UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7696

DEBORAH L. PULLIAM,

Plaintiff-Appellant,
Cross-Appellee,

VERSUS

CITY OF HORN LAKE, MISSISSIPPI, ET AL.,

Defendants,

JIMMY ROBERSON,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Mississippi
(CA-DC89-W158-B-O)

(July 25, 1994)

Before JOHNSON, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:[1]

This action arose out of an attempt to issue a citation for violation of a municipal dog ordinance; and both parties appeal, raising numerous issues. We **AFFIRM**.

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[1] 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Animal control officer Smiley caught a dog running loose on August 30, 1988, and returned it to a nearby residence (later determined to be Deborah Pulliam's).[2] Shortly thereafter, when Smiley patrolled the area again, the dog was out again. Failing in an attempt to catch the dog, Smiley requested assistance from the City of Horn Lake police.

Jimmy Roberson and another police officer went to the scene, where Smiley told Roberson that a dog had been "running across the neighborhood, different yards in the neighborhood", and that a woman had returned to the dog's home. (The dog had returned to Pulliam's carport; at some point, Pulliam let it in the house.) When Smiley told Roberson that she needed Pulliam's name in order to prepare a citation for violation of the dog ordinance, Roberson suggested that they proceed to her door and ask for it. Pulliam answered Roberson's knock, and a brief conversation ensued. Although Pulliam "did not deny" that her dog was out when she got home, she told the officers that they were "harassing" her. Smiley informed Pulliam that she was going to issue a citation for violation of the ordinance, and Roberson asked for a drivers' license so they could prepare it. In fact, Smiley and Roberson

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[2] During the preceding month, Smiley had caught both of Pulliam's dogs running loose. Upon being told where the dogs belonged, Smiley returned them to the enclosed back yard. Smiley left a copy of the municipal dog ordinance at the house, and, on the copy of the ordinance, wrote a note concerning her capture of the dogs. Smiley made no effort to ascertain who owned the residence, believing that by her putting up the animals and leaving a note, the owner would take care of "whatever problem the dogs were having about getting out."

asked Pulliam at least twice for some form of identification. Pulliam did not give them her name, complaining instead about the dog catcher harassing people. Roberson stated that he was placing Pulliam under arrest, while grabbing her arm and pulling her out of the doorway.

Taken in handcuffs to the police station, Pulliam was charged with both violation of the ordinance and resisting arrest. A municipal court judge later dismissed the ordinance charge, and the city prosecutor did not pursue the resisting arrest charge to trial.

In Pulliam's action against Roberson, Smiley, the City, and Officer Philley, summary judgment was awarded to all but Roberson.[3] As to him, the court granted summary judgment in part, but other claims were tried, including 42 U.S.C. § 1983 claims under the Fourth Amendment, and state claims for assault and battery, false arrest, false imprisonment, malicious prosecution, and unreasonable search and seizure.

At the close of evidence at trial, the court granted Roberson judgment as a matter of law on the federal claims, on the basis that, *inter alia*, "there is no cause of action for false arrest under Section 1983 unless the arresting officer lacked probable cause". The jury returned a verdict for Pulliam on her state law claims for false arrest, false imprisonment, assault and battery,

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[3] Likewise, Pulliam appeals only as to Roberson.

and malicious prosecution: $12.50 for malicious prosecution, and $10,000 for the rest.[4]

II.

Pulliam's appeal concerns the federal claims, damages for malicious prosecution, and denial of attorneys' fees.[5]

A.

Pulliam raises two contentions regarding the judgment as a matter of law on her § 1983 claims. Our standard of review for such a judgment is well-established; we will reverse only "if there

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[4] Pulliam moved the court to amend the judgment to reflect that the malicious prosecution verdict also equated to violation of the Fourth Amendment; to hold a new trial relating to whether a separate Fourth Amendment violation occurred in that Pulliam "was arrested in her home" (or that the court find such a violation and award $10,000 punitive damages); and to find that every other successful state claim also constituted a deprivation of federal rights. She moved also for attorneys' fees. Roberson moved for judgment as a matter of law, *see* Fed. R. Civ. P. 50(b), contending that he could not have either falsely arrested Pulliam (or, in the alternative, was entitled to state qualified immunity), or maliciously prosecuted her. In the alternative, he moved for remittitur of the $10,000 award. The motions were denied. (Attorneys' fees were denied under 28 U.S.C. § 1988, because Pulliam did not prevail on any federal claim.)

