IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3517
Summary Calendar

GARY K. BEHRENS,

Plaintiff-Appellant,

versus

KATHY SHARP, Individually, and as an employee/officer of Patrick J. Canulette, Sheriff, St. Tammany Parish, State of Louisiana and PATRICK J. CANULETTE, Sheriff, St. Tammany Parish, State of Louisiana,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(CA 92-1498 "H" (5))

(January 18, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

I

Gary K. Behrens, the appellant, commenced this § 1983 action against Kathy Sharp, a detective with the St. Tammany Parish

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Sheriff's Department, and Sheriff Patrick J. Canulette, alleging that they violated his Fourth, Fifth, Sixth, and Fourteenth Amendment rights during a criminal investigation into allegations of child molestation against him by his five-year-old daughter. The allegations resulted in the appellant's prosecution on charges of sexual battery. A jury acquitted him of the charges. On the defendants' motion, the district court dismissed the complaint in this civil action for failure to state a claim. Behrens then moved, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the judgment. The district court granted the motion and reinstated the appellant's Fourth Amendment claim and his pendent state law actions. In his Fourth Amendment claim, Behrens alleged that Sharp had maliciously initiated the criminal prosecution against him without probable cause, and that Sheriff Canulette was deliberately indifferent to his constitutional rights because Canulette had failed to provide adequate training for his employees or to staff his office with persons sufficiently expert in child sex abuse cases.

Both defendants moved for summary judgment, arguing that probable cause existed for the appellant's arrest, or alternatively, that they were entitled to qualified immunity. They asserted that on February 26, 1990, Sharp received a phone call from Dr. George Lawrence's office, reporting that Cathy Behrens, the appellant's estranged wife, had brought her two daughters, Megan and Jennifer, in to be examined for possible sexual abuse.

Lawrence found no physical evidence of abuse on Megan, but found an irritation in Jennifer's vagina. During an interview with Cathy Behrens later that day, Sharp asked Cathy why she suspected that her children had been sexually abused. Cathy responded that on Friday February 23, 1990, Jennifer, who was six years old, had been upset and crying at school and had stated that she was afraid of her father. Cathy also explained that Jennifer had not been sleeping well, that she had been clinging and hanging on her mother, and that recently Jennifer's grades had suffered. Cathy further said that on February 25, 1990, upon Jennifer's return from a visit with her father, she said she wanted to die because her father had touched her private parts. Cathy also informed Sharp that she had been separated from appellant, and that they had separated because he had been physically abusive.

Sharp briefly questioned Jennifer, who stated that her father had touched her private parts. Sharp then conducted a more extensive taped interview during which Jennifer said that her father had touched her vagina on four separate occasions. Jennifer initially indicated that her father touched her only on the outside of her panties, but later said he touched her inside the panties once. Sharp and Donna Cohen, of the Office of Child Services, met with Gary Behrens, the father and the appellant, concerning the allegations on March 6, 1990. He denied the allegations. He suggested that they were a ploy by his wife to get custody of the children. He stated, however, that he did not believe Jennifer had

made up the charges, but nevertheless claimed that he was not the perpetrator.

Sharp and Cohen interviewed both Jennifer and Jennifer's teacher at her school on March 21. In her deposition, Sharp explained that she wanted to re-interview Jennifer to ensure that her allegations were consistent. During this interview, Jennifer reiterated that her father had touched her vagina four times, but this time she said that he had touched her twice outside the panties and twice on the inside. Sharp was aware of the inconsistency, but testified that she was not concerned because the total number of touchings, four, was the same in both interviews. Jennifer's teacher told Sharp that since the holidays (about the time the visitations with the appellant commenced), Jennifer had been withdrawn from the other children, was no longer doing well in school, and had rubbed the back and inner thighs of a male classmate at school. On March 14, Dr. Helen Britton examined Jennifer at the New Orleans Children's Hospital's Child Sexual Abuse Clinic. Donna Cohen, of Child Services, later informed Sharp that she had learned from the hospital that Jennifer's physical examination revealed scarring in her vaginal area. Sharp testified that she understood the report as indicating possible sexual abuse.

