that Shelton's claim failed because he did not show that Rivera had arrested him without probable cause.

Shelton has pursued two issues on appeal, whether the court properly dismissed his case against Brown and Klevenhagen for failure to state a claim, and whether the court properly dismissed his case against Rivera as frivolous based on the finding that Rivera had probable cause to arrest him. We affirm in part, and reverse in part and remanded.

II.

Shelton argues that the defendants conspired to harass, prosecute, and imprison him in violation of his constitutional rights. Though the district court dismissed the claims against Brown and Klevenhagen because they did not personally participate in any deprivation of rights, Shelton alleges a conspiracy, which, if proven, would establish the personal involvement required to state a claim against them as supervisory employees. Thompkins v. Belt, 828 F.2d 298, 303-05 (5th Cir. 1987).

Shelton initially named Brown as a defendant because of Brown's alleged involvement in Shelton's arrest and detention. At a Spears hearing, Shelton stated that he named Brown as a defendant only because Brown failed to schedule a probable cause hearing. After his first arrest, Shelton spent only five or six hours in jail, an insignificant restraint on his liberty that does not require a probable cause hearing. County of Riverside v. McLaughlin, 111 S.Ct. 1661, 1670 (1991). After the second arrest, Shelton's trial counsel waived the probable cause hearing. As a result, Brown did not conspire to deprive Shelton of a probable cause hearing.

Similarly, Shelton named Klevenhagen as a defendant because his arrest was illegal and because Rivera did not have probable cause to arrest him. Nowhere in his pleadings, however, does Shelton allege that Klevenhagen was involved in the incident. Shelton also advances the theory that Klevenhagen was involved in a conspiracy to keep him in prison unjustly, but has articulated no facts to support this accusation.[1] The district court did not err in dismissing these two defendants.

III.

The district court dismissed Shelton's complaint against Rivera as frivolous under 28 U.S.C. § 1915(d). It observed that Shelton's conviction was reversed based on his motion to suppress the evidence illegally seized during his first arrest, and that the second arrest was improper because Shelton had committed no crime and possessed no contraband when he was arrested the second time.

The district court, however, concluded that Shelton's claims were frivolous. This determination rested on two facts: Shelton's trial counsel waived a probable cause determination, and Shelton was indicted and later convicted of possession of a controlled substance.

Though it might show that the police did not detain Shelton for too long without a probable cause hearing, the fact that Shelton's trial counsel waived the probable cause hearing does not establish probable cause for purposes of the civil action. See

[1]Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

Brumfield v. Jones, 849 F.2d 152, 155 n.4 (5th Cir. 1988). Similarly, because Shelton's conviction was eventually overturned, the existence of probable cause should not rest on his indictment and subsequent conviction. See id. Accordingly, the district court's judgment is vacated and the case against Rivera is remanded for further proceedings.

AFFIRMED IN PART and REVERSED and REMANDED IN PART.