[5] Pulliam asserted also that the district court erred "by failing to hold that [her] malicious prosecution claim stated a cause of action under Title 42 U.S.C. § 1983." At oral argument, she conceded this issue in the light of ***Albright v. Oliver***, ___ U.S. ___, 114 S. Ct. 807 (1994), which held that, in the absence of a specific violation of a federal constitutional right, *e.g.*, the Fourth Amendment, a § 1983 claim cannot be grounded in any "substantive due process right to be free of prosecution without probable cause." *See* ***id.*** at 812-14. ***Albright*** implicitly overruled this circuit's precedent favoring a generalized § 1983 action for malicious prosecution as a prophylactic protection of constitutional rights. *See* ***id.*** at 811 n.4 (referring to ***Sanders v. English***, 950 F.2d 1152, 1159 (5th Cir. 1992)); *see also* ***id.*** ("In view of our disposition of this case, it is evident that substantive due process may not furnish the constitutional peg on which to hang such a `tort.'").

is substantial evidence opposed to the motion[], that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions". *See* ***Boeing Co. v. Shipman***, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

1.

Pulliam contends that the district court erred in ruling that Roberson possessed probable cause to arrest her for violation of the ordinance. It held that violation of the ordinance, although not an arrestable offense under state law, gave Roberson, for Fourth Amendment purposes, adequate probable cause. Pulliam does not challenge this legal reasoning; she asserts instead that the court erred in concluding that Roberson had adequate information upon which to believe that the ordinance had been violated.[6] But,

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[6] The ordinance states in pertinent part:

> SECTION 1. DEFINITIONS: For the purpose of this Ordinance the following definitions shall apply when used herein.
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> (a). "At Large". The term "at large" shall mean off the enclosed premises of the owner and not under the control of the owner ... by leash ....
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> * * *
>
> SECTION 5. DANGEROUS, VICIOUS DOGS AT LARGE.
>
> (a). Unlawful to permit at large. No dog of dangerous, vicious, fierce or mischievous propensities ... may be at large at any time ....
>
> (b). DANGEROUS, VICIOUS, FIERCE, MISCHIEVOUS. ... If any such dog at large ... trespasses upon the premises of any person other than the owner

probable cause "merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief" that a crime had been committed, ***Texas v. Brown***, 460 U.S. 730, 742 (1983) (internal quotations and citation omitted); ultimate guilt or innocence is not the yardstick for measuring probable cause, *see* ***Bodzin v. City of Dallas***, 768 F.2d 722, 725 (5th Cir. 1985); ***Saldana v. Garza***, 684 F.2d 1159, 1165 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983).

Roberson testified that Smiley told him that the dog was "running loose" and "running across the neighborhood, different yards in the neighborhood". In addition, Pulliam told him that, when she returned home, the dog was in the carport (an unenclosed area of the premises), and she "did not deny" that the dog had been running loose. In sum, reasonable people could not find that Roberson lacked probable cause to believe that the ordinance had been violated.

2.

Pulliam contends that the Fourth Amendment was violated also because she was arrested in her home without a warrant and without exigent circumstances. But, a person standing in the doorway of a house is in a public place, and lacks any expectation of privacy; thus, a doorway arrest does not implicate the Fourth Amendment. ***United States v. Santana***, 427 U.S. 38, 42 (1976); ***United States v.***

> thereof, then such dog shall be conclusively presumed to be a mischievous dog and a dog of mischievous propensities and tendencies ....

Municipal Ordinance 81-73.

Carrion, 809 F.2d 1120, 1127-28 (5th Cir. 1987).[7] And, even if a person is standing slightly back from the door frame, she is considered to be in a public place. ***Carrion***, 809 F.2d at 1128 n.9 (5th Cir. 1987).

Pulliam stipulated that, at the time of her arrest, "she was standing in her carport door." Arguably, no more need be said. In any event, her testimony was consistent with this stipulation, and this testimony is further confirmed by that of another officer present at the arrest.[8]

B.

Pulliam challenges next the $12.50 malicious prosecution award. The thrust of her contention seems to be that its inadequacy resulted from inappropriate closing argument by Roberson's counsel (Pulliam states that "it is possible" that this was the reason). But, Pulliam did not object to the comments; and

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[7] Pulliam seems to contend that, because she was at the door only as a result of the officers' knock, she had not placed herself in a public place. *But see, e.g.,* ***Carrion***, 809 F.2d at 1123, 1128 (upholding police arrest, at gunpoint, of suspect in hotel doorway after hotel employee knocked on door and announced "Housekeeping"); *see also* Wayne R. LaFave & Jerold H. Israel, 1 Criminal Procedure § 3.6 at 43 (1991 Supp.) ("Such a warrantless arrest is not rendered illegal by the fact that the police summoned the defendant to the door without revealing their intention to arrest him or by resort to noncoercive subterfuge.") (footnotes omitted). Pulliam does not contend that the officers employed coercion or a false claim of authority to gain her presence at the door.

