UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2939
Summary Calendar

Michael P. Gardner,

Plaintiff-Appellee,

VERSUS

Harris County, Texas, Et Al.,

Defendants.

William H. Ethridge,
Deputy Sheriff,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA H-89-657)

(November 10, 1993)

Before THORNBERRY, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:[*]

Appellee filed civil rights action against deputy sheriff for injuries sustained during an alleged illegal arrest. Deputy filed motion for summary judgment based on qualified immunity. The

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

motion was denied by the district court, and the deputy timely appeals. We dismiss the appeal for lack of appellate jurisdiction.

Facts and Prior Proceedings

Michael P. Gardner filed a 42 U.S.C. § 1983 action, alleging that he sustained back and neck injuries during the course of an unlawful arrest by Deputy Sheriff William Ethridge. Ethridge filed a motion for summary judgment, arguing that he was entitled to qualified immunity. After a hearing, the district court denied the motion. The case was subsequently re-assigned to a different district court. Shortly thereafter, Gardner filed an amended complaint, and Ethridge filed another motion for summary judgment. The motion was denied. Ethridge then filed a motion for reconsideration which was also denied. Ethridge appeals both the denial of his second motion for summary judgment and his motion for reconsideration.

Discussion

A. Timeliness of the Notice of Appeal

Gardner argues that Ethridge did not file a timely notice of appeal because he did not file a motion for reconsideration until 17 days after the denial of his motion for summary judgment. Gardner also argues that the appeal is untimely because Ethridge did not appeal from the denial of his first motion for summary judgment, and he did not raise any new issues in his second motion.

The district court's order denying Ethridge's motion for summary judgment was entered on November 20, 1992. Ethridge served his motion to reconsider on December 7, 1992. Excluding the

intermediate weekends and Thanksgiving Day, the motion for reconsideration was filed timely on the tenth day after entry of the order denying the motion. Fed. R. Civ. P. 59(e) (motion to alter or amend a judgment must be served no later than ten days after entry of the judgment). Therefore, the notice of appeal filed on December 28, 1992, was filed timely within the thirty-day appeal period. **Harcon Barge, Inc. v. D & G Boat Rentals, Inc.,** 784 F.2d 665, 667 (5th Cir.) (en banc), **cert. denied**, 479 U.S. 930 (1986) (any motion served within ten days of entry of judgment that challenges the judgment is construed as Rule 59(e) motion and notice of appeal is due thirty days after the entry of the order granting or denying such motion).

Likewise without merit is Gardner's argument that Ethridge is barred from appealing the denial of his second motion for summary judgment because he did not appeal the denial of his first motion for summary judgment. Summary judgment orders are interlocutory in nature and may be reconsidered at any time. **See Lavespere v. Niagara Machine & Tool Works, Inc.,** 910 F.2d 167, 185 (5th Cir. 1990).

B. Standard of Review

This Court reviews the grant or denial of summary judgment motions de novo. **Hanks v. Transcontinental Gas Pipe Line Corp.**, 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

C. Illegal Arrest

Ethridge argues that the district court wrongfully denied his motion for summary judgment based on qualified immunity. Specifically, Ethridge complains that technical deficiencies in the charges against Gardner made at the time of arrest did not render the arrest unlawful. In addition, Ethridge argues that even if the original charges were deficient, there was probable cause to arrest Gardner for making a false report to a police officer. Ethridge argues therefore, that he is entitled to qualified immunity.

The first inquiry in the examination of a defendant's claim of qualified immunity is whether the plaintiff alleged the violation of a clearly established constitutional right. **Siegert v. Gilley**, 111 S.Ct. 1789, 1793 (1991). The second inquiry is to determine whether the defendants are entitled to qualified immunity. **Id.** State officials are entitled to qualified immunity unless they violate a constitutional right that was clearly established at the time of their conduct. **Pfannstiel v. City of Marion**, 918 F.2d 1178, 1183 (5th Cir. 1990).

