UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1751
Summary Calendar

JAY BRUMMETT,

Plaintiff-Appellant,

VERSUS

JIMMY CAMBLE[1], ET AL.,

Defendants,

JIMMY CAMBLE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

(3:87-CV-0789-H)

(August 25, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[**]

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[1]The correct last name of this defendant may be "Campbell"; but he was referred to as "Camble" in the original complaint, in briefs and in the opinion of this Court on the prior appeal. Nothing in the records indicates that two different individuals with similar names were involved; and for consistency, we use the spelling indicated.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Brummett borrowed $33,445.80 from First State Bank of Cleburne (FSB) to open a retail stereo store. The loan was collateralized by the equipment and inventory in the store. Brummett defaulted on the loan and when FSB loan officer Doug Sanders and collections officer Jim Boles visited the store to survey the inventory listed as collateral for his loan, Brummett informed them that the inventory had been sold to customers in the normal course of business. Brummett closed the store in April 1983, and the bank, following standard loan collection procedures, sent a demand letter for the full amount of the loan plus interest to Brummett. The bank also informed Brummett that it had decided to turn the matter over to the district attorney's office.

Brummett was informed by then county attorney Dan Boulware that he was subject to indictment for "removing" collateral that secured his debt to FSB in violation of Texas Penal Code Ann. § 32.33 (West 1994). The Johnson County grand jury indicted Brummett for "removing" property with intent to hinder enforcement of FSB's security interest. Three years later the charges were dismissed for insufficient evidence.

Brummett filed a civil rights complaint against then county attorney Boulware, then district attorney John R. MacClean, Johnson County, FSB, Sanders, Boles, and FSB president Jimmy Camble. Brummett alleged that Boulware and MacClean had personal interests in FSB and therefore conspired with FSB employees to maliciously prosecute him for "removing" collateral from Texas when there was

no evidence to support the allegation. The district court dismissed the claims against the public defendants, Boulware, MacClean, and Johnson County, based on absolute prosecutorial immunity. The district court also granted summary judgment for the private defendants, Sanders, Boles, Camble and FSB, on statute of limitations grounds. On appeal, this Court affirmed the dismissal of Boulware and MacClean on absolute prosecutorial immunity grounds, but vacated the judgment with respect to Johnson County and the private defendants. See Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991), cert. denied, 112 S. Ct. 2323 (1992).

On remand Johnson County and the private defendants filed motions for summary judgment. The district court granted the motions because there was insufficient evidence to support Brummett's allegations that the public defendants conspired with the private defendants to maliciously prosecute him. The district court dismissed the § 1983 claims with prejudice and the pendent state law claim without prejudice.

OPINION

In Brummett's first appeal this Court recognized that a claim for malicious prosecution is cognizable under § 1983. See Brummett, 946 F.2d at 1180 & n.2. Under the law of the case doctrine, the decisions of law made in a former appeal must be followed in all subsequent proceedings in the same case unless "(i) a subsequent trial produces substantially different evidence; (ii) the prior decision was clearly erroneous and would work a manifest injustice; or (iii) controlling authority has since made a contrary

decision of law applicable to the issue." Hermann Hosp. v. MEBA Medical and Benefits Plan, 959 F.2d 569, 578 (5th Cir. 1992). Subsequent to this Court's ruling in the first appeal, the U.S. Supreme Court held in a plurality opinion that there is no substantive due process claim for malicious prosecution, although there may be a Fourth Amendment claim. Albright v. Oliver, ___ U.S. ___, 114 S. Ct. 807, 813-14, 127 L. Ed. 2d 114 (1994) (plurality opinion). Brummett alleged a Fourth Amendment violation, and therefore because the Supreme Court did not decide whether a Fourth Amendment malicious prosecution claim is still cognizable under § 1983, Brummett may pursue his claim under the law of the case doctrine. See Johnson v. Louisiana Dep't of Agriculture, 18 F.3d 318, 320 (5th Cir. 1994) ("[t]he Supreme Court has recently held that malicious criminal prosecution, if actionable in constitutional law, should be governed by the Fourth Amendment rather than substantive due process....").

This Court reviews the district court's grant of summary judgment 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 material fact and the moving party is entitled to judgment as a matter of law. Newel v. Oxford Management, Inc., 912 F.2d 793, 795 (5th Cir. 1990). There is no genuine issue of

material fact, if taking the record as a whole, a rational trier of fact could not find for the nonmoving party. Id.

Brummett argues that he presented sufficient competent summary judgment evidence to overcome the private defendants' motion for summary judgment. "A private party may be held liable under § 1983 if he or she is a willful participant in joint activity with the State or its agents." Cinel v. Connick, 15 F.3d 1338, 1343 (5th Cir.) (internal quotation and citation omitted), petition for cert. filed, (U.S. July 5, 1994) (No. 94-55). To support a conspiracy claim the plaintiff must establish that there was an agreement between the private and public defendants to commit an illegal act and that he was deprived of his constitutional rights. Id. A private defendant's action that elicits state authority does not constitute state action. See Daniel v. Ferguson, 839 F.2d 1124, 1130 (5th Cir. 1988) (reporting criminal action and signing criminal complaint does not amount to state action).

Brummett argues that the district court's decision is based on a faulty premise because the district court improperly assumed that Brummett was indicted under Tex. Penal Code Ann. § 32.33(f)(2) (Vernon 1994), disposing of secured property, when in fact he was indicted under § 32.33(e), "removing" a secured property interest, and there was no evidence of removal. From the record it appears that Brummett was indicted under § 32.33(e), but he still must provide competent summary judgment evidence that the public and private defendants conspired to falsely prosecute him under that section of the statute.