[8] Because we affirm on the § 1983 claims, we need not address Pulliam's claim that the court erred by refusing to instruct on punitive damages; she does not challenge the refusal for her state law claims, and acknowledges that she raises the issue merely "to preserve the record and be allowed to request a charge for punitive damages should" we "remand the § 1983 claims for a new trial." Likewise, Pulliam acknowledges that her attorneys' fees request is moot if we do not reverse the § 1983 ruling.

we do not find plain error -- far from it. *See* ***Grizzle v. Travelers Health Network, Inc.***, 14 F.3d 261, 269 (5th Cir. 1994) (reviewing allegedly improper closing argument for plain error); ***Daniel v. Ergon, Inc.***, 892 F.2d 403, 411 (5th Cir. 1990) ("Appellate review [of statements made in closing argument] is limited to plain error where no objection is made at trial ....").

To the extent that Pulliam raises a generalized claim of inadequacy, the jury probably found malicious prosecution because of Roberson's instigation of a resisting arrest charge, rather than the ordinance violation. *See infra*. And, the resisting arrest charge was dropped, sparing Pulliam from trial. Under our well-known, restricted standard of review for a jury award, *see* part III.C., we find no basis for error.

III.

Roberson's cross-appeal challenges the malicious prosecution and false arrest findings, and the $10,000 award.

A.

Obviously, we cannot overturn a jury verdict lightly; that "decision must be accepted if the record contains any competent and substantial evidence tending fairly to support the verdict." ***Gibraltar Savings v. LDBrinkman Corp.***, 860 F.2d 1275, 1297 (5th Cir. 1988) (citation omitted), *cert. denied*, 490 U.S. 1091 (1989). "Substantial evidence ... is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence." ***Id.*** (citations omitted).

To establish malicious prosecution under Mississippi law, Pulliam was required to show:

> (1) the institution of a criminal proceeding; (2) by, or at the instance of, the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceeding; (5) want of probable cause for the proceeding; and (6) the plaintiff's suffering of injury or damage as a result of the prosecution.

Strong v. Nicholson, 580 So. 2d 1288, 1293 (Miss. 1991) (citations omitted).

Roberson maintains that sufficient evidence was lacking to show that he instigated the prosecution under the ordinance, and, in the alternative, asserts that he possessed sufficient probable cause to do so. We need not address the former contention, because, as to the latter, we have already affirmed the district court's conclusion that Roberson had probable cause to believe that the ordinance had been violated.

On the other hand, Roberson unquestionably charged Pulliam with resisting arrest. And, as shown in part III.B., there was sufficient evidence from which the jury could find that his actions with regard to that charge were a basis for malicious prosecution, because he had no right to arrest Pulliam.[9]

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[9] As noted, the resisting arrest charge was not brought to trial. But, needless to say, a malicious prosecution claim will lie even if there is no trial on the underlying charge giving rise to the claim. *See* ***Royal Oil Co., Inc. v. Wells***, 500 So. 2d 439, 443 (Miss. 1986) (prosecution abandoned after failure to obtain grand jury indictment); ***Pugh v. Easterling***, 367 So. 2d 935, 938 (Miss. 1979) (abandonment of prosecution, withdrawal of affidavit, or *nolle prosequi* all constitute termination favorable to plaintiff and will support malicious prosecution claim).

B.

"Under Mississippi law, the elements of false arrest or imprisonment are two-fold: (1) the detention of a person; and (2) the unlawfulness of the detention." ***Hart v. Walker***, 720 F.2d 1436, 1439 (5th Cir. 1983) (citing ***Powell v. Moore***, 174 So. 2d 352, 354 (Miss. 1965)). Obviously, there was detention; the issue is whether it was lawful.

Roberson contends that the district court erred in holding that the ordinance did not create an arrestable offense.[10] Mississippi's arrest statute authorizes a warrantless arrest for, *inter alia*, "an indictable offense committed ... in [Roberson's] presence". Miss. Code Ann. § 99-3-7 (1993 Supp.). And, the Mississippi Supreme Court held long ago that "[t]he word `indictable' in this section means such offenses as a grand jury may indict for, and *does not include municipal ordinances*." ***Letow v. United States Fidelity & Guar. Co.***, 83 So. 81, 82 (Miss. 1919) (applying § 1447, Code of 1906, a predecessor to § 99-3-7 with no relevant linguistic differences) (emphasis added).