While an order denying a motion for summary judgment based on a qualified immunity claim is immediately appealable under the collateral order doctrine if it turns on an issue of law, when "...disputed factual issues material to immunity are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable." **Feagley v. Waddill**, 868 F.2d 1437,

1439 (5th Cir. 1989) (citations omitted). In determining appealability, consideration must also be given to the legal principles defining the basis for a qualified immunity defense. **Id.**

There are disputed factual questions regarding whether Ethridge had probable cause to arrest Gardner for the offenses of public drunkenness or disorderly conduct. These disputed factual questions relate to whether or not Ethridge violated Gardner's clearly established constitutional rights at the time of the arrest. Gardner's version of the events surrounding his arrest alleged that he and his wife, Theresa, had an argument at their home on January 2, 1988. Gardner admits that he had been drinking. The dispute with his wife involved Theresa's child, Gardner's stepchild. Gardner called the Harris County Sheriff's Department seeking to have the child transported to a mental hospital where the child was receiving treatment. A family disturbance dispatch was broadcast, directing a deputy sheriff to the Gardner home. Deputy Ethridge and two other deputy sheriffs responded to the dispatch. After an animated discussion between the three deputies and Gardner, Theresa left in Gardner's company car. Gardner objected to Theresa driving the company car, contending that she was not insured, and advised the deputies that if they permitted her to leave with the car, he would call the sheriff's dispatcher and report the car stolen. Theresa left in the company car and the deputies immediately left the scene.

Gardner then made calls to the sheriff's dispatcher reporting the company car stolen. Deputy Ethridge received the dispatch and returned to Gardner's residence. After Gardner came to his front door, Ethridge advised him that he could not accept a stolen car report because the car was not stolen. Gardner contends that he never left the inside of his residence and that Ethridge walked into the house without permission and threatened him. Gardner asked Ethridge to leave and then was attacked by Ethridge, handcuffed and taken to Ethridge's patrol car. While in route to the Sheriff's substation, Gardner complained of pain in his neck and back. Ethridge radioed ahead for an ambulance to meet them at the substation. The ambulance arrived and Gardner spent four days in the hospital. Gardner was charged with disorderly conduct and public intoxication, but the criminal charges were dismissed when Ethridge failed to appear for a trial setting.

Not surprisingly, Ethridge's version of the events surrounding the arrest is much different. He alleges that when he arrived at the Gardner residence on the night in question, Theresa Gardner and her children obviously feared for their safety. It was also obvious that Gardner was intoxicated, and he was responding in a belligerent and uncooperative manner. Even though Gardner contended that Theresa could not drive the company car, Ethridge did not stop Mrs. Gardner from leaving the house with her children. The deputies departed immediately after Theresa Gardner left. Soon after the departure, Gardner placed several calls to the sheriff's office to report that his car had been stolen. Deputy Ethridge and

another officer again drove to the Gardner home. Outside the house, Ethridge explained to Gardner that he could not take a report of a stolen car because Gardner's wife had the car. The deputies suggested to Gardner that he calm down and get some sleep. Gardner refused to listen and shouted and used profanity at the deputies. Ethridge then arrested Gardner for public intoxication and disorderly conduct. Gardner responded by quickly walking back into his home. Ethridge followed Gardner inside the house. Ethridge turned Gardner towards the wall, asked him to put his hands on the wall, handcuffed him, walked him to the police car and put him in the back seat. When Gardner complained of neck pain on the way to the substation, Ethridge called for an ambulance. At the hospital Ethridge contends that he was told by the emergency room physician that they could not find anything wrong with Gardner but were going to admit him for observation.

Obviously there are disputed factual questions regarding whether Ethridge had probable cause to arrest Gardner for the offenses of public drunkenness and disorderly conduct. However, it is arguable that conduct involving public intoxication or public disorder could also serve as a basis for filing a charge of falsely reporting a stolen vehicle if the report was filed as the result of such intoxication. However, whether Ethridge acted reasonably in arresting Gardner on any basis is a disputed factual question that

was not resolved by the evidence submitted in connection with the motion for summary judgment.[1]

Because of the existence of disputed factual issues concerning the arrest, the qualified immunity issue is not subject to an interlocutory appeal. **Feagley**, 868 F.2d at 1439.

Conclusion

For the foregoing reasons, we dismiss this appeal for lack of appellate jurisdiction.

APPEAL DISMISSED.

[1] A police officer may arrest a person if he has probable cause to believe that person committed a crime. **King v. Chide**, 974 F.2d 653, 656-57 (5th Cir. 1992). However, the Fourth Amendment also requires an examination of "the reasonableness of the manner in which the seizure is conducted." **Id.** at 657 (citation omitted). "[T]he legality of an arrest may be established by proving that there was probable cause to believe that the plaintiff has committed a crime other than the one with which he was eventually charged, provided that the crime under which the arrest is made and [the] crime for which probable cause exists are in some fashion related." **Gassner v. City of Garland, Texas**, 864 F.2d 394, 398 (5th Cir. 1989) (internal quotations and citations omitted). The issue is "`whether the conduct that served as the basis for the charge for which there was no probable cause could, in the eyes of a similarly situated reasonable officer, also have served as the basis for a charge for which there was probable cause.'" **Id.** (citation omitted).