Based on this information, Sharp prepared four identical affidavits for the appellant's arrest. The affidavits stated that appellant touched Jennifer's vaginal area four times between November 18, 1989, and February 25, 1990. Sharp presented the

affidavits to Judge James R. Strain, of the City Court of Slidell, who signed four arrest warrants pursuant to which the appellant was arrested. Sharp testified that when she presented the affidavits to the judge, she provided him with additional background information about the case and her investigation.

In opposition to the motion for summary judgment, the appellant argued that the affidavits Sharp had prepared were insufficient to support a finding of probable cause, that a reasonably well-trained officer in Sharp's position would have known that the affidavits were insufficient, and that the additional information Sharp had provided to Judge Strain did not rehabilitate the affidavits because it was not given in the form of sworn testimony. Behrens further maintained that Sharp had omitted material information from the affidavit that would have vitiated a finding of probable cause. Specifically, the appellant asserted that Sharp had failed to inform the judge that: (1) there was an inconsistency between the date Donna Cohen had recorded as the day Jennifer first made her allegations, February 23, 1990, and the date Sharp had recorded, February 25, 1990; (2) he had denied the allegations and suggested that they were a ploy by his wife to gain an advantage in their custody battle; (3) he was not permitted to attend the initial interview, but his wife had attended and participated in the interview; (4) Sharp had spoken with Jennifer and Cathy about the allegations before the taped interview; (5) Sharp had used improper techniques to question Jennifer, thereby

contaminating the information she had obtained during the course of the interview; and (6) Sharp had failed to consider competing explanations for the allegations, such as Jennifer's anger toward him as the result of the divorce proceedings or coaching from his estranged wife. Behrens further argued that the Sheriff was liable under an inadequate training theory because Sharp had received no specialized training in interviewing child sex abuse victims before assuming her position as juvenile detective.

The district court granted defendants' motion for summary judgment. The court concluded that the "bare bones" affidavits Sharp prepared did not establish probable cause for the arrest warrants and that the additional information Sharp conveyed to Judge Strain did not cure the defect because she did not provide the information under oath or affirmation. The court determined, however, that Behrens's arrest was lawful because Sharp had probable cause for the arrest based on the information she had gathered during the course of her investigation. Alternatively, the court ruled Sharp was entitled to qualified immunity because her actions were objectively reasonable in the light of clearly established law. The court further determined that Canulette could not be found liable because the arrest was lawful. The court also observed that the appellant had failed to produce evidence to support his claim of inadequate training. Finally, the court dismissed the pendent state law claims over which it had no

independent jurisdiction. The court subsequently denied the appellant's Rule 59(e) motion to alter or amend the judgment.

II

On appeal, Behrens maintains that the district court erroneously ruled that he was arrested lawfully because Sharp obtained the warrants based on "bare bones" affidavits, and the arresting officers did not have probable cause for his arrest. He further argues that Sharp did not have probable cause because (1) her interviewing techniques contaminated the initial interview with Jennifer; (2) she excluded the appellant from the initial interview; (3) she discussed the allegations with Cathy and Jennifer before the recorded interview; (4) she failed to explore possible competing explanations for Jennifer's allegations; and (5) she failed to take into account material inconsistencies in the statements made by Jennifer and Cathy. Behrens also contends that Sharp's actions were objectively unreasonable and that the Sheriff's inadequate training program for officers assigned to investigate child sex abuse cases evidenced deliberate indifference to his constitutional rights.

III

We review a grant of summary judgment de novo. Abbott v. Equity Group, Inc., 2 F.3d 613, 618-19 (5th Cir. 1993). Summary judgment is proper if the moving party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Campbell v. Sonat Offshore Drilling, Inc., 979

F.2d 1115, 1118-19 (5th Cir. 1992). The party opposing a motion for summary judgment must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986). On appeal from summary judgment, this court examines the evidence in the light most favorable to the non-moving party. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992).