The summary judgment evidence established that the public and private defendants denied any conspiracy to maliciously prosecute Brummett. Boles and MacClean filed affidavits denying any conspiracy. Camble, Boulware and Sanders denied any conspiracy in their deposition testimony. Robert Lawing, the assistant district attorney who moved to dismiss the indictment, also testified by deposition that he never discussed the case with any FSB employees, except to inform them of the dismissal, which he considered to be based on "legal technicalities."

Brummett offered no competent evidence to refute the private defendants' summary judgment evidence. In his affidavit, Brummett averred that MacClean, Boulware, Sanders, and grand juror Charles Credeur met in MacClean's office immediately prior to Brummett's appearance before the grand jury. He did not provide any evidence to establish that his case was discussed during the alleged meeting. Unsubstantiated allegations and speculation cannot defeat a summary judgment motion. Thomas v. Price, 975 F.2d 231, 235 (5th Cir. 1992); International Shortstop, Inc. v, Rally's Inc., 939 F.2d 1257, 1266 (5th Cir. 1991), cert. denied, 112 S. Ct. 936 (1992). Brummett also stated that one grand juror told him that the grand jury had passed a "no criminal intent" resolution and asked Boulware to inform Brummett of that resolution. Hearsay statements are not competent summary judgment evidence. Cormier v. Pennzoil Exploration & Prod. Co., 969 F.2d 1559, 1561 (5th Cir. 1992). Finally, Brummett's claims that MacClean and Boulware pursued the indictment for political and personal reasons are unsubstantiated

and cannot defeat the motion for summary judgment. See Thomas, 975 F.2d at 235.

Brummett argues that MacClean and Boulware are not entitled to absolute prosecutorial immunity. However, this Court affirmed the district court's dismissal of those defendants in the first appeal. See Brummett, 946 F.2d at 1180-82. The law of the case doctrine, therefore, prohibits Brummett challenging dismissal of the public defendants in this appeal. See Hermann Hosp., 959 F.2d at 578.

Brummett also challenges the district court's judgment granting summary judgment for Johnson County. To establish county liability under § 1983 a plaintiff must demonstrate a county policy or custom which caused the constitutional violation. Colle v. Brazos County, 981 F.2d 237, 244 (5th Cir. 1993). Only when the execution of a county's policies or its customs deprives an individual of constitutional or federal rights does liability under § 1983 result. Even assuming that Brummett was indicted without probable cause, Brummett has offered no evidence that Johnson County had a policy of indicting individuals without probable cause. Boulware stated in his affidavit that he followed established procedures while pursuing the indictment against Brummett. Allegations of a single, isolated incident are insufficient to show the existence of a custom or policy. Fraire v. City of Arlington, 957 F.2d 1268, 1278 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). Brummett has not demonstrated that Johnson County has a policy or custom which caused his alleged constitutional violation.

Brummett argues that the district court improperly granted Johnson County's motion for a protective order to prevent Brummett from deposing members of the grand jury that indicted him. Johnson County, on behalf of the members of the grand jury, filed the motion for the protective order arguing that, under state law, grand jury deliberations are secret and Brummett had not shown a particularized need for the information that outweighed the need for secrecy. The district court, applying state law which mandates that grand jury deliberations remain secret, see Tex. Code Crim. Proc. Ann. art. 20.02 (West 1977), granted Johnson County's motion.

Evidentiary privileges in federal court are governed by Fed. R. Evid. 501. ACLU v. Finch, 638 F.2d 1336, 1342 (5th Cir. 1981). In federal question cases, unless state law supplies the rule of decision for an element of a claim or defense, privileges are governed by principles of common law as they are interpreted by the federal courts. Id. at 1342. To determine whether to apply the state law privilege, the federal court must balance the policies behind the privilege against the policies favoring disclosure. Id. at 1343. "[I]n any given instance the special federal interest in seeking the truth in a federal question case may require disclosure despite the existence of a state rule holding the same communications privileged." Carr v. Monroe Mfg. Co., 431 F.2d 384, 388 (5th Cir. 1970), cert. denied, 400 U.S. 1000 (1971).

Brummett argues that he needs to depose the grand jurors to establish that Boulware presented no evidence of "removal" to the grand jury and that the grand jury returned a "no criminal intent"

resolution. As discussed above, even assuming that Brummett was indicted without probable cause under the removal section of the statute, Brummett has offered no evidence that the public and private defendants conspired to obtain the illegal indictment. The information that Brummett sought from the grand jurors would not establish a conspiracy between the public and private defendants. Brummett presented no evidence that would allow this Court to disregard the Texas state law privilege making grand jury deliberations secret.

The private defendants argue that Brummett failed to establish his state law claim for malicious prosecution. The district court did not address the merits of this claim, but rather dismissed the claim without prejudice for lack of subject matter jurisdiction. The private defendants did not file a cross-appeal from the district court's judgment, and we therefore decline to address the claim in this appeal. See In re Toyota of Jefferson, Inc., 14 F.3d 1088, 1091 n.1 (5th Cir. 1994) (when there is no cross-appeal, the appellee cannot attack the decision of the district court to enlarging his own rights or lessen the rights of his adversary).

The decisions of the trial court are AFFIRMED.