IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7712
Conference Calendar

MELODY BRAZELL,

Plaintiff-Appellee,

versus

TOWN OF SOUTH PADRE and
EDWARD F. BUTLER,

Defendants,

EDWARD F. BUTLER, Defendant-Appellant

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA B-90-018
- - - - - - - - - -
June 23, 1993

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:*

Edward F. Butler appeals the denial of his motion for summary judgment based on qualified immunity. This Court has jurisdiction over the appeal of this interlocutory order because qualified immunity shields a government official from suit and liability, and therefore the denial of a motion for summary judgment based on qualified immunity is immediately appealable. Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Review of the district court's grant of summary judgment is de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209, 212 (5th Cir. 1990). Summary judgment is appropriate when, considering all of the facts in the pleadings, depositions, admissions, answers to interrogatories, and affidavits and drawing all inferences in the light most favorable to the nonmoving party, there is no genuine issue of fact. Newel v. Oxford Management, Inc., 912 F.2d 793, 795 (5th Cir. 1990). There is no genuine issue of fact if taking the record as a whole a rational trier of fact could not find for the nonmoving party. Id.

Before the Court addresses whether Butler is entitled to qualified immunity, the Court must determine whether Brazell has stated a valid constitutional claim. Spann, 987 F.2d at 1114. Brazell alleged that Butler ordered her arrest without probable cause because she rebuffed his sexual advances. These allegations are sufficient to set forth a Fourth Amendment violation and the Court must address whether Butler is entitled to qualified immunity. Enlow v. Tishomingo County, Miss., 962 F.2d 501, 510 (5th Cir. 1992).

Butler contends that he is entitled to qualified immunity because he had probable cause to order Brazell's warrantless arrest under Tex. Penal Code § 42.08(a) (West 1989) and Tex. Code Crim. Proc. Ann. art. 14.02 (West 1977). He submitted affidavits and a videotape which he argues conclusively establish that Brazell was intoxicated at the time of her arrest and was a potential danger to herself or others. This evidence conflicts with Brazell's sworn statements that Butler followed her from a

bar to the restaurant and had her arrested without provocation because she rebuffed his sexual advances. Viewing all of the facts in evidence there is a genuine issue of fact whether Butler had probable cause to order Brazell's arrest for public intoxication. See Carey v. State, 695 S.W.2d 306, 311-12 (Tex. Ct. App. 1985) (to establish probable cause to make a warrantless arrest under § 42.08(a), officer must reasonably believe that the individual poses a potential danger to himself or others). Butler is not entitled to judgment as a matter of law.

AFFIRMED.