Roberson contends, however, that ***Letow*** was overruled by ***Paramount-Richards Theatres v. City of Hattiesburg***, 49 So. 2d 574 (Miss. 1950), involving arrests for showing movies after 6:00 P.M. on Sunday, in violation of both a state statute and a municipal

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[10] The jury was instructed that the ordinance "was a non-arrestable offense under Mississippi law, and, therefore, the arrest at that time was without authority of law."

ordinance.[11] *See* ***id.*** at 575-77. The court approved the warrantless arrests. ***Id.*** at 579-80. Prior to detailed discussion of their validity, however, it simply stated that "[u]nder the statutes *and* ordinance in question the manager of a theatre was clearly subject to arrest." ***Id.*** at 579 (emphasis added). Roberson seizes on the court's use of the conjunctive, and asserts that ***Paramount-Richards*** validates warrantless arrests for violations of an ordinance.

This reads far too much into the language of the opinion. We believe the language was an accident of the factual lagniappe that the conduct violated both a state statute and an ordinance, not that the court would have endorsed the arrest had the conduct contravened *only* an ordinance. Moreover, in later discussing the authority for the arrests, the court referred only to the statutes. In sum, ***Letow*** and ***Paramount-Richards*** are in harmony; conduct that violates a municipal ordinance, by itself, is not an "indictable offense" within the meaning of the Mississippi arrest statute (***Letow***); conduct that violates a state criminal statute, regardless

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[11] The statute provided for a $50 fine for any person who "shall engage in, show forth, exhibit, act, represent, perform, or cause to be shown forth, acted, represented or performed, any tricks, juggling, sleight of hand, or any bearbaiting, any bull-fighting, horse-racing, or cock-fighting, or any such like show or exhibit, on Sunday", but did not "prohibit the showing of moving picture shows ... between the hours of 1:00 o'clock p.m. and 6:00 o'clock p.m., on Sundays." ***Paramount-Richards***, 49 So. 2d at 576-77 (quoting statute). In addition, other statutes criminalized working, or employing workers, on Sunday. ***Id.*** at 576. The ordinance made all misdemeanor offenses against the state an offense against the city if committed within its corporate limits. ***Id.*** at 577.

of whether an ordinance is in play, is (***Paramount-Richards***).[12] The district court recognized correctly that violation of the ordinance was not an arrestable offense under state law.[13]

In the alternative, Roberson asserts weakly that he was entitled to qualified immunity under state law, because it is "patently unfair to expect a police officer in 1988 to be aware of a 1919 case". The jury was instructed on this defense and rejected it, apparently concluding that Roberson did not act in good faith. There is no basis for disturbing this finding.

C.

Finally, Roberson claims that the $10,000 award is excessive. It goes without saying that our review is extremely narrow:

> We do not reverse a jury verdict for excessiveness except on "the strongest of showings." The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as clearly exceed[ing] that amount that

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[12] This conclusion is buttressed by Mississippi's provision for indictments, Miss. Code Ann. § 99-7-1 (1972), which does not mention ordinances.

[13] Roberson also cites ***Butler v. State***, 212 So. 2d 573 (Miss. 1968), for the proposition that one can be indicted for both felonies and misdemeanors. From this, he reasons that, because the ordinance purports to be a misdemeanor, it is an indictable offense. ***Butler*** did not speak to ordinances, much less address whether an ordinance, the violation of which is labeled by the municipality as a misdemeanor, is *itself* the basis for an indictment. And, the ordinance at issue in ***Letow*** proclaimed that violation of the ordinance was a misdemeanor; nevertheless, its violation was not deemed an "indictable offense". ***Letow***, 83 So. at 82.

> *any* reasonable man could feel the claimant is entitled to."

Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983) (brackets and emphasis in original; footnotes with citations omitted).

Pulliam was pulled from her doorway, handcuffed, and taken to the police station (where she was at first handcuffed to the wall). She introduced photographs of bruises on her arms that resulted from the incident (and persisted for three to four weeks). She also testified that her mother and sister stayed with her the first few nights following her release, because she was "scared they were going to come back and get me." Pulliam's sister confirmed that Pulliam was "nervous, she was depressed, and she was terrified about being alone. She was upset, and she had -- she was scared of the Horn Lake Police Department."

In addition, Pulliam sought medical treatment for her bruises and nervousness. The physician diagnosed Pulliam as having "situational depression"; stated that it probably had started with her recent divorce, but that "the event that occurred with the police and the dog ... contributed to her condition"; and treated Pulliam with anti-depressant medication.

Viewing this evidence within the narrow confines of our greatly restricted standard of review, we cannot disturb the award.

IV.

For the foregoing reasons, the judgment is

AFFIRMED.