IV

A

We will assume that the affidavits Sharp prepared and submitted to Judge Strain in support of her application for the arrest warrants failed to set forth sufficient facts to establish probable cause; thus, the warrants were invalid. See Whiteley v. Warden, 401 U.S. 560, 564-65, 91 S.Ct. 1031, 28 L. Ed. 2d 306 (1971). The legality of the appellant's arrest, however, turns on whether there was probable cause to support it. While the warrant requirement protects an arrestee's procedural rights, Brown v. Edwards, 721 F.2d 1442, 1453 (5th Cir. 1984), "[t]he Fourth Amendment does not require a warrant for an arrest made on probable cause." U.S. v. Fortna, 796 F.2d 724, 739 (5th Cir.), cert. denied, 479 U.S. 950 (1986). Accordingly, if Sharp had probable cause to arrest the appellant without a warrant, the appellant's Fourth Amendment rights were not violated. See U.S. v. Calandrella, 605 F.2d 236, 246-47 (6th Cir.) (even where arrest warrant defective, existence of probable cause will support

officer's action), cert. denied, 449 U.S. 991 (1979); Weeks v. Estelle, 509 F.2d 760, 765 (5th Cir.) (where officer who issued radio bulletin for suspect's arrest had probable cause to arrest suspect, suspect's Fourth Amendment rights were not violated when other officers arrested him pursuant to bulletin), cert. denied, 423 U.S. 872 (1975); Hagans v. U.S., 315 F.2d 67, 68 (5th Cir.) (defective warrant does not render arrest invalid if valid arrest could have been made without warrant), cert. denied, 375 U.S. 826 (1963).

"A police officer has probable cause to arrest if, at the time of the arrest, he had knowledge that would warrant a prudent person's belief that the person arrested had already committed or was committing a crime." Duckett v. City of Cedar Park, 950 F.2d 272, 278 (5th Cir. 1992). "[P]robable cause is to be determined on the basis of the facts available to the officers at the time, without reference to whether the evidence ultimately proved to be reliable." Bigford v. Taylor, 834 F.2d 1213, 1218 (5th Cir.), cert. denied, 488 U.S. 822 (1988). The Court is not "authorized to second-guess the conduct of the police with the benefit of . . . knowledge, gained from later developments, that the evidence eventually turned out to be unfounded or proved insufficient to show commission of a crime." Id. Police officers may not, however, "disregard facts tending to dissipate probable cause." Id.

B

Our review of the record in this case ultimately leaves us with no doubt that the facts available to Sharp at the time she applied for the arrest warrant supported a reasonable belief that Behrens had committed the crime of sexual battery, in violation of La. Rev. Stat. Ann. § 14:43.1.A (West Supp. 1993). Sexual battery includes the intentional touching "of the anus or genitals of the victim by the offender," where the victim "has not yet attained fifteen years of age and is at least three years younger than the offender." Id. By the time she applied for the arrest warrant, Sharp had spoken with Jennifer twice, and during both interviews, Jennifer informed Sharp that her father had touched her vagina with his hand four times. The physical evidence available to Sharp buttressed the credibility of Jennifer's allegations. Dr. Lawrence found an irritation in Jennifer's vaginal area and Dr. Britton indicated that Jennifer's vagina showed signs of scarring, which Sharp knew to be evidence of sexual abuse. Sharp also received information from Jennifer's teacher and her mother concerning Jennifer's recent behavioral changes, including inappropriate sexual behavior at school, that supported the charges. Moreover, in her deposition, Sharp testified that she found Jennifer believable, that she did not appear to have been coached by anyone, that she seemed genuinely upset about the allegations, and that she did not otherwise speak negatively about her father. She further explained that she did not find the inconsistencies in Jennifer's

allegations material and that she was unaware of the different date Cohen had recorded as the date Jennifer first made her allegations.

We have fully considered Behrens's arguments including his contention that the manner in which Sharp conducted the recorded interview with Jennifer contaminated it and rendered the information from that and the subsequent interview unreliable, thereby vitiating probable cause. To support this argument he relies on the trial testimony of Dr. Stephen D. Thurber, an expert in clinical child psychology, who was a defense witness at the appellant's criminal trial. Thurber described Sharp's initial interview with Jennifer as "replete with numerous contaminants which distorted the information." Thurber identified Sharp's use of leading and repetitive questions, and discounting of responses as problems with the interview. Thurber also found fault with Sharp's decision to discuss the allegations with Jennifer before taping, Sharp's failure to have the appellant on the scene at the time of the interview, and Sharp's failure to explore alternative explanations for the allegations during the interview. Whatever merit these criticisms might have, they attack the ultimate reliability of the evidence obtained from the investigation and invite the Court to engage in precisely the type of second-guessing prohibited by Bigford.

C

Alternatively, even if we assume the facts Sharp possessed were insufficient actually to establish probable cause for the

appellant's arrest, Sharp was nevertheless entitled to summary judgment. This is true because we conclude that a reasonable officer could have believed that probable cause existed for the arrest, and, thus, Sharp is entitled to qualified immunity. See, e.g., Hunter v. Bryant, ___ U.S. ___, 112 S.Ct. 534, 537, 116 L. Ed. 2d 589 (1991). Sharp's actions throughout the investigation, with the exception of the "bare bones" affidavits she prepared, were objectively reasonable in the light of the clearly established law. See Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L. Ed. 2d 523 (1987). Sharp did not simply accept Jennifer's allegations and arrest appellant on the strength of those allegations. Cf. Fittanto v. Klein, 788 F. Supp. 1451, 1459 (N. D. Ill. 1992) (no qualified immunity for officer who arrested suspect on unsupported allegations of five-year-old without further investigation). Rather, before applying for the warrant, she interviewed Cathy Behrens, the appellant, and Jennifer's school teacher, re-interviewed Jennifer, and obtained medical evidence consistent with abuse. As for Behrens's attack on Sharp's interviewing techniques, at least two courts have held that the law governing the proper methods of questioning alleged victims of child abuse is not so clearly established as to defeat a claim of qualified immunity. See Myers v. Morris, 810 F.2d 1437, 1458-61 (8th Cir.) (child sexual abuse allegations investigated in 1984-85), cert. denied, 484 U.S. 828 (1987); Fittanto, 788 F. Supp. at 1457-59 (law no clearer in 1992 than when Myers was decided). In

both cases, the interviews of the alleged victims were attacked because they were conducted using techniques similar to the ones Sharp employed when she interviewed Jennifer. Therefore, because the law governing interviewing techniques in child sex abuse cases is not clearly established, the alleged deficiencies in the interview do not provide a basis for defeating Sharp's claim of qualified immunity.

IV

We now turn to Behrens's claims against Canulette. Behrens sued him in his official capacity, and, therefore, the real party in interest is the St. Tammany Parish Sheriff's Office. See Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L. Ed. 2d 114 (1985). A governmental entity may be held liable under § 1983 when the execution of that entity's policy or custom causes a constitutional violation. City of Canton v. Harris, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L. Ed. 2d 412 (1989). Because appellant has failed to establish a Fourth Amendment violation, no liability can be imposed against the Sheriff's Office.

Even if we concluded, however, that appellant's Fourth Amendment rights were violated, his inadequate training theory is unpersuasive. To prevail on this claim, appellant must establish that (1) the Sheriff's training procedures were inadequate; (2) Canulette was deliberately indifferent in adopting the training policy; and (3) the inadequate training policy directly caused his injury. Benavides v. County of Wilson, 955 F.2d 968, 972 (5th

Cir.), cert. denied, 113 S.Ct. 79 (1992). In City of Canton, the Supreme Court stated that deliberate indifference exists when

> in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

489 U.S. at 390.

The evidence here indicates that Sharp received no specialized training in interviewing child sexual abuse victims, even though she was hired to work in the juvenile division and was likely to encounter this type of case. Sharp did attend sexual abuse training classes, however. She also completed a seven-week general law enforcement course, and received two months of on-the-job training with another officer. She further testified that she had participated in a total of 15 interviews before she first interviewed Jennifer. Furthermore, as the district court observed, the appellant produced no evidence of state or national standards demonstrating what constitutes adequate training for police officers likely to be involved in child sex abuse investigations. See Benavides, 955 F.2d at 973. Thurber's testimony addressed the type of training recommended for social workers or psychologists in interviewing victims. Nor did Behrens produce evidence of similar incidents, which would have made the need for more or better training so obvious as to render the failure to provide such

training deliberate indifference. See City of Canton, 489 U.S. at 390; Languirand v. Hayden, 717 F.2d 220, 227-29 (5th Cir. 1983).

V

Finally, the district court correctly dismissed the appellant's state law claims because there was no independent basis for federal jurisdiction over them. See Wong v. Stripling, 881 F.2d 200, 204 (5th Cir. 1989).

VI

For the reasons set out in this opinion, the judgment of the district court dismissing Behrens's complaint is

A F F I R